ERRORS OF OMISSION: WORDS MISSING FROM THE NINTH CIRCUIT'S *YOUNG V. HAWAII*

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INTRODUCTION

The en banc Ninth Circuit on March 24 held by a seven-to-four vote that the Second Amendment right does not encompass open handgun carriage.[1] The decision in *Young v. Hawaii* complements the Circuit's 2016 en banc *Peruta v. San Diego*, which held that concealed carry is categorically outside the Second Amendment.[2] Thus, according to the Ninth Circuit, a State may ban both open and concealed carry. There is no right to bear handguns. Carrying arms in public for defense is "not within the scope of the right protected by the Second Amendment."[3] Four judges dissented, in an opinion written by Judge Diarmuid O'Scannlain.[4]

The majority opinion examines legal history at great length. It seems aimed at countering Justice Clarence Thomas's dissent from denial of certiorari last year in *Rogers v. Grewal*, wherein he detailed the legal foundation for the right to "bear arms."[5] This Article does not join this inter-Judge debate. Instead, it examines the majority opinion on its own terms. Most revealing about *Young*'s lengthy majority opinion is how it selectively cites the sources on which it relies.

Part I of this Article examines *Young*'s treatment of Supreme Court precedents. Part II reviews the Ninth Circuit's description of English law; Part III American colonial law, and Part IV subsequent American law. Part V discusses

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1. Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc).
2. Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc).
3. *Young*, 992 F.3d at 826*; see also id.* at 773–74.
4. *Id.* at 828 (O'Scannlain, J., dissenting). Judge Ryan D. Nelson also authored a three-judge dissent arguing that Young properly stated an as-applied claim.
5. Rogers v. Grewal, 140 S. Ct. 1865 (2020) (Thomas, J., dissenting from denial of certiorari).

the Ninth Circuit's argument that bearing arms may be banned to respect State and local sovereignty.

I. U.S. SUPREME COURT OPINIONS

A. District of Columbia v. Heller

The Second Amendment declares, "[a] well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[6] *District of Columbia v. Heller* holds that these words "guarantee the individual right to possess and carry weapons in case of confrontation."[7] The "right of the people" is not limited to Militia members.[8]

The Second Amendment's "right of the people," like the "right of the people" of the First and Fourth Amendments, belongs to ordinary Americans.[9] They have separate individual rights to "keep" and to "bear"—carry—arms.[10]

But the *Young* majority carefully evades quoting what *Heller* said about "carrying" arms. *Heller* named some "presumptively lawful" exceptions to the Second Amendment:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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 such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms.[11]

The exceptions prove the rules: Individuals have Second Amendment rights from which felons and the mentally ill can be excluded. Firearm commerce is necessary to the exercise of Second Amendment rights, but the government may impose conditions and qualifications on firearm vendors. Similarly, "the full scope of the Second Amendment" generally includes "the carrying of firearms," but not in "sensitive places."[12] The Ninth Circuit misleadingly addressed this language from *Heller* by not quoting it, and then mischaracterizing it. Omitting *Heller*'s words about "carrying firearms," *Young* asserted that *Heller* authorized "bans on possession in sensitive places."[13]

6. U.S. CONST. amend. II.
7. 554 U.S. 570, 591 (2008).
8. *Id.* at 586, 589.
9. *Id.* at 580, 591.
10. *Id.* at 582–86.
11. *Id.* at 626–27, 661 n.26 (emphasis added).
12. *Id.* at 626–27; *see* Moore v. Madigan, 702 F.3d 933, 935–36 (2012) (interpreting *Heller*'s language to imply a right to public firearm carriage); Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J. L. & PUB. POL'Y 17, 30–31 (2016) (same); David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGIS. 303, 312 n.51 (2016) (same); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of ''Bearing Arms'' for Self-Defense*, 61 AM. L. REV. 585, 610–11, 616, 617 (2012) (same).
13. Young v. Hawaii, 992 F.3d 765, 782 (9th Cir. 2021).

B. Robertson v. Baldwin *and* Dred Scott v. Sandford

Young thrice quotes the Court's 1897 *Robertson v. Baldwin* decision for the proposition that the Second Amendment right was "inherited from our English ancestors."[14] Yet *Young* ignores what *Robertson* said about the scope of the Second Amendment right, on the same page from which *Young* quotes:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (Art. I) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; *the right of the people to keep and bear arms (Art. II) is not infringed by laws prohibiting the carrying of concealed weapons* . . . .[15]

The obvious implication of stating the legal rule that *concealed* carry bans do not infringe Second Amendment is that prohibitions on open carry do.

Also missing from *Young* is what the Supreme Court said about the right to carry in the racist 1857 *Dred Scott v. Sandford*.[16] *Young* cites *Dred Scott* for the proposition that the early Supreme Court rarely exercised its power of judicial review.[17] Yet it leaves out one of Chief Justice Taney's stated reasons for holding that Freedmen were not citizens: if they were, they would have the right to ''keep and carry arms wherever they went."[18]

II. ENGLISH LAW AND THE REMNANTS OF THE STATUTE OF NORTHAMPTON

Opponents of the right "to bear arms" often cite England's 1328 Statute of Northampton.[19] According to *Young*, the Statute is part of 700-year Anglo-American tradition against all defensive arms carrying. This Part examines the English legal history.

A. Fourteenth Century Orders and Enactments

According to the *Young* majority, (1) England's 1328 Statute of Northampton prohibited all arms carrying, save for persons in government service; and (2)

14. *Id.* at 782, 786, 797 n.18 (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).
15. *Robertson*, 165 U.S. at 281–82 (emphasis added).
16. 60 U.S. (19 How.) 393 (1857).
17. *Young*, 992 F.3d at 824 (citing *Dred Scott*, 60 U.S. (19 How.) 393).
18. *Dred Scott*, 60 U.S. (19 How.) at 417.
19. *E.g.*, Peruta v. County of San Diego, 824 F.3d 919, 931 (9th Cir. 2016) (en banc); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why it Matters*, 64 CLEV. ST. L. REV. 373 (2016).

the Statute was adopted and so enforced in the early Colonies and States.[20] But the majority's evidence contradicts the notion that the Statute was regularly read as a complete ban. For example, the majority cites a royal instruction to London hotel-keepers to tell their guests not to carry their arms within the city.[21] Such an order presumes that ordinary travelers would be carrying and arriving with arms. The order was issued on December 19, 1343, shortly before the Feast of St. Thomas the Apostle, potentially drawing a large crowd of miscreants from outside the city.[22]

By the time English arms law became relevant in America—since the 1607 settlement of Jamestown, and especially after the 1689 English Declaration of Rights—the Statute of Northampton was not construed to prohibit peaceable carrying, as discussed *infra* Section II.B. In support of the contrary notion, the Ninth Circuit states that "[i]n 1350, Parliament specifically banned the carrying of concealed arms."[23] *Young* quotes the statute: "[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other . . . it shall be judged . . . . Felony or Trespass, according to the Laws of the Land."[24] As quoted, the statute appears to be a specific ban on concealed carry. The full text of the statute, however, shows that it punished carrying concealed in furtherance of violent crime:

> And if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, *to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance*, it is not the Mind of the King nor his Council, that in such case it shall be judged Trespass, but shall be judged . . . . Felony or Trespass, according to the Laws of the Land of old Times used, and according as the case rquireth.[25]

B. Chune v. Piott

Judicial decisions since the seventeenth century show that the Statute of Northampton was held not to apply to the peaceable carrying of ordinary arms. It only applied to carrying that caused a breach of the peace that terrorized the public. One such case is 1615's *Chune v. Piott*. According to *Young*, *Chune* held that "[t]he sheriff could arrest a person carrying arms in public 'notwithstanding

20. *Young*, 992 F.3d at 816–19.

21. *Id.* at 787 (citing 1 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, 1323–1364, at 156 (Dec. 19, 1343) (A.H. Thomas ed., 1898)).

22.

> On Friday before the Feast of St Thomas the Apostle [21 Dec.] Ao 17 Edw. III [1343] a bill was sent to each Alderman enjoining him to make careful inquiry of all the Articles of the Wardmoot, and to see that no hostiller or lodging-house keeper remained in the Ward who was not of good fame, and that all hostillers were under surety not to receive evildoers. All suspicious characters arriving in hostelries were to be reported to the officers of the City. All guests in hostelries were to be warned against going armed in the City.

1 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, 1323–1364, at 156 (Dec. 19, 1343) (A.H. Thomas ed., 1898).

23. *Young*, 992 F.3d at 788.

24. *Id.* (quoting 25 Edw. 3, 320, st. 5, c. 2 (1350)) (brackets in original).

25. 25 Edw. 3, 320, st. 5, c. 2 (1350) (emphasis added).

he doth not break the peace.'"[26] Justice Croke's full sentence shows a very different meaning:

> Without all question, the sheriffe hath power to commit, est custos, & conservator pacis, if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace ***in his presence***.[27]

Thus, if an arms-carrier broke the peace, the sheriff could arrest him even if the breach had not taken place in the sheriff's presence. Justice Houghton's seriatim opinion agreed that a sheriff may arrest someone, "upon suspition," for breaching the peace outside the sheriff's presence.[28]

By omitting "in his presence," *Young* converts *Chune*'s actual rule (sheriffs can arrest even if they did not witness the peace breached) into a significantly different rule (sheriffs can arrest when there is no breach).

C. Sir John Knight's Case and Its Aftermath

The Statute of Northampton's major interpretation came in 1686, three years before the English right to arms was guaranteed in the 1689 Declaration of Rights. Sir John Knight was a Protestant who loved assisting in the enforcement of statutes outlawing Catholic religious practice.[29] On May 3, 1686, for example, he informed the Mayor and Sheriff of Bristol about an illegal "conventicle"; he apparently assisted them in arresting the Catholics.[30] But King James II, a Catholic, ordered them released, and the King's Attorney General refused to prosecute them.[31]

Some irate Catholics once assaulted Knight, and according to Knight, twice tried to assassinate him; an elderly woman testified that when she refused to reveal Knight's location, they started beating her to death, and she was only saved by bystander intervention.[32] For protection, Knight began carrying one or two blunderbusses, a firearm similar to a short shotgun. His defensive carry was peaceful.

One Sunday, Knight took his guns to church. The King ordered that he be prosecuted for violating the Statute of Northampton, under the charge that he "did walk about the streets armed with guns, and that he went into the church of

26. *Young*, 992 F.3d at 790 (quoting Chune v. Piott, 80 Eng. Rep. 1161 (K.B. 1615) (emphasis added to "in his presence," the portion omitted in *Young*)). The majority inexplicably states that "the Statute of Northampton is not mentioned" in *Chune*. *Id.*

27. *Chune*, 80 Eng. Rep. at 1162. *Young* mistakenly pincites the quote to page 1161. *Young*, 992 F.3d at 790–91.

28. *Chune*, 80 Eng. Rep. at 1162.

29. Jason McElligott, *Biographical Dictionary*, *in* 6 THE ENTRING BOOK OF ROGER MORRICE 1677-1691 1, 121–22 (2007).

30. 3 THE ENTRING BOOK OF ROGER MORRICE 1677-1691 113 (Tim Harris ed., 2007) [hereinafter 3 ENTRING BOOK].

31. *Id.* at 126; 2 CALENDAR OF STATE PAPERS DOMESTIC: JAMES II, 1686-7, at 118 (1964).

32. 3 ENTRING BOOK, *supra* note 30, at 126, 141–43, 307–08.

St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects, *contra formam statuti*."[33]

The Chief Justice of the King's Bench, presiding, observed that the Statute of Northampton had "almost gone in desuetudinem, yet where the crime shall appear to be malo animo, it will come within the Act."[34] The Chief Justice thus made clear, first, that the statute has long been unenforced and ignored. (Like old laws in several States against certain sex acts that were discussed by the Supreme Court in *Lawrence v. Texas—unenforced for so long that they became legally unenforceable.*[35]*)* Noting that "now there be a general connivance"—with the law's apparent acquiescence—"to gentlemen to ride armed for their security" the Chief Justice held that arms carriage was illegal where it is done malo animo—"with evil intent; with malice."[36] Knight was acquitted.[37]

The case reports are plain, but the *Young* majority muddles them to reach the conclusion that the case provides no clear precedent: "[w]e cannot resolve this dispute in the original sources, much less in the academic literature."[38]

At the time, English courts did not deliver written opinions. Instead, judges explained their reasoning orally from the bench. Enterprising private reporters summarized what they said in bound volumes that they sold to lawyers. *Knight's Case*, as a major political prosecution, was apparently of sufficient interest that two reporters covered it.

In the nineteenth century, Parliament ordered the consolidation of the private reporters into the *English Reports*. Volumes 87 and 90 each contain a report of Knight's case.

The Ninth Circuit manufactures a conflict between the reports. The volume 90 report contained the Chief Justice's observation about desuetude. But, says the majority, "[a]ccording to another reporter, the Chief Justice of the King's Bench opined that the meaning of the Statute of Northampton was to punish those who *go armed*. *Knight's Case*, 87 Eng. Rep. at 76."[39] Not quoted is what the Chief Justice said on the cited page:

> [T]he meaning of the statute of 2 Edw. 3, c. 3, was to punish people who go armed to terrify the King's subjects. It is likewise a great offence at the common law, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law.[40]

33. Sir John Knight's Case, 87 Eng. Rep. 75, 76, 3 Mod. 117 (K.B. 1685). The prosecution was initiated by information rather than indictment, under a form Blackstone described as "in the name of the king alone…filed ex-officio by his own immediate officer, the attorney-general . . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES *308.

34. Rex v. Sir John Knight, 90 Eng. Rep. 330, 330 (K.B. 1685).

35. Lawrence v. Texas, 539 U.S. 558, 573 (2003) ("In those States where sodomy is still proscribed . . . there is a pattern of nonenforcement with respect to consenting adults acting in private.").

36. *Malo Animo*, BLACK'S LAW DICTIONARY (10th ed. 2014).

37. *Sir John Knight*, 90 Eng. Rep. at 330.

38. Young v. Hawaii, 992 F.3d 765, 791 (9th Cir. 2021).

39. *Id.* (emphasis added).

40. Sir John Knight's Case, 87 Eng. Rep. 75, 76, 3 Mod. 117 (K.B. 1685).

The Chief Justice said that the offense was to "go armed to terrify the King's subjects," but the majority described the offense as merely to "go armed."

Young speculates that Knight might have been "acquitted by virtue of his aristocratic status," citing a law review article claiming that aristocrats were "the one group expressly exempted from the Statute of Northampton."[41] But this is contrary to the Statute's plain text: "it is enacted, that *no man great nor small, of what condition soever he be*, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them . . . ."[42] Aristocrats were expressly *included*. Indeed, they were the Statute's primary target because, in 1328, the leading barons and lords often led large criminal gangs.[43] Thus, Knight's lawyer argued that "[t]his statute was made to prevent the people's being oppressed by great men; but this is a private matter, and not within the statute."[44]

After the jury acquitted Knight, the Attorney General moved that Knight be bonded for good behavior, and the Chief Justice agreed.[45] The bond was refunded a few months later when the court's term ended.[46] To the Ninth Circuit, the bond made "Knight's 'acquittal' more of a conditional pardon."[47] But juries acquit, not pardon. Significantly, even the bond did not forbid Knight from carrying arms. Imposing the bond on anti-Catholic Knight would presumably please Catholic King James II, who appointed the Chief Justice and had personally ordered Knight's prosecution.

D. The English Declaration of Rights

King James II was overthrown in the Glorious Revolution of 1688, partly because he tried to establish French-style absolutist rule by disarming everyone but his standing army and select militia.[48] Before the new monarchs could ascend the throne, they had to accept the English Declaration of Rights. The Declaration was enacted by Parliament meeting in special convention. Would-be King William and Queen Mary accepted the Declaration.[49] According to the Bill of Rights, "the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."[50]

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41. *Young*, 992 F.3d at 791 n.11.

42. 2 Edw. III ch. 3 (1328) (emphasis added).

43. For decades, there had been a problem of ''magnates maintaining criminals.'' Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 ENG. HIST. REV. 842, 849 (1993). The House of ''Commons' complaints about armed noblemen'' resonated with Queen Isabella and her consort, Roger Mortimer. They found it ''politically necessary to check dissent against the increasingly unpopular regime.'' *Id.* at 856. Fearful of being overthrown, Isabella did not want armed men coming to Parliament or traveling armed to meet her. *Id.* at 849. The majority cited page 850 of Verduyn's article. *Young*, 992 F.3d at 788.

44. *Sir John Knight*, 90 Eng. Rep. at 330.

45. *Id.* at 331; Sir John Knight's Case, 87 Eng. Rep. 75, 76 & n.(a) (K.B. 1685), Comberbach 41 (1686).

46. 3 ENTRING BOOK, *supra* note 30, at 349.

47. Young v. Hawaii, 992 F.3d 765, 791 (9th Cir. 2021).

48. *See*, *e.g.*, NICHOLAS J. JOHNSON, GEORGE A. MOCSARY, MICHAEL P. O'SHEA & DAVID B. KOPEL, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 128–31 (2d ed. 2017).

49. 1 Wm. & Mary, sess. 2, ch. 2 (1689).

50. *Id.* at cl. 7.

The arms right did not apply to England's tiny Catholic population. By statute, English Catholics who swore allegiance to William and Mary could possess and carry arms.[51] An English Catholic who refused to so swear could still have arms "for the defence of his House or person" if a justice of the peace issued a license.[52] The English Bill of Rights did not apply in Ireland, where the English government vigorously attempted to disarm Catholics.[53]

As the Ninth Circuit points out, the English arms right was subject to regulation "as allowed by law."[54] Because the English Declaration of Rights was a statute, future Parliaments could override it, even while Kings could not. Constitutions, by design, are immune to legislative will. Indeed, James Madison's speech introducing the American Bill of Rights in Congress specifically addressed defects, which the Second Amendment would correct, in the English right. According to Madison's notes for the speech, the English Declaration of Rights was a "mere act of parl[iamen]t." Further, the English right was only for "arms to protest[an]ts."[55]

William Hawkins's *A Treatise of the Pleas of the Crown* was influential on both sides of the Atlantic and is a key guide to how the English understood their rights after *Knight's Case* and the Declaration of Rights.[56] The *Young* majority writes:

> Hawkins, however, also recognized that the lawful public carry of arms required some particular need. The desire for proactive self-defense was not a good enough reason to go armed openly. "[A] man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and [that] he wears it for the safety of his person from his assault."[57]

The Ninth Circuit omits what Hawkins said next: "no wearing of arms is within the meaning of the statute unless it be accompanied with such circumstances as are apt to terrify the people."[58] It also omits Hawkins' description of "such armour" as "dangerous and unusual Weapons," not common arms.[59] *Heller* turned the common law rule against carrying "dangerous and unusual Weapons" into the principle that the Second Amendment does not protect such weapons.[60] Because *Heller* protects handguns, a lower court may not declare them "dangerous and unusual."[61]

The Ninth Circuit abandoned English history after the early eighteenth century, save for accurately citing Blackstone for the point that the Declaration of

51. 1 Wm. & Mary ch. 15 (1689).

52. *Id.*

53. *E.g.*, "An Act for the better securing the government, by disarming papists," 1 Wm. & Mary ch. 15 (1688).

54. Young v. Hawaii, 992 F.3d 765, 793 (9th Cir. 2021).

55. James Madison, *Notes for Speech in Congress Supporting Amendments*, *in* THE ORIGIN OF THE SECOND AMENDMENT 645, 645 (David E. Young ed., 2d ed. 1995) (alterations added).

56. WILLIAM HAWKINS, 1 A TREATISE OF THE PLEAS OF THE CROWN (1724).

57. *Young*, 992 F.3d at 792.

58. HAWKINS, *supra* note 56, at 136.

59. *Id.* at 135.

60. District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

61. *Id.* at 627.

Rights allowed Parliament to put conditions on arms carrying.[62] Had *Young* continued examining English legal history, it would have reported that, for over two centuries after the Declaration of Rights, Parliament never passed a general law against peaceable carry, and all the case law recognized such a right.[63] Indeed, the King's Bench, reversing a conviction, held that acting *in terrorem populi* was an "essential element" of the Statute of Northampton.[64] That would be superfluous if carrying a revolver, as was the defendant, was inherently terrifying.

Laws against commoners carrying guns while hunting were still enforced because commoners were prohibited from hunting.[65] Fears of rebellion in 1819 resulted in a law, which sunset in 1821, against military-style drilling in eleven counties and allowing confiscation of suspected rebels' arms; even that law did not purport to prohibit arms carrying by nonrebels.[66] No known post-1686 English or American case interprets the Statute of Northampton to bar peaceable defensive carry.

III. THE AMERICAN COLONIES

The majority then surveyed colonial arms regulation. There were originally sixteen American colonies. By the time independence was declared in 1776, they had been consolidated into thirteen: Plymouth Colony became part of Massachusetts Bay; New Haven Colony was absorbed into Connecticut; and East Jersey and West Jersey combined into New Jersey. Of the sixteen colonies, only four enacted any arms-carriage restriction.

Massachusetts Bay and New Hampshire enacted statutes that banned carrying "offensively."[67] A prohibition against carrying "offensively" is not a prohibition on peaceable defensive carry. After Bacon's Rebellion was defeated in 1676, Virginia forbade unauthorized assemblies of more than five armed men.[68]

62. *Young*, 992 F.3d at 793–94.

63. King v. Smith, 2 Ir. Rep. 190 (K.B. 1914) (neither peaceable revolver carry nor lawful use in public is terrifying); Rex v. Meade, 19 L. Times Rep. 540, 541 (1903) (right to peaceable carry does not include ''firing a revolver in a public place, with the result that the public were frightened or terrorized.''); Rex v. Dewhurst, 1 State Trials, N.S. 529, 601–02 (1820) (''But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business.''). The 1870 Gun Licenses Act required those carrying firearms outside their property to buy a 10-shilling annual license from the post office. Postal clerks had no discretion to refuse someone paying the fee. Gun License Act, Act 33 & 34 Vict. c. 57 (1870).

64. *Smith*, 2 Ir. Rep. at 204.

65. *See*, *e.g.*, Wingfield v. Statford & Osman, Sayer 15, 96 Eng. Rep. 787; 1 Wils. K.B. 314, 95 Eng. Rep. 637 (K.B. 1751) (because gun ownership is lawful, an indictment for the statute against commoners possessing engines for the destruction of game must allege that the gun in question was used for hunting).

66. The Seizure of Arms Act, 60 Geo. 3 & 1 Geo. 4 ch. 2 (1819); R.K. WEBB, MODERN ENGLAND: FROM THE 18TH CENTURY TO THE PRESENT 164–67 (2d ed. 1980); *see* STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? 93–97 (2021).

67. *Young*, 992 F.3d at 794.

68. An Act for the Releife of Such Loyal Persons as have Suffered Losse by the Late Rebells, 2 Stat. (Va.) 386 (1676-1677).

The law affirmed that individuals or small groups had the unfettered right to carry.[69]

The only colonial enactment broadly restricting carry came from East Jersey. In 1686, the colony banned concealed carry.[70] It also restricted open handgun, but not long gun, carry for "planters."[71] A planter was "[o]ne of those who settled new and uncultivated territory."[72] This statutory restriction on handguns for frontiersmen, but not for townspeople, is the only pre-1800 American handgun carry prohibition that the court can cite.

Whether the East Jersey carry law continued in force after the Jerseys were consolidated in 1712 is unclear. It was not long before the East Jersey frontier closed, leaving no "new and uncultivated territory." With no frontiersmen in East Jersey, there was nobody to whom the open-carry ban applied.

The New Jersey legislature apparently thought that the laws of former East Jersey had no continuing force. When it restricted concealed carry in 1905, it did so by enacting a licensing statute.[73] Unlicensed open carry was lawful in New Jersey until 1966, when the legislature enacted a licensing requirement.[74]

Young accurately cites ten colonial statutes requiring that people carry arms to church or when traveling,[75] although it later brushes these off as "a couple of colonial examples."[76] As the opinion points out, carry mandates are a form of regulation. The majority thus reasons that the mandates prove that "the public carrying of arms was always subject to conditions prescribed by the legislature."[77]

But mandates are fundamentally different from prohibitions. Some nations mandate that citizens vote in elections. Such mandates do not prove that governments may prohibit everyone from voting, or that no individuals have a right to vote.

Moreover, the widespread colonial arms mandates prove false the *Young* majority's assertion that "The colonists shared the English concern the mere presence of firearms in the public square presented a danger to the community."[78]

IV. THE EARLY REPUBLIC

State legislatures began enacting concealed carry bans in 1813. Most courts upheld them. Of the thirty-four States in the Union just before the Civil War

69. *Id.*
70. *Young*, 992 F.3d at 794 (citing 1686 N.J. Laws at 289).
71. *Id.*
72. RICHARD M. LEDERER, JR., COLONIAL AMERICAN ENGLISH 175 (1985). Many New Jersey "planters" of the time were Scotch-Irish immigrants, a group often disdained by the English.
73. 2 COMPILED STATUTES OF NEW JERSEY 1759 (1911).
74. N.J. STAT. ANN. § 2A:151-41 (1966).
75. *Young*, 992 F.3d at 794–96.
76. *Id.* at 819.
77. *Id.* at 796.
78. *Id.* at 794.

began, nine had enacted a statute against concealed carry—seven in the South, Indiana, and Ohio. More States followed later in the century.

Although *Young* describes the concealed carry statutes and cases at length, the recitation does not advance *Young*'s thesis that *open* carry may be prohibited. Nor can the court cite any statute from before 1860, other than East New Jersey's partial ban, that actually prohibited open carry. Lacking on-point statutes, the majority relies on other laws that it inaccurately claims to have banned both open and concealed carry. Like its English legal history, *Young*'s American legal history only supports its thesis when crucial text from its sources is omitted.

A. North Carolina and State v. Huntly

The Ninth Circuit cites to a 1792 North Carolina statute that copied the Statute of Northampton verbatim: "[i]ronically, notwithstanding its recent independence, North Carolina did not even remove the references to the king."[79] Yet the North Carolina legislature never enacted such a statute. *Young* cites to "1792 N.C. Laws 60, 61 ch. 3."[80] The lengthier cite would be FRANÇOIS-XAVIER MARTIN, A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60–61 (1792). The State of North Carolina later officially declared that the book "was utterly unworthy of the talents and industry of the distinguished compiler, omitting many statutes, always in force, and inserting many others, which never were, and never could have been in force, either in the Province, or in the State."[81]

According to the Ninth Circuit:

> In 1836, the North Carolina legislature explicitly repealed "all the statutes of England or Great Britain" in use in the state . . . which prompted a challenge to its Northampton analogue. The Supreme Court of North Carolina upheld the statute, however, finding that the Statute of Northampton did not create the substantive prohibitions therein . . . . [T]he court concluded that the statute's prohibitions "[had] been always an offen[s]e at common law."[82]

More precisely, the North Carolina Supreme Court said there was no "statute" to uphold:

> The [defendant's] argument is, that the offence of riding or going about armed with unusual and dangerous weapons, to the terror of the people, was created by the statute of Northampton, 2nd Edward the 3d, ch. 3d, and that, whether this statute was or was not formerly in force in this State, it certainly has not been since the first of January, 1838, at which day it is declared in the Revised Statutes, (ch. 1st, sect. 2,) that the statutes of England or Great Britain shall cease to be of force and effect here.[83]

79. *Id.* at 798.
80. *Id.*
81. *Preface of the Commissioners of 1838*, REVISED CODE OF NORTH CAROLINA xiii (1855).
82. *Young*, 992 F.3d at 798 n.19 (citing State v. Huntly, 25 N.C. (3 Ired.) 418, 420–21 (1843)).
83. *Huntly*, 25 N.C. at 420–22.

The Statute of Northampton had simply embodied the common law rule against "riding or going about armed with unusual and dangerous weapons, to the terror of the people."[84]

Huntly agreed with "the Chief Justice in Sir John Knight's case, that the statute of Northampton was made in affirmance of the common law."[85] It then set forth the common law offense:

> It has been remarked, that a double-barrelled gun, or any other gun, cannot in this country come under the description of "unusual weapons," for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an "unusual weapon," wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every day accoutrements--as a part of his dress--and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.—But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun per se constitutes no offence. For any lawful purpose—either of business or amusement[86]—the citizen is at perfect liberty to carry his gun. It is the wicked purpose--and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.[87]

Although the *Huntly* Justices did not approve of routine gun carrying, they acknowledged that peaceable carry was lawful. Despite its 60-page treatment of legal history and *Huntly*, *Young* omitted *the* paragraph from *the* state supreme court opinion that authoritatively describes the Statute of Northampton's meaning in America.

B. Surety of the Peace Statutes

In the nineteenth century, several states enacted surety laws relating to going armed. According to *Young*, these laws banned carry "*unless* the person so armed could show 'reasonable cause.'"[88] The Massachusetts statute, which was typical, read:

84. *Id.* Huntly, in fact, publicly threatened violence and death on multiple occasions, in violation of the common law rule, and his conviction was upheld. *Id.* at 418–19, 423.

85. *Id.* at 421.

86. "Business or amusement" was a legal term of art encompassing all activity. *See* Schooner Exchange v. Mcfaddon, 11 U.S. (7 Cranch) 116, 143 (1812) ("[T]he ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement[.]"); Johnson v. Tompkins, 13 F. Cas. 840, 846 (Cir. Ct. E.D. Penn. 1833) ("[A]ny traveller who comes into Pennsylvania upon a temporary excursion for business or amusement[.]"); Baxter v. Taber, 4 Mass. 361, 367 (1808) ("[H]e may live with his family, and pursue his business, or amusements, at his pleasure, either on land or water[.]"); Respublica v. Richards, 2 U.S. (2 Dall.) 224, 1 Yeates 480 (Penn. 1795) (same as *Johnson*,17 F. Cas. at 846).

87. *Huntly*, 25 N.C. at 423–24.

88. Young v. Hawaii, 992 F.3d 765, 799 (9th Cir. 2021).

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace.[89]

The majority ignores the statute's standing requirement that a complainant show "reasonable cause to fear an injury, or breach of the peace." As Robert Leider points out, this "negated the ability to file a complaint based on the carrying of weapons for lawful purposes."[90] Faced with a prima facie complaint, the carrier had to either prove that he or she had "reasonable cause to fear an assault or injury" or post bond to keep the peace. Importantly, no portion of the surety statute barred carriage for one who had to post a bond.[91] Surety statutes, as William Blackstone explained, were prophylactic, "without any crime actually committed by the party, but arising only from probable suspicion that some crime is intended or likely to happen."[92]

Although *Young* surveys many state cases, it omits one from Massachusetts in which the state's surety statute, as the majority explains it, should have been determinative. In 1896 the Massachusetts Supreme Judicial Court upheld against constitutional challenge convictions under an 1893 statute banning armed parades.[93] Citing several state constitutional cases addressing concealed carry bans, the court held that "the legislature may regulate and limit the mode of carrying arms."[94] The Supreme Judicial Court did not cite the State's 1835 surety statute—an odd omission if the statute was understood as having banned public carry for the preceding sixty-one years.

The surety statute's enforcement record does not support *Young*'s theory that it banned carry. The only known Massachusetts case in which the statute was invoked involved two Black men behaving peacefully outside a courthouse at 1 A.M.[95] The Justice of the Peace ordered a bond, but following appeal to municipal court, the case was dropped.[96] There are no reported nineteenth-century cases enforcing a surety law against a peaceable person. Professor Leider's exhaustive search yielded two possible examples of such enforcement—both against Black men in Washington, D.C.[97]

89. 1835 Mass. Acts 750.
90. Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms* 13 (George Mason University Legal Studies Research Paper Series No. LS 21-06, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697761 [https://perma.cc/RV6P-RS88].
91. 1835 Mass. Acts 748–51.
92. BLACKSTONE, *supra* note 33, at *252.
93. Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896).
94. *Id.* at 172.
95. Leider, *supra* note 90, at 16.
96. *Id.*
97. *Id.* at 15–18.

C. Carry Statutes

When American States wanted to regulate arms carrying by people who were not carrying with bad intent, they did so directly, by statute. To the nineteenth-century American sensibility, peaceable open carry was the norm, but concealed carry suggested "criminal intent."[98]

Today, however, many people prefer not to see visible guns, while remaining undisturbed by discreet concealed carry. A modern, tradition-based application of the Second Amendment allows for regulation of the mode of carry—open or concealed—but not a carry ban. The state cases on which *Heller* relies to determine the meaning and scope of the right to bear arms support, on the whole, the legislative choice between open or concealed carriage.[99]

Young cites an 1821 Tennessee statute banning all carry of "belt or pocket pistols."[100] It omits the statute's traveler exemption and the Tennessee Supreme Court holdings that the legislature could not prohibit open carry of military-style handguns (which, it noted, were not "belt pistols").[101] Tennessee and Arkansas did not fully ban handgun carriage, but their post-Reconstruction Jim Crow governments were quite restrictive. Eventually, only large "Army or Navy model" handguns could be carried, and only "in the hand," with the goal of disarming Freedmen who could not afford such arms.[102] Open long gun carry was unrestricted.[103]

The *Young* majority accurately cites Texas's 1871 and 1874 handgun carry bans. Even these unusually restrictive laws did not apply to travelers or long guns.[104] As of 1900, there were 45 states. A majority prohibited concealed carry, and three severely repressed the right to bear arms. Open carry was the lawful norm.[105]

Young accurately cites several western territories' stringent carry restrictions. Wyoming—part of the United States since the 1803 Louisiana Purchase and organized as a territory in 1868—forbade handgun carriage in incorporated towns in 1876.[106] In 1889, Wyoming adopted a constitution in preparation for statehood in 1890. It guaranteed "The right of citizens to bear

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98. *Id.* at 10–11 nn.93–94; Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1359 (2009).

99. Joseph G.S. Greenlee, *Concealed Carry and the Right to Bear Arms*, 20 FEDERALIST SOC'Y REV. 32, 34–35 (2019).

100. Young v. Hawaii, 992 F.3d 765, 799 (9th Cir. 2021).

101. Porter v. State, 66 Tenn. 106, 108 (1874); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871).

102. Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1329–33 (1995).

103. *Young*, 992 F.3d at 806–808.

104. *Id.* at 800–01, 804–05.

105. The first state or colonial concealed handgun ban was enacted in 1813. 1813 Ky. Acts 100; CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 143–52 (1999).

106. *Young*, 992 F.3d at 800–01; George A. Mocsary & Debora Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. at 3 (forthcoming 2021).

arms in defense of themselves and of the state shall not be denied."[107] The final territorial legislature repealed the 1876 law against open carry in towns.[108] Before 1876 and since 1890, Wyoming always allowed permitless open carry.[109]

Young also accurately cites an 1860 New Mexico Territory ban on all public carry.[110] As in Wyoming, the policy ended at statehood, when the 1911 New Mexico Constitution proclaimed that "[t]he people have the right to bear arms for their security and defense; but nothing herein shall be held to permit the carrying of concealed weapons."[111]

As *Young* points out, the Oklahoma Territory's 1890 statute is confusing, seemingly allowing rifle and shotgun carry only for hunting, traveling, militia, or repair.[112] Handgun carry was prohibited at a long list of public assemblies, churches, school, circuses, and even "any social party or social gathering."[113] Oklahoma's 1907 statehood Constitution secured the right to open carry: "[t]he right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."[114]

Whatever lessons about American tradition and history can be drawn from the territorial carry restrictions should be considered in light of the tradition of state constitutions that forbade legislatures from prohibiting open carry. A territory's preparation for statehood will include the examination of territorial laws for conformity to the U.S. Constitution, in letter and in spirit.[115] State constitutional drafters know that they must garner popular assent—not a mere legislative majority—in a general election. Western state constitutional conventions usually took place amidst high dissatisfaction with territorial governments. Constitutional conventions were an opportunity to create permanent safeguards against old legislative missteps.

Indeed, "history, if not unequivocal, has expressed a decided, majority view."[116] According to the Ninth Circuit, that view is that the government may fully prohibit public handgun carry. But *Young* can identify only a few islands of genuine prohibition in an ocean of permissiveness.

Unlicensed open handgun carry was the overwhelming norm for America's first 250 years, starting with the Jamestown landing in 1607. In the post-bellum nineteenth century, open handgun carry remained lawful in all but a few jurisdictions. Today, about half the States allow permitless open carry, many since

107. WYO. CONST. art. I, § 24.
108. Mocsary & Person, *supra* note 106, at 10–11.
109. *Id.*
110. *Young*, 992 F.3d at 800–01.
111. N.M. CONST. art, II, § 6.
112. *Young*, 992 F.3d at 800–01; 1891 Okla. Sess. Laws 495-96, art. 47, § 5.
113. 1891 Okla. Sess. Laws 495-96, art. 47, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into any church or religious assembly.").
114. OKLA. CONST., art. II, § 26.
115. *See* Mocsary & Person, *supra* note 106, at 13–15.
116. *Id.* at 38.

statehood.[117] Some others require a license that is summarily issued to law-abiding adults passing a background check and safety class.[118]

If past and present state statutes are any indication, *Young* is incorrect in concluding that "[i]t remains as true today as it was centuries ago, that the mere presence of such weapons presents a terror to the public."[119]

Individuals do not have an "unfettered right to carry weapons in public spaces."[120] But this is a straw man. Mr. Young did not claim that Hawaii could not license handgun carriage or limit it to nonsensitive places. He challenged only the state's refusal to issue carry permits to law-abiding, trained, background-checked adults merely because it does not think that ordinary people "need" to carry a handgun for lawful protection. It falls to courts to ensure that the power to regulate does not become a power to destroy.[121] The *Ninth* Circuit abdicated this duty.

V. RESPECTING STATE SOVEREIGNTY

The Ninth Circuit, again citing *Sir John Knight's Case*, justifies Hawaii's ban on the ground that allowing defensive carry would imply that the state, as sovereign, is "unable or unwilling to protect the people" and that "state and local governments have lost control of our public spaces."[122] The court quotes eminent sources for the idea that government protection is the *quid pro quo* for popular allegiance.[123] Says the court, "[t]he king who cannot guarantee the security of his subjects—from threats internal or external—will not likely remain sovereign for long."[124]

Yet as the Ninth Circuit has acknowledged, the U.S. Supreme Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[125] One has no legal right to government protection except in unusual situations where the government has specifically assumed such a duty.[126]

In practice, the state can only protect some people some of the time. When seconds count, police are minutes away. It is rare for criminals to attack in places where the police happen to be. An omnicompetent government that always protects everyone from violent attack outside the home is a nice, but impossible,

117. *Open Carry*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/terminology/carry-types/open-carry/ (last visited Apr. 28, 2021) [https://perma.cc/S9AF-T7KH].

118. *Id.*

119. Young v. Hawaii, 992 F.3d 765, 820–21 (9th Cir. 2021).

120. *Id.* at 813.

121. McCulloch v. Maryland, 17 U.S. 316, 391, 426 (1819).

122. *Young*, 992 F.3d at 816, 821; *see supra* note 43 and accompanying text.

123. *Id.* at 814.

124. *Id.*

125. Johnson v. Seattle, 474 F. 3d 634, 639 (9th Cir. 2007).

126. DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 198 (1989).

ideal.[127] It has been especially far from reality for communities—like Black people in the South after the Civil War—for whom state protection can be desultory at best.[128]

And contrary to *Young*'s suggestion, Americans are not subjects. As James Madison put it, "[t]he people, not the government, possess the absolute sovereignty."[129] In ratifying the Second and Fourteenth Amendments, the people affirmed their sovereign rights to protect themselves. *Young* transfers the core of sovereignty—the right to protect one's life and body—from the people to a government that, in Hawaii as everywhere, cannot always defend those whom it forbids to exercise their inherent right of self-defense.[130]

CONCLUSION

The *Young v. Hawaii* majority claims that total prohibition of the right to bear a handgun in public is consistent with "overwhelming" American legal history. The claim is refuted by the very sources on which the majority relies, once their full context is revealed.

127. *But see* MINORITY REPORT (Twentieth Century Fox 2002).

128. *See* George A. Mocsary & Rafael Mangual, *States Have a Constitutional Duty to Recognize Gun Rights Nationwide*, THE HILL (Dec. 27, 2017, 3:30 PM), https://thehill.com/opinion/international/366536-states-have-a-constitutional-duty-to-recognize-gun-rights-nationwide [https://perma.cc/H83C-FQKC].

129. 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 569 (1876).

130. *See* Riss v. New York, 240 N.E.2d 860, 900 (N.Y. 1968) (Keating, J., dissenting) ("What makes the city's position particularly difficult to understand is that, in conformity to the dictates of the law, Linda did not carry any weapon for self-defense . . . . Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her.").