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## The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review

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# THE FACES OF THE SECOND AMENDMENT OUTSIDE THE HOME: HISTORY VERSUS A HISTORICAL STANDARDS OF REVIEW

PATRICK J. CHARLES\*

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## I. INTRODUCTION

In the wake of *District of Columbia v. Heller*<sup>1</sup> and *McDonald v. City of Chicago*<sup>2</sup> there have been numerous legal challenges to extend the Second Amendment outside the home. The challenges come in all forms. Some advocates rely on *Heller*'s dicta to claim handguns provide the quintessential self-defense weapon outside the home.<sup>3</sup> Others take a balancing of liberty approach to claim any threats to the liberty, security, and property of a person know no bounds, and may be preserved with the public carrying of arms.<sup>4</sup> Lastly, some challenges invoke First Amendment jurisprudence to assert that any prior restraints on armed individual self-defense are unconstitutional, unless the government can show a compelling or substantial government interest for doing so.<sup>5</sup>

In terms of historiography, what makes these challenges interesting is they are a complete reversal from the Standard Model stance nearly three decades earlier. Writing in 1983, Don B. Kates determined the Second Amendment did not protect the right to carry guns outside the home, unless "in the course of militia service."<sup>6</sup>

<sup>1</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>2</sup> *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

<sup>3</sup> See *United States v. Masciandaro*, 638 F.3d 458, 465 (4th Cir. 2011); *Williams v. State*, 10 A.3d 1167, 1171 (Md. 2011); see also *DiGiacinto v. Rector and Visitors of George Mason University*, 704 S.E.2d 365 (Va. 2011).

<sup>4</sup> See Memorandum in Support of Plaintiffs' Motion for Preliminary and/or Permanent Injunction, *Shepard v. Madigan*, No. 3:11-cv-00405, at 5 (S.D. Ill. 2011). For scholarly approaches making similar lines of argument, see Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009); Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL'Y 951 (2011).

<sup>5</sup> For an interesting case on this subject, see *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011). For the continued push to import First Amendment jurisprudence into the Second Amendment, see *Ezell v. Chicago*, 651 F.3d 684, 697, 699-701 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

<sup>6</sup> Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983). Three years later, Kates would retract this statement in light of Stephen P. Halbrook's research. See Don B. Kates Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 149 (1986). To date, Halbrook's research has yet to provide any substantiated evidence that a right to armed individual self-defense extends outside the home, either through the common law or Second Amendment. Halbrook makes numerous historical assumptions to this point, but does so without adequate historical evidence. See *infra* notes 18 and 278 for discussion. Furthermore, the findings in this article dispel any of Halbrook's historical assumptions.

Also, in 1992, Kates wrote a short article claiming the founding generation saw no difference in individual armed self-defense and rebelling against tyranny. See Don B. Kates Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87 (1992). A close reading of the Kates' sources and placing them in historical context does not support this conclusion, particularly his discussion on William Blackstone's fifth auxiliary right and the founding generation's articulation of Blackstone. Compare Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 24-60 (2010) (tracing the intellectual origins of Blackstone's fifth auxiliary right and discussing its limits in Anglo-

“Outside that context,” wrote Kates, “the only carrying of firearms which the amendment appears to protect is such transportation as is implicit in the concept of a right to possess—e.g., transporting them between the purchaser or owner’s premises and a shooting range, or a gun store or gunsmith and so on.”<sup>7</sup>

Today, however, the view of the Second Amendment has drastically changed. Following the opinions in *Heller* and *McDonald*, advocacy groups are pushing for robust Second Amendment rights outside the home. This includes rights to open carry, conceal carry, and even a revisionist libertarian spin of William Blackstone’s analysis on auxiliary rights.<sup>8</sup> Needless to say, the Second Amendment is continuing to morph further into mythical meaning, and farther away from any historical context.<sup>9</sup>

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American constitutionalism), with Kates, *The Second Amendment and the Ideology of Self-Protection*, *supra*, at 90-104.

<sup>7</sup> Kates, *Handgun Prohibition*, *supra* note 6, at 267; see also Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 482 (1995) (supporting Kates’s initial interpretation).

<sup>8</sup> See Memorandum in Support of Plaintiffs’ Motion for Preliminary and/or Permanent Injunction *supra* note 4, at 5 (claiming the Second Amendment extends “to carrying arms for protection against violence in public. This is apparent from Blackstone’s discussion of the right to arms. Blackstone classified the right of British subjects ‘of having arms for their defence’ as among ‘auxiliary’ rights ‘which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.’”); *City Club Podcast: Alan Gura, Esq., speaks about the District of Columbia v. Heller case, and Second Amendment rights and the Firearms Control Regulation Act*, THE CITY CLUB OF CLEVELAND (July 7, 2008) (“The right to arms was well established . . . from Blackstone’s conception of a right of self-preservation. If you have the right to preserve your own life, Blackstone reasoned, you have an auxiliary right to arms with which you would do so, and that is what the English law protected, and that is the right the English king started to encroach upon . . . and it is very well documented.”). This interpretation of Blackstone is severally flawed in terms of textual interpretation and historical context. See Charles, *The Right of Self-Preservation and Resistance*, *supra* note 6, at 34-36.

<sup>9</sup> The historical underpinnings of *District of Columbia v. Heller* are not built upon a solid foundation. For the problems with *Heller*’s Anglo origins analysis, compare Patrick J. Charles, “*Arms for Their Defence*”?: *An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351 (2009), with JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994). Lois G. Schwoerer was the first historian to point out the problems with this line of historical thinking and refute Joyce Lee Malcolm’s thesis. See Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, in *THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 207–21* (Carl T. Bogus ed., 2000). For the problems with *Heller*’s American origins analysis, compare PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* (2009), with STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008). Despite the historical problems, one could reconcile the holding in *Heller*—self-defense in the home with a handgun—in one of two ways. The first is through a living or popular constitution analysis. See Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 594-98 (2011); Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2011). The other is through an extension of the English common law and castle doctrine. See 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 136, ch. 63, § 8 (1716).

How is this being accomplished? One answer is revisionist history. This occurs in all areas of constitutional law from the First Amendment<sup>10</sup> to congressional power over immigration,<sup>11</sup> and is not limited to the Second Amendment.<sup>12</sup> Revisionism surfaces as a means for individuals, advocacy groups, public interest groups and even politicians to advance an agenda through the courts rather than adopt legislation or constitutional reform. In short, revisionist history is a reeducation of the public to believe a historical fiction was in fact a historical reality.<sup>13</sup>

In terms of the right to “keep and bear arms” in public places, this means diminishing the founding generation’s understanding of the police power to only a few minor exceptions.<sup>14</sup> The founders are recast as a gun-toting civil society where every individual’s life is portrayed as more constitutionally significant or equal to

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<sup>10</sup> Compare Patrick J. Charles & Kevin O’Neill, *Saving the Press Clause From Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. (forthcoming 2012) (tracing the historical origins of the press clause through custom and intellectual thought), with Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PENN. L. REV. 459 (2011) (defining the Press Clause as a technology guarantee despite only one print technology being available in the eighteenth century).

<sup>11</sup> Compare Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion*, 15 TEX. REV. LAW & POL. 61 (2010) (addressing the international and Anglo origins over immigration and its imprint on American constitutionalism), with James E. Pfander and Theresa R. Wardon, *Reclaiming the Immigration Constitution of The Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359 (2010) (ahistorically claiming the immigration power was limited to norms of prospectively).

<sup>12</sup> See *supra* note 9.

<sup>13</sup> Constitutional revisionism is nothing new in the pantheons of history. See J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (New York, A.S. Barnes & Co. 1957) (discussing the use of history and contemporary understandings of the common law to mold constitutional interpretation); see also Henry Reed, *American Constitution in 1787 and 1866*, in 2 THE INTERNATIONAL REVIEW 604, 619 (1875) (“Every man has a theory of government under which he lives, and sees it through the medium of his theory. With the government, as seen through this medium, he is either satisfied or dissatisfied. If the former, he is inclined to attribute to its agency a large share of the prosperity and happiness which the people have enjoyed; if the latter, he is equally liberal in charging upon it the adversity and unhappiness they have experienced. In fact, the country appears to these observers to be fortunate or otherwise, and our history and progress respectable or otherwise, accordingly as the government is in conformity or otherwise with their respective theories. With the one, the desire is that the government shall remain as it was created, and the Constitution be interpreted in accordance with recognized canons of legal interpretation; with the other, it is that the Constitution shall be interpreted to agree with his ideas of political expediency, and the government be made to conform to the interpretation.”).

<sup>14</sup> See Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139 (2007). In addition to this article refuting this historical assumption, Churchill’s thesis has already been sufficiently challenged as outside the bounds of eighteenth century historical reality. See Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197 (2007) (rebutting Churchill’s thesis); David Thomas Konig, *Arms and the Man: What Did the Right to “Keep” Arms Mean in the Early Republic?*, 25 LAW & HIST. REV. 177 (2007).

society's interest in preserving the peace and ensuring the public good.<sup>15</sup> In other words, it is being asserted that an armed society facilitates the peace as much as a well-regulated government or society.<sup>16</sup> While this mythical Second Amendment has garnered acceptance among some of the masses, politicians, and gun advocates, the historical evidence does not support this conclusion. Indeed, the founding generation saw a great importance for arms bearing in the advancement of the Early Republic, but not in the manner it is cast by gun proponents.<sup>17</sup>

Another way the Second Amendment is being recast is through inventive legal strategies. Those that advocate for a robust Second Amendment outside the home seek solace in libertarian doctrine and First Amendment jurisprudence. These approaches wish to cast aside history as inconclusive, and claim armed individual self-defense as equally fundamental in time, place, and manner as other constitutional rights, such as freedom of speech or religion.<sup>18</sup> In particular, it is

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<sup>15</sup> See HALBROOK, THE FOUNDERS' SECOND AMENDMENT, *supra* note 9, at 20, 98, 108, 137, 158.

<sup>16</sup> A well-regulated government or society was the entire theory behind republican government and embodied in the Declaration of Independence. See Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 505-11 (2011).

<sup>17</sup> This holds particularly true in terms of the "well-regulated militia" right to "keep and bear arms." See generally Patrick J. Charles, *The Constitutional Significance of a "Well-Regulated" Militia Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NE. U. L.J. 1 (2011); Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323 (2011). For some ahistorical positions that an armed populace equates to a "well-regulated militia," see Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty"*, 3 TENN. J.L. & POL'Y 120, 130 (2007) ("the Second Amendment was prompted by the perceived need to protect the right of individuals to keep and bear arms, which would encourage a well-regulated militia"); STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 61-65, 85 (2d ed. 1994) (arguing that the Second Amendment should be interpreted to read that because a "well-organized militia is necessary to security of a free State" that the people should be armed); *id.* at 144 ("Recognition of the right of the people to have arms promoted a well-regulated militia."); David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO 61, 67 n.32 (2010) (stating that the Founding Fathers never defined a well-regulated militia and understood it to require that the people at large be "properly armed and equipped"); HALBROOK, THE FOUNDERS' SECOND AMENDMENT, *supra* note 9, at 181-83 (asserting the myth that "the people at large" have a right to "keep and bear arms" separate from the federal and State governments because an "armed citizenry" had demonstrated "success" in the American Revolution).

<sup>18</sup> Some appellate courts have embraced portions of this liberty balancing. See *Ezell v. Chicago*, 651 F.3d 684 (7th Cir. 2011) (although paying lip service to history, adopting facets of First Amendment jurisprudence when analyzing the Second Amendment); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (recognizing facets of First Amendment jurisprudence for importation to the Second Amendment). For scholarly approaches, see Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, *supra* note 4, at 1516-33; Blackman, *The Constitutionality of Social Cost*, *supra* note 5, at 1042.

argued that the Second Amendment has finally been recognized as fundamental, and the courts must begin jurisprudence anew to reflect this fact.<sup>19</sup>

This article disagrees that the courts need to reinvent or recast the Second Amendment outside the home to reflect its “fundamental” status as recognized in *Heller* and *McDonald*. The history of public arms regulation already provides significant guideposts for the courts to adjudicate the right to “keep and bear arms” in public.<sup>20</sup> To accomplish this, it requires placing history in context and not letting mythical interpretations or historical assumptions to permeate.

Thus, this article begins by decoding the public carrying of arms as the founding generation would have understood it.<sup>21</sup> It provides substantiating historical evidence that counters the mythical meanings of the Statute of Northampton,<sup>22</sup> and proves that the Statute did not solely seek to regulate a particular conduct with the intent to terrify, but the activity of carrying arms among the public concourse. It was the act of carrying arms itself that was deemed to terrify the people, for it was thought to be uncommon and unsafe to go armed in a well-regulated society. Such conduct ran counter to the idea of government authority and the police power.<sup>23</sup>

In addition to this showing, this article weighs the historical approach against others, particularly libertarian balancing and the importation of First Amendment jurisprudence into the Second.<sup>24</sup> To apply either of these latter approaches would be unprecedented in the pantheons of arms regulation history and American jurisprudence altogether. Not once did the founding generation conflate public arms

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<sup>19</sup> See Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J.L. & PUB. POL’Y 203, 208 (2010); Blackman, *The Constitutionality of Social Cost*, *supra* note 4, at 1042.

<sup>20</sup> See Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. L.REV. COLLOQUY. 227, 237-42 (2011).

<sup>21</sup> This requires identifying longstanding historical restrictions on the “keeping” or “bearing” of arms circa 1791 or a longstanding political or philosophical ideology for regulating or restricting the “keeping” or “bearing” of arms circa 1791, not finding an exact historical parallel. See Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: “Historical Guideposts” and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON J. CONST. L. & POL’Y 7, 21-30 (2010).

<sup>22</sup> See *infra* Part II.

<sup>23</sup> See *infra* Part II.

<sup>24</sup> Certainly, it remains unclear as to what standard of review the Supreme Court will apply in such instances. See Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in McDonald v. City of Chicago*, 63 FLA. L. REV. 487, 501-5 (2011) (discussing the difficulty in determining what constitutes a “sensitive place”). For a categorical analysis of First and Second Amendment jurisprudence, see Joseph Blocher, *Categoricalism and Balancing the First and Second Amendments*, 84 N.Y.U. L. REV. 375 (2009). For some other commentary comparing the First and Second Amendments, see William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009).

carrying with a presumption of liberty or prior restraint.<sup>25</sup> Instead, arms regulation was premised on what was in the interest of the public good.<sup>26</sup>

## II. THE STATUTE OF NORTHAMPTON AS A GUIDEPOST TO ANALYZING THE SECOND AMENDMENT OUTSIDE THE HOME

It is no secret that both *Heller* and *McDonald* reflect originalist approaches to constitutional interpretation.<sup>27</sup> Given this fact, it makes little sense to completely cast off history in determining the protective scope of the Second Amendment outside the home.<sup>28</sup> As Justice Scalia stated in *McDonald*, the “traditional restrictions [on arms] go to show the scope of the right” just as history helps to define “*other* rights.”<sup>29</sup> While Scalia conceded that conducting “historical analysis can be difficult,” he recognized history to be “the *best means available* in an imperfect world.”<sup>30</sup> He elaborated:

In the most controversial matters brought before this Court . . . *any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion. Moreover, the methodological differences that divide historians, and the varying interpretative assumptions they bring to their work, are nothing compared to the differences among the American people . . . .<sup>31</sup>

This begets the question, “What historical support is there for the regulation of arms in public?” The answer is the public regulation of arms is as old as the Norman Conquest<sup>32</sup> or what eighteenth century commentators referred to as the beginning of

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<sup>25</sup> The doctrine of prior restraint has a long history in the intellectual origins of a free press. See Charles and O’Neill, *Saving the Press Clause from Ruin*, *supra* note 10. However, no legal scholar or historian has found any substantiated evidence that the Second Amendment was viewed in a similar light.

<sup>26</sup> Charles, *Scribble Scrabble*, *supra* note 20, at 231-36.

<sup>27</sup> For some critiques on this point, see Bret Boyce, *Heller, McDonald and Originalism*, 2010 CARDOZO L. REV. DE NOVO 2 (2010); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008).

<sup>28</sup> Many courts have agreed with this approach, albeit with little effect. See *United States v. Rene*, 583 F.3d 8, 11-12 (1st Cir. 2009); *United States v. Skoien*, 587 F.3d 803, 808-09 (7th Cir. 2009), *aff’d*, 614 F.3d 638 (7th Cir. July 13, 2010), *vacated, reh’g en banc*, No. 08-3770, 2010 U.S. App. LEXIS 6584 (7th Cir. Feb. 22, 2010); *United States v. Brown*, 715 F. Supp. 2d 688 (E.D. Va. 2010); *United States v. Tooley*, 717 F. Supp. 2d 580 (S.D. W. Va. 2010); *United States v. Walker*, 709 F. Supp. 2d 460 (E.D. Va. 2010); see also Darrell Miller, *What the Seventh Amendment Can Teach Us About the Second* (forthcoming 2011); Charles, *The Second Amendment Standard of Review After McDonald*, *supra* note 1.

<sup>29</sup> *McDonald v. Chicago*, 130 S. Ct. 3020, 3056 (2010) (Scalia, J., concurring).

<sup>30</sup> *Id.* at 3057-58.

<sup>31</sup> *Id.* at 3058 (internal citations omitted).

<sup>32</sup> THE LAWS OF THE EARLIEST ENGLISH KINGS 69, 81 (F.L. Attenborough ed. & trans., 1922).

the English Constitution.<sup>33</sup> It was a subject that was often dependent upon socio-economic status and in the interests of the public good.<sup>34</sup> The most significant regulation on this subject is the 1328 Statute of Northampton. It stipulated that no person shall “go nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere,”<sup>35</sup> and was a staple in the American legal system before and after the adoption of the Constitution.<sup>36</sup>

A textual reading of the Statute supports a broad prohibition on the public carrying of arms to prevent public injury, crime, and breaches of the peace.<sup>37</sup> Thus, in terms of our Anglo-American legal tradition, it may be asserted that the Second Amendment was not viewed as extending outside the home, and if it did at all, it only provided minimal protection. In contrast, a number of Second Amendment commentators claim the Statute of Northampton cannot be interpreted in this light. For instance, David B. Kopel and Clayton Cramer claim the Statute requires “arms carrying with the *specific intent* of terrorizing the public.”<sup>38</sup> David T. Hardy similarly deduces the Statute stands for the punishment of dangerous conduct, not the act itself. He believes the “key to the offense was not so much the nature of the arm, as the *specific intent* to cause terror.”<sup>39</sup> Also, Eugene Volokh claims the Statute must be understood “as covering only those circumstances where carrying of arms was unusual and therefore terrifying.”<sup>40</sup> Quoting William Hawkins’ *Pleas of the Crown*, Volokh asserts the Statute solely stands for the legal proposition that “public carrying ‘accompanied with such circumstances as are apt to terrify the people’ was .

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<sup>33</sup> JEAN LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT; IN WHICH IT IS COMPARED BOTH WITH THE REPUBLICAN FORM OF GOVERNMENT, AND THE OTHER MONARCHIES IN EUROPE* 7-15 (London, T. Spilsbury, new ed. 1775).

<sup>34</sup> See Patrick J. Charles, “*Arms for Their Defence?*”, *supra* note 9, at 358, 363-65.

<sup>35</sup> 2 Edw. 3, c. 3 (1328) (Eng.); see also 25 Edw. 3, st. 5, c. 2, § 13 (1350) (Eng.) (if “any Man of this Realm ride armed covertly or secretly with Men of Arms against any other . . . shall be judged Treason.”); 1 Jac.1, c. 8 (1603-4) (Eng.) (also known as the Statute of Stabbing).

<sup>36</sup> Charles, *Scribble Scrabble*, *supra* note 20, at 231-36.

<sup>37</sup> This textual reading is affirmed by a subsequent statute amending and enforcing it. See 20 Rich. 2, c. 1 (1396-97) (Eng.) (“no Lord, Knight, or other, little nor great, shall go nor ride by Night nor by Day armed . . . save and except the King’s Officers and Ministers in doing their Office.”); see also GEORGE CRABB, *A HISTORY OF THE ENGLISH LAW; OR AN ATTEMPT TO TRACE THE RISE PROGRESS, AND SUCCESSIVE CHANGES OF THE COMMON LAW FROM THE EARLIEST PERIOD TO THE PRESENT TIME* 335-36 (Burlington, Chevney Godrich 1831) (interpreting the statute according to its text).

<sup>38</sup> David B. Kopel & Clayton Cramer, *State Standards of Review for the Right to the Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1127 (2010) (emphasis added) (discussing *State v. Huntly*, 3 Ired. 418 (N.C. 1843)); see also Kopel & Cramer, *supra*, at 1133-34.

<sup>39</sup> David T. Hardy, *District of Columbia v. Heller and McDonald v. City of Chicago: The Present as Interface of the Past and Future*, 3 NE. U. L.J. 199, 205 (2011) (emphasis added).

<sup>40</sup> Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009).

. . . seen as prohibited,” but “wearing common weapons’ in ‘the common fashion’ was legal.”<sup>41</sup>

It is interesting that each of these commentators claim their interpretation to be rooted in history, yet not one sought to delve into the historical record. It is what the legal academy refers to as *faux originalism*,<sup>42</sup> for each of these commentators make false assumptions as to what behavior the Statute of Northampton sought to prevent. This ad hoc historical inquiry is insufficient at any academic level, for many questions are still left unanswered such as legislative intent, legal interpretation, and the public understanding of its tenets. The only way to truly understand the Statute’s regulatory scope is to delve into its Anglo origins and trace it through mid-nineteenth century America. As John Marshall aptly put it:

Where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.<sup>43</sup>

Unsurprisingly, Marshall was not the only prominent eighteenth century legal mind to deduce statutory interpretation from the collective whole. Josiah Quincy Junior, a prominent Boston attorney during the American Revolution, deduced a similar conclusion:

1st That it the most natural and genuine Exposition of a Statute to Construe one Part of the Statute by another Part of the same Statute, for that best expresseth the Meaning of the Makers. 2dly The words of an Act of Parliament must be taken in a lawful [and] rightfull Sense . . . 3dly That Construction must be made of a Statute in Suppression of the Mischief, [and] in Advancement of the Remedy.<sup>44</sup>

It is from this talking point that Quincy elaborated on statutory interpretation and the importance of assembling the whole to include text, legislative intent, the spirit of the law, and history:

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<sup>41</sup> *Id.* at 102 (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, *supra* note 10, at 136, ch. 63, § 9).

<sup>42</sup> Steven G. Calabresi was the first to coin “faux originalism” to describe false notions of history. See Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 646, 647, 651 (2006). However, the phrase has become most associated with Judge Richard Posner’s critique of *District of Columbia v. Heller*. See Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32-33; see also Saul Cornell, *St. George Tucker’s Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. COLLOQUY 406, 409 (2008); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 631 (2008); Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095, 1096 (2009); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1559-65 (2009).

<sup>43</sup> *United States v. Fisher*, 6 U.S. 358, 386 (1805).

<sup>44</sup> 2 THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 219 (Daniel R. Coquillette and Neil Longley York eds., 2007).

The fairest [and] most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made; by signs of the most natural [and] probable. And these signs are either the words, the context, the subject matter, the effects [and] consequence, or the spirit [and] reason of the law . . . The true key for construing a statute is to consider the subject matter of it, and the ends and purposes for which it was made. But perhaps this may be better done from the history [and] circumstances of the times, than [from the bowels] of the statute . . . The words of the statutes are not only to be considered, but rather the intent of the makers is to be weighed; for the intent is the principle thing to be considered.<sup>45</sup>

Thus, if we are to proceed to understand the founding generation's view of the Statute of Northampton in legal terms, many questions must be answered. First, is the intent of the Statute "plain" or does the "mind labour to discover the design of the legislature"? Clearly, the Statute of Northampton contained no intent requirement for the conduct of going armed to be otherwise unlawful.<sup>46</sup> One merely had to go or ride armed in "Fairs, Markets," or other populated enclaves. The same was true for the 1285 statute of Edward I, which made it unlawful to go or wander "about the Streets" of London, "after Curfew tolled . . . with Sword or Buckler, or other Arms for doing Mischief . . . *nor any in any other Manner*, unless he be a great Man or other lawful Person of good repute[.]"<sup>47</sup> It was not until 1350 that there was a "going armed" statute with an intent requirement. This statute neither amended nor overrode the Statute of Northampton. It merely stipulated that it was a separate felony for "any Man of this Realm ride armed covertly or secretly with Men of Arms against any other."<sup>48</sup>

Given these historical facts, it is hard to deduce how some may claim the Statute of Northampton is to be read with a particularized terrifying conduct requirement. Nevertheless, if one is to fully appreciate the Statute's legislative purpose a deeper historical inquiry is required in accordance with Quincy's viewpoint, which brings us to a second set of questions.<sup>49</sup> What was the Statute's common understanding from its inception? What was the reason for the Statute and where there any legal exceptions to the standard rule? Did the early American perception of the law deviate at all from this understanding? What evidence, if any, is there for this conclusion? Did the Second Amendment and contemporaneous state provisions seek to override the Statute of Northampton?

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<sup>45</sup> *Id.* at 225.

<sup>46</sup> *See* 2 Edw. 3, c. 3 (1328) (Eng.); 20 Rich. 2, c. 1 (1396-97) (Eng.).

<sup>47</sup> 13 Edw. 1 (1285) (Eng.) (Statutes for the City of London) (emphasis added).

<sup>48</sup> 25 Edw. 3, st. 5, c. 2, § 13 (1350) (Eng.). The differentiation between the 1350 statute and the Statute of Northampton is supported by Coke's Institutes. *See* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 160 (E&R Brooke et. al. eds., London, 1797) (showing the "clau[s]e of the [s]tatute 25 E. 3" was a treason distinction).

<sup>49</sup> *See* Carlton F.W. Lawson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1378-79 (2009) (questioning whether the Statute of Northampton was ever enforced and whether it was prevalent in American jurisprudence after the Constitution).

The answers to this second set of questions requires more than textual word play and misconceptions of the law from centuries prior or what is referred to as *faux originalism*. Instead, it requires the use of accepted historical methodologies to deduce original or public meaning.

A. *The Original Meaning of the Statute of Northampton through the Sixteenth Century*

In 1716, William Hawkins wrote that the offense of going or riding armed had always been an offense under the common law.<sup>50</sup> To date, no historian or originalist has provided evidence to support the position that the offense preceded the Statute of Northampton. Certainly, the Parliament of Edward I made it unlawful for most persons to go armed at night in the City of London,<sup>51</sup> yet it may be asserted that this statute merely provides another example of public arms regulation, and is not an affirmation of any common law authority. Not surprisingly, the counterpoise to this assertion lies in the English archives, for its contents affirm the offense of “going armed” was prohibited by the prerogative power before being codified as the Statute of Northampton.

The first such recorded instance appears to have occurred in the mid-thirteenth century.<sup>52</sup> The practice then carried into the latter half of the century when Edward I instructed the sheriffs of Salop and Stafford to prohibit anyone from “going armed within the realm without the king’s special licence.”<sup>53</sup> From this date, proclamations against going armed to prevent possible affrays became quite regular, particularly during the assembly of people at tournaments.<sup>54</sup> An exception being in 1302, when Edward I instructed the sheriff of Warwick to arrest “any knight, esquire or any other person” that went armed until the Westminster Parliament convened.<sup>55</sup>

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<sup>50</sup> HAWKINS, *supra* note 9, at 136, ch. 63, § 4.

<sup>51</sup> 13 Edw. 1 (1285) (Eng.) (Statutes for the City of London).

<sup>52</sup> 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 583* (1895) (“[B]efore the end of Henry III’s reign there were ordinances which commanded the arrest of suspicious persons who went about armed without lawful cause.”).

<sup>53</sup> 4 *CALENDAR OF THE CLOSE ROLLS, EDWARD I, 1296-1302* 318 (September 15, 1299, Canterbury) (H.C. Maxwell-Lyte ed., London, Mackie And Co. 1906).

<sup>54</sup> 4 *THE HISTORY OF THE COUNTY OF LEICESTER: THE CITY OF LEICESTER 1-30* (R.A. McKinley ed., 1958).

<sup>55</sup> 4 *CALENDAR OF THE CLOSE ROLLS, EDWARD I, supra* note 53, at 583 (June 13, 1302, Cartham); *see also id.* at 588 (July 16, 1302, Westminster) (“To the sheriff of York. Order to cause proclamation to be made throughout his bailiwick prohibiting any knight, esquire or any other person from tourneying, tilting . . . making jousts, seeking adventures or otherwise going armed without the king’s special licence, and to cause to be arrested the horses and armour of any persons found thus going with arms after proclamation.”); 5 *CALENDAR OF THE CLOSE ROLLS, EDWARD I, 1302-1307* 210 (June 10, 1304, Stirling) (H.C. Maxwell-Lyte ed., London, Mackie And Co. 1908) (“To the sheriff of Leicester. Order to cause proclamation to be made immediately upon sight of this order prohibiting any knight, esquire or other person from tourneying, tilting . . . making jousts, seeking adventures, or otherwise going armed in any way without the king’s licence.”); *id.* at 535-36 (June 12, 1307, Carlisle) (“To the sheriff of Essex . . . all persons assembling there, under penalty of forfeiting all that they can forfeit to

On numerous occasions Edward II issued similar proclamations to ensure political stability. In 1308, Dover was ordered to enforce the prohibition that “no knight, esquire, or other shall, under pain of forfeiture . . . go armed at Croydon or elsewhere before the king’s coronation.”<sup>56</sup> In 1310, the sheriff of York was ordered to prohibit any “earl, baron, knight, or other” from going armed.<sup>57</sup> Meanwhile, in 1312, Edward II ordered the sheriffs of Warwick and Leicester to seize the weapons of any that “go armed . . . without the king’s special licence . . .”<sup>58</sup>

These examples provide ample historical evidence of the government’s prerogative in prohibiting the people from going publicly armed to ensure the peace. What remains unclear is whether these prohibitions were only enforced during times of suspected affray, thus preventing the people from being armed for only short periods of time, or whether the power to prohibit going armed was inherent with the local constable or sheriff’s authority, and the proclamations served as reminders of the status quo. The evidence available at the turn of the fourteenth century does not provide a clear affirmation, but there is nothing in the historical record to suggest that the local authorities were prohibited from disarming individuals among the public concourse to ensure the public safety.

What the record does unequivocally reveal is that Edward II issued a proclamation that served as the precursor to the Statute of Northampton. On April 28, 1326, the proclamation was one of a series of attempts to provide uniform order and justice throughout the kingdom. The following was relayed to the sheriff of Huntington:

Whereas the king lately caused by proclamation to be made throughout his realm prohibiting any one going armed without his licence, except the keepers of his peace, sheriffs, and other ministers, willing that any one doing the contrary should be taken by the sheriff or bailiffs or the keepers of his peace and delivered to the nearest gaols . . . the king now learns that Thomas de Eye, John Grubbe, and Richard le Orfreysier . . . with aketons, bacinets, and other arms by day and by night in towns, fairs, markets, and other public and private places, committing many evil deeds, contrary to the proclamation and inhibition aforesaid . . . .<sup>59</sup>

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the king, of their making tournaments, jousts, or tilting . . . or of their going armed or seeking adventures otherwise there or elsewhere within the sheriff’s bailiwick.”).

<sup>56</sup> 1 CALENDAR OF THE CLOSE ROLLS, EDWARD II, 1307-1313 52 (February 9, 1308, Dover) (H.C. Maxwell-Lyte ed., London, Mackie And Co.1892).

<sup>57</sup> *Id.* at 257 (March 20, 1310, Berwick-on-Tweed).

<sup>58</sup> *Id.* at 553 (October 12, 1312, Windsor); *see also id.* at 269 (“To the sheriff of York. Order to proclaim the king’s prohibition of anyone making tournaments, bourds, jousts, seeking adventures, or going armed, under pain of forfeiture, until the king returns from Scotland.”).

<sup>59</sup> 4 CALENDAR OF CLOSE ROLLS, EDWARD II, 1323-1327 560 (April 28, 1326, Kenilworth) (H.C. Maxwell-Lyte ed., London, Mackie And Co. 1898). Edward II issued a similar proclamation a month earlier. *See id.* at 549 (March 6, 1326, Leicester) (ordering the sheriff of York to arrest “any man hereafter [that] go armed on foot or horseback, within liberties or without”); *see also* 1 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364 15 (November 1326) (A.H. Thomas ed., 1926) (“[N]o man go armed by night or day, save officers and other good men of the City assigned by the Mayor and Aldermen in

While Edward II would end up fleeing in the midst of social and political turmoil,<sup>60</sup> two years later Parliament would streamline the proclamation into the Statute of Northampton.<sup>61</sup> The Statute was much more than a prohibition on arms in the public concourse. Its tenets also provided the basis of English legal reform for centuries to come.<sup>62</sup> The Statute sought to purge corruption within local government, unify the kingdom under a body of law, and ensure the public peace was kept.<sup>63</sup>

In terms of public arms, the Statute's prohibition not only mirrored Edward II's proclamation, but was also the means to prevent breaches of the peace such as theft and robbery.<sup>64</sup> In fact, it was the numerous complaints of crime and corruption to the House of Commons that brought the need for legal reform.<sup>65</sup> One of those reforms was the prohibition of public arms to maintain justice, as well as prevent any overthrow of government at the local or national level.<sup>66</sup>

In the years following, reminders were sent to the different sheriffs that the Statute of Northampton should be strictly enforced as prohibiting the act of "going armed," not a particular conduct with the intent to terrify. In 1328, the sheriff of Southampton was ordered "to cause the statute in the late parliament at Northampton prohibiting men coming armed before [the] justices or other ministers . . . or going armed, etc., to be observed in all its articles throughout the whole of [the] bailiwick[.]"<sup>67</sup> In 1330, the sheriffs of Surrey and Sussex were informed to "take all those whom [they] shall find going armed, with their horses and armour . . . as the king understands that many are going about armed, in the sheriff's bailiwick, contrary to the form of the statute made in the late parliament of Northampton."<sup>68</sup> In 1332, the keepers and justices of Northumberland were reminded to arrest "all persons riding or going armed to disturb the peace, and to keep them safely in prison

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their wards to keep watch and preserve the peace, under penalty of forfeiture of arms and imprisonment."); *id.* ("The bearing of arms is forbidden, except to the officers of the City assigned by the Mayor and Alderman to keep watch in the Wards, and to the Hainaulters of the Queen, who are accustomed to go armed in the manner of their country.").

<sup>60</sup> For a history discussing this, see generally Claire Valente, *The Deposition and Abdication of Edward II*, 113 *ENG. HIST. REV.* 852 (1998).

<sup>61</sup> 2 *Edw. 3, c. 3* (1328) (Eng.).

<sup>62</sup> See Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 *ENG. HIST. REV.* 842, 850 (1993).

<sup>63</sup> See Bertha Haven Putnam, *The Transformation of the Keepers of the Peace into the Justices of the Peace*, 12 *TRANSACTIONS ROYAL HIST. SOC'Y* 19 (1929) (discussing the legal reforms to ensure the peace at the local level as the result of the Statute of Northampton).

<sup>64</sup> *Id.* at 19-20.

<sup>65</sup> Verduyn, *supra* note 62, at 848-49.

<sup>66</sup> *Id.*; see also W. R. Jones, *Rex et ministry: English Local Government and the Crisis of 1341*, 13 *J. BRIT. STUD.* 1, 6 (1973).

<sup>67</sup> 1 *CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1327-1330* 420 (November 10, 1328, Wallingford) (H.C. Maxwell-Lyte ed., London, Mackie And Co. 1896).

<sup>68</sup> 2 *CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1330-1333* 131 (April 3, 1330, Woodstock) (H.C. Maxwell-Lyte ed., London, Mackie And Co. 1898).

. . . .”<sup>69</sup> Similarly, in 1334, the mayor and bailiffs of York were reminded that “no one except a minister of the king should use armed force or go armed in fairs, markets, etc. under pain of loss of [his] arms and imprisonment[.]”<sup>70</sup> Meanwhile, in 1343, all London hostelries were required to inform their guests of the prohibition “against going armed in the City.”<sup>71</sup>

Given these affirmations of strict enforcement, it is difficult to ascertain how historian Joyce Lee Malcolm could have asserted that the Statute of Northampton was never enforced.<sup>72</sup> It is unclear what, if any, research Malcolm conducted on the

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<sup>69</sup> *Id.* at 610 (October 28, 1332, York).

<sup>70</sup> 3 CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1333-1337 294 (January 30, 1334, Woodstock) (H.C. Maxwell-Lyte ed., London, Mackie And Co.1898); *see also id.* at 539 (January 21, 1336, Woodstock) (“The king orders the sheriff to cause proclamation to be made throughout that bailiwick that no one, under pain of forfeiture, shall make such gatherings, or go armed in fairs, markets and other places.”); *id.* at 695 (August 18, 1336, Perth) (ordering the sheriff of Wilts that “no one, except the king’s serjeants and ministers, shall go armed, or ride or lead or procure an armed power before the justices or elsewhere in that county, nor do anything to injure the king’s peace against the form of the statute of Northampton; and the sheriff shall cause all those whom he finds doing the contrary, after the proclamation, to be arrested.”).

<sup>71</sup> 1 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364 156 (December 19, 1343) (A.H. Thomas ed., 1898). Edward III issued similar proclamations throughout his reign. *See* MEMORIALS OF LONDON & LONDON LIFE 268 (H.T. Riley ed., 1868) (preventing “broils, riots, and disputes” the king “forbid that any one, on pain of forfeiture of so much as unto the King he may forfeit, of whatsoever estate or condition he be, shall go armed with haketon, or with plate, or with habergeon . . . or with long dagger, or with any other manner of arms suspected, within the City of London, or within the suburbs, or in any other places between the said city and the Palace of Westminster, or anywhere in the Palace, by land or by water.”); *id.* at 192 (“It is ordained and granted by the Mayor, Aldermen, and Commonality, of the City of London, for maintaining the peace between all manner of folks in the said city, that no person, denizen or stranger, other than officers of the City, and those who have to keep the peace, shall go armed, or shall carry arms, by night or by day, within the franchise of said city.”); *id.* at 173 (“[N]o person, native or stranger, shall go armed in the same city, or shall carry arms by night or by day, on pain of imprisonment, and of losing his arms; save only, the serjeants at-arms of our Lord the King, and of my Lady the Queen, and the vadlets of the Earls and Barons . . . and save also, the officers of the City, and those who shall be summoned unto them, for keeping and maintaining the peace of the City.”); 11 CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1360-1364 533 (June 12, 1363, Westminster) (H.C. Maxwell-Lyte ed., 1909) (“That no man of whatsoever condition shall go armed in the said city nor suburbs, nor carry arms by day nor by night, except yeomen of the great lords of the land carrying their lords’ swords in their presence, serjeants at arms of the king, of the queen, the prince and the king’s other children, ministers of the city and men going in their company at their orders to aid them in keeping the peace, upon the pain aforesaid and upon pain of losing their arms and armour.”).

<sup>72</sup> MALCOLM, TO KEEP AND BEAR ARMS, *supra* note 9, at 104; *see also* Joyce Lee Malcolm, *The Creation of a “True Antient and Indubitable” Right: The English Bill of Rights and the Right to be Armed*, 32 J. BRIT. STUD. 226, 242 (1993) (showing Malcolm imported the findings in *To Keep and Bear Arms* from this article). Malcolm’s misleading and insufficiently researched conclusions on the Statute of Northampton have had influential effects in Second Amendment scholarship. *See* Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1363-64 (2009) (relying on Malcolm’s research for contemporary legal analysis on the Statute of Northampton); Kevin C. Marshall,

Statute,<sup>73</sup> but the historical record does not support her non-enforcement conclusion.<sup>74</sup> Not only was the statute enforced to prevent crime, murder, and breaches of the peace, but it was even amended by Richard II. The amendment expressly exempted government officers, from carrying arms and mitigated the act to misdemeanor forfeiture of arms and a fine.<sup>75</sup>

Furthermore, Malcolm's take on history fails in that there are numerous affirmations that the Statute of Northampton was continually enforced to maintain law and order.<sup>76</sup> In 1377 Richard II ordered the mayor and bailiffs of Newcastle and

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*Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 716-17 (2009) (relying on Malcolm's research for contemporary legal analysis on the Statute of Northampton); David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 ALB. L. REV. 305, 317 (2005) (relying on Malcolm's research for contemporary legal analysis on the Statute of Northampton); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1347 (1995) (relying on Malcolm's research for contemporary legal analysis on the Statute of Northampton). It should be noted that Malcolm also serves as a political advocate for gun rights. In particular, Malcolm uses her historical research to advocate for open carry and conceal carry rights to prevent crime. Given this article's findings, Malcolm's use of history for said policy arguments should be called into question. For some of Malcolm's political advocacy, see Joyce Lee Malcolm, *The Soft-on-Crime Roots of British Disorder*, WALL ST. J. (August 16, 2011), available at <http://online.wsj.com/article/SB10001424053111903918104576502613435380574.html>; David Kopel, *Congressional Hearing on Interstate Handgun Carry Reciprocity*, VOLKH CONSPIRACY (September 14, 2011), <http://volokh.com/2011/09/14/congressional-hearing-on-interstate-handgun-carry-reciprocity/> (linking to U.S. House Subcommittee on Crime, Terrorism, and Homeland Security debates regarding H.R. 822 where Malcolm testifies for conceal carry reciprocity).

<sup>73</sup> For historical articles, preceding Malcolm's book, that affirm the Statute of Northampton was enforced in the fourteenth century, see Putnam, *supra* note 64, at 30-31; Verduyn, *supra* note 63, at 853, 862-63.

<sup>74</sup> While praised by the pro-gun community and many Second Amendment advocacy groups, Malcolm's methodological approach and findings were sufficiently challenged by Lois G. Schwoerer. See generally Schwoerer, *To Hold and Bear Arms*, *supra* note 10; see also LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689, at 74-78 (1981) (most of Schwoerer's initial findings have proven to be historically sound). Since Schwoerer's influential article, Malcolm's entire work has proven to be highly controversial among historians in terms of its research methods and conclusions. See TIM HARRIS, *REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685-1720*, at 343 (2006); Schwoerer, *To Hold and Bear Arms*, *supra* note 9, at 207-21; Charles, "Arms for Their Defence"?, *supra* note 9; Charles, *The Right of Self-Preservation and Resistance*, *supra* note 6. To date, these subsequent findings have gained the acceptance of the historical community and have cast out Malcolm's thesis as historically unattainable. See Brief for English/Early American Historians as Amici Curiae Supporting Respondents, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (supported by twenty-one scholars and historians).

<sup>75</sup> 20 Rich. 2, c. 1 (1396-97) (Eng.). This understanding of amendments to the Statute of Northampton was well understood in the Early Republic. See 1 WILLIAM OLDNALL RUSSELL, *A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS* 271-72 (2d ed., 1826).

<sup>76</sup> For some other examples of enforcement, see 4 CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1337-1339 104 (February 20, 1337, Hatfield) (H.C. Maxwell-Lyte ed., 1900) (reminding the sheriff of Berks to enforce the Statute of Northampton and "no one, except the king's serjeants and ministers, shall go armed or ride with armed power before the justices at

Tyne to arrest persons that committed “mischief in that town,” including “going armed, bearing arms or leading an armed power to the disturbance of the peace . . . .”<sup>77</sup> He even reminded the mayor and bailiffs that the Statute of Northampton provided the legal vehicle to do so:

[W]ith particular exceptions therein specified, no man whatsoever estate or condition shall go with armed force, lead any force to the disturbance of the peace, ride or go armed by day or night in fairs, markets or in [the] presence of justices or other the king’s ministers or elsewhere under pain of losing their arms and of imprisonment . . . .<sup>78</sup>

In 1386, Richard II similarly ordered Sir Henry Grene to “repair to the town of Pyghtesle . . . and elsewhere in Nor[t]hamptonshire” and “cause proclamation to be made, on the king’s behalf forbidding any man of whatsoever estate or condition to go armed there or lead an armed power to the disturbance of the peace, or do aught else in breach of the peace or of the Statute of Northampton concerning the carrying of arms, or to the terror or disturbance of the people[.]”<sup>79</sup> Two years later, he issued another order to the bailiffs of Scardburgh:

Order to arrest and imprison until further order for their deliverance all those who shall be found going armed within the town, leading an armed power, making unlawful assemblies, or doing aught else whereby the peace may be broken and the people put in fear . . . as in the statute lately published as Northampton among other things it is contained that no man of whatsoever estate or condition shall be bold to appear armed before the justices or the other king’s ministers in performance of their office, lead an armed force in breach of the peace, ride or go armed by day or night in fairs and markets or elsewhere in presence of justices etc. under pain of losing his arms and of imprisonment . . . .<sup>80</sup>

Richard II even issued such proclamations to London. In 1381, he proclaimed that “no stranger or privy person, save those deputed to keep the peace, shall go

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the said day and places, nor do anything against the peace.”); MEMORIALS OF LONDON AND LONDON LIFE, *supra* note 71, at 295-300 (“[N]o Fleming, Brabanter, or Selander shall go armed, or carry any manner of arms, or knife, small or great, with a point, either privily or openly, on pain of forfeiture of the same, and imprisonment of his body.”).

<sup>77</sup> 1 CALENDAR OF CLOSE ROLLS, RICHARD II, 1377-1381 34 (December 1, 1377, Westminster) (H.C. Maxwell-Lyte ed., 1914).

<sup>78</sup> *Id.*

<sup>79</sup> 3 CALENDAR OF THE CLOSE ROLLS, RICHARD II, 1385-1389 128 (February 6, 1386, Westminster) (H.C. Maxwell-Lyte ed., 1914).

<sup>80</sup> *Id.* at 399-400 (May 16, 1388, Westminster); *see also* 2 CALENDAR OF THE CLOSE ROLLS, RICHARD II, 1381-1385 3 (August 7, 1381, Reading) (H.C. Maxwell-Lyte ed., 1920) (“Order to cause proclamation to be made at the town of Warkenaby and elsewhere on the king’s behalf forbidding any man of whatsoever estate or condition to go armed contrary to the peace or to the statute of Northampton concerning the carrying of arms contrary to the peace.”).

armed therein after they shall come to their lodgings . . . .”<sup>81</sup> Then in 1391 and 1393 respectively, he ordered the sheriff to arrest any “man of whatsoever estate or condition” that shall “go armed, girt with a sword or arrayed with other unaccustomed harness, bear arms, swords, or other such harness, or do aught whereby the peace or the statutes concerning the bearing of arms contrary to the peace may be broken . . . .”<sup>82</sup>

Henry IV, Richard II’s successor, also issued proclamations against going armed in accordance with the Statute of Northampton. In 1405, he issued the following proclamation to the bailiffs of Suthwerke:

Order to cause proclamation to be made, forbidding any man of whatsoever estate or condition to make unlawful assemblies within the town and suburbs of Suthwerke, to go armed, girt with sword or arrayed with other unusual harness, to carry with him arms, swords or harness aforesaid, or to do aught whereby the peace may be broken or the statutes concerning the bearing of arms contrary to the peace, or any of the people disturbed or put in fear, under pain of losing such arms etc. and of imprisonment . . . .<sup>83</sup>

Nearly forty years later, Henry VI would refer to the Statute of Northampton expressly in a proclamation to the sheriffs of York:

[A] statute published in the parliament holden at Nor[t]hampton in 2 Edward III, wherein it is contained that no man of whatsoever estate or condition shall go armed, lead an armed power in breach of the peace, or ride or pass armed by day or night in fairs, markets or elsewhere in the presence of justices, the king’s ministers or others under pain of losing his arms and of imprisonment . . . .<sup>84</sup>

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<sup>81</sup> 2 CALENDAR OF THE CLOSE ROLLS, RICHARD II, 1381-1385 92 (November 2, 1381, Westminster) (H.C. Maxwell-Lyte ed., 1920). Richard II issued a similar proclamation for London. See MEMORIALS OF LONDON AND LONDON LIFE, *supra* note 71, at 43 (“Be it proclaimed . . . for the safekeeping of the peace, that no one repairing unto the City after he shall have taken up his lodging there, shall go armed, or shall carry upon him, or have carried after him, a sword, unless he be a knight.”).

<sup>82</sup> 4 CALENDAR OF THE CLOSE ROLLS, RICHARD II, 1389-1392 530 (December 23, 1391, Westminster) (H.C. Maxwell-Lyte ed., 1922); see also 5 CALENDAR OF THE CLOSE ROLLS, RICHARD II, 1392-1396 249 (December 18, 1393, Westminster) (H.C. Maxwell-Lyte ed., 1925).

<sup>83</sup> 2 CALENDAR OF CLOSE ROLLS, HENRY IV, 1402-1405 526 (July 16, 1405, Westminster) (A.E. Stamp ed., 1929). Henry IV issued a similar proclamation to the mayor and sheriffs of London. See 3 CALENDAR OF THE CLOSE ROLLS, HENRY IV, 1405-1409 485 (January 30, 1409, Westminster) (A.E. Stamp ed., 1931) (“Forbidding any man of whatsoever estate or condition to go armed within the city and suburbs, or any except lords, knights and esquires with a sword, and the king’s will is that one sword and no more be borne after each of these, under pain of forfeiting armour and swords.”).

<sup>84</sup> 4 CALENDAR OF THE CLOSE ROLLS, HENRY VI, 1441-1447 224 (May 12, 1444, Westminster) (A.E. Stamp ed., 1937); see also 6 CALENDAR OF THE CLOSE ROLLS, HENRY VI, 1454-1461 205 (April 12, 1457, Westminster) (C.T. Flower ed., 1947) (to the sheriff of Worcester that “no man of whatsoever estate, degree or condition shall presume . . . to go or

Certainly, the crown did not need to proclaim the enforcement of the Statute of Northampton for sheriffs, bailiffs, constables, and other government officials to enforce the prohibition on “going armed” in the public concourse. The royal proclamations merely confirm its existence, subsequent enforcement, and the conduct it sought to prevent. As the historical evidence reveals, by the end of the fourteenth century the act of carrying arms in public was a misdemeanor under penalty of forfeiture of arms and imprisonment in some cases. Meanwhile, assaulting with weapons, purposefully arming with the intent to harm others, or even drawing a weapon was a separate crime in itself in accordance with the facts of the case.<sup>85</sup>

This fact is confirmed by two important pieces of English legal history. First, there is a 1350 statute that stipulated a separate penalty for “any man of this Realm [who] ride armed covertly or secretly with men of arms against any other. . . .”<sup>86</sup> This statute neither amended nor overrode the Statute of Northampton. Instead, it expressly stated that it “shall be judged a *Felony* or *Trespass*, according to the Laws of the land of the old time used, and *according as the case requireth*.”<sup>87</sup> In contrast, the Statute of Northampton was a conduct misdemeanor punishable by fine and jail sentence.

Another piece of historical evidence drawing out this interpretation is England’s first common law treatise, which was compiled and written in 1419 by John Carpenter.<sup>88</sup> Entitled the *Liber Albus* or *The White Book of the City of London*, it distinguishes between unlawfully carrying arms in the public concourse or without the license of government, and the act of drawing a weapon or unlawfully employing it.<sup>89</sup> The section entitled “That no one go armed” states:

[T]hat no one, of whatever condition he be, go armed in the said city or in the suburbs, or carry arms, by day or by night, except the vadlets of the great lords of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms of his lordship the King, of my lady the Queen, the Prince, and the other children of his lordship the King, and the officers of the City, and such persons as shall come in their company in aid of them, at their command, for saving and maintaining the said peace; under the penalty aforesaid, and the loss of their arms and armour.<sup>90</sup>

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ride armed with lances, ‘launcegayes, gleyves’ and other arms contrary to the laws under pains therein contained.”).

<sup>85</sup> 25 Edw. 3, st. 5, c. 2, § 13 (1350) (Eng.) (going armed secretly or covertly “shall be judged Felony or Trespass, according to the Laws of the land of the old time used, and *according as the case requireth*.”) (emphasis added).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (emphasis added).

<sup>88</sup> JOHN CARPENTER, *LIBER ALBUS: THE WHITE BOOK OF THE CITY OF LONDON* (Henry Thomas Riley ed., London, 1861).

<sup>89</sup> *Id.* at 335-36.

<sup>90</sup> *Id.* at 335. For other affirmations in the *Liber Albus* that the general going armed in public was unlawful, see *id.* at 229, 555, 556, 558, 560, 580.

Particular attention should be given to the fact that going armed in public was seen as a government license. Without a license, only the “officers of the City” and those whom “aid” them “*at their command*” were within the meaning of the law.<sup>91</sup> All other persons of “whatever condition” were not allowed to carry arms in the public concourse, including the less populated suburbs.<sup>92</sup> At the same time, even if a person was licensed to go armed among the public concourse it did not immunize them from other legal punishment. As the *Liber Albus* details, the law provided for separate misdemeanor fines associated with the improper employment of arms:

[T]he better to preserve the peace of his lordship the King, and that each may fear the more to break his peace, it is ordained, that if any person shall draw a sword, misericorde, or knife, or any arm, even though he do not strike, he shall pay unto the City half a mark, or remain in the prison of Newgate fifteen days. And if he shall draw blood of any one, let him pay unto the City two shillings, or remain in the said prison forty days.<sup>93</sup>

This misdemeanor penalty did not even include any potential battery, assault, or murder charges that could be imposed. The latter crimes were tried as independent felonies, while going armed in public or unlawfully employing arms in public were separate misdemeanors. Travelers entering London and its suburbs were not immune from punishment either. Even the keeper of the hostel or inn, where the armed traveler was boarded, could be held liable for punishment:

[T]hat every hosteler and herbergeour cause warning to be given unto his guests that they leave their arms in their hostels where they shall be harboured; and if they shall not do so, and any one shall be found carrying arms contrary to said proclamation, through default of warning by his host, such host is to be punished by imprisonment and by fine, at the discretion of the Mayor and Aldermen.<sup>94</sup>

Certainly, prohibitions on going armed did not extend to the realm’s unpopulated and unprotected enclaves. English law generally made exceptions for the use of arms in the countryside to those persons qualified by law to possess them.<sup>95</sup> Even in these instances, however, English law often dictated the terms of their employment as to preserve order and safety.

Assuming that Second Amendment researchers have previously delved into this historical issue, the misdemeanor classification<sup>96</sup> of “going armed” may explain why

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<sup>91</sup> *Id.* (emphasis added).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 408.

<sup>94</sup> *Id.* at 335.

<sup>95</sup> Perhaps the greatest example of this is 33 Hen. 8, c. 6 (1541) (Eng). The law covered who may possess arms, limitations on the size and types of arms that may be possessed, and where one may train with the arms. For a discussion, see Charles, “*Arms for Their Defence?*”, *supra* note 9, at 394-95.

<sup>96</sup> This is confirmed by 20 Rich. 2, c. 1 (1396-97) (Eng.) (assessing a fine for non-compliance) (“[N]o Lord, Knight, nor other, little nor great, shall go nor ride by night nor by

so many have failed to pinpoint its original meaning,<sup>97</sup> for this fact makes it difficult to find documentation of its enforcement. Such records were not maintained to the standard they are today and misdemeanors almost never went to trial. Still, we know the prohibition was enforced by government officials because they often swore to uphold the tenets of the Statute of Northampton. For instance, from 1424 onward, upon the mayor of Norwich assuming office (and perhaps other cities), the following was included into the proclamation:

The M[a]y[o]r of this Cite comaundyth on the Kyngis behalve, that [each] Man kepe the Pe[ace for] this tyme forthwarde, and that no man disturb[e], n[or] br[a]ke the forseid Pe[ace], n[or] go armed with in the cit[y], upon the p[ai]n of pr[isonment], and forfeiture of all the ar[mor] . . .<sup>98</sup>

Overall, the historical evidence is convincing that the Statute of Northampton was not regulating dangerous conduct with arms, but the act of carrying arms by itself. As Abraham Fraunce wrote in a 1588 legal treatise, when individuals went armed in circumstances “not usually worne and borne, it will strike a feare into others that be not armed. . . .”<sup>99</sup> In other words, it was the act of arming in the public concourse that terrified the people, for the authority to ensure the public peace rested with the local government authorities.

The tenets of the Statute were even extended to Wales in preparation of its England annexation as one of the basis of its new legal system. The 1534 Henry VIII statute forbid the carrying of any “hand-gun, sword, staff, dagger, halberd, morespike, spear or any other weapon, privy coat or armour defensive” by any:

[P]er[s]on or per[s]ons dwelling or re[s]jiant within *Wales* . . . of what e[s]tate, degree or condition [s]oever he or they be . . . unto any [S]e[ss]ions or court to be holden within *Wales* . . . or to any place *within the di[s]tance of two miles* from the [s]ame [S]e[ss]ions or court, nor to any town, church, fair, market, or other congregation, except it be upon the hute and outcry made of any felony or robbery done or perpetrated . . .

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day armed . . . upon the pain [of fine and ransom to the crown] save and except the King’s officers and ministers in doing their office.”).

<sup>97</sup> For a list of Second Amendment works that have overlooked this history, see MALCOLM, *supra* note 72, at 104; Kopel & Cramer, *supra* note 38, at 1127, 1133-34; Hardy, *supra* note 39, at 205; Volokh, *supra* note 40, at 101.

<sup>98</sup> FRANCIS BLOMEFIELD, AN ESSAY TOWARDS A TOPOGRAPHICAL HISTORY OF THE COUNTY OF NORFOLK: THE HISTORY OF THE CITY AND COUNTY OF NORWICH, PART I 138 (London, W. Bulmer, and Co. 1806); *see also* SIR ANTHONY FIRZHERBERT, IN THIS BOOK IS CONTAYNED THE OFFICES OF SHYRIFFES, BAYLIFFES OF LYBERTYES, ESCHEATORS, CONSTABLES, AND CORONERS AND SHEWED WHAT EUERYE ONE OF THEM MAY DOE BY VERTUE OF THEIR OFFICES, DRAWEN OUT OF BOOKS OF THE COMMON LAWE AND OF THE STATUTES (London, Thomas Marshe 1579) (confirming the Statute of Northampton was to be strictly enforced by constables and sheriffs).

<sup>99</sup> ABRAHAM FRAUNCE, THE LAVVIERS LOGLIKE EXAMPLIFYING THE PRAECEPTS OF LOGLIKE BY THE PRACTISE OF THE COMMON LAWE 56 (London, William How 1588) (citing to 2 Edw. 3, c. 3 (1328) (Eng.)).

[or] except it be by the commandment, *licence or a[ss]ent* of the [s]aid justices, [s]teward or other officer. . . .<sup>100</sup>

Having the license of government to carry arms in the public concourse was one of the exceptions to the rule, but always conditioned on the permission of government. Going armed in public was not a right, but an exception that most generally applied to men of nobility and their attendants.<sup>101</sup> Other than this rare government allowance, only the keepers of the peace were permitted to carry arms in the public concourse. The purpose of the general prohibition being that the government was the preserver of the public peace, not the individual people by being armed. For modern commentators to assert otherwise is to flip the idea of a well-regulated society on its head.<sup>102</sup>

While twenty-first century political scientists may disagree whether prohibitions on “going armed” actually prevent murder and crime, it does not supersede the historical fact that these were the reasons behind the Statute of Northampton. For instance, upon learning of the increase in murders, manslaughters, and crimes for three years, Queen Elizabeth I provided the Statute as one of nine remedies: “1. That the sheriff may be accountant. 2. *Riding and going armed against the law to be punished* . . . 9. Preaching ministers to be increased.”<sup>103</sup>

This was not the first time Elizabeth I called for the enforcement of gun control statutes as a means to preserve the peace and prevent crime. In 1579, she called for the enforcement of all gun control “Actes of Parliament remaining of force, which included the tenets of the Statute of Northampton to prohibit the carrying of “Daggess, Pistolles, and such like, not on[ly] in Cities and Townes, [but] in all partes of the Realme in common high[ways], whereby her Majesties good qu[i]et people, desirous to live in peaceable manner, are in feare and danger of their lives . . . .”<sup>104</sup> It was the carrying of such “offensive weapons” among the public concourse, that was “contrary to the Lawes,” including any unlicensed exercising and shooting of firearms:

<sup>100</sup> 26 Hen. 8, c. 6, § 3 (1534) (Eng.) (emphasis added).

<sup>101</sup> This is what Hawkins was referring to when he wrote:

That Per[s]ons of Quality are in no Danger of Offending again[s]t this Statute by wearing common Weapons, or having their u[s]ual Number of Attendants with them, for their Ornament or Defence, in [s]uch Places, and upon [s]uch Occa[s]ions, in which it is the common Fashion to make u[s]e of them, without cau[s]ing the lea[s]t Su[s]picion of an Intention to commit any Act of Violence or Di[s]turbance of the Peace.

1 HAWKINS, *supra* note 41, at 136. Eugene Volokh is wrong to assert “‘wearing common weapons’ in ‘the common fashion’ was legal” under the Statute of Northampton. Compare Charles, *Scribble Scrabble*, *supra* note 20, at 237-39, with Volokh, *The First and Second Amendments*, *supra* note 40, at 102.

<sup>102</sup> For a discussion on a well-regulated society, natural rights, and individual rights, see Charles, *supra* note 16, at 505-11.

<sup>103</sup> CALENDAR OF STATE PAPERS DOMESTIC: ELIZABETH, 1601-3, WITH ADDENDA 1547-65 214 (June 1602) (Mary Anne Everett Green ed., 1870) (emphasis added).

<sup>104</sup> BY THE QUENNE ELIZABETH I: A PROCLAMATION AGAINST THE COMMON USE OF DAGGES, HANDGUNNES, HARQUEBUZES, CALLIUERS, AND COTES OF DEFENCE 1 (London, Christopher Barker 1579).

There is another greater disorder growne . . . under the colour of learning or exercising to shoote therein, to the service at Musters appointed in sundrie Counties for the common service of the Realme . . . by which meanes, through the general carrying of them in places not appointed for such musters, and by the frequent shooting within them in and ne[ar] Cities, Towns corporate, or the Suburbes thereof where great multitude of people do live, reside, and trav[el]by and downe for their necessar[y] businesse, many harmes do ensue, and occasions like to increase of great danger, by such libertie permitted for the use of suche offensive weapons in places not convenient. For these considerations, and for the consequences of sundrie mischieves that may ensue, her Majestie by the like advice of her Counsell, both commande and charge all man[n]er her subjects of what estate so ever they be, from henceforth to forbear from shooting in any man[n]er of Handgunnes, Harquebuzes, Calliuers, or such like, of what name so ever they be either charged with Bullet or without, in any place, but on[ly] at and in the places that are or shall be appointed for common Musters . . . or shall be appointed to be meete places, either within the great Cities or the Suburbes of the same, or in places farre off[f] from Townes of habitation, for the exercise of Shooting in such places as is aforesayde . . . .<sup>105</sup>

In 1594, Elizabeth I reminded her officials of this prohibition on carrying arms among the public concourse. In particular, she professed that the public carrying of pistols was “to the terrour of all people professing to travel and live peaceably . . . .”<sup>106</sup> This “terror” not only included the “open carrying [of] such Dags, but also in a device to have secretly small Daggges, commonly called pocket Dags . . . .”<sup>107</sup> Six years later, Elizabeth I again commanded “all Justices of the Peace to take straight order for the due execution of the Lawes aforesaid, according to the true intent and meaning of the same,” including the “car[r]ying and use of Gunnes (contrary to the sayd Statutes) and especially of Pistols, Birding pieces, and other short pieces and small shot . . . .”<sup>108</sup>

It is important to note, as with original intent of Statute of Northampton, each of Elizabeth’s measures sought to maintain social order and prevent potential crimes such as murder, assault, and robbery. Certainly, modern day empirical data concerning dangerous weapons and public safety are always worth considering in terms of crafting effective legislation. However, these public safety concerns have been historically left with the government police power, and unquestioned.<sup>109</sup> In

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<sup>105</sup> *Id.* at 1-2.

<sup>106</sup> BY THE QUENNE ELIZABETH I: A PROCLAMATION AGAINST THE CARRIAGE OF DAGS, AND FOR REFORMATION OF SOME OTHER GREAT DISORDERS 1 (London, Christopher Barker 1594).

<sup>107</sup> *Id.*

<sup>108</sup> BY THE QUENNE ELIZABETH I: A PROCLAMATION PROHIBITING THE USE AND CARIAGE OF DAGGES, BIRDING PIECES, AND OTHER GUNNES, CONTRARY TO LAW 1 (London, Christopher Barker 1600).

<sup>109</sup> For an American perspective discussing this point, see Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597 (2006); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007). While Winkler’s survey is sufficient for this point, it should be noted that his findings are only a basic historical survey, and do not

terms of the historical record, there exists no empirical evidence that the Statute was ever viewed as an infringement on the natural right of self-defense or ever an issue of public scrutiny in correspondence, pamphlets, books, or newspapers.

*B. The Statute of Northampton in Seventeenth and Eighteenth Century England*

Despite the Statute of Northampton expressly prohibiting the act of carrying arms, the question that lingers is whether this perception changed. In other words, did later generations view the Statute as prohibiting only dangerous conduct? Did the 1689 English Declaration of Rights allowance to “have arms” change the status quo? The best source to start answering these questions is William Hawkins’ *Pleas of the Crown*, for it would be continuously cited in eighteenth century treatises as the authority on the Statute of Northampton.

Hawkins wrote:

That in [s]ome Ca[s]es there may be an Affray where there is no actual Violence; as where a Man arms him[s]elf with dangerous and unu[s]ual Weapons, in such a Manner as will naturally cau[s]e a Terror to the People, which is [s]aid to have been always an Offence at the Common Law, and is [s]trictly prohibited by many Statutes [including the Statute of Northampton] . . . .<sup>110</sup>

Hawkins’ analysis confirms the act of carrying a “dangerous” weapon offends the law, yet it still raises two important questions. First, what constituted a “dangerous” or “unusual” weapon in the early seventeenth century? Second, what “manner” of carrying such arms will “cause Terror to the People”? If we use the original intent of the Statute of Northampton as a guidepost, the answer to these questions is the carrying of any weapon that may endanger society among the concourse of the people.<sup>111</sup> Robert Gardiner’s 1692 *The Compleat Constable* corresponds with this understanding. Gardiner wrote the Statute of Northampton covered instances where a “Person [s]hall Ride or go Arm’d offen[s]ively . . . or in Fairs or Markets or el[s]ewhere, by Day or by Night, in affray of their Maje[s]ties

fully articulate the Anglo-American tradition of gun control, especially concerning the Statute of Northampton.

<sup>110</sup> 1 HAWKINS, *supra* note 41, at 135. It is important to note that some treatises stipulated “dangerous *and* unusual weapons,” and others “dangerous *or* unusual weapons.” (emphasis added). Compare HARRY TOULMIN, *THE MAGISTRATE’S ASSISTANT* 5 (1807) (“There may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people.”), with JOHN HAYWOOD, *THE DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, IN THE STATE OF TENNESSEE* 176 (Nashville, Thomas G. Bradford, 1810) (“[R]iding or going armed with dangerous or unufual weapons, [is a crime against the public peace, by terrifying the good people of the land.]”).

<sup>111</sup> For some treatises supporting that arming in itself constitutes a terror of the people, see JOHN FAUCHEREAUD GRIMKE, *THE SOUTH CAROLINA JUSTICE OF THE PEACE* 405 (Philadelphia, R. Aitken, 1778) (“[T]here mu[s]t be some su[c]h circum[s]tances, either of actual force or violence, or at lea[s]t of an apparent tendency thereto, as are naturally apt to [s]trike a terror into the people; as of armour, threatening [s]peeches, or turbulent ge[s]tures; for every [s]uch offence must be laid to be done to the terror of the people.”); HAYWOOD, *supra* note 110, at 176 (“Riding or going armed with dangerous or unufual weapons, [is a crime against the public peace, by terrifying the good people of the land.]”).

Subjects, and Breach of the Peace; *or wear or carry any Daggers, Guns, or Pi[s]tols Charged . . .*"<sup>112</sup> The only persons who maintained the "lawful Authority to bear Armour or Weapons" were government officials, and "Per[s]ons pur[s]uing the Hue and Cry, in ca[s]e of Felony and other Offences again[s]t the Peace . . ." "<sup>113</sup>

In the subsequent 1724 edition, the power of constables to disarm persons that "go armed" was further affirmed:

For the preventing the Breach of the Peace, [the constable] . . . may stop all such Persons as go or ride unlawfully arm'd and take their Arms from them, and commit them to Prison . . . .<sup>114</sup>

Other early treatises came to similar conclusions by interpreting the Statute of Northampton as an affirmation of governmental police authority. In 1694, James Tyrell wrote how the "Sheriffs of the Counties [are] to make u[s]e thereof for the Execution of the Laws," including the act of persons "[s]o much as to Ride or go Arm'd, as may appear by the Statute of *Northampton* . . ." "<sup>115</sup> Thus, it was unlawful for persons "to take up Arms, unle[ss] in their own defence against Illegal Violence, and in [s]uch manner as the Law directs . . ." "<sup>116</sup> Tyrell's reference to "as the Law directs" is historically significant, for it serves as another reference to the sheriff or constable's authority in assembling the hue and cry to repel "illegal violence." Excluding the common law castle doctrine,<sup>117</sup> such authority did not rest with the general people.<sup>118</sup>

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<sup>112</sup> ROBERT GARDINER, *THE COMPLEAT CONSTABLE* 18 (1692) (emphasis added). See also WILLIAM SHEPPARD, *OFFICES AND DUTIES OF CONSTABLES, BORSHOLDERS, TYTHINGMEN, TREASURERS OF THE COUNTY-STOCK, OVERSEERS OF THE POOR, AND OTHER LAY MINISTERS*, at ch.8, §4 (4th ed., London 1657) ("If any person whatsoever . . . shall be so bold as to goe or ride armed by night or by day, as to carry any Dag[ger]s or Pistols" the constable may seize the arms); GEORGE MERITON, *GUIDE FOR CONSTABLES, CHURCHWARDENS, OVERSEERS OF THE POOR, SURVERYORS OF THE HIGHWAYS, TREASURERS OF THE COUNTY STOCK, MASTERS OF THE HOUSE OF CORRECTION, BAYLIFFS OF MANNOURS, TOLL-TAKERS IN FAIRS, & C.* 22 (London 1669) ("If any per[s]on [s]hall ride or go armed offen[s]ively before the Kings Ju[s]tices, or before any other the King's Officers or Mini[s]ters during their Office, or in Faires or Markets or el[s]ewhere by Night or by Day in Affray of the King's people, and breach of the Peace, or ware or carry any Guns, Daggers, or Pi[s]tols charged; in [s]uch Case the Constable upon the fight hereof may [s]eize and take away their Armour and other Weapons . . . .") (citing 2 Edw. 3, c. 3 (1328) (Eng.), 20 Rich. 2, c. 1 (1396-97) (Eng.), and other English statutes).

<sup>113</sup> GARDINER, *supra* note 112, at 18-19. The Hue and Cry could only be pursued at the discretion of the constable. See Charles, *The Constitutional Significance of a "Well Regulated" Militia*, *supra* note 17, at 98-99 and accompanying footnotes.

<sup>114</sup> ROBERT GARDINER, *THE COMPLETE CONSTABLE* 13 (6th ed. 1724).

<sup>115</sup> JAMES TYRRELL, *BIBLIOTHECA POLITICA; OR AN EQUIRY INTO THE ANCIENT CONSTITUTION OF THE ENGLISH GOVERNMENT BOTH IN RESPECT TO THE JUST EXTENT OF REGAL POWER, AND THE RIGHTS AND LIBERTIES OF THE SUBJECT* 639 (London, W. Rawlins, S. Roycroft, and H. Sawbridge 1694).

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> See 1 HAWKINS, *supra* note 41, at 136 (outlining castle doctrine).

<sup>118</sup> See GARDINER, *supra* note 112, at 18-19; Charles, *The Constitutional Significance of a "Well Regulated" Militia*, *supra* note 17, at 98-99.

Joseph Keble's 1683 *An Assistance to the Justices of the Peace* conveyed the same interpretation of the Statute of Northampton:

*Again, if any per[s]on what[s]soever (except the Kings Servants and Mini[s]ters in his pre[s]ence, or in executing his Precepts or other Officers, or [s]uch as [s]hall a[ss]i[s]t them, and except it be upon the Hue-and-cry make to keep the peace, &c.) [s]hall be [s]o bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places . . . then any Con[s]table, or any of the [s]aid Officers may take [s]uch Armour from him for the Kings u[s]e, and may al[s]o commit him to the Gaol; and therefore it [s]hall be good in this behalf for the[s]e Officers to [s]tay and Arre[s]t all [s]uch per[s]ons as they [s]hall find to carry Dags or Pistols, or to be apparelled with Privy-Coats or Doublets, as by the Proclamation made [by Queen Elizabeth]. . . .<sup>119</sup>*

As shown above, Keble's analysis is historically accurate in that the Statute remained in force as a prohibition on going publicly armed throughout Elizabeth's reign. It remained a staple of the law into the seventeenth century as is evidenced by the following proclamation of James I:

Whereas the bearing of Weapons covertly, and specially of short Dagges, and Pistols . . . hath ever beene, and yet is by the Lawes and polic[y] of this Realme straitly forbidden as car[r]ying with it inevitable danger in the hands of desperate persons . . . And some persons being questioned for bearing of such about them, have made their excuse, That being decayed in their estates, and indebted, and therefore fearing continually to be Arrested, they weare the same for their defence against such Arrests. A case so farre from just excuse, as it is of itsel[e] a grievous offence for any man to arme himselfe against Justice, and therefore deserves . . . sharpe and severe punishment. But besides this evill consequence . . . we have just cause to provide also against those devilish spirits, that maligning the quiet and happiness of this Estate, may use the same to more execrable endes. And therefore by this Due Proclamation, We doe straitly charge and command all Our subjects and other persons whatsoever, that they neither make, nor bring into this Realme, any Dagges, Pistols, or other like short Gunnes [prohibited by law] . . .<sup>120</sup>

In contrast to this historical evidence and the express text of the Statute of Northampton, Eugene Volokh claims it did not override the general wearing of "common weapons" in a common fashion.<sup>121</sup> He provides no substantiated historical

<sup>119</sup> JOSEPH KEBLE, *AN ASSISTANCE TO THE JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY* 224 (W London, W. Rawlins, S. Roycroft, and H. Sawbridge 1683) (emphasis added); see also JOSEPH KEBLE, *AN ASSISTANCE TO THE JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY* 224 (2d ed., London, W. Rawlins, S. Roycroft, and H. Sawbridge 1689) (emphasis added). For Elizabeth I applying the tenets of the Statute of Northampton to pistols and dags, see *supra* pp. 20-22 and accompanying footnotes.

<sup>120</sup> BY THE KING JAMES I: A PROCLAMATION AGAINST THE USE OF POCKET DAGS 1 (London, Robert Barker, 1612).

<sup>121</sup> Volokh, *supra* note 40, at 102 (quoting 1 HAWKINS, *supra* note 41, at 136).

support for this assertion except a selective reading of Hawkins' *Pleas of the Crown*. Hawkins, however, was referring to the legal exceptions already addressed, which are narrow exceptions (afforded by the lawmakers) to the general rule.<sup>122</sup> The first exception to the Statute was permitting persons of "quality" or the nobility's right to wear arms and be accompanied with armed escorts.<sup>123</sup> Such persons were exempt because they were presumed to be "in no danger of offending" the law, or having "an intention to commit any act of violence, or disturbing of the peace."<sup>124</sup> Meanwhile, the second exception was government officials and keepers of the peace, and was confirmed by Richard II.<sup>125</sup>

Volokh's historical interpretation also does not comport with Chapter 63, Section 8 of Hawkins treatise:

[A] Man cannot excu[s]e the wearing [s]uch Armour in Publick, by alledging that [s]uch a one threatened him, and that he wears it for the Safety of his Per[s]on from his A[ss]ault; but it hath been re[s]olved, That no one [s]hall incur the Penalty of the [s]aid Statute for a[ss]embling his Neighbours and Friends in his own Hou[s]e, again[s]t tho[s]e who threaten to do him any Violence therein, becau[s]e a Man's Hou[s]e is as his Ca[s]tle.<sup>126</sup>

Here, we find English common law support for the Supreme Court's holding in *District of Columbia v. Heller*,<sup>127</sup> but Hawkins makes it clear that the preparatory wearing or carrying of arms in public was not protected. As the manual *A Help to the Magistrates and Ministers of Justices* illustrates, a constable swore to apprehend all "Vagabonds, Rogues, Night-walkers . . . and other suspected Persons, and of such as go Armed[.]"<sup>128</sup>

Lastly, Volokh's interpretation does not take into account the English licensing system. Under the common law and affirmed by subsequent statutes, the ability of

<sup>122</sup> See GARDINER, *supra* note 112, at 18-19.

<sup>123</sup> This is confirmed by numerous editions of Giles Jacob's dictionary. See GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms" (7th ed. n.p., Henry Lintot 1756) ("By the Common Law it is an Offence for Persons to go or ride *armed* with dangerous and unusual Weapons; But Gentlemen may wear common *Armour* according to their Quality"); GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms" (8th ed. London, H. Woodfall and W. Strahan 1762); A NEW LAW DICTIONARY, at "armour and arms" (Owen Ruffhead & J. Morgan eds., Dublin, n.pub. 1773); GILES JACOB, 1 A NEW LAW DICTIONARY, at "armour and arms" (T.E. Tomlins ed., London, Andrew Strahan 1797).

<sup>124</sup> JAMES PARKER, THE CONDUCTOR GENERAL . . . ADAPTED TO THESE UNITED STATES 11 (New York, John Patterson 1788) (quoting 1 HAWKINS, *supra* note 41, at 136).

<sup>125</sup> 20 Rich. 2, c. 1 (1396-97) (Eng.) ("[N]o Lord, Knight, or other, little nor great, shall go nor ride by night nor by day armed . . . save and except the King's officers and ministers in doing their office.").

<sup>126</sup> 1 HAWKINS, *supra* note 41, at 136. This exemption to assemble neighbors for the Hue and Cry could only apply to those instances where a constable, sheriff, or magistrate could not be obtained to order the Hue and Cry. See Charles, *The Constitutional Significance of a "Well-Regulated" Militia*, *supra* note 17, at 98-99 and accompanying footnotes.

<sup>127</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>128</sup> A HELP TO MAGISTRATES, AND MINISTERS OF JUSTICE 107 (3d ed., London 1705).

persons to go armed among the public concourse was based upon government acquiescence only. A person was required to obtain the crown's license to go armed in the public concourse.<sup>129</sup> The status quo remained after the adoption of the 1689 English Declaration of Rights "have arms" provision.<sup>130</sup> For instance, on December 21, 1699, the following proclamation was published in *The Post Boy*:

Whereas, We have received Information That several Persons not Qualified by the Laws of this Realm, to carry Arms, have nevertheless in contempt and Violation of the Law, taken on them to Ride and Go Armed, and for their so doing, have sometimes insisted on Licences formerly Granted, which have been Re-called and made Void . . . and others have wholly Falsified and Counterfeited Licences to carry Arms . . . We have for the Remedying the said Evil, thought fit to Re-call all Licences whatsoever . . . and to Require all persons whatsoever having such Licences, to bring in and Lodge the same with the Clerk of the Council . . .

. . .<sup>131</sup>

On March 18, 1713, the lord-lieutenant of Dublin, Ireland issued a similar proclamation after a fire destroyed the record books containing the licensing records:

[W]hereas we are informed, That several Persons not qualified by the Laws of this Realm to carry Arms, have nevertheless in Contempt and Violation thereof, taken upon them to ride and go armed; For prevention whereof. We do strictly require all Magistrates and Justices of the Peace to make diligent search for and seize all Arms of any sort or kind whatsoever, which they shall find in the Custody of such Persons not qualified by the Laws of this Kingdom, to carry Arms . . . .<sup>132</sup>

In addition to Volokh's flawed approach to historically determining the Statute's prosecutorial scope, there is another historically based argument to limit the Statute's original intent and express language. A contingent of scholars assert the holding in Sir John Knight's case stands for the proposition that, in addition to "going armed," particularized terrifying conduct is a requirement to violate the Statute.<sup>133</sup>

A close examination of the *English Reports* and the case history does not support this conclusion. The King's Bench held the intent of the Statute was "to punish

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<sup>129</sup> See 4 CALENDAR OF THE CLOSE ROLLS, EDWARD I, *supra* note 53, at 318 (September 15, 1299, Canterbury); *id.* at 588 (July 16, 1302, Westminster); 5 CALENDAR OF THE CLOSE ROLLS, EDWARD I, *supra* note 55, at 210 (June 10, 1304, Stirling); 1 CALENDAR OF THE CLOSE ROLLS, EDWARD II, *supra* note 56, at 553 (October 12, 1312, Windsor); 4 CALENDAR OF THE CLOSE ROLLS, EDWARD II, *supra* note 59, at 560 (April 28, 1326, Kenilworth).

<sup>130</sup> Following the 1689 Declaration of Rights, the government continued to disarm dangerous and disaffected persons and enforce preceding gun control statutes without any question of a violation of the right to "have arms." See Charles, "Arms for Their Defence"?, *supra* note 9, at 374-80, 382-83.

<sup>131</sup> THE POST BOY (London), December 21, 1699, at 1, col. 1.

<sup>132</sup> THE POST BOY (London), April 3, 1714, at 1, col. 1.

<sup>133</sup> See Hardy, District of Columbia v. Heller and McDonald v. City of Chicago, *supra* note 39, at 205; Kopel & Cramer, *State Standards of Review for the Right to the Keep and Bear Arms*, *supra* note 38, at 1127, 1133-34.

people who go armed to terrify the King's subjects[,]” affirming the act of “going armed” was 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[.]”<sup>134</sup> This legal definition takes nothing away from the original meaning of the Statute.<sup>135</sup> It supports the proposition that going armed with dangerous weapons in the public concourse, without the license of the government, terrified the people.

Furthermore, the King's Bench stipulated the narrow holding that it could not inflict any other punishment than what the Statute directed. In this case, Sir John Knight was cloaked with governmental authority because he committed the act in accordance with the Mayor and Aldermen of Bristol.<sup>136</sup> Thus, under the terms of the Statute of Northampton, Knight qualified as one of the “King's Officers and Ministers in doing their Office,” and would have been exempted from punishment.<sup>137</sup> This explains why the jury acquitted Knight, and nothing further could be done according to the Statute.<sup>138</sup>

At the trial itself, the political nature of Knight's prosecution was well-known. Despite facilitating and taking part in the seizure of the priest, the Mayor and Aldermen of Bristol were acquitted of all charges, yet the Attorney General still prosecuted Knight.<sup>139</sup> In an attempt to separate Knight from the other government

<sup>134</sup> Sir John Knight's Case, (1686) 87 Eng. Rep. 75 (K.B.).

<sup>135</sup> See *supra* pp. 10-21; see also JOSEPH HIGGS, A GUIDE TO JUSTICES 56 (n.p. 1734) (stating that a constable “may stop and seize all Persons who shall ride, or go armed.”); Miller, *Guns as Smut*, *supra* note 24, at 1317-18.

<sup>136</sup> The fact that the incident in question involved the participation of government officials is affirmed by the Calendar of State Papers. See CALENDAR OF STATE PAPERS DOMESTIC: JAMES II, 1686-7, at 118 (May 1, 1686) (“The King, being informed that the *Mayor and some other magistrates* of Bristol lately seized upon a priest, who was going to officiate privately in a house there . . . and having received an account that Sir John Knight was not only the informer but a busy actor in the matter by going himself to search.”) (emphasis added); *id.* (June 7, 1686) (Sir John Knight to Earl of Sunderland) (“But in regard the Duke of Beaufort's letter to the Mayor of Bristoll has helped me to one most considerable objection, not only against myself but against the Mayor and Aldermen, as if they acted by my influence, I think it not amiss to make a defence whilst with little trouble it may be cleared.”). Knight was originally arrested for “several seditious practices.” *Id.* (May 22, 1686).

<sup>137</sup> 20 Rich. 2, c. 1 (1396-97) (Eng.); see also 1 HAWKINS, *supra* note 9, § 9 (stating that persons of quality are presumed to not offend the Statute of Northampton).

<sup>138</sup> Joyce Lee Malcolm contends the King's Bench was unwilling to apply the statute. See MALCOLM, TO KEEP AND BEAR ARMS, *supra* note 9, at 105. This interpretation is false. The King's Bench clearly acknowledged the legality of the statute, but could not inflict any more punishment after the jury acquitted. Malcolm also provides no substantiated evidence for her proposition that the Statute of Northampton was never enforced, nor that the jury's acquittal led to the greater disarmament of England. These are some of the many historical myths that continue to permeate among modern Second Amendment scholars.

<sup>139</sup> Knight, the Mayor, and Aldermen were all called to the Hampton Court to answer for their actions. See 3 THE ENTRING BOOK OF ROGER MORRICE 1677-1691: THE REIGN OF JAMES II, 1685-1687, at 134 (Tim Harris ed., Boydell Press 2007). On June 12, 1686, the Mayor and Aldermen requested forgiveness for “any faults,” pled “ignorante of the Lawes in that Case,” and were “discharged, so that [the charges] will fall upon Sir John Knight[.]” *Id.* at 136. It is also worth noting that the actions of Knight, the Mayor, and Aldermen were deemed favorable by those in Bristol. *Id.* at 113 (stating Sir John Knight did “disturbe and imprison a Popish

officials, the Attorney General sought prosecution under the Statute of Northampton by attempting to prove that Knight was disaffected to government, and could not be exempt by law.<sup>140</sup> As evidence of his legal theory, the Attorney General offered that Knight had refused a “Commission to be a Captain in the time of Monmouth’s Rebellion,” and was outside the protective scope of governmental immunity.<sup>141</sup> Knight countered with “very good prooffe” that he acted as one of the crown’s officials, and only refused the commission because of the distances involved.<sup>142</sup> If anything, Knight felt his refusal of the king’s commission had done more of a service in that he offered prudent advice to the crown’s ministers.<sup>143</sup>

The indictment itself even accused Knight of being a “*very disloyall and Seditious and ill affected man . . . [that] had caused Musketts or Armes to be carried before him in the Streets, and into the Church to publick service to the terror of his Majesties Leige people.*”<sup>144</sup> Knight admitted that he was armed upon going to the church, but refused to concede that he was disaffected.<sup>145</sup> In explaining the turn of events, Knight also informed the King’s Bench of an assault and identifiable threat to his person.<sup>146</sup> Days earlier, two Irishmen had been waiting outside Knight’s home to assault his person. After waiting to no avail, the Irishmen approached a woman

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Conventicle that was at Mass, but they were suddenly after set at liberty, this is very wonderfull they were disturbed once.”).

<sup>140</sup> The legal theory behind the prosecution is captured by Joseph Keble. See KEBLE, *supra* note 119, at 647 (writing one may prosecute government officials so as to judge and punish them “in their Natural Persons, and not in their Body Politick” when they have committed an act by force outside the scope of their office).

<sup>141</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 307.

<sup>142</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 307-08.

<sup>143</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 308.

<sup>144</sup> *Id.* at 141 (emphasis added). The indictment was presented on June 12, 1686. See 1 NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714 380 (Oxford 1857) (“Sir John Knight pleaded not guilty to an information exhibited against him for goeing with a blunderbus in the streets, to the terrifyeing his majesties subjects.”). Joyce Lee Malcolm does not include the indictment in her account, yet contends it occurred on June 10, 1686. See MALCOLM, TO KEEP AND BEAR ARMS, *supra* note 9, at 104. The record to which Malcolm refers says nothing of a firearm or the Statute of Northampton. See CALENDAR OF STATE PAPERS DOMESTIC: JAMES II, 1686-7, at 136 (June 10, 1686) (“Information is preferring against Sir John Knight for creating and encouraging fears in the hearts of his Majesty’s subjects.”).

<sup>145</sup> Knight talked about his defense in a June 7, 1686 letter to the Earl of Sutherland. He defended his actions by acting in conjunction with the Mayor and Aldermen. See CALENDAR OF STATE PAPERS DOMESTIC, *supra* note 136 (June 7, 1686) (Sir John Knight to Earl of Sunderland). The jury agreed with this defense, finding Knight to be “loyall.” See 1 LUTTRELL, *supra* note 144, at 389 (“Sir John Knight, the loyall, was tried at the court of kings bench for a high misdemeanour, in goeing armed up and down with a gun att Bristoll; who being tried by a jury of his own city, that knew him well, he was acquitted, not thinking he did it with any ill design . . . ’tis thought his being concerned in taking up a popish priest at Bristoll occasioned this prosecution.”).

<sup>146</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 307.

for Knight's whereabouts, and brutally beat her for failing to reveal the location.<sup>147</sup> In addition to this incident, there was another involving Mack Don, who Knight claimed to have assaulted his person, although no charges were ever brought against Don.<sup>148</sup> It was for these reasons that Knight confessed to the court that he always "rode with a Sword and a Gun," and had a number of armed attendants,<sup>149</sup> which had been the nobility's allowance under the common law.<sup>150</sup>

However, Knight never rested his innocence or legal defense on preparatory self-defense or the nobility's common law right to go armed with lawful attendants. It was not the act Knight was being charged with, nor was any of the "attendants" charged in violation of the Statute. Instead, Knight defended the case in terms of "active Loyalty" to the crown<sup>151</sup> and even cited Richard II's statute exempting governmental officials from punishment.<sup>152</sup> It is a historical point of emphasis that when Knight was armed to apprehend the priest he was under the license of the king's service. It is for this reason the King's Bench doubted the conduct "came within the equity and true meaning of the Statute of Northampton about goeing armed . . . ."<sup>153</sup> The Chief Justice even scolded the Attorney General for indicting Knight. The Chief Justice stated, "[I]f there be any blinde side of the Kings business[s] you will al[ways] lay your finger upon it, and shew it to the Defendants . . . ."<sup>154</sup>

Here again, we see the difference between myth and reality. Those that read Sir John Knight's case as a turning point in the popular understanding of the Statute of Northampton are purporting a historical myth to advance a Second Amendment agenda.<sup>155</sup> Indeed, Knight was accused of walking "about the streets armed with guns,"<sup>156</sup> but the jury acquitted Knight because he was a government official that was well-affected to the crown.<sup>157</sup>

<sup>147</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 307.

<sup>148</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 142.

<sup>149</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 307.

<sup>150</sup> See 1 HAWKINS, *supra* note 10, at § 9.

<sup>151</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 308.

<sup>152</sup> See *Rex v. Knight*, (1686) 90 Eng. Rep. 330.

<sup>153</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 308. Given Knight's station, the only way he could have offended the statute is if he was outside the loyalty of the crown and had acted rebelliously in violation of government decree. It is for this reason that a brief summary of the English report claims the Chief Justice said Knight's crime must appear "malo animo" or with evil intent, for the legal presumption was that Knight could not offend the Statute of Northampton. See *Rex v. Knight*, (1686) 90 Eng. Rep. 330. It is at this point that the King's Bench acknowledged the exception for "gentlemen" or nobility to "ride armed" as not to offend the Statute. *Id.*; see also 1 HAWKINS, *supra* note 9, at § 9; Charles, *Scribble Scrabble*, *supra* note 20, at 238-39 (discussing the nobility's exception to the rule that did not apply to the general public).

<sup>154</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 139, at 308.

<sup>155</sup> See *supra* notes 73 and 133.

<sup>156</sup> *Sir John Knight's Case*, (1686) 87 Eng. Rep. 75 (K.B.).

<sup>157</sup> 1 LUTTRELL, *supra* note 144, at 389.

C. *The Statute of Northampton in Seventeenth and Eighteenth Century America*

The mythical approach to Sir John Knight's case does not explain why subsequent treatises did not recognize the holding as embodying a right to carry arms among the public concourse, including Hawkins' *Pleas of the Crown*.<sup>158</sup> As will be discussed in this section, the founding generation commonly understood the Statute of Northampton according to its original meaning—prohibiting the carrying of arms among the concourse of the people to preserve the public peace.

In *District of Columbia v. Heller*, the Supreme Court held that the “right to keep and bear arms” is deeply rooted in our Anglo origins.<sup>159</sup> Assuming this fact, courts must work within this framework and assume: “By the time of the founding, the right to have arms had become fundamental for English subjects.”<sup>160</sup> It was a right that “unlike some other English rights . . . was codified in a written Constitution.”<sup>161</sup> Logically, given that the founders borrowed their understanding of the right to arms from their English ancestors, they would have also borrowed and understood the ideological and philosophical restrictions on the right, including the Statute of Northampton.<sup>162</sup>

At the same time, scholars such as Richard L. Aynes are correct to question the wholesale importing of English law into American constitutionalism.<sup>163</sup> There were instances where the Constitution's drafters sought to remedy the defects of the English system.<sup>164</sup> Fortunately, this problem does not present itself with the importation of the Statute of Northampton, the English common law, or the English police power concerning public arms carrying. The Statute was expressly incorporated<sup>165</sup> by Massachusetts, North Carolina, and Virginia in the years

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<sup>158</sup> Hawkins' *Pleas of the Crown* offers sufficient proof in this regard. See 1 HAWKINS, *supra* note 9, at § 8 (stating preparatory arming is not a defense to the Statute of Northampton). See THE POST BOY (London), December 21, 1699, at 1, col. 1; THE POST BOY (London), April 3, 1714, at 1, col. 1.

<sup>159</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

<sup>160</sup> *Id.* at 593.

<sup>161</sup> *Id.* at 599.

<sup>162</sup> Charles, *The Second Amendment Standard of Review After McDonald*, *supra* note 21, at 35-36; see also *supra* pp. 6-10 (discussing Supreme Court's use of history to define constitutional scope of the Second Amendment).

<sup>163</sup> Richard L. Aynes, *McDonald v. Chicago, Self-Defense, the Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL'Y 181, 195 (2011). This author finds it heartening that Professor Aynes, a fellow Cleveland-Marshall graduate, promotes an open and transparent exchange between scholars in this area of the law. It is a collegial exchange that is often missing in legal academia, particularly in Second Amendment scholarship.

<sup>164</sup> The major difference between the English Constitution and the American Constitution were the latter's republican structure. See Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence*, *supra* note 16, at 523-32.

<sup>165</sup> Other state and local authorities may have enforced the Statute of Northampton as part of the English common law, even without an express statute. This is confirmed by the varying constable oaths published in eighteenth century legal treatises. See *infra* note 178 and accompanying text.

immediately after the adoption of the Constitution.<sup>166</sup> In the case of North Carolina, the statute read almost verbatim by prohibiting going armed at night or day “in fairs, markets, nor in the presence of the King’s Justices, or other ministers, *nor in no part elsewhere . . .*”<sup>167</sup>

Furthermore, history tells us that the importation of the English common law was prevalent among the founding generation. Associate Justice Samuel Chase kept a journal compiling all the British case law still in force within the United States.<sup>168</sup> Meanwhile, the 1776 Maryland Constitution guaranteed its inhabitants:

[T]he Common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . . .<sup>169</sup>

Certainly preventing breaches of the peace and ensuring the public safety were part of this “common law.”

The earliest American statute prohibiting “going armed” appears to have been enacted in 1686 by the New Jersey Assembly. Entitled *An Act Against Wearing Swords, &c.*, it sought to prevent “several Persons [from] wearing Swords, Daggers, Pistols, Dirks, Stilladoes, Skeines, or any other unusual and unlawful Weapons” in public, for it induced “great Fear and Quarrels” among the inhabitants.<sup>170</sup> The only statutory exceptions to the rule were the carrying of weapons for lawful purposes such as those arms carried by magistrates, the militia for state sanctioned musters, and “all Strangers, Travelling upon their lawful Occasions thro’ this Province, behaving themselves peaceably.”<sup>171</sup>

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<sup>166</sup> See 2 THE PERPETUAL LAWS, OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION TO THE SECOND SESSION OF THE GENERAL COURT, IN 1798 259 (Worcester, Isaiah Thomas 1799) (confirming that no person “shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth”); FRANCOIS-XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60–61 (Newbern 1792) (confirming that no person may “go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the King’s Justices, or other ministers, nor in no part elsewhere”); A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 33 (Augustine Davis 1794) (confirming that no person may go or ride armed by night or day, in fairs, markets, or elsewhere, or in the presence of the Court’s Justices or other ministers of justice).

<sup>167</sup> MARTIN, *supra* note 166, at 61 (emphasis added).

<sup>168</sup> See Samuel Chase, British Case Law Citations (1800) (unpublished journal, on file with the Library of Congress Rare Books Division, Washington, DC).

<sup>169</sup> MD. CONST. OF 1776, DECLARATION OF RIGHTS, art. III, § 1.

<sup>170</sup> THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 289 (1758).

<sup>171</sup> *Id.* at 290.

The statutory use of the phrase “great fear” highlights the importance of the police power in preventing the dangers imposed by public carrying.<sup>172</sup> Often legal treatises included the phrase “terror of the people” to illustrate this fact.<sup>173</sup> Subsequent colonial and state assemblies obliged by including the language in their respective statutes.<sup>174</sup> The terminology did not legally require “circumstances where carrying of arms was unusual and therefore terrifying.”<sup>175</sup> Instead, the act of riding or going armed among the people was deemed terrifying itself and considered a breach against the public peace.<sup>176</sup>

It is worth noting that, throughout the eighteenth century, prohibitions against “going” or “riding” armed were worded differently. Some statutes imported text from the Statute of Northampton.<sup>177</sup> Some borrowed the language from the

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<sup>172</sup> On June 12, 1809, Gloucester, Massachusetts passed a series of resolutions confirming “the object of Government is the Security and Protection of the governed.” BOSTON GAZETTE, January 12, 1809, at 2. One of those protections was that the government “will u[s]e all lawful means ‘to arre[s]t di[s]turbers and breakers of the peace; or [s]uch others as may . . . go armed by night . . . to the fear and terror of the good people of this town . . . .” *Id.*

<sup>173</sup> The phrase was seemingly used as a substitute for the different public locations listed in the Statute of Northampton and other English statutes. See 2 Edw. 3, c.3 (1328) (Eng.) (banning public carry before government officials, fairs, markets, and other public places); 26 Hen. 8, c. 6 (1534) (Eng.) (banning weapons from “any Place within the Di[s]tance of two Miles from the [s]ame Se[s]sions or Court, nor any Town, Church, Fair, Market or other Congregation, except it be upon a Hute or Outcry”); 33 Hen. 8, c. 6 (1541-42) (Eng.) (limiting the shooting of arms “to shoot with any Handgun Demie hake, or Haquebut at any Butt or Banke of earth only in place convenient for the same”). For some examples of this substitute in treatises, see HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE 248 (1736) (stating that the constable “may take away Arms of them who ride or go armed in Terror of the People”); GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 92 (1736) (the constable “may take away Arms from [s]uch who ride, or go, offensively armed, in Terror of the People . . .”).

<sup>174</sup> See 2 THE PERPETUAL LAWS, OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION TO THE SECOND SESSION OF THE GENERAL COURT, IN 1798 259 (1799) (“[E]very Ju[s]tice of the Peace . . . may cau[s]e to be [s]taid and are[s]ted . . . [s]uch as [s]hall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth . . .”).

<sup>175</sup> Volokh, *The First and Second Amendments*, *supra* note 40, at 101.

<sup>176</sup> See 25 Edw. 3, c. 2, § 13 (1350) (Eng.) (confirming it was a separate offense to go or ride armed “covertly or secretly” against any other); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769) (“The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”); HAYWOOD, *supra* note 110, at 107 (“Riding or going armed with dangerous or unu[s]ual weapons, is a crime again[s]t the public peace, by terrifying the good people of the land.”); TOULMIN, *supra* note 110, at 5 (“[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people.”); THE SALEM GAZETTE, June 2, 1818, at 4 (“As it is well known to be an offence against law to ride or go armed with . . . firelocks, or other dangerous weapons, it cannot be doubted that the vigilant police officers . . . will arre[s]t [violators] . . .”).

<sup>177</sup> See Martin, *supra* note 166, at 61; A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, *supra* note 166, at 33.

constable oath.<sup>178</sup> Meanwhile, treatises touching upon the power of local magistrates often carried forward portions of Hawkins' *Pleas of the Crown*.<sup>179</sup> Certainly, the variance of rules on statutory construction can provide any good attorney with different interpretations for each version.<sup>180</sup> One may claim statutes that prohibited going "armed offensively" speak more to reckless conduct rather than the act of "going armed" itself. At the same time, one may also claim the same language serves as a prohibition on offensive weapons.<sup>181</sup> As John Bond wrote in *A Compleat Guide for Justices of Peace*, the Statute of Northampton stands for the legal proposition that "Persons with *offensive Weapons* in Fairs, Markets or elsewhere in Affray of the King's People, may be arrested by the Sheriff, or other the King's Officers[.]"<sup>182</sup>

A similar understanding of the police power and common law was conveyed by Gloucester, Massachusetts. On June 12, 1809, the town resolved the formation of a Committee of Public Safety, empowering it:

[T]o [s]uppre[s]s all di[s]turbers of the peace, and notice every abu[s]e offered by any individual, or combination of men, patrolling our [s]treets

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<sup>178</sup> For the oath, see A HELP TO MAGISTRATES, *supra* note 128, at 107 ("[Y]ou [s]hall Arre[s]t all [s]uch Per[s]ons as in your [s]ight or pre[s]ence [s]hall Ride or go Armed Offen[s]ively . . . and other [s]u[s]pected Per[s]ons, and of [s]uch as go Armed, and the like . . ."); CONDUCTOR GENERALIS; OR, A GUIDE FOR JUSTICES OF THE PEACE, AND CORONERS, CONSTABLES, JURY-MEN, OVER-SEERS OF THE POOR, SURVEYORS OF HIGH-WAYS, GOVERNORS OF FAIRS, GAOLERS, &c. 79-80 (n.p. 1711) (same); THE BOOK OF OATHS, AND THE SEVERAL FORMS THEROF, BOTH ANCIENT AND MODERN, FAITHFULLY COLLECTED OUT OF SUNDRY AUTHENTICK BOOKS OF RECORDS 207 (1715) ("You [s]hall are[s]t all [s]uch per[s]ons as in your [s]ight or pre[s]ence [s]hall ride or go armed offen[s]ively, or [s]hall commit, or make any Riot, Affray, or other breach of his Maje[s]ty's Peace . . ."). For some statutes that followed this construction, see ACTS AND LAWS, OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW ENGLAND 11 (n.p. 1726) (to arrest "such as shall Ride, or go Armed Offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, or elsewhere, by Night or by Day, in Fear or Affray of Their Majesties Liege People."). For some examples of a colony adopting the oath to appoint constables, see A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA: NOW IN USE AND FORCE 131-32 (James Davis ed., Newbern, 1752); ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE, IN NEW-ENGLAND 2. (Daniel Fowle ed., Portsmouth, 1761).

<sup>179</sup> See 4 BLACKSTONE, *supra* note 176, at 148-49; JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 358 (4th ed., Dublin, 1793).

<sup>180</sup> See *supra* note 110 for discussion on different constructions on "dangerous and unusual" and "dangerous or unusual" weapons.

<sup>181</sup> For some examples of what constituted as "offensive weapons," see *Proclamation by the King*, LONDON CHRONICLE, Feb. 14, 1735, at 1 (including "Fire Arms" as constituting "offen[s]ive Weapons"); THE ACTS OF THE ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 54 (Williamsburg, W. Rind, A. Purdie, and J. Dixon 1769) (defining "offensive weapons" to include "Guns" and "Ammunition"); WILLIAM PATTERSON, LAWS OF THE STATE OF NEW JERSEY, REVISED AND PUBLISHED UNDER THE AUTHORITY OF THE LEGISLATURE 410 (n.p. 1800) (defining "offensive weapons" to include "any pistol, hanger, cutlass, bludgeon").

<sup>182</sup> JAMES BOND, A COMPLEAT GUIDE FOR JUSTICES OF PEACE 42 (3d ed., London, 1707) (emphasis added); see also *id.* at 181 ("A person going or riding with offensive Arms may be arrested by a Constable, and by him be brought before a Justice.").

and wharves, having *offen[s]ive weapons*, either by night or day, to the annoyance and terror of the inhabitants; and have them apprehended and puni[s]hed at the expence of the town . . . .<sup>183</sup>

Whichever interpretation one wants to deduce from the different constructions, it does not displace the original meaning of the Statute of Northampton nor the fact that States continued to adopt its tenets after the ratification of the Constitution, even if in different forms. This continued well into the nineteenth century through different State criminal codes.<sup>184</sup> Thus, if we are to deduce anything from these different constructions it is that regulating of public arms to preserve the peace is part of our Anglo-American tradition. This includes prohibiting dangerous weapons “among the great Concourse of the People.”<sup>185</sup>

While detractors will continue to claim the Statute was understood to regulate dangerous or unusual conduct with arms, this interpretation is solely based on a flawed reading of Hawkins’ *Pleas of the Crown*<sup>186</sup> and Sir John Knight’s case.<sup>187</sup> To date, no historian has found any substantiating evidence supporting the Second Amendment extended to preparatory self-defense among the public concourse. Such claims are based on a mythical Second Amendment rather than historical reality. Certainly, as a matter of individual political virtue, there is nothing wrong with advocating to government that one should have the option to armed defense outside the home. The entire basis of our republican government is that the people have a vested property interest in preserving their liberty through the political process.<sup>188</sup> However, as a matter of constitutional doctrine in the eighteenth century discourse, a preparatory individual self-defense *right* to bear arms in the public concourse was non-existent.

This does not mean that the Statute of Northampton should be interpreted as prohibiting gun owners from transporting firearms for lawful purposes such as to

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<sup>183</sup> BOSTON GAZETTE, January 16, 1809, at 2 (emphasis added). The resolves were published throughout the United States. See AMERICAN CITIZEN, January 19, 1809, at 2; CONNECTICUT JOURNAL, January 19, 1809, at 3; FEDERAL REPUBLICAN AND COMMERCIAL GAZETTE, January 23, 1809, at 2; CITY GAZETTE AND DAILY ADVERTISER, March 7, 1809, at 2.

<sup>184</sup> For some examples in treatises, see 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 392 (5th ed., n.p. 1877) (“[A] man cannot excuse the wearing such armour in public by alleging that a person threatened him”); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 527-28 (Philadelphia 1846) (confirming its enforcement in several states and that a “man cannot excuse the wearing such armor in public, by alleging that such a one threatened him”).

<sup>185</sup> JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 13 (Newburn, James Davis 1774).

<sup>186</sup> Compare Charles, *Scribble Scrabble* *supra* note 20, at 237-39, with Volokh, *The First and Second Amendments*, *supra* note 41, at 102; see also *supra* pp. 7-8 (discussing how Volokh and other scholars often confuse the statutory exceptions with the general rule).

<sup>187</sup> See Kopel and Cramer, *State Standards of Review for the Right to the Keep and Bear Arms*, *supra* note 38, at 1127, 1133-34; Hardy, *District of Columbia v. Heller and McDonald v. City of Chicago*, *supra* note 39, at 205.

<sup>188</sup> Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” In Our Constitutional Jurisprudence*, *supra* note 16, at 490-502.

State or federally sponsored militia service,<sup>189</sup> shooting ranges, a new residence, or to purchase and sell firearms.<sup>190</sup> Even a seventeenth century American prohibition statutorily permitted the transportation of arms from “Strangers, Travelling upon their lawful Occasions thro’ this Province, behaving themselves peaceably.”<sup>191</sup> What the Statute of Northampton primarily stands for is preventing the carrying or use of dangerous arms among the concourse of the people, for in these instances one’s personal security is divesting with a well-regulated society.

#### D. The Statute of Northampton in Nineteenth Century America

In *Ezell v. City of Chicago*, the Seventh Circuit Court of Appeals held that arms regulation in the mid- to late-nineteenth century should be utilized when deciphering the protective scope of the Second Amendment as it applies to the States.<sup>192</sup> The opinion is the first in two historical aspects. First, a federal court has never applied a separate historical test for the Bill of Rights to the States as to the federal government. Second, a court has never deduced original meaning from the year the Fourteenth Amendment was ratified when interpreting the 1791 Bill of Rights.<sup>193</sup>

Given these two facts, it is unlikely that the *Ezell* opinion will gain the majority in the next Second Amendment case before the Supreme Court. However, should this legal test survive and be adopted by a Court majority, the historical record provides substantiated evidence that the tenets of the Statute of Northampton survived well into the nineteenth century.<sup>194</sup>

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<sup>189</sup> See generally Charles, *The Constitutional Significance of a “Well-Regulated” Militia*, *supra* note 19 (discussing the founding generation’s understanding of rights associated with militia arms bearing); Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights*, *supra* note 17.

<sup>190</sup> Don B. Kates’s initial stance comports with the Anglo-American origins of regulating arms. See Kates, *Handgun Prohibition*, *supra* note 6, at 267.

<sup>191</sup> THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY, *supra* note 170, at 290.

<sup>192</sup> *Ezell v. Chicago*, 651 F.3d 684, 702 (7th Cir. 2011).

<sup>193</sup> The opinion by Judge Diane S. Sykes is also troubling in that it only endorses originalist scholarship that purports a rather broad based Second Amendment without accepting the founding generation’s regulations on public safety. *Id.* at 12 n.11 (not citing to one Ph.D. historian that specializes in either eighteenth century or nineteenth century history or to originalist scholarship endorsed by the historical academy). This is not the first time that Judge Sykes has refused to take into account the entire historical record. See *United States v. Skoien*, 614 F.3d 638, 645-54 (7th Cir. 2010) (Sykes, J., dissenting) (relying solely on the works of scholars that interpret the Second Amendment broadly). This form of historical inquiry runs counter to both Justice Stevens’ dissent and Justice Scalia’s concurrence in *McDonald*. *McDonald v. Chicago*, 130 S. Ct. 3020, 3117 (2010) (Stevens, J., dissenting) (showing concern that a pure historical approach could still lead to judicial bias, because judges will not know which “pieces to credit and which to discount, and then . . . assemble them into a coherent whole.”); *id.* at 3057-58 (Scalia, J., concurring) (stating the historical inquiry is whether “any historical methodology, under any plausible standard of proof, would lead to the same conclusion.”).

<sup>194</sup> See *supra* notes 182-85 and RICHARD BURN, *THE JUSTICE OF THE PEACE, AND THE PARISH OFFICER* 29-31 (21st ed., A. Strahan, London, 1810); WILLIAM WALTER HENING, *THE NEW VIRGINIA JUSTICE* 49-50 (3d ed., J. & G. Cochran, Richmond, 1820).

This is best supported by the only two State courts that examined the Statute as a historical guidepost to understanding the protective scope of the right to bear arms.<sup>195</sup> The first such case was *State v. Huntly*, before the North Carolina Supreme Court in 1843.<sup>196</sup> One of the issues before the court was whether the Statute of Northampton was still in force as a lawful restriction on the carrying of arms. Writing for the court, Judge William Joseph Gaston correctly traced the Statute's origins through the English common law:

Indeed, if those acts [of going armed or committing affrays] be deemed by the common law crimes and misdemeanors, which are in violation of the public rights and of the duties owing to the community in its social capacity, it is difficult to imagine any which more unequivocally deserve to be so considered than the acts charged upon this defendant. They attack directly that public order and sense of security, which it is one of the first objects [sic] of the common law, and ought to be of the law of all regulated societies, to preserve inviolate--and they lead almost necessarily to actual violenee [sic]. Nor can it for a moment be supposed, that such acts are less mischievous here or less the proper subjects of legal reprehension, than they were in the country of our ancestors. The bill of rights in this State secures to every man indeed, the right to "bear arms for the defence of the State." While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised.<sup>197</sup>

Not only does Gaston's opinion coincide with the original intent of the Statute of Northampton,<sup>198</sup> but it also perfectly captures the balance between liberty, security, and happiness as the founding generation understood it.<sup>199</sup> The preservation of all three rested on the laws of republican government or a well-regulated society. To characterize eighteenth century constitutionalism otherwise is to misunderstand the correlation between a representative government, laws, and constitutions.

Detractors will claim Gaston stated "the carrying of a gun, *per se*, constitutes no offence,"<sup>200</sup> thus the preparatory carrying of arms was viewed as constitutionally protected as long for it did not *terrify* the people.<sup>201</sup> This interpretation fails upon reading the next sentence. Gaston expressly conditioned public arms carrying for lawful purposes such as "business or amusement," making no mention of any self-

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<sup>195</sup> For more on the use of historical guideposts when evaluating the Second Amendment, see Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: "Historical Guideposts" and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON J. CONST. L. & POL'Y 7, 21-30.

<sup>196</sup> *State v. Huntly*, 25 N.C. 418, 421-22 (3 Ired. 1843).

<sup>197</sup> *Id.*

<sup>198</sup> See *supra* Part I.

<sup>199</sup> See Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" In Our Constitutional Jurisprudence*, *supra* note 16, at 477-517.

<sup>200</sup> *Huntly*, 25 N.C. at 422.

<sup>201</sup> See Kopel and Cramer, *State Standards of Review for the Right to the Keep and Bear Arms*, *supra* note 38, at 1133-34.

defense exceptions.<sup>202</sup> The reference to lawful purposes undoubtedly acknowledged the State's police power over public arms bearing to preserve the peace. In other words, Gatson foresaw instances where a person may have been carrying the firearm for transport to a residence or location, repair, hunting, or to attend a militia muster. It was in these latter instances that the carrying constituted no crime *per se*. However, the common law offense of carrying arms without the authority of government was still punishable by law. The question that the court had to ask before it determined a violation of the Statute of Northampton is: "Why was the person carrying the arm?" If the carrying was for a lawful purpose, there was no violation.<sup>203</sup> However, if it was to merely carry arms among the public concourse it would be a violation of the Statute.<sup>204</sup>

In 1872, the Texas Supreme Court was the other nineteenth century State court to evaluate the Statute of Northampton. In *English v. State*, Judge Moses B. Walker examined the constitutionality of a Texas law prohibiting the carrying of deadly weapons in public to include "pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles, and bowie knives."<sup>205</sup> Using the Statute of Northampton as a historical guidepost, Walker wrote:

It will doubtless work a great improvement in the moral and social condition of men, when every man shall come fully to understand that, in the great social compact under and by which states and communities are bound and held together, each individual has compromised the right to avenge his own wrongs, and must look to the state for redress. We must not go back to that state of barbarism in which each claims the right to administer the law in his own case; that law being simply the domination of the strong and the violent over the weak and submissive.

It is useless to talk about personal liberty being infringed by laws such as that under consideration. The world has seen too much licentiousness cloaked under the name of natural or personal liberty; natural and personal liberty are exchanged, under the social compact of states, for civil liberty.

The powers of government are intended to operate upon the civil conduct of the citizen; and whenever his conduct becomes such as to offend against public morals or public decency, it comes within the range of legislative authority. How far the functions of police may be extended

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<sup>202</sup> *Huntly*, 25 N.C. at 422.

<sup>203</sup> The North Carolina Supreme Court was not articulating a new legal principle in adjudicating gun control offenses. In the early eighteenth century, the King's Bench gave a similar rationale when interpreting the 1706 Game Act. See *Wingfield v. Stratford & Osman* (1752), in 1 REPORTS OF CASES ADJUDGED IN THE COURT OF THE KING'S BENCH 15 (1751-1756), (Joseph Sayer ed., W. Strahan & M. Woodfall, London, 1775); *id.* at 16; 6 Ann. c. 16, § 6 (1706) (Eng.). The rationale being the possession of a gun did not automatically constitute a violation of the statute *per se*, for the person could be keeping or carrying it for a lawful purpose. See Charles, *Arms For Their Defence?*, *supra* note 34, at 396-97.

<sup>204</sup> 2 Edw. 3, c. 3 (1328) (Eng.).

<sup>205</sup> *English v. State*, 35 Tex. 473, 474 (1872).

to govern the conduct of men—how far personal liberty may be restrained for the prevention of crime, are nice questions; yet, says one of the ablest thinkers of modern times, John Stewart Mill, in his work on Liberty . . . “It is one of the undisputed functions of government, to take precautions against crime before it has been committed, as well as to detect and punish afterwards. The right inherent in society to ward off crimes against itself by antecedent precautions, suggests the obvious limitations to the maxim, ‘that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment.’”<sup>206</sup>

Here, again, we see an opinion that took into account the original intent of the Statute of Northampton and the interrelation between liberty and republican government as the founding generation understood it. The entire purpose of such prohibitions was to ensure the public safety or peace. Indeed, constitutional rights embody cores that the legislature may never infringe, yet conduct falling outside this core could be regulated in the interest of the public good.<sup>207</sup> In the case of the Second Amendment, there is no historical evidence to suggest the “core” of the right to armed self-defense superseded the community’s safety concerns or the tenets of the Statute of Northampton.<sup>208</sup> An 1837 charge to the grand jury, delivered by Judge Peter Oxenbridge Thacher, illustrates this point:

In our own Commonwealth [of Massachusetts], no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property. Where the practice of wearing secret arms prevails, it indicates either that the laws are bad; or that they are not executed with vigor; or, at least, it proves want of confidence in their protection. It often leads to the sudden commission of acts of atrocious injury; and induces the individual to rely for defence on himself, rather than on society. But how vain and impotent is the power of a single arm, however skilled in the science of defence, to protect its possessor from the many evil persons who infest society. The possession of a concealed dagger is apt to produce an elation of mind, which raises itself about the dictates both of prudence and law. The possessor, stimulated by a sensitive notion of honor, and constituting himself the sole judge of his rights, may suddenly commit a deed; for which a life of penitence will hardly, even in his own estimation, atone. When you survey the society to which you belong, and consider the various wants of its members;—their numbers, their variety of occupation and character,—their conflicting interests and wants . . . what is it, permit me to ask, preserves the common peace and safety? I know of no answer, but THE LAW:—it is

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<sup>206</sup> *Id.*

<sup>207</sup> Charles, *Scribble Scramble*, *supra* note 20, at 232-36, 242, 245-46.

<sup>208</sup> *Id.*

the law, which makes every man to know his own place, compelling him to move in it, and giving him his due.<sup>209</sup>

Clearly, the legal tenets imbedded in the Statute of Northampton survived, which is further evidenced by nineteenth century commentators such as Francis Wharton,<sup>210</sup> William Oldnall Russell,<sup>211</sup> and James Kent.<sup>212</sup> Throughout the nineteenth century numerous States enacted different versions.<sup>213</sup> In fact, a variation of the Statute was

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<sup>209</sup> PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, ON MONDAY, DECEMBER 5TH, A.D. 1836 AND ON MONDAY, MARCH 13TH, A.D. 27-28 (Dutton and Wentworth, 1837).

<sup>210</sup> Wharton, *supra* note 184, at 527-28 (confirming the Statute of Northampton's enforcement and that a "man cannot excuse the wearing such in public, by alleging such a one threatened him."). "It has been said generally, that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor by the common law." *Id.*

<sup>211</sup> SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 392 (5th ed., Philadelphia, T. & J. W. Johnson & Co. 1877) ("[A] man cannot excuse the wearing of such armour in public by alleging that a person threatened him.").

<sup>212</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW 406 (8th ed., New York, William Kent 1854) ("As the practice of carrying concealed weapons has been often so atrociously abused, it would be very desirable, on principles of public policy, that the respective legislatures have the competent power to secure the public peace, and guard against personal violence by such a precautionary provision.").

<sup>213</sup> For varying examples, see THE REVISED STATUTES OF THE STATE OF WISCONSIN: PASSED AT THE ANNUAL SESSION OF THE LEGISLATURE COMMENCING JANUARY 13, 1858, AND APPROVED MAY 17, 1858 at 985 (W.B. Keen, Chicago 1858) ("If any person shall go armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person . . ."); GEORGE B. YOUNG, THE GENERAL STATUTES OF THE STATE OF MINNESOTA, AS AMENDED BY SUBSEQUENT LEGISLATION, WITH WHICH ARE INCORPORATED ALL GENERAL LAWS OF THE STATE IN FORCE AT THE CLOSE OF THE LEGISLATIVE SESSION OF 1878 at 629 (Davidson & Hall, St. Paul 1879) ("Whoever goes armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapons, without reasonable cause to fear an assault or other injury or violence to his person . . ."); JOHN PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 250 (9th ed., Philadelphia 1862) ("If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence . . ."); HENRY A. BULLARD & THOMAS CURRY, 1 A NEW DIGEST OF THE STATUTE LAWS OF THE STATE OF LOUISIANA, FROM THE CHANGE OF GOVERNMENT TO THE YEAR 1841 at 252 (E. Johns & Co., New Orleans 1842) ("[A]ny person who shall be found with any concealed weapon, such as a dirk, dagger, knife, pistol, or any other deadly weapon concealed in his bosom, coat, or in any other place about him, that do not appear in full open view . . ."); THE REVISED STATUTES OF THE STATE OF MAINE, PASSED OCTOBER 22, 1840 at 709 (William R. Smith & Co., Augusta 1841) ("Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without a reasonable cause to fear an assault on himself . . ."); THE REVISED CODE OF THE DISTRICT OF COLUMBIA, PREPARED UNDER THE AUTHORITY OF THE ACT OF CONGRESS 570 (A.O.P. Nicholson, Washington 1857) ("If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an

even adopted as far west as the Oregon Territory. In 1853 Oregon criminal law stipulated:

If any persons shall go armed with dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault, injury, or other violence to his person, or to his family or property, he may, on complaint of any other person, having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace for a term not exceeding six months, with the right of appealing as before provided.<sup>214</sup>

Like the Statute of Northampton, the Oregon provision prohibited the public carrying of arms.<sup>215</sup> However, the provision was unique in that allowed a defense of “reasonable” fear from assault. Certainly, a person could not claim the defense as an everyday preparatory measure,<sup>216</sup> but it does show the variations of public carry statutes that developed in the United States. Perhaps, most importantly, it gives constitutional credence to modern statutes prohibiting the carrying of arms unless there is a showing of immediate danger.<sup>217</sup>

### III. HISTORICAL GUIDEPOSTS VERSUS OTHER SECOND AMENDMENT STANDARDS OF REVIEW

As Part I details, the historical evidence of public arms regulation is compelling. The text, original understanding, and history reveal that the Statute of Northampton served as a prohibition on the carrying of arms among the public concourse. Contrary to the claim of historian Joyce Lee Malcolm and those misled by her research, its provisions were enforced by local constables, sheriffs, bailiffs, and magistrates from its inception and even became a staple in American jurisprudence.

Detractors will claim there is no evidence of such prohibitions being enforced in seventeenth and eighteenth century America, thus the Statute of Northampton should

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assault or other injury or violence to his person . . .”); REVISED STATUTES OF THE STATE OF DELAWARE, TO THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND FIFTY-TWO 333 (Dover, Delaware 1852) (“Any justice of the peace may also cause to be arrested . . . all who go armed offensively to the terror of the people, or are otherwise disorderly and dangerous.”).

<sup>214</sup> THE STATUTES OF OREGON ENACTED AND CONTINUED IN FORCE BY THE LEGISLATIVE ASSEMBLY, AS THE SESSION COMMENCING 5TH DECEMBER, 1853 220 (Asahel Bush, Oregon 1854).

<sup>215</sup> The language of the Oregon provision was likely taken from another source such as Elisha Hammond’s *A Practical Treatise*. See E. HAMMOND, A PRACTICAL TREATISE; OR AN ABRIDGEMENT OF THE LAW APPERTAINING TO THE OFFICE OF JUSTICE OF THE PEACE 184 (C.A. Mirick & Co., West Brookfield 1841). See also *supra* note 213.

<sup>216</sup> It is likely that this defense was intended for those settled or traveling in frontier areas. It was common for travelers to be armed in hostile Indian Territory, where the local magistrates, sheriffs, and other officials could not protect the frontier without advanced warning.

<sup>217</sup> See MD. PUB. SAFETY CODE ANN. § 5-306(a)(5)(ii) (2011) (“[T]he Secretary shall issue a permit within a reasonable time to a person who the Secretary finds . . . has a good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.”); *Williams v. Maryland*, 417 Md. 479, 485 (Md. 2011).

not be a guidepost in determining the protective scope of the Second Amendment outside the home.<sup>218</sup> What this type of ad-hoc historical rebuttal fails to take into account is the Statute was a misdemeanor and enforced by local government officials. The fact of the matter is that eighteenth century local records were not maintained to the standard they are today and misdemeanors were rarely brought before any court. Absent the finding of numerous detailed records concerning eighteenth century fines or local imprisonment for misdemeanors, tracking the Statute's enforcement is nearly impossible. This does not mean, however, that the Statute of Northampton was never enforced. If anything, the Statute's survival in constable oaths, American treatises, and its adoption by numerous colonial and State assemblies affirms its role in our eighteenth and nineteenth century legal system.

Not to mention, this type of fake historical assessment or *faux originalism* could be used to extinguish other traditional eighteenth century laws as constitutionally unimportant.<sup>219</sup> In other words, courts need to be mindful and maintain a sense of historical consciousness when advocates make generalizations about the enforcement or meaning of earlier laws.<sup>220</sup> It is often too easy for advocates to mitigate our past by falsely claiming founding era rights existed under a presumption of liberty or that the founding generation did not adhere to well-known legal tenets.<sup>221</sup> Instead of accepting these ad-hoc historical surveys under the guise of originalism, the courts need to rely on *accepted* historical works and methodologies to understand eighteenth century constitutionalism and law as a collective whole if we are to examine rights under any form of originalist inquiry. As Judge Ilana Rovner wrote in an *Ezell v. Chicago* concurrence:

If [the courts] are to acknowledge the historical context and the values of the period when the Second and Fourteenth Amendments were adopted,

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<sup>218</sup> Following the work of Joyce Lee Malcolm, this has been the stance by many Second Amendment scholars. See *supra* note 72 and accompanying text.

<sup>219</sup> Often litigants provide competing history as a tactic to get the courts to decide the case according to more familiar jurisprudential tests. This was the case in *Ezell v. City of Chicago*, when attorneys David Sigale, Alan Gura, and David T. Hardy submitted an erroneous reply asserting a “well-regulated militia” rests with the people being armed and the government can facilitate the people’s militia. Compare Reply Brief for Plaintiffs-Appellants at 5, *Ezell v. Chicago*, (No. 10-CV-5135), 2011 WL 1837507 at \*5-18 (7th Cir. July 6, 2011), with Amicus Brief of Historians and Legal Scholars at 5, *Ezell v. City of Chicago*, (No. 10-CV-5135), 2011 WL 1837507 at \*15-27 (7th Cir. July 6, 2011). This historical interpretation does not comport with the historical evidence or the text of the Constitution. See generally Charles, *The Constitutional Significance of a “Well-Regulated Militia”*, *supra* note 17; Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights*, *supra* note 17.

<sup>220</sup> See generally Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998); Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 ALB. L. REV. 91 (1998); Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095 (2009).

<sup>221</sup> For a historical rebuttal to this approach to eighteenth century constitutionalism, see generally Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” In Our Constitutional Jurisprudence*, *supra* note 16.

then we must accept and apply the full understanding of the citizenry at that time.<sup>222</sup>

This begets the question: “What does the Statute of Northampton provide us in terms of evaluating the protective scope of the Second Amendment outside the home?” The answer is armed individual self-defense outside the home deserves only minimalist protection or categorical exclusion.<sup>223</sup> The Statute’s tenets provide the courts with a longstanding philosophical and ideological restriction on the “bearing” of arms as the founding generation understood it.<sup>224</sup> The remaining jurisprudential question ultimately rests on whether the arms prohibited are lethal or non-lethal. If the arms are lethal, the Statute serves as a sufficient historical guidepost to prohibit their use among the public concourse. However, if the arms are non-lethal, there may be a plausible argument that their inability to harm the community or breach the peace permits their use as a reasonable means to exercise an individual’s right to self-defense.

Again, the Statute should not be historically interpreted as prohibiting the transport of arms—lethal or non-lethal—for lawful purposes. In order for “the people” to exercise the *Heller* right of armed individual self-defense in the home,<sup>225</sup> one must be able to reasonably transport the firearm to and from the shooting range. At the same time, individuals must be able to reasonably transport firearms to a new residence, to government sanctioned militia service,<sup>226</sup> or to purchase and sell lawful firearms.

Naturally, the historical guidepost approach to adjudicating the Second Amendment is not the only one available to the courts. There exist two other popular theories to adjudicating the Second Amendment outside the home. The first is a libertarian individual balancing approach, which gives equal weight to individual interests to that of the community. The second approach is importing First Amendment jurisprudence into the Second. Each approach will be addressed in turn and weighed against historical guideposts.

#### A. *The Problems with Libertarian Approaches to Second Amendment Jurisprudence*

In 2009, Eugene Volokh published what has come to be an influential work on adjudicating Second Amendment claims entitled *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*.<sup>227</sup>

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<sup>222</sup> *Ezell v. Chicago*, No. 10-3523, 2011 WL 262351, at \*23 (7th Cir. July 6, 2011) (Rovner, J., concurring).

<sup>223</sup> Charles, *The Second Amendment Standard of Review After McDonald*, *supra* note 1, at 23-25. For a fascinating comment on how government property and universities should be categorically excluded as a “sensitive place,” see Joan H. Miller, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235 (2011).

<sup>224</sup> See Charles, *The Second Amendment Standard of Review After McDonald*, *supra* note 1, at 21-30.

<sup>225</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>226</sup> There is no historical evidence to suggest an individual has the right to associate in non-government sanctioned militia service. See Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights*, *supra* note 17, at 374-79.

<sup>227</sup> Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, *supra* note 4.

To date, the work has been cited by the Seventh, Ninth, Tenth, and District of Columbia Circuit Court of Appeals respectively,<sup>228</sup> and proved influential in the Fourth Circuit to at least state that armed individual self-defense must extend beyond the home.<sup>229</sup> The basis of Volokh's framework rests on a libertarian interest balancing approach in terms of individual burdens:

Whenever people are in the prohibited places--places where they have a right to be, and often have a practical need to be--they are barred from protecting themselves with a firearm.

And of course people's ability to protect themselves elsewhere is no substitute for their ability to protect themselves where they are. Some rights, such as free speech, may be only slightly burdened by laws that bar speech in some places but allow it in many other places. But self-defense has to take place wherever the person happens to be. Nearly any prohibition on having arms for self-defense in a particular place . . . is a substantial burden on the right to bear arms for self-defense. Perhaps the burden can be justified on scope or danger reduction grounds, but it is indeed a serious burden.<sup>230</sup>

By no means does Volokh claim the Second Amendment outside the home can constitutionally extend everywhere. He concedes that gun bans at airports and courthouses are only a "modest burden on lawful self-defense, perhaps low enough to fall below the constitutional threshold."<sup>231</sup> However, all other bans to include open and conceal carry, carrying in places where alcohol is served, private property, public streets and sidewalks, schools, and some government property are substantial burdens the Second Amendment, and perhaps unconstitutional.<sup>232</sup>

The main problem with adopting Volokh's jurisprudential approach is it raises the interest of the individual above the interests of society. This is a historically unattainable position, for it flips the Statute of Northampton on its head. Indeed, there are public policy arguments to be made concerning the benefits of armed individual self-defense outside the home, but this policy choice cannot be claimed as a constitutional right, nor does it not coincide with the founding generation's understanding of a well-regulated society and public arms carrying.<sup>233</sup>

To its credit, Volokh's analytical framework submits to any "historical exclusion" on "certain places" as a means to lessen the burden. If this is the case then the text, original intent, and history of the Statute of Northampton provide the guidepost by which to work from. It is here, however, that Volokh takes a stance

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<sup>228</sup> See *Ezell v. Chicago*, No. 10-3525, 2011 WL 2623511, at \*12 (7th Cir. July 6, 2011); *Nordyke v. King*, 644 F.3d 776, 783 (9th Cir. 2011); *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009); *Heller v. District of Columbia*, No. 10-7036, 2011 WL 4551558 (D.C. Cir. Oct. 4, 2011) (also known as *Heller II*).

<sup>229</sup> See *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011).

<sup>230</sup> Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, *supra* note 4, at 1515.

<sup>231</sup> *Id.* at 1526.

<sup>232</sup> See *id.* at 1516-33.

<sup>233</sup> See *supra* Part I.

that does not comport with the historical record. He claims that the wearing or carrying of “common weapons” in the “common fashion” is part of the Anglo-American tradition.<sup>234</sup> As shown in Part I, this interpretation is historically indefensible.

Naturally, Volokh is not the only person to take a libertarian approach when adjudicating the Second Amendment. Josh Blackman asserts a similar stance by classifying the Second Amendment in terms of “social costs.”<sup>235</sup> In particular, he takes issue with singling out the Second Amendment as the “most dangerous right” if the Supreme Court has recognized that other forms of liberty “yield negative externalities.”<sup>236</sup> For this reason Blackman advocates for the adjudicating of all enumerated rights by balancing individual liberty interests against society’s need for safety and security:

The presumption should be that an enumerated, fundamental right in our Constitution that is “deeply rooted in this Nation’s history and tradition” should be treated equally to other such important rights. Those aiming to detract from this standard bear the burden of establishing a disparate treatment, not the other way around. The scales of rights should be set at equipoise, and balance in a similar fashion liberty interests and social costs . . . .<sup>237</sup>

In response to those jurists that purport to extend a presumption of constitutionality to the Second Amendment, particularly to the “longstanding prohibitions” listed by the *Heller* majority, Blackman writes:

[The] presumption of constitutionality restricts the ability of the Second Amendment to flourish alongside its brethren in the Bill of Rights. Although Justice Scalia remarks that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned,” he provides no historical rationale, whatsoever, for the “longstanding prohibitions” dicta.<sup>238</sup>

Few, if any, jurists will disagree with Blackman that fundamental rights deserve constitutional protection. At the same time though, each constitutional right maintains a distinct and unique historical pedigree based upon numerous factors. This includes the rich history of the Second Amendment. To date, the Supreme Court has applied said history to recognize the Second Amendment as protecting two *core* rights. The first is the right of “the people” to possess handguns for self-defense at home. Although the Second Amendment does not expressly state this right, the *Heller* Court took a historical guidepost approach by tracing it through our Anglo-American origins<sup>239</sup> and contemporaneous State analogues.<sup>240</sup> Meanwhile, the

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<sup>234</sup> See Volokh, *The First and Second Amendments*, *supra* note 40, at 102.

<sup>235</sup> See generally Blackman, *The Constitutionality of Social Cost*, *supra* note 4.

<sup>236</sup> See *id.* at 953.

<sup>237</sup> *Id.* at 984.

<sup>238</sup> *Id.* at 976.

<sup>239</sup> See *Dist. of Columbia v. Heller*, 554 U.S. 570, 592-96 (2008).

second core right is that of participating in the common defense in a “well-regulated militia” force;<sup>241</sup> an interpretation that finds considerable support in the historical record.<sup>242</sup>

Given the Supreme Court found both of these *cores* to be rooted in historical tradition, it makes little sense to carve out new Second Amendment rights by discarding history and weighing a new test that balances social costs.<sup>243</sup> Furthermore, in terms of actual “social costs” to the safety of the community, Blackman never weighs the potential dangers imposed by public arms bearing as understood by the founding generation with that of modern society. If we are to truly import “social costs” as a jurisprudential matter, it is imperative that jurists at least consider the constitutionality of modern gun control regulations in relation to 1791,<sup>244</sup> for changes in technology have substantially increased the potential dangers associated with the public carrying of firearms that legislatures take into account.

To begin with this approach, the historical record provides substantial evidence that the discharging of firearms within populated areas could be prohibited as a means to ensure public safety.<sup>245</sup> In 1768 the Boston Town Council, in particular, adopted such a regulation because its “inhabitants have been lately surprised and endangered by the firing of Muskets charged with Shot or Ball on the Neck, Common, and other Parts of the Town[.]”<sup>246</sup> Two decades later, the town of Newburyport, Massachusetts followed suit and passed an ordinance outlawing the discharging of firearms, excepting the lawful purpose of organized militia musters controlled by State officers:

That no person (excepting the militia, when under arms, on muster-days, and by the command of their officer) shall fire off any sort of gun, pistol . . . or other thing charged or composed in whole, or in part of gun-powder, in array of the streets, lanes or public ways in this town, nor so near as to affright any horse, or in any sort tend to affright, annoy or injury any person whatever—nor shall any person discharge at a mark or otherwise any gun, charged with ball, at any time or front of any place within this

<sup>240</sup> See *id.* at 599-603; PA. CONST. OF 1776, DECLARATION OF RIGHTS, art. XIII (“That the people have the right to bear arms for the defence of themselves and the state . . . .”); VT. CONST. OF 1786, DECLARATION OF RIGHTS, art. XVIII (“That the people have a right to bear arms for the defence of themselves and the State . . . .”).

<sup>241</sup> See *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

<sup>242</sup> See generally Charles, *The Constitutional Significance of a “Well-Regulated Militia”*, *supra* note 17.

<sup>243</sup> See Blackman, *The Constitutionality of Social Cost*, *supra* note 4, at 978-1003.

<sup>244</sup> See *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (“[E]xclusions need not mirror the limits that were on the books in 1791”); *GeorgiaCarry.org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011) (quoting *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010)). See also Charles, *The Second Amendment Standard of Review After McDonald*, *supra* note 21, at 15.

<sup>245</sup> See Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts*, *supra* note 20, at 241.

<sup>246</sup> An Act to Prevent the Firing of Guns Charged with Shot or Ball in the Town of Boston, reprinted in BOSTON POST-BOY & ADVERTI[S]ER, Sept. 5, 1768, pg. 1, col. 3.

town, nor in any direction but such only as from time to time *shall be approved of and licensed by the town, or by the select-men thereof.*<sup>247</sup>

What can be deduced in terms of eighteenth “social costs” from these provisions? The answer is the prevention of negligent discharges by single-shot firearms was deemed suitable in the interests of the public good, and during an era where maintaining a loaded and properly charged firearm could be compromised by the surrounding conditions.<sup>248</sup> Most importantly, it comes at a point in history when the standard rifleman could discharge, on average, two or three rounds per minute dependent upon the skill of the shooter.<sup>249</sup> Thus, given the technology available to the founding generation, we can calculate the eighteenth century “social cost” associated with firearms at a ratio of two potential deaths per minute.<sup>250</sup>

Now in terms of modern firearms, a standard handgun can fire anywhere between six (standard 357 magnum revolver) to over a dozen bullets (standard magazine-loaded handgun), and can be easily loaded in seconds. Thus, a low “social cost” estimate ranges the modern handgun between the ratio of twelve and twenty-four potential deaths per minute, with a trained marksman capable of effectuating as high as forty-eight potential deaths per minute.<sup>251</sup> This death per minute ratio is well beyond the “social cost” equivalent of an eighteenth century riot, which was

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<sup>247</sup> At a legal meeting of the freeholders and other inhabitants of the town of Newburyport . . . held on the twenty-ninth day of March, A.D. 1785, *reprinted in* ESSEX JOURNAL, AND THE MASSACHUSETTS AND NEW-HAMPSHIRE GENERAL ADVERTISER (Essex, Mass.), May 11, 1785, pg. 2, col. 2 (emphasis added).

<sup>248</sup> Charles, *Scribble Scrabble*, *supra* note 20, 1833 n. 90 (2011).

<sup>249</sup> James E. Hicks, *United States Military Shoulder Arms, 1795-1935*, 1 THE JOURNAL OF THE AMERICAN MILITARY HISTORY FOUNDATION 23, 31 (1937). An experienced marksman with a flintlock could fire between three to four rounds per minute, but this is a high estimate. *See id.* at 30.

<sup>250</sup> This ratio does not change should the shooter be armed with a pair of pistols. Generally, pistols took longer to reload than rifles or muskets, but could be preloaded and fire as long as the powder was not compromised. *See* George Suiter, Master Gunsmith Colonial Williamsburg Foundation, to Patrick J. Charles, (email from January 16, 2012 (3:35 PM)) (on file with author). Don B. Kates & Clayton E. Cramer claim that eighteenth century persons could have conceivably carried “two, four, or even six single-shot pistols on their belt,” and thus fire “six bullets in about ten seconds.” Don B. Kates and Clayton Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1356-57 (2009). This is a rather high assessment. Although the physical carrying of six unloaded pistols may have been possible, the technology available at the time would have made it difficult to effectively carry and keep all six loaded and charged.

<sup>251</sup> Even Second Amendment academics Don B. Kates and Clayton E. Cramer agree that a “reasonably skilled wielder of a modern pistol could expect to *accurately* shoot perhaps twenty to forty bullets in about sixty to ninety seconds.” Kates & Cramer, *supra* note 250, at 1357 (emphasis added). This estimate does not take into account technological advances in ammunition such as armor piercing, tumbling, or viper rounds, nor does it take into account the increased distance by which firearms projectiles can travel as to cause harm. *See* Suiter to Charles, *supra* note 250 (stating the effective range of an eighteenth century rifle averaged 200 yards, a musket 100 yards, and a pistol was only effective at close range). Both of these factors could increase the “social costs” associated with modern firearms under a more inclusive paradigm.

unquestionably prohibited by law in the interests of public safety.<sup>252</sup> Not even an eighteenth century cannon could successfully achieve a “social cost” ratio that high.

The purpose of providing this historical parallel is not to limit the types of arms that may be acquired in accordance with the Second Amendment. This is an entirely separate constitutional issue in itself, and it is well-settled in our constitutional jurisprudence that rights must evolve with accepted technologies.<sup>253</sup> Instead, the historical point is the actual “social costs” associated with firearms has risen exponentially since the late eighteenth century, and this does not even include substantial demographic changes by comparing eighteenth and twenty-first century census or population data. To phrase it another way, if the founding generation believed it legally sufficient to prohibit going armed among the public concourse with a two deaths per minute ratio, it is difficult to question the constitutionality of prohibiting arms that measure at a twelve, twenty-four, or as high as forty-eight potential deaths per minute.

The last libertarian approach to adjudicating Second Amendment rights is a mythical take on *Blackstone’s Commentaries*. It claims that the English Constitution, at least as William Blackstone understood it, conveys a right to carry arms for “protection against violence in public.”<sup>254</sup> This ahistorical conclusion is reached by classifying the 1689 Declaration of Rights “have arms” provision as an auxiliary right ““which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.””<sup>255</sup>

The problem with this approach is it recasts Blackstone’s understanding of auxiliary rights under an individualized libertarian paradigm; an interpretation that does not comport with the historical record. Blackstone never equated auxiliary rights with individual civil rights. Instead, he defined auxiliary rights as the means to ensure that civil rights are “ascertained, and protected by the dead letter of the laws, if the *constitution* [provides] no other method to secure their actual enjoyment.”<sup>256</sup> Blackstone’s reference to the English Constitution is telling, for it illuminates that auxiliary rights are those constitutional mediums that are intimately connected with the administration of government, not the individual exertions of the people.

In the case of the right to “have arms,” it is listed as the “fifth and *last* auxiliary right.”<sup>257</sup> This means that four auxiliary rights precede the deployment of the “right

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<sup>252</sup> See An Act to Prevent Routs, Riots, and Tumultuous Assemblies, and the Evil Consequences Thereof, 1786 Mass. Acts ch. 8; An Act for the More Speedy and Effectual Suppression of Tumults and Insurrections in the Commonwealth, 1786 Mass. Acts ch. 9; An Act to Prevent Routs, Riots, and Tumultuous Assemblies, 1797 N.J. Laws ch. 17; An Act Against Riots and Rioters, 1705 Pa. laws ch. Xxviii.

<sup>253</sup> *Brown v. Entm’t Merch. Ass’n*, 131 S.Ct. 2729, 2731 (2011); *Dist. of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

<sup>254</sup> Memorandum in Support of Plaintiffs’ Motion for Preliminary and/or Permanent Injunction at 5, *Shepard v. Madigan*, No. 11-cv-00405, at 5 (S.D. Ill., May 13, 2011).

<sup>255</sup> *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136 (1765)).

<sup>256</sup> 1 BLACKSTONE, *supra* note 255, at 140 (emphasis added).

<sup>257</sup> *Id.* at 143 (emphasis added).

of self-preservation and resistance.” The first auxiliary right is Parliament’s exercise of its powers; the second is through the sovereign; and the third is by the courts of justice.<sup>258</sup> When those fail, resort may be had to the fourth auxiliary right: the right to petition Parliament or the King for the “redress of grievances.”<sup>259</sup> And only after *that* right is exhausted may the people resort to “have arms.” Thus, in Blackstone’s construct, the Declaration’s guarantees—the right to petition and the allowance to “have arms”—are means by which individuals preserve and protect their liberties if Parliament, the sovereign, the courts, and their right to petition fail them.<sup>260</sup>

Perhaps it can be asserted that the *Heller* majority interpreted Blackstone as supporting the English right to arms as divorced from militia service,<sup>261</sup> thus his treatise should be extended to support public arms bearing as a means to preserve individual security, life, and property. This argument fails for two historical reasons. First, as discussed above, this interpretation cannot survive if the Supreme Court is to use history as a contextual guidepost.<sup>262</sup> One needs to look no further than the contemporary works of Jean Louis De Lolme and Francis Plowden to understand Blackstone’s view of auxiliary rights.<sup>263</sup> Second, Blackstone expressly identified the Statute of Northampton as being a lawful restraint on the use of arms,<sup>264</sup> meaning the text, original intent, and history of the Statute supersedes any ahistorical libertarian conclusion.<sup>265</sup>

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<sup>258</sup> *Id.* at 141.

<sup>259</sup> *Id.* at 143.

<sup>260</sup> For a full discussion on this point, see Charles, *The Right of Resistance and Self-Preservation*, *supra* note 7, at 26-40.

<sup>261</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (stating Blackstone’s “description of [the arms provision] cannot possibly be thought to tie it to militia or military service. It was, he said, ‘the natural right of resistance and self-preservation . . . and defence.’”).

<sup>262</sup> *Id.* at 626 (recognizing the restrictions of the right by Blackstone).

<sup>263</sup> FRANCIS PLOWDEN, *THE CONSTITUTION OF THE UNITED KINGDOM OF GREAT BRITAIN & IRELAND* 147 (London, T. Sutton 1802) (“To preserve these rights or liberties from violation it is necessary, that the Constitution of parliament be supported in its full vigor. . . . And to vindicate them, when actually violated or attacked, all British subjects are entitled in the first place to regular administration . . . next to the right of petitioning the King and parliament . . . and lastly to the right of having and using arms for self-preservation and defence.”); DE LOLME, *supra* note 33, at 303–13 (discussing Blackstone’s right of “self-preservation” and “resistance”). For the founding generation’s understanding of Blackstone’s right of “self-preservation and resistance,” see Charles, *The Right of Self-Preservation and Resistance*, *supra* note 6, at 54-59 (concluding the right was in reference to restoring or defending the English Constitution from enemies, foreign or domestic).

<sup>264</sup> 4 BLACKSTONE, *supra* note 176, at 148-49.

<sup>265</sup> See *supra* Part I.

*B. The Problems with First Amendment Approaches to Second Amendment Jurisprudence*

In *District of Columbia v. Heller*, the Supreme Court recognized a jurisprudential link between the First and Second Amendments.<sup>266</sup> Given the Court had taken 150 years to incorporate the First Amendment to the States,<sup>267</sup> the Court found nothing out of the ordinary in recognizing the Second Amendment as a “individual right” divorced from militia service. Other than this minor historical link, the Court gave no inclination that First Amendment jurisprudence should provide the vehicle to adjudicate the Second.

Still, numerous courts are drawing jurisprudential parallels between the two Amendments. The Fourth Circuit Court of Appeals agreed “with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.”<sup>268</sup> The Third Circuit felt the guidance of the First Amendment provided the “natural choice,” for “*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment.”<sup>269</sup> Meanwhile, the Seventh Circuit followed the lead of the Third and Fourth Circuits, stating:

[The court] can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.<sup>270</sup>

Certainly, the Supreme Court has acknowledged the two Amendments as embodying individual rights, but so too does the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments respectively. This begets numerous questions, such as why not incorporate or apply any of the other Amendment’s jurisprudential approaches? Are the First and Second Amendments historically linked as to require the courts to adapt the latter to the former? In what ways do the First and Second Amendments differ in terms of the Anglo-American tradition?

Perhaps the answer to the first question rests with the judiciary’s familiarity with First Amendment doctrine. As Joseph Blocher informs us, “First Amendment

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<sup>266</sup> For instance, just as the right to free speech is not unlimited, the Court found the Second Amendment does not “protect the right of citizens to carry arms for *any sort* of confrontation.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 545 (2008).

<sup>267</sup> *Id.* at 626.

<sup>268</sup> *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

<sup>269</sup> *United States v. Marzzarella*, 614 F.3d 85, 89 fn.4 (3d Cir. 2010).

<sup>270</sup> *Ezell v. Chicago*, 2011 WL 2623511, at 17 (7th Cir. 2011). Also, the District of Columbia Court of Appeals has recognized the use of First Amendment jurisprudence to adjudicate the Second. *See Heller v. District of Columbia*, No. 10-7036, at 32 (October 4, 2011).

doctrine is comfortably familiar, and courts almost certainly will continue to rely on it--probably explicitly so--as they attempt to address the seemingly parallel problems arising under the Second Amendment."<sup>271</sup> Familiarity aside, the different conduct associated with the First and Second Amendments makes it difficult to import First Amendment doctrine wholesale. It purports to "muddle" rather than "clarify" Second Amendment analysis.<sup>272</sup>

In fact, it is difficult to ascertain how any court could even infer the Supreme Court acquiesced to importing First Amendment jurisprudence to the Second. As Fourth Circuit Court of Appeals Judge Andre M. Davis astutely points out:

*Heller* does refer to the First Amendment, but only for several quite limited purposes: (1) to compare its language, along with that of other amendments in the Bill of Rights, to the language of the Second Amendment; (2) to establish that constitutional rights are not limited to the use of equipment available at the time of ratification, but extend to modern analogues; (3) to make the simple point that unqualified constitutional language does not imply an "unlimited" right; (4) to note that initial recognition of a right sometimes comes long after ratification; and finally, (5) to remind its audience that our constitutional rights are "the very *product* of an interest-balancing by the people" and thus that balancing them away in the manner ascribed to Justice Breyer would be inappropriate. Certainly the First Amendment, as a fount of rights the dissenting Justices have frequently championed, was a useful source for the *Heller* majority. But these limited references are hardly an invitation to import the First Amendment's idiosyncratic doctrines wholesale into a Second Amendment context, where, without a link to expressive conduct, they will often appear unjustified.<sup>273</sup>

There is also a historical problem with importing First Amendment Jurisprudence. This problem being the legal tenets of the First Amendment has never been remotely associated with the Second.<sup>274</sup> From its Anglo origins through

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<sup>271</sup> Blocher, *Categoricalism and Balancing the First and Second Amendments*, *supra* note 24, at 402.

<sup>272</sup> *United States v. Chester*, 628 F.3d 673, 687 (4th Cir. 2010) (Davis, J., concurring). To its credit, the Third Circuit has recognized this fact, stating: "While we recognize the First Amendment is a useful tool in interpreting the Second Amendment, we are also cognizant that the precise standards of scrutiny and how they apply may differ under the Second Amendment." *United States v. Marzzarella*, 614 F.3d 85, 96 fn.15 (3d Cir. 2010). However, the Third Circuit failed to clarify what, if any, differences this entails.

<sup>273</sup> *United States v. Chester*, 628 F.3d 673, 687 (4th Cir. 2010) (Davis, J., concurring) (citations omitted).

<sup>274</sup> This includes any rights to "keep and bear arms" associated with militia service. The First Amendment protects a citizen's right to believe in anarchy, totalitarianism, and the overthrow of government. However, the founding generation would have disarmed such individuals to preserve the Union and peace. See Charles, *The Constitutional Significance of a "Well-Regulated Militia"*, *supra* note 17, at 56-61, 98 n.500. At the same time, history shows there was never a right to associate in militias separate from government. See Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights*, *supra* note 17, at 374-90.

the Early Republic, no one ever attributed the ideological or political origins of free speech, religion, or the press as akin to armed self-defense. If anything, the two are complete opposites, for the First Amendment prohibits prior restraint and eighteenth century gun control embraced prior restraint to preserve the peace.

Perhaps one can claim that both Amendments embody natural rights and should be adjudicated as such. Unfortunately, this approach fails to take into account the public utility associated with each respective right as the founding generation understood it. As was seen with the history Statute of Northampton, prohibitions on going armed and even discharging firearms were deemed as a lawful prior restraint in the interests of public safety.<sup>275</sup> In fact, the carrying or use firearms in public required a governmental license in many instances.<sup>276</sup>

To put it another way, the historical evidence does not reveal that the founding generation placed the utility of armed individual self-defense in the public concourse as superior to the interests of the community at large. No one ever questioned these prohibitions as an infringement on the natural right of self-defense or the right to bear arms. In fact, no historian, legal scholar, or originalist has found any seventeenth or eighteenth century newspaper editorials, correspondence, pamphlets, or books that purport otherwise.<sup>277</sup> Hypothetically speaking, even if a few examples are to appear, it does not detract from the Anglo-American tradition on prohibiting arms among the public concourse.

In contrast to the Second Amendment, the public utility afforded by the First Amendment is well documented from the late seventeenth century and through the Early Republic. In the case of a free press, it was the deemed the basis of all other liberties.<sup>278</sup> This is because it served as the medium by which the people communicated to their government, and the government communicated to the people.<sup>279</sup> As eighteenth century political philosopher David Hume informs us, all mixed governments required “foregoing observation” through the “liberty of the

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<sup>275</sup> See *supra* Part I.

<sup>276</sup> See *supra* pp. 10-11, 23-24, 42.

<sup>277</sup> This is not to say that Second Amendment scholars have not inferred this right existed by stating the Second Amendment protects against public violence. See HALBROOK, *THE FOUNDERS' SECOND AMENDMENT*, *supra* note 9, at 20, 98, 108, 137, 158. For a reply of Halbrook's recasting of eighteenth century perceptions of armed self-defense, see William G. Merkel, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221, 1258-61 (2010).

<sup>278</sup> See *The Freedom of the Press*, THE HERALD OF FREEDOM (Boston, MA), May 21, 1790, at pg. 77, col. 3 (“It was the saying of an ancient and wise Englishman [Matthew] Tindal who lived at the time of the glorious revolution in 1688, that ‘While the FREEDOM OF THE PRESS is preserved unchecked and uncontrouled, all other liberties, both civil and religious will be secured to us under so faithful a guardian.’ And it was also declared by the enlightened Virginians, at the commencement of the American revolution, that, ‘The freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by DESPOTIC governments.’ . . . the liberty of the press should be freely exercised, when changes in government are taking place.”).

<sup>279</sup> See generally Charles and O'Neill, *Saving the History of the Press Clause from Ruin*, *supra* note 10.

press.”<sup>280</sup> A free press served to check “arbitrary power” and provide the “easy method of conveying the alarm from one end of the kingdom to the other.”<sup>281</sup> It ensured the “spirit of the people” could be aroused “in order to curb the ambition” of government.<sup>282</sup>

The South Carolina *State Gazette* attributed a similar public utility to the press:

FROM the great utility . . . which every man is enabled to communicate his sentiments to the public, and the general concern which matters relative to government are always sure to create; a prodigious number of publications are continually making their appearance; so as to communicate to several measures adopted by administration, as well as whatever is advanced by either the advocates or judges, concerned in the management and decision of any cause or suit of importance in any court of law or equity. By that means the public are made acquainted with the nature of the subject that have been deliberated upon in the assembly of their representatives . . . .<sup>283</sup>

This public utility is what led to the doctrine against prior restraint. The philosophy being that a constitutional free press served as a self-correcting pendulum of truth on matters of public concern such as science, philosophy, politics, and government.<sup>284</sup> Any actual physical harm associated with the utility could be corrected after the fact by the doctrine of libel. We know this from *Blackstone’s*

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<sup>280</sup> DAVID HUME, *ESSAYS: MORAL, POLITICAL, AND LITERARY* 11-12 (Eugene F. Miller ed., 1987).

<sup>281</sup> *Id.* at 12.

<sup>282</sup> *Id.*

<sup>283</sup> THE STATE GAZETTE OF SOUTH CAROLINA (Charleston, SC), July 3, 1786, pg. 2, cols. 2.

<sup>284</sup> Numerous free press treatises attest to this fact. See JOHN TOLAND, *A LETTER TO A MEMBER OF PARLIAMENT, SHEWING, THAT A RESTRAINT ON THE PRESS IS INCONSISTENT WITH THE PROTESTANT RELIGION, AND DANGEROUS TO THE LIBERTIES OF THE NATION* 10 (London 1698) (“[T]he more apt Men are to mistake and to be deciev’d [by false arguments], the less reason there is for their relying on one Party, but the more to examine with all care and diligence the Reasons on all sides, and consequently for the Press being open to all Parties, one as well as the other. So that those that are for allowing Men the liberty of judging for themselves . . . are very unhappy in their arguments, because they all make against themselves, and out of their own Mouths they are condemned.”); *id.* at 15 (“The more important any Controversy is, the more Reason there is for the Liberty of the Press, that [the people] may examine with all diligence imaginable the Tenets of their adversaries as well as of their Guides; and that the more they heard the one Party, the more they should read the other; and that if they fall into any Error by so doing, they would not be accountable for it.”). See also CHARLES BLOUNT, *A VINDICATION OF LEARNING AND THE LIBERTY OF THE PRESS* 22 (London 1695) (stating falsehoods are self-correcting); MATTHEW TINDAL, *REASONS AGAINST RESTRAINING THE PRESS* 13 (London 1704) (stating truth is a self-correcting principle, especially when it comes to matters concerning government); *The Benefit of the Public of a Free Press*, THE PLYMOUTH JOURNAL, AND THE MASSACHUSETTS ADVERTISER (Plymouth, MA), Apr. 25, 1786, at 2 (“A notion may be in favour with the vulgar; an opinion may have credit with the great; a system may be devised and established by a faction: But if the notion be absurd, the opinion false or the system iniquitous, the Press will sooner or later, ridicule, refute, or expose them all.”).

*Commentaries*, which states the origin of libel was to prevent a “breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed.”<sup>285</sup> This fact is confirmed by other eighteenth century jurists. In 1785, Chief Justice of the Pennsylvania Supreme Court Thomas McKean stated that libels are a “breach of the public peace, by stirring up the objects of them, their friends and families to acts of revenge and perhaps of bloodshed.”<sup>286</sup> In 1791, Judge Israel Sumner stated, “The true reason, therefore, why the law punishes [libel] criminally, seems to be that it tends to create ill blood, and to disturb the publick peace.”<sup>287</sup> Meanwhile, in the same year Judge Nathaniel Sargeant stated, “The reason why the law criminally punishes any libelous publication or writing, is because of its tendency to excite revenge, which introduces bloodshed and murder.”<sup>288</sup>

Thus, the only common historical denominator that can be drawn between the origins of the First and Second Amendments is both could be restricted as a means to prevent bloodshed or a breach of the public peace.<sup>289</sup> Yet, even this commonality maintains an important division as to when the legislature may regulate to prevent the breach. In the case of a free press, punishment occurred after the act due to constitutional limitations on prior restraint, and any form of licensing was subject to severe scrutiny. In contrast, armed individual self-defense gave way to the safety of the public at large and obtaining a government license for use was *never* questioned in law or history.

Given these historical facts, it makes little sense to import First Amendment jurisprudence into the Second under the auspices that both are individual rights. If the courts are going to take the Second Amendment outside the home seriously, its history must first be reconciled to determine what areas are categorically excluded or should receive minimal protection.

#### IV. CONCLUSION

The legal tenets surrounding the Statute of Northampton are part of our Anglo-American tradition and provide the courts with a historical guidepost in adjudicating the Second Amendment outside the home. History provides us with substantiated

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<sup>285</sup> 4 BLACKSTONE, COMMENTARIES, *supra* note 176, at 150.

<sup>286</sup> Extract From a Charge Delivered to the Grand Jury for the City and County of Philadelphia, THE PENNSYLVANIA PACKET (Philadelphia, PA), Apr. 19, 1785, pg. 3 col. 1. *See also* Extract From a Charge Delivered to the Grand Jury of Pennsylvania, by Thomas McKean, Chief Justice of the Supreme Court of that State, THE CENTINEL OF FREEDOM (Newark, NJ), Dec. 12, 1797, pg. 1 col. 3 (stating again that the “direct tendency of these libels is the breach of the public peace, by stirring up the objects of them, their families and friends to acts of revenge, and perhaps bloodshed”).

<sup>287</sup> Trial for Libel, CONCORD HERALD (Concord, NH), Apr. 6, 1791, pg. 1 col. 3.

<sup>288</sup> The Honorable Chief Justice Sargeant’s Charge to the Jury, CONCORD HERALD (Concord, NH), Apr. 13, 1791, pg. 1 col. 2.

<sup>289</sup> As one anonymous eighteenth century writer pointed out, there are laws to “restrain the militia” from using its arms to “oppress, terrify, plunder, and vex their peaceable neighbours,” and any laws that restrict the freedom of the press are similar because both “prevent the wonton injury and destruction of individuals” are to ensure there is a legal “line some where, or the peace of society would be destroyed by the very instrument designed to promote it.” Liberty, THE INDEPENDENT CHRONICLE AND THE UNIVERSAL ADVERTISER (Boston, MA), Aug. 20, 1789, at 1.

evidence that the Statute's origins derive from the government's authority to ensure public safety, and prevent breaches of the peace such as murder and crime.<sup>290</sup> Indeed, the Statute was adopted during a time of political uncertainty,<sup>291</sup> but prohibitions on publicly going armed were affirmed by subsequent generations as a confirmation of governmental police authority, including the founding generation after the adoption of the United States Constitution.<sup>292</sup>

There are certainly other approaches the courts may employ when adjudicating the Second Amendment outside the home. These approaches range from a libertarian interest balancing approach to importing First Amendment jurisprudence, and even rewriting our history altogether through revisionism or a living constitution. While it is at the constitutional discretion of the courts to employ any of these latter approaches in creating a standard of review, each poses vexing problems if *Heller* and *McDonald's* originalist approach to constitutional interpretation is to survive.

To put it another way, if our Anglo-American tradition is what commanded the recognition of the Second Amendment as an individual right, so too must the ideological and philosophical restraints on that right.<sup>293</sup> This requires more than the courts paying lip service to history, and adjudicating the Second Amendment according to judicial whims.<sup>294</sup> The courts must maintain some sense of historical consciousness, for it is "the *best means available* in an imperfect world."<sup>295</sup> As Judge Ilana Rovner eloquently put it in *Ezell v. City of Chicago*, "If we are to acknowledge the historical context and the values of the period when the Second and Fourteenth Amendments were adopted, then we must accept and apply the full understanding of the citizenry at that time."<sup>296</sup>

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<sup>290</sup> See *supra* Part I.

<sup>291</sup> See *id.*

<sup>292</sup> Charles, *Scribble Scrabble*, *supra* note 20, at 237.

<sup>293</sup> Charles, *The Second Amendment Standard of Review After McDonald*, *supra* note 21, at 13-15.

<sup>294</sup> Despite the numerous gun control regulations in our Anglo-American tradition with safety as a concern, no post-*Heller* court has upheld a modern gun control provision by relying on history. The closest any court has come is the use of history to affirm intermediate scrutiny should apply. See *United States v. Tooley*, 717 F. Supp. 2d 580 (S.D. W. Va. 2010).

<sup>295</sup> *McDonald v. Chicago*, 130 S.Ct. 3020, 3057-58 (2010) (Scalia, J., concurring).

<sup>296</sup> *Ezell v. Chicago*, 2011 WL 262351, at 23 (7th Cir. 2011) (Rovner, J., concurring).