CONSTITUTIONAL LAW — SECOND AMENDMENT — NINTH CIRCUIT PANEL HOLDS OPEN-CARRY LAW INFRINGES CORE RIGHT TO BEAR ARMS IN PUBLIC. — *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

In *District of Columbia v. Heller*,[1] the U.S. Supreme Court definitively proclaimed that the Second Amendment guarantees a core individual right to keep handguns within the home for self-defense.[2] Justice Scalia's majority opinion also signaled that judges should interpret the amendment using the tools of "public meaning" originalism, an approach that requires a close examination of history to discern the "normal and ordinary" understanding of the text at the time of enactment.[3] For the past decade, lower courts have grappled with this methodology when confronting a set of issues that *Heller* left unresolved: whether the Second Amendment protects a right to "bear" arms in public, and if so, whether that right is a "core" guarantee triggering more rigorous judicial scrutiny.[4] Recently, in *Young v. Hawaii*,[5] a Ninth Circuit panel answered those questions in the affirmative and held that a state's open-carry licensing statute was invalid for burdening a core right to bear firearms outside of the home.[6] Though the majority insisted that the core status of this right is rooted in the Second Amendment's original meaning, the panel's conclusion rested on a selective historical analysis that ultimately undercut the stated aims of originalism itself. The opinion thus serves as a reminder that, where history fails to yield clear answers in Second Amendment disputes, true fidelity to originalism requires a degree of deference to legislative judgments on firearm policy.

In 2011, Hawaii resident George Young twice applied to his county police department for a license to carry a loaded firearm in public.[7] Young contended that his applications met the requirements of Hawaii's

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[1] 554 U.S. 570 (2008).

[2] *Id.* at 595, 628–30. Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the Fourteenth Amendment incorporates *Heller*'s Second Amendment right against the states. *Id.* at 791. The Second Amendment provides, in relevant part, that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

[3] *Heller*, 554 U.S. at 576 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)); *see also* Lawrence B. Solum, *Semantic Originalism* 1–2, 18 (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008).

[4] *See, e.g.*, Drake v. Filko, 724 F.3d 426, 430–31 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874–76 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 88–91 (2d Cir. 2012).

[5] 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

[6] *Id.* at 1068, 1071.

[7] *Id.* at 1048. The practice of carrying a loaded firearm outside of one's own home is known as "public carry." *See* James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 910 (2012). That term encompasses both "open carry" (where the firearm is visible to others) and "concealed carry" (where the firearm is hidden but readily accessible). *Id.*

section 134-9, a statutory framework for issuing public-carry licenses to handgun owners who satisfy specific criteria.[8] The statute authorized local law enforcement agencies to grant concealed-carry licenses in "exceptional case[s]" where applicants demonstrated a "reason to fear injury," and open-carry licenses to residents "engaged in the protection of life and property" with a specific need for carrying a handgun in public.[9] The Hawaii County Police Chief concluded that Young was ineligible for a license under either standard and rejected both applications.[10]

Young then filed a claim against Hawaii County, the State of Hawaii, and various officials, alleging that section 134-9's limitations on concealed and open carry violated his Second Amendment right to bear arms in public.[11] Proceeding in the U.S. District Court for the District of Hawaii, the plaintiff requested a permanent injunction of section 134-9 and the issuance of a firearm license in his name.[12] The State and County each moved to dismiss the complaint.[13] The district court found that sovereign immunity barred Young's action against the State,[14] and rejected the claims against the County on the merits.[15] Hawaii's statute, the judge reasoned, did not affect what *Heller* had identified as the Second Amendment's central guarantee: the "narrow individual right to keep an operable handgun at home."[16] Moreover, even if the amendment did protect public carry to some degree, the state's regulation would still withstand intermediate scrutiny.[17] Young's claims were dismissed, and the plaintiff appealed.[18]

The Ninth Circuit panel reversed.[19] Writing for the majority, Senior Judge O'Scannlain[20] first considered whether Young's claim implicated a right subject to constitutional protection. Since the Ninth Circuit's post-*Heller* precedent had already placed concealed carry beyond the Second Amendment's scope,[21] the panel addressed only the "unresolved"

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[8] *Young*, 896 F.3d at 1048 (citing HAW. REV. STAT. § 134-9 (2013)).

[9] HAW. REV. STAT. § 134-9(a).

[10] *Young*, 896 F.3d at 1048.

[11] *Id.* at 1049.

[12] Complaint for Deprivation of Civil Rights at 52, Young v. Hawaii, 911 F. Supp. 2d 972 (D. Haw. 2012) (No. 12-cv-00336).

[13] *See Young*, 911 F. Supp. 2d at 978.

[14] *Id.* at 982.

[15] *Id.* at 987–92.

[16] *Id*. at 989.

[17] *Id.* at 990–91.

[18] *Young*, 896 F.3d at 1049.

[19] *Id.* at 1074. For reasons unrelated to the merits, this reversal applied only to the judgment for the County. *See id.* at 1049 n.1. On appeal, the County adopted the State's defense. *Id.*

[20] Senior Judge O'Scannlain was joined by Judge Ikuta.

[21] *Young*, 896 F.3d at 1050 ("[T]he Second Amendment right to keep and bear arms does not include, *in any degree*, the right . . . to carry concealed firearms in public." (quoting Peruta v. County of San Diego (*Peruta II*), 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (emphasis added))).

question of whether the amendment "encompasses a right to *open* carry."[22] This inquiry required adhering to the interpretive methods set forth in *Heller*, where the Court relied on historical sources to conclude that the amendment protected a core right to self-defense within the home.[23]

Judge O'Scannlain began with the text. He focused on the "latter verb" in the Second Amendment's right to "keep and bear arms," construing "bear" to cover carrying firearms "outside the home" in case of "confrontation."[24] He then supported this view with a historical survey that, like the Court's inquiry in *Heller*,[25] began with the Founding era and extended into the late 1800s.[26] The panel's analysis canvassed "founding-era treatises," nineteenth-century case law, and "the post–Civil War legislative scene,"[27] and placed a particularly heavy emphasis on five southern state court opinions that treated open carry as constitutionally protected.[28] Those opinions, Judge O'Scannlain explained, uniformly framed open carry as a constitutional guarantee and therefore "command[ed]" the application of the Second Amendment beyond the home.[29] The panel concluded that the relevant case law, along with the other historical sources surveyed, unmistakably revealed a "single American voice" endorsing a "right to carry a firearm openly" in public.[30] Hawaii's statute thus burdened conduct within the ambit of the Second Amendment, and the law would have to withstand judicial scrutiny to remain in effect.[31]

The *Young* majority next set out to determine the proper standard of review for its evaluation of the challenged statute.[32] The panel explained that the nature of its analysis would hinge on the strength of the underlying right: intermediate scrutiny would be appropriate if Hawaii's regulation affected a limited guarantee, while a more demanding standard would be necessary if the statute burdened conduct within the amendment's "core."[33] Judge O'Scannlain contended that *Heller* left the boundaries of that core undefined and reasoned that the historical evidence required extending the core to encompass open carry.[34] The

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[22] *Id.* (emphasis added) (citing *Peruta II*, 824 F.3d at 939).

[23] *Id.* at 1051; *see also* District of Columbia v. Heller, 554 U.S. 570, 576–619 (2008).

[24] *Young*, 896 F.3d at 1052.

[25] *Heller*, 554 U.S. at 576–619.

[26] *Young*, 896 F.3d at 1053–61.

[27] *Id.* at 1061.

[28] *See id.* at 1054–57 (citing State v. Reid, 1 Ala. 612 (1840); Nunn v. State, 1 Ga. 243 (1846); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822); State v. Chandler, 5 La. Ann. 489 (1850); Simpson v. State, 13 Tenn. (5 Yer.) 356 (1833)).

[29] *Id.* at 1056–57.

[30] *Id.* at 1061.

[31] *Id.* at 1068.

[32] *Id.*

[33] *Id.* (describing the Ninth Circuit's "sliding scale" approach for evaluating firearm laws).

[34] *Id.* at 1069–70.

panel thus subjected Hawaii's statute to a more demanding review,[35] asserting that no justification could salvage the law if it imposed too "severe" a restriction on the core right to bear arms in public.[36]

Judge O'Scannlain reasoned that section 134-9 did just that. He argued that the licensing scheme limited open-carry eligibility to a "small and insulated subset" of applicants "whose job[s] entail[ed] protecting life or property," and therefore precluded the "typical" Hawaiian resident from carrying a loaded firearm in public.[37] This limitation effectively "eviscerate[d] a core Second Amendment right," thereby rendering the state's open-carry licensing provision unconstitutional.[38]

Senior Judge Clifton dissented.[39] He challenged the majority's characterization of open carry as a core right, arguing that *Heller* had limited the Second Amendment's core to the context of one's own "hearth and home."[40] The majority was able to reach its conclusion only by disregarding a "long history" of public-carry regulation,[41] flouting Ninth Circuit precedent,[42] and ignoring the similarities between Hawaii's statute and firearm-licensing schemes upheld in other circuits.[43] Judge Clifton then critiqued the panel's evaluation of section 134-9. He identified intermediate scrutiny as the appropriate level of analysis and found that Hawaii's statute would have passed muster under that standard.[44] The State of Hawaii echoed these arguments in its petition for rehearing en banc,[45] which the Ninth Circuit granted on February 8, 2019.[46]

While the *Young* panel's disposition can no longer be cited as precedent in the Ninth Circuit,[47] its opinion still yields important insights about the broader project of originalist Second Amendment interpretation. Justice Scalia argued that originalism demands judicial interference where legislative action on firearms clearly contravenes the Second Amendment's historical understanding. The *Young* panel's opinion,

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[35] *See id.* at 1070.

[36] *Id.* at 1068 (quoting Jackson v. City and County of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014)).

[37] *Id.* at 1071. Judge O'Scannlain added that concealed-carry licenses were issued too infrequently under section 134-9 to compensate for its restrictive open-carry criteria. *Id.* at 1071 n.21.

[38] *Id.* at 1071.

[39] *Id.* at 1074 (Clifton, J., dissenting).

[40] *Id.* at 1080; *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[41] *Young*, 896 F.3d at 1081 (Clifton, J., dissenting).

[42] *See id.* at 1075, 1080.

[43] *Id.* at 1076 ("[Hawaii's] statutory scheme is the same type of 'good cause' public carry regulation that the Second, Third, and Fourth Circuits [have] upheld . . . .").

[44] *Id.* at 1081–82.

[45] *See* Petition for Rehearing En Banc, *Young*, 896 F.3d 1044 (No. 12-17808).

[46] Young v. Hawaii, 915 F.3d 681 (9th Cir. 2019) (mem.). The en banc proceedings have been stayed pending the issuance of a Supreme Court opinion in *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019). *See* Order at 1, Young v. Hawaii, No. 12-17808 (9th Cir. Feb. 14, 2019).

[47] *Young*, 915 F.3d at 682.

which concluded that history points unambiguously to a core open-carry right, initially appears to cohere with this framework. A closer look at *Young*, however, reveals that its holding rested on a highly selective analysis that discounted the ambiguous history of public carry to arrive at a fixed constitutional meaning. This approach is fundamentally inconsistent with the principles of interpretive neutrality and judicial restraint that define the originalist vision, a tension that becomes even more apparent when *Young* is contrasted with other opinions addressing the scope of a right to bear arms in public. *Young*'s shortcomings indicate that, where balanced historical analysis fails to settle Second Amendment disputes, sound originalism requires a degree of deference on questions of firearm policy.

The *Heller* Court, in the course of articulating a core right to self-defense inside the home, established several guideposts for Second Amendment interpretation. The opinion signaled that public meaning originalism should govern the amendment's analysis[48] and emphasized the primacy of historical evidence in discerning shared understandings of the constitutional text.[49] *Heller* indicated, for example, that regulations lacking clear analogs in early American history might run afoul of the amendment's original meaning.[50] More broadly, Justice Scalia later argued that tying Second Amendment decisions to neutral historical criteria would yield desirable outcomes; an originalist approach would lend itself to both interpretive impartiality and judicial restraint.[51]

Though *Young* ostensibly adhered to these principles in locating open carry within the Second Amendment's core, the history of arms-bearing in public is far more ambiguous than the panel's analysis suggests.[52] *Young*'s interpretation relied heavily on judicial history from the antebellum South, where a distinct culture of "slavery, honor, [and] violence"[53] gave rise to a "strong tradition of permissive open carry."[54] The five opinions supposedly "command[ing]" *Young*'s conclusions[55] reflected those regional norms,[56] and thus failed to demonstrate any broad

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48 Solum, *supra* note 3, at 2; *see* District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) (seeking the amendment's "[n]ormal meaning" among "ordinary citizens in the founding generation").

49 *Heller*, 554 U.S. at 592; *see id.* at 576–619.

50 *See, e.g.*, *id.* at 629 (observing that "[f]ew laws in the history of our Nation have come close" to the restrictive nature of the District of Columbia's residential handgun ban).

51 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 804–05 (2010) (Scalia, J., concurring).

52 *See Young*, 896 F.3d at 1076 (Clifton, J., dissenting).

53 Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 125 (2015).

54 Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1723 (2012).

55 *Young*, 896 F.3d at 1056; *see id.* at 1055–57.

56 *See* Ruben & Cornell, *supra* note 53, at 127–28.

national consensus on the right to bear arms outside of the home.[57] Moreover, *Young*'s narrow historical account disregarded a sweeping tradition of public-carry regulation that coincided with the drafting, ratification, and early application of the Second Amendment. That tradition — which has been documented extensively[58] — included "robust" restrictions on concealed and open carry that enjoyed "widespread acceptance" in many states.[59] Those longstanding regulatory practices simply cannot be squared with *Young*'s assertion that history speaks with a "single American voice" on open carry,[60] and they directly contradict the conclusion that the amendment's original meaning compelled the invalidation of Hawaii's statute.

Young's shortcomings point to a broader lesson about Second Amendment analysis: where balanced historical review fails to reveal a single public meaning, reading the record selectively risks subverting the objectives of originalism itself. *Heller* may have treated history as determinative in defining the right to self-defense within the home, but Justice Scalia was well aware that this approach has its limits. The "principal defect" of originalism, he explained, is that "historical research is always difficult and sometimes inconclusive."[61] Such ambiguity, however, is not an invitation for courts to choose their preferred constitutional meaning; judges should instead proceed cautiously to resolve disputes in a manner consistent with broader originalist values.[62]

The *Young* panel failed to heed this admonition, and consequently deviated from two primary aims of public meaning originalism: interpretive impartiality and judicial restraint. First, consider impartiality. Justice Scalia called for a "historically focused" method of Second Amendment interpretation to encourage "reasoned analysis" and produce "less subjective" conclusions.[63] But where historical inquiries reveal a "range of possible fair interpretations,"[64] a commitment to

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[57] *Young* is not entirely alone in using antebellum southern law to treat public carry as a core right. *See* Wrenn v. District of Columbia, 864 F.3d 650, 658–59 (D.C. Cir. 2017). For a detailed critique of this approach, see Ruben & Cornell, *supra* note 53, at 124–28, 134–35.

[58] *See, e.g.*, ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 113–18, 163–73 (2013); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 112–21 (2013); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 7–41 (2012); Cornell, *supra* note 54, at 1707–15, 1719–25; Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 57–62, 63–67 (2017).

[59] Cornell, *supra* note 54, at 1719.

[60] *Young*, 896 F.3d at 1061.

[61] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

[62] *See id.* at 863 (urging judges to avoid "mistak[ing] their own predilections for the law").

[63] McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring).

[64] *See* Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2049 (2006); *see also id.* at 2050 ("[O]ne may recognize that originalism sometimes does not dictate clear answers . . . without rejecting the methodology itself.").

objectivity requires acknowledging this indeterminacy. The *Young* majority declined to make that acknowledgment, and instead pointed to *Heller*'s citations of southern cases to rationalize its own privileged treatment of antebellum law.[65] *Heller*, however, does not provide a persuasive justification for plucking favorable evidence from a vast record; the *Heller* Court was unambiguously mindful of the long tradition of firearm regulation, and signaled that its analysis should not be taken to preclude the full examination of that history in later cases.[66] Once *Young*'s stated rationale for its lopsided inquiry is peeled away, the panel's analysis cannot be defended as dispassionate originalist interpretation.[67] The *Young* majority instead employed a tactic that Justice Scalia cautioned against: marshaling support for a single perspective by "look[ing] over the heads of the crowd and pick[ing] out your friends."[68]

Young's outcome is also at odds with the conception of originalism as a restraint on undue interference in the political domain. According to Justice Scalia, originalist analysis "intrudes less upon the democratic process" than other interpretive methods: courts are expected to safeguard rights grounded clearly in "constitutional history," while leaving other asserted rights to be "adopted or rejected" through ordinary politics.[69] Put differently, where history is "indeterminate . . . as to the specific question at hand," courts have "no basis for displacing . . . political decisions made by an imperfect representative democracy."[70] Such restraint would have been warranted in *Young*, where the conduct at issue had long been regulated due to the pronounced threat to public safety.[71] But the *Young* panel instead inserted itself into Hawaii's legislative process without a convincing justification for doing so, engaging in the exact type of judicial overreach that originalism was intended to avoid.

Young's deficiencies make clear that, when confronting the ambiguous history of arms-bearing outside of the home, the Ninth Circuit —

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65 *Young*, 896 F.3d at 1056–57, 1057 n.9.

66 *See* District of Columbia v. Heller, 554 U.S. 570, 626 & n.26 (2008) ("[W]e do not undertake an exhaustive historical analysis today . . . [and] nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . ." *Id.* at 626. "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 626 n.26.); *see also* Heller v. District of Columbia, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[Various] gun regulations have co-existed with the Second Amendment right and are consistent with that right . . . as the Court said in *Heller*.").

67 *Cf.* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 92 (2016) (describing selective originalist analysis as "the worst sort of 'law office history'").

68 *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 36 (Amy Gutmann ed., 1997) (critiquing courts' selective interpretations of legislative history).

69 McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Scalia, J., concurring).

70 Paulsen, *supra* note 64, at 2057.

71 *See* sources cited *supra* notes 58–59 and accompanying text.

and courts generally — should exhibit greater deference to legislative judgments on firearm regulation. Many courts have already acknowledged the historical indeterminacy surrounding public-carry restrictions,[72] and have accordingly analyzed such laws using standards far less demanding than the one applied in *Young*.[73] Several circuits, for example, have evaluated the constitutional validity of public-carry licensing schemes under intermediate scrutiny, which preserves any regulation "substantially related" to an "important governmental interest."[74] Had that standard (or another similarly deferential approach)[75] been adopted in *Young*, the panel likely would have reached an outcome more consistent with originalism's aims of impartiality and restraint. When courts encounter challenges to public-carry statutes, more deferential review ensures appropriate respect for the legislatures' prerogative,[76] discourages unwarranted restrictions on state police power,[77] and leaves room for democratic debate on issues unfamiliar to the Founding generation.[78] Simply put, unless historical evidence clearly commands otherwise, courts claiming fidelity to originalist values ought to defer to democratically enacted public-carry policies.[79]

Though the Ninth Circuit's decision to grant rehearing may rectify the flaws in this case, *Young*'s shortcomings indicate that balanced historical review will often fail to resolve disputes over the regulation of firearms in public.[80] In such cases, courts should demonstrate greater respect for legislative judgments and democratic preferences on firearm policy. Otherwise, they risk subverting the values of impartiality and restraint that animated Justice Scalia's call for Second Amendment originalism.

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[72] *See, e.g.*, Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) ("[T]here is no national consensus, rooted in history, concerning the right to public carriage of firearms."); Kachalsky v. County of Westchester, 701 F.3d 81, 91 (2d Cir. 2012) ("History and tradition do not speak with one voice here.").

[73] *See* Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819, 839–43 (2015) (summarizing the circuit courts' analyses of public-carry laws).

[74] *Kachalsky*, 701 F.3d at 96; *see Gould*, 907 F.3d at 672; Drake v. Filko, 724 F.3d 426, 435 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013).

[75] *See* Rostron, *supra* note 73, at 820.

[76] *See* United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011) (arguing that intermediate scrutiny is most appropriate for firearm regulations in public settings because the standard avoids "handcuffing lawmakers' ability" to protect public safety and prevent armed violence).

[77] *See* Ruben & Cornell, *supra* note 53, at 133 & n.66.

[78] *See* MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 172–73 (2014) (arguing that modern firearm-related issues unforeseeable at the time of the Founding should be left to the "push-and-pull of politics," *id.* at 173).

[79] This call for more deference is limited to the regulation of public carry, an issue that the Court has not addressed. This claim does not apply to restrictions on *Heller*'s core right to self-defense in the home, for which a more rigorous analysis (such as strict scrutiny) would likely be appropriate.

[80] The Supreme Court may provide some clarity on this issue when it considers the constitutionality of a city ban on the transportation of unloaded handguns. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).