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## The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why it Matters

Patrick J. Charles

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# THE FACES OF THE SECOND AMENDMENT OUTSIDE THE HOME, TAKE TWO: HOW WE GOT HERE AND WHY IT MATTERS

PATRICK J. CHARLES\*

## ABSTRACT

Since the late twentieth century, the Second Amendment has been increasingly promoted as the unfettered right to carry firearms in the public concourse. This expansive meaning, however, lacks historical support. Historical evidence reveals a disparity between the Anglo-American origins of armed carriage laws and present-day interpretations of the Second Amendment. The historical backdrop also reveals the impact pro-gun organizations have had on the expansion of armed carriage. Differences in state armed carriage laws, analyzed from both historical and regional perspectives, will one day require the Supreme Court to determine which version of history should dictate the meaning of the Second Amendment.

## CONTENTS

INTRODUCTION.....	373
I. THE ANGLO-AMERICAN ORIGINS OF THE LAW AND ARMED CARRIAGE .....	378
II. THE LAW AND ARMED CARRIAGE DURING THE NINETEENTH CENTURY .....	401
III. THE LAW AND ARMED CARRIAGE DURING THE TWENTIETH CENTURY .....	431
A. <i>Pro-Gun Perspectives on Armed Carriage Before the Standard         Model Second Amendment</i> .....	433
B. <i>After the Standard Model Second Amendment</i> .....	466
IV. WHY THE HISTORY OF THE LAW AND ARMED CARRIAGE MATTERS.....	475

## INTRODUCTION

In recent years, following the Supreme Court’s landmark decision in *District of Columbia v. Heller*,<sup>1</sup> the Second Amendment has reached new heights in American discourse.<sup>2</sup> This includes the extent to which the right to “keep and bear arms”

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<sup>1</sup> 554 U.S. 570 (2008).

<sup>2</sup> See generally Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?*, 23 WM. & MARY BILL RTS. J. 1143 (2015).

extends outside the home,<sup>3</sup> and the perception is growing that it protects the preparatory armed carriage of firearms for self-defense within the public concourse. Consider that there are a growing number of states modifying their constitutions to protect a right to carry firearms outside the home for self-defense.<sup>4</sup> Meanwhile, other states have taken the legislative route to ensure individuals may carry firearms in the public concourse with virtually no legal impediments.<sup>5</sup> Otherwise known as “constitutional carry,” advocates for these types of laws firmly believe the “Second Amendment is my gun permit.”<sup>6</sup> Then there are states such as Georgia that have amended their laws so that individuals may carry loaded firearms almost anywhere

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<sup>3</sup> For some post-*Heller* legal commentary addressing this point, see Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008); Brian Enright, *The Constitutional “Terra Incognita” of Discretionary Concealed Carry Laws*, 2015 U. ILL. L. REV. 909 (2015); John R. Frazer, *Home, Sweet Home: The Second Amendment and the Right to Carry Arms in Public*, 4 REGENT J.L. & PUB. POL’Y 1 (2012); Joseph A. Gonnella, *Concealed Carry: Can Heller’s Handgun Leave the Home?*, 51 CAL. W. L. REV. 111 (2014); Justine E. Johnson-Makuch, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 FORDHAM L. REV. 2757 (2015); Robert Leider, *Our Non-Originalist Right to Bear Arms*, 123 YALE L.J. 1486 (2014); Owen McGovern, *The Responsible Gun Ownership Ordinance and Novel Textual Questions About the Second Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 471 (2012); Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 89 IND. L.J. 1587 (2014); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2012); Nicholas Moeller, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401 (2014); Ryan Notarangelo, *Carrying the Second Amendment Outside the Home: A Critique of the Third Circuits Decision in Drake v. Filko*, 64 CATH. U. L. REV. 235 (2014); Michael O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585 (2012); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85 (2010); 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).

<sup>4</sup> See, e.g., Eugene Volokh, *Alabama Constitutional Right to Bear Arms Strengthened, by 72%-28% Vote*, VOLOKH CONSPIRACY (Nov. 5, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/05/alabama-constitutional-right-to-bear-arms-strengthened-by-72-28-vote>.

<sup>5</sup> See, e.g., Mark Emmert & David Hench, *Concealed-Carry Law Might Not Put Maine Under the Gun*, PORTLAND PRESS HERALD (June 5, 2015), <http://www.pressherald.com/2015/06/05/concealed-carry-law-might-not-put-state-under-the-gun>; Jeff Guo, *These States are Poised to Allow People to Carry Hidden Guns Around Without a Permit*, WASH. POST (Mar. 2, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/02/these-states-are-poised-to-allow-people-to-carry-hidden-guns-around-without-a-permit>; Maya Rhodan, *New Kansas Law Will Allow Concealed Carry Without Gun Permit or Training*, TIME (Apr. 2, 2015), <http://time.com/3770182/kansas-bill-constitutional-carry-concealed-guns>.

<sup>6</sup> See, e.g., Dana Loesch: *Hands Off My Gun(s)*, GUNS & AMMO, June 2015.

except college campuses, certain government buildings, and past airport security checkpoints.<sup>7</sup>

The perception that the Second Amendment guaranteed an unfettered right of individuals to carry firearms in the public concourse grew to prominence in the late twentieth century. Indeed, prior to the late twentieth century there were individuals that asserted broad Second Amendment rights both publically and privately.<sup>8</sup> However, such a view was not embraced by either Americans or pro-gun supporters at large.<sup>9</sup> It was not until 1985, when the National Rifle Association (NRA) initiated its nationwide campaign to revise “restrictive carry” laws that the Second Amendment, outside the home, began to take on an expansive meaning.<sup>10</sup> In particular, the NRA lobbied state legislatures to change their firearms carry licensing regimes from “may issue” to “shall issue,” with the primary justification being the desire to arm law-abiding citizens for self-defense.<sup>11</sup> Today, however, the justification for individuals to carry firearms in the public concourse is perceived a bit differently. Armed carriage is no longer just about self-defense. It is now associated with the First Amendment rights of free speech and assembly, and therefore it has become common to witness gun rights activists carrying firearms as a means to bring attention to their cause.<sup>12</sup>

Take for instance the example of Jim Cooley, who carried a fully loaded AR-15 with a 100-round drum through the Atlanta International Airport terminal. In light of Georgia’s “guns everywhere” law, at no point was Cooley committing even a misdemeanor. As to why Cooley thought it necessary to carry a fully loaded AR-15 in an international airport, he answered: “If you don’t exercise your rights, the

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<sup>7</sup> See The Safe Carry Protection Act of 2014, H.R. 60, 152d Gen. Assemb. Reg. Sess. (Ga. 2014); see also Niraj Chokshi, *What Georgia’s Expansive New Pro-Gun Law Does*, WASH. POST (Apr. 23, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/23/what-georgias-expansive-new-pro-gun-law-does>. For more on states acting to expand armed self-defense beyond the home, see Logan A. Forsey, *State Legislatures Stand Up For Second Amendment Gun Rights While the U.S. Supreme Court Refuses to Order a Cease Fire on the Issue*, 37 SETON HALL LEG. J. 411 (2013).

<sup>8</sup> See *infra* pp. 401-30.

<sup>9</sup> See *infra* pp. 430-65.

<sup>10</sup> David Conover, *To Keep and Bear Arms*, AM. RIFLEMAN, Sept. 1985, at 40-41.

<sup>11</sup> See G. Ray Arnett, ...*Sincerely*, GRA, AM. RIFLEMAN, May 1986, at 7; see also Dr. Alonzo H. Garcelon, *The President’s Column*, AM. RIFLEMAN, Dec. 1985, at 46. Although the movement began in 1985, it was not until 1987 that the first state—Florida—adopted all of NRA’s suggested changes. See David B. Kopel & Clayton E. Cramer, *Shall Issue: The New Wave of Concealed Handgun Laws*, 63 TENN. L. REV. 679 (1995); Ted Lattanzio, *Florida Gun Owners and Lawmen Stand Together*, AM. RIFLEMAN, May 1987, at 42; *Gun Owners Win Significant Legislative Fights in 1987*, AM. RIFLEMAN, Aug. 1987, at 66. For more on the legislative shift from “may issue” licensing schemes to “shall issue,” see Megan Ruebsamen, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 66-76 (2013); see also Steven W. Kranz, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 HAMLINE L. REV. 637, 646-49 (2006).

<sup>12</sup> Charles, *supra* note 2, at 1172-73.

government doesn't have any hesitation taking them away."<sup>13</sup> Another example occurred in St. Louis, Missouri, where gun rights activists, in an act of civil disobedience, planned to march through the St. Louis Zoo with firearms to protest the Zoo's policy of prohibiting weapons on its premises.<sup>14</sup>

While instances like these are largely symbolic in advocating for Second Amendment rights outside the home, the same cannot be said of Jon Ritzheimer's "Freedom of Speech" rally in front of the Islamic Community Center of Phoenix, Arizona. As part of the rally, Ritzheimer held a "draw Mohammed" contest to "expose the true colors of Islam" and protestors were encouraged to exercise their Second Amendment rights.<sup>15</sup> When Ritzheimer's rally was finally held, 250 armed protestors, some carrying two to three firearms, were met by largely unarmed counter-protestors.<sup>16</sup> As a justification for the armed rally the protestors claimed that they needed to be armed in case the First Amendment came "under much anticipated attack."<sup>17</sup> Here, Ritzheimer was referencing events that took place weeks earlier, where Elton Simpson and Nadir Soofi, both of whom prayed at the Islamic Community Center of Phoenix, attacked a "draw Mohammed" contest being held in Garland, Texas.<sup>18</sup> Although the Simpson and Soofi attack was thwarted by law enforcement, there was clamoring among gun rights activists that the Second Amendment is there to protect the First Amendment.<sup>19</sup>

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<sup>13</sup> *Man Raises Eyebrows Carrying Rifle Through Atlanta Airport*, WSB-TV 2 ATLANTA (June 2, 2015), <http://www.wsbtv.com/news/news/local/man-raises-eyebrows-carrying-gun-through-atlanta-a/nmTFS>.

<sup>14</sup> Kevin Killeen, *Zoo Takes Legal Action to Block Gun Protestors*, CBS ST. LOUIS (June 12, 2015), <http://stlouis.cbslocal.com/2015/06/12/gun-protestors-plan-to-march-through-st-louis-zoo/>; *Gun-Rights Activist Questions Saint Louis Zoo's Firearms Ban*, CBS ST. LOUIS (June 9, 2015), <http://stlouis.cbslocal.com/2015/06/09/gun-rights-activist-questions-st-louis-zoos-firearms-ban>.

<sup>15</sup> Sara Sidner & Ed Payne, *Mohammed Cartoon Contest: Protest Held Outside Phoenix Mosque*, CNN (May 30, 2015), <http://www.cnn.com/2015/05/29/us/mohammed-cartoon-contest/index.html>.

<sup>16</sup> Evan Wyloge, *Hundreds Gather in Arizona for Armed Anti-Muslim Protest*, CNN (May 30, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/05/30/hundreds-gather-in-arizona-for-armed-anti-muslim-protest>.

<sup>17</sup> Sidner & Payne, *supra* note 15.

<sup>18</sup> Catherine Shoichet & Michael Pearson, *Garland, Texas, Shooting Suspect Linked Himself to ISIS in Tweets*, CNN (May 4, 2015), <http://www.cnn.com/2015/05/04/us/garland-mohammed-drawing-contest-shooting/index.html>; Holly Yan, *Texas Attack: What We Know About Elton Simpson and Nadir Soofi*, CNN (May 5, 2015), <http://www.cnn.com/2015/05/05/us/texas-shooting-gunmen/index.html>.

<sup>19</sup> *See, e.g.*, Michael Cantrell, *This Cartoon Explains the Reason the Second Amendment Exists PERFECTLY*, YOUNG CONSERVATIVES (May 29, 2015), <https://www.youngcons.com/this-cartoon-explains-the-reason-the-second-amendment-exists-perfectly>. The Second Amendment Foundation has presented a similar line of argument in Second Amendment litigation. *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Preliminary and/or Permanent Injunction at 9-10, *Shepard v. Madigan*, 863 F. Supp. 2d 774 (S.D. Ill. 2011) (No. 11-cv-00405) ("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,

Ultimately, what the “draw Mohammed” rally demonstrates is how drastically the right to “keep and bear arms” has transformed. From the perspective of the armed protestors and many contemporary gun rights advocates, the Second Amendment was placed in the Bill of Rights to ensure all other constitutional rights and civil liberties were followed.<sup>20</sup> Gun rights advocates also perceive the Second Amendment as guaranteeing the right to repel force with armed force should the force occur in private or public. As NRA Executive Vice President Wayne LaPierre often quips, “[t]he only thing that stops a *bad guy* with a gun is a *good guy* with a gun.”<sup>21</sup>

What this Article sets forth to uncover is how we got to this point. It does so by exploring historical developments in the law and armed carriage from the fourteenth century to the present. Part I provides the historical backdrop of the law and armed carriage from the fourteenth century until the end of the eighteenth century.<sup>22</sup> Part II discusses developments in the law and armed carriage throughout the nineteenth century.<sup>23</sup> Part III continues the discussion from the early twentieth century to the modern era, with a particular focus as to how pro-gun organizations and supporters came to view the Second Amendment as embodying a right to armed carriage in the

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personal liberty, and private property.’ . . . Inasmuch as threats to liberty, security, and property know no bounds, a right to arms limited to the home plainly would have been insufficient to meet its high purposes.”) (internal citations omitted).

<sup>20</sup> See, e.g., Nick Wing, *Louie Gohmert: Second Amendment Is Necessary Because . . . Sharia Law?*, HUFFINGTON POST (Feb. 21, 2013), [http://www.huffingtonpost.com/2013/02/21/louie-gohmert-second-amendment\\_n\\_2735971.html](http://www.huffingtonpost.com/2013/02/21/louie-gohmert-second-amendment_n_2735971.html). This kind of rhetoric began appearing in the 1990s. See, e.g., Wayne LaPierre, *America’s First Freedom*, AM. RIFLEMAN, Dec. 1997, at 8 (“I say that the Second Amendment is, in order of importance, the first amendment. It is America’s First Freedom, the one right that protects all the others. Among freedom of speech, of the press, of religion, of assembly, of redress of grievances, it is the first among equals. The right to keep and bear arms is the one right that allows ‘rights’ to exist at all.”).

<sup>21</sup> David Nakamura & Tom Hamburger, *Put Armed Police in Every School, NRA Urges*, WASH. POST (Dec. 21, 2012), [https://www.washingtonpost.com/politics/put-armed-police-officers-in-every-school-nra-head-says/2012/12/21/9ac7d4ae-4b8b-11e2-9a42-d1ce6d0ed278\\_story.html](https://www.washingtonpost.com/politics/put-armed-police-officers-in-every-school-nra-head-says/2012/12/21/9ac7d4ae-4b8b-11e2-9a42-d1ce6d0ed278_story.html) (emphasis added); see also *Sheriff Calls on America’s “Good Guys” to Shoot “Bad Guys,”* CBS NEWS (Dec. 8, 2015), <http://www.cbsnews.com/news/florida-sheriff-wayne-ivey-arming-citizens-goes-viral> (Brevard County, Florida, Sheriff Wayne Ivey calling on armed citizens to take an active role in shootings “until the cavalry arrives.”).

<sup>22</sup> See *infra* notes 26–154 and accompanying text. Part I is a supplement to and consolidation of previous scholarship on the law and armed carriage from the fourteenth through the late eighteenth century. Part I also contains corrections and clarifications to any errors in previous scholarship.

<sup>23</sup> See *infra* notes 155–288 and accompanying text. Part II is a supplement to and consolidation of previous scholarship on the law and armed carriage during the nineteenth century. Part II also contains corrections and clarifications to any errors in previous scholarship.

public concourse.<sup>24</sup> Lastly, Part IV brings together Parts I through III and addresses why the history of the law and armed carriage matters today.<sup>25</sup>

#### I. THE ANGLO-AMERICAN ORIGINS OF THE LAW AND ARMED CARRIAGE

In virtually any discussion as to the Constitution's meaning, purpose, and scope, it is common to explore the intentions and understanding of those that drafted it.<sup>26</sup> This exploration is usually accomplished by interpreting the contemporaneous meaning of the text in question, understanding the remedy or restriction the text sought to provide, and examining historical practice both before and after the Constitution's ratification.<sup>27</sup> Such an exploration also requires understanding the Anglo origins of American constitutionalism, as well as the development of the Anglo-American common law.<sup>28</sup>

As it pertains to the Second Amendment, understanding the Anglo origins is of particular significance given that Article VII of the 1689 Declaration of Rights<sup>29</sup> was in part the inspiration for including the right to "keep and bear arms" within the Bill of Rights.<sup>30</sup> Logically, given that the Framers borrowed the right to arms from their

<sup>24</sup> See *infra* notes 289–561 and accompanying text.

<sup>25</sup> See *infra* Parts I, II & III.

<sup>26</sup> This enterprise has been categorized under many subheadings, to include historicism, intentionalism, interpretivist history, historical narrative, and originalism. For different scholarly approaches, see, for example LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1977); Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965); Paul Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); John Philip Reid, *Legal History*, 1966 ANN. SURV. AM. L. 669; Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1987); Charles E. Wyzanski, Jr., *History and Law*, U. CHI. L. REV. 237 (1959).

<sup>27</sup> For the most recent Supreme Court opinions applying this approach, see *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *NLRB v. Noel-Canning*, 134 S. Ct. 2550 (2014).

<sup>28</sup> See, e.g., *Ex Parte Grossman*, 267 U.S. 87, 109 (1925) (stating "the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted"); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 52 BOS. U. L. REV. 212 (1972). For recent scholarship discussing the importance of the common law when exhuming the Constitution's historical meaning, see Kunal M. Parker, *Law "In" and "As" History: The Common Law in the American Polity*, 1 U.C. IRVINE L. REV. POL'Y 587 (2011); Lorianne Updike Toler et al., *Pre-Originalism*, 36 HARV. J.L. & PUB. POL'Y 277 (2012).

<sup>29</sup> 1 W. & M., sess. 2, c. 2, art. VII (1688) (Eng.) ("That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.").

<sup>30</sup> See generally ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS [1803] 238–39 (Clyde N. Wilson ed., 1999); 2 ST. GEORGE

English ancestors, one would assume they also borrowed and understood the ideological and philosophical restrictions on the right.<sup>31</sup> At the same time, one must proceed cautiously when importing English law into American constitutionalism.<sup>32</sup> The fact of the matter is there were instances where the Framers sought to remedy the defects of the English system.<sup>33</sup>

However, this problem does not seem to present itself in terms of the law and armed carriage, for the Statute of Northampton's prohibition on carrying dangerous weapons in the public concourse was alive and well in American law both before and after the Constitution's ratification. Initially signed into law in 1328, the Statute of Northampton stipulated that no person—except government officials and those under the license of government—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>34</sup> Violation of the Statute was a misdemeanor resulting in forfeiture of arms and up to thirty days imprisonment.<sup>35</sup>

The Statute of Northampton was of such importance that its tenets survived for over 500 years, with states such as Massachusetts, North Carolina, and Virginia recognizing it after the ratification of the Constitution.<sup>36</sup> In Massachusetts, for

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TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 143 n.40 (Phila., William Young Birch & Abraham Small 1803); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (Philadelphia, Philip H. Nicklin, 2d ed. 1829); James Madison, Member of the U.S. House of Representatives, Notes for Speech in Congress (June 8, 1789), <http://consourse.org/document/notes-for-speech-in-congress-1789-6-8>. It is worth noting there is historical disagreement as to what extent the English Declaration of Rights influenced the American Bill of Rights, particularly the Second Amendment. See Kenneth R. Bowling, “A Tub to the Whale”: *The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988); see also Lois G. Schworer, *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, 225 (Carl T. Bogus ed., 2000).

<sup>31</sup> See, e.g., James Stoner, *Why You Can't Understand the Constitution Without the Common Law*, LIBR. L. & LIBERTY (Dec. 2, 2012), <http://www.libertylawsite.org/liberty-forum/why-you-cant-understand-the-constitution-without-the-common-law>.

<sup>32</sup> See Richard L. Aynes, *McDonald v. City of Chicago, Self-Defense, the Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL'Y 181, 195 (2011); see also WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

<sup>33</sup> Perhaps the greatest distinction between the English and the United States Constitution is the latter's republican structure. 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, 523-32 (2011).

<sup>34</sup> See 2 Edw. 3, c. 3 (1328) (Eng.); accord 20 Rich. 2, c. 1 (1396-97) (Eng.).

<sup>35</sup> *Id.*

<sup>36</sup> The first appearance of the Statute of Northampton in Massachusetts's law dates back to 1692. See ACTS AND LAWS PASSED BY THE GREAT AND GENERAL COURT OF ASSEMBLY OF THEIR MAJESTIES PROVINCE OF THE MASSACHUSETTS-BAY 18 (1692) (“That every Justice of the Peace . . . may cause to be Staid and Arrested all . . . [that] shall Ride, or go Armed offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing



instance, the law reaffirmed the Justice of the Peace's common-law power to stay and arrest "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth . . . ."<sup>37</sup> North Carolina's restatement of the Statute of Northampton began by listing the common exceptions to the rule—government officials in performance of their duty and the hue and cry—then stipulated that no one shall bring "force in an affray of peace, *nor* to go *nor* ride armed by day *nor* by night, in fairs, markets, *nor* in the presence of the King's Justices, or other ministers, *nor* in no part elsewhere . . . ."<sup>38</sup> Meanwhile, Virginia's restatement of the Statute differed

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their Office, or elsewhere, By Night or by Day, in Fear or Affray of Their Majesties Liege People . . ."). Virginia and North Carolina seem to have adopted the Statute of Northampton in light of their legislatures importing English law into their respective legal systems. See PATRICK J. CHARLES, *HISTORICISM, ORIGINALISM, AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE* 74-75 (2014). Before the American Revolution, New Hampshire also recognized the Statute of Northampton. See ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND 2 (1759) ("And every justice of the peace within this province, may cause to be stayed and arrested, all . . . who shall go armed offensively . . . And upon view of such justice, concession of the offender, or legal proof of any such offence, the justice may commit the offender to prison, until he or she find such surities of the peace and good behavior . . . and cause the arms or weapons so used by the offender, to be taken away . . .").

<sup>37</sup> 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).

<sup>38</sup> FRANCOIS-XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 60-61 (Newbern 1792) (emphasis added). In a recent article, David B. Kopel contests whether in fact North Carolina adopted the Statute of Northampton and asserts that the only restriction on going armed was applicable to slaves. See David B. Kopel, *The First Century of Right to Arms Litigation*, GEO. J.L. & PUB. POL'Y (forthcoming 2016). What Kopel overlooks is that in 1776 the North Carolina adopted a resolution stipulating that, "all such Statutes, and such Parts of the Common Law . . . not destructive or, repugnant to, or inconsistent with, the Freedom and Independence of this States . . . shall endure, continue, and be in Force . . ." THE JOURNAL OF THE PROCEEDINGS OF THE PROVINCIAL CONGRESS OF NORTH CAROLINA, HELD AT HALIFAX THE 12<sup>TH</sup> DAY OF NOVEMBER, 1776 73 (James Davis ed., 1776). One of these statutes would have been the Statute of Northampton, which was born out of the common law. See, e.g., JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 13 (1774); JAMES IREDELL, LAWS OF THE STATE OF NORTH-CAROLINA 70 (1791) (showing the legal tenets embodied by the Statute of Northampton were part of the constable's oath).

Kopel's criticism of this author is not limited to the North Carolina statute. It extends to all of this author's historical findings on the Statute of Northampton. According to Kopel, the Statute of Northampton was "primarily concerned with armed nobles frustrating the judicial process," and in no way restricted the general carriage of dangerous weapons in public. Kopel, *supra* note 38, at 7. However, in coming to this conclusion, Kopel omits the Statute of Northampton's subsequent enforcement and over 300 years of history—history that directly contradicts Kopel's narrow characterization. An examination of this evidence reveals the Statute was enforced as a prohibition on carrying dangerous weapons in the public concourse. Compare *id.*, with Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 12-23 (2012) (text accompanying footnotes). There are indeed other methodological and accuracy problems with Kopel's history on the Statute of Northampton and those are addressed throughout Part I.

slightly. Drafted by Thomas Jefferson and presented to the General Assembly by James Madison,<sup>39</sup> Virginia began with the exceptions to the rule, but incorporated different operative language by stipulating that no one should bring “force and arms” to government officials, “nor go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country . . . .”<sup>40</sup>

When the ideological, philosophical, and political origins of the American Revolution are considered it is not at all surprising that some state governments expressly recognized the Statute of Northampton.<sup>41</sup> It was immediately following the publication of the Declaration of Independence that the constitutions of Maryland, Delaware, New Jersey, and New York each declared the common law of England was still in force, as well as those English statutes not repugnant to the respective state’s constitution or laws.<sup>42</sup> North Carolina, Vermont, and Virginia enacted similar laws to this effect.<sup>43</sup> Simply put, much of the English legal system was alive and well in the early republic.

Given the survival and existence of the Statute of Northampton in American law, even after the ratification of the Constitution, one would logically presume the Founding generation did not perceive the preparatory carrying of firearms for self-defense in public places to be a constitutional right.<sup>44</sup> This presumption is amplified by the fact that late eighteenth-century law dictated a duty to retreat and the need to prevent needless death.<sup>45</sup> But those that subscribe to the Standard Model view of the Second Amendment proclaim the Statute of Northampton can only be read as applying to the “carrying arms in ways that caused public terror.”<sup>46</sup> In making this claim, Standard Model writers have never provided sufficient evidence, at least in

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<sup>39</sup> 72 A Bill Forbidding and Punishing Affrays, Comm. of the Va. Assembl. (June 18 1779), <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0072>.

<sup>40</sup> A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 33 (Augustine Davis, 1794) (emphasis added).

<sup>41</sup> The American Revolution was a largely a dispute over English rights, privileges, and liberty. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1956).

<sup>42</sup> CHARLES, *supra* note 36, at 73-74.

<sup>43</sup> *Id.*

<sup>44</sup> Of course, the Founding generation understood self-defense to be a *natural right*. This is not to say, however, they viewed the preparatory carrying of dangerous weapons in public places a *constitutional right*—that is the legislature could not regulate the carriage of dangerous weapons in the public concourse to prevent affrays and injuries.

<sup>45</sup> See Patrick J. Charles, *The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy*, 41 FORDHAM URB. L.J. CITY SQUARE 10, 25-26 (2013); see also RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 3-5 (1991); Garrett Epps, *Any Which Way But Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American “Retreat Rule,”* 55 L. & CONTEMP. PROBS., 303, 307-08 (1992).

<sup>46</sup> See, e.g., 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. L.J. 199, 205 (2011); David B. Kopel & Clayton E. Cramer, *State Standards of Review for the Right to the Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1127, 1133-34 (2010); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009).

total historical context, to support it. It is due to this faux-historical characterization that Standard Model writers have concluded that by the late eighteenth century there were no laws regulating “peaceful carrying [of firearms] for self-defense or otherwise.”<sup>47</sup>

However, historical claims such as this contradict the evidentiary record.<sup>48</sup> To begin, it should be noted that prohibitions on going armed in the public concourse actually predated the Statute of Northampton and developed out of the common law in the mid-thirteenth century.<sup>49</sup> In the years that immediately followed, a number of royal proclamations were issued to enforce this rule of law.<sup>50</sup> In 1320, one proclamation was issued in the town of Oxford following armed assaults on the university’s clerks, scholars, and masters. The chancellor requested the “King’s peace” be enforced and the “bearing of arms should be completely forbidden, by the laity as well as clerks, and that the chancellor, in default of the mayor, may punish them on all occasions which are necessary.”<sup>51</sup> The king’s council replied and instructed the Mayor to “forbid any layman *except town officials* to wear arms in the town.”<sup>52</sup> On April 28, 1326, another proclamation was issued by Edward II “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 keeps of his peace and delivered to the nearest galos . . . .”<sup>53</sup>

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<sup>47</sup> Amicus Brief of Academics for the Second Amendment in Support of Petitioners at 16-17, *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (No. 12-845); *see also* Brief of Amici Curiae Historians, Legal Scholars, and CRPA Foundation In Support of Appellees and in Support of Affirmance at 4, *Wrenn v. District of Columbia*, 808 F.3d 81 (D.C. Cir. 2015) (No. 15-7057); Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 *ENGAGE* 30, 30 (2012).

<sup>48</sup> The laws touching upon the discharging of firearms alone shows the emphasis the Founding generation placed on preventing injury and ensuring the public safety. *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.* 1821, 1833-35 (2011).

<sup>49</sup> 2 *FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 583 (1895).

<sup>50</sup> Charles, *supra* note 38, at 11-13 and accompanying footnotes.

<sup>51</sup> Petition of the Chancellor, Masters and Scholars of the University of Oxford to the King and King’s Council (1320) (Manuscripts Division, British Library, London, UK) (on file with author). The petition was translated and transcribed by the joint efforts of Tessa Webber and Judy Weiss, both of whom are faculty at the University of Cambridge.

<sup>52</sup> *Id.* (emphasis added); *see also* *COLLECTANEA: THIRD SERIES* 119 (Oxford, Clarendon Press 1896).

<sup>53</sup> *See* 4 *CALENDAR OF CLOSE ROLLS, EDWARD II, 1323-1327* 559-70 (Apr. 28, 1326, Kenilworth) (H.C. Maxwell-Lyte ed., 1898). Edward II issued a similar proclamation a month earlier. *See id.* at 547-52 (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 THE PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364* 11-37 (A.H. Thomas ed., 1926) (“no man go armed by night or day, save officers and other good men of the City assigned by the Mayor and Aldermen in their wards to keep watch and preserve the peace, under penalty of forfeiture of arms and imprisonment”); *id.* (“The bearing

Edward II would end up fleeing in the midst of social and political turmoil.<sup>54</sup> But two years later, Parliament codified these proclamations as part of the Statute of Northampton.<sup>55</sup> The Statute was crucial in extending the King's courts of justice and provided the basis of English legal reform for centuries to come.<sup>56</sup> It purged corruption within local government, unified the kingdom under a body of law, and ensured the public peace was kept.<sup>57</sup> In terms of the Statute's enforcement, it was enforced to prevent crime, murder, and breaches of the peace.<sup>58</sup> It prohibited both bringing force in affray and the carrying of dangerous weapons in the public concourse.<sup>59</sup> The prohibition on being armed in the public concourse was particularly enforced throughout London and its suburbs.<sup>60</sup> In 1351 for instance,

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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>54</sup> For a history discussing this, see Claire Valente, *The Deposition and Abdication of Edward II*, 113 ENG. HIST. REV. 852, 853-81 (1998).

<sup>55</sup> 2 Edw. 3, c. 3 (1328) (Eng.).

<sup>56</sup> Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 ENG. HIST. REV. 842, 850 (1993).

<sup>57</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, 21-48 (1929) (discussing the legal reforms to ensure the peace at the local level as the result of the Statute of Northampton).

<sup>58</sup> Charles, *supra* note 38, at 12-16.

<sup>59</sup> This is stipulated within the text of the Statute of Northampton itself. 2 Edw. 3, c. 3 (1328) (Eng.) (“That *no Man great nor small*, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a cry made for Arms to keep the Peace, and the same in such places where such Acts happen,] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, *nor bring no force in affray of the peace, nor to 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 . . .*”) (emphasis added). Here lies the main distinction between this author's history and those scholars that adhere to the Standard Model. Take for instance Standard Model scholar David B. Kopel, who asserts that the Statute of Northampton was only intended to apply to “noblemen who appeared before the king or his ministers wearing armor.” Kopel, *supra* note 38, at 7. However, the Statute of Northampton's text and accompanying record of enforcement contradicts such a narrow construction. See Charles, *supra* note 38, at 12-16 and accompanying footnotes.

<sup>60</sup> See MEMORIALS OF LONDON AND LONDON LIFE, 272-73 (H.T. Riley ed., 1868); see also *id.* at 192 (“it is ordained and granted by the Mayor, Alderman, the Commonalty, 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 the said city, on pain of imprisonment, and of losing the arms”); *id.* at 172 (“no person, native or stranger, shall go armed in the same city, or shall carry arms by day or by night, on pain of imprisonment”); 1 CALENDAR OF THE PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364, at 143-64 (Dec. 19, 1343). For the first legal treatise summarizing prohibitions on going armed in London and its suburbs, see LIBER ALBUS: THE WHITE BOOK OF THE CITY OF LONDON 229, 335-36, 555, 556, 558, 560, 580 (Henry Thomas Riley ed., 1861).

Edward III issued a proclamation reminding his subjects it was unlawful to “go armed” with dangerous weapons “within the City of London, or within the suburbs, or in any others places between the said city and the Palace of Westminster . . . except the officers of the King, according to the form of the Statute made at Northampton.”<sup>61</sup>

In 1396, the Statute of Northampton was reaffirmed and slightly amended by Richard II, with the penalty being the forfeiture of arms or a fine and possible imprisonment.<sup>62</sup> After Richard II’s death the Statute was reissued in one form or another by subsequent monarchs to include Henry IV, Henry VI, Elizabeth I, and James I.<sup>63</sup> Elizabeth I’s reign is particularly significant given the Statute’s prohibition extended to modern weaponry, and included firearms, pistols and concealable weapons.<sup>64</sup> James I reinforced this rule of law,<sup>65</sup> but it was Elizabeth I’s

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<sup>61</sup> “Royal Proclamation as to the Wearing of Arms in the City, and at Westminster; and as to Playing at Games in the Palace at Westminster,” MEMORIALS OF LONDON AND LONDON LIFE, *supra* note 60, at 268-69, 273.

<sup>62</sup> 20 Ric. 2, c. 1 (1396-97) (Eng.). In a previous article, this author wrote Richard II amended the Statute of Northampton by “expressly exempt[ing] government officers from carrying arms . . . .” See Charles, *supra* note 38, at 15. This statement needs correction and qualification. The exemption for government officials was already in the Statute of Northampton. 2 Edw. 3, c. 3 (1328) (Eng.). However, Richard II did reaffirm it, and therefore both the Statute of Northampton and Richard II’s statute provided an exemption for government officials and those assisting them in executing their duties.

<sup>63</sup> Charles, *supra* note 38, at 16-17, 20-23.

<sup>64</sup> See CALENDAR OF STATE PAPERS DOMESTIC: ELIZABETH, 1601-3, WITH ADDENDA 1547-65, at 214 (June 1602) (Mary Anne Everett Green ed., 1870); see also BY THE QUEENNE ELIZABETH I: A PROCLAMATION AGAINST THE CARRIAGE OF DAGS, AND FOR REFORMATION OF SOME OTHER GREAT DISORDERS 1 (Christopher Barker, London 1594); BY THE QUEENNE ELIZABETH I: A PROCLAMATION AGAINST THE COMMON USE OF DAGGES, HANDGUNNES, HARQUEBUZES, CALLIERS, AND COTES OF DEFENCE 1 (Christopher Barker, London 1579); INSTRUCTIONS TO THE CONSTABLES OF RYE UPON THE LATE PROCLAMATION AGAINST THE COMMON USE OF “DAGGES, HANDGUNNES, HARQUEBUTS, CALIVERS AND COATS OF DEFENCE” (The National Archives, East Sussex Record Office 1578-1579) (on file with author) (“Ye are to have a dilligent care to suche as ye shall see to carry any dagges, pistolles, harquebusies, calivers and suche leike in the stretes or other places within the liberties (excepte at the days of common musters and to the places of exercise for the shot) and if ye fynde eny to carry eny such peces to stae them and to cease the said peces, and them to present to Mr. Maior or one of the jurates of your ward.”); BY THE QUENE [ELIZABETH I], FOR AS MUCH AS CONTRARY TO GOOD ORDER AND EXPRESSED LAWES MADE BY PARLIAMENTE IN THE XXXIII YERE OF THE RAIGNE OF THE QUENES MAJESTIES MOST NOBLE FATHER OF WORTHY MEMORY KYNG HENRY THE EIGHT 1 (1559) (“Many men do dayly...ryde with Handgonnes & Dagges, under the length of three quarters of a yarde, whereupon have folowed occasions for sundrye lewde and evyll persons, with such unlawfull Gonnes and Dagges now in time of peace to execute greate and notable Robberies, and horrible murders...Her Majestie consydyering, witht he advyse of her Counsayle, howe beneficiall a lawe the same is, and specially at this tyme moste nedefull of dewe execution, and howe negligently it is of late observed: Strayghtly therefore chargeth and commandeth, not onely all maner her loving subjects fro[m] henceforth to have good and specciall regarde to the due execution of the same Statute, and of every part thereof . . .”).

<sup>65</sup> See BY THE KING JAMES I: A PROCLAMATION AGAINST THE USE OF POCKET DAGS 1 (Robert Barker, London 1612) (“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

amendment in particular that legal commentators took notice of from the late sixteenth century through the eighteenth century. For instance, William Lambarde, arguably the most prominent lawyer of the Elizabethan period, described the Statute of Northampton in the following terms:

[I]f any person whatsoever (except the Queenes servants and ministers in her presence, or in executing her precepts, or other offices, or such as shall assist them and except it be upon Hue and Crie made to keep the peace, and that in places where acts against the Peace do happen) shall be so bold, as to go, or ride armed, by night, or by day, in Faires, Markets, or any other places: then any Constable, or any other of the saide Officers, may take such Armour from him, for the Queenes use, & may also commit him to the Gaole. And therefore, it shall be good in this behalf, for the Officers to stay and arrest all such persons as they shall find to carry Dags or Pistols, or to be appareled with privie coates, or doublets: as by the proclamation [of Queen Elizabeth I] . . . .<sup>66</sup>

Lambarde's understanding of the Statute of Northampton proved influential. He was cited, reprinted, or paraphrased by a number of prominent commentators including Abraham Fraunce, Michael Dalton, Edward Coke, William Hawkins, and others.<sup>67</sup> In the case of Michael Dalton's *The Countrey Justice*, it was the first restatement to use the word "offensively."<sup>68</sup> The word aptly spoke to how the Statute

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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 itselfe 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 Daggess, Pistols, or other like short Gunnes"); see also BY THE KING [JAMES I], A PROCLAMATION AGAINST STEELETS, POCKET DAGGERS, POCKET DAGGES AND PISTOLS 1 (Robert Barker, London 1616) ("Wherefore it being always the more principall in Our intention to prevent, then to punish, being given to understand the use of Steelets, pocket Daggess, and Pocket Dags and Pistols, which are weapons utters unserviceable for defence, Militarie practice, or other lawfull use, but odious, and noted Instruments of murther, and mischief; we doe straightly will and command all persons whatsoever, that they doe not henceforth presume to weare or carie about them any such Steelet or pocket Dagger, pocket Dagge or Pistoll . . . .").

<sup>66</sup> WILLIAM LAMBARDE, THE DUTIES OF CONSTABLES, BORSHOLDERS, TYTHINGMEN, AND SUCH OTHER LOW AND LAY MINISTERS OF THE PEACE 13-14 (1602). For Lambarde's earlier restatement, see WILLIAM LAMBARDE, EIRENARCHA: OR THE OFFICE OF THE JUSTICES OF THE PEACE, IN TWO BOOKES 134-35 (1582). For more on William Lambarde, see Wilfrid Prest, *William Lambarde, Elizabethan Law Reform, and Early Stuart Politics*, 34 J. BRITISH STUD. 464 (1995).

<sup>67</sup> Charles, *supra* note 45, at 11-17.

<sup>68</sup> MICHAEL DALTON, THE COUNTRY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 30 (1618). For the influence of Dalton's writings, see THOMAS GARDEN BARNES, SHAPING THE COMMON LAW 136-51 (2008).

of Northampton encompassed both bringing force in affray and carrying dangerous weapons in the public concourse, to include pistols and firearms.<sup>69</sup> As Dalton put it:

[The peace may be enforced to] All such as shall go or ryde armed (offensively) in Fayres, Markets, or elsewhere; or shall weare or carry any Daggess or Pistolls charged: it seemeth any Constable seeing this, may arrest them and may carrie them before the Justice of the Peace. And the Justice may binde them to the peace, yeah though those persons were so armed or weaponed for their defence; for they might have had the peace against the other persons: and besides, it striketh a feare and terror into the Kings subjects.<sup>70</sup>

What Dalton and Lambarde's restatements illuminate is that the act of carrying dangerous weapons was sufficient to amount an affray, "strike a feare"<sup>71</sup> or "striketh a feare."<sup>72</sup> As Ferdinando Pulton, the prominent Elizabethan legal editor put it, the Statute of Northampton intended "that he which in a peaceable time doth ride or goe armed, without sufficient warrant or authoritie so to doe, doth meane to breake the peace, and to doe some outrage" because the law will "always [be] ready to defend every member of the common weal[th], from taking or receiving of force or violence from others . . ."<sup>73</sup> In other words, the Statute of Northampton served "not onely to preserve peace, & to eschew quarrels, but also to take away the instruments of fighting and batterie, and to cut off all meanes that may tend in affray or feare of the people."<sup>74</sup>

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<sup>69</sup> In the 1619 edition of Dalton's treatise the word "Gunns" was added to the list of dangerous weapons as to read "Gunns, Daggess, or Pistols." MICHAEL DALTON, *THE COUNTRY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS* 31 (1619). Dalton's treatise *Officium Vicecomitum* does not mention firearms in its Statute of Northampton restatement. See MICHAEL DALTON, *OFFICIUM VICECOMITUM: THE OFFICE AND AUTHORITIE OF SHERIFS* 14 (1623) ("Also everie sherife . . . may and ought to arrest all such persons as goe or ride armed offensively, either in the presence of the sherife, or in Faires or Markets or elsewhere in affray of the Kings people, and may commit them to prison to remaine at the king's pleasure. . . and also the Sherife may seize and take away their armour to the Kinds use, and prize the same by the oaths of some present . . . And yet themselves (fcz. The Sherife and his officers) may lawfully beare armour and weapons."). However, Dalton did cite to his treatise *The Country Justice* where firearms are listed as prohibited. *Id.*

<sup>70</sup> DALTON, *supra* note 68, at 129. David Kopel oddly criticizes this author for not citing Dalton. See Kopel, *supra* note 38, at 10 n.49. In doing so, it seems Kopel failed to read this author's other writings on the Statute of Northampton where Dalton is cited extensively. See Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 *FORDHAM URB. L.J.* 1727, 1803, 1835-37 (2012); Charles, *supra* note 45, at 14-16, 18-19. Additionally, it is worth noting that Dalton's restatement on the Statute actually undercuts Kopel's historical assessment. See DALTON, *supra* note 68, at 30, 129 (showing that the Statute applied to firearms and the act of carrying by itself "striketh a feare").

<sup>71</sup> LAMBARDE, *supra* note 66, at 134-35.

<sup>72</sup> DALTON, *supra* note 68, at 129.

<sup>73</sup> FERDINANDO PULTON, *DE PACE REGIS ET REGNI VIZ* 4 (1609).

<sup>74</sup> *Id.* For more on Ferdinando Pulton's background, see Virgil B. Heltzel & Ferdinando Pulton, *Ferdinando Pulton, Elizabethan Legal Editor*, 11 *HUNTINGTON LIBR. Q.* 77 (1947).

Although Dalton and Lambarde would go on to influence a number of subsequent restatements, citations to their work are noticeably absent from Sir Edward Coke's *The Third Part of the Institutes of the Laws of England* discussion "Against going or riding armed."<sup>75</sup> Coke merely restated the Statute of Northampton's text.<sup>76</sup> He did not employ the word "offensively," nor did he list firearms as being prohibited in the public concourse. Instead, Coke differentiated between "force and armed," bringing "force in affray of the people," and the act of going and riding armed.<sup>77</sup> Still, there is nothing to suggest that Coke maintained a different view from Lambarde and Dalton given Coke correctly distinguished between the misdemeanor Statute of Northampton and the 1351 Treason Act,<sup>78</sup> which maintained a mens rea element and was to be "adjudged . . . according to the laws of the realme of old time used, and according, as the case requires."<sup>79</sup> Moreover, Coke understood and applied the general exceptions to the rule—government officials, military duty, and the hue and cry.<sup>80</sup> He even proceeded to list the castle doctrine as an exception twice, but emphasized that preparatory armed carriage did not qualify: "But he cannot assemble force, though he be extreemly threatened, to goe with him to Church, or market, or any other place, but that is prohibited by this Act."<sup>81</sup>

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<sup>75</sup> EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 160 (1644).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Compare 2 Edw. 3, c. 3 (1328) (Eng.), with 25 Edw. 3, stat. 5, c. 2, § 13 (1350) (Eng.) ("And if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, to slay him, or rob him, or to take him, or retain him till he hath made Fine or Ransom for to have his Deliverance . . . shall be judged Felony or Trespass, according to the Laws of the Land of the old Time used, and according gas the Case requireth.").

<sup>79</sup> COKE, *supra* note 75, at 160.

<sup>80</sup> *Id.* at 161.

<sup>81</sup> *Id.* at 161-62. Coke even provided a 1350 case where Sir Thomas Figet wore armor in Westminster to "safeguard" his life, yet was prosecuted under the Statute of Northampton. *Id.* at 162. At no point did Coke characterize Figet as having worn the armor recklessly, unusually, with the intent to terrify or otherwise. Instead Figet forfeited the armor due to the act of wearing it concealed and was imprisoned. *Id.* As John Rushworth summarized the case in 1659: "Sir Thomas Figet went armed in the Palace, which was shewed to the Kings Councell; wherefore he was taken and disarmed before the chief Justice, shard and committed to the prison, and he could not be bayled till the King sent his pleasure; and yet it was shewed, that the Lord of T. threatened him." JOHN RUSHWORTH, *HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE WEIGHTY MATTERS IN LAW*, Appendix 26 (1659); see also PULTON, *supra* note 73, at 4 ("And shortly after, the [Statute of Northampton] was put in execution; so a knight was attached and arraigned in the Kings Bench, for that hee did weare armor under his upper garment in the kings palace, and in Westminster hall; who pleaded that there was debate between him and another knight, who did that weeke strike him, and yet did menace him, and that for feare of further peril, and to save his life hee did weare the same armour; But this was adjudged no plea, for the court did award, that hee should forfeit his armour, and be committed to the marshalsey."). Of note in the Figet case was a procedural error. It seems that Figet was fined and imprisoned before ever being arraigned, indicted, and convicted. See JOSEPH KEBLE, *AN EXPLANATION OF THE LAWS AGAINST RECUSANTS, &C. ABRIDGED* 91



(1681); *see also* WILLIAM CAWLEY, THE LAWS OF Q. ELIZABETH, K. JAMES, AND K. CHARLES THE FIRST CONCERNING JESUITES, SEMINARY PRIESTS, RECUSANTS, &C. 97-98 (1680).

David B. Kopel arrives at a much different understanding of Figet's case. Relying on a sixteenth-century English treatise written in French, titled *Office et Auctoritie de Justices de Peace*, Kopel infers that the case was understood as making concealed carry permissible because it did not terrify the people. *See* Kopel, *supra* note 38, at 11 n.50. Until 1538, the treatise was compiled, written, and updated by Anthony Fitzherbert. However, beginning in 1583, Richard Crompton became the editor. In the 1584 edition, Crompton published the following summary of Figet's case:

Tho. Figet Chivaler ale armed south les drapes al Welt. sur que fuit attache, et il dit que un Sir J. Trevet luy manace, et pur sa vie saver il estoit arme, et non obstant ses armes fueront forf. *per* agarde, et fuit prise, et il fuit commaunde al Marshal, et cestuy que luy manace vient, et fuit commaund sur quant que il poit forfait, que il ne ferra male al dit Sir Thomas, 24. C.3.fo.33. *per hoc* il appert, que home ne alera armed overtment, comment que soit pur son defence: Mes il semble que home poit aller armed oue privie coate de plate south son coate, ou &c. car ces ne poit encuter ascun feare al people, *Quere tamen*.

ANTHONY FITZHERBERT, L'OFFICE ET AUCTHORITIE DE JUSTICES DE PEACE 58 (Richard Crompton ed., 1584). Curious of Kopel's historical find and claim, this author reached out to historian Elisa Jones for a full translation. Here is what she provided:

Thomas Figet Chivaler went clad in armor under his weltd garment, whence coming unclasped, and he said that one Sir J. Trevet threatens him, and in order to save his life he was armored, and not withstanding that his armor will be forfeited *per* observation, and avoids arrest, and he avoids being committed to the charge of the Marshal, and this man that threatened him approaches, and avoids arrest in regard to inciting crime, as he will not hurt the aforementioned Sir Thomas, 24. C.3.fo.33. *per hoc* [through this] it seems, that a man will not go in armor publicly, even if it is for his defense: But it appears that a man is able to go armored in the private coat of plate under his coat, or etc. because this is not able to incite any fear in the people, *Quere tamen*.

Elisa Jones to Patrick J. Charles, Translation of *L'Office & Authority de Justices de Peace*, December 7, 2015 (on file with author). The translation is significant for a number of reasons. First, Crompton's restatement of Figet's case contradicts that of Coke, Rushworth, and Keble, and therefore seems to have been written in error. This error is amplified by the fact that the law regulated the carriage and use of concealable weapons, both before and after the publication of Crompton's 1584 edition. *See supra* notes 64 & 65 and accompanying text. Second, despite Crompton concluding that wearing armor concealed did not violate the Statute of Northampton, no subsequent legal commentator arrived at a similar conclusion. Third, in the early sixteenth-century English translations of Fitzherbert's treatise, the Statute of Northampton was restated in broad terms, with no concealable exception. *See* ANTHONY FITZHERBERT, THE NEWE BOKE OF JUSTICES OF PEAS, MADE BY ANTHONY FITZHERBERT JUDGE, LATELY TRANSLATED OUT OF FRENCH INTO ENGLISHE 47 (1538) ("The Shyreffe may arrest men rydyng or goyng armyd, and comitte them to pryson, there to rmayne at the kynges pleasure."); *see also* ANTHONY FITZHERBERT, THE NEWE BOKE OF JUSTYCES OF PEAS, BY A.F.K. LATELY TRANSLATED OUT OF FRENCH INTO ENGLISHE 64 (1541) ("None shal go nor ryd armid by day nor by nyght, and payne to lea[ve] their armour to the king"); *id.* at 346 ("Constables in the towne where they beare office, may arrest me[n] that go or ryde armed in rayres, or markettes by daye or by nyght, and take their armour as forfayt to the kyng, and empryson them at the kynges pleasure."); ANTHONY FITZHERBERT, IN THIS BOKE IS CONTEYNEED THE OFFYCES OF SHYREFFES, BAILLYFFES, OF LIBERTYES, ESCHETOURS, COSTABLES AND CORONERS 2 (1543) ("The shyreffé may arreste men rydyng or goyng armyd, and comytte them to pryson, there to rmayne at the kynges pleasure"); *id.* at 97 ("Constables

Coke was not the only seventeenth-century legal commentator to make the important legal distinction between armed self-defense in public and private. Joseph Keble, an English barrister and law reporter, expressed a similar understanding:

[I]f a Man, hearing that another will fetch him out of his House and beat him, do assemble company with force, it will be no unlawfull Assembly, for his House is his hold and Castle. . . . But if he be only threatened that he shall be beaten, if he go to the Market, then may he not assemble Company for his aid [i.e. raise the hue and cry], because he needeth not to go thither, and he may provide for himself by Surety of the Peace [i.e. an appeal to sheriff, constable, or justice of the peace for protection] . . . .<sup>82</sup>

As it pertained to the law and armed carriage, Keble borrowed primarily from Lambarde and his first restatement of the Statute of Northampton was as follows:

Yet may an Affray be, without word or blow given; as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon other that be not armed as he is; and therefore both the Statutes of Northampton (2 Ed. 3. 3.) made against wearing Armour, do speak of it, by the words, *Affray del pais & in terrorem pouli, surety*.<sup>83</sup>

Keble's reference to arms "not usually worn" did not mean that individuals maintained a *right* to go armed with "common weapons" as some Standard Model writers have concluded.<sup>84</sup> Instead, the phrase "not usually worn" conveys that there were instances where a person was permitted to carry arms in public, the most common being when "the Sheriff, or any of his Officers, for the better Executing of their Office . . . carry with them Hand-guns, Daggers, or other Weapons, invasive or defensive," notwithstanding such prohibitions.<sup>85</sup> There were indeed other

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in the townes where they beare office may arreste me[n] that goo or ryde armed in fayres, or markettes by daye or by nyght, and take theyr armour as forfayt to the kyng and imprison them at the kiges pleasure."); ANTHONY FITZHERBERT, IN THIS BOKE IS CONTEYNED THE OFFYCE OF SHYREFFES, BAILLIFFES OF LIBERTIES, ESCHETOURS, COSTABLES AND CORONERS 2 (1545) ("The Shyreffe may arrestte men rydyng or goying armyed, and comyte them to pryson, there to remayne at the kynges pleasure."); *id.* at 99 ("Constables in the townes where they beare office, may arreste me[n] that go or ryde armed in fayres, or markets by daye or by nyght, and take theyre armour as forfayte to the kyng and imprison them at the kings pleasure."). The overall point to be made is Crompton's interpretation of Figet's case is historically unsubstantiated. Thus, the same is true of Kopel's account of the law of armed carriage by the late sixteenth century.

<sup>82</sup> JOSEPH KEBLE, AN ASSISTANCE TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 646 (2d ed., 1689). For the rule of law concerning a surety of the peace, see *id.* at 410 (Justices "will not grant any Writ for Surety of the Peace, without making an Oath that he is in fear of bodily harm. Nor the Justices of the Peace ought not to Grant any Warrant to cause a man to find Surety of the Peace, at the request of any Person, unless the Party who requireth it, will make an Oath, that he requireth it for safety of his Body, and not for malice.").

<sup>83</sup> KEBLE, *supra* note 82, at 147.

<sup>84</sup> See, e.g., Volokh, *supra* note 46, at 101.

<sup>85</sup> KEBLE, *supra* note 82, at 711.

exceptions—militia service, the hue and cry, and watchman duty—but all were regulated by statute and at the license of government. To read Keble’s treatise otherwise would make his reference to striking “a fear upon other that be not armed as he is” superfluous.<sup>86</sup> It also conflicts with the second portion of Keble’s treatise describing the Statute of Northampton and the rule of law pertaining to armed carriage:

*Again, if any person whatsoever (except the Kings Servants and Ministers in his presence, or in executing his Precepts or other Officers, or such as shall assist them, and except it be upon the Hue-and-cry make to keep the peace, &c.) shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places . . . then any Constable, or any of the said Officers may take such Armour from him for the Kings use, and may also commit him to the Goal; and therefore it shall be good in this behalf for these Offices to stay and Arrest all such persons as they shall find to carry Dags or Pistols, or to be appareled with Privy-Coats or Doublets . . .*<sup>87</sup>

The English commentators that followed each restated the Statute of Northampton in different terms, but cited to or paraphrased from Lambarde’s, Dalton’s, and Coke’s treatises. For instance, William Sheppard included the prohibition on firearms, but omitted the word *offensively*.<sup>88</sup> George Meriton and Robert Gardiner included the word *offensively* and referenced the prohibition on firearms.<sup>89</sup> Meanwhile, John Layer omitted any reference to firearms, yet included

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

<sup>87</sup> *Id.* at 224.

<sup>88</sup> See WILLIAM SHEPPARD, THE OFFICES AND DUTIES OF CONSTABLES, BORSHOLDERS, TYTHING-MEN, TREASURERS OF THE COUNTY-STOCK, OVERSEERS FOR THE POORE, AND OTHER LAY-MINISTERS 39-40 (1641).

<sup>89</sup> ROBERT GARDINER, THE COMPLEAT CONSTABLE 18-19 (1692); GEORGE MERITON, A GUIDE FOR CONSTABLES, CHURCHWARDENS, OVERSEERS OF THE POOR, SURVEYORS OF THE HIGHWAYS, TREASURERS OF THE COUNTY STOCK, MASTERS OF THE HOUSE OF CORRECTION, BAYLIFFS OF MANNOURS, TOLLTAKERS IN FAIRS, & C. 22-23 (1669). David B. Kopel oddly criticizes this author for citing to George Meriton and Robert Gardiner’s restatements on the Statute of Northampton. See Kopel, *supra* note 38, at 12 n.54. What Meriton and Gardiner’s restatements confirm is that the Statute of Northampton prohibited the carrying of firearms in the public concourse without the license of government. To be clear, Meriton and Gardiner’s restatements coincide with other legal commentators such as William Lambarde and Michael Dalton. See DALTON, *supra* note 68, at 129; LAMBARDE, *supra* note 66, at 134-35. Kopel then inaccurately claims that the 1708 edition of Gardiner’s treatise did not require constables to disarm those that went armed with dangerous weapons in the public concourse. See Kopel, *supra* note 38, at 12 n.54. Yet Gardiner’s treatise clearly states that constables shall arrest “any Person [that] shall Ride or go Arm’d offensively . . . or wear or carry any Daggers, Guns or Pistols Charged . . .” ROBERT GARDINER, THE COMPLEAT CONSTABLE 18 (1708). It seems Kopel made this mistake by conflating the 1662 Militia Act with the Statute of Northampton. The former afforded government officials the power to disarm dangerous persons and Catholics. *Id.* at 68; 13 & 14 Car. 2, c.3 (1662) (Eng.); 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

the word *offensively*.<sup>90</sup> But even in Layer's case it is important to note that he listed the legal exceptions—government officials, military muster, and the assembling of the hue and cry.<sup>91</sup>

By the turn of the eighteenth century some commentators began substituting *offensive weapons* in lieu of *offensively*. The phrase, as understood in the eighteenth century, encompassed dangerous weapons such as pistols, firearms, hangers, cutlasses, and bludgeons.<sup>92</sup> For instance, in the 1707 treatise *A Compleat Guide for Justices of Peace*, John Bond wrote 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>93</sup> Bond made sure to clarify that the prohibition applied to persons "that carry Guns charged."<sup>94</sup> William Forbes also streamlined the legal principle, writing, "[b]y the *English* law, a Justice of Peace . . . may cause [to] Arrest Persons with offensive Weapons in Fairs, Markets, or elsewhere in Affray, and seize their Armour . . . ."<sup>95</sup>

What makes these restatements so important is they would go on to influence writers like Hawkins, Blackstone, and American commentators. For instance, North Carolina jurist James Davis cited to Dalton and wrote in *The Office and Authority of a Justice of the Peace* the following: "Justices of the Peace . . . may apprehend any Person who shall go or ride armed with unusual and offensive Weapons, in an Affray, or among any great Concourse of the People . . . ."<sup>96</sup> John Haywood borrowed from *Blackstone's Commentaries*, writing "riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is prohibited by statute upon the pain of forfeiture of the

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CLEV. ST. L. REV. 351, 364-68, 376-78 (2009) (showing the 1662 Militia Act was enforced to disarm "dangerous" people and "papists").

<sup>90</sup> JOHN LAYER, *THE OFFICE AND DUTIE OF CONSTABLES, CHURCHWARDENS, AND OTHER THE OVERSEERS OF THE POORE* 15-16 (1641).

<sup>91</sup> *Id.* at 16. David B. Kopel asserts this author's findings on the Statute of Northampton are inaccurate on the grounds that "watchmen" would have been armed during the night. See Kopel, *supra* note 38, at 10-11 n.49. Here, Kopel improperly conflates compulsory arms bearing—which were at the license of government—with a right to go armed in public. Compulsory arms bearing, to include watchman duty, was regulated by law. See Statute of Winchester, 13 Edw. I, St. 2 (1285) (Eng.); DALTON, *supra* note 68, at 140-41; Henry Summerson, *The Enforcement of the Statute of Winchester, 1285-1327*, 13 J. LEGAL HIST. 232 (1992).

<sup>92</sup> See Charles, *supra* note 38, at 34 n.181; see also 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 14 (16th ed. 1788) (classifying "fire arms" as "offensive weapons"); 2 LORD HENRY HOME KAMES, *SKETCHES OF THE HISTORY OF MAN* 89 (1774) (distinguishing between "offensive weapons" of war and "defensive weapons").

<sup>93</sup> JAMES BOND, *A COMPLEAT GUIDE FOR JUSTICES OF PEACE* 42 (3d ed., London 1707); *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").

<sup>94</sup> *Id.* at 43.

<sup>95</sup> William Forbes, *The Duty and Powers of Justices of Peace, in THIS PART OF GREAT-BRITAIN CALLED SCOTLAND* 26 (1707).

<sup>96</sup> DAVIS, *supra* note 38, at 13.

arms . . . .”<sup>97</sup> Meanwhile, James Wilson, in his lectures on the law, copied directly from Hawkins’s *Pleas of the Crown*, writing, “[i]n some cases, there may be 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 diffuse a terror among the people.”<sup>98</sup>

Looking at this historical evidence in its entirety one can deduce three conclusions. First, regulations pertaining to going armed in the public concourse were deeply embedded in Anglo-American law for over 500 years. Second, such regulations applied to dangerous weapons and could include firearms. A 1686 New Jersey statute, entitled *An Act Against Wearing Swords, &c.*, is one of many evidentiary sources that supports this proposition. The statute prohibited “Persons [from] wearing Swords, Daggers, Pistols, Dirks, Stilladoes, Skeines, or any other unusual and unlawful Weapons” in public because it would induce “great Fear and Quarrels” among the inhabitants.<sup>99</sup> Third, both the Statute of Northampton and the common law dictated a person would be immune from prosecution if they were carrying dangerous weapons with the license of government. This included compulsory armed carriage for militia service, watchmen, security patrols, and the hue and cry.

In contrast to these findings, those that subscribe to the Standard Model insist on a different reading of the Statute of Northampton and the common law touching upon armed carriage. They assert that the Statute only prohibited armed carriage with the “specific intent” of terrorizing the public.<sup>100</sup> This interpretation was first surmised by David I. Caplan in a study paid for by the Indiana Sportsmen’s

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<sup>97</sup> JOHN HAYWOOD, *THE DUTY AND OFFICE OF JUSTICES OF THE PEACE, AND OF SHERIFFS, CORONERS, CONSTABLES, &c.* 10 (1800).

<sup>98</sup> 2 JAMES WILSON, *THE COLLECTED WORKS OF JAMES WILSON* 1138 (Kermit L. Hall & Mark David Hall eds., 2007).

<sup>99</sup> *THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY* 289 (1758). Ultimately, what the New Jersey statute confirms is that colonial legislatures regulated armed carriage in public. Nevertheless, David B. Kopel asserts this author misreads the New Jersey statute and it could not have applied to “larger handguns.” Kopel, *supra* note 38, at 13-14 n.59. The New Jersey statute curiously does not list such an exception, but certainly it would not have prevented colonists from traveling the frontier with arms, hunting, compulsory arms bearing or taking weapons into town for repair. *See THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY, supra* note 99, at 289-90 (“Whereas there hath been great complaint by the Inhabitants of this Province, that several Persons wearing Swords, Daggers, Pistols, Dirks, Stilladoes, Skeines, or any other unusual or unlawful Weapons, by reason of which several Persons in this Province, receive great abuses, and put in great Fear and Quarrels, and Challenges made, to the great abuse of the Inhabitants of this Province . . . BE IT FURTHER ENACTED by the Authority aforesaid, that no Person or Persons after Publication hereof, shall presume privately to war any Pocket Pistol, Skeines, Stilladers, Daggers or Dirks, or other unusual or unlawful Weapons within this Province . . . BE IT FURTHER ENACTED by the Authority aforesaid, that no Planter shall Ride or go Armed with Sword, Pistol, or Dagger, excepting all Officers, Civil and Military, and Soldiers while in actual Service, as also all Strangers, Travelling upon their lawful Occasions thro’ this Province, behaving themselves peaceably.”).

<sup>100</sup> *See supra* note 46.

Council.<sup>101</sup> Relying primarily on the incomplete case summaries of *Rex v. Knight* in the *English Reports*,<sup>102</sup> Caplan asserted that although the Statute of Northampton originally “banned all carrying of arms by private persons,” by the late seventeenth century the Statute was given a “narrow reading” requiring specific intent.<sup>103</sup> A year later, Caplan’s findings were consolidated, reorganized, and published in the *Fordham Urban Law Journal*.<sup>104</sup> Caplan’s findings were then redistributed to the pro-gun masses through publications like the NRA’s *American Rifleman*.<sup>105</sup> While Caplan must be credited for being the first to advance a rather limited construction of the law and armed carriage, it was not until historian Joyce Lee Malcolm published her findings<sup>106</sup> that the “narrow reading” took firm hold in Standard Model circles.<sup>107</sup>

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<sup>101</sup> DAVID I. CAPLAN, *THE SECOND AMENDMENT: A BASIC UNDERPINNING IN THE CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES* (1975) (on file with author).

<sup>102</sup> Until the mid-eighteenth century, the *English Reports* were mostly incomplete and deemed unreliable for reconstructing cases or judicial precedent. They were neither intended to be nor viewed as comprehensive case studies. Rather, they served to instruct practitioners and students on the intricacies of pleading. See NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 52-56 (2008). For more on law reporting in England up through the seventeenth century, see L.W. ABBOTT, *LAW REPORTING IN ENGLAND 1485-1585* (1973); *LAW REPORTING IN BRITAIN: PROCEEDINGS OF THE ELEVENTH BRITISH LEGAL HISTORY CONFERENCE* (Chantal Stebbings ed., 1995).

<sup>103</sup> CAPLAN, *supra* note 101, at 2.

<sup>104</sup> David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 *FORDHAM URB. L.J.* 31 (1976).

<sup>105</sup> See David I. Caplan, *A Noted Legal Scholar Explains How . . . Gun Control Jeopardizes All Our Constitutional Rights*, *AM. RIFLEMAN*, Oct. 1979, at 30; see also *The Right to Keep and Bear Arms: An Analysis of the Second Amendment*, *AM. RIFLEMAN*, Aug. 1977, at 16.

<sup>106</sup> See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 104 (1994) [hereinafter MALCOLM, *TO KEEP AND BEAR ARMS*]; JOYCE LEE MALCOLM, *DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND* 7 (1981) [hereinafter MALCOLM, *DISARMED*]; 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); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 *HASTINGS CONST. L.Q.* 285, 293 (1983) [hereinafter Malcolm, *The Right of the People*]. In 1981, the NRA Institute for Legislative Action distributed a pamphlet on the history and meaning of the Second Amendment. In the pamphlet, the Statute of Northampton was discussed and, given the publication date, it is likely both David I. Caplan and Joyce Lee Malcom influenced its analysis on the English statute. See NRA INSTITUTE FOR LEGISLATIVE ACTION, *THE RIGHT TO KEEP AND BEAR ARMS: AN ANALYSIS OF THE SECOND AMENDMENT* 4 (1981) (“According to English Courts, Edward’s decree applied only when the individual bore his arms in such a way as to terrify the populace. The Statute presumed that the people have arms and that the occasion for their use may come at any time.”).

<sup>107</sup> See 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) (same); Nelson Lund, *The Second Amendment, Heller, and Originalist*

There is a problem, however, with taking the Standard Model interpretation seriously—there is no historical evidence, at least in the historical context, to support it. Ultimately, the Standard Model interpretation relies on a rather strained reading of *Rex v. Knight*, where in 1686 Sir John Knight was acquitted of violating the Statute of Northampton.<sup>108</sup> According to the Standard Model interpretation, James II prosecuted Knight under the Statute as part of a larger plan to disarm political dissidents, but the King’s Bench rejected interpreting the Statute in line with its text because it would “disarm law-abiding citizens.”<sup>109</sup>

First, it must be noted that a close examination of the evidence provides no support for the claim that James II intended to use the Statute of Northampton as a vehicle to disarm all of England. There is not one historical document, letter, pamphlet, or secondary account that supports it. It is a finding that seems to have been created out of thin air.<sup>110</sup> At best the finding is a historical guess. But what makes the Standard Model claim even worse is the history of Sir John Knight’s case cannot be remotely read to support a limiting construction of the Statute of Northampton. Further, no subsequent English or American legal commentator interpreted the case as narrowly as one Standard Model scholar has contended.<sup>111</sup> The King’s Bench held the intent of the Statute of Northampton was “to punish 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>112</sup> This legal definition takes nothing away from the prosecutorial scope of the Statute. If anything, it supports the proposition of the legal commentators stated earlier—going armed with dangerous weapons in the public concourse, without the license of the government, terrified the people.<sup>113</sup>

More importantly, the King’s Bench stipulated that it could not inflict any other punishment than what the Statute directed. In Sir John Knight’s case, he committed the act of going armed in public with the Mayor and Aldermen of Bristol in order to

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*Jurisprudence*, 56 UCLA L. REV. 1343, 1363-64 (2009) (same); Kevin C. Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 716-17 (2009) (same).

<sup>108</sup> 90 Eng. Rep. 330 (1686).

<sup>109</sup> MALCOLM, TO KEEP AND BEAR ARMS, *supra* note 106, at 104-5.

<sup>110</sup> The same holds true for other Standard Model claims pertaining to James II, disarmament and the 1689 Declaration of Rights. *See* Charles, *supra* note 70, at 1819-22.

<sup>111</sup> David B. Kopel, in particular, attempts to connect the Standard Model’s limited construction of Sir John Knight’s case with prominent eighteenth-century legal commentators such as William Blackstone and William Hawkins. *See* Kopel, *supra* note 38, at 12-14. But neither Blackstone nor Hawkins referenced or cited Sir John Knight’s case, nor did they conclude there was a right to peacefully carry dangerous weapons in public. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136, ch. 63, §§ 1-10 (1716).

<sup>112</sup> Sir John Knight’s Case, 87 Eng. Rep. 75, 76 (1686) (emphasis added).

<sup>113</sup> *See* LAMBARDE, *supra* note 66, at 134-35; *see also* DALTON, *supra* note 68, at 129; JOSEPH KEBLE, AN ASSISTANCE TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 146-47, 646, 749 (London, W. Rawlins, S. Roycroft, & H. Sawbridge 1689).

break up a Catholic conventicle at mass.<sup>114</sup> Thus, under the terms of the Statute of Northampton, Knight would have qualified under the Statute's government license clause and would have been exempted from punishment.<sup>115</sup> This adequately explains why the jury acquitted Knight, and nothing further could be done.<sup>116</sup>

At the trial itself the political nature of Knight's prosecution was well known.<sup>117</sup> Although the Mayor and Aldermen accompanied Knight to the church armed and arrayed, the Attorney General acquitted them all. Knight was still prosecuted.<sup>118</sup> In order to legally distinguish Knight from the Mayor and Aldermen, the Attorney General prosecuted Knight under the legal theory that he was disaffected to government, and therefore could not be exempt by law. As evidence, the Attorney General offered evidence that Knight had refused a "Commission to be a Captain in the time of Monmouth's Rebellion," and thus was outside the protective scope of governmental immunity.<sup>119</sup> Knight countered with "very good prooffe" that he only

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<sup>114</sup> The evidentiary record affirms that the incident in question involved the participation of government officials. 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>115</sup> See 2 Edw. 3, c. 3 (1328) (Eng.) (exempting anyone "assisting" government officials in executing their duties); *accord* 20 Ric. 2, c. 1 (1396-97) (Eng.).

<sup>116</sup> Joyce Lee Malcolm contends the King's Bench was unwilling to apply the statute. MALCOLM, TO KEEP AND BEAR ARMS, *supra* note 106, at 105. This interpretation is unsupported. The King's Bench clearly acknowledged the legality of the statute, but could not inflict any more punishment after the jury acquitted.

<sup>117</sup> It is a historical point of emphasis that Sir John Knight, the Mayor, and Aldermen broke up a Catholic meeting of worship. See *supra* note 114. James II, a Catholic himself and supporter of religious liberty, was not pleased by this action. The fact of the matter is—throughout 1686—James II witnessed an increase in Protestant prosecution of Catholics exercising their religion. James II did everything in his power to suppress such intolerance, and hoped to steer the nation in the direction of religious freedom. For more on this topic, see TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685-1720, Chapter V (2006); J.P. KENYON, THE STUART CONSTITUTION: DOCUMENTS AND COMMENTARY 377-78 (2d ed., 1986); JOHN MILLER, JAMES II: A STUDY IN KINGSHIP 155-57 (1978).

<sup>118</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; see also THE REIGN OF JAMES II, 1685-1687 134 (Tim Harris ed., 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 those in Bristol deemed the actions of Knight, the Mayor, and Aldermen favorable. *Id.* at 113 (stating Sir John Knight did "disturbe and imprison a Popish Conventicle that was at Mass, but they were suddenly after set at liberty, this is very wonderful they were disturbed once.").

<sup>119</sup> THE REIGN OF JAMES II, *supra* note 118, at 307.



refused the commission because of the distances involved.<sup>120</sup> If anything, Knight felt his refusal of the King's commission did more of a service in that he offered prudent advice to the crown's ministers.<sup>121</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>122</sup> While Knight admitted that he was armed the day he went to the church, Knight refused to concede that he was disaffected.<sup>123</sup> Knight *never* rested his innocence or legal defense on preparatory armed self-defense or a legal right to carry arms in public.<sup>124</sup> Knight even testified before the court that he generally did not enter Bristol armed.<sup>125</sup> Knight stated that whenever he “had occasion to come to the Town [he] rode with a Sword and a Gun, [but] left them at the end of Town when he came in, and took them thence when he went out . . . .”<sup>126</sup>

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<sup>120</sup> *Id.* at 307-08.

<sup>121</sup> *Id.* at 308.

<sup>122</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, at 380 (Oxford 1857) (“sir John Knight pleaded not guilty to an information exhibited against him for goeing with a blunderbuss 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, *supra* note 106, 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, 1686-1687, 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>123</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: JAMES II, 1686-1687, at 122 (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 122, at 389 (“sir John Knight, *the loyall*, was tried at the court of kings bench for a high misdemeanor, in goeing armed up and down 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.”) (emphasis added).

<sup>124</sup> In explaining the turn of events prior to the day in question, Knight informed the King’s Bench of an assault and identifiable threat to his person. 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 118, at 307. 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 for Knight’s whereabouts, and brutally beat her for failing to reveal the location. *Id.* 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. *Id.* at 142.

<sup>125</sup> In two previous accounts on the history of *Rex v. Knight*, this author wrote that “Knight confessed to the court that he always ‘rode with Sword and Gun,’ and had a number of armed attendants . . . .” See CHARLES, *supra* note 36, at 135; Charles, *supra* note 38, at 30. This sentence was written in error and this Article serves as a correction. While Knight did in fact admit to riding with “Sword and Gun” to Bristol, Knight testified that he usually left them at “the end of Town.” 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 118, at 307.

<sup>126</sup> 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 118, at 142.

Ultimately, what Knight's testimony supports, if anything, is going armed in the public concourse with dangerous weapons was not permitted without the license of government. Why else would Knight leave his gun and sword "at the end of Town"?

In the end, Knight ultimately defended and won his case on the grounds of "active Loyalty" to the crown.<sup>127</sup> The King's Bench agreed by doubting Knight's conduct "came within the equity and true meaning of the Statute of Northampton about going armed[.]"<sup>128</sup> The Chief Justice even scolded the Attorney General for the politically motivated indictment against Knight. The Chief Justice stated, "if there be any blinde side of the Kings business[s] you will all[ways] lay your finger upon it, and shew it to the Defendants[.]"<sup>129</sup>

What the case of *Rex v. Knight* ultimately highlights is the ease in which false and unsupported historical claims can influence an entire strain of legal scholarship.<sup>130</sup> The holding in the case was *not* that the "peaceable carry" of dangerous weapons was outside the scope of the Statute of Northampton.<sup>131</sup>

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<sup>127</sup> *Id.* at 308.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> This author has referred to this legal scholarship phenomenon as a "domino defect." It takes place whenever one unproven historical claim is built upon another and so on. "It creates a historically self-perpetuating chain of ill-founded legal scholarship." CHARLES, *supra* note 36, at 90.

<sup>131</sup> Kopel, *supra* note 38, at 8-13. David B. Kopel's account of Sir John Knight's case fails for a number of factual and methodological reasons. First, Kopel omits that the "three friends" accompanying Knight were actually the Mayor and Aldermen of Bristol. *Id.* at 8. This is quite a significant omission. 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 118, at 134, 136. Second, because Knight was accompanying and assisting the Mayor and Aldermen on official business the Attorney General prosecuted Knight on the grounds he, unlike the Mayor and Aldermen, was disaffected to government, and therefore carried arms unlawfully through the streets of Bristol. *Id.* at 307-08. Third, there is no evidence to even suggest that Knight defended his innocence on the grounds he was peacefully carrying weapons for private purposes. Compare *id.* at 134, 136, 142, 307-08, with Kopel, *supra* note 38, at 8-11 n.47 (stating Knight defended his case on the grounds the Statute of Northampton only covered "heavily armed nobles who oppress the public" and "there is no basis . . . for [Patrick J. Charles's] assertion Knight was acquitted because he was a government agent"). The historical record, if anything, conveys that Knight defended his case on the grounds of loyalty to the crown. Fourth, Knight told the court he generally left his weapons "at the end of Town." 3 THE ENTRING BOOK OF ROGER MORRICE, *supra* note 118, at 308. Fifth, following the conclusion of Knight's case, not one legal commentator stated or inferred that the "peaceable carry" of dangerous weapons in the public concourse was now lawful or constitutionally protected. In fact, one of the historical treatises Kopel relies upon—a 1694 book by James Tyrrell—actually undercuts his overall position on the Statute of Northampton. See Kopel, *supra* note 38, at 12; see also David B. Kopel, *English Legal History and the Right to Carry Arms*, VOLOKH CONSPIRACY (Oct. 31, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/31/wrenn-history>. While Kopel is correct that Tyrrell wrote the Statute of Northampton would not have applied whenever English subjects were compelled by the government to take up arms "against Illegal Violence," such arms bearing had to be done in "such manner as the Law directs," i.e., at the license of government. JAMES TYRRELL, BIBLIOTHECA POLITICA: OR AN ENQUIRY 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 (1694) (emphasis added). Kopel omitted this qualifying phrase.

Historical claims such as this are quite odd in light of the evidentiary record,<sup>132</sup> yet for four decades Standard Model writers have cited to and relied on incomplete historical analysis to produce a limiting construction of the Statute of Northampton.<sup>133</sup> This in turn has propped up the myth that there were no laws regulating the carrying of arms for self-defense up to the early nineteenth century.<sup>134</sup> It is a costly mistake that even the first Second Amendment casebook made in its analysis of the Statute of Northampton:

The 1328 Statute of Northampton imposed a very broad restriction on arms-carrying, although there appears to be little evidence of it actually been much enforced . . . .

Over three centuries later, a charge under the statute was brought against a notable political opponent of the despotic King James II. The opponent had gone to church armed, and was acquitted by the jury . . . . The Chief Justice explained that the statute only applies to persons “who go armed to terrify the King’s subjects.” While the statute “is almost in desuetudinem,” it would apply “when the crime shall appear malo animo” (with evil intent). The Chief Justice noted “a general connivance to gentlemen to ride armed for their security.” The limiting construction of the case was treated as the authoritative rule thereafter.<sup>135</sup>

Other than pointing out that the Statute of Northampton was enacted in 1328 and Sir John Knight was, in fact, prosecuted, the casebook’s statement is completely inaccurate. This particularly applies to the authors’ final sentence proclaiming the “limiting construction of the case was treated as the authoritative rule thereafter.”<sup>136</sup> As support for this proposition the authors cite to William Blackstone’s *Commentaries on the Laws of England*.<sup>137</sup> However, at no point did Blackstone mention, reference, quote, or cite to Sir John Knight’s case, nor did he limit the Statute’s construction as the authors would have us believe.<sup>138</sup> What Blackstone wrote was: “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

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One also has to consider that the first publication of Sir John Knight’s case was not until 1700; that is six years after Tyrell’s treatise was published. See THE THIRD PART OF MODERN REPORTS, BEING A COLLECTION OF SEVERAL SPECIAL CASES IN THE COURT OF KING’S BENCH 117-18 (1700).

<sup>132</sup> See *supra* pp. 378-92.

<sup>133</sup> See *supra* notes 46, 106 & 107. See, e.g., CAPLAN, *supra* note 101, at 2; STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 49-50, 213 (1994).

<sup>134</sup> See, e.g., Lund, *supra* note 107, at 1368.

<sup>135</sup> NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 81-82 (1st ed. 2012) (citations omitted). It is worth noting that this casebook was written and compiled by only Standard Model scholars.

<sup>136</sup> *Id.* at 82.

<sup>137</sup> *Id.*

<sup>138</sup> See 4 BLACKSTONE, *supra* note 111, at 148-49; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136-39 (1765).

land, and is particularly prohibited by the statute of Northampton.”<sup>139</sup> Blackstone then illustrated the Statute of Northampton’s scope with a historical parallel. It was viewed as similar to the “laws of Solon” where “every Athenian was finable who walked about the city in armour.”<sup>140</sup>

Here we learn that Blackstone did not deviate at all from the Statute of Northampton’s purpose—a prohibition on carrying dangerous weapons in the public concourse without the license of government because in such instances an individual’s security was vested with society and the laws governing it.<sup>141</sup> This point is only strengthened upon examination of Blackstone’s other sections. For instance, when discussing the hue and cry—the doctrine applicable to pursuing criminals—Blackstone wrote that any person raising it “must acquaint the constable of the vill[age] with all the circumstances which he knows of the felony, and the person of the felon” before the pursuit could be approved.<sup>142</sup> The castle doctrine was the only exception to this rule.<sup>143</sup>

William Hawkins’s *Pleas of the Crown* also contradicts how the Second Amendment casebook summarizes the Statute of Northampton in law and history, thus further disproving the notion of a “limiting construction” being the “authoritative rule thereafter.”<sup>144</sup> Writing in 1716, Hawkins stated that “any Justice of the Peace, or other person . . . impowered to execute” the Statute of Northampton may “seize the Arms” of “any Person in Arms contrary” to its provisions.<sup>145</sup> This included the seizure of arms for preparatory self-defense in the public concourse. As Hawkins aptly put it, “a Man cannot excuse the wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears is for the Safety of his Person from his Assault.”<sup>146</sup>

There were three exceptions to the general prohibition. The first was home-bound self-defense. The rationale being “because a Man’s House is . . . his Castle,” there shall be no penalty for a person “assembling his Neighbours and Friends in his own House, against those who threaten to do him any violence therein.”<sup>147</sup> The second exception applied to persons carrying arms with the license of government. There was no legal presumption to “terrify the People” if a “Person[] of Quality,” i.e., person licensed for public carriage, wore “common Weapons” approved by

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<sup>139</sup> 4 BLACKSTONE, *supra* note 111, at 148-49.

<sup>140</sup> *Id.* at 149.

<sup>141</sup> *See* Charles, *supra* note 38, at 11-27.

<sup>142</sup> 4 BLACKSTONE, *supra* note 111, at 291.

<sup>143</sup> *Id.* at 223.

<sup>144</sup> JOHNSON ET AL., *supra* note 135, at 82. William Hawkins’s *Pleas of the Crown* provides citations in the margins. In the section discussing the Statute of Northampton, Hawkins cited William Lambarde, Michael Dalton, Edward Coke, and Joseph Keble—all of whom read the Statute according to its historical terms. *See* 1 HAWKINS, *supra* note 111, at 136, ch. 63, §§ 1-5.

<sup>145</sup> 1 HAWKINS, *supra* note 111, at 136, ch. 63, § 5.

<sup>146</sup> *Id.* at 136, ch. 63, § 8.

<sup>147</sup> *Id.*

law.<sup>148</sup> And the last exception was the assembling of arms for the hue and cry, *posse comitatus*, or militia. In the words of Hawkins, there was no violation of the Statute of Northampton when a person “arms himself to suppress or resist such Disturbers of the Peace or Quiet of the Realm.”<sup>149</sup> This last exception was not a free license to enforce the peace at an individual’s leisure. Instead, the assembling of the hue and cry, *posse comitatus*, or militia was solely at the discretion of government.

Yet somehow supporters of the Standard Model version of the Second Amendment arrive at the opposite conclusion.<sup>150</sup> They read the licensing exception as the general rule, which would swallow Hawkins’s other sections as superfluous and erase five centuries of history.<sup>151</sup> Furthermore, in order for the Standard Model’s interpretation to even be plausible, historians would have to remove other legal commentators, such as William Lambarde and Michael Dalton, from the pantheon of history. But this is not history in context. It is mythmaking at its finest.

The overall point to be made about the law and armed carriage at the close of the eighteenth century is the Statute of Northampton was a staple in Anglo-American law for almost 500 years. Its legal tenants remained active following the 1689 Glorious Revolution, the 1776 American Revolution, and the ratification of the Constitution. During this period, no legal commentator, judge, politician, or even newspaper or journal article asserted that the Statute of Northampton was inviolate of the right to arms, whether that right originated from Article VII of the 1689

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<sup>148</sup> *Id.* at 136, ch. 63, § 9. It is often overlooked that up through seventeenth century arms ownership and use in England was dependent on socio-economic status. *See* 1 Jac. 2, c. 8 (1685) (Eng.); 13 & 14 Car. 2, c. 3 (1662) (Eng.); 4 & 5 Phil. & M., c. 2 (1557) (Eng.); 26 Hen. 8, c. 6, § 4 (1534) (Eng.); 20 Rich. 2, c. 1 (1396) (Eng.); 7 Rich. 2, c. 13 (1383) (Eng.); 25 Edw. 3, st. 5, c. 2 (1351) (Eng.); 2 Edw. 3, c. 3 (1328) (Eng.); 13 Edw., st. 5 (1285) (Eng.); 13 Edw., st. 2, c. 6 (1285) (Eng.); 7 Edw. (1279) (Eng.). Article VII of the 1689 Declaration of Rights confirmed the status quo with the qualifying phrase “suitable to their condition . . .” 1 W. & M., sess. 2, c. 2, art. VII (1688) (Eng.). As it pertained to servants or laborers, they were not permitted to carry a dagger, buckler, or sword during their travels—that is unless they were accompanying someone of quality. 12 Rich. 2, c. 6 (1388) (Eng.); MICHAEL DALTON, *THE COUNTRY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS* 36 (1630).

<sup>149</sup> 1 HAWKINS, *supra* note 111, at 136, ch. 63, § 10.

<sup>150</sup> Take for instance the claims of Standard Model scholar Don B. Kates. In his mind, the right to arms “emerged from a tradition which viewed general possession of arms as a positive social good as well as an indispensable adjunct to the individual right of self-defense.” Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 93 (1992). Kates comes to this conclusion by taking numerous commentators out of context, particularly Blackstone. According to Kates, Blackstone “described the right to arms . . . emphasisiz[ing] both the individual self-protection rationale and the *criminological premises*, which are so foreign to the terms of the modern debate over the Second Amendment.” *Id.* (emphasis added). History in context, however, does not support such a conclusion. At no point did Blackstone describe the right in such terms. *See* 4 BLACKSTONE, *supra* note 111, at 291; *see also* Charles, *supra* note 70, at 1801, 1822-24 (rebutting the Standard Model claim that the right to arms was intended to thwart crime on an individualized basis).

<sup>151</sup> *See* 1 HAWKINS, *supra* note 111, at 136, ch. 63, §§ 5, 8, 10. *Compare* Charles, *supra* note 38, at 7-36 (providing substantiated research on the Statute of Northampton in historical context), *with* Volokh, *supra* note 46, at 101-02 (selectively quoting Hawkins and other legal treatises).

English Declaration of Rights, the Second Amendment to the United States Constitution, or a state constitution “bear arms” analogue. This is not to say, however, there were not individuals that perceived the Statute of Northampton as a violating the right to arms. It just means such historical evidence is non-existent, and therefore inapplicable.

Of course, this does not mean that the Statute of Northampton was enforced everywhere and anywhere.<sup>152</sup> In accord with law enforcement practice up through the late eighteenth century, there was a substantial amount of discretion given to government officials.<sup>153</sup> Certainly, as is stipulated in the Statute of Northampton, the prohibition on carrying dangerous weapons in the public concourse would not have applied during instances of compulsory arms bearing, i.e., when the government legally required its citizens to carry arms for militia service, security patrols, the hue and cry, or when individuals needed to take a weapon into town for repair. One must also consider that up through the late eighteenth century the majority of people lived outside city centers, towns, and other populated enclaves.<sup>154</sup> Therefore, it would have been common for late eighteenth-century Americans to arm themselves when traveling on unprotected highways or through the unsettled frontier. People also carried weapons for hunting or to the town center for repair. But these historical observations do not negate the fact that it was within the purview of the government to regulate the public carriage of arms in the public concourse to prevent affrays and public injury. This was the entire purpose behind the Statute of Northampton and other late eighteenth-century laws touching upon dangerous weapons, none of which were called into question as a violation of the right to bear arms.

## II. THE LAW AND ARMED CARRIAGE DURING THE NINETEENTH CENTURY

From the turn of the nineteenth century until its close, the law and armed carriage underwent somewhat of a transformation. This transformation can be attributed to a number of factors, including changes in constitutional drafting, the westward expansion of the United States, the cultural divide between the North and South, as well as the cultural divide between the settled East and the frontier West, the public discourse concerning armed carriage of dangerous weapons, and judicial interpretations as to the scope the right to arms afforded. Needless to say, the United States of the Antebellum and Reconstruction Eras was not that of the early republic.

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<sup>152</sup> Charles, *supra* note 38, at 35-36.

<sup>153</sup> For more on this topic, see J.M. BEATTIE, *CRIME AND THE COURTS OF ENGLAND: 1660-1880* (1996); JULIUS GOEBEL, JR. AND T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* (1944); DOUGLAS GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776* (1976); Dietrich Oberwittler, *Crime and Authority in Eighteenth Century England: Law Enforcement on the Local Level*, 15 HIST. SOC. RES. 3 (1990); Joel B. Samaha, *The Recognizance in Elizabethan Law Enforcement*, 25 AM. J. LEGAL HIST. 189 (1981); Alan D. Watson, *The Constable in Colonial North Carolina*, 68 N.C. HIST. REV. 1 (1991).

<sup>154</sup> See e.g., ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* 44 (Liberty Fund 1999) (1803) (stating America was different from previous republics, like Athens and Rome, in that it consisted of “an agricultural people, dispersed over immense territory . . . whose population does not amount to one able bodied militia man for each mile square.”).

Throughout this period the tenets embodied by the Statute of Northampton remained somewhat relevant to the law and armed carriage.<sup>155</sup> In fact, the Statute proved to be the baseline for drafting one of the first distinctly American versions of armed carriage laws. Dubbed the “Massachusetts Model” by historian Saul Cornell,<sup>156</sup> these laws varied to a degree, but generally stipulated:

If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace.<sup>157</sup>

Maine, Delaware, the District of Columbia, Wisconsin, Pennsylvania, West Virginia, Oregon, and Minnesota all adopted variants of the Massachusetts Model.<sup>158</sup>

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<sup>155</sup> See, e.g., *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843); *English v. State*, 35 Tex. 473 (1871); JAMES KENT, COMMENTARIES ON AMERICAN LAW 406 (8th ed. 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”); 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271-72 (2d ed. 1831); 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 392 (5th ed. 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 (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>156</sup> Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1719-26 (2012).

<sup>157</sup> 1835 Mass. Acts 750.

<sup>158</sup> See THE REVISED STATUTES OF THE STATE OF WISCONSIN, PASSED AT THE ANNUAL SESSION OF THE LEGISLATURE COMMENCING JAN. 13, 1858, AND APPROVED MAY 17, 1858, 985 (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”); see also 1870 W. VA. LAWS ch. 153, § 8; EDWARD C. PALMER, THE GENERAL STATUTES OF MINNESOTA 629 (St. Paul, Davidson & Hall 1867) (“Whoever goes 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”); 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, at 250 (9th ed., Phila. 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”); THE REVISED STATUTES OF THE STATE OF MAINE PASSED OCTOBER 22, 1840, 709 (Augusta, William R. Smith & Co. 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 570 (D.C., A.O.P. Nicholson 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 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

In some cases it was cities,<sup>159</sup> including those in the western frontier that adopted the broad prohibition.<sup>160</sup>

In accord with the Statute of Northampton, the Massachusetts Model prohibited the act of carrying dangerous weapons in the public concourse,<sup>161</sup> and even retained the common-law surety of the peace.<sup>162</sup> What distinguished the Massachusetts Model from its English predecessor was that it provided a statutory exception if the individual was able to demonstrate an “imminent” or “reasonable” fear of assault or injury to his or her person, family or property.<sup>163</sup> The respected jurist Peter Oxenbridge Thacher commented on the Massachusetts Model as follows:

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

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(Dover, W.B. Keen 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”); THE STATUTES OF OREGON ENACTED AND CONTINUED IN FORCE BY THE LEGISLATIVE ASSEMBLY AS THE SESSION COMMENCING 5TH DECEMBER, 1853, 220 (Oregon, Asahel Bush 1854).

<sup>159</sup> Late nineteenth-century cities and municipalities adopted a variety of ordinances and laws to stop the practice of carrying dangerous weapons in the public concourse. Take for instance Baltimore, Maryland, which passed a rather unique ordinance to deter the practice of carrying concealed weapons. It added a monetary fine should a person be found with a concealed weapon following their arrest or having been charged with a crime or misdemeanor. See THE BALTIMORE CITY CODE 705 (Lewis Mayer ed., 1879). For more city ordinances and laws pertaining to armed carriage, see *infra* note 245.

<sup>160</sup> See *City Ordinances*, HOPE PIONEER, Nov. 10, 1904, at 4, (ordinance stipulating that any “person found armed within the corporate[] limits of the City of Hope with a dirk, dagger, sword, pistol, revolver, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person, or to his family or property, shall upon conviction thereof, be punished by a fine not exceeding ten dollars”); see, e.g., DODGE CITY, KAN., ORDINANCE No. 16, § XI (Sept. 22, 1876); *When and Where May a Man Go Armed*, DAILY EVENING BULL., Oct. 26, 1866, at 5, (discussing San Francisco’s policy that “no person shall carry deadly weapons within city limits”).

<sup>161</sup> Compare Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.), with 1835 Mass. Acts 750.

<sup>162</sup> For more on the common law and surety for keeping the peace, see KEBLE, *supra* note 82, at 410 (Justices “will not grant any Writ for Surety of the Peace, without making an Oath that he is in fear of bodily harm. Nor the Justices of the Peace ought not to Grant any Warrant to cause a man to find Surety of the Peace, at the request of any Person, unless the Party who requireth it, will make an Oath, that he requireth it for safety of his Body, and not for malice . . .”).

<sup>163</sup> See A PRACTICAL TREATISE, OR AN ABRIDGEMENT OF THE LAW APPERTAINING TO THE OFFICE OF JUSTICE OF THE PEACE 184 (West Brookfield, C.A. Mirick & Co. 1841). For some examples of how such “reasonableness” was adjudged by nineteenth century courts, see *State v. Barnett*, 11 S.E. 735 (W. Va. 1890); *State v. Duke*, 42 Tex. 455 (1875).



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 the law, which makes every man to know his own place, compelling him to move in it, and giving him his due.<sup>164</sup>

Thacher unambiguously interpreted the law as a prohibition on armed carriage in the public concourse. Thus, in Massachusetts and those states emulating its model, the statutory scope of the right to arm oneself defensively outside of the home was extremely limited.<sup>165</sup> The perception was that state and local governments retained the police power to prohibit the carrying of dangerous weapons in the public concourse so long as there was an affirmative legal defense available when there was a clear and tangible threat to one's person, family or property.<sup>166</sup>

This legal understanding of the Massachusetts Model was on display during the 1878 trial of George D. Moore in Milwaukee, Wisconsin, who was convicted of “going armed with a revolver.”<sup>167</sup> Drunk at the time of arrest, Moore defended himself on the grounds that he had no intent to use the weapon and therefore was not a danger to the public. Judge James A. Mallory informed the jury that the statute only provided a defense for those that were “carrying weapons on the apprehension of violence.”<sup>168</sup> The jury subsequently returned a guilty verdict and sentenced Moore to “hard labor at the House of Correction for one month.”<sup>169</sup> A similar outcome faced

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<sup>164</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. 1837, at 27-28 (Bos., Dutton and Wentworth 1837).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; see also *The Public Peace*, NORTH AM. & U.S. GAZETTE (Phila.), Apr. 30, 1850, at 2 (arguing for a prohibition on the carrying of dangerous weapons in public unless the individual can “show that they carry them for [self-defense],” but that such a defense would not apply to “persons walking in the streets, or drinking at taverns, or going about their ordinary business. No man can be deemed to have a cause for defence—such defence as calls for the preparation of deadly weapons—who has not some reasonable grounds to expect the assault of an enemy . . .”).

<sup>167</sup> *Dear Pistol Practice*, MILWAUKEE DAILY SENTINEL, Oct. 23, 1878, at 8.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* Some northern judges expressed dissatisfaction over the practice of carrying dangerous weapons in public in other cases. See, e.g., *Multiple News Items*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER (N.Y.C.), Sept. 20, 1879, at 35 (describing how Judge Cowing

George Babcock in Covington, Ohio, who failed to show “reasonable ground[s] to believe his person or the person of some of his family, or his property, to be in danger from violence or crime.”<sup>170</sup>

Of course, the Massachusetts Model was not the only approach to regulating armed carriage in the nineteenth century. Alternatively there were laws that prohibited the carriage of concealed weapons, yet permitted the carriage of weapons openly. Thus, while the Massachusetts Model prohibited the carriage of all dangerous weapons in the public concourse, to exclude those rare instances where an imminent threat could be proven, armed carriage laws adopted in the South were more permissive. The southern states of Alabama, Arkansas, Georgia, Kentucky, Louisiana, Tennessee, and Virginia, as well as the northern states of Ohio and Indiana all passed such laws.<sup>171</sup>

This raises an important historical question: Why did states predominantly in the South adopt concealed carry prohibitions and states in the North adopt the Massachusetts Model? The answer requires understanding the distinctive nature of southern violence.<sup>172</sup> Throughout the nineteenth century in the South, armed crime, assaults, and murders were on the rise. What made this rise rather distinctive was its intimate relation to the institution of slavery, as well as southern notions of vengeance and honor.<sup>173</sup> Furthermore, southern violence was a public spectacle, and therefore culturally acceptable by many living in the South. Take for instance the following account of a duel that took place in New Orleans, Louisiana:

[On February 26, 1837] a duel was fought in [New Orleans], between Captain Shamburg and Mr. Cuvillier. The meeting took place with broadswords, on horseback. They paraded at the paper hour, on fine

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sentenced a person for a year for firing a gun at an officer in public, and that he was of the opinion there “was no reason or excuse why any many should go through the streets armed with a bowie-knife or a pistol”); *The Law in Regard to Homicide—Charge of the Chief Justice Appelton in the Case of James H. Williams, Indicted for the Murder of James McGraw*, BANGOR DAILY & WHIG COURIER, Aug. 28, 1865, at 35 (“The right to take the life of an assailant in self-defence is a right only of the last resort, never existing until the party assailed has done all in his power to escape from or avoid this terrible necessity. Human life is sacred. It is not to be sacrificed for the mere point of honor or to avenge an insult. Men should not be permitted to carry deadly weapons in a civilized community. Their possession tends to induce their use.”).

<sup>170</sup> *The Wagoning System*, NASHVILLE UNION & AM., Mar. 3, 1872, at 1.

<sup>171</sup> See CLAYTON CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 143-51 (1999); see also *Act of March 18, 1859*, 1959 OHIO LAWS 56.

<sup>172</sup> Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 124-28 (2015).

<sup>173</sup> For some discussions, see EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19<sup>TH</sup> CENTURY AMERICAN SOUTH (1984); DICKSON D. BRUCE, JR., VIOLENCE AND CULTURE IN THE ANTEBELLUM SOUTH (1979); Ryan L. Dearing, *Violence, Masculinity, Image, and Reality on the Antebellum Frontier*, in 100 INDIANA MAGAZINE OF HISTORY 26 (2004); Jeff Forret, *Slave-Poor White Violence in the Antebellum Carolinas*, in 81 THE NORTH CAROLINA HISTORICAL REVIEW 139 (2004); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001); RANDOLPH ROTH, AMERICAN HOMICIDE (2009); BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH (1982).

looking geldings, armed with swords—took their positions, and waited, like knights of the old, the word was given for combat. The result was, that after some close cutting and thrusting, Shamburg had his hat cleft in twain, and his horse killed under him; and Cuvillier had a division made of his clothing across his whole front, leaving, it is said, a slight flesh wound; and here the affair terminated. The duel was at a public place, and, from the mode of fighting, a large number of persons were drawn to the spot to witness the combat.<sup>174</sup>

From the perspective of outsiders, the level and frequency of southern violence was quite shocking.<sup>175</sup> As a young Bostonian traversing through Tallahassee, Florida, observed: “The inhabitants here are rather quarrelsome. One must be very careful not to use any kind of offensive language, swearing excepted. A person’s life is not worth much here.”<sup>176</sup> Some Southerners were equally disturbed over their state of affairs. “The evil [of violence and social disorder], has, indeed, reached such a height that it not only mars the harmonious working of our civil and political system, but threatens with danger the very elements of all social organization—the sacredness of human life and the security of private property,” wrote a correspondent with the *Charleston Mercury*.<sup>177</sup>

In order to address the violence problem, a number of state legislatures sought to remove the carriage of dangerous weapons from the equation, particularly those that could be concealed.<sup>178</sup> The legislatures’ rationale for prohibiting the carriage of

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<sup>174</sup> *Novel Duel*, PENSACOLA GAZETTE, Apr. 22, 1837, at 1.

<sup>175</sup> See, e.g., FREDERICK LAW OLMSTEAD, A JOURNEY THROUGH TEXAS; OR, A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER 158 (1857) (“The street affrays are numerous and characteristic. I have seen, for a year or more, a San Antonio weekly [newspaper], and hardly a number fails to have its fight or its murder. More often than otherwise, the parties meet upon the plaza by chance, and each, on catching sight of his enemy, draws a revolver, and fires away . . . it is, not seldom, the passersby who suffer. Sometimes it is a young man at a quiet dinner in a restaurant, who receives a ball in the head; sometimes an old negro woman, returning from the market who gets winged.”).

<sup>176</sup> *Advantages of Being Prepared for Self-Defence*, LIBERATOR (Bos.), Feb. 21, 1840, at 4.

<sup>177</sup> *Prevention of Crime*, CHARLESTON MERCURY, Oct. 8, 1857, at 2; see also *Carrying Concealed Weapons*, EVANSVILLE DAILY JOURNAL, May 12, 1855, at 2 (“It would be really a waste of time, to allude to the evil effects of this brutal propensity [of carrying concealed weapons]. It makes cowards of us and destroys all confidence in law. It leads us into temptation and fills us with a reckless desire to display our brutality at the expense of every feeling that ought to govern the actions of the christian . . . we trust another session of the legislature, will not pass by without giving us a law to prevent the carrying of concealed weapons”).

<sup>178</sup> See *Act of March 18, 1859*, *supra* note 171; CRAMER, *supra* note 171; P.M. Butler, *Governor’s Message to Legislature of South Carolina*, EMANCIPATOR (Charleston), Dec. 20, 1838, at 1 (“There are many subjects connected with the criminal code which urgently demand the attention of the legislature—Among these, is the habit of wearing concealed deadly weapons, which has become too common among the more unthinking part of the community. This practice is highly reprehensible, offensive to good taste, subversive of the peace of the country, and unworthy of an advanced stage of Christian civilization. Revenge and resentment are bad counselors under any circumstances, or for any age; but, when they operate on youthful inexperience, they have a peculiarly baneful and mischievous effect. To carry secret weapons for an unarmed adversary to be used on an anticipated occasion, is but to

concealed weapons, yet permitting their open carriage was essentially two-fold. The first was one of perceived morality. It was reasoned that only the criminal and unvirtuous elements within society carried concealed weapons.<sup>179</sup> In contrast, those that carried arms openly were viewed as respectable and transparent.<sup>180</sup> This is not to say that the open carriage of arms was unanimously deemed an acceptable societal norm.<sup>181</sup> In some areas, the practice was certainly common, but it was not

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arm revenge; and to provide them against a casual emergency, is to afford a criminal temptation to resentment . . . This vulgar and unmanly practice should not only be discountenanced, as is by the virtuous and intelligent part of society, but it should in some way be inhibited by legal enactments. It would not perhaps be proper to prohibit the wearing of weapons about the person.”); Edmund J. Davis, *Message from Governor, April 29, 1870*, in HOUSE JOURNAL OF THE TWELFTH LEGISLATURE OF TEXAS: FIRST SESSION 19 (1870) (“I would, in this respect of prevention of crimes, call your attention to the provisions of section thirteen of the Bill of Rights, on the subject of bearing arms. The legislature is there given a control over the privileges of the citizen, in this respect, which was not in the old constitution. There is no doubt that to the universal habit of carrying arms is largely to be attributed the frequency of homicides in this State. I recommend that this privilege be placed under such restrictions as may seem to your wisdom best calculated to prevent the abuse of it. Other than in a few of the frontier counties there is no good reason why deadly weapons should be permitted to be carried on the person.”); John Pope, *Governor’s Message to Arkansas General Assembly*, ARK. GAZETTE, Oct. 5, 1831, at 1 (stating to the Arkansas legislature that a “man, conscious of his own integrity of purpose, unless he has special reason to apprehend danger, ought not to carry such [deadly] weapons, in the civil and social walks of life; and he who wears them, should be held to a rigid accountability for their use.”).

<sup>179</sup> See, e.g., *Prevention of Crime*, CHARLESTON MERCURY, Oct. 8, 1857, at 2 (“The only conceivable object, of course, in thus carrying these dangerous instruments of death, is to kill; the violent, that they may perpetrate their misdeeds with impunity; the peaceful, under the plea that the habit, though originally reprehensible, has become a dire necessity under the reign of license and disorder.”).

<sup>180</sup> See, e.g., *Can It Be Prohibited*, GA. WKLY. TELEGRAPH J. & MESSENGER (Macon), Aug. 26, 1881, at 6 (“While [open carry] would undoubtedly render a man very conspicuous, it would nevertheless put his neighbor on guard”); *Carrying Concealed Weapons*, in DAILY EVENING BULL. (S.F.), Jan. 26, 1866, at 3 (“If a man carries arms openly he is seldom dangerous. Those whom he may intend to attack are soon notified and prepared. If he intends to prevent a crime, it may be prevented.”); *Carrying Concealed Weapons: True Comment on the General American Custom*, DAILY ARK. GAZETTE (Little Rock), May 26, 1877, at 6 (“The frontiersman, who holds his life in his hand, carries his weapon openly and gives fair warning to his enemy that he is prepared for an attack.”); *Concealed Weapons*, ALTA CAL. (S.F.), June 1, 1854, at 2 (“[L]et them [carry weapons] openly, so that those with whom they come in contact may know with whom and what they are dealing.”).

<sup>181</sup> See, e.g., *Carrying Concealed Weapons: True Comment on the General American Custom*, DAILY ARK. GAZETTE, May 26, 1877, at 6 (“[I]f our society young man was to walk down Charles street any sunny afternoon with his silver mounted derringer hanging from his waist-belt, he would expose himself to unlimited ridicule. The question would be asked what was his object in so doing and what danger he expected to meet in broad day-light and in a crowded thoroughfare”); *Concealed Weapons*, DAILY CLEV. HERALD, Apr. 19, 1859, at 3 (“There is little or no necessity for going armed. Not one person in a hundred does it. The class that goes habitually armed are themselves men of violence or associates with those who are. The state of society that demands peaceable citizens to go armed for self-protection, is indeed deplorable.”).

applauded.<sup>182</sup> Still, there was the perception that those who carried arms openly would at least place others on notice of the potential danger that awaited them. As historian Robert Ireland put it, in the South the “truly brave man either wore his weapons openly or [wore] none at all and certainly did not resort to sneak attacks that more resembled assassinations than fair and honorable confrontations.”<sup>183</sup>

Some, particularly in the western frontier, viewed open armed carriage as being protected by the Second Amendment.<sup>184</sup> For these individuals, while the carriage of concealed weapons fell outside the Second Amendment’s scope, the open carriage of arms was within it. As a San Francisco, California correspondent with the *Alta California* rationalized: “If the people consider it necessary for their safety and protection to carry pistols or bowie knives, or muskets, or even six pound brass field pieces, let them carry them [openly], for the Constitution of the United States guarantees to the people the right to keep and bear arms.”<sup>185</sup>

What undoubtedly aided in the rise of the southern “open carry” view were two notable changes in American law: (1) a shift in constitutional language, and (2) the first American courts to address the constitutionality of armed carriage regulations. Starting with the modification of state constitutional language, during the Antebellum Era, Second Amendment analogues in new state constitutions began to reflect a more individualized perception of the right.<sup>186</sup> Consider that at the time of the Constitution’s ratification only four of the thirteen states retained Second

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<sup>182</sup> As Chief Justice James Jackson of the Georgia Supreme Court (1880-87) wrote in an opinion-editorial:

The judiciary of Georgia strive to enforce [concealed weapons and dueling] laws, and day by day the evil lessens and crime diminishes . . . If men will take the law into their own hands, become themselves the judges of their own cases, and their own sheriff to execute the sentence they themselves pronounce, they must be certain that they judge the case according to law, and execute the sentence which that law pronounces, or they must suffer the consequences of their mistake of law . . . The people of the North, and of the world, may rest assured that life and limb and property are held as sacred at the South as elsewhere . . . The day of the grog-shop and of that which it produces—the inflamed passion and the deadly weapon—is rapidly passing away.

Editorial, *The Deadly Duel: A Southern Lawyer’s Sensible Views on the Subject*, ROCKY MOUNTAIN NEWS (Den.), May 26, 1877, at 6; see also *Self-Defence*, ORLEANS GAZETTE, & COM. ADVERTISER, May 8, 1919, at 1 (questioning the southern practice of carrying dangerous weapons in public on moral and philosophical grounds).

<sup>183</sup> ROBERT M. IRELAND, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, in THE REGISTER OF THE KENTUCKY HISTORICAL SOCIETY 370, at 384 (1993).

<sup>184</sup> See, e.g., *On Wearing Concealed Arms*, DAILY NAT’L INTELLIGENCER (S.F., Cal.), Sept. 9, 1820, at 2 (a grand jury supporting the “right of carrying arms,” yet questioning the practice of carrying concealed weapons); *Carrying Concealed Weapons*, DAILY EVENING BULL. (S.F.), Jan. 26, 1866, at 3 (showing political debate in California where Democrats objected to a concealed carry law on Second Amendment grounds).

<sup>185</sup> *Concealed Weapons*, ALTA CAL. (S.F.), June 1, 1854, at 2.

<sup>186</sup> See, e.g., *Prevention of Crime*, CHARLESTON MERCURY, Oct. 8, 1857, at 2 (“The moral causes of this cheap contempt of which human life is held among us, lie upon the surface, and are seen in the extravagant notions of personal rights and independence . . . And out of this extravagant theory of personal independence, thus perverted by early contact with vice and violence, has grown an equally extravagant notion respecting the right of self-defence”).

Amendment analogues in their respective constitutions, each of which reflected more of a communal view of the right to “bear arms,”<sup>187</sup> and five state constitutions included analogues highlighting the significance of a constitutional “well-regulated militia.”<sup>188</sup> Early on this trend continued as new states joined the Union and adopted their first constitutions or old states modified existing ones. Kentucky, Tennessee, and Ohio all included more communal language in their respective Second Amendment analogues.<sup>189</sup> It was not until 1817 that the more individualized provisions were adopted. The first was Mississippi, followed by Connecticut and Alabama.<sup>190</sup> This is not to say that each and every follow-on state Second

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<sup>187</sup> MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. XVII (“The people have a right to keep and bear arms for the common defence”); N.C. CONST. OF 1776, DECLARATION OF RIGHTS, art. XVII (“That the people have a right to bear arms, for the defence of the State”); PA. CONST. OF 1776, DECLARATION OF RIGHTS, art. XIII (“That the people have a 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 defence of themselves and the State”).

<sup>188</sup> DECLARATION OF RIGHTS AND FUNDAMENTAL RULES art. XVIII (Del. 1776) (“That a well regulated Militia is the proper, natural and safe Defense of a free government”); MD. CONST. OF 1776, art. XXV (“That a well-regulated militia is the proper and natural defence of a free government”); N.H. CONST. OF 1784, art. XXIV (“A well regulated militia is the proper, natural, and sure defence of a state”); N.Y. CONST. OF 1777 (“And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service”); DECLARATION OF RIGHTS art. XIII (Va. 1776) (“That a well-regulated militia, composed of the body of people trained to arms, is the proper, natural, and safe defence of a free State”).

<sup>189</sup> See e.g., KY. CONST. OF 1799, art. X, § 23 (“That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned”); OHIO CONST. OF 1802, art. VIII, § 20 (“That the people have a right to bear arms for the defense of themselves and the state: and as standing armies in time of peace, are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power”); TENN. CONST. OF 1796, art. XI, § 26 (“That the freemen of this State have a right to keep and bear arms for their common defence”).

<sup>190</sup> See ALA. CONST. OF 1819, art. I, § 23 (“Every citizen has a right to bear arms in defence of himself and the State”); CONN. CONST. OF 1818, art. I, § 17 (“Every citizen has a right to bear arms in defence of himself and the State”); MISS. CONST. OF 1817, art. I, § 23 (“The right of every citizen to keep and bear arms in defense of his home, person, or property, or in the aid of the civil power when thereto legally summoned, shall not be called into question, but the legislature may regulate or forbid the carrying of concealed weapons”).

Amendment analogue adopted the more individualized language,<sup>191</sup> but by the Reconstruction Era a shift was certainly noticeable.<sup>192</sup>

Coinciding with the shift in constitutional language were the first challenges questioning the authority of legislatures to regulate armed carriage. The first was *Bliss v. Commonwealth*, a constitutional challenge to Kentucky's concealed carry law,<sup>193</sup> where it was argued the law was unconstitutional on the grounds it violated article X, section 2 of the 1799 Kentucky Constitution.<sup>194</sup> Ultimately the Kentucky Supreme Court ruled the concealed carry law was unconstitutional, but with rather unorthodox legal reasoning. Throughout the early republic the judiciary examined the constitutionality of laws under a presumption of constitutionality. It was only in those instances where the law conflicted with the core of the constitutional right that it was struck down.<sup>195</sup> The Kentucky Supreme Court in *Bliss*, however, applied a presumption of liberty. From the court's perspective, whenever the Kentucky legislature passes a law that "imposes any restraint on the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious."<sup>196</sup> In other words, although Kentucky's concealed carry law did not actually prohibit

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<sup>191</sup> See IND. CONST. of 1816, art. I, § 20 ("That the people have a right to bear arms for the defence of themselves, and the state; and that military shall be kept in strict subordination to the civil power"); LA. CONST. of 1812, art. III, § 22 ("The free white men of this State, shall be armed and disciplined for its defence; but those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled so to do, but shall pay an equivalent for personal service").

<sup>192</sup> By 1868, seven of the thirty-six state constitutions retained such analogues. See ALA. CONST. of 1867, art. I, § 28 ("That every citizen has a right to bear arms in defence of himself and the State"); CONN. CONST. of 1818, art. I, § 17 ("Every citizen has a right to bear arms in defence of himself and the State"); KAN. CONST. of 1859, BILL OF RIGHTS, § 4 ("The people have the right to bear arms for their defence and security; but standing armies in times of peace are dangerous to liberty, and shall not be tolerated and the military shall be in strict subordination to the civil power"); MICH. CONST. of 1850, art. XVIII, § 7 ("Every person has a right to bear arms for the defence of himself and the State"); MISS. CONST. of 1868, art. I, § 15 ("All persons shall have a right to keep and bear arms for their defence"); OHIO CONST. of 1851, art. I, § 4 ("The people have the right to bear arms for their defense and security but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power"); TEX. CONST. of 1868, art. I, § 13 ("Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulation as the legislature may prescribe"). For a full breakdown of every state "bear arms" provision in 1868, 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, 51-52 (2011).

<sup>193</sup> *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

<sup>194</sup> KY. CONST. of 1799, art. X, § 23.

<sup>195</sup> Charles, *supra* note 33, at 502-17. For a late eighteenth-century example showing the presumption of constitutionality being applied to the right to arms, see Charles, *supra* note 48, at 1822-29.

<sup>196</sup> *Bliss*, 12 Ky. (2 Litt.) at 92.

armed carriage altogether, the fact that it regulated any aspect of carrying arms required that it be struck down.<sup>197</sup>

Subsequent Antebellum courts that examined the authority of legislatures to regulate armed carriage were essentially required to square their analysis with that of *Bliss*, and in every instance the court undertook a different approach. From this arose the southern open carry–concealed carry distinction in armed carriage jurisprudence. For instance in the Alabama case of *State v. Reid*, while the plaintiff relied on *Bliss*, the Attorney General countered that the State’s concealed carry law was constitutional on the grounds “[e]very man was still left free to carry arms openly . . . .”<sup>198</sup> In its decision, the Alabama Supreme Court rejected *Bliss* and agreed with the Attorney General, stating that under the “bear arms” provision of the Alabama Constitution “the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.”<sup>199</sup>

What undoubtedly aided the Alabama Supreme Court in coming to its decision was the individualistic nature of article I, section 23 of the 1819 Alabama Constitution, which guaranteed: “Every citizen has a right to bear arms, in defence of *himself* and the State.”<sup>200</sup> At the same time history of the law played a persuasive role. Relying on the text and structure of Article VII of the 1689 Declaration of Rights, the Alabama Supreme Court reasoned that since Parliament was permitted to “determine what arms shall be borne and how,” it was within the purview of the Alabama legislature to regulate the manner arms are worn and borne—that is so long as it does not amount to a complete destruction of the right.<sup>201</sup>

In line with *Reid*, both the Georgia Supreme Court, in *Nunn v. State*, and Louisiana Supreme Court, in *State v. Chandler*, determined that their respective state legislatures could regulate the concealed carriage of dangerous weapons, but that open carry was protected.<sup>202</sup> Meanwhile, both the Tennessee Supreme Court, in *Aymette v. State*, and the Arkansas Supreme Court, in *State v. Buzzard*, outrightly rejected any notion of such a right, whether it was concealed or open, unless it was in support of the common defense.<sup>203</sup> From both courts’ perspective, to recognize a

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<sup>197</sup> *Id.* at 91-92 (“But to be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form; it is the *right* to bear arms in defence of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.”). The court’s rationale coincided with a treatise on the Kentucky common law published in the same year. See CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822).

<sup>198</sup> 1 Ala. 612, 614 (1840).

<sup>199</sup> *Id.* at 619.

<sup>200</sup> ALA. CONST. of 1819, art. I, § 23 (emphasis added).

<sup>201</sup> *Reid*, 1 Ala. at 616.

<sup>202</sup> *Nunn v. State*, 1 Ga. 243 (1846); *State v. Chandler*, 5 La. Ann. 489 (1850).

<sup>203</sup> *State v. Buzzard*, 4 Ark. 18 (1842); *Aymette v. State*, 21 Tenn. 154, 158 (1840).



right to armed carriage in the public concourse was an affront to the right's intended purpose and ran counter to the principle of law and order.<sup>204</sup>

What the aforementioned cases show is there was a variance of southern opinions as to whether the right to "bear arms" included a right to armed carriage, but there was a significant common denominator. In every case the respective state court failed to examine the history of the Statute of Northampton to determine the constitutionality of the right to armed carriage in public.<sup>205</sup> Surprisingly, the only Antebellum court to rely on the Statute of Northampton was a jurisdiction that no longer retained a law regulating armed carriage in the public concourse—North Carolina—yet it was one of three states to recognize the Statute following the Constitution's ratification.<sup>206</sup>

In *State v. Huntly*, the North Carolina Supreme Court held that although the state legislature recently negated all English and Great Britain statutes as being in force, the legal tenets of the Statute of Northampton was an exception to the rule.<sup>207</sup> The reason being the Statute did not create the offense of "riding or going about armed with dangerous and unusual weapons," but was an affirmance of the common law.<sup>208</sup> Writing for the court, Judge William Joseph Gaston traced the origins of the law and armed carriage to 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.

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<sup>204</sup> See *Buzzard*, 4 Ark. at 24 ("But surely if the government does not possess the power of so regulating and controlling, by law, the acts of individuals, as to protect the private rights of others, preserve domestic tranquility, peace and order, promote the common interests of the community, provide for the common defence of the country, and the preservation of her free institutions, established for the common benefit of the people, and, in a great measure, committed to its fostering care, its powers are inadequate to the performance of the obligations imposed upon it."); *Aymette*, 21 Tenn. at 159 ("To hold that the legislature could pass no law upon this subject, by which to preserve the public peace, and protect our citizens from the terror, which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes, and to make it a social evil, of infinitely a greater extent to society, than would result from abandoning the right itself.")

<sup>205</sup> In *Simpson v. State*, the Tennessee Supreme Court did examine whether the Statute of Northampton was applicable within the State. 13 Tenn. 356 (1833). The plaintiff William Simpson, who was charged with committing an affray with arms, argued the Statute of Northampton was not applicable in the State on the grounds it conflicted with article XI, section 26 of the 1796 Tennessee Constitution. *Id.* at 360; see also TENN. CONST. of 1796, art. XI, § 26 ("That the freemen of This State have a right to keep and to bear arms for their common defense"). The court *never* answered whether the Tennessee Constitution superseded the Statute of Northampton or whether there was a right to armed carriage in public. The court ultimately quashed the conviction on the grounds the indictment did not accurately describe the affray for which the plaintiff was charged and tried. *Simpson*, 13 Tenn. at 360-62.

<sup>206</sup> See MARTIN, *supra* note 38, at 60-61.

<sup>207</sup> 25 N.C. 418 (1843).

<sup>208</sup> *Id.* at 420.

They attack directly that public order and sense of security, which it is one of the first objects 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 violence. 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>209</sup>

Here, Gaston’s opinion coincides with the prosecutorial scope of the Statute of Northampton.<sup>210</sup> It expressly conditioned armed carriage for lawful purposes such as “business or amusement” and did not mention any armed preparatory self-defense exceptions.<sup>211</sup> Gatson’s reference to lawful purposes undoubtedly acknowledged the State’s police power over armed carriage 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 for this reason that the carrying did not constitute a crime per se. However, the common-law offense of carrying dangerous weapons in the public concourse 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>212</sup> If it was to merely carry arms among the public concourse it could be a violation of the Statute.<sup>213</sup>

Gatson was not the only Antebellum Era legal mind that saw the continued relevance of the Statute of Northampton in the ongoing debate over the law and armed carriage.<sup>214</sup> Citing to the Statute of Northampton, James Kent wrote in

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<sup>209</sup> *Id.*

<sup>210</sup> *See supra* pp. 392-401.

<sup>211</sup> *Huntly*, 3 N.C. at 422. At no point is this author inferring the right to self-defense was non-existent in the Antebellum Era. However, it is important to point out that Judge Gatson did not list preparatory armed carriage as one of the “lawful” exceptions.

<sup>212</sup> The North Carolina Supreme Court was not articulating a novel legal principle. In the early eighteenth century, the King’s Bench gave a similar rationale when interpreting the 1706 Game Act. *See* 6 Ann., c. 16, § 6 (1706) (Eng.); *Wingfield v. Stratford & Osman* (1752), in 1 REPORTS OF CASES ADJUDGED IN THE COURT OF THE KING’S BENCH 1751-1756 15, 16 (Joseph Sayer ed., London, W. Strahan & M. Woodfall 1775). 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, *supra* note 89, at 396-97.

<sup>213</sup> David B. Kopel interprets *State v. Huntly* quite differently and criticizes this author’s reading. *See* Kopel, *supra* note 38, at 23-24. While Kopel is certainly entitled to disagree with this author, it seems Kopel’s interpretation is based on an unsupported reading of Sir John Knight’s case, which Judge Gatson cited for the proposition that the “Statute of Northampton was made in affirmance of the common law.” *Huntly*, 3 N.C. at 421. For the historical differences on Sir John Knight’s case between this author and Kopel, compare Kopel, *supra* note 38, at 6-14, with *supra* pp. 393-99 and accompanying footnotes.

<sup>214</sup> *See, e.g.,* WHARTON, *supra* note 155, at 528.

*Commentaries on American Law*, “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>215</sup>

Ultimately, what can be deduced from the Antebellum Era as a whole is there were two interpretations as to whether the right to bear arms included armed carriage. Courts in the South primarily perceived such a right as being embodied within either the Second Amendment or the respective state constitutional “bear arms” analogue. In contrast, courts in the North did not recognize such a right, particularly as it pertained to armed carriage in the public concourse. But as the United States came out of the Civil War and into the Reconstruction Era, two notable developments began to take shape. The first was that southern courts began to assimilate their jurisprudence of the law and armed carriage with that of the North. The second development was the arrival of newspaper opinion editorials debating the policy implications and effectiveness of armed carriage laws.

Beginning with how southern courts assimilated some of the North’s views of the law and armed carriage, this development may be attributed to the general increase of lawlessness and violence in the Reconstruction South. Faced with this problem, southern states responded by modifying their respective constitutions so that the legislature’s police power was not called into question.<sup>216</sup> This was followed by legislatures enacting strict legislation to curtail the practice of carrying dangerous weapons in the public concourse.<sup>217</sup> Such legislation was even passed in states where their respective constitutions did not contain a police power or regulatory proviso.<sup>218</sup>

These armed carriage laws were eventually challenged in the courts, but for the most part were upheld as a constitutional exercise of police power. Comparing and contrasting these Reconstruction Era decisions from their Antebellum Era counterparts, there developed a noticeable shift in legal doctrine. Again, during the Antebellum Era there were southern courts that held legislatures could ban the concealed carry of dangerous weapons, but could not ban open carry. However, these courts were generally silent as to the extent the state legislatures could regulate open carriage. In what manner could the state restrict the carriage of dangerous

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<sup>215</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 406 (8th ed. 1854).

<sup>216</sup> See, e.g., GA. CONST. of 1868, art. I, § 14; TENN. CONST. of 1870, art. I, § 26; FLA. CONST. of 1885, art. I, § 20; TEX. CONST. of 1868, art. I, § 13 (“Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulation as the legislature may prescribe.”). New states also included such provisions. See IDAHO CONST. of 1889, art. I, § 11; UTAH CONST. of 1896, art. I, § 6.

<sup>217</sup> Brief of Thirty-Four Professional Historians and Legal Historians as Amici Curiae in Support of Respondents at 15-18, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521) [hereinafter *Amici Curiae Brief of Historians*]; see also *Some Oil and Vinegar*, ANDERSON INTELLIGENCER (S.C.), Jan. 13, 1881, at 1 (“Carrying concealed weapons is essentially a cowardly practice, and severe laws to punish it should not only be enacted, but relentlessly enforced. It is a very vicious part of a highly vicious American practice, which originating in the necessities of a rude border life, and strengthened in the South by the institution of negro slavery, and in the West by the preponderance of daring, swaggering or reckless men, has grown and spread, through all of this boasted nineteenth century, until it has become not only a national reproach, but an unbearable evil.”).

<sup>218</sup> *Amici Curiae Brief of Historians*, *supra* note 217, at 15-18.

weapons even if carried openly? Did it matter whether the law restricted carriage in private, public, or both?

The Reconstruction Era courts began providing the answers, and there developed a consensus that legislatures could restrict the carrying of dangerous weapons in the public concourse.<sup>219</sup> Take for instance the Georgia Supreme Court, where previously in *Nunn v. State* the court was forthright in declaring the legislature could not prohibit the carriage of arms openly, but was silent as to how the legislature could regulate any facet of open carriage.<sup>220</sup> Nearly three decades later, the court addressed the matter in *Hill v. State*. At issue was an 1870 law that prohibited any person from carrying “any dirk, Bowie-knife, pistol or revolver, or any kind of deadly weapon, to any court of justice of any election ground or precinct, or any place of public worship, or any other public gathering . . . except militia muster grounds.”<sup>221</sup>

By the time the Georgia Supreme Court was presented with *Hill*, the judges became cognizant to the problem of southern violence through the practice of armed carriage. “I have always been at a loss to follow the line of thought that extends the guarantee to the right to carry pistols, dirks, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day,” wrote Judge McCay.<sup>222</sup> But more importantly, the court curtailed its pronouncement in *Nunn*.<sup>223</sup> What the court ultimately rationalized is that any right to carry weapons did not supersede the right to peacefully assemble, vote, and worship in the public concourse “unmolested by terror, or danger, or insult.”<sup>224</sup> For it to be the other way around or for the right to carry arms in public to be the equivalent of the right to peacefully assemble, vote, and worship would mean the “whole scheme of law and order, and government and protection, would be a failure, and that the people, instead of depending upon the laws and the public authorities for protection, were

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<sup>219</sup> See, e.g., JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152-53 (1868) (“But all such provisions, all such guarantees, must be construed with reference to their intent and design. This [Second Amendment] is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner.”); JOEL TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW 394 (1867) (the “right in the people to keep and bear arms, although secured by . . . the constitution, is held in subjection to the public safety and welfare.”); see also John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 CENT. L.J. 259, 287 (1874) (“[T]he peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons.”).

<sup>220</sup> *Nunn v. State*, 1 Ga. 243, 251 (1846).

<sup>221</sup> *Hill v. State*, 53 Ga. 472, 474 (1874). For the full statute, see PUBLIC LAWS PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, AT THE SESSION OF 1870, WITH AN APPENDIX 42 (Augustus Flesh ed., 1870).

<sup>222</sup> *Hill*, 53 Ga. at 475.

<sup>223</sup> It is worth mentioning that the Reconstruction Era Georgia Supreme Court would have dismissed the case outright if it wasn’t for the precedent set in *Nunn. Id.* at 474. (“Were this question entirely a new one, I should not myself hesitate to hold that the language of the constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the “arms” necessary for a militiaman.”).

<sup>224</sup> *Id.* at 478.

each man to take care of himself, and to be always ready to resist to the death, then and there, all opposers.”<sup>225</sup>

In *Andrews v. State*, the Tennessee Supreme Court arrived at a similar conclusion.<sup>226</sup> At issue was a law that prohibited the carriage of a “dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver” in both public and private.<sup>227</sup> As it pertained to the carriage of such arms in private, the court concluded the law was unconstitutional because it would have punished individuals that purchased such weapons and carried them to their residence.<sup>228</sup> In other words, the law was deemed unconstitutionally broad because it needlessly intruded into the right to “keep” such weapons.<sup>229</sup> But as it pertained to the prohibition in public, the court found the law to be a constitutional exercise of government police power.<sup>230</sup> As Judge Freeman wrote:

While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.”<sup>231</sup>

Even Texas, known for its frontier way of life, concluded that the it may prohibit the carrying of dangerous weapons in the public concourse. In *English v. State*, relying on precedent, contemporaneous legal commentary, and the historical genesis of the Statute of Northampton, the Texas Supreme Court concluded that the state’s armed carriage law did not violate the Second Amendment.<sup>232</sup> Rather, the court reasoned restrictions promoted civil liberty and public safety: “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.”<sup>233</sup>

Then there was the Missouri Supreme Court case of *State v. Reando*. At issue was the constitutionality of an 1874 state law that prohibited the concealed carriage of any firearms or dangerous weapons into:

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

<sup>226</sup> *Andrews v. State*, 50 Tenn. 165, 179-182 (1871).

<sup>227</sup> *Id.* at 171. For the full statute, see 2 A COMPILATION OF THE STATUTE LAWS OF THE STATE OF TENNESSEE 91 (Seymour D. Thompson & Thomas M. Steger eds., 1873).

<sup>228</sup> *Andrews*, 50 Tenn. at 178.

<sup>229</sup> *Id.* at 179.

<sup>230</sup> *Id.* at 182.

<sup>231</sup> *Id.* at 181-82.

<sup>232</sup> *English v. State*, 35 Tex. 473, 475-81 (1872). The Texas Supreme Court interpreted the Statute of Northampton broadly and cited to William Blackstone and Sir John Knight’s case as legal authority. *Id.* at 476.

<sup>233</sup> *Id.* at 477.

[A]ny church or place where people have assembled for religious worship, or into any schoolroom or into any place where people may be assembled for educational, literary or social purposes, or to any election precinct, on any election day, or into any court room, during the sitting of court, or into any other public assemblage of persons met for other than militia drill . . . .<sup>234</sup>

The law was subsequently challenged on the grounds it violated article I, section 8 of the Missouri Constitution of 1865, which provided the “right of the citizens to bear arms in defence of themselves and the lawful authority of the State.”<sup>235</sup> Judge Elijah H. Norton, a delegate to the Missouri Constitutional Convention of 1861 and the father of the Missouri Constitution of 1875,<sup>236</sup> upheld the law as a constitutional exercise of government police power.<sup>237</sup> First, Judge Norton determined that the law did not prohibit the carriage of arms openly and therefore was entirely consistent with precedents set in other southern courts.<sup>238</sup> Second, although the Missouri Supreme Court was not presented with an open carriage restriction of dangerous weapons in public places, Judge Norton noted the practice was so repugnant to the “moral sense of every well-regulated community” that society would be “shocked by any one who would so far disregard it, as to invade such places with fire arms and deadly weapons[.]”<sup>239</sup> Judge Norton then concluded the opinion by noting the presumptive constitutionality of public firearm regulations in general:

The statute in question is nothing more than a police regulation, made in the interest of peace and good order, perfectly within the power of the legislature to make. Such, or similar statutes, have been upheld in all the States, so far as we have been able to ascertain . . . .

[O]r rather making it an offense to use them in certain ways and places, have never been questioned . . . .

The constitution protects a person in his right of property, and instances are numerous where the legislature has assumed to regulate and control it. A person has a right to own a mischievous or dangerous

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<sup>234</sup> 1 THE REVISED STATUTES OF THE STATE OF MISSOURI 1879, at 224 (1879). The law also prohibited the general carriage of firearms or dangerous weapons “when intoxicated or under the influence of intoxicating drinks . . .” *Id.*

<sup>235</sup> MO. CONST. of 1865, art. I, § 8.

<sup>236</sup> See generally 2 A HISTORY OF NORTHWEST MISSOURI 1915 (Walter Williams ed., 1915).

<sup>237</sup> *The Supreme Court: On Carrying Concealed Weapons*, St. J. (Jefferson City, Mo.), Apr. 12, 1878, at 2. This is the only copy of the opinion that seems to have survived. The case cannot be found in the Missouri Supreme Court Historical Database, but was briefly reported in a contemporaneous issue of *The Central Law Journal*. See *Abstract of Decisions of the Supreme Court of Missouri: October Term, 1877*, 6 CENT. L.J. 16, 16 (1878) (“The act of the legislature prohibiting the conveying of fire-arms into courts, churches, etc. . . . is constitutional. It is a police regulation not in conflict with the provisions of the organic law . . . *State v. Reando*.”).

<sup>238</sup> *The Supreme Court: On Carrying Concealed Weapons*, St. J. (Jefferson City, Mo.), Apr. 12, 1878, at 2.

<sup>239</sup> *Id.*

animal; yet under our statute, if the owner thereof, knowing its propensities, unlawfully suffer it to go at large or shall keep it without ordinary care, and such animal while so at large and not confined, kill any human being, such owner is liable to be punished as for manslaughter in the third degree. It is provided in the constitution of the United States that the freedom of speech and of the press shall not be abridged by any law of Congress, and yet this provision has never been so construed as to deny to Congress the power to make it offence for libelous matter to be published, rendering the offender liable to prosecution and punishment for the libel so published . . . .<sup>240</sup>

The important point that Judge Norton made was that all rights are subject to regulation in the interest of the public good. This was particularly the case when the exercise of the right could have negative impacts on the community at large. Ultimately, what the decisions in *Hill*, *Andrews*, *English*, and *Reando* collectively showed was, as the United States progressed into the Reconstruction Era, even the violent South gradually came to accept firearm restrictions in public as a constitutional exercise of government police power. This is not to say each and every southern court explored the legal contours of government police power and armed carriage within the public concourse. In a number of cases, the respective court was only faced with the constitutionality of a concealed carry prohibition, and swiftly upheld the constitutionality of the law on the grounds that it did not prohibit all forms of armed carriage.<sup>241</sup> But as states' armed carriage laws evolved to encompass aspects of open carriage, so, too, did their jurisprudence.

By the close of the nineteenth century the general consensus was that state and local governments retained the police power to regulate armed carriage in the public concourse—that is so long as the legislature did not utterly destroy the right or fail to provide for self-defense exceptions in extreme cases.<sup>242</sup> As the eminent jurist John Forrest Dillon summarized the issue in the first law review article on the subject:

It is within common experience that there are circumstances under which to disarm a citizen would be to leave his life at the mercy of a treacherous and plotting enemy. If such a state of facts were clearly proven, it is obvious it would be contrary to all our notions of right and justice to punish the carrying of arms [in that instance], although it may have infringed the letter of some statute.<sup>243</sup>

In all other cases, however, Dillon noted the state legislatures were acting within their authority “to regulate the bearing of arms in such manner as [they] may see fit, or to restrain it altogether.”<sup>244</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *See, e.g.*, *Fife v. State*, 31 Ark. 455, 559-62 (1876); *Ex Parte Cheney*, 27 P. 436, 437-38 (Cal. 1891); *State v. Wilmoth*, 74 Mo. 528, 530-31 (Mo. 1881); *State v. Speller*, 86 N.C. 697, 700 (1882).

<sup>242</sup> *See, e.g.*, *Commonwealth v. McNulty*, 28 Leg. Intel. 389 (Pa. 1871); *Andrews v. State*, 50 Tenn. 165, 188-89 (1871).

<sup>243</sup> Dillon, *supra* note 219, at 286.

<sup>244</sup> *Id.* at 296.

At the same time southern courts were assimilating to northern views of the law and armed carriage, a number of cities across the United States, including Milwaukee, Wisconsin, Wheeling, West Virginia, and New York, New York adopted some of the first “good cause” or “may issue” licensing regimes.<sup>245</sup> In the

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<sup>245</sup> See, e.g., ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, IN FORCE JANUARY 1, 1881, at 214-15 (Elliott F. Shepard & Ebenezer B. Shafer eds., 1881); LAWS AND ORDINANCES FOR THE GOVERNMENT OF THE CITY OF WHEELING, WEST VIRGINIA 206 (1891) (1881 ordinance requiring a “permit in writing from the mayor” to carry “any pistol, dirk, bowie knife or weapon of the like kind,” as well as prohibiting certain concealed weapons); *The Dog Was Mad*, SUNDAY SENTINEL (Milwaukee, Wis.), Apr. 19, 1885, at 3 (reporting that a number of Milwaukee citizens submitted applications to the chief of police for “permission” to carry a pistol in light of recent dog attacks). Initially, the Milwaukee licensing regime applied to the general carriage of dangerous weapons in public. See THE GENERAL ORDINANCES OF THE CITY OF MILWAUKEE TO JANUARY 1, 1896, at 692-93 (Charles H. Hamilton ed., 1896). However, it seems the ordinance was subsequently amended to only prohibit the carriage of concealed weapons. See THE GENERAL ORDINANCES OF THE CITY OF MILWAUKEE TO SEPTEMBER 1, 1905, at 181-82 (Carl Runge ed., 1906). Other cities adopted similar “good cause” or “may issue” regimes. See AN ORDINANCE IN THE REVISION OF THE ORDINANCES GOVERNING THE CITY OF KANSAS 264 (Gardiner Lathrop & James Gibson eds., 1880) (prohibiting concealed carriage unless the individual is a government official or obtained “special permission from the Mayor”); CHARTER AND ORDINANCES OF THE CITY OF STOCKTON 240 (1908) (1891 ordinance prohibiting concealed carriage unless the individual is a government official or obtained a “written permit to do so from the Mayor”); COMPILED ORDINANCES OF THE CITY OF OMAHA 70 (Champion S. Chase ed., 1881) (ordinance prohibiting the carriage of concealed weapons, with exceptions to government officers and “well known and worthy citizens, or persons of good repute . . . going to or from their place or places of business, if such business be lawful”); GENERAL MUNICIPAL ORDINANCES OF THE CITY OF OAKLAND, CALIFORNIA 218 (Fred L. Button ed., 1895) (1890 ordinance prohibiting concealed carriage unless the individual is a government official or obtained a “written permit . . . granted by the Mayor for a period of not to exceed one year to any peaceable person whose profession or occupation may require him to be out at late hours of the night to carry a concealed deadly weapon”); GENERAL ORDINANCES OF THE CITY OF BINGHAMTON, NEW YORK 128 (John Marcy, Jr., & W. Earl Weller eds., 1919) (showing a permit issued by the chief of police was required to “carry pistols” in the city); GENERAL REVISED AND CONSOLIDATED ORDINANCE AND SPECIAL ORDINANCES OF LINCOLN, NEBRASKA 68-69 (Thos. H. Pratt & D.J. Flaherty eds., 1908) (ordinance prohibiting concealed carriage except for “officers of the law discharging their duties” and “persons whose business or occupation may seem to require the carrying of weapons for their protection, and who shall have obtained from the Mayor a license to do so.”); MUNICIPAL ORDINANCES OF THE CITY OF TROY 425 (1905) (1905 ordinance prohibiting concealed carriage except for “peace officers” and requiring “any person . . . who has occasion to carry a loaded revolver, pistol or firearm for [their] protection” to apply for permit from the “commissioner of public safety”); THE MUNICIPAL CODE OF ST. LOUIS 738 (Eugene McQuillin ed., 1901) (1892 revised ordinance prohibiting concealed carriage unless the individual is a government official or obtained “written permission from the mayor”); THE MUNICIPAL CODE OF THE CITY OF SPOKANE, WASHINGTON 310 (Rose M. Denny ed., 1896) (1895 ordinance prohibiting concealed carriage of dangerous weapons or “any instrument by the use of which injury could be inflicted” unless the individual is a government official or obtained a “special written permit from the Superior Court”); REVISED CHARTER AND ORDINANCES OF THE CITY OF TACOMA, WASHINGTON 81 (L.W. Roys ed., 1905) (ordinance prohibiting the concealed carriage of any “revolver, pistol or other firearms” unless the individual is a government official or had obtained a “written permit” from the chief of police); THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH 283 (Joseph Lippman ed., 1893) (1888 ordinance prohibiting concealed carriage of deadly weapons unless the individual



obtained the “permission” of the mayor); *City Ordinance*, PADUCAH EVENING SUN, Sept. 8, 1909, at 6 (ordinance prohibiting the carrying of firearms “within any park, boulevard, avenue, street, parkway, or driveway of this city under the control or supervision of the Board of Park Commissioners, except under a permit”); *Democratic Platform*, DEMOCRATIC NW. (Napoleon, Ohio), July 28, 1881, at 3 (calling for the amendment of the present law prohibiting concealed carriage by increasing the penalty and providing for a permit licensing scheme for “persons whose business keeps them out at night, and those in charge of money”); *For Concealed Weapons: John Holt Had License to Tote Pistol, But Carried Same Concealed*, GAINESVILLE DAILY SUN, Aug. 14, 1905, at 5 (discussing ordinance prohibiting concealed carriage, but permitting open carriage with a license so long as weapon is “carried in full view, and on the front of the body or person”); *Kills Ten in a Second*, COLUMBUS J. (Columbus, Neb.), Sept. 8, 1909, at 4 (“America is a civilized country whose cities and towns are—or—should be—sufficiently orderly and sufficiently policed to safeguard life and protect property, it must also be conceded that law-abiding citizens are not called upon to carry concealed weapons for their own protection. To carry weapons so concealed without a permit is itself unlawful.”); *License to Carry Weapons*, DENISON REV., June 11, 1913, at 3 (ordinance prohibiting the general carriage of “offensive and dangerous weapons” unless the individual is a government official or obtained a permit from the mayor, sheriff or chief of police); *Ordinance No. 79*, ADAMS COUNTY NEWS, June 14, 1899, at 2 (ordinance prohibiting concealed carriage unless the individual is a government official or obtained a “written permit from the Town Marshal”); P.F. Skinner, *Suggests New Weapon Laws*, WASH. HERALD, Mar. 26, 1922, at 4 (calling for a revision of the District of Columbia’s armed carriage law that allows for a permit and stating “[n]o man with a permit to carry should object to a search when he knows such an action means his safety”); *Reports on Weapons Carrying*, EVENING TIMES-REPUBLICAN (Marshalltown, Iowa), Sep. 6, 1913, at 6 (grand jury calling on the mayor, chief of police, and sheriff to be more cautious when “granting permits to the present holders of such to carry guns and conclud[ing] that it can not overlook the want of care exhibited in the issuance of permits granting so dangerous a privilege to any person in the community”). For cities that adopted general prohibition on going armed in public, whether concealed, open or both, see CHARTER AND REVISED ORDINANCES OF THE CITY OF SAN JOSE 91 (1882) (1882 ordinance prohibiting the general carriage of “slung shot, or knuckles, or instruments of the like,” and the concealed carriage of any “pistol, dirk, or other dangerous weapon” unless the individual is a government official); CHARTER AND GENERAL ORDINANCES OF THE CITY OF ALBANY 110 (1887) (ordinance prohibiting the carriage of “any deadly or dangerous weapons of any kind whatever in a concealed manner,” but excepting “peace officers”); CHARTER AND REVISED ORDINANCES OF FORT WORTH, TEXAS 196 (1900) (ordinance prohibiting the general carriage of “any pistol, dirk, dagger, slung-shot, sword cane, spear or knuckle . . . bowie knife, or any other knife manufactured or sold for the purpose of offense or defense”); DIGEST OF THE CHARTER AND ORDINANCES OF THE CITY OF MEMPHIS, TOGETHER WITH THE ACTS OF THE LEGISLATURE RELATING TO THE CITY 190 (William H. Bridges ed., 1863) (ordinance prohibiting the concealed carriage of “any pistol, Bowie-knife, dirk or other deadly weapon,” including requiring policemen to obtain a permit from the mayor to do so); CHARTER AND ORDINANCES OF THE CITY OF NEW HAVEN, TOGETHER WITH STATUTES RELATING TO THE CITY 133 (1870) (ordinance prohibiting the general carriage of “brass knuckles, or any slung shot, or weapon of similar character,” as well as “any weapon concealed on his person”); CHARTER AND ORDINANCES OF THE CITY OF SYRACUSE 192 (1877) (ordinance prohibiting the carriage of “any dirk, bowie knife, sword or spear cane, pistol, revolver, slung-shot, jemme, brass knuckles, or other deadly and unlawful weapon”); CHARTER AND ORDINANCES OF THE CITY OF WATERBURY TOGETHER WITH STATUTES RELATING TO THE CITY 144 (1874) (ordinance prohibiting the carriage of “any steel, iron, or brass knuckles, or any slung shot or weapon of similar character, or . . . any weapon concealed on his person”); CODE OF THE CITY OF AUGUSTA, GEORGIA 187, at 296 (C.E. Dunbar ed., 1909) (prohibiting the carriage of concealed weapons); COMPILED ORDINANCES OF THE CITY OF ST. PAUL, MINNESOTA 78 (Hiram David Frankel ed., 1908) (1882 ordinance prohibiting the concealed carriage of “dangerous or deadly

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weapon[s]”); COMPILED ORDINANCES OF THE CITY OF OMAHA 70 (Champion S. Chase ed., 1881) (ordinance prohibited the carriage of concealed weapons, with exceptions to government officers and “well known and worthy citizens, or persons of good repute . . . going to or from their place or places of business, if such business be lawful”); DIGEST OF THE LAWS AND ORDINANCES OF THE CITY OF LITTLE ROCK 168 (John H. Cherry ed., 1882) (1881 ordinance prohibiting the concealed carriage of “any pistol or colt . . . bowie-knife, dirk-knife, or dirk or dagger . . . or any other dangerous weapon”); DULUTH CITY CHARTER AND ORDINANCES 471 (J.B. Richards ed., 1905) (1904 ordinance prohibiting the concealed carriage of any “slung-shot, sand-club, metal knuckles, dagger, dirk, pistol or other firearm, or any dangerous weapon within the city”); GENERAL ORDINANCES OF THE CITY OF PROVIDENCE AND THE RULES OF THE BOARD OF ALDERMEN AS REVISED IN THE YEAR 1899, at 219 (1900) (ordinance authorizing policemen to “arrest without warrant . . . any person . . . being unduly armed with a dangerous weapon”); ORDINANCES OF THE CITY OF NASHVILLE 340 (William K. McAlister, Jr. ed., 1881) (1873 ordinance prohibiting the carriage of any “pistol, bowie-knife, dirk-knife. . . or other deadly weapon”); REVISION OF THE ORDINANCES AND MUNICIPAL LAWS OF THE CITY OF COVINGTON, KENTUCKY 254 (Walker C. Hall ed., 1900) (1900 ordinance prohibiting the concealed carriage of dangerous weapons “other than an ordinary pocket knife,” except for government officers, mail carriers, or express messengers); REVISED ORDINANCES OF THE CITY OF SEATTLE 186 (1893) (ordinance prohibiting the concealed carriage of “any dangerous or deadly weapon”); REVISED GENERAL ORDINANCES OF THE CITY OF SIOUX CITY, IOWA 109 (M. Lloyd Kennedy ed., 1894) (1889 ordinance prohibiting the concealed carriage of dangerous weapons except for government officials in the “proper discharge of [their] official duties”); THE REVISED ORDINANCES OF THE CITY OF SEDALIA, MISSOURI 330 (John Cashman ed., 1894) (ordinance prohibiting the concealed carriage of “any pistol or revolver, slung-shot, cross knuckles . . . or other dangerous or deadly weapon” unless the individual is a government official); THE CHARTER AND ORDINANCES OF THE TOWN OF COVINGTON, VIRGINIA 33 (1896) (1896 ordinance prohibiting the concealed carriage of “any pistol, dirk, bowie knife, razor, slung-shot, or any weapon of the like”); THE GENERAL ORDINANCES OF THE CITY OF SAINT JOSEPH 508 (Charles S. Shepherd ed., 1897) (ordinance prohibiting the carriage of concealed weapons); THE LAWS AND ORDINANCES OF THE CITY OF PORTLAND, OREGON 22 (W.T. Hume ed., 1892) (ordinance prohibiting the concealed carriage of “dangerous weapons”); THE MUNICIPAL CODE OF THE CITY OF TOLEDO 170, at 276 (Irvin Belford & Charles T. Lewis eds., 1885) (1868 ordinance prohibiting the concealed carriage of “any pistol, bowie knife, dirk, or any dangerous weapon”); THE ORDINANCES OF A GENERAL NATURE OF THE CITY OF YOUNGSTOWN, OHIO 52 (A.E. Knight ed., 1885) (ordinance prohibiting the concealed carriage of “any pistol, bowie knife, dirk, or any dangerous weapon”); THE REVISED CODE ORDINANCES OF THE CITY OF HOUSTON OF 1914, at 267 (E.P. Phelps ed., 1914) (1913 ordinance prohibiting the general carriage of “any pistol, dirk, dagger, sword cane, spear, slung shot, [or] knife”); THE REVISED ORDINANCES OF THE CITY OF JACKSONVILLE 92 (C. Harry Dummer ed., 1884) (1877 ordinance prohibiting the concealed carriage of any “pistol or revolver . . . dirk, knife, bowie knife, or any other dangerous deadly weapon,” except for government officials carrying out their duties); *A War on Pistols*, DAILY DISPATCH (Richmond, Va.), July 6, 1880, at 3 (reprinting four opinion editorials in other newspapers which detail the national increase of armed carriage laws, as well as call for more armed carriage laws); *Deputy Sheriffs Must Obey the Law*, ALBUQUERQUE MORNING J., Nov. 12, 1905, at 1 (Albuquerque sheriff clarifying that not even “deputy sheriffs” were permitted to carry concealed weapons at all times unless in pursuit of criminal or was “necessary for the public safety”); *Ordinance No. 88*, WILLIAMS NEWS (Williams, Ariz.), Sept. 21, 1916, at 2 (ordinance prohibiting the concealed carriage of any “revolver, pistol, bowie knife, dirk . . . or any other dangerous weapon”); *The Carrying of Concealed Weapons*, MEM. DAILY APPEAL, Dec. 1, 1872, at 2 (opinion editorial applauding the strict enforcement of Memphis’s armed carriage ordinance); *Unloaded Weapons are Contrary to Law Also*, L.A. HERALD, July 30, 1907, at 7 (announcing that the Los Angeles city council amended its prohibition on carrying concealed weapons to be applicable to both unloaded and loaded firearms). In the case of

case of New York, New York the licensing regime required the applicant to prove his or her good character and the reason why the permit should be granted.<sup>246</sup> Other cities followed suit at the urging of the press.<sup>247</sup> In the case of Salt Lake City, Utah, the local newspaper advocated for an “ordinance forbidding the carrying of concealed weapons, except with special permits issue by the Mayor or City Marshall.”<sup>248</sup> The newspaper was of the opinion that the city council retained “the right to frame and adopt such an ordinance,” and pointed to other cities that have adopted “ordinances similar . . . and they are believed to be useful laws, operating in the interest of peace and good order.”<sup>249</sup>

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Pawtucket, Rhode Island, the police retained discretion to arrest all that were “unduly armed.” See ORDINANCES OF THE TOWN OF PAWTUCKET, AS REVISED IN 1877, at 65 (1882); see also 1 PROVIDENCE CITY DOCUMENTS FOR THE YEAR 1892, at 247 (1882). In the case of Minneapolis, Minnesota, its charter expressly recognized the power to “license, prohibit, regulate and control the carrying of concealed weapons and provide for confiscation of the same.” MINNEAPOLIS CITY CHARTER AND ORDINANCES 58 (Chas. F. Haney ed., 1892). The same was true of other cities. See, e.g., A DIGEST OF LAWS AND ORDINANCES FOR THE GOVERNMENT OF THE MUNICIPAL CORPORATION OF THE CITY OF HARRISBURG, PENNSYLVANIA IN FORCE AUGUST 1, 1906, at 62 (1906); A DIGEST OF THE LAWS AND ORDINANCES FOR THE GOVERNMENT OF THE MUNICIPAL CORPORATION OF THE CITY OF WILLIAMSPORT, PENNSYLVANIA IN FORCE AUGUST 1, 1900, at 46 (1900); CHARTER OF THE CITY OF DALLAS 42 (1899) (“The city council shall have full power and authority by ordinance to regulate, control and prohibit the carrying of firearms and other weapons within the city limits”); THE ORDINANCES OF THE CITY OF NORFOLK AND THE ACTS OF THE ASSEMBLY OF VIRGINIA 10 (1885).

<sup>246</sup> *Why People Carry Pistols*, ST. LOUIS DAILY GLOBE-DEMOCRAT, Mar. 29, 1878, at 2. In New York City, only police officers were permitted to carry firearms in public without a license. The law may have been prompted at the suggestion of New York Supreme Court Justice John R. Brady. See *Scraps and Facts*, YORKVILLE ENQUIRER, Feb. 10, 1876, at 2. Justice Brady would continue to lobby for such a law at the State level. See *A Life Sentence for Lovitz: Judge Brady Hopes it May be Made a Felony to Carry a Pistol Without a License*, SUN (N.Y.C.), Feb. 26, 1891, at 9.

<sup>247</sup> See, e.g., *Accidents from Fire-Arms*, TOWANDA DAILY REV. (University Park, Pa.), June 2, 1881, at 2 (calling for the enforcement of the law against carrying concealed weapons and for Pennsylvania “to go a step farther in the matter, take charge of fire-arms, [and] give license to use them when a special case demands it”); *Personal Liberty*, LAKE CHARLES ECHO, July 29, 1882, 1 (calling for the amendment of the present armed carriage law by “granting a license to carry weapons upon the furnishing of a good peace bond” and a “rigorous enforcement” of the prohibition on all others); *Scraps and Facts*, *supra* note 246 (calling for a modification to the existing concealed carriage law by “providing that any citizen of character may get from the police a permit” and noting that “[n]o law abiding citizen would ever carry a concealed weapon from choice,” but there are times when a “citizen feels it necessary to have a weapon with which to protect himself against possible attack by thugs”); *The Recent Homicides*, ABBEVILLE PRESS & BANNER, Nov. 14, 1877, at 2 (calling for an amendment to the present armed carriage law by “requiring persons to pay a license for carrying deadly weapons” so that firearm casualties would be “of less frequent occurrence”); [Truncated Title], MEM. DAILY APPEAL, Feb. 17, 1882, at 2 (calling for a modification to the existing armed carriage law by “permitting those who desire to go armed to make application for that purpose to the chief of police”).

<sup>248</sup> *Concealed Weapons*, SALT LAKE HERALD, June 4, 1887, at 4.

<sup>249</sup> *Id.*

On the heels of southern courts upholding laws prohibiting armed carriage in the public concourse, and cities across the United States enacting their own armed carriage restrictions, northern courts began examining the constitutionality of laws that prohibited individuals from assembling and parading with militia type arms, even when such arms were disabled from firing.<sup>250</sup> It was an issue that made it all the way to the Supreme Court in *Presser v. Illinois*, where it was unanimously held:

It cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States, and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations, are authorized by the militia laws of the United States. *The exercise of this power by the states is necessary to the public peace, safety, and good order.*<sup>251</sup>

Needless to say, by the close of the nineteenth century it became rather uncontroversial that state and local governments retained broad police power to restrict armed carriage in the public concourse. This is not to say such laws were never called into question as a violation of the right to arms.<sup>252</sup> The nineteenth-century legal challenges by themselves bring this point to light. But this was not the only medium through which challenges over the validity of armed carriage laws surfaced. The liberty of the press was another, which brings us to the second notable development to take shape on the law and armed carriage during the Reconstruction

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<sup>250</sup> See, e.g., *Dunne v. People*, 94 Ill. 120 (1879); *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896); *Carried a Gun: Murphy's Conviction Sarsfield Guards Case Stands*, BOS. DAILY ADVERTISER, May 23, 1896, at 10; *To Bear Arms: The Murphy Case Before the Full Supreme Bench*, BOS. DAILY ADVERTISER, Mar. 31, 1896, at 10; see also *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (stating as a militia right the right to bear arms does not permit individuals to carry arms “so that in case of an emergency they would be more or less prepared”).

<sup>251</sup> *Presser v. Illinois*, 116 U.S. 252, 267-68 (1886) (emphasis added); see also *State Authority Over Assemblages—Various Decisions by the U.S. Supreme Court*, N.Y. TRIB., Jan. 5, 1886, at 2 (summarizing the holding in *Presser* as “the right of the State to prevent the armed assemblage of its citizens and their parading as military companies when not organized as such under the laws of the State or the United States”); *The Right to Bear Arms*, SALT LAKE EVENING DEMOCRAT, Jan. 9, 1886, at 2 (“not much attention is likely to be paid to [*Presser v. Illinois*] which, as soon as passion gave place to reason, all must have seen was inevitable. The police power of the States is absolute, and, in exercising it for the common safety, rights guaranteed by the constitution are not invaded, but preserved. It is not denying or abridging the right of the people to bear arms to insist that they shall satisfy the State authorities that their purposes are lawful, for otherwise they have no rights in the premises.”); *NEW ULM WKLY. REV.* (Minn.), Jan. 20, 1886, at 2 (summarizing the holding in *Presser* as “a state of the Union has the right to prevent the armed assemblage of its citizens and their parading as military companies when not organized as such under the laws of the state or the United States”).

<sup>252</sup> See, e.g., David A. Curtis, *The Right to Bear Arms: It Shall Not Be Infringed*, *Says the Constitution*, L.A. HERALD, May 22, 1891, at 6 (calling into question whether armed carriage laws and permit licensing schemes violate the Second Amendment).

Era—the arrival of “pro-gun” newspaper opinion editorials debating the policy implications and effectiveness of armed carriage laws.<sup>253</sup>

While these pro-gun opinion editorials seem to have done little, if anything, to prevent the passage of armed carriage laws or influence Reconstruction Era legal discourse on the subject,<sup>254</sup> they historically serve as the first publications where individuals questioned the effectiveness of restricting armed carriage in the public concourse. One such editorial appeared in the October 26, 1866, edition of the *Daily Evening Bulletin*, and called into question San Francisco’s policy of prohibiting armed carriage “within the city limits.” What particularly troubled the author was the expansiveness of the city limits as defined by the legislature:

The law ordains that no person shall carry deadly weapons within the city limits. Now, these limits are according to the law and city maps, all that tract of land between the Pacific ocean and the bay, and from North Beach to a point 12 miles south. This tract is laid out in our charts into beautiful streets, etc. This is the ideal San Francisco—such as it doubtless will be in 1966. The present San Francisco, however, is about one-sixth part of this great domain, whilst the remainder is nothing but a wilderness . . . . We do not meet with many inhabitants . . . over this waste . . . . In the thickly settled part of the town, where the police are in sufficient number to protect the citizen against the evil-minded, I can understand the justice of the regulation. But to prohibit the carrying of weapons beyond our western hills and in the solitudes of Lone Mountain and the Mission, is something that must be pronounced unjust.<sup>255</sup>

At no point did the author call into question the San Francisco council’s authority to regulate armed carriage. Instead, the author challenged the fairness of the law and whether it served its intended purpose. Other opinion editorials challenging the effectiveness of armed carriage laws took a similar tone.<sup>256</sup> In the August 25, 1897,

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<sup>253</sup> See *Carrying Concealed Weapons: Another Disputant*, EVENING STAR (D.C.), Aug. 8, 1881, at 1; *Concealed Weapons: Pretty Hard to Say When the Owners are Amenable to the Law*, DENV. EVENING POST, Aug. 25, 1897, at 5; *Concealed Weapons: Texas Siftings*, GALVESTON DAILY NEWS, Jan. 9, 1886, at 8; *Should We Carry Deadly Weapons? Should They be Licensed?*, GALVESTON DAILY NEWS, Feb. 6, 1881, at 2; *To the Waco Examiner*, WACO EXAMINER, Feb. 10, 1888; *When and Where May a Man Go Armed*, DAILY EVENING BULL. (S.F.), Oct. 26, 1866, at 5.

<sup>254</sup> Opinion editorials challenging the effectiveness and constitutionality of armed carriage laws continued well into the twentieth century. Hereto though, the editorials had little, if any, impact on the continued passage of armed carriage laws throughout the United States. It was not until the 1920s, when hunters and sportsman became organized, that any noticeable impact could be seen. See *infra* pp. 430-73.

<sup>255</sup> *When and Where May a Man Go Armed*, *supra* note 253, at 5.

<sup>256</sup> See, e.g., *All Should Carry Arms*, INDIANAPOLIS J., Dec. 7, 1895, at 4 (“[M]y judgement is that all laws against carrying weapons are wrong and should be repealed. They cannot be enforced, and for that reasons should not exist . . . . My view is that all should be free to carry arms as they please . . . . We would then hear less of violent assaults and burglaries, and such crimes as so often occur, and there would not be a crime more by reason of the unrestrained right to carry arms. It would prevent rather than promote crime.”); *Concealed Weapons*, NEW ORLEANS CRESCENT, Nov. 15, 1868, at 2 (“The law or ordinance forbidding the carrying of weapons is but the natural offshoot or inefficiency and negligence of those intrusted with the

edition of the *Denver Evening Post*, an anonymous author questioned the prosecutorial scope of the law: “It is . . . the circumstances not the man or weapon that makes a weapon dangerous.”<sup>257</sup> The point the author was trying to make was many everyday tools, such as pitchforks, crowbars, and sledge hammers, can be used as dangerous weapons, yet their carriage was not prohibited by law.<sup>258</sup> Meanwhile, in the February 6, 1881, edition of *The Galveston Daily News*, an author under the name Sinex asserted that Texas’s armed carriage law deprived “the law-abiding of the right to bear deadly weapons” against robbers and murderers.<sup>259</sup> Sinex went on to argue that criminals would continue to carry dangerous weapons no matter the penalty, and called for an armed carriage licensing law rather than prohibiting the practice altogether.<sup>260</sup> “Why not provide for licensing the carrying of concealed weapons, and make it a penitentiary offense for anyone to carry them without a license?,” Sinex queried.<sup>261</sup>

In contrast to these pro-gun views were “pro-regulation” opinion editorials calling for the enforcement of existing armed carriage restrictions, the passage of new or additional restrictions or the end of armed carriage altogether. Such pro-regulation editorials appeared with frequency in the press. Generally speaking, the authors viewed the practice of carrying dangerous weapons as needlessly inducing violence.<sup>262</sup> It was only through strict enforcement of the law and education that the

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execution of the law against the criminals who use weapons unlawfully. I say, let who will carry weapons if he chooses, but make him strictly responsible for their improper use. Let swift and adequate punishment follow the commission of crime and we will have less of it.”); Spectator, *The Other Side*, MEM. DAILY APPEAL, Dec. 12, 1880, at 2 (criticizing restrictive armed carriage laws on the grounds that weapons make “all equally strong,” criminals do not obey them, and allowing individuals to be armed would deter crime); *The Practice of Carrying Concealed Weapons*, PASCAGOULA DEMOCRAT-STAR, Oct. 13, 1882, at 6 (“unless the law against carrying concealed weapons can be enforced, it ought to be repealed; because if not enforced it places good citizens who will obey the laws at the mercy of those who break them.”).

<sup>257</sup> *Concealed Weapons: Pretty Hard to Say When the Owners are Amenable to the Law*, DENV. EVENING POST, Aug. 25, 1897, at 5.

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

<sup>259</sup> *Should We Carry Deadly Weapons? Should They be Licensed?*, GALVESTON DAILY NEWS, Feb. 6, 1881, at 2; see also *To the Waco Examiner*, WACO EXAMINER, Feb. 10, 1888 (“Are we protected by the pistol law? It arms the thief, robber and out-law against the honest and law abiding man. It leaves him a dependent upon the mercies of the out-law as the captive bird is upon that of its captors. Every violator of any law also violates the pistol law; at least carries a pistol; yet how many of them convicted of robbery, theft or other crime are made to suffer the penalty of a violated pistol law?”).

<sup>260</sup> *Should We Carry Deadly Weapons? Should They Be Licensed?*, *supra* note 259, at 2; see also *Concealed Weapons: Texas Sifting*, GALVESTON DAILY NEWS, Jan. 9, 1886, at 8 (“The very people, the orderly and respectable, who would be deterred from carrying weapons out of respect for the civil law, are the very ones who would need them, and with whom they could be most safely trusted, while the criminal, bent on acts calculated to entail the most serious punishment, is not likely to try to escape the risk of a paltry \$10 fine . . .”).

<sup>261</sup> *Should We Carry Deadly Weapons? Should They be Licensed?*, *supra* note 259, at 2.

<sup>262</sup> See, e.g., *Concealed Weapons*, DALL. HERALD, Feb. 24, 1883, at 1; *Concealed Weapons*, NORTH AM. (Phila.), Oct. 8, 1881, at 2; *Fighting Played Out*, WKLY. DEMOCRATIC

authors believed the deadly practice could be abolished.<sup>263</sup> From the pro-regulation perspective there was “no excuse for the carrying of weapons either openly or concealed,” except for in “half civilized or border communities, where law and order has not been established, and where each individual must look to himself for protection against all comers . . . .”<sup>264</sup>

There were also opinion editorials that directly countered the pro-gun argument that armed carriage laws were pointless because only the law-abiding followed them.<sup>265</sup> Take for instance the following anonymous editorial in the November 23, 1867, edition of *The Daily Evening Bulletin*:

We are told that the law is obeyed only by the well-disposed, that it deprives the good citizen of the means to protect himself, and that it causes more breaches of the peace than it prevents. These are astonishing propositions. There is certainly originality if not wisdom in opposing the law because it is obeyed only by the well-disposed. On this principle every law against crime should be repealed.<sup>266</sup>

Much like the pro-gun side, it is unknown exactly what impact, if any, such pro-regulation editorials had on the passage of armed carriage laws. What is known is that by the close of the nineteenth century almost every state in the Union maintained some type of armed carriage law,<sup>267</sup> as did many cities and

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STATESMAN (Tex.), Oct. 24, 1878, at 1; *Going Armed*, LA. DEMOCRAT, Dec. 2, 1868, at 1; *One Way to Stop Murder*, GA. WKLY. TELEGRAPH, Apr. 15, 1879, at 8; *The Pistol and Concealed Weapons*, LA. DEMOCRAT, Feb. 23, 1884, at 4; *Shooting at Sight*, BOS. DAILY ADVERTISER, Aug. 28, 1883, at 3; *The Right to Bear Arms, and Murder*, GALVESTON DAILY NEWS, May 15, 1884, at 4; *The Use of Pistols*, MILWAUKEE DAILY SENTINEL, June 16, 1881, at 4.

<sup>263</sup> See, e.g., *How to Put a Stop to Murder*, WKLY. NEWS & COURIER (Charleston), Jan. 12, 1898, at 5; *Shooting at Sight*, BOS. DAILY ADVERTISER, Aug. 28, 1883, at 3; *Wearing Arms Habitually*, NEW ORLEANS REPUBLICAN, Mar. 8, 1876, at 4 (stating that in order to end the practice of going habitually armed it “need not be by prosecution under the laws, but by remonstrance and persuasion with those who follow the practice.”).

<sup>264</sup> *Concealed Weapons*, WKLY. GRAPHIC (Kirksville, Mo.), Jan. 28, 1881, at 1; see also *Concealed Weapons*, N.Y. DAILY TIMES, May 18, 1855, at 4 (“[T]he power should exist somewhere of prohibiting the carrying deadly weapons in the midst of a peaceful community, and we should imagine that it would be competent to enact prohibitory laws on this subject as a matter of police regulation and for the public security, without conflicting with the spirit of [State] Constitutional provisions which secure the right of carrying arms.”).

<sup>265</sup> See, e.g., *Disarming All But Assassins*, DAILY PICAYUNE, Nov. 21, 1895, at 4 (stating the enforcement of the concealed carry law in Louisiana “disarms all law-abiding citizens; while the thugs, hoodlums, the bullies and other of that kidney pay no attention to the law and go constantly armed.”).

<sup>266</sup> *The Law Against Carrying Concealed Weapons*, DAILY EVENING BULL. (S.F.), Nov. 23, 1867, at 2.

<sup>267</sup> See, e.g., 1 THE PENAL CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS 120-24 (Sam Andrew Wilson ed., 1896) (prohibiting armed carriage at public places and gatherings, but not applying to frontier counties or “the carrying of arms on one’s own premises or place of business, nor to persons traveling, nor to one who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening . . . .”); THE STATUTES OF OKLAHOMA 1893, at 503-4 (W.A. McCartney et al. eds., 1893) (prohibiting

municipalities.<sup>268</sup> Additionally, some armed carriage laws were modified to eliminate discretion of enforcement. As a result, law enforcement officials could be fined or removed from office for failing to arrest individuals that violated the respective armed carriage law.<sup>269</sup> Ultimately what the pro-regulation editorials inform us is that armed carriage laws were seen as a solution to quelling violence, crime, and murder. Thus much like the Statute of Northampton,<sup>270</sup> the growth of nineteenth-century armed carriage laws reflected the government's authority to ensure public safety, peace, and order. Indeed, in the Antebellum South the constitutionality of armed carriage laws were called into question as inviolate of the right to arms, whether that right was understood to be protected at the federal or state level.<sup>271</sup> However, this view of the right to arms was not universally held across the United States by any means. More importantly, as the United States progressed into the twentieth century, it was a view that increasingly grew out of favor.<sup>272</sup>

Needless to say, by the close of the nineteenth century, there was a general legal consensus that the Second Amendment did not encompass a right to preparatory armed self-defense in the public concourse. Here, it is worth noting that there are alternative historical assessments of the law and armed carriage in the nineteenth century. Standard Model scholar Michael P. O'Shea, who asserts that at the time of the Fourteenth Amendment's ratification a right to armed self-defense outside the home was rather uncontroversial, postulates one such assessment.<sup>273</sup> "It should be uncontroversial that when historical claims are made about the existence or nonexistence of a particular tradition in American legal history, the decisions and opinions of American Courts are important evidence of that tradition," writes O'Shea.<sup>274</sup> In other words, according to O'Shea, because some Antebellum Era courts in the South acknowledged a broad right to armed self-defense outside the home it is a right the courts must today recognize as being in line with traditional American values.

However, for contemporary Second Amendment jurisprudence to only import the values and tradition of some southern Antebellum courts is doctrinally problematic. For one, it is a rather subjective take on the right to arms outside the home. Not only did contemporaneous northern courts view the public carriage of dangerous weapons differently, but later southern Reconstruction courts generally upheld laws

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armed carriage at public places and gatherings, but permitting the carriage of shotguns or rifles for hunting, repair, and military muster).

<sup>268</sup> See *supra* notes 149, 150 & 245.

<sup>269</sup> See, e.g., DIGEST OF THE CHARTER AND ORDINANCES OF THE CITY OF MEMPHIS, *supra* note 245, at 190 (stipulating any police officer that fails to report every violation of the concealed carriage ordinance shall be "removed from office"); A DIGEST OF THE STATUTES OF ARKANSAS EMBRACING ALL LAWS OF A GENERAL NATURE 506 (L.P. Sandels & Joseph M. Hill eds., 1894).

<sup>270</sup> For the purpose and intent behind the Statute of Northampton, see Charles, *supra* note 38, at 7-30.

<sup>271</sup> See generally *infra* pp. 401-29.

<sup>272</sup> See generally *infra* pp. 401-29.

<sup>273</sup> See generally O'Shea, *supra* note 3.

<sup>274</sup> *Id.* at 671.



prohibiting the carriage of dangerous weapons in the public concourse.<sup>275</sup> Therefore, the best historical rationale that O'Shea can put forward is although there was a variance of nineteenth-century opinions, it is better to acknowledge the southern Antebellum tradition over the others; that is the individual right to armed carriage in the public concourse over the police power to regulate it extensively.

Additionally, O'Shea's reliance on southern Antebellum case law is problematic in that it fails to come to terms with the violence and slavery tradition from which it is rooted. To borrow from Eric M. Ruben and Saul Cornell, it was "the distinctive nature of Southern society, including its culture of slavery and honor, [which] contributed to an aggressive gun culture and influenced Southern [armed carriage] jurisprudence."<sup>276</sup> This creates quite the morality dilemma in accepting the southern Antebellum Era as the jurisprudential baseline.

Herein enters Standard Model scholar David B. Kopel, who views the Reconstruction South, not the Antebellum South, as presenting the morality dilemma. According to Kopel the Reconstruction South's adoption of stricter firearm laws should be jurisprudentially stricken because such laws were an antecedent of Jim Crow.<sup>277</sup> This history in law assessment is common in Standard Model circles.<sup>278</sup> However, it is an assessment that conflicts with most of the evidentiary record. While Kopel and other Standard Model scholars are correct to note that the Reconstruction Black Codes were racially motivated,<sup>279</sup> this was not true of all late nineteenth-century firearm laws, particularly those pertaining to armed carriage.<sup>280</sup>

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<sup>275</sup> See *supra* pp. 414-18.

<sup>276</sup> Ruben & Cornell, *supra* note 172, at 128; see also *Some Oil and Vinegar*, ANDERSON INTELLIGENCER, Jan. 13, 1881, at 1 ("Carrying concealed weapons is essentially a cowardly practice, and severe laws to punish it should not only be enacted, but relentlessly enforced. It is a very vicious part of a highly vicious American practice, which originating in the necessities of a rude border life, and strengthened in the South by the institution of negro slavery, and in the West by the preponderance of daring, swaggering or reckless men, has grown and spread, through all of this boasted nineteenth century, until it has become not only a national reproach, but an unbearable evil.").

<sup>277</sup> Kopel, *supra* note 38, at 32-43, 61-62; Kopel & Cramer, *supra* note 46, at 1137-38.

<sup>278</sup> See STEPHEN P. HALBROOK, *SECURING CIVIL RIGHTS* (2010); DAVID P. KOPEL, *THE TRUTH ABOUT GUN CONTROL* 11-15 (2013); Robert J. Control & Raymond T. Diamond, "Never Intended to be Applied to the White Population": *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995); Robert J. Control & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 336 (1991); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995).

<sup>279</sup> Otherwise known as Black Codes, the regulations often prohibited free blacks and mulattoes from owning, using or carrying firearms. For more on the Black Codes, see Barry A. Crouch, "All the Vile Passions": *The Texas Black Code of 1866*, 97 SW. HIST. Q. 12 (1993); Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365 (1969); THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* (1965); James B. Browning, *The North Carolina Black Code*, 15 J. NEGRO HIST. 461 (1930).

<sup>280</sup> See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615, 621-22 (2006); Cornell, *supra* note 156, at 1724; see also *supra* pp. 401-06.

The fact of the matter is most late nineteenth-century firearm laws were adopted to quell violence, prevent crime, and mitigate public injury.

But even assuming *arguendo* that Kopel and other Standard Model scholars are somehow correct, many late nineteenth-century firearm laws were adopted with racist forethought—their embrace of the Antebellum South is hypocritical. From a morality standpoint, it is difficult for Standard Model scholars to justify embracing an era and culture rooted in the institution of slavery, yet excluding another under the auspices that its legislators and judges were acting with implicit racism.<sup>281</sup>

This raises an important doctrinal question. If the existence of implicit racism truly is a determining factor as to whether an era is appropriate for examining the scope and meaning of the Constitution, then what eras in American history should be excluded? Certainly the early republic must be considered given that the Founding generation owned slaves, acquiesced to slave codes, and maintained racial biases.<sup>282</sup> This included many Supreme Court Justices including Chief Justice John Marshall.<sup>283</sup> In fact, if one pauses to consider, almost every era in American history has experienced some form of implicit racism, and this is not even considering other forms of prejudice such as sexism, xenophobia, homophobia, or bigotry. The English origins of American law present a similar dilemma. It is no secret that English law was rooted in social hierarchy and an intolerance of non-Protestants,<sup>284</sup> yet the importation of English law is common in American jurisprudence.<sup>285</sup>

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<sup>281</sup> When *Moore v. Madigan* was before the Seventh Circuit Court of Appeals the NRA submitted a legal brief asserting that the Second Amendment must extend beyond one's doorstep because "colonial statutes required individual arms-bearing for public safety . . ." Brief and Required Short Appendix of Plaintiffs-Appellants at 34 n.14, *Shepard v. Madigan*, 734 F.3d 748 (7th Cir. 2013) No. 12-1788 (citing An Act for the Better Security of the Inhabitants, By Obliging the Male White Persons to Carry Fire Arms To Places of Public Worship (Ga. 1770), reprinted in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 157–58 (1800)). As historical support, the NRA relied on a Colonial Era Georgia statute that stipulated every able-bodied male shall carry arms to church and other public gathering. *Id.* But a close reading of the Georgia statute reveals its true purpose. The statute was not an endorsement of a right to armed carriage, but one of many means to suppress potential slave revolts. See PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 18 (2009). Fortunately, when the Seventh Circuit handed down its opinion in *Moore* it did not rely on the Georgia statute, but it does highlight just how little consideration has been given to southern traditions of the law and armed carriage.

<sup>282</sup> See, e.g., William Cohen, *Thomas Jefferson and the Problem of Slavery*, 56 J. AM. HIST. 503 (1969); William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81 (1972); William G. Merkel, *Founding Father on Trial: Jefferson's Rights Talk and the Problem of Slavery During the Revolutionary Period*, 64 RUTGERS L. REV. 595 (2012); Kenneth Morgan, *George Washington and the Problem of Slavery*, 34 J. AM. STUD. 279 (2000); Gary Rosen, *James Madison and the Problem of Founding*, 58 REV. POL. 561 (1996).

<sup>283</sup> See, e.g., Lawrence B. Custer, *Bushrod Washington and John Marshall: A Preliminary Inquiry*, 4 AM. J. LEGAL HIST. 34 (1960); Lewis F. Powell, Jr., *Supreme Court Justices from Virginia*, 84 VA. MAG. HIST. & BIOGRAPHY 131 (1976).

<sup>284</sup> The history and background of Sir John Knight's case is a fitting example. Knight went armed with the Mayor and Aldermen of Bristol to stop a Catholic meeting of worship. At the time, not only was Catholic worship often suppressed, but Catholics were also generally prohibited from holding political office or exercising many of the privileges and liberties of Protestants. Knight's prosecution was highly political. James II, Catholic himself, wanted to

The point to be made is that if the judiciary faithfully applied the Standard Model's implicit racism justification for excluding late nineteenth-century firearm laws, the same principle must apply to all eras and facets of the law. But to faithfully execute such a standard would mean that virtually every historical era could be negated on the grounds of implicit racism, sexism, xenophobia, homophobia, and bigotry.<sup>286</sup> This is not, of course, an endorsement of importing any form of prejudice into American constitutional jurisprudence. It just means that the prejudice at issue needs to be unequivocally apparent and historically compartmentalized. The Antebellum Era Slave Codes and the Reconstruction Era Black Codes are examples that undoubtedly qualify, for both were instrumental in the adoption of the Fourteenth Amendment's Equal Protection Clause.<sup>287</sup> Conversely, the overwhelming majority of late nineteenth-century armed carriage laws do not fall into this category. They were laws that applied to all individuals, regardless of race, sex, color, or creed.<sup>288</sup> The same is true of most Antebellum Era armed carriage laws.

The historical lesson to be learned is that the nineteenth century was largely a continuation of the legal precedents set by the previous five centuries with the survival and enforcement of the Statute of Northampton. Certainly, as the United States progressed through the nineteenth century, the law and armed carriage transformed gradually, but the legal tenets embodied in the Statute of Northampton were still prevalent. This can be seen in a language of the new statutory provisions, legal treatises addressing the subject of armed carriage, and a number of state court decisions.

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make an example of Knight, but failed because Knight was assisting the Mayor and Aldermen in executing their duties. *See supra* pp. 393-99.

<sup>285</sup> *See supra* note 28 and accompanying text.

<sup>286</sup> *See, e.g.*, DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW (2000); MARY FRANCES BERRY, BLACK RESISTANCE-WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA (1995); Vivian Grosswald Curran, *Racism's Past and Law's Future*, 28 VT. L. REV. 683 (2004); Genna Rae McNeil, *Before Brown: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431 (2003).

<sup>287</sup> The point here is one should proceed cautiously when employing history in law. This not only ensures constitutional legitimacy, but also minimizes mythmaking. *See generally* Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23 (2014).

<sup>288</sup> Charges and convictions for carrying dangerous or concealed weapons in public appeared regularly in late nineteenth century newspapers. These convictions were not dependent upon race, color, or creed. *See, e.g.*, *Carrying Concealed Weapons*, ROCK ISLAND ARGUS (Ill.), Feb. 21, 1883, at 1 (Judge Williamson calling for the strict enforcement of carrying concealed weapons and dangerous weapons); *Circuit Court Docket*, MARBLE HILL PRESS (Mo.), Mar. 10, 1892, at 4; *Criminal Cases for June Court*, JOHNSTOWN WKLY. DEMOCRAT (Pa.), June 6, 1890, at 8; *Criminal Court at Alexandria*, CIN. DAILY STAR, Dec. 3, 1879, at 5; *Criminal Court Notes*, HARTFORD HERALD (Ky.), Oct. 8, 1879, at 3; *District Court*, ST. LANDRY DEMOCRAT (Opelousas, La.), Sept. 26, 1885, at 5; *District Court*, ST. TAMMANY FARMER (Opelousas, La.), Oct. 29, 1881, at 2; *Mayor's Court*, ROANOKE TIMES, Oct. 8, 1890, at 8; *The Court of General Sessions*, PICKENS SENTINEL (S.C.), Mar. 17, 1892, at 3.

## III. THE LAW AND ARMED CARRIAGE DURING THE TWENTIETH CENTURY

As the United States entered the twentieth century, virtually every state in the Union retained some type of law regulating armed carriage. Additionally, a number of states permitted cities, towns, and localities to pass stringent restrictions on the use of firearms within their respective jurisdictions.<sup>289</sup> In fact, by 1979 forty-three out of the fifty states allowed their cities, towns, and localities to enact more stringent firearm regulations.<sup>290</sup> It was rather uncontroversial that state and local governments could prohibit the carrying of dangerous weapons in the public concourse.<sup>291</sup> As one early twentieth-century commentator to explore the scope of the Second Amendment put it:

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<sup>289</sup> State firearm localism to cities, towns, and localities has roots in the late nineteenth century. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 116-17 (2014). Take for instance, the city of Tulsa, Oklahoma, which prohibited the concealed carriage of “any pistol, revolver, or gun of any kind whatsoever,” and the general carriage of “any pistol, revolver, bowie knife, dirk knife . . . or any other offensive or defensive weapon[.]” CITY OF TULSA, OKLAHOMA: COMPILED ORDINANCES OF TULSA 462 (1917). The legal exceptions to the were “officers” executing their duties and “persons” carrying long guns “to and from repair shops[.]” *Id.* For some other early twentieth century and late nineteenth century city and municipal armed carriage laws, see *supra* notes 149, 150 & 245.

<sup>290</sup> KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 164 (2006).

<sup>291</sup> See Albert Chandler, *The Right to Bear Arms*, 39 BRIEF 15, 20-23 (1940) (summarizing the cases supporting the constitutionality of armed carriage laws); John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 413 (1933) (“in . . . the United States . . . it is recognized that, in the proper exercise of the police power, the carrying of weapons by the individual may be regulated, restricted, and even prohibited by statute.”); Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1914) (“The single individual or the unorganized crowd, in carrying weapons, is not spoke of or thought of as ‘bearing arms.’”); George I. Haight, *The Right to Keep and Bear Arms*, 2 BILL RTS. REV. 31, 41 (1941) (“that the right to bear arms [as it pertains to “carrying certain weapons”], like other rights of person and property, is to be construed in connection with the general police power and is subject to legitimate regulation thereunder.”); Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 143-44 (1928) (“There are certain forms of weapon regulation so proper and necessary that they are universally conceded . . . [such as] against wearing arms in church, court, polling-place, etc . . . .”); *Advocates the Law for Sale of Arms: Proposed Enactment Not in Conflict With Constitution, Mr. Sinclair Says*, EVENING STAR (D.C.), Nov. 30, 1914, at 3 (stating the Second Amendment, like other rights, “must be construed in connection with the police power—the power whereby the health, comfort, good order, peace, security, safety and general welfare of the community are promoted.”); Earl Godwin, *Enforce the Gun Toting Law*, WASH. TIMES, May 22, 1918, at 18 (“No court can afford to disregard a law so necessary as our own gun toting statute. This is NOT a border town nor a mountain fastness. It is the home of the President of the United States, his Cabinet, and the men who compose the brains of the nation in addition to several hundred thousand lesser fold who pray that they, too, may be looked upon as worthy of the protection of the law.”); *Pistol Toting*, ADAIR COUNTY NEWS (Columbia, Ky.), Feb. 8, 1905, at 9 (Missouri governor calling for the strict enforcement of current armed carriage laws); *Pistol Toting Must Go*, EVENING STAR (D.C.), Jan. 24, 1911, at 6 (discussing the growth of strict laws against pistol toting and that such habit “has no proper place in a civilized community”); *The Pistol Toting Evil*, FORT MILL TIMES (Tex.), Sept. 15, 1910, at 8 (story of two judges calling for the strict enforcement of laws prohibiting armed carriage); *The Governor on Whisky and Pistols*, INDIANAPOLIS J., Jan. 14, 1903, at 7 (supporting Indiana Governor Winfield T. Durbin’s

Surely no one will contend that children have a constitutional right to go to school with revolvers strapped around them, or that men and women have a right to go to church or sit in the courtrooms, or crowd around election precincts armed like desperadoes, and that this is beyond the power of the legislature to prevent.<sup>292</sup>

This understanding of the law and armed carriage gained strength following World War II.<sup>293</sup> Jurisprudentially speaking, the status quo was that all laws regulating firearms were constitutionally scrutinized under a reasonableness or rationale basis standard of review.<sup>294</sup> This included armed carriage laws.<sup>295</sup> This is not to say that there was uniformity of regulation on the law and armed carriage. In 1950 for example, out of the forty-eight states in the Union, seventeen required a license to carry a concealed firearm, but retained no restrictions as to carrying a firearm openly.<sup>296</sup> Seven states and the District of Columbia required a license to carry a firearm concealed or openly.<sup>297</sup> Twelve states prohibited the carrying of a concealed firearm, but did not require a license to carry a firearm openly.<sup>298</sup> Georgia prohibited the carrying of a concealed firearm, but required a license to carry a

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proposal to require a license to carry pistols, open or concealed); Y.B. LEGIS. 1903, at d14-d15 (Robert H. Whitten ed., 1904). *But see In re Brickey*, 8 Idaho 597 (1902); *May Carry Weapons in Idaho*, WASH. TIMES, Dec. 24, 1902, at 8 (reporting that the Idaho Supreme Court ruled the State Legislature cannot prohibit every manner of armed carriage in public).

<sup>292</sup> Haight, *supra* note 291, at 42.

<sup>293</sup> See Joe B. Brown, *Firearms Legislation*, 18 VAND. L. REV. 1362, 1371 (1966) (“[I]n the vast majority of states, firearms, or at least handguns, can be regulated by state authorities as long as the regulation bears a reasonable relation to the police power of the state and does not violate due process”); Carter B. Chase, *Regulation of Carrying Pistols for Self-Defense*, 14 INTRAMURAL L. REV. N.Y.U. 20, 26 (1958) (“In general the trend has been to approve regulatory laws such as New York’s Sullivan Law.”); Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53, 63 (1966) (“The right to bear arms . . . was established as a ‘fundamental principle’ by nations well aware of the parallel principle of police power—*i.e.*, the protection of the public health, safety, and welfare.”); *id.* at 73 (“The test of the validity of gun-control legislation should then be its reasonableness as a police regulation considering any inhibiting effects on genuine self-protection.”). *But see* Stuart R. Hays, *The Right to Bear Arms, a Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 405 (1960) (“It would seem that as long as there is danger to the life of man that the society has not eliminated the right of self-defense. As long as this right lives, then also should coexist the right to bear arms, this is exoteric.”).

<sup>294</sup> See, e.g., Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007); Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597 (2006).

<sup>295</sup> See, e.g., *Davis v. State*, 146 So. 2d 892 (Fla. 1962); *Matthews v. State*, 148 N.E.2d 334 (Ind. 1958); *People v. Zerillo*, 189 N.W. 927 (Mich. 1922); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968); *State v. Angelo*, 130 A. 458 (N.J. 1925); *State v. Storms*, 308 A.2d 463 (R.I. 1973); *Hill v. State*, 298 S.W.2d 799 (Tenn. 1957).

<sup>296</sup> F.J.K., *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. PA. L. REV. 905, 909 (1950).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

firearm openly. Missouri only prohibited the carrying of firearms in specific places.<sup>299</sup> Meanwhile, New Mexico prohibited the carrying of firearms in settlements.<sup>300</sup>

Despite the lack of uniformity in state armed carriage laws one common feature developed—the adoption of “good cause” or “may issue” licensing regimes. The antecedents of these licensing regimes arguably date back to the Statute of Northampton, where constables, sheriffs, and justices of the peace retained broad discretion over whom may carry arms in the public concourse.<sup>301</sup> Then in the late nineteenth century a number of cities, towns and localities adopted ordinances prohibiting armed carriage in public unless the individual had obtained a permit from either the mayor or police chief.<sup>302</sup> This was followed by states adopting similar schemes,<sup>303</sup> and by 1960 every state in the Union except Vermont and New Hampshire adopted some form of “good cause” or “may issue” licensing regimes.<sup>304</sup>

But by the close of the twentieth century there was a noticeable shift away from “good cause” or “may issue” licensing regimes. This development in the law and armed carriage was largely due to pro-gun advocacy efforts. Part III explores this development in two parts. First, Part III.A. examines pro-gun attitudes to the law and armed carriage before the rise of the Standard Model Second Amendment—that is before the Second Amendment was interpreted broadly in pro-gun circles. Part III.B. then examines how the Standard Model ultimately facilitated the “right to carry” movement we know today.

#### *A. Pro-Gun Perspectives on Armed Carriage Before the Standard Model Second Amendment*

In order to fully contextualize how the majority of states went away from “good cause” or “may issue” licensing regimes it is important to understand what was taking place before the rise of the Standard Model Second Amendment from the mid- to late-1970s. As addressed earlier, as matter of legal understanding, at the turn of the twentieth century it was rather uncontroversial that state and local governments could prohibit or license the act of carrying dangerous weapons in the public concourse. This is not to say that armed carriage could be universally

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<sup>299</sup> *Id.* at 909-10.

<sup>300</sup> *Id.* at 910. For additional macro summaries of the law and armed carriage at the state level, see *Transporting Your Firearms*, AM. RIFLEMAN, June 1970, at 41; *Basic Facts of Firearms Control*, AM. RIFLEMAN, Feb. 1964, at 14; Frank C. Daniel, *The Gun Law Problem*, AM. RIFLEMAN, Feb. 1953, 16-18.

<sup>301</sup> *See supra* pp. 378-92.

<sup>302</sup> *See supra* notes 149, 150 & 245.

<sup>303</sup> *See, e.g.*, SUPPLEMENT TO THE REVISED LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 1435 (1910) (“The justice of a court, or trial justices, the board of police or the mayor of a city, or the selectmen of a town, or persons authorized by them, respectively, may, upon the application of any persons, issue a license to such person to carry a loaded pistol or revolver in this commonwealth, if it appears that the applicant has good reason to fear an injury to his person or property, and that he is a suitable person to be so licensed.”).

<sup>304</sup> Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 1960-2001*, 26 CONTEMP. ECON. POL. 198, 200 (2008).

prohibited anywhere and everywhere. Based on nineteenth-century jurisprudence there developed an understanding that the law must be flexible enough for individuals to carry and transport arms for lawful purposes, whether that purpose be for recreational shooting, hunting, and even self-defense in extreme cases.<sup>305</sup>

Despite this legal consensus, at the turn of the twentieth century, there arose a growing number of pro-gun opinion editorials that were highly critical of armed carriage laws. The criticism came in a variety of forms.<sup>306</sup> Some claimed that armed carriage laws misplaced the criminal blame with the instrument itself rather than the actions of the individual carrying it. Meanwhile, others thought armed carriage laws were pointless because criminals and murderers would never obey them.<sup>307</sup> These individuals rationalized that the better alternative was armed citizens, which in turn would cause criminals to reconsider their actions:

The gangster is born a coward or he wouldn't be a gangster, and he will take all the mean advantage he can get. A defenseless citizen is "meat" to him. But let an apparently defenseless citizen "flash a gun" on him and the chances are he and his gang will "beat it" precipitately.<sup>308</sup>

But as the United States proceeded further into the twentieth century, the lethality, quantity, and accessibility of firearms were noticeably on the rise. So, too, was the practice of carrying pistols, revolvers, and other dangerous weapons in public. To presidential advisor and civil rights leader Booker T. Washington, the solution was educating the public against the "barbarous, coarse and vulgar habit" of carrying dangerous weapons in public.<sup>309</sup> "There is no reason why a person in a civilized country like the United States should get into the habit of going around in the community loaded and burdened with a piece of iron in the form of a pistol or

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<sup>305</sup> See *infra* pp. 433-64.

<sup>306</sup> See, e.g., *Carrying Concealed Weapons*, UNION TIMES (S.C.), Jan. 25, 1901, at 4 ("To our mind, it has always been plain that all [armed carriage] laws are in contravention to the plain wording of the second amendment"); *The Citizen's Right to Carry Arms*, OCALA EVENING STAR (Fla.), Feb. 29, 1912, at 2 ("The law against carrying concealed weapons should be repealed. It is a sneaking, hypocritical attempt to deprive the people of their constitutional rights. The constitution of the United States explicitly guarantees the right to carry arms. As neither state nor federal statutes can take away this right, legislatures pass laws against carrying concealed weapons, knowing that self respect and the opinions of his neighbors will prevent a man from carrying them openly."); *The "Right to Bear Arms"*, N.Y. TIMES, Dec. 5, 1903, at 8 (stating a proposed armed carriage law for Chicago is "in apparent contravention of the Federal Constitution"). But see *The Right to Bear Arms*, N.Y. TRIB., Feb. 13, 1906, at 6 (stating unless the respective state's constitution guarantees a right to armed carriage the government, "in the exercise of the police power," may "regulate and restrict the carrying of deadly forces for private purposes, just as it does for the carrying of explosives").

<sup>307</sup> See, e.g., A. Weinhagen, *Concealed Weapons*, OUTDOOR LIFE, June 1909, at 607 ("It is quite unnecessary to point out that a man who is willing to dynamite, rob, burglarize, shoot and murder, is extremely unlikely to have his conscience keep him from carrying a weapon, even though it be unlawful.").

<sup>308</sup> J.W.E., *The Right to Bear Arms*, N. Y. TIMES, Aug. 26, 1910, at 6.

<sup>309</sup> *Booker T. Washington Asks Negroes to Suppress the Gun-Toter*, IOWA ST. BYSTANDER, Feb. 2, 1912, at 2.

gun,” wrote Washington in a nationally reprinted opinion editorial.<sup>310</sup> Others thought the solution was to ban the sale of pistols and revolvers to the general public. As one early twentieth-century judge rationalized, if the sale of pistols were prohibited to “any persons other than policemen and persons employed as guardians of great interests,” the practice of carrying dangerous weapons in the public concourse would overall cease.<sup>311</sup>

New York City Police Commissioner William G. McAdoo also gave considerable thought to the increase of firearms violence and the social costs associated.<sup>312</sup> In an opinion editorial, McAdoo pleaded that a “crusade should be instituted immediately in all cities of the country against the illegal carriers of deadly weapons.”<sup>313</sup> According to McAdoo, from 1881 to 1902 the national murder ratio increased fourfold.<sup>314</sup> As a solution McAdoo proposed that local governments “intelligently and severely” enforce existing armed carriage laws, adopt armed carriage permit schemes, and increase the penalties associated with unlawful carriage.<sup>315</sup> Additionally, McAdoo proposed some of the first modern controls on the supply and sale of dangerous weapons. Indeed, in the late nineteenth century it became common for cities, towns, and localities to control the sale of firearms and other dangerous weapons to minors.<sup>316</sup> However, there were no comparable restrictions for adults. Therefore, McAdoo proposed that states, cities, and municipalities adopt licensing regimes to purchase firearms on par with the District of Columbia.<sup>317</sup> McAdoo also proposed that every dealer in “deadly weapons . . .

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<sup>310</sup> *Id.*

<sup>311</sup> *Against All Weapons: Justice Foster Says Laws are Too Lax—Cause of Crime*, N.Y. TRIB., Jan. 31, 1906, at 14.

<sup>312</sup> William G. McAdoo, *The Concealed Weapon: How to Prevent Fifty Thousand Crimes a Year*, EVENING STAR (D.C.), July 2, 1905, at 11 (“I have talked with many foreign officials upon the subject, and they all regard us as the one and only civilized country in which violence exists unchecked. That this is true from their standpoint is clearly evident from the perusal of our own daily papers as compared with theirs. That it is not checked as it might be is true, and it is a mystery to them how a nation so civilized in other respects can permit it.”).

<sup>313</sup> *Id.* at 15.

<sup>314</sup> *Id.* at 11 (“The ratio of murders to our national population has increased from 24.7 per million in 1881 to 112 per million in 1903. It rose irregularly in 1894, 1895, and 1895 to 144, 152, and 151 respectively; but the ratio is steadily increasing. In this respect we are becoming steadily more lawless, steadily more inclined to take the law into our own hands.”).

<sup>315</sup> *Id.*

<sup>316</sup> See, e.g., A DIGEST OF THE LAWS AND ORDINANCES OF THE CITY OF PHILADELPHIA 726 (Frank F. Brightly ed., 1887); SUPPLEMENT TO THE PUBLIC STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 156 (C.A. Merrill ed., 1890); THE CHARTER AND ORDINANCES OF THE CITY OF SALEM 168 (1896); THE CODE OF ORDINANCES OF THE CITY COUNCIL OF MONTGOMERY, WITH THE CHARTER 240 (William S. Thorington ed., 1888); THE CODE OF THE STATE OF GEORGIA 1186 (R.H. Clark et al eds., 1882); 3 REVISED ORDINANCES OF THE CITY OF GALESBURG, ILLINOIS 71 (W. Selden Gale et al eds., 1896); THE REVISED STATUTES, CODES AND GENERAL LAWS OF THE STATE OF NEW YORK 3330 (Clarence F. Birdseye ed., 1890).

<sup>317</sup> McAdoo, *supra* note 312, at 11



keep a register of the name and residence of every purchaser, with a full description of the weapon.”<sup>318</sup>

In light of the increase of firearms violence and crime, legislators began exploring new regulatory regimes, which were very similar to McAdoo’s proposed reforms.<sup>319</sup> Arguably the most notable was New York’s Sullivan Law, which required individuals to obtain a license to either purchase or carry a handgun.<sup>320</sup> From the Sullivan Law’s enactment it was heavily criticized in pro-gun literature. What bothered pro-gun supporters in particular was the licensing requirement to purchase and own a pistol.<sup>321</sup> The Sullivan Law’s severe limitations on armed carriage were also criticized,<sup>322</sup> but not every sportsman and gun owner was opposed

<sup>318</sup> *Id.*; see also WILLIAM G. MCADOO, *GUARDING A GREAT CITY* 150 (1906).

<sup>319</sup> See J.W.G., *Homicide and the Carrying of Concealed Weapons*, J. AM. INST. CRIM. L. & CRIMINOLOGY 92 (1911); *A Pistol Regulation*, EVENING STAR (D.C.), Oct. 14, 1911, at 6 (calling for new firearms legislation under District of Columbia’s power to enact “police regulations”); *Gang Prisoners Fined: Magistrate Breen Says Concealed Weapons Cause Feuds*, N.Y. TRIB., Sept. 21, 1903, at 4; *The Pistol Habit: Stop It*, 69 INDEPENDENT 371 (Aug. 18, 1910); *Magistrates Say Limit the Sale of Deadly Weapons*, EVENING WORLD (N.Y.C.), Apr. 16, 1901, at 1 (front page feature outlining the need for stricter firearm regulations and controls to prevent homicide, murder and crime); Paul Theiman, *Tag the Revolvers*, SAVANNAH TRIB., Aug. 7, 1909, at 1; *The Gun Habit*, HOLT COUNTY SENTINEL (Oregon, Mo.), July 3, 1908, at 2 (discussing growing public sentiment for firearm regulations and controls); *Topics of the Times: Big Pistols or None Commanded*, N.Y. TIMES, Nov. 28, 1907, at 6.

<sup>320</sup> The Sullivan Law is reprinted in the HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 895 (1925). According to newspaper accounts, the Sullivan Law was enacted to lower the “numbers of murders and suicides and sacrifice of human life by irresponsible persons . . . .” *Gun-Toting Bill Urged at Albany: Suicide and Murder Lessened, Plea of Its Supporters*, WASH. HERALD, Feb. 17, 1911, at 3. In 1916, *The New York Times* reported 8,000 citizens obtained licenses to carry weapons in New York City. See *8,000 New Yorkers May “Tote” Pistols*, N.Y. TIMES, June 26, 1916, at 9. By 1929, the number of carry licenses increased to 26,627. See *32,400 Get Permits for Pistols in Year*, N.Y. TIMES, Aug. 18, 1929, at N2. New York was not alone in requiring individuals to obtain a license to purchase a handgun. See, e.g., THE REVISED ORDINANCES OF THE CITY OF AKRON, OHIO 37 (Henry M. Hagelbarger ed., 1921) (“It shall be unlawful for any person to buy, purchase, or obtain in exchange, any revolver, pistol or other small firearm without first having obtained a permit from the Chief of Police to make such purchase.”); THE CHICAGO MUNICIPAL CODE OF 1922, at 366 (Samuel A. Ettelson ed., 1922) (“It shall be unlawful for any person to purchase any pistol, revolver, derringer, bowie knife, dirk or other weapons of like character, which can be concealed on the person, without first securing from the superintendent of the police a permit to do so.”); *New Law Governing Sale of Weapons*, CRESKO PLAIN DEALER (Cresco, Iowa), June 27, 1913, at 1 (announcing a new law prohibiting the sale of certain concealable weapons, requiring a “permit from the chief of police, mayor or sheriff” for arms dealers to sell “any revolver, pistol or pocket bill or other weapons of a like character which can be concealed on the person,” and requiring a license to carry concealed weapons).

<sup>321</sup> See *The Sullivan Law*, FIELD & STREAM, Jan. 1912, at 886; see also *The Sullivan Pistol Act*, FIELD & STREAM, Feb. 1912, at 991-92 (asking the law be amended to allow for licensing at the “city, town, and village” level).

<sup>322</sup> See F.J.B., *The Sullivan Anti-Weapon Law*, OUTDOOR LIFE, June 1914, at 563-65 (“I fail to see where there is any authority permitting any Legislature to restrict the carrying of arms by any citizen of the United States.”).

to them.<sup>323</sup> To many, the ownership and use of firearms was an important responsibility that required the balancing of American values with the public safety.<sup>324</sup> These individuals perceived firearms as part of their heritage, yet understood that society was changing rapidly and required new legislative approaches.<sup>325</sup>

However, for pro-gun supporters the Sullivan Law was the wrong course of action. It heightened their fears that the United States was moving away from a “nation of riflemen” to the more civilized European model.<sup>326</sup> What also heightened pro-gun fears was that other state and local jurisdictions were adopting similar legislation.<sup>327</sup> This prompted pro-gun supporters to assail the Sullivan Law in every way possible. They asserted that the Sullivan Law negatively impacted the national

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<sup>323</sup> See Ernest Coler, *About Gun Cranks*, OUTDOOR LIFE, Aug. 1911, at 182 (opposing restrictive firearm laws, but not supporting “the average gun toter who lugs a loaded weapons around for sheer foolishness, without need, or with illegal intent”); *The Sullivan Law*, *supra* note 321, at 886 (satisfied the Sullivan Law was construed to allow for the transportation of arms for hunting and recreation); *The Sullivan Pistol Act*, *supra* note 321, at 991-92 (requesting the Sullivan Law be amended to at least allow for the transport of firearms in luggage when traveling). At the time the Sullivan Law was enacted, New York City already maintained a “good cause” or “may issue” licensing regime. See *supra* pp. 418-21.

<sup>324</sup> Harry V. Radford, *The Position of the American Sportsman*, FIELD & STREAM & AM. ANGLER, June 1901, at 233-35.

<sup>325</sup> See Another Shooter, *More Concerning Anti-Pistol Laws*, ARMS & MAN, Mar. 22, 1917, at 515 (admitting that in “many instances pistol bills are not all ‘bad’ and it has been found wise not to stir sleeping dogs”); Coler, *supra* note 323, at 183 (“There was a time when folks across the water called us a nation of riflemen,” but now “it has become an unctuous boast to say: ‘I’ve never owned a gun in my life and never will own one.’”); F.J.B., *supra* note 322, at 563-65 (seeing the Sullivan Law as part of the problem with American values towards firearms changing); *Merry Christmas—And Gun Laws*, AM. RIFLEMAN, Dec. 1929, at 6 (listing firearms legislation the NRA supported and opposed).

<sup>326</sup> See *Firearms and Crime Prevention*, ARMS & MAN, Feb. 8, 1919, at 388; Alfred B. Geikie, *The Passing of the American*, OUTDOOR LIFE, Dec. 1915, at 573 (“There was a time when the American-born citizen was virtually personified. He was a rifleman of the type which is the nation’s greatest protection against foreign invasion . . . . The times have changed. The ‘spirit of 76’ is but a memory and the type of American contemporaneous with those stirring days has been obliterated in the on-rush of so-called ‘civilization’ . . . .”); Henry Morris, *Will Anti-Pistol Laws Decrease Crime?*, OUTDOOR LIFE, July 1924, at 71-73; Lionel F. Phillips, *The Citizen and the Revolver*, OUTDOOR LIFE, May 1922, at 299 (“Disarming the citizen simply doubles the resources of the criminal, and does not lessen crime. On the contrary, it increases it, for the simple reason that the criminal has nothing to fear except the police and other public officials in that case.”); *Posted Land*, FIELD & STREAM, Dec. 1913, at 805 (“In our country, this assurance that we are a nation of riflemen is rapidly passing away . . . . To-day more and more the percentage of men who go afield with firearms is decreasing, and the cities are filling with human herds absolutely valueless as soldiers or fighting men.”).

<sup>327</sup> See C. C. Finn, *Firearms Legislation*, ARMS & MAN Feb. 1, 1921, at 13; *Fool Pistol Legislation in Massachusetts*, FIELD & STREAM, Sept. 1912, at 471-72; *Massachusetts Would Legislate Against Revolver*, ARMS & MAN, Feb. 18, 1915, at 407; Nathaniel C. Nash, Jr., *Anti-Revolver Legislation: Part I*, ARMS & MAN, Nov. 16, 1916, at 145-46; *On the Question of Concealed Weapons*, ARMS & MAN, May 6, 1915, at 106; see also *supra* note 320 and accompanying text.

defense,<sup>328</sup> did nothing to decrease crime and murder rates,<sup>329</sup> left law-abiding citizens defenseless,<sup>330</sup> and that the government should enforce existing firearm laws before creating new ones.<sup>331</sup> The Sullivan Law was even assailed as being “un-American” and some pro-gun supporters went so far to speculate it was part of a sinister insurance scheme or a foreign attempt to disarm the United States.<sup>332</sup>

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<sup>328</sup> See, e.g., *Firearms and Crime Prevention*, ARMS & MAN, Feb. 8, 1919, at 388; Nathaniel C. Nash, Jr., *Anti-Revolver Legislation: Part II*, ARMS & MAN, Nov. 23, 1916, at 165-66.

<sup>329</sup> See *The Right to Keep and Bear Arms*, NEGRO STAR (Wichita), Dec. 2, 1927, at 1 (“Legislation to prohibit [pistols] on the theory that it would reduce crime, is a mistake, for the criminal would still get his guns from sources outside the United States.”); see also F.M. Barker, *The Home Gun Man*, OUTDOOR LIFE, Jan. 1925, at 42 (“The non-availability of pistols will no more stop crime than does the difficulty of obtaining dynamite or nitroglycerine prevent the blowing of safes in banks and offices today.”).

<sup>330</sup> See Captain E.C. Crossman, *Anti-Firearms Legislation*, FIELD & STREAM, Dec. 1923, at 925 (“I fail to see why a few million law-abiding citizens, ill-protected and often entirely unprotected by the police, should be disarmed in the vain hope that the same laws would also disarm some small proportion of the crooks, and so reduce the risks attendant to the profession of policemen.”); Charles P. Fagnani, *Assails Sullivan Law*, N.Y. TIMES, Sept. 4, 1923, at 16 (“If it has been conceived in the manifest interest of the criminally disposed to deliver up decent members of the population, helpless and undefended, into the power of gunmen, burglars, &c., it could not be more adequate.”); Robert P. Green, *The Sullivan Law’s Workings*, N.Y. TIMES, Apr. 13, 1914, at 10 (questioning the prosecutorial scope of the Sullivan Law to a citizen that defended himself in the home against an assailant); Allyn H. Tedmon, *A Law for the Outlaw*, AM. RIFLEMAN, June 1, 1923, at 4; *The Right to Keep and Bear Arms*, N.Y. TIMES, May 3, 1923, at 18 (“As to the comparative safety of the armed and unarmed citizen, a man who knows how to use his gun is not likely to be ruined by the opportunity of resistance.”); Stephen Trask, *Fighting the Devil With Fire*, AM. RIFLEMAN, July 1, 1924, at 9 (stating “laws of the Sullivan type have miserably and pathetically failed of their purposes”).

<sup>331</sup> See, e.g., Eltinge F. Warner, *The Anti Anti-Pistol Fight*, FIELD & STREAM, Oct. 1922, at 640 (“Every State in the Union already has a law, every city and town and hamlet an ordinance, which, if enforced, would solve the problem. There is no need whatsoever for additional laws of any kind.”).

<sup>332</sup> See G.C. Brown, *Get Together and Fight*, ARMS & MAN, Feb. 23, 1918, at 430 (“Recently I saw a statement that German gold has undoubtedly been the cause of some of the attempted legislation against arms . . . it would most certainly be to Germany’s advantage to make us more defenseless than we were.”); *Disarmament and Economy*, AM. RIFLEMAN, Nov. 1931, at 41 (asserting a link between the Sullivan Law and higher insurance premiums); Donald E. Martin, *Anti-Gun Laws and Their Originators*, OUTDOOR LIFE, Nov. 1924, at 354 (“The anti-gun fanatic . . . may be agents of some foreign power which wants American disarmed for obvious reasons. They may be agents of predatory wealth contemplating something too raw to be safe while the people have the power to resist effectually, or of a Bolshevik clique with ambitions to deliver the blessings of Leninism to the United States.”); Joe Taylor, *The Anti-Pistol Laws*, FIELD & STREAM, July 1923, at 34 (asserting restrictive gun laws lead to increased crime rates and insurance premiums); *The Anti Anti-Pistol Situation*, FIELD & STREAM, Dec. 1922, at 887 (“Who is contributing the money to put out this anti-pistol propaganda—they are most carefully keeping cover.”); Eltinge F. Warner, *It’s Up to YOU!*, FIELD & STREAM, Jan. 1926, at 34-35 (asserting anti-pistol laws will lead to the confiscation of all firearms); Eltinge F. Warner, *Who is to Blame?*, FIELD & STREAM, June 1921, at 827 [hereinafter Warner, *Who is to Blame*] (“All kinds of anti-firearm laws . . . all of them

To counter the Sullivan Law and what pro-gun supporters perceived to be a growing anti-firearms movement, the United States Revolver Association (USRA) took the lead in advancing the interests of sportsmen and gun owners.<sup>333</sup> The USRA was the first organization to advocate for Second Amendment rights, and took the position it would never stand in the way of firearm laws that restricted the criminal element from possessing or using firearms.<sup>334</sup> This included laws requiring a “license to carry a firearm provided” the applicant could “show cause why [they] should go armed.”<sup>335</sup> The USRA ultimately lived up to its promise by drafting and promoting “sane” model legislation for states to adopt in 1923.<sup>336</sup> Known as the Revolver Act, the model legislation sought to balance the “incontrovertible right of the people to protect themselves” and “the police to deny the right to carry pistols . . . to those whose character or history would indicate that they might make unlawful use of the same.”<sup>337</sup> Under the Revolver Act, individuals were required to obtain a license to carry a concealed weapon; all handgun purchases were subjected to a brief waiting period, and the gun dealers had to turn over all records of handgun sales.<sup>338</sup> The

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decidedly anti-American, have been brought before these legislatures and there seems to be a wave of crazy legislation going over the country for some unknown reason.”); *Watch the Anti-Firearm Laws*, ARMS & MAN, Dec. 15, 1919, at 8 (stating “anti-firearm laws” are “un-American” and are “repulsive to the average thinking citizen”); F.J.B., *supra* note 322, at 564 (“The New York state law . . . will lead to a reign of terror similar to the conditions in Rome at the time of Rienzi.”).

<sup>333</sup> *Pistol Association Asks for Laws*, VINITA DAILY CHIEFTAIN (Okla.), May 11, 1912, at 1. The USRA was incorporated in 1904 “to foster the art of revolver and small-arm shooting.” *Revolver Association Incorporated*, N.Y. TIMES, Jan. 24, 1904, at 11. The USRA worked closely with the NRA. *See Would Join with N.R.A.: Revolver Association Seeks Amalgamation of Two Bodies*, N.Y. TIMES, Jan. 16, 1917, at 11.

<sup>334</sup> *See Fight the Anti-Firearm Law*, ARMS & MAN, Feb. 2, 1918, at 368-69; *see also* Kendrick Scofield, *U.S.R.A. Names New Officers*, ARMS & MAN, Jan. 26, 1918, at 346-54.

<sup>335</sup> *Pistol Association Asks for Laws*, *supra* note 333, at 1. Considering that “good cause” or “may issue” licensing laws had been in effect for over thirty years, it is not surprising that the USRA supported them. *See generally supra* note 245.

<sup>336</sup> *See The Rising Curve of Murder*, N.Y. TIMES, Nov. 1, 1922, at 14; U.S. Revolver Ass’n, *Sane Regulation of Pistol Sales*, OCALA EVENING STAR (Fla.), Sept. 30, 1922, at 1 (opinion editorial published by Revolver Association promoting the Revolver Act as “sane” legislation); *Uniform Weapon Laws*, EVENING WORLD (N.Y.C.), Nov. 16, 1922, at 30 (showing the Revolver Association touted the Revolver Act as “sane regulation”).

<sup>337</sup> *Shall We Abolish the Hammer?*, FIELD & STREAM, Sept. 1922, at 557.

<sup>338</sup> ADAM WINKLER, *GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 207 (2011); *see also* *Wants Pistols Sold Here Under License: Head of Revolver Association Advocates Measure Like the Capper Bill*, N.Y. TIMES, Feb. 14, 1923, at 5. Even before the Revolver Act there were some cities that required gun dealers to maintain records of all sales. *See, e.g.*, REVISED ORDINANCES OF THE CITY OF PEORIA, ILLINOIS 783 (1910) (“Every person dealing in deadly weapons . . . shall keep a register of all such weapons sold, loaned, rented, or given away . . . Such register shall contain the date of sale, loaning, renting or gift, the name and age of the person . . . and the purpose for which it was purchased or obtained.”); *New Law Governing Sale of Weapons*, *supra* note 320, at 1 (announcing a new law requiring licensed dealers to report all sales within twenty-four hours to the county recording, including “age and occupation of the purchaser, and description, number and identification of the weapon sold.”); THE CHICAGO MUNICIPAL CODE, *supra* note 320, at 366 (“Every person, firm

Revolver Act was enthusiastically endorsed in pro-gun circles<sup>339</sup> and subsequently enacted by a number of states, to include California, Connecticut, Indiana, Michigan, New Hampshire, New Jersey, North Dakota, Oregon, and West Virginia.<sup>340</sup>

In addition to the formation of the USRA, the Sullivan Law brought about increased efforts by hunters and sportsmen, as well as local hunting, fishing, and other organizations of “he-men,”<sup>341</sup> to regularly inform gun owners of pending state and local legislation.<sup>342</sup> Here, it is important to note that prior to the Sullivan Law’s enactment there was no unified gun advocacy movement.<sup>343</sup> Resistance to firearm legislation was limited to opinion editorials, which primarily appeared in hunting and sporting magazines such as *Outdoor Life*, *Field and Stream*, and the NRA’s publication *Arms and the Man*, which was later renamed *American Rifleman* in 1923. Although these opinion editorials appeared with some regularity, they generally took up no more than a page or two of any hunting and sporting magazine.

The historical point to be made about the Sullivan Law is it, along with other contemporaneous firearm restrictions, essentially changed the gun advocacy landscape. From the perspective of pro-gun supporters, the growth of restrictive

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or corporation that is licensed to deal . . . shall make out and deliver to the superintendent of police every day before twelve o’clock noon, a legible and correct report of every sale or gift made under authority of said license of the preceding twenty-four hours”).

<sup>339</sup> See, e.g., Peter P. Carney, *Regarding Uniform Revolver Law*, *OUTDOOR LIFE*, Mar. 1925, at 175 (calling for more states to adopt the uniform revolver legislation); Morris, *supra* note 326, at 72 (claiming that unlike other anti-firearm laws, the model legislation has not led to an increase in crime in California); Elemore E. Peake, *In Defence of the Pistol*, *N.Y. TIMES*, Jan. 7, 1923, at xx6 (stating the Act “will accomplish all that any pistol legislation can accomplish . . . without denying . . . law-abiding citizens . . . the protection of life and property as well as recreation.”); Joe Taylor, *The Price of Murder*, *FIELD & STREAM*, May 1924, at 29 (“The recently enacted California law referred to is a model one and every State of the Union should follow California’s lead toward protecting law abiding citizens and disarming crooks.”); *The Anti Anti-Pistol Situation*, *FIELD & STREAM*, Sept. 1923, at 29 (“We believe that this is the best law of its kind that we have yet come across and one that ought to be on the statute books of every state in the Union that does not already possess one equally as good. By ‘equally as good’ we mean a law that amply protects the right of the honest citizen to possess and carry pistols and revolvers for the protection of his person, his loved one and his property while at the same time providing the police departments with ample authority and leeway to prevent these weapons from coming into, or remaining in, the hands of lawless or irresponsible persons.”).

<sup>340</sup> WINKLER, *supra* note 338, at 208. For public support of the Revolver Act, see *Regulating Revolver Sales*, *GRAND FORKS HERALD* (N.D.), Oct. 2, 1922, at 4 (“That some legislation on this subject is necessary scarcely admits of argument.”); *Way Must Be Found to Stop Pistol “Toting,”* *EVENING STAR* (D.C.), Oct. 18, 1922, at 6 (showing nationwide support for the Revolver Association’s push for model legislation and the end of “pistol toting”).

<sup>341</sup> Joe Taylor, *For Instance—The Anti Anti-Pistol Law*, *FIELD & STREAM*, May 1923, at 127.

<sup>342</sup> See *Report on Field and Stream’s Campaign to Prevent Anti-Pistol Legislation*, *FIELD & STREAM*, May 1923, at 127.

<sup>343</sup> See, e.g., G.C. Brown, *Get Together and Fight*, *ARMS & MAN*, Feb. 23, 1918, at 429-30; Kenneth F. Lockwood, *Lawmakers and Sport*, *FIELD & STREAM*, Dec. 1921, at 76; Shooter, *Urges Union Against Anti-Pistol Laws*, *ARMS & MAN*, Feb. 15, 1917, at 415; Warner, *supra* note 331, at 640.

firearm legislation was due to undesirable changes in American society and culture. Individuals that supported firearms restrictions were often cast as being “gun cranks” or “anti-pistol.” Women and “feminine” men were blamed for America’s changing attitudes on guns.<sup>344</sup> “Nearly every day we read of some crank, faddist or reformer, usually a woman or a near-woman, trying to curtail the limited liberties of the already burdened American citizen,” wrote one commentator in an opinion editorial.<sup>345</sup> The run-of-the-mill pro-gun supporter wanted reformers to focus less on restrictive firearm legislation and more on solving other problems.<sup>346</sup> This would guarantee that the United States was “run by *real men*, and not by old women and petticoated men.”<sup>347</sup>

Casting those that supported firearm restrictions as weak, unpatriotic, and ignorant was quite common in early twentieth-century pro-gun literature.<sup>348</sup> In contrast to these deprecating characterizations, pro-gun supporters interestingly cast themselves as being patriotic defenders against all enemies, foreign and domestic.<sup>349</sup> Essentially, sportsmen and gun owners were socializing each other to believe that they are the true Americans and flag bearers of the country’s heritage and future.<sup>350</sup>

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<sup>344</sup> See, e.g., Coler, *supra* note 325, at 182; Harry McGuire, *Behold, the Popgun Crusaders!*, *OUTDOOR LIFE*, Sept. 1932, at 16 [hereinafter McGuire, *Popgun Crusaders!*] (claiming most “reformers” are “women, most of them are unoccupied women; and most of them are unoccupied women who have dignified their status by organizing into some kind of Friday Morning Club, Snoop Society or Social Service Sorority.”); Harry McGuire, *Farewell, Farewell to the Popgun Crusaders*, *OUTDOOR LIFE*, Dec. 1931, at 20-21 [hereinafter McGuire, *Farewell*]; Harry McGuire, *The Good Women of the Friday Morning Club*, *OUTDOOR LIFE*, Apr. 1929, at 1 [hereinafter McGuire, *Friday Morning Club*].

<sup>345</sup> W.T. Burress, *Pocket Disarmament and Reformers*, *OUTDOOR LIFE*, Sept. 1921, at 208.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* (emphasis added).

<sup>348</sup> See, e.g., Carney, *supra* note 339 (describing those that support firearm restrictions as “poor misguided souls” and the “real enemies of our nation”); Alfred B. Geikie, *The Passing of the American*, *OUTDOOR LIFE*, Dec. 1915, at 573; Ray P. Holland, *Pass a Law*, *FIELD & STREAM*, Dec. 1925, at 17; Donald E. Martin, *Anti-Gun Laws and Their Originators*, *OUTDOOR LIFE*, Nov. 1924, at 354; Nash, *supra* note 327, at 145-46; Eltinge F. Warner, *Idiocy Running Amuck*, *FIELD & STREAM*, Nov. 1931, at 17; Warner, *Who is to Blame*, *supra* note 332.

<sup>349</sup> See, e.g., *Hysteria in High Places*, *AM. RIFLEMAN*, Jan. 1932, at 4; Joe Taylor, *The Anti-Anti Pistol Situation: An Answer to the Foregoing*, *FIELD & STREAM*, June 1923, at 186 (“[Citizens that sign petitions for firearm restrictions] don’t realize they are playing into the hands of the bandits. They don’t realize they are also striking a mistaken blow at the thousands of true blue American sportsmen and sportswomen who follow clean, health-giving sport by field and stream.”); *The Plot to Take Your Guns Away*, *OUTDOOR LIFE*, Apr. 1941, at 20; John P. Wright, *Proposed Legislation Against Firearms*, *OUTDOOR LIFE*, Jan. 1925, at 40 (stating restrictive firearm laws will always be rejected by those who are “faithful to their ancestry of patriotic fighting men who won our national independence and not with empty words, but by thoro[ugh] knowledge and use of firearms.”).

<sup>350</sup> See, e.g., *A Memorial—An Heritage*, *AM. RIFLEMAN*, Feb. 1932, at 4 (“The sallow, the anemic, the narrow, may try to reform you; may, because you love a gun, call you potential murderers or wanton destroyers; but when the Nation needs a Man it will turn to a sportsman, to an out-of-doors man, as it turned in the day of George Washington, and as it has turned in

According to the pro-gun line of thinking, riflemen do not follow “weaklings” or “reformers.”<sup>351</sup> Riflemen point “the way for cowards and for weaklings . . . .”<sup>352</sup> The USRA’s former Vice President and then NRA President Karl T. Frederick echoed these sentiments in a *Field and Stream* opinion editorial.<sup>353</sup> Those that did not own or use firearms were labeled as “sheep.”<sup>354</sup> Meanwhile, those that did own and use firearms were labeled as “shepherds”:

The object of [restrictive firearms laws] is obvious. It is to disarm everybody except the police and a few favored persons. The result is equally obvious. Everyone is disarmed except for the crooks, the racketeers, the gangsters, the police and those few favored persons . . . .

The theory, which underlies this doctrine of disarming the populace is steadily becoming clearer. Graphically stated it is this: The people of the state are divided into three classes. First come the sheep—a great flock of several million, the honest law-abiding men and women of the state. Then come the shepherds. The police are the shepherds of this enormous flock of sheep. And third come the wolves—the gangsters, racketeers and crooks, who prey upon the sheep.

The theory as well as the practice of the Sullivan Law and all other anti-pistol laws of the several states is that this great flock of sheep must behave like sheep. They must support the shepherds and endure the wolves. They cannot and they must not defend themselves. They must only bleat. They must run for cover; they must huddle together; they must obey the shepherds and depend upon them for safety . . . .

The shepherds, however, are warriors. They alone can fight the wolves; they alone are brave; they alone can be trusted with weapons; they alone know how to use them . . . .

And the wolves—how they flourish! Their existence and numbers are proof complete that the shepherds cannot protect the sheep. The shepherds do what they can, and they catch or kill some of the wolves . . . . For the shepherds to exterminate the wolves becomes more and more impossible. Every year they increase in numbers and boldness . . . .

This pictures the situation which exists under the Sullivan Law in New York and in those states where the “pistol abolitionists” have had their way.

How long are you sheep going to consent to be mutton for the wolves? How long are you going to let the shepherds deny you the right to be anything but helpless sheep? Are you satisfied to bleat, or are you going to do something more effective?<sup>355</sup>

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every crisis since.”); *Make “The Spirit of ‘76” the Spirit of ‘32*, AM. RIFLEMAN, July 1932, at 6.

<sup>351</sup> *Fight!*, AM. RIFLEMAN, Aug. 1932, at 4.

<sup>352</sup> *Id.*

<sup>353</sup> For more on Frederick’s background, see WINKLER, *supra* note 338, at 210.

<sup>354</sup> Karl T. Frederick, *Are You Men or Mutton?*, FIELD & STREAM, Feb. 1932, at 13.

<sup>355</sup> *Id.*

The argument that the unarmed are easy prey for criminals was employed whenever pro-gun supporters wanted to denounce and criticize armed carriage laws.<sup>356</sup> They viewed instances where an armed “courageous citizen” thwarted criminal activity as impressing upon criminals “the lesson of the Vigilante days of the old West—namely, that the criminal element can be cleaned up even in the worst of times if a sufficient number of citizens will arm themselves and use those arms when they are needed.”<sup>357</sup> Some pro-gun supporters went a step further by claiming a fully armed society would not only deter crime, but bring forth civility.<sup>358</sup> From their perspective, the government should encourage armed carriage. “The law-abiding citizen should feel that by carrying a revolver for defense he is performing a public service, and I certainly believe that if the criminal element once thought that the chances were that their intended victims were armed they would think twice,” wrote one pro-gun supporter in an opinion editorial.<sup>359</sup> This is not to say that pro-gun supporters endorsed individuals going armed in public without proper training.<sup>360</sup> It was quite the opposite.<sup>361</sup> As H.R. Ridgely, a retired Navy officer, wrote in an opinion editorial advocating for the repeal of armed carriage laws altogether: “The untrained are never safe when handling firearms, but are dangerous to themselves and to others.”<sup>362</sup>

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<sup>356</sup> See, e.g., Crossman, *supra* note 330, at 925; Arthur Grahame, *The Plan to Disarm Sportsmen*, OUTDOOR LIFE, July 1938, at 17, 19; *Guns and Crime*, OUTDOOR LIFE, Aug. 1925, at 157; John Walker Harrington, *Too Many Loopholes for Criminals are Seen in Sullivan Law*, N.Y. HERALD, Sept. 20, 1925, at A3; George L. Morrow, *The Anti-Pistol Law*, OUTDOOR LIFE, Apr. 1925, at 300; *The Right to Keep and Bear Arms*, N.Y. TIMES, May 3, 1923, at 18.

<sup>357</sup> McGuire, *Farewell*, *supra* note 344, at 20; see also Ray P. Holland, *Pistols*, FIELD & STREAM, Sept. 1936, at 17 (stating that where “fool pistol laws don’t exist” citizens are “granted the privileges of their fathers” which allows “real justice to strike quickly when crime is committed”).

<sup>358</sup> See, e.g., William W. Ems, *The Obnoxious Anti-Weapon Law*, OUTDOOR LIFE, Feb. 1915, at 190 (stating that in Guatemala everyone carries arms, which “makes every man a great deal more polite to his neighbor than he otherwise might be, and he does not take offense at trivial matters so quickly and hurling insulting epithets at another. Also, it places the respectable citizen on an equal footing in the matter of arms with the footpad and gunman . . .”); Lionel F. Phillips, *The Citizen and the Revolver*, OUTDOOR LIFE, May 1922, at 299 (“The logical method of combatting the activities of the criminal class is not to disarm the law-abiding citizen . . . but to remove the present restrictions as to the carrying of weapons, and then train the citizen to their use.”).

<sup>359</sup> G.P. Gleason, *To Combat the Non-Gun Toting Law*, OUTDOOR LIFE, Dec. 1922, at 442.

<sup>360</sup> See, e.g., *A Congressional Firearms Inquiry*, AM. RIFLEMAN, Mar. 1924, at 11 (arguing that Congress should require “every law officer, federal and municipal, to prove proficiency in the practical use of firearms before a weapon is issued to him as a prerequisite to his privilege of going legally armed”) (emphasis added); C.A. Richmond, *The Revolver’s Alibi*, OUTDOOR LIFE, Jan. 1923, at 34 (“If there must be pistol legislation, the safety of the public would be better conserved by a law which would compel every citizen to carry a revolver and be capable of scoring at least 50 out of a possible 100 at 50 yards.”).

<sup>361</sup> See, e.g., Morris, *supra* note 326, at 72 (advocating for “armed reputable citizens” to “subjugate gun-toting reprobates”).

<sup>362</sup> H.C. Ridgely, *Why Not Carry Firearms?*, OUTDOOR LIFE, Dec. 1926, at 465. William P. Eno, the father of traffic safety regulations, advanced a similar line of thinking. See William



What ultimately came out of the pro-gun literature against restrictive firearm legislation was what would later be dubbed the “more guns equals less crime” theory. Pro-gun supporters rationalized if an unarmed citizenry was easy prey to criminals and armed carriage laws were ineffective in deterring criminal behavior, then it was common sense that the more responsibly armed citizens society placed in the public concourse the less crime there would be.<sup>363</sup> One pro-gun supporter went so far to state it was “the duty of all good citizens . . . to aid in the suppression of crime by discouraging the criminal, by convicting him that his victims will not tamely submit to his depredations but will meet him with his own weapons and skill a shade better than that possessed by the thug.”<sup>364</sup>

Today, the “more guns equals less crime” theory is often associated with the statistical work of John Lott, Jr. In 1998, Lott asserted that gun control and safety laws were ineffective at reducing crime, and that those state and local jurisdictions that enacted pro-gun legislation experienced a noticeable reduction in criminal activity.<sup>365</sup> Although Lott’s findings have turned out to be highly questionable,<sup>366</sup> the “more guns equals less crime” theory has remained influential in modern discourse.<sup>367</sup> In the first half of the twentieth century, however, the theory did not gain traction outside of pro-gun circles. The one exception was forensic scientist and Army officer Calvin Goddard.<sup>368</sup> In 1930, he published an article in the *American*

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P. Eno, *Arms for the Public: Permits Should Be Issued to Keep and Carry Weapons*, N.Y. TIMES, Nov. 3, 1931, at 23 (criticizing the Sullivan Law’s workings, but supporting a permit scheme to “carry arms” in public so long as the applicant is of good character and can demonstrate to the police that they are “familiar with arms and know[] how to handle them safely”).

<sup>363</sup> See, e.g., *The Best Defense*, AM. RIFLEMAN, Apr. 1932, at 6 (discussing how the Iowa Bankers Association learned that “an armed offensive was the best defensive” which eliminated bank robberies in Iowa); Morris, *supra* note 326, at 72; Ridgely, *supra* note 362, at 464-65 (asserting that armed citizens in public would deter crime and current firearm legislation only increases crime rates); *Tyros on the Hill*, AM. RIFLEMAN, Dec. 1932, at 6 (“the type of anti-firearms legislation which attempts to disarm . . . has never resulted in anything except an increase of armed felonies. On the other hand, where the honest citizen has been permitted to own a gun and has been encouraged to know how to use it safely, some splendid records for the suppression of armed felonies have been established. In no case has crime increased because the sportsmen of the State have been permitted to possess guns without having to bootleg them.”).

<sup>364</sup> *Making Crime Unattractive*, AM. RIFLEMAN, June 1924, at 13.

<sup>365</sup> See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (3d ed., 2010). See generally Don B. Kates & Alice Marie Beard, *Murder, Self-Defense, and the Right to Arms*, 45 CONN. L. REV. 1685 (2013); Don B. Kates & Carlisle Moody, Heller, McDonald, and Murder: Testing the More Guns, More Murder Thesis, 39 FORDHAM URB. L.J. 1421 (2012).

<sup>366</sup> See, e.g., PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 25-27 (2014); Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193 (2003).

<sup>367</sup> Charles, *supra* note 2, at 1173-75.

<sup>368</sup> However, it was likely that Goddard was a member of the NRA or, at a minimum, a supporter. See Lieutenant Colonel Calvin Goddard, *How Illinois Organized to Fight Anti-Firearms Legislation*, AM. RIFLEMAN, Nov. 1934, at 9.

*Journal of Police Science* claiming that firearm restrictions, particularly the Sullivan Law, doubled violent crime rates.<sup>369</sup> According to Goddard, in the early twentieth century there was virtually no crime.<sup>370</sup> There were also no legal restrictions as to the production, sale, ownership, or use of lethal weapons.<sup>371</sup> Allegedly, the passage of anti-firearms legislation changed the status quo. The net effect was a decrease in ownership of firearms and a substantial increase in crime.<sup>372</sup>

As a solution Goddard proposed the repeal of most restrictive firearms legislation.<sup>373</sup> Moreover, Goddard proposed that military reserve officers in civilian attire carry concealed weapons to deter criminals.<sup>374</sup> Alongside them would be NRA and USRA members. "Let [these] members too, be invited, urged, indeed besought, in the interests of public welfare, to accept permits to carry arms concealed and transport them upon their persons at all times," wrote Goddard.<sup>375</sup> These measures in turn would "increase the percentage of armed, ununiformed, persons present in any gathering, and decrease immeasurably the changes of the crook 'getting away with it.'"<sup>376</sup> However, Goddard cautioned against armed citizens enforcing the law or untrained citizens carrying arms in the public concourse. "I do not advocate . . . presenting them with pistol permits and saying, 'Go ye forth, and bear arms in defense of the peace of the land.' An armed man who knows not how to use his arms safely and accurately, is a liability and not an asset," wrote Goddard.<sup>377</sup>

Historically speaking, Goddard's analysis on armed carriage laws and criminology is significant because it was first time anyone thoughtfully considered how "more guns" could in fact equal "less crime." But it is worth noting that Goddard's analysis was based solely on his perception of the past, not verifiable historical facts. For one, Goddard's assertion that there were virtually no laws regulating firearms at the turn of the twentieth century is patently false.<sup>378</sup> Additionally, at no point did Goddard provide any statistical evidence or analysis to support his claim that early twentieth-century restrictive firearms legislation led to an increase in crime rates. Essentially, Goddard's analysis was based on his personal observations and convictions, not reliable scientific research.<sup>379</sup>

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<sup>369</sup> Calvin Goddard, *The Pistol Bogey*, 1 AM. J. POLICE SCI. 178, 183 (1930).

<sup>370</sup> *Id.* at 178. *But see* McAadoo, *supra* note 312.

<sup>371</sup> Goddard, *supra* note 369, at 178.

<sup>372</sup> *Id.* at 179-83.

<sup>373</sup> *Id.* at 184-85.

<sup>374</sup> *Id.* at 186.

<sup>375</sup> *Id.* at 187.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *See supra* pp. 401-31.

<sup>379</sup> It is possible that Goddard was relying on the first *Uniform Crime Reports*, which were published monthly from 1930 to 1931, and quarterly from 1932 to 1940. *See* Marvin V. Wolfgang, *Uniform Crime Reports: A Critical Appraisal*, 111 U. PENN. L. REV. 708 (1963). At no point, however, did Goddard mention or refer to these reports. More importantly, the content of the reports would have made it impossible to scientifically conclude that more guns equals less crime. The reports themselves are available online at the *National Archive of*

As far as Goddard's "more guns equals less crime" analysis influencing the field of criminology, it did not gain traction like his writings on forensic ballistics.<sup>380</sup> But Goddard did catch the attention of NRA President Karl T. Frederick, for the following year Frederick published an article that echoed many of Goddard's sentiments.<sup>381</sup> In the article, Frederick claimed that despite the growth in "restrictive laws relating to pistols" there was a "startling increase in violent crime."<sup>382</sup> Additionally, Frederick asserted there was more than a casual connection between states that adopted strict firearm regulations and increased violent crime rates. "Some of the States which have the most drastic laws suffer, nevertheless, from the greatest proportion of violent crime; others whose laws are extremely mild and reasonable stand high in respect to the absence of crime," wrote Frederick.<sup>383</sup> But like Goddard, Frederick provided no substantial evidence to support it. Still, noting the arrival of the "more guns equals less crime" theory in pro-gun circles is of historical significance because it coincided with the next push to provide uniformity to state firearm laws.

At the same time the USRA was promoting the Revolver Act, the National Conference of Commissioners (NCC) began exploring its own model legislation—the Uniform Firearms Act.<sup>384</sup> Much like the Revolver Act, the Uniform Firearms Act required a license for individuals to carry concealed weapons in the public concourse, all handgun purchases to be subjected to a brief waiting period, and gun dealers turn over all records of handgun sales.<sup>385</sup> Initially, the NCC's desire to adopt uniform firearms legislation was endorsed by virtually everyone, to include the National Crime Commission, attorney generals, firearm manufacturers, and even the USRA and NRA.<sup>386</sup> But following the publication of the Uniform Firearms Act's

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*Criminal Justice Data. Uniform Crime Reports, 1920-1959*, NAT'L ARCHIVE CRIM. JUST. DATA,

<https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3666?keyword=Uniform+Crime+Reports&permit%5B0%5D=AVAILABLE>) (last visited Mar. 13, 2016).

<sup>380</sup> NRA President Karl T. Frederick seems to be the only author to have incorporated Goddard's analysis as to how trained armed citizens may thwart criminal activity. Compare Goddard, *supra* note 369, at 180 ("Here is a dead man. Here is the gun that killed him. Had this gun not existed, he would be alive today. Abolish guns and we abolish their effects."), with Karl T. Frederick, *Pistol Regulation: Its Principles and History, Part I*, 2 AM. J. POLICE SCI. 440, 450 (1931) (same).

<sup>381</sup> See *supra* note 369 and accompanying text.

<sup>382</sup> Frederick, *supra* note 380, at 450–51.

<sup>383</sup> *Id.* at 451. For the remainder of Frederick's article, see Karl T. Frederick, *Pistol Regulation: Its Principles and History, Part II*, 3 J. CRIM. L. & CRIMINOLOGY 72 (1932); Karl T. Frederick, *Pistol Regulation: Its Principles and History, Part III*, 3 J. CRIM. L. & CRIMINOLOGY 531 (1932).

<sup>384</sup> See Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A.J. 767, 767–69 (1926); *To Ask All States for Ban on Pistols*, N.Y. TIMES, Jan. 30, 1927, at 2.

<sup>385</sup> See W.H., *The Uniform Firearms Act*, 18 VA. L. REV. 904, 904–08 (1932).

<sup>386</sup> See Mills *Suggests Pistol Laws*, BOS. DAILY GLOBE, July 25, 1926, at B4; Eltinge F. Warner, *The Pistol Situation*, FIELD & STREAM, Nov. 1926, at 15; *Will Asks States for Pistol Laws*, N.Y. TIMES, Apr. 30, 1926, at 4.

first draft, pro-gun supporters rejected it on the grounds it was poorly drafted and required a license to purchase a pistol.<sup>387</sup> As NRA Executive Vice-President Milton A. Reckord wrote in an opinion editorial:

We are of the opinion that pistol and revolver traffic should be controlled, but we believe this can be done without disarming the honest citizen. We think it can be done by controlling the dealer and placing certain restrictions upon the sale of revolvers and pistols and by licensing those who carry a pistol.<sup>388</sup>

What ultimately came out of the pro-gun objections was a number of legislative compromises.<sup>389</sup> In terms of the law and armed carriage, pro-gun supporters were successful in steering the NCC away from a complete prohibition in the public concourse.<sup>390</sup> In its place individuals would obtain a concealed carry license if they could show a proper reason for carrying and the approval process was a matter left up to the respective states.<sup>391</sup> The compromise was largely a reflection of the NRA's stance on armed carriage laws.<sup>392</sup> At the time, the NRA was willing to concede the necessity of some restrictive firearm legislation.<sup>393</sup> The organization even supported

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<sup>387</sup> See, e.g., *Disarming the Gunman*, N.Y. TIMES, Feb. 24, 1927, at 4; M.A. Reckord, *The Truth About the Firearms Situation and a Suggestion for Its Practical Solution*, AM. RIFLEMAN, Apr. 1, 1927, at 4; *Wants Sound Laws Regulating Pistols*, N.Y. TIMES, July 12, 1926, at 21. For the other problems and concerns relating to the provisions within the Uniform Firearms Act, see Imlay, *Uniform Firearms Act Reaffirmed*, 16 A.B.A. J. 799, 799-801 (1930); Henry Morris, *The National Crime Commission Anti-Gun Bill*, OUTDOOR LIFE, June 1927, at 28-29, 80.

<sup>388</sup> M.A. Reckord, *Control of Pistol Traffic*, N.Y. HERALD TRIB., Mar. 10, 1927, at 18.

<sup>389</sup> W.H., *supra* note 385, at 908 ("In view of the fact that the Uniform Firearms act was designed with a view to affecting a practical compromise between two extreme views and at the same time to remain in line with existing state legislation, it is submitted that this result has been admirably achieved.")

<sup>390</sup> See M.A. McCullough, *Conference's Antifirearm Law Derided*, OUTDOOR LIFE, Dec. 1930, at 71 (dissenting to a draft of the Uniform Firearms Act that prohibited the carrying of concealed weapons except at "one's place of abode or fixed place of business"); see also Morris, *supra* note 387, at 29 (arguing that the NCC was wrong to prohibit armed carriage because if "citizens were encouraged to meet criminals on equal terms . . . the chances are that they would win all prizes for bravery and for real results.")

<sup>391</sup> See *Urges Pistol Law With License Clause*, N.Y. TIMES, Aug. 16, 1930, at 2; W.H., *supra* note 385, at 907.

<sup>392</sup> See *Merry Christmas—And Gun Laws*, *supra* note 325, at 6 ("We have no objection to obtain a permit to carry a gun concealed, as long as a proper provision is made in the law to enable any honest citizen who is a member of a properly organized target-shooting club to carry his gun to and from the target range. We do not believe that the necessity of a permit to carry concealed weapons with have any appreciable effect on the use of guns by criminals; but if the police believe that such a law will help them, we have no objection to its passage.")

<sup>393</sup> See, e.g., Charles Askins, *Game Laws for the Other Fellow*, AM. RIFLEMAN, Aug. 1924, at 129 ("Without some restriction of what the individual would consider his human rights, our sole job in the world would be killing each other off. Such restrictive laws meet general approval for every one of us knows that whether we like them or not they are an unavoidable

the strict regulation of “powerful weapons in crowded communities,”<sup>394</sup> to include requiring the registration the Magnum revolver in the same vein as machine guns and sawed-off shotguns.<sup>395</sup>

In the end, the Uniform Firearms Act was heralded by pro-gun supporters and the NRA as the “most effective and proper measure to control possession and sale of guns.”<sup>396</sup> And because of its popularity among federal and state government officials, law enforcement, and pro-gun supporters alike, the Uniform Firearms Act was adopted by Alabama, Arkansas, Indiana, Maryland, Montana, Pennsylvania, South Dakota, Virginia, Washington, and Wisconsin.<sup>397</sup> The NRA and pro-gun supporters were even optimistic that the Uniform Firearms Act’s popularity would result in New York adopting it, and therefore repeal the Sullivan Law.<sup>398</sup> However, such optimism was short-lived when New York Governor Franklin D. Roosevelt vetoed the bill and issued the following statement:

[Although] this legislation retains [the] prerequisite for a pistol permit in the city of New York . . . it would permit a person to obtain a permit in any county outside of the city without the necessity of fingerprinting and photographing, and bring the revolver into the city of New York . . . .

A great many sportsmen have urged me to approve this legislation. It is hard to understand the interest of sportsmen and pistols. I have myself fished and hunted a great deal. I have a deep interest in outdoor sports and in the various sportsmen’s associations which foster them. But, it is common knowledge, of course, that fishermen never use a pistol, and that hunters practically never use a pistol. Practically all hunting is done with shotgun or rifle and this legislation does not concern itself with shotguns or rifles.

There are a few people—relatively few—who desire to have revolvers in their homes for theoretical self-protection. Of course, the value of a revolver for this purpose is very problematical . . . .

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necessity. All law and every law is restrictive; there is no human progress without law of some kind”).

<sup>394</sup> *You Can’t Fool the Editors All the Time*, AM. RIFLEMAN, May 1925, at 14.

<sup>395</sup> *Powder Smoke: Legislation in 1937*, AM. RIFLEMAN, Jan. 1937, at 4. The NRA’s rationale was the Magnum “performs no practical function for the sportsman which cannot be as well or better performed by arms of standard type,” and therefore “it is impossible to defend the Magnum against legislation which would have the practical effect of limiting its sale to agents of the Federal, States, and local police.” *Id.*

<sup>396</sup> Donald Stillman, *Rod and Gun*, N.Y. HERALD TRIB., Feb. 19, 1932, at 2.

<sup>397</sup> WINKLER, *supra* note 338, at 209. In the case of Indiana, the Uniform Firearms Act rescinded all of the state’s previous concealed carriage licenses. License holders were required to reapply for new licenses through the circuit court. *See License of Pistol Toters Expires Midnight June 30*, DAILY BANNER, June 15, 1935, at 4.

<sup>398</sup> *See, e.g.,* George P. Le Brun, *Uniform Pistol Laws*, N.Y. TIMES, Nov. 4, 1930, at 24; Karl T. Frederick, *Too Many Teeth in Law*, N.Y. TIMES, Mar. 24, 1932, at 20; F.G. Morris, *The Uniform Firearms Act*, N.Y. HERALD TRIB., Mar. 11, 1932, at 12; *Mulrooney Fights Easing Pistol Law*, N.Y. TIMES, Mar. 25, 1932, at 4; *Sportsmen Plan “Sane” Substitute for Sullivan Act*, N.Y. HERALD TRIB., Jan. 19, 1932, at 6; Stillman, *supra* note 396, at 26; *Uniform Pistol Bill Passes*, N.Y. HERALD TRIB., Mar. 9, 1932, at 32.

The grave increase in the use of revolvers by criminals, individually or in organized gangs, makes essential the rigid control of the manufacture and sale of these weapons. To obtain full protection, there ought to be a Federal statute on the subject so as to prevent the present continuous and ready flow of pistols from one state to another.

The methods provided by law for such identification at the present time may cause inconvenience to a few—but this is inconvenience only—for there is nothing, and should be nothing, derogatory or degrading to one's character or standing as a citizen in being photographed or fingerprinted for this purpose. No person, on mature reflection should object to this inconvenience if he but realize that the state and its communities are trying to stamp out gangsters and unlawful pistol toters .

<sup>399</sup>  
 . . .

Roosevelt's rejection of the Uniform Firearms Act drew the ire of pro-gun supporters for two reasons. First, although pro-gun supporters maintained few qualms with the licensing of armed carriage, they thought it was "un-American" to license firearm purchases. As Ray P. Holland, the editor-in-chief of *Field and Stream* put it: "A permit should be required to carry concealed weapons. That's all. It is un-American to forbid a man to have a pistol in his home."<sup>400</sup> The second reason Roosevelt's veto message irked pro-gun supporters was it encouraged federal action.<sup>401</sup> Ever since the passage of the Sullivan Law, pro-gun supporters backed legislative proposals that incorporated aspects of firearm localism and limited aspects of firearm nationalism.<sup>402</sup> Thus far, pro-gun supporters averted federal intervention into the matter. However, upon Roosevelt being elected President of the United States, a federal solution to the nation's crime and violence epidemic was certainly forthcoming, and the task fell to Attorney General Homer S. Cummings.<sup>403</sup>

Throughout Cummings's tenure as Attorney General (1933–1939), pro-gun forces worked diligently to defeat any federal attempt to regulate firearms. It began

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<sup>399</sup> *Governor Vetoes Gun Law Changes*, N.Y. TIMES, Mar. 29, 1932, at 4.

<sup>400</sup> Holland, *supra* note 357, at 17.

<sup>401</sup> *Id.*

<sup>402</sup> See, e.g., *A National Sullivan Law*, ARMS & MAN, Mar. 1921, at 8; McCullough, *supra* note 390, at 71 ("A law which might be suitable within the well-policed and closely built-up areas of metropolitan districts is wholly out of place in other sections . . . . Local option should be decisive. No law which runs counter to the prevailing sentiment is ever enforced generally . . . ."); *The Sullivan Law*, *supra* note 321, at 886; *The Sullivan Pistol Act*, *supra* note 321, at 992 (stating the Sullivan Law "should be amended to permit . . . . Local license option in every city, town, and village in the state").

<sup>403</sup> See Adam Winkler, *Franklin Roosevelt: The Father of Gun Control*, NEW REPUBLIC (Dec. 19, 2012), <http://www.newrepublic.com/article/111266/franklin-roosevelt-father-gun-control>. For Cummings's twelve point plan to suppress crime, see Homer S. Cummings, U.S. Attorney Gen., Address Delivered Before the Continental Congress of the Daughters of the American Revolution: A Twelve Point Program (Apr. 19, 1934), <http://www.justice.gov/ag/speeches-5>. For Cummings's take on firearms and crime suppression, see Homer S. Cummings, U.S. Attorney Gen., Address Delivered Before the Annual Convention of International Association of Chiefs of Police: Firearms and the Crime Problem (Oct. 5, 1937), <http://www.justice.gov/ag/speeches-5>.

in September 1933 when the NRA called upon its members to get involved. From the NRA's perspective, the national crime problem was not due to the availability of firearms, but with a criminal justice system that placed "police chiefs, commissioners, sheriffs, judges, prosecutors, and justices of the peace under the domination of politicians."<sup>404</sup> Moreover, the NRA was of the opinion that if the federal government regulated firearms it would ultimately lead to an increase in crime. The NRA felt that if history taught the world anything it was that criminals could be "stamped out by an aroused *armed* citizenry, either called to the aid of the police as possemen, or, as in the days of the Old West, disgusted with corrupt police officials and organized into their own law-enforcement groups—the Vigilantes."<sup>405</sup> In other words, the NRA believed that history showed that the armed citizen was the "weapon of democracy."<sup>406</sup>

Within sportsmen and gun-owner publications, this type of rhetoric appeared regularly in response to proposed federal firearm regulations.<sup>407</sup> The NRA, in particular, exerted its leverage and employed numerous tactics to urge membership against firearm nationalism.<sup>408</sup> In one publication the organization blamed sportsmen and gun owners for not getting involved.<sup>409</sup> In another it postulated that federal firearm regulations were part of a conspiracy towards arms confiscation.<sup>410</sup> This line of rhetoric was employed frequently to argue against registration.<sup>411</sup> At one point the NRA even asserted it did not oppose registration because "the *theory* was bad," but because there was no assurance whatsoever it would not be used for "political persecution purposes."<sup>412</sup>

In the end, the tactics employed by the NRA and pro-gun supporters were quite effective.<sup>413</sup> Although both the 1934 National Firearms Act and the 1938 Federal

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<sup>404</sup> *Powder Smoke: Federal Firearms Law*, AM. RIFLEMAN, Sept. 1933, at 4.

<sup>405</sup> *Powder Smoke: The Attorney General is Inconsistent*, AM. RIFLEMAN, Jan. 1934, at 4 (emphasis added).

<sup>406</sup> *Id.*

<sup>407</sup> See, e.g., Ray P. Holland, *Anti-Gun Mania*, FIELD & STREAM, May 1936, at 15 [hereinafter Holland, *Anti-Gun*]; Ray P. Holland, *Guns*, FIELD & STREAM, May 1934, at 15 [hereinafter Holland, *Guns*]; Sylvester Rabadan, *A Letter*, FIELD & STREAM, May 1938, at 23.

<sup>408</sup> See, e.g., *Powder Smoke: Random Shots*, AM. RIFLEMAN, July 1934, at 4; *Powder Smoke: Keep Those Letters and Telegrams Coming*, AM. RIFLEMAN, Mar. 1934, at 4; *Powder Smoke: Firearms in the Senate*, AM. RIFLEMAN, Feb. 1934, at 4.

<sup>409</sup> See *Powder Smoke: Why Gun Laws?*, AM. RIFLEMAN, Nov. 1933, at 4.

<sup>410</sup> See *Disarmament by Subterfuge*, AM. RIFLEMAN, May 1934, at 4; *Powder Smoke: The Clearing Picture*, AM. RIFLEMAN, Dec. 1933, at 4.

<sup>411</sup> See, e.g., *Powder Smoke: Gun Registration*, AM. RIFLEMAN, Apr. 1934, at 4; Milton E. Reckord, *Mr. Cummings Proposes*, FIELD & STREAM, Apr. 1938, at 21; *Random Shots*, AM. RIFLEMAN, Aug. 1934, at 4.

<sup>412</sup> *Powder Smoke: Why Honest Citizens Object*, AM. RIFLEMAN, Feb. 1936, at 4.

<sup>413</sup> See, e.g., Ray P. Holland, *Before Election*, FIELD & STREAM, Sept. 1934, at 15 (stating National Firearms Act does not burden sportsmen); *Powder Smoke: Sportsmen's Victory*, AM. RIFLEMAN, Aug. 1938, at 4 (celebrating the passage of Federal Firearms Act as a NRA victory).

Firearms Act were enacted into law, the enforcement provisions did not impose serious burdens on an individual's ability to purchase, own, and use firearms.<sup>414</sup> Additionally, the NRA gained invaluable experience in combatting restrictive firearms legislation, as well as grass roots organizing. The NRA developed an efficient process to track and grade federal, state, and local anti-firearms legislation.<sup>415</sup> The process included the use of telegrams and telephones to set "in motion a large train of events" to defeat restrictive firearms bills.<sup>416</sup> The NRA even touted itself as providing a form of "guardianship" over firearm freedom through "conscientious cooperation, wide-flung organization, and a frequently-exhibited willingness and ability to bring down upon the head of the short-sighted anti-gun legislator the concentrated wrath" of the sportsman and gun owner.<sup>417</sup>

What made the NRA's legislative and grass roots efforts so effective were its cunningly tailored talking points. Each served to rouse its membership against restrictive firearms legislation. The NRA's talking points included things like "punish the criminal not the law-abiding firearm owner,"<sup>418</sup> "enforce the laws on the books,"<sup>419</sup> "firearm restrictions lead to increased crime rates,"<sup>420</sup> and "one new firearm law leads to more and ultimately confiscation."<sup>421</sup> Until 1950 arguably the

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<sup>414</sup> For more on scope of the National Firearms Act and the Federal Firearms Act, see Alfred M. Ascione, *The Federal Firearms Act*, 13 ST. JOHN'S L. REV. 438 (1939); James N. Brown III, Note, *Firearms Regulations*, 17 W. RES. L. REV. 569, 571-73 (1965); Brabner-Smith, *supra* note 291, at 405-09.

<sup>415</sup> See *Firearms Legislation*, AM. RIFLEMAN, Mar. 1941, at 22 (first instance where NRA begins grading legislation); C.B. Lister, *The Record for 1933*, AM. RIFLEMAN, Dec. 1933, at 8; *Our Business is Everybody's Business*, AM. RIFLEMAN, Mar. 1933, at 6; *The Roll Call of 1933 Firearms Legislation*, AM. RIFLEMAN, Mar. 1933, at 20 (first instance where NRA publishes legislation roll call); Cover Page, AM. RIFLEMAN, July 1932, at 1 (outlining the NRA's objectives, to include "assistance to legislators in drafting laws discouraging the use of firearms for criminal purposes" and "prevention of the passage of legislation unnecessarily restricting the use of firearms").

<sup>416</sup> *Quiet Efficiency*, AM. RIFLEMAN, Apr. 1933, at 6.

<sup>417</sup> *Id.*; see also *Congress Convenes This Month—*, AM. RIFLEMAN, Jan. 1938 (encouraging current NRA members to sign up friends to combat anti-firearm legislation); *Powder Smoke: More on Legislation*, AM. RIFLEMAN, Mar. 1937, at 6 (stating the NRA has been quite successful in its lobbying efforts).

<sup>418</sup> See, e.g., *Another Vicious and Unnecessary Firearm Bill*, AM. RIFLEMAN, Apr. 1936, at 2; Harold F. Dawes, *Logic on Pistol Laws*, OUTDOOR LIFE, July 1932, at 72-73; *Powder Smoke: Gun Registration*, AM. RIFLEMAN, Apr. 1934, at 4; Cover Page, AM. RIFLEMAN, July 1932, at 1 (outlining that one of the NRA's objectives was to provide "assistance to legislators in drafting laws discouraging the use of firearms for criminal purposes").

<sup>419</sup> See, e.g., *Powder Smoke: Random Shots*, *supra* note 408, at 4.

<sup>420</sup> See *infra* pp. 458-66; see also Edward Huntington Williams, *Criminal Gun*, OUTDOOR LIFE, Oct. 1930, at 30 (stating firearms laws do not work).

<sup>421</sup> See, e.g., C.B. Lister, *Pattern in Red*, AM. RIFLEMAN, Apr. 1948, at 10 [hereinafter Lister, *Pattern in Red*]; C.B. Lister, *The History of Liberty—*, AM. RIFLEMAN, May 1946, at 9 [hereinafter Lister, *The History of Liberty*]; C.B. Lister, *A Foot in the Door*, 94 AM. RIFLEMAN, 13 Apr. 1946, at 13 [hereinafter Lister, *A Foot in the Door*]; see also Raymond R. Camp, *Wood, Field and Stream*, N.Y. TIMES, Feb. 11, 1941, at 31; Ben Franklin Hardaway, *Ban on Ammunition Questioned*, N.Y. TIMES, Feb. 18, 1948, at 26; Eltinge F. Warner,



NRA's greatest talking point was its legislative arch nemesis—the Sullivan Law. It was used as a constant reminder as to what could happen nationally if sportsmen and gun owners did not fight against each and every piece of restrictive firearms legislation.<sup>422</sup>

In 1940, the NRA combined all of its talking points and lessons learned into a pamphlet titled *The Pro and Con of Firearms Legislation*. Its purpose was to “assist legislators who are interested in making a thorough study of the problems involved in regulating the use, ownership and possession of firearms.”<sup>423</sup> The pamphlet outlined everything from the NRA's organizational history, to legislation that the organization would both work in support and opposition to,<sup>424</sup> to the NRA's views on “anti-gun” laws, criminology, and crime statistics,<sup>425</sup> to a summary of federal and state regulations on firearms.<sup>426</sup> What is of particular interest, at least as a matter of historiography, was the pamphlet's analysis of the Second Amendment because it aptly summarized the NRA's position on the law and armed carriage from the 1920s until the late twentieth century. In contrast to what some academics have historically claimed,<sup>427</sup> the NRA and its members had given some thought to the Second Amendment's meaning and protective scope.<sup>428</sup> Certainly a detailed analysis was

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*Disarmament for Defense?*, FIELD & STREAM, Oct. 1940, at 15; *No Gun Registration Law Needed*, OUTDOOR LIFE, June 1934, at 73; Eltinge F. Warner, *Idiocy Running Amuck*, FIELD & STREAM, Nov. 1931, at 17.

<sup>422</sup> See, e.g., Frederick, *supra* note 354, at 13; see also *The Plot to Take Your Guns Away*, *supra* note 349, at 21; Grahame, *supra* note 356, at 17, 19; Holland, *supra* note 407, at 15; C.B. Lister, *Invasion*, AM. RIFLEMAN, Feb. 1943, at 11; *Powder Smoke: The Sinister Influence*, AM. RIFLEMAN, Apr. 1935, at 6; *Powder Smoke: Stick to the Issue, Mr. Alco!*, AM. RIFLEMAN, Nov. 1934, at 6; *Powder Smoke*, AM. RIFLEMAN, Oct. 1934, at 4; *Powder Smoke: Shades of the Pioneers!*, AM. RIFLEMAN, Sept. 1934, at 4; *Powder Smoke: Gun Registration*, *supra* note 411, at 4.

<sup>423</sup> NAT'L RIFLE ASS'N., *THE PRO AND CON OF FIREARMS LEGISLATION 1* (1940) (on file with author).

<sup>424</sup> The NRA supported legislation that (1) prohibited the possession of firearms or dangerous weapons by convicted criminals, fugitives, mental incompetents, drug addicts, vagrants, and undesirable aliens; (2) provided additional penalties for armed felons; (3) background checks; and (4) making the theft of a firearm a major criminal offense. *Id.* at 2. The NRA did not oppose legislation that (1) required gun dealers to register for a nominal fee; (2) prohibited the handling of arms by pawnbrokers; (3) required a “reasonable delay” between application and purchase of firearms; and (4) limited the sale and use of firearms by minors. *Id.* The NRA opposed legislation that (1) imposed punitive taxes on firearm purchases; (2) permitted government officials the authority to decide whether individuals could own and use firearms; and (3) required the registration of firearms. *Id.*

<sup>425</sup> *Id.* at 3, 12.

<sup>426</sup> *Id.* at 7, 10–11.

<sup>427</sup> See, e.g., JOAN BURBICK, *GUN SHOW NATION: GUN CULTURE AND AMERICAN DEMOCRACY* 73–74 (2006); WINKLER, *supra* note 338, at 64–65.

<sup>428</sup> See *Small Arms and the Explosives Bill*, ARMS & MAN, Sept. 1917, at 509 (stating that state firearm regulations seem to violate the “spirit” of the Second Amendment); *Congress Convenes This Month*, *supra* note 417 (asking every NRA member to stand up for the “right of the American Citizen to bear Arms”); *Powder Smoke: Keep Those Letters and Telegrams*

lacking, but the NRA and its membership firmly believed that the Second Amendment and similar state constitution analogues provided sportsmen and gun owners with some constitutional protection.<sup>429</sup> In terms of the pamphlet itself, the NRA's analysis in many ways reflected the constitutional status quo, with a hint of idealism:

The most generally accepted concept of [the right to bear arms] is that it delegates the task of controlling firearms to the individual state governments. The original states thought themselves as separate and individual sovereignties who voluntarily joined in a Federal union to which they surrendered certain rights and powers for the common good. Any power not specifically delegated to the Federal government was reserved as a proper function of the state governments. To further clarify the matter of states' rights and to relieve the minds of those citizens who feared that the new Federal government would disregard certain principles of liberty which had been adopted after long and bitter struggles, the first ten amendments were prepared as a "Bill of Rights" to specifically designate some powers as functions of governments.

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*Coming*, *supra* note 408, at 4; *A National Sullivan Law*, ARMS & MAN, Mar. 1, 1921, at 8 (stating legislators never properly consider the Second Amendment when enacting anti-firearm legislation); Brown, *supra* note 332, at 429 (stating the Second Amendment historically came from the 1689 English Declaration of Rights and protected arms ownership "for defense only"). For some early twentieth-century pro-gun advocate opinion editorials discussing the scope and meaning of the Second Amendment, see *Another View of Preparedness*, AM. RIFLEMAN, July 1923, at 10 (stating one of the "fundamental" rights of American citizenship is "the right to keep and bear arms"); Barker, *supra* note 329, at 42; *Constitutional Provision on Arms*, OUTDOOR LIFE, Aug. 1921, at 148; Geikie, *supra* note 326, at 573-74; McGuire, *Friday Morning Club*, *supra* note 344; McGuire, *Popgun Crusaders!*, *supra* note 344, at 16; Morrow, *supra* note 356, at 300; *The Foreign Gunman in American Crime*, AM. RIFLEMAN, Sept. 1925, at 22 ("The American Rifleman bears to brief for any political party or religious creed . . . it stands for the right of all reputable citizens to own and bear arms, as guaranteed to them by the Constitution."); Rabadan, *supra* note 407, at 23; *The Sullivan Law*, *supra* note 321, at 886; *The Sullivan Pistol Act*, *supra* note 321, at 991-92; Chauncey Thomas, *Our Own Fault*, OUTDOOR LIFE, Aug. 1914, at 187-88; Eltinge F. Warner, *An Important Letter*, FIELD & STREAM, Sept. 1925, at 16; Eltinge F. Warner, *You Have No Constitutional Rights!*, FIELD & STREAM, Mar. 1932, at 15; Captain Charles S. Wheatley, *The People, the Constitution, and Firearms*, OUTDOOR LIFE, June 1930, at 104.

<sup>429</sup> See *supra* note 428; see also Camp, *supra* note 421, at 31 (echoing the sentiments of the NRA that the Second Amendment guarantees a "hands-off policy" to federal firearm regulation); Raymond R. Camp, *Wood, Field and Stream*, N.Y. TIMES, Jan. 5, 1949, at 31 (asserting that many state firearm regulation proposals violate the Second Amendment); Raymond R. Camp, *Wood, Field and Stream*, N.Y. TIMES, Feb. 9, 1947, at S3 (asserting that the registration of firearms is a violation of the Second Amendment); Charles W. Carson, *Firearms Restrictions Opposed*, N.Y. TIMES, Mar. 19, 1941, at 20 (asserting that the regulation of private possession of firearms, to include the Sullivan Law, violate the Second Amendment); Eltinge F. Warner, *Firearm Laws and the Constitution*, FIELD & STREAM, Oct. 1946, at 41 (asserting that there was a time where "courts in several decisions held state anti-gun laws to be a violation of the Second Amendment," but that is was "no longer considered open to argument, and it is extremely improbable that any Federal Court would today listen to such an argument").

The United States Supreme Court has held that the second amendment is a limitation on the power of the Federal government. Under this interpretation a state legislature is free to regulate the manner of bearing arms *within the limits of its own constitution* but in any case it probably lacks the authority to completely destroy the right to bear arms. By a judicious use of its police power it may properly regulate the use of firearms as a means of preventing crime but legislatures cannot exercise this power in an arbitrary manner but must make a reasonable use of the police powers granted to them by the state constitutions under which they operate.<sup>430</sup>

Of historical note was the NRA's admission that state and local governments retained broad police powers—that is so long as such legislation did not contradict the respective state's constitutional provision.<sup>431</sup> Here again, it is worth noting that the NRA did not have any problem with the licensing of armed carriage per se.<sup>432</sup> As NRA President Karl T. Frederick stated before Congress in 1934, "I have never believed in the general practice of carrying weapons . . . I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses."<sup>433</sup> However, the NRA did not support licensing laws where state or local government exercised police power in an "arbitrary manner."<sup>434</sup> By "arbitrary manner" the NRA meant licenses that were without sufficient due process.<sup>435</sup> This is not to say that some pro-gun supporters did not take more extreme positions on the law and armed carriage, but these positions were largely based on romantic notions of the past.<sup>436</sup> One open letter stated that it was a "disgrace" that so many Americans

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<sup>430</sup> NAT'L RIFLE ASS'N., *supra* note 423, at 4.

<sup>431</sup> *Id.*

<sup>432</sup> See, e.g., *Shall We Abolish the Hammer?*, *supra* note 337, at 557 ("In order that the police may function properly in this respect, it is essential to require every person to obtain a police permit to carry a pistol. And that the police be empowered to require whatever proof they shall deem sufficient of the integrity of the applicant.").

<sup>433</sup> *National Firearms Act: Hearing Before the Comm. on Ways and Means H.R.*, 73rd Cong. 59 (1934).

<sup>434</sup> NAT'L RIFLE ASS'N., *supra* note 423, at 4.

<sup>435</sup> See Eltinge F. Warner, *Gun Prohibition*, FIELD & STREAM, Aug. 1940, at 13 (objecting to armed carriage laws that do not presume an individual applying for a license to carry is "responsible" and "honest"); Holland, *supra* note 357, at 17 (stating any armed carriage permit scheme should be "compulsory on the authorities to grant"); *Shall We Abolish the Hammer?*, *supra* note 337, at 557 (dissenting to licensing laws that "permit the police to exercise arbitrary judgment and reject any application they care to whether they have just cause or not"); Eltinge F. Warner, *Hand Over Your Gun!*, FIELD & STREAM, May 1930, at 19 (objecting to a proposed armed carriage law on the grounds it would only license a "small minority").

<sup>436</sup> See, e.g., Grahame, *supra* note 356, at 18 ("Our forefathers took the possession of firearms as a matter of course. Every farmer and ranchman had his shotgun or rifle or handgun and state lawmakers were quite content to go along with them. Citizen gun owners were a great aid in law enforcement, and when dangerous criminals had to be hunted down, the sheriff often did the job with a hastily sworn-in posse of volunteers, who brought along their own guns and didn't need anyone to show them how to use them.").

had become “unfamiliar with the use of firearms.”<sup>437</sup> The author was of the opinion that if the people would only return to “some of the ideals of ‘76” that society would deter criminal activity.<sup>438</sup> As a solution, the author recommended an “efficient, well-paid police department,” judges “appointed for life,” and permitting, “all good citizens to own and carry arms and train them in their proper safe use.”<sup>439</sup>

Although the NRA did not officially condone universal armed carriage to deter criminal activity, the organization certainly fostered the viewpoint in its magazine *American Rifleman*.<sup>440</sup> This is because the NRA championed the view that all restrictive firearms legislation led to an increase in crime.<sup>441</sup> Moreover, the NRA often portrayed the armed citizen as carrying out an important American historical tradition.<sup>442</sup> In contrast, those that supported restrictive firearms legislation were characterized as too civilized, weak, unpatriotic or ignorant of firearms.<sup>443</sup> Once World War II broke out it became common for the NRA to associate supporters of restrictive firearms legislation with Nazis, communists, and fascists.<sup>444</sup> The practice

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<sup>437</sup> Stephen D. Butts, *A Letter*, FIELD & STREAM, Dec. 1933, at 15.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> See, e.g., *Powder Smoke: The Attorney General is Inconsistent*, *supra* note 405, at 4 (stating history proves that criminals could be “stamped out by an aroused *armed* citizenry, either called to the aid of the police as possemen, or, as in the days of the Old West, disgusted with corrupt police officials and organized into their own law-enforcement groups—the Vigilantes.”) (emphasis added).

<sup>441</sup> See, e.g., Lister, *A Foot in the Door*, *supra* note 421, at 13; *Tyros on the Hill*, *supra* note 363, at 6.

<sup>442</sup> See, e.g., *A Memorial—An Heritage*, *supra* note 350, at 4; *Fight!*, *supra* note 351, at 4; C.B. Lister, *History vs. Histrionics*, AM. RIFLEMAN, May 1943, at 13; *ISM*, AM. RIFLEMAN, Feb. 1939, at 2; “*Make ‘The Spirt of ‘76’ the Spirt of ‘32*, *supra* note 350, at 6.

<sup>443</sup> See *Powder Smoke: Politics and Propaganda*, AM. RIFLEMAN, Sept. 1940, at 4; *Powder Smoke: Adequate Defense for Uncle Sam—And His Nephews*, AM. RIFLEMAN, Jan. 1936, at 4; Holland, *Anti-Gun Mania*, *supra* note 407, at 15 (“It seems utterly absurd that anyone with even fourth-grade intelligence could think that anti-firearm laws will prevent crime.”); Lister, *supra* note 442, at 13.

<sup>444</sup> See Frank A. Contey III, *Possessing Firearms Upheld*, N.Y. TIMES, Aug. 16, 1952, at 14 (opinion editorial asserting Nazi registration and disarmament); C.B. Lister, *A Soldier Speaks*, AM. RIFLEMAN, Dec. 1949, at 8; C.B. Lister, *For Disarming the Bourgeoisie*, AM. RIFLEMAN, Jan. 1947, at 7; C.B. Lister, *Matter of Proportion*, AM. RIFLEMAN, Oct. 1948, at 10; C.B. Lister, *Optimist—Or Sucker?*, AM. RIFLEMAN, Sept. 1948, at 12; C.B. Lister, *Passion for Crisis*, AM. RIFLEMAN, Mar. 1948, at 10; C.B. Lister, *Pious Subterfuge*, AM. RIFLEMAN, Jan. 1946, at 9; C.B. Lister, *Simple Arithmetic*, AM. RIFLEMAN, Nov. 1949, at 10; C.B. Lister, *State of Mind*, AM. RIFLEMAN, June 1948, at 8; C.B. Lister, *Straightening the Record*, AM. RIFLEMAN, Mar. 1947, at 6; Lister, *supra* note 422, at 11; Lister, *Pattern in Red*, *supra* note 421, at 10; Lister, *The History of Liberty*, *supra* note 421, at 9. *But see Logic and Reason*, AM. RIFLEMAN Feb. 1962, at 14 (showing the NRA taking offense for its members and their beliefs being referred to as “communists, radicals, or fanatics”); John M. Snyder, *The Other Side of Gun Control*, AM. RIFLEMAN, Dec. 1973, at 14 (dissenting to media coverage that associated the NRA’s membership with Nazis, the Ku Klux Klan, and Minutemen).

continued throughout the twentieth century and is still prevalent today.<sup>445</sup> Writing in 1968, Yale Law School professor George D. Braden aptly criticized the NRA's comparison as "hysterical," "demagogic," and missing the point altogether:

There never have been any really good arguments against legislation designed to protect civilized society against trigger happy fools. But up to now the murder-weapon lovers have used rational arguments. When they are reduced to comparing civilized Americans who believe in controlling firearms to the German people of Hitler's day, irrational arguments have taken over . . . . We civilized people do not wish to deny arms to the people. We wish only to know precisely who keep and bear arms and to assure ourselves that they are competent keepers and bearers.<sup>446</sup>

From the close of World War II until the end of the 1960s, the NRA maintained its formula for defeating restrictive firearms legislation by informing its members of pending legislation,<sup>447</sup> encouraging them to be politically active,<sup>448</sup> warning them of supposed schemes to confiscate firearms and potential threats to America's ideals,<sup>449</sup> and fostering a positive and patriotic image of sportsmen and gun owners,<sup>450</sup> to

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<sup>445</sup> See, e.g., Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding Gun Culture Wars (A Call to Historians)*, 73 *FORDHAM L. REV.* 653 (2004); see also *Again, Gun Registration Aids Confiscation*, *AM. RIFLEMAN*, June 1967, at 16; *Communism as a Bitter Lesson*, *AM. RIFLEMAN*, Mar. 1973, at 8; *Communism, Assassinations and Anti-Gun Attitudes*, *AM. RIFLEMAN*, Oct. 1974, at 22; *Communism Versus Gun Ownership*, *AM. RIFLEMAN*, Jan. 1973, at 14; *Communism Versus Gun Ownership*, *AM. RIFLEMAN*, Aug. 1970, at 16; *Will Revolutionaries With Guns Heed the 1968 Gun Control Act?*, *AM. RIFLEMAN*, Feb. 1973, at 14.

<sup>446</sup> George D. Braden, *Rifle Group Assailed*, *N.Y. TIMES*, June 19, 1968, at 46-47.

<sup>447</sup> See, e.g., *A Busy Year With Gun Laws*, *AM. RIFLEMAN*, July 1956; *Federal Gun Legislation*, *AM. RIFLEMAN*, Jan. 1966, at 15; *Legislative Activity in 1961*, *AM. RIFLEMAN*, Aug. 1961, at 22; *Legislative Box-Score*, *AM. RIFLEMAN*, Mar. 1949; *NRA Position on Gun Legislation*, *AM. RIFLEMAN*, May 1967, at 17.

<sup>448</sup> See, e.g., Merritt A. Edson, *The Greatest Dangers*, *AM. RIFLEMAN*, June 1955, at 16; *Inform Your Legislator*, *AM. RIFLEMAN*, Jan. 1961, at 8; *Let's Take the Offensive*, *AM. RIFLEMAN*, Sept. 1958, at 16; C.B. Lister, *The Greater Danger*, *AM. RIFLEMAN*, Dec. 1949; Louis F. Lucas, *The Price of Individual Rights*, *AM. RIFLEMAN*, July 1960, at 16; John Scofield, *The Voice, the Pen, the Vote...*, *AM. RIFLEMAN*, Jan. 1951; *The Big Half-Truth and Smear By Association*, *AM. RIFLEMAN*, Dec. 1966, at 16; *The Power to Make Law*, *AM. RIFLEMAN*, Sept. 1957, at 16.

<sup>449</sup> See, e.g., C.B. Lister, *Truth—Self Evident*, *AM. RIFLEMAN*, July 1949, at 10 (asking members to ever be mindful of communist and fascist threats to "American ideal"); C.B. Lister, *Hysteria Abroad*, *AM. RIFLEMAN*, June 1949, at 12 (warning that game laws are the new threat to "the arsenal of democracy"); *The Faces of the Opposition*, *AM. RIFLEMAN*, Nov. 1967, at 16 (alleging a concentrated media campaign to support anti-gun agenda); *The Right to Arms for Self-Defense*, *AM. RIFLEMAN*, Jan. 1967, at 16 (warning of attempts of "homefront disarmament"); Jac Weller, *Britain Disarms Herself*, *AM. RIFLEMAN*, Feb. 1954, at 15-18 (using Britain as an example as to how "rigid firearms control" could lead to "the disarming of the private citizen and plac[e] him at the mercy of the criminal").

<sup>450</sup> See *A Man and His Gun*, *AM. RIFLEMAN*, Mar. 1959, at 14; *A Paul Revere Organization*, *AM. RIFLEMAN*, Mar. 1958, at 14; Karl Hess, *Don't Let the Feds Take Your Guns*, *AM. MERCURY*, Feb. 1958, at 35; Donald L. Jackson, *The Man With a Rifle*, *AM.*

include the notion that an armed citizenry is a strong deterrent to Cold War aggression.<sup>451</sup> One noticeable addition was the NRA's emphasis on education over new firearms legislation.<sup>452</sup> From the NRA's perspective, restrictive firearms legislation was usually the result of an unfortunate accident, which in turn led some "anti-gun" reformers to advocate, "there ought to be a law."<sup>453</sup> The NRA's solution was to provide its members with the educational tools to prevent the passage of such laws and in the process promote good firearms legislation.<sup>454</sup> This included

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RIFLEMAN, Dec. 1951, at 13; James E. Serven, *Why Americans Own, Shoot, and Collect Guns*, AM. RIFLEMAN, Apr. 1963, at 12; *The Armed Citizen*, AM. RIFLEMAN, Nov. 1965, at 14.

<sup>451</sup> See e.g., Merritt A. Edson, . . . *Keep Your Powder Dry!*, AM. RIFLEMAN, July 1954, at 14 (stressing the importance of riflemen to defeat communism); Merritt A. Edson, *Is the Rifleman Outmoded?*, AM. RIFLEMAN, Apr. 1954, at 16 (stating that riflemen will be needed in future warfare and "the continued existence of our country, may, some day in the future, depend again upon stout-hearted men armed with rifles and with the ability to use them"); C.B. Lister, *Plan for Defense*, AM. RIFLEMAN, Feb. 1949, at 10 (encouraging "universal military service" and a defense budget that supports rifle clubs); see also Ralph L. Smilde, *Right to Bear Arms: Ownership of Rifle Declared Part of Our National Heritage*, N.Y. TIMES, Jan. 4, 1964, at 22 (stating that individual proficiency and ownership of small arms would "certainly be a deterrent to any attack of invader"); James I. Wendell, *Right to Bear Arms Upheld: Limitation on Weapons Considered Poor Means to Prevent Murder*, N.Y. TIMES, Dec. 21, 1963, at 21 (stating the familiarity and ownership of weapons is an important skill seeing that "practically every young male American will be called up for military service").

<sup>452</sup> See *Let's Take the Offensive*, supra note 448, at 16 ("The real answer to gun accidents, just as has been found in traffic accidents, is education."); see also Merritt A. Edson, *Education Versus Legislation*, AM. RIFLEMAN, Mar. 1955, at 16 [hereinafter Edson, *Education Versus Legislation 2*] ("A gun, just like an automobile, can be dangerous unless the operator has been taught how to handle it safely. A gun, just like an automobile, can be used for unlawful purposes unless the operator has been convinced that crime does not pay. These are the essential truths on which gun legislation should be based."); Merritt A. Edson, *Education Versus Legislation*, AM. RIFLEMAN, Apr. 1953, at 12 [hereinafter Edson, *Education Versus Legislation 1*] ("Just as crime cannot be eradicated by passing laws aimed at the gun rather than at the criminal, neither can shooting accidents be wiped out by a similar approach . . . . The real answer to gun accidents, just as has been found in traffic accidents, is education."); Merritt A. Edson, *A Sense of Responsibility*, AM. RIFLEMAN, Sept. 1952, at 16 (admitting that "guns are dangerous and have always [been] so," but emphasizing the importance of responsibility through education); Merritt A. Edson, *A Realistic Approach*, AM. RIFLEMAN, Oct. 1951, at 16 (stating the answer to hunting accidents is not to "pass a law," but "gun-safety education, just as driver education and training has been found to be the proper approach to the automobile accident problem.").

<sup>453</sup> See, e.g., *A Knowledge of Existing Gun Laws*, AM. RIFLEMAN, Mar. 1963, at 12; *Legislation by Regulation?*, AM. RIFLEMAN, July 1957, at 16; *There Ought to be a Law!*, AM. RIFLEMAN, Oct. 1956, at 16; *The Quick-Draw Craze*, AM. RIFLEMAN, Feb. 1959, at 14 (encouraging gun safety before people will react with "there ought to be a law"); see also Karl Hess, *Should You Own a Gun?*, AM. MERCURY, Apr. 1957, at 59.

<sup>454</sup> See J.J. Basil, Jr., & Daniel L. Mountain, *Firearms Legislation and the Gun Owner: A Guide to Sound Action by the Individual for Preventing Restrictive Gun Laws*, AM. RIFLEMAN, July 1964, at 30-32; Elizabeth T. Cornish, *Your Gun and the Non-Shooter*, AM. RIFLEMAN, Mar. 1955, at 4; Frank C. Daniel, *The Gun Law Problem*, AM. RIFLEMAN, Feb. 1953, at 16-18, 46; *Let's Sound Off!*, AM. RIFLEMAN, July 1956, at 16 (admitting that firearms result in accidents and deaths, but encouraging proper education and training in firearms); Michael Nadel, *What Can We Do?*, AM. RIFLEMAN, Feb. 1954, at 19; John F. Soubier, *Before It's Too*

establishing a test for sportsmen and gun owners to determine whether the respective firearms legislation was “good” or “bad.”<sup>455</sup> The test comprised of five questions:

1. Is it an enforceable law?
2. For what purpose is the law intended, and will it actually achieve that purpose?
3. Could the law be used by an unscrupulous person or party to extend or perpetuate its own power?
4. Is the law really necessary or does it merely contribute to a network of technical restrictions which can trip you or some other conscientious sportsman into being an unintentional violator?
5. Is the law an attempt to accomplish by prohibition what can be accomplished only by education and training?<sup>456</sup>

If one applied the NRA’s test to virtually any restrictive firearms law the result was always a failed grade. Given that the NRA was of the opinion that virtually every restrictive firearms law led to increased crime rates or was ineffective at deterring crime altogether, the result should not at all be surprising.<sup>457</sup> Yet somehow the NRA continued to tout itself as a supporter of reasonable firearm legislation.<sup>458</sup> At one point the NRA claimed it “always has . . . and always will be ready to do what is best for America,” to include never placing its organizational goals or firearm heritage “ahead of the national welfare.”<sup>459</sup> The NRA supported the

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*Late: Learn What is Required to Fight Local Antigun Legislation, and Be Ready*, AM. RIFLEMAN, Sept. 1958, at 17-19, 32; *The Positive Approach*, AM. RIFLEMAN, Aug. 1961, at 16; Edson, *supra* note 448, at 16 (“We must prepare ourselves to counter bad ideas with good ideas. We must meet good intentions with proven results, incomplete knowledge with education.”).

<sup>455</sup> See Daniel, *supra* note 455, at 16-18; *Inform Your Legislator*, *supra* note 448, at 8; Louis F. Lucas, *Good-by Guns?*, AM. RIFLEMAN, Dec. 1960, at 14; Franklin L. Orth, *Where the NRA Stands...*, AM. RIFLEMAN, Sept. 1966, at 22; *There Ought to be a Law!*, *supra* note 253, at 16; *Well-Meaning, But Without Understanding*, AM. RIFLEMAN, Jan. 1957, at 14.

<sup>456</sup> Lucas, *supra* note 455, at 14.

<sup>457</sup> See, e.g., *The Positive Approach*, *supra* note 454, at 16 (“It is true that a small percentage of our population uses firearms for illegal purposes. We abhor this situation but believe that firearms legislation is of insufficient value in the prevention of crime to justify the inevitable restrictions which such legislation places on law-abiding citizens.”).

<sup>458</sup> See *The Illegal Use of Guns*, AM. RIFLEMAN, Dec. 1964, at 16; *This is Our Stand*, AM. RIFLEMAN, May 1965, at 16 (“Contrary to the claims by the anti-gun forces, members of the [NRA] and millions of other law-abiding citizens do not oppose all proposed firearms legislation.”); Edson, *Education Versus Legislation 1*, *supra* note 452, at 12 (“Consistently, the NRA has favored and supported those laws that are good.”); Edson, *Education Versus Legislation 2*, *supra* note 452, at 16 (“Consistently, the NRA has favored and supported those laws that are good.”); *There Ought to be a Law!*, *supra* note 253, at 16 (“The Federal government controls the transfer between individuals of machine guns and requires dealers in firearms to maintain certain records. Although these laws technically may be imperfect instruments, few would claim that, in theory, their object was improper. If we could say ‘All gun laws are bad gun laws’, our course of action would be clear and well defined. Since we must concede that some controls are good, then we assume the burden of defining what is good, and what is bad.”).

<sup>459</sup> *Word of Wisdom on Gun Laws*, AM. RIFLEMAN, Mar. 1967, at 14.

disarmament of anyone who “committed a felony or a crime of violence or has a notoriously bad character . . . .”<sup>460</sup> Additionally, the NRA supported legislation that required firearm purchasers to identify themselves, firearm dealers maintain records of sales, parental consent before selling a firearm to a minor, taking a safety course before a minor could obtain a hunting license, and punishing theft of a firearm as a “major offense.”<sup>461</sup> At one point, the NRA even supported a seven-day waiting period before purchasing a handgun.<sup>462</sup> In the 1980s, however, the NRA retracted its support for waiting periods on the grounds they were nothing more than “permit-to-purchase” statutes that burden “law-abiding citizens,” and threaten public safety.<sup>463</sup>

Essentially, the NRA’s post-World War II stance as to whether firearms legislation was “good” or “bad” was a direct reflection of the organization’s interpretation of the Second Amendment. To the NRA, the Second Amendment embodied both individual responsibilities and constitutional guarantees.<sup>464</sup> As it

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<sup>460</sup> Merritt A. Edson, *On Our Honor*, AM. RIFLEMAN, Aug. 1954, at 16.

<sup>461</sup> Frank C. Daniel, *The Gun Law Problem*, AM. RIFLEMAN, Feb. 1953, at 18.

<sup>462</sup> See Peter Grose, *Rifle Group Head Disputes Need of Gun Controls*, N.Y. TIMES, June 8, 1968, at 16; Bill Riviere, *The Great 40 Million Firearms Owners Insist the Right to Bear Them is Sacred*, BOS. GLOBE, Apr. 7, 1968, at F8.

<sup>463</sup> See, e.g., Clayton E. Cramer, *California’s Waiting Period Law; Just How Well Has It Worked?*, AM. RIFLEMAN, Apr. 1993, at 20-21; *Waiting Periods Threaten Public Safety*, AM. RIFLEMAN, July 1991, at 59; *Waiting Periods: No Modest Proposal*, AM. RIFLEMAN, Sept. 1981, at 56-57.

<sup>464</sup> See *Citizens of Good Repute*, AM. RIFLEMAN, Sept. 1964, at 20 (stating the NRA has always supported “the right of law-abiding citizens to keep and bear arms for recreation, for self-protection, and for national defense . . . this right has been forfeited by individuals who commit a crime of violence or have a notoriously bad character.”); Merritt A. Edson, *The Right to Bear Arms*, AM. RIFLEMAN, July 1955, at 14 [hereinafter Edson, *The Right to Bear Arms*] (“Any right carries with it certain responsibilities and, in discharging those responsibilities, we surrender none of the basic right. In case of the basic right, as we see it, is the right of the lawful citizen to own personal weapons and to use those weapons lawfully for recreation and for personal and national defense.”); Merritt A. Edson, *Independent, and Prepared for Peace or War*, AM. RIFLEMAN, May 1955, at 16 (stating the NRA stands for “the right of loyal, law-abiding citizens to purchase, to own, and to use firearms for lawful purposes”); Merritt A. Edson, *Our Common Interests*, AM. RIFLEMAN, Oct. 1954, at 16 (stating the NRA serves to protect the “right of law-abiding citizens to own and use firearms in recreation, self-defense, and national security.”); Merritt A. Edson, *To Keep and Bear Arms*, AM. RIFLEMAN, Aug. 1952, at 16 [hereinafter Edson, *To Keep and Bear Arms*] (discussing the Second Amendment as a responsibility and a right to own and use firearms for lawful purposes, as well as national defense); Edson, *supra* note 460, at 16 (“The National Rifle Association has steadfastly maintained that the right of citizens of good repute to keep and bear arms for recreation, for self-protection, and for national defense should not be abridged. We believe just as stoutly that the individual who has committed a felony or a crime of violence or has a notoriously bad character should be denied that right.”); Louis F. Lucas, *The National Rifle Association of America*, AM. RIFLEMAN, May 1959, at 16 (stating the NRA “believes in the fundamental right of an individual to keep and bear arms and stands squarely behind the premise that the lawful ownership of firearms must not be denied [to] American citizens of good repute, so long as they continue to use such weapons for lawful purposes.”); *Our Priceless Heritage*, AM. RIFLEMAN, July 1958, at 16 (stating the Second Amendment imposes the obligation to “use our firearms, when necessary, in defense of our nation; to exert our best efforts to see that every citizen, military and civilian alike, is taught basic



pertained to the right as an individual responsibility, NRA Executive Director Merritt A. Edson wrote it was “to see that we use our weapons safely, lawfully, and in observance of those controls imposed by proper authority for the welfare of all.”<sup>465</sup> It was even conceded that it was “generally accepted that some degree of control over firearms is both proper and necessary”:

Because of the constitutional right of individual Americans to keep and bear arms, responsible citizens have the right to own firearms and to use them for self-protection, for the security of our nation, and for recreational activities such as hunting and target shooting. In return, they have certain obligations which must be fulfilled. Firearms must be handled with safety and skill. They must be kept in good condition and stored in an appropriate place. They must be used with common sense and consideration for others . . . .

Intelligent Americans will agree that under today’s conditions, guidelines must be established for the control of firearms in some areas. Nevertheless, this control must be based on reason and understanding, not on emotional reaction or misinformation.<sup>466</sup>

As it pertained to the Second Amendment’s constitutional guarantee, the NRA consistently advanced that the right protected individual firearm ownership for national defense, self-protection, and “lawful purposes” such as shooting for recreation and hunting.<sup>467</sup> At no point did the NRA claim the Second Amendment guaranteed a right to preparatory armed carriage in public.<sup>468</sup> However, the NRA

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marksmanship; to train our youth to enjoy shooting . . . to insure proper punishment of those who use firearms for unlawful purposes; and to be forever alert to prevent wearing away of our right.”).

<sup>465</sup> See Edson, *The Right to Bear Arms*, *supra* note 464, at 14; see also *Words of Wisdom on Gun Laws*, AM. RIFLEMAN, Mar. 1967, at 14 (“Neither citizens [that have fought in past or current wars] nor the NRA, their organization, would put personal pastime with firearms ahead of the national welfare. The record in that respect is crystal clear. Many of the truly effective firearms regulations in this country . . . were passed with NRA support and counsel. The NRA always has been and always will be ready to do what is best for America. It is the first of all patriotic organizations of good conscience.”).

<sup>466</sup> *The Misuse of Firearms*, AM. RIFLEMAN, Mar. 1964, at 16; see also *Mail-Order Gun Control*, AM. RIFLEMAN, Mar. 1965, at 16; *This is Our Stand*, *supra* note 458, at 16.

<sup>467</sup> *The Misuse of Firearms*, *supra* note 466, at 16.

<sup>468</sup> See *Basic Facts of Firearms Controls*, AM. RIFLEMAN, Feb. 1964, at 14 (“The courts have held that the states under their general and broad police powers may regulate, within the limits of their constitutions, the possession and use of firearms in furtherance of the health, safety, and general welfare of their citizens. In the exercise of this power and in the due administration of criminal justice, the states have adopted various controls over the . . . carrying . . . of firearms.”); *CBS Reports: Murder and the Right to Bear Arms*, (CBS Television Network June 10, 1964) (statement of NRA President Bartlett Rummel) (“we believe that a respectable citizen should have the right to have and keep his weapons to use them in hunting or in sports, or defending his home or his place of business.”) (on file with author); Edson, *The Right to Bear Arms*, *supra* note 464, at 14 (“Going armed with a concealed weapons is a privilege which the community properly reserves for those possessed of good reason. The fact that we are required to show reason for being granted the privilege of going armed with a concealed weapons should not be interpreted as an infringement upon the

asserted that the Second Amendment must at least guarantee an ancillary right to transport weapons from home to business or from home to shooting recreation. “The right to own a personal weapon amounts to little without the corresponding right to carry it from place to place—from home to range, from tournament to tournament, in the upland country in search for birds, or in the deepest wilds in the hunt for carrying game,” wrote Edson.<sup>469</sup>

While the NRA did not perceive the Second Amendment as guaranteeing a right to preparatory armed carriage up through the late 1960s, as a matter of public policy, the organization began openly advocating against “shall issue” licensing regimes.<sup>470</sup> The NRA truly believed that “fewer crimes of violence would take place” if there were a number of properly trained armed citizens on the streets.<sup>471</sup> From the NRA’s perspective, imposing restrictions on the ownership and use of firearms did little, if anything, to reduce crime.<sup>472</sup> Crime was a larger societal problem that involved

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right to keep and bear arms.”); Oscar Godbout, *Wood, Field and Stream: Sportsmen Are Not Expected to Complain About Proposed Curbs on Weapons*, N.Y. TIMES, June 26, 1964, at 24 (stating that no sportsmen would object to a city prohibition on carrying unloaded rifles or shotguns unless in a case); *Mail-Order Gun Control*, *supra* note 466, at 16 (“In some parts of America, crime has become a real problem. In some cases, concealable firearms are a vital part of that problem.”); *Realistic Firearms Controls*, AM. RIFLEMAN, Jan. 1964, at 14 (“The NRA does not oppose reasonable legislation regulating the carrying of a concealed handgun, but it does oppose the theory that a target shooter, a hunter, or a collector should be required to meet the same conditions.”); *The Illegal Use of Guns*, *supra* note 458, at 16 (“Reputable gun owners . . . do not oppose reasonable legislation regulating the carrying of a concealed handgun, but they do oppose the theory that a target shooter, a hunter, or a collector should be required to meet the same conditions.”); *There Ought to be a Law!*, *supra* note 253, at 16 (stating some firearm restrictions are “proper and necessary” such as the 48 state regulations on concealed carry). *But see* Bartlett Rummel, *Pistol Licensing Laws: Do They Deny Your Right of Self-Defense?*, AM. RIFLEMAN, Apr. 1961, at 23 (concluding that many NRA members have a difficult time reconciling judicial opinions upholding a license to carry arms).

<sup>469</sup> See Edson, *To Keep and Bear Arms*, *supra* note 464, at 16; *see also* *NRA Basic Policy*, AM. RIFLEMAN, July 1964, at 31 (“The NRA is opposed to the theory that a target shooter, hunter, or collector, in order to transport a handgun for lawful purposes, should be required to meet the conditions for a permit to carry a concealed weapon.”).

<sup>470</sup> See, e.g., Daniel, *supra* note 461, at 18 (pledging the NRA’s continued support for the Uniform Firearms Act); *NRA Basic Policy*, *supra* note 469, at 31 (supporting legislation that “clearly” sets forth in the law the “conditions” for a license to carry, and its “issuance . . . should be mandatory”).

<sup>471</sup> See Norman D. Arbaiza, Opinion, *For Repeal of Sullivan Law*, N.Y. TIMES, Oct. 25, 1955, at 32 (opinion editorial hypothesizing the “crime rate” would be “substantially reduced” in New York if criminals “were aware that a majority of law-abiding citizens carried arms”); John E. Osborn, *Guns, Crime, and Self-Defense*, AM. RIFLEMAN, Sept. 1967, at 31 (advocating for less restrictive armed carriage licensing so long as the applicant “know[s] how to use guns and [is] familiar with all the rules of safety as well as the penalties for misuse.”); John M. Snyder, *Crime Rises Under Rigid Gun Control*, AM. RIFLEMAN, Oct. 1969, at 54; *Let’s Sound Off!*, *supra* note 454, at 16.

<sup>472</sup> See, e.g., *Crime Control for Non-Criminals?*, AM. RIFLEMAN, Mar. 1967, at 16; *Words of Wisdom on Gun Laws*, *supra* note 465, at 14.

many variables.<sup>473</sup> At the time, however, the American public overwhelmingly disagreed with the NRA's position and stricter firearm regulations became the norm.<sup>474</sup> The NRA responded by blaming the large disparity of public opinion in favor of increased firearm restrictions on everything from the biased media, to distorted television depictions of firearms violence, to cultural changes in American society.<sup>475</sup>

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<sup>473</sup> See Edson, *Education Versus Legislation 2*, *supra* note 452, at 16; Edson, *Education Versus Legislation 1*, *supra* note 452, at 12; *Let's Take the Offensive*, *supra* note 448, at 16 ("Just as crime cannot be eradicated by passing laws aimed at the gun rather than at the criminal, neither can shooting accidents be wiped out by a similar approach"); Wendell, *supra* note 451, at 21 ("This writer does not believe that safety, or protection from the emotionally maladjusted, can ever be absolute.").

<sup>474</sup> See Hazel Erskine, *The Polls: Gun Control*, 3 PUB. OPINION Q. 455 (1972); George Gallup, *Gallup Poll: A Permit to Be Armed?*, BOS. GLOBE, Feb. 15, 1965, at 11; *Gallup Poll Hits Gun Owners*, AM. RIFLEMAN, Oct. 1959, at 12 (showing seventy-five percent of adults favoring a law requiring a police permit before buying a firearm). For the NRA's view and response to these public opinion polls, see Robert L.F. Sikes, *Should Congress Enact Administration Proposals for Increased Federal Controls Over Firearms?* CON, 46 CONG. DIG. 221, 223 (1967) (statement of NRA President Franklin L. Orth, July 19, 1967) ("A segment of the publicity media has been wont to cast the aims and purposes of the National Rifle Association in a highly unfavorable and negative light. This has been particularly true in the field of firearms legislation. Our critics and adversaries often proclaim by word of mouth and on the printed page that the NRA is for minimum firearms control or no gun regulation at all. Nothing could be further from the truth."); *Do Americans Really Want New Gun Laws?*, AM. RIFLEMAN, Apr. 1968, at 16 (showing a recent survey does not support claims that the public supports more firearm restrictions); Louis F. Lucas, *Firearms and Public Opinion*, AM. RIFLEMAN, Feb. 1960, at 14 (encouraging NRA members to "make known the true facts and create public opinion which is favorable to firearms and shooting"); John M. Snyder, *Why Anti-Gun Polls Are Open to Doubt*, AM. RIFLEMAN, Apr. 1968, at 20 (questioning the methodology of public opinion polls that show a desire for increased firearms restrictions); *Realistic Firearms Controls*, *supra* note 468, at 14 (stating the Kennedy assassination caused an "eruption in the press, radio, and television" for increased firearm restrictions); see also Mark J. Green Lynn Hinerman, Letter to the Editor, *For Gun Legislation*, N.Y. TIMES, July 4, 1968, at 18 (responding to the NRA's claim of "hysteria" against firearms and stating public opinion polls have shown "long standing and overwhelming" support for firearm restrictions).

<sup>475</sup> See Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 665, 668 (1965) (postulating that the either deputizing "armed citizens" along President Kennedy's route in Dallas or an "armed witness" may "have been alert enough after the first shot to have prevented the fatal shot"); *Can Three Assassins Kill a Civil Right?*, AM. RIFLEMAN, July 1968, at 16 (stating the underlying causes of crime are complicated and the problem is not firearms); Harlon B. Carter, *The NRA . . . What It Is and Does*, AM. RIFLEMAN, Nov. 1965, 19 (stating the positive effects of gun control are "exaggerated," and many of the problems with society revolve around "permissive education, permissive parents, and . . . a permissive society"); *Consent of the Governed*, AM. RIFLEMAN, July 1961, at 16 ("We Americans slowly but steadily are being molded to conform to the Big Government pattern. It is a trend, and if we succumb to it, we shall lose everything that made this nation and brought it to greatness . . ."); *Creating 'Vigilantism' Where None Exists*, AM. RIFLEMAN, June 1967, at 16 (assailing the media for misrepresenting the NRA's position in an opinion editorial published in *American Rifleman*); Harold W. Glassen, Opinion, *Another Opinion: The Right to Bear Arms*, N.Y. TIMES, June 16, 1968, at E17 (opinion editorial by NRA president expressing his frustration at Americans pushing for increased firearm restrictions); *In the Interest of Accuracy*, AM. RIFLEMAN, Jan. 1967, at 106 (responding to *Reader's Digest* article *We Need a Firearms*

As a counterpoint to sway public opinion away from firearm restrictions, the NRA continued to contend that restrictive firearms legislation was ineffective at reducing crime.<sup>476</sup> But the NRA's criminological claim was always more nominal than real. Herein entered Alan S. Krug—an economist and assistant to the director of the National Shooting Sports Foundation—who published a number of studies that coincided with the NRA's position on firearm restrictions.<sup>477</sup> According to Krug, “[f]ewer people with guns [did] not mean less crime” and there was “no positive correlation between the extent of firearm ownership and crime rates.”<sup>478</sup> Krug even thought it was theoretically plausible that more “firearms ownership by the law-abiding public could be a factor in restricting the number of . . . criminal acts,” but

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*Control Law—Now!*); *Non-Violence Begins at Home—on the TV*, AM. RIFLEMAN, July 1968, at 18 (blaming TV programming and the media for glorifying and sensationalizing violence); *Self-Defense—1966*, AM. RIFLEMAN, Sept. 1966, at 22 (reprinted opinion editorial asserting “one gun could have made the difference between life and death for the eight student nurses who were brutally slaughtered” by Richard Speck); *The Answer is Simply Law Enforcement*, AM. RIFLEMAN, Nov. 1968, at 16 (stating there is much misinformation and propaganda against firearms and that it may be a government ploy to distract people away from the Vietnam War); *The Latest Twist in Anti-Gun Propaganda*, AM. RIFLEMAN, Dec. 1968, at 16; *The Mentally Ill*, AM. RIFLEMAN, Sept. 1966, at 20; *The U.S. Justice Department, Izvestia and the New Yorker*, AM. RIFLEMAN, June 1968, at 16 (dissenting to media portrayals of the NRA and Carl Bakal's book); *Whose Right to Be Biased?: Gun Owners Ask TV Network*, AM. RIFLEMAN, May 1967, at 38 (assailing NBC's portrayal of NRA in a one-hour program *Whose Right to Bear Arms?*); Paul Wilkes, *The NRA—A Study in Power*, BALT. SUN, June 23, 1968, at FD1 (detailing the NRA's efforts to defeat restrictive firearms legislation); *Let's Sound Off!*, *supra* note 454, at 16 (asserting the media and television is wrongfully placing the blame on guns for accidents in the home); *The Big Half-Truth and Smear by Association*, *supra* note 448, at 16 (stating a number of “firearms critics” are misrepresenting crime statistics and smearing the NRA). For more on Carl Bakal's views on the NRA and gun control, see CARL BAKAL, *THE RIGHT TO BEAR ARMS* (1966); Carl Bakal, *The Right to Bear Arms VI: What Can Be Done?*, BOS. GLOBE, Aug. 5, 1966, at 10; Carl Bakal, *The Right to Bear Arms V: Dodd Bill Smothered*, BOS. GLOBE, Aug. 4, 1966, at 18; Carl Bakal, *The Right to Bear Arms IV: Kinfolk Use the Guns*, BOS. GLOBE, Aug. 3, 1966, at 12; Carl Bakal, *The Right to Bear Arms III: Arsenal: U.S. Home*, BOS. GLOBE, Aug. 2, 1966, at 14; Carl Bakal, *The Right to Bear Arms II: The Rifle That Killed Him*, BOS. GLOBE, Aug. 1, 1966, at 8; Carl Bakal, *The Right to Bear Arms . . . It's Killing Us*, BOS. GLOBE, July 31, 1966, at A3.

<sup>476</sup> See, e.g., *The Silent Protectors*, AM. RIFLEMAN, Jan. 1971, at 28; Grose, *supra* note 462, at 16; Lucas, *supra* note 455, at 14 (“A realistic evaluation will show that most firearms legislation is of insufficient value in the prevention of crimes or accidents . . .”); *Realistic Firearm Controls*, *supra* note 468, at 14 (“The NRA believes that firearms legislation is of insufficient value in the prevention of crime to justify the inevitable restrictions which such legislation places upon law-abiding citizens.”); see also William C. Snead, *Do Laws Requiring Registration of Privately Owned Firearms Lower Murder Rate?*, 3 S. TEX. L.J. 317 (1958) (using basic statistics of murder and homicide to conclude the registration of weapons will not lower the rate at which murders and homicides are committed).

<sup>477</sup> See ALAN S. KRUG, *DOES FIREARMS REGISTRATION WORK* (1968); ALAN S. KRUG, *THE TRUE FACTS ON FIREARMS LEGISLATION* (1968) [hereinafter KRUG, *THE TRUE FACTS*]. The NRA subsequently employed Krug. See *NRA Closes Pennsylvania Lobbying Office*, OUTDOOR NEWS, Jan. 1996, at 1.

<sup>478</sup> KRUG, *THE TRUE FACTS*, *supra* note 477, at 17.

admitted his conclusion in this respect was “not proven by . . . the results of this study.”<sup>479</sup>

The NRA embraced Krug’s findings and presented them at congressional hearings.<sup>480</sup> However, Krug’s findings were misleading. The only variable Krug considered was whether the states required a license to purchase a firearm.<sup>481</sup> At no point did Krug consider how overall firearm availability and use impacted total deaths by homicide, suicide, and accident by firearms.<sup>482</sup> Indeed, Krug and the NRA were correct in asserting that an individual intent on committing a criminal act would hardly be deterred by legislative restrictions,<sup>483</sup> but they seemingly ignored that controlling the availability and use of firearms could lower the overall rate of firearm deaths and curtail tragic shootings,<sup>484</sup> and needless to say, the assertion that “more guns equals less crime” remained in dispute.

As the NRA entered the 1970s, the organization stepped up its efforts to defeat restrictive firearms legislation.<sup>485</sup> In order to counter growing public sentiment in favor of more restrictive firearms legislation, the NRA went on the offensive. The NRA openly accused the media as having an anti-gun agenda,<sup>486</sup> blamed the criminal

<sup>479</sup> *Id.*

<sup>480</sup> *Id.* at 7-13.

<sup>481</sup> See generally Martin S. Geisel et al., *The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis*, 1969 DUKE L.J. 647.

<sup>482</sup> *Id.*

<sup>483</sup> See MARVIN E. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 82-83 (1958) (“[F]ew homicides due to shootings could be avoided merely if a firearm were not immediately present, and that the offender would select some other weapon to achieve the same destructive goal.”).

<sup>484</sup> See also Elmer A. Bessick, *Gun Control Statutes and Domestic Violence*, 19 CLEV. ST. L. REV. 556 (1970); Steven Thomas Seitz, *Firearms, Homicide, and Gun Control Effectiveness*, 6 LAW & SOC’Y REV. 595 (1972); *The Philadelphia Firearms Ordinance—A Case of Comprehensive Oversight*, 114 U. PA. L. REV. 550, 554 (1966). But see Douglas R. Murray, *Handguns, Gun Control Laws and Firearm Violence*, 23 SOC. PROBS. 81 (1968) (concluding that every study using statistics to determine the effects of firearm legislation on crime is unsupported). See generally Frank Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721 (1968).

<sup>485</sup> See *Anti-Gun Issue Reaches Showdown*, AM. RIFLEMAN, June 1976, at 16; *Anti ’68 Gun Law Bills Flood House Committee*, AM. RIFLEMAN, May 1971, at 44; . . . *And No Apologies*, AM. RIFLEMAN, Jan. 1970, at 14; *Biggest Nonsense in Gun Control*, AM. RIFLEMAN, June 1971, at 16; Ashley Halsey, Jr., *Sentiment Grows for Gun Law Repeal*, AM. RIFLEMAN, Oct. 1970, at 47; Ashley Halsey, Jr., *Where We Stand on U.S. Gun Laws*, AM. RIFLEMAN, June 1970, at 26; *How the 1968 Gun Act ‘Creates Criminals’*, AM. RIFLEMAN, Oct. 1971, at 20; Woodson D. Scott, *A Statement: By the President of the National Rifle Association*, AM. RIFLEMAN, Mar. 1970, at 16; Woodson D. Scott, *On Repeal of the Gun Control Act*, AM. RIFLEMAN, July 1970, at 17; *The Gun Control Act: How Much Longer?*, AM. RIFLEMAN, July 1970, at 16; *This Is the Year*, AM. RIFLEMAN, Apr. 1972, at 14; *We Must Continue Our Fight*, AM. RIFLEMAN, Feb. 1975, at 16; *Where the Biggest Blame Lies*, AM. RIFLEMAN, Sept. 1971, at 22.

<sup>486</sup> See *Anti-Gun Article Backfires*, AM. RIFLEMAN, Dec. 1972, at 19; *Answering the Latest Humbug About Handguns*, AM. RIFLEMAN, Aug. 1971, at 18; *CBS Hoodwinks the U.S. on Guns*, AM. RIFLEMAN, Oct. 1974, at 22; Ashley Halsey, Jr., *Handgun Ownership ‘Whipped’ on*

justice system for being too soft,<sup>487</sup> and questioned the validity of opinion polls that showed support for more restrictive firearms legislation.<sup>488</sup> Still, despite the NRA becoming increasingly frustrated with additional firearms restrictions, the organization maintained its position on armed carriage laws. While the NRA continued to emphasize that trained armed citizens were effective in deterring and stopping criminal activity,<sup>489</sup> armed carriage had to be within the confines of the law.<sup>490</sup>

In fact, following the attempted assassination of Governor George C. Wallace in 1972, the NRA put forth the argument that the assassination might not have taken place had Maryland enforced its “shall issue” licensing provision accordingly.<sup>491</sup> This was followed by former NRA President Harold W. Glassen conceding to the constitutionality of most firearm restrictions under the “police power,” to include armed carriage laws:

It is necessary . . . for you and me and the millions who think as we do to recognize at once that all the State courts of last resort, insofar as I know without exception, have recognized that the constitutional right of the people, of the individual, to keep and bear arms is subject to the *police power* of the States. “Police power” simply means that the State has the right of reasonable regulation for the general health, welfare and safety of its citizens. The key word here is “reasonable” and this has been quite universally interpreted to include within such police power tight

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*TV*, AM. RIFLEMAN, June 1970, at 16; *How Anti-Gun Propaganda is Twisted Into ‘News’*, AM. RIFLEMAN, Dec. 1971, at 47; *Of Time (TV) and Money*, AM. RIFLEMAN, June 1974, at 14; Irvine Reynolds, *Gun Controls and the News Media*, AM. RIFLEMAN, Nov. 1974, at 42; *Some Advice for Ann Landers*, AM. RIFLEMAN, May 1974, at 16; Snyder, *supra* note 444, at 19; *TV Anti-Gun Bias: The FCC Position*, AM. RIFLEMAN, May 1975, at 53; *What You Can Do About Anti-Gun TV*, AM. RIFLEMAN, Apr. 1975, at 18; *What They Preach, But Don’t Practice*, AM. RIFLEMAN, Jan. 1974, at 18; *Why the Anti-Gun Press is Mistaken*, AM. RIFLEMAN, June 1974, at 14; *Who Can Relax and Enjoy the Wall Street Journal?*, AM. RIFLEMAN, Aug. 1972, at 20.

<sup>487</sup> See, e.g., *Facts Prove Crime, Not Guns, Is Problem—Kukla*, AM. RIFLEMAN, Oct. 1974, at 54; *Let’s Legislate Against Crime for a Change*, AM. RIFLEMAN, July 1971, at 16.

<sup>488</sup> See, e.g., Clare E. Aukofer, *Gun Opposition Tied to Ignorance: Best Educated Often Know Least About Gun Laws*, AM. RIFLEMAN, May 1976, at 44; Gallup vs. Harris, *And What You Can Believe*, AM. RIFLEMAN, Dec. 1975, at 14; *Gun Control Facts to Remember and to Tell to Others*, AM. RIFLEMAN, Feb. 1972, at 15; Don B. Kates, Jr., *Why So Many Anti-Handgun Polls?*, AM. RIFLEMAN, Aug. 1979, at 38. The NRA even contracted its own “independent” study on the matter. See Neal Knox, *Crime, Not Guns, Real Issue*, AM. RIFLEMAN, May 1979, at 49 (article appeared in the NRA Official Journal placed within the magazine); *Pro-Gun Poll Comes as Revelation*, AM. RIFLEMAN, Feb. 1976, at 16; *White House Hears Pro-Gun Side*, AM. RIFLEMAN, Mar. 1976, at 16.

<sup>489</sup> See, e.g., *The Silent Protectors*, *supra* note 476, at 28 (celebrating the 112th publication of the “Armed Citizen” column).

<sup>490</sup> See, e.g., *Police and the NRA*, AM. RIFLEMAN, Feb. 1971, at 14; *Transporting Your Firearms*, *supra* note 300, at 41.

<sup>491</sup> See Ashley Halsey, Jr., *One With a Gun, One With a Hammer*, AM. RIFLEMAN, July 1972, at 18-19.

regulations on the carrying of concealed firearms, the carrying thereof in public places and the carrying of firearms in automobiles . . . .<sup>492</sup>

It was not until the mid-1970s that a series of events changed the NRA's stance on armed carriage laws. It began when the NRA registered as a political lobby and stood up its Legislative Action Unit.<sup>493</sup> A year later the NRA stated it would no longer compromise on gun control.<sup>494</sup> The NRA's position was only hardened following the 1977 Cincinnati Revolt,<sup>495</sup> when the organization's membership rededicated and reformed the organization to combat gun control.<sup>496</sup> But arguably the most important event to change the NRA's position on armed carriage laws was the rise of the Standard Model Second Amendment, and it is a subject Part III.B. discusses in detail.

### *B. After the Standard Model Second Amendment*

In the mid to late 1970s, at the same time the NRA changed its position on gun control, the Standard Model Second Amendment was coming into the academic fold.<sup>497</sup> Under the Standard Model, the Second Amendment was placed into the Bill of Rights to provide every individual the right to possess and use arms, divorced from government sanctioned militias, as a means to check government tyranny through an armed citizenry, provide the means to repel force with force should one be assailed in private or public, and provide for the common defense.<sup>498</sup>

This is not to say that the Standard Model Second Amendment appeared out of nowhere. The historical justifications, theoretical premises, and legal arguments that ultimately became the Model's foundation appeared periodically within pro-gun

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<sup>492</sup> Harold W. Glassen, *Right to Bear Arms is Older than the Second Amendment*, AM. RIFLEMAN, Apr. 1973, at 22.

<sup>493</sup> See *NRA Forms Legislative Action Unit to Check Anti-Gun Moves*, AM. RIFLEMAN, June 1975, at 16; John M. Snyder, *NRA Registers As Lobby to Uphold Gun Ownership*, AM. RIFLEMAN, Apr. 1974, at 16.

<sup>494</sup> *NRA Stand: No Compromise on Gun Laws*, AM. RIFLEMAN, Nov. 1975, at 44. In taking this stand, the NRA abandoned its previous position that "some degree of control over firearms is both proper and necessary . . ." *The Misuse of Firearms*, supra note 466, at 16.

<sup>495</sup> See, e.g., Harlon Carter, *This is Your NRA*, AM. RIFLEMAN, Mar. 1978, at 60.

<sup>496</sup> See *Concerned NRA Members Redirect Their Association*, AM. RIFLEMAN, July 1977, at 16; Jim Carmichael, *The NRA Revolution*, OUTDOOR LIFE, Sept. 1977, at 102; see also Joel Achenbach et al., *How NRA's True Believers Converted a Marksmanship Group Into a Mighty Gun Lobby*, WASH. POST (Jan. 12, 2013), [https://www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15\\_story.html](https://www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15_story.html).

<sup>497</sup> See Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211 (2009). The first commentator to coin the term "Standard Model" was Glenn Harlan Reynolds. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

<sup>498</sup> See generally STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008).

literature throughout much of twentieth century.<sup>499</sup> But it was not until 1976 that the first law review article appeared.<sup>500</sup> Written by David I. Caplan, the article concluded that history shows the right to arms permits the people “to retain the ability to obtain, keep, and practice with arms, in order that they may always be in a position to exercise their right of self-preservation and defense, as well as join and serve effectively in the appropriate militia to restore the Constitution, should the need ever arise.”<sup>501</sup> Additionally, as it pertained to the law and armed carriage, Caplan asserted that the Second Amendment guaranteed the right to “carry arms in a quiet and peaceful manner.”<sup>502</sup>

As historical support for this “right to carry” conclusion, Caplan relied solely on the 1686 English case *Rex v. Knight*.<sup>503</sup> According to Caplan, at the time the case was decided the courts had adopted a “narrow reading” of the Statute of Northampton, which “required proof that the carrying of arms had been for the purpose of ‘terrify[ing] the King’s subjects.’”<sup>504</sup> Caplan then proceeded to selectively quote prominent English legal commentators, such as Edward Coke, William Blackstone, and William Hawkins, to conclude that by the time of the American Revolution there had developed a “clear individual right to carry arms in a non-threatening manner . . . .”<sup>505</sup>

Caplan’s resort to English history was crucial to his overarching interpretation of the Second Amendment. As Caplan wrote in an article appearing in the NRA’s publication *American Rifleman*, “[t]he common law sets the minimal standard to this day for the various provisions of the Bill of Rights interpreted by our Supreme Court.”<sup>506</sup> Considering this constitutional premise, Caplan ultimately concluded that—through the common law—the Second Amendment “protected the absolute right of individuals to arms for self-defense—so long as not in such manner or of such unusual type as to terrorize the ‘good people of the land’ . . . .”<sup>507</sup>

In terms of historical accuracy, Caplan’s conclusion is an affront to the evidentiary record. Caplan never explored the background history surrounding *Rex v. Knight*, to include the indictment against Sir John Knight, the Attorney General’s

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<sup>499</sup> See, e.g., *Constitutional Provision on Arms*, *supra* note 430, at 148; Glassen, *supra* note 492, at 22; Edson, *To Keep and Bear Arms*, *supra* note 464, at 16; Wheatley, *supra* note 428, at 104; see also Hays, *The Right to Bear Arms*, *supra* note 293, at 381-406; Hess, *supra* note 253, at 54; Bartlett Rummel, *To Have and Bear Arms*, AM. RIFLEMAN, June 1964, at 38; *The Right to Arms for Self-Defense*, *supra* note 449, at 16.

<sup>500</sup> Caplan, *Restoring the Balance*, *supra* note 104, at 31-53.

<sup>501</sup> *Id.* at 52.

<sup>502</sup> *Id.* at 34.

<sup>503</sup> Caplan’s analysis was solely based on the incomplete *English Reports*. See CAPLAN, *supra* note 101, at 2-3; Caplan, *supra* note 104, at 32. For the historical problems associated with relying on the English Reports, see *supra* note 102 and accompanying text.

<sup>504</sup> Caplan, *supra* note 104, at 32.

<sup>505</sup> *Id.* at 34-35.

<sup>506</sup> Caplan, *supra* note 105, at 81.

<sup>507</sup> *Id.*



prosecution, or Knight's legal defense.<sup>508</sup> But more importantly, at no point did Caplan research or address the historical evidence contemporaneous with Statute of Northampton's enactment, the record of its subsequent enforcement for centuries, as well as all the legal commentary confirming its broad prosecutorial scope.<sup>509</sup> The fact of the matter is for five centuries the Statute of Northampton was enforced and generally restated as restricting armed carriage with dangerous weapons in the public concourse.<sup>510</sup>

From a historiographical perspective, Caplan's conclusion is significant in two respects. For one, Caplan was the first legal commentator to give the Statute of Northampton a narrow construction. Up to that point, virtually every twentieth-century legal commentator to have quoted or cited the Statute of Northampton understood it as prohibiting armed carriage in the public concourse.<sup>511</sup> The other reason Caplan's conclusion is significant was its mass proliferation in pro-gun literature.<sup>512</sup> Relying on the same incomplete *English Reports*, virtually every follow-on Standard Model convert came to the same conclusion.<sup>513</sup> The conclusion

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<sup>508</sup> See *supra* pp. 393-99.

<sup>509</sup> See *supra* pp. 378-92.

<sup>510</sup> See *supra* pp. 465-68.

<sup>511</sup> See Emery, *supra* note 291, at 473 (reading the Statute of Northampton as a broad prohibition on armed carriage); Haight, *supra* note 291, at 32 (reading the Statute of Northampton and other public carry restrictions broadly); F.J.K., *supra* note 296, at 905 (reading the Statute of Northampton as "prohibit[ing] the carrying of weapons in public places, to encourage peaceful behavior"); Stanley Mosk, *Gun Control Legislation: Valid and Necessary*, 14 N.Y. L. F. 694, 707 (1968) (reading the Statute of Northampton as establishing "the statutory misdemeanor of 'going about armed'"); Rohner, *supra* note 293, at 61-62 (reading the Statute of Northampton as a "statutory misdemeanor of 'going about armed'"); Brabner-Smith, *supra* note 291, at 400 (reading the Statute of Northampton as a "crime against the public peace to ride or go about with dangerous or unusual weapons").

<sup>512</sup> See, e.g., NRA INSTITUTE FOR LEGISLATIVE ACTION, *supra* note 106; Caplan, *supra* note 105, at 30; *The Right to Keep and Bear Arms*, *supra* note 105, at 16.

<sup>513</sup> See David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 DET. C. L. REV. 789, 794-95 (1982) (relying primarily on the *English Reports* incomplete account of Sir John Knight's case for interpreting the Statute of Northampton); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63, 71-72 (1982); Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 311 (1985); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1, 7 (1981); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 565 (1986); see also Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 202 (1982) (citing Sir John Knight's case for the proposition that the "open peaceful carrying [of dangerous weapons] in one's business place, vehicle, or on a public street in the ordinary course of one's travels . . . cannot be prohibited").

gained even more prominence once historian Joyce Lee Malcolm began publishing her findings on the English history of the right to arms.<sup>514</sup>

Some members of the United States Senate subsequently embraced the conclusion. In 1982, the Republican-controlled Senate Subcommittee on the Constitution of the Committee of the Judiciary published a report accepting the Standard Model's limited construction of the Statute of Northampton *carte blanche*, and thus concluded that the Second Amendment guaranteed "a right of the individual citizen to privately possess and carry in a peaceful manner firearms and similar arms."<sup>515</sup> The Senate Subcommittee's report was swiftly applauded in pro-gun circles. Standard Model scholar David T. Hardy wrote the report was a "conclusive reply to those who assert, without historical research . . . that the Amendment relates only to state-organized bodies of troops."<sup>516</sup> The NRA also praised the report as "the most extensive legal research made public on the Second Amendment . . ."<sup>517</sup>

The only Standard Model scholar to deviate from Caplan's right to carry conclusion<sup>518</sup> was Don B. Kates, who in 1983 wrote that the Second Amendment's core did not protect a right to armed carriage unless "in the course of militia service."<sup>519</sup> Still, Kates was the opinion that the Second Amendment's "right to possess" arms must come with some ancillary right to transport "between the purchaser or owner's premises and a shooting range, or a gun store or gunsmith and so on."<sup>520</sup> Kates's interpretation was essentially a mirror image of the NRA's before the 1977 Cincinnati Revolt. Up to that point, the NRA never professed that the Second Amendment guaranteed a right to preparatory armed carriage in the public concourse, but did feel the Second Amendment must implicitly protect some ancillary right to transport. As NRA Executive Director Merritt A. Edson wrote in 1952: "The right to own a personal weapon amounts to little without the corresponding right to carry it from place to place—from home to range, from tournament to tournament, in the upland country in search for birds, or in the deepest wilds in the hunt for carrying game."<sup>521</sup>

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<sup>514</sup> MALCOLM, *DISARMED*, *supra* note 106, at 7; MALCOLM, *TO KEEP AND BEAR ARMS*, *supra* note 106, at 104; Malcolm, *The Right of the People*, *supra* note 106, at 293; Malcolm, *The Creation*, *supra* note 106, at 242; *see also supra* note 107 and accompanying text.

<sup>515</sup> THE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97TH CONG., *THE RIGHT TO KEEP AND BEAR ARMS* 11 (Comm. Print 1982). The subcommittee was comprised of Republican Senators Orrin G. Hatch (Utah), Strom Thurmond (South Carolina), Charles E. Grassley (Iowa), and Democratic Senators Dennis DeConcini (Arizona) and Patrick J. Leahy (Vermont). *Id.*

<sup>516</sup> David T. Hardy, *To Keep and Bear Arms*, *AM. RIFLEMAN*, Aug. 1982, at 36-37.

<sup>517</sup> *Special Senate Judiciary Report: Second Amendment Protects Individual Rights*, *AM. RIFLEMAN*, Apr. 1982, at 54.

<sup>518</sup> Caplan, *supra* note 104, at 40.

<sup>519</sup> Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204, 267 (1983).

<sup>520</sup> *Id.*

<sup>521</sup> Edson, *To Keep and Bear Arms*, *supra* note 464, at 16.

Kates's rejection of Caplan's right to carry for "peaceful purposes"<sup>522</sup> drew the ire of other pro-gun scholars, and was even categorized by fellow Standard Model scholar Stephen P. Halbrook as "Orwellian Newspeak."<sup>523</sup> In fact, before Kates submitted a petition of certiorari to the Supreme Court to determine the scope of the Second Amendment, Halbrook and others "advised" Kates that the right to "bear arms" included a right to armed carriage for self-defense.<sup>524</sup> Kates ultimately rejected the advice and instead petitioned the Supreme Court that any right to carry was limited to militia service and transport for lawful purposes.<sup>525</sup>

It was not until two years later that Kates retracted his stance, albeit on his own terms. Following a debate with Halbrook,<sup>526</sup> Kates conceded that the historical evidence invalidated his previous position, but cautioned that any right to armed carriage was qualified.<sup>527</sup> From this point onward Standard Model scholars have been in full agreement on the Statute of Northampton's limited construction, and thus have presented the Second Amendment as guaranteeing a right to preparatory armed carriage in the public concourse.<sup>528</sup>

With history now seemingly in the NRA's favor, it was only a matter of time before the organization changed its position on the law and armed carriage. From an ideological standpoint the change made sense. Beginning in the 1970s, the NRA no longer supported even modest firearms restrictions.<sup>529</sup> The organization firmly

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<sup>522</sup> Caplan, *supra* note 104, at 40.

<sup>523</sup> Stephen P. Halbrook, *To Bear Arms for Self-Defense: Our Second Amendment Heritage*, AM. RIFLEMAN, Nov. 1984, at 28.

<sup>524</sup> *Id.*

<sup>525</sup> Petition for Writ of Certiorari at 9, *Quilici v. Vill. of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) No. 82-1934 ("[B]ased on 18th Century usage . . . the Amendment's guarantee is plainly individual in nature, and . . . it extends to the keeping of small arms for any legitimate purpose—but that individuals may carry them outside the home only in the course of militia service."); *id.* at 22 ("Coke emphasized that the Statute of Northampton, which prohibited the carrying of arms, did not apply to their possession in the home . . .").

<sup>526</sup> In the debate, Halbrook asserted it was "inconceivable" that the Founding generation "would have tolerated the suggestion" that the people needed the "permission of a state authority" to carry arms in the public concourse. Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 L. & CONTEMP. PROBS. 151, 162 (1986).

<sup>527</sup> Don B. Kates, *The Second Amendment: A Dialogue*, 49 L. & CONTEMP. PROBS. 143, 149 (1986); *see also* Kates, *supra* note 497, at 1222.

<sup>528</sup> *See supra* notes 46, 106 & 107, and accompanying text; *see also* Amicus Curiae Brief of Historians, *supra* note 47.

<sup>529</sup> *See NRA Stand: No Compromise on Gun Laws*, *supra* note 494, at 44.

believed that the only way to deter crime was to punish the criminal severely<sup>530</sup> and armed citizens were seen as an important variable in the equation.<sup>531</sup>

It was in 1985 that the NRA officially changed its position following a “straw poll to determine member attitudes . . . regarding harsh laws designed to prohibit citizens from lawfully carrying concealed firearms for personal protection.”<sup>532</sup> The NRA ended up agreeing with its membership that society benefited from “responsible gun ownership and carrying by law-abiding individuals.”<sup>533</sup> The NRA stated in addition to “member attitudes,” both criminology and history was in their favor.<sup>534</sup>

What ultimately came out of the NRA’s change in position was the right to carry initiative. It consisted of the NRA promoting model “shall issue” licensing legislation, which recognized “the choice of carrying a firearm for self-defense is a highly personal one, that it may literally be a matter of life and death, and that the means to self-defense must not be denied to any citizen except under the most extraordinary circumstances.”<sup>535</sup> The NRA’s right to carry initiative was one of four intended to reverse the trend of restrictive firearm legislation and promote the Standard Model Second Amendment.<sup>536</sup> The second was firearms preemption legislation, which prevented cities, towns, and municipalities from adopting any localized firearm law.<sup>537</sup> The third was modifying state Second Amendment analogues to be more reflective of the Standard Model Second Amendment.<sup>538</sup>

Lastly, there was the education initiative, which was the NRA’s public relations campaign intended to sway the American people against firearm restrictions.<sup>539</sup> Here, the NRA took quite an aggressive approach. In 1981 for instance, the NRA put

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<sup>530</sup> See, e.g., *Causes of N.Y.C. Crime Revealed*, AM. RIFLEMAN, May 1980, at 64; Neal Knox, *Open Letter To All NRA Members and Gun Owners*, AM. RIFLEMAN, Aug. 1981, at 54; *Facts Prove Crime, Not Guns, Is Problem—*, *supra* note 487, at 55 (“This nation does not need any more gun control. What it desperately needs is a system to provide fast, just, and certain punishment for crime.”).

<sup>531</sup> See, e.g., *As Crime Escalates: More Gun Laws Not the Solution*, AM. RIFLEMAN, Mar. 1981, at 54; *FBI Crime Report Dispels Gun Myths*, AM. RIFLEMAN, Dec. 1980, at 48; Howard W. Pollock, *The President’s Column*, AM. RIFLEMAN, Sept. 1983, at 54 (writing anti-gun forces are “unable to acknowledge the deterrent effect of an armed citizenry to criminal attacks from any quarter, whether from individual felons, tyrants, or world aggressors”); see also *The Silent Protectors*, *supra* note 476, at 28.

<sup>532</sup> Conover, *supra* note 10, at 40.

<sup>533</sup> *Id.*

<sup>534</sup> *Id.* at 41.

<sup>535</sup> *Id.* at 74.

<sup>536</sup> For the NRA’s larger strategy to expand Second Amendment rights, see J. Warren Cassidy, *Here We Stand*, AM. RIFLEMAN, Feb. 1989, at 7.

<sup>537</sup> See Arnett, *supra* note 11, at 7; Garcelon, *supra* note 11, at 46; *Gun Owners Win Significant Legislative Fights in 1987*, *supra* note 11, at 66.

<sup>538</sup> See *supra* note 537; see also *Right to Bear Arms Affirmed By Voters in State Referenda*, AM. RIFLEMAN, Dec. 1982, at 49.

<sup>539</sup> See Warren, *supra* note 536, at 7.

together a documentary titled *It Can't Happen Here*, which portrayed the Bureau of Alcohol, Tobacco, and Firearms (ATF) as a “jack-booted group of fascists.”<sup>540</sup> Then in 1989 the NRA published full-page advertisements depicting acts of criminal violence with headline questions such as “do robbers, rapists and murders wait in lines,” “why can’t a police man be there when you need him”, and “how much red tape is too much red tape when he threatens to kill you.”<sup>541</sup> It is difficult to gauge the effectiveness of the NRA’s education initiative during these early years. While the Standard Model certainly gained new supporters in legal circles,<sup>542</sup> the NRA’s aggressive tactics did not stop the passage of the 1993 Brady Handgun Prevention Act or the 1994 Federal Assault Weapons Ban (AWB).<sup>543</sup> The NRA in turn expressed its disgust by printing on the cover of the *American Rifleman* a depiction of the Statute of Liberty being raped by a politician.<sup>544</sup>

Placing the education initiative aside, what is certain is the NRA’s other initiatives proved quite successful. As it pertained to the preemption initiative, in 1979 forty-three states allowed their respective cities, towns, and localities to enact more stringent firearm regulations, yet by 2005 the NRA was successful in shifting that number to just five.<sup>545</sup> The state constitution initiative was equally successful.

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<sup>540</sup> Peter Earley, *NRA Aims at U.S. Agency*, WASH. POST (July 23, 1981), <https://www.washingtonpost.com/archive/politics/1981/07/23/nra-aims-at-us-agency/d6b42283-ce0b-4744-bf93-8dd80f4a3d91>; Howard Kohn, *Inside the Gun Lobby*, ROLLING STONE (May 14, 1981), <http://www.rollingstone.com/politics/news/inside-the-gun-lobby-19810514>.

<sup>541</sup> *NRA’s Violent Crime Ads Hit Home*, AM. RIFLEMAN, Jan. 1988, at 50.

<sup>542</sup> See, e.g., Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 384-401 (2000) (outlining the growth of Standard Model literature in the late twentieth century); see also Robert J. Cottrol, *Enforce the Second Amendment*, AM. RIFLEMAN, Mar. 1990, at 21 (asserting the Standard Model interpretation needs to “become part of the public debate on the Constitution and gun control”); Clayton E. Cramer, *State Constitutions and the Second Amendment*, AM. RIFLEMAN, Feb. 1992, at 22-23, 73 (asserting all late eighteenth century state constitution Second Amendment analogues support the Standard Model interpretation); Stephen P. Halbrook, *The Arms Of All the People Should Be Taken Away*, AM. RIFLEMAN, Mar. 1989, at 26-28, 76-77 (asserting the framers adopted the Second Amendment in response to British attempts to disarm the colonists); Michael K. McCabe, *Madison and the Bill of Rights*, AM. RIFLEMAN, Mar. 1991, at 20-21 (asserting the Second Amendment’s drafting history supports the Standard Model interpretation); Mark H. Overstreet, *Warren Burger vs. the Founding Fathers*, AM. RIFLEMAN, Feb. 1992, at 53-54, 74 (pushing back against Chief Justice Warren Burger’s interpretation of the Second Amendment).

<sup>543</sup> For some of the NRA’s literature opposing the Brady Handgun Violence Prevention Act and the AWB, see *Assault in Congress Puts Your Rights at Risk*, AM. RIFLEMAN, July 1991, at 20; James Jay Baker, *Gun Control is Bad Medicine*, AM. RIFLEMAN, Feb. 1994, at 32; James Jay Baker, *War For Your Guns*, AM. RIFLEMAN, Sept. 1991, at 36; James Jay Baker, *First Step Brady Bill Leads to Semi-Auto Ban and More*, AM. RIFLEMAN, Aug. 1991, at 54; Christopher C. Little, *Communitarianism, Clinton & Congress: A New Threat Emerges for Gun Owners*, AM. RIFLEMAN, Oct. 1993, at 30; *The Last Chapter in Second Amendment History*, AM. RIFLEMAN, Oct. 1993, at 34.

<sup>544</sup> Inside was an article depicting the same image. See Tanya Metaksa, *Help Me Stop the Rape of Liberty*, AM. RIFLEMAN, Oct. 1994, at 40.

<sup>545</sup> GOSS, *supra* note 290, at 164.

By the close of the twentieth century the NRA obtained gun-friendly Second Amendment analogues in twelve states.<sup>546</sup> In the case of West Virginia, the new constitutional provision proved instrumental in striking down the state's "may issue" licensing regime as unconstitutional.<sup>547</sup>

These successes complimented the right to carry initiative. The NRA no longer needed to concern itself with combatting local firearms legislation. The organization could now focus its efforts on transforming the right to arms at the state level. The first success was achieved in 1987, when Florida adopted the NRA's model armed carriage legislation.<sup>548</sup> From there the NRA was successful in pushing the model legislation to other states. Within a span of just three years the NRA successfully lobbied ten states to adopt "shall issue" licensing regimes.<sup>549</sup> In the first half of 1995 alone the NRA lobbied another ten states.<sup>550</sup> And by the close of the twentieth century a total of twenty-nine states adopted "shall issue" licensing regimes, thus making "shall issue" the jurisdictional majority in the United States.<sup>551</sup>

To be clear, as the United States entered the twenty-first century, the law and armed carriage shifted drastically. For some gun rights' supporters the shift was perceived as a return to a period in American history where firearms regulations were non-existent. For others the change made criminological sense. However, historically speaking, both of these justifications have proven to be more nominal than real. For one, as this Article has highlighted, the history of the law and armed carriage spans over seven hundred years. The criminological justification is equally suspect. When one considers all the variables associated with crime it is curious how some social scientists have concluded less firearm restrictions are directly responsible for lowering crime rates.<sup>552</sup>

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<sup>546</sup> For a compilation of changes in State constitution "bear arms" provisions from 1982 to 2000, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 192, 215–17 (2006).

<sup>547</sup> See *State ex rel. City of Princeton v. Buckner*, 180 W. Va. 457 (1988); *West Virginia High Court Overturns Licensing Laws*, AM. RIFLEMAN, Sept. 1988, at 67.

<sup>548</sup> Lattanzio, *supra* note 11, at 135.

<sup>549</sup> Grossman & Lee, *supra* note 304, at 200.

<sup>550</sup> Randy Kozuch, *Victory Report From the States*, AM. RIFLEMAN, Sept. 1995, at 44; Sam Walker, *More States Allow People to Pack Guns So Mr. Noble Is Doing It*, CHRISTIAN SCI. MONITOR (Mar. 9, 1995), <http://m.csmonitor.com/1995/0309/09011.html>.

<sup>551</sup> Grossman & Lee, *supra* note 304, at 201.

<sup>552</sup> See, e.g., COMMITTEE ON LAW AND JUSTICE, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford et al. eds., 2004) ("The literature on right-to-carry laws . . . has obtained conflicting estimates of their effects on crime. Estimation results have proven to be very sensitive to the precise specification used and time period examined. The initial model specification, when extended to new data, does not show evidence that passage of right-to-carry laws reduces crime. The estimated effects are highly sensitive to seemingly minor changes in the model specification and control variables. No link between right-to-carry laws and changes in crime is apparent in the raw data, even in the initial sample; it is only once numerous covariates are included that the negative results in the early data emerge. While the trend models show a reduction in the crime growth rate following the adoption of right-to-carry laws, these trend reductions occur long after law adoption, casting serious doubt on the proposition that the trend models estimated in the literature reflect effects of the law change. Finally, some of the point estimates are imprecise. Thus, the committee concludes that with

Another problem with the criminology justification is there is no way to definitively measure the burdens and benefits of armed carriage. Certainly, there have been a number of instances where an armed citizen repelled an attacker or thwarted a crime from occurring,<sup>553</sup> but there have also been instances where an armed citizen needlessly employed deadly force in disproportion to the crime being committed or misused the firearm in a fit of rage.<sup>554</sup> Perhaps the best way to describe the modern debate over armed carriage is in terms of armed faith. Those that advocate for armed carriage have faith that society is safer as more armed citizens enter the public concourse. This faith is encapsulated in such pro-gun political slogans as “more guns equal less crime”<sup>555</sup> and the “only thing that stops a bad guy with a gun is a good guy with a gun.”<sup>556</sup> But these political slogans are just that—slogans.<sup>557</sup> The “only thing that stops a bad guy with a gun is a good guy with a gun” is particularly specious upon examining the statistics of mass shootings and active shooters. As a recent Federal Bureau of Investigation (FBI) report has shown, out of 160 active shooter incidents from 2000 to 2013 only five or 3.1% were ended by armed individuals.<sup>558</sup> Over four times that number or 13.1% were ended by unarmed individuals.<sup>559</sup> But statistics do not deter those that maintain armed faith or fear a potential attack.<sup>560</sup> This is what makes the modern debate over the Second

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the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates.”).

<sup>553</sup> See, e.g., *The Armed Citizen*, *supra* note 450, at 14.

<sup>554</sup> See e.g., Ingrid Kelley, *Customer with CPL Shoots at Shoplifting Suspect at Home Depot*, FOX 2 DETROIT (Oct. 7, 2015), <http://www.fox2detroit.com/news/local-news/30725284-story>; Kristin Weber, *Florida Man Killed in Front of Family After Road Rage*, WLTX 19 (July 24, 2015), <http://www.wltx.com/story/news/nation/2015/07/24/florida-man-killed-in-front-of-family-after-road-rage/30635217/>.

<sup>555</sup> See, e.g., John R. Lott, Jr., *More Guns, Less Violent Crime*, AM. RIFLEMAN, Jan. 1997, at 26.

<sup>556</sup> See, e.g., David Nakamura & Tom Hamburger, *Put Armed Police in Every School, NRA Urges*, WASH. POST (Dec. 21, 2012), [http://www.washingtonpost.com/politics/put-armed-police-officers-in-every-school-nra-head-says/2012/12/21/9ac7d4ae-4b8b-11e2-9a42-d1ce6d0ed278\\_story.html](http://www.washingtonpost.com/politics/put-armed-police-officers-in-every-school-nra-head-says/2012/12/21/9ac7d4ae-4b8b-11e2-9a42-d1ce6d0ed278_story.html) (emphasis added).

<sup>557</sup> See, e.g., Joshua Gillin & Amy Sherman, *Is Violent Crime Lower in States with Open Carry?*, POLITIFACT FL. (Oct. 9, 2015), <http://www.politifact.com/florida/statements/2015/oct/09/matt-gaetz/violent-crime-lower-states-open-carry/>; Clifton B. Parker, *Right-to-Carry Gun Laws Linked to Increase in Violent Crime, Stanford Research Shows*, STAN. NEWS (Nov. 14, 2014), <http://news.stanford.edu/news/2014/november/donohue-guns-study-111414.html>.

<sup>558</sup> J. PETE BLAIR & KATHERINE SCHWEIT, A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013, FBI & TEX. ST. U. 11 (Sept. 16, 2013),

<https://www.fbi.gov/about-us/office-of-partner-engagement/active-shooter-incidents/a-study-of-active-shooter-incidents-in-the-u.s.-2000-2013>.

<sup>559</sup> *Id.*

<sup>560</sup> Take for instance the findings in a survey conducted immediately after the San Bernardino, California terrorist attack. When survey participants were asked whether the United States should enact stricter gun control or encourage more people to carry guns legally, a forty-seven percent majority responded that the United States should encourage more people

Amendment rather unique.<sup>561</sup> It is built on political and ideological convictions more so than concrete data.

#### IV. WHY THE HISTORY OF THE LAW AND ARMED CARRIAGE MATTERS

In Parts I through III the history of the law and armed carriage was unpacked and detailed. What it reveals is the act of carrying dangerous weapons in the public concourse has long been subject to some form of regulation. It originated out of the English common law, was statutorily codified in the Statute of Northampton, and subsequently transformed based on changes in American demography, criminology, and technology. Thus as American society transformed so, too, did laws touching upon armed carriage. This is an overlooked aspect of the history pertaining to law and armed carriage.<sup>562</sup>

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to carry guns legally, compared to forty-two percent minority in favor of stricter gun control measures. Gary Langer, *Most Now Oppose an Assault Weapons Ban; Doubts About Stopping a Lone Wolf Run High*, ABC NEWS (Dec. 16, 2015), <http://abcnews.go.com/Politics/now-oppose-assault-weapons-ban-doubts-stopping-lone/story?id=35778846>. Whether the survey participants were made aware of the FBI's active shooter statistics is unknown. It should be noted, however, that the answers were largely divided according to political and ideological affiliations. Republicans and conservatives were more inclined to support encouraging armed carriage than Democrats and liberals. *Id.* This political and ideological divide was also reflected in a survey that asked Americans to list their biggest concern. While most Republicans and conservatives (sixty percent) listed being a victim of a terrorist attack, most Democrats and liberals listed being a victim of gun violence. See Mark Murray, *Public Split On Biggest Worry—Terrorism vs. Gun Violence*, NBC NEWS (Dec. 6, 2015), <http://www.nbcnews.com/meet-the-press/public-split-biggest-worry-terrorism-vs-gun-violence-n475086>. This political and ideological divide over gun control and safety measures has become common in the wake of *D.C. v. Heller*. See Rich Morin, *The Demographics and Politics of Gun-Ownning Households*, PEW RES. CTR. (July 15, 2014), <http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/> (showing Republicans are twice as likely as Democrats to have firearms in their homes); Charles, *supra* note 2, at 1156-65.

<sup>561</sup> The statistics pertaining to deaths by gun violence are especially telling when it comes to armed faith and fear of potential attack. As it stands today, annual firearm deaths in the United States exceed that of motor vehicles. See Dan Diamond, *More Young Americans Now Die From Guns Than Cars*, FORBES (Aug. 26, 2015), <http://www.forbes.com/sites/dandiamond/2015/08/26/americas-gun-violence-problem-in-three-charts/>. Additionally, firearms kill four times as many people in the United States annually than military members have died fighting the Global War on Terror. See *Honor the Fallen*, MIL. TIMES (Dec. 17, 2015), <http://thefallen.militarytimes.com/> (tallying 6,841 fallen military service members as of December 17, 2015). Even more telling is a comparison between annual firearm deaths and the total number of terrorist related deaths. Excluding the attacks on September 11, 2001, less than 500 United States citizens have been killed by terrorist related acts across the globe, which is less than two percent of annual firearm deaths. See Julia Jones & Eve Bower, *American Deaths in Terrorism vs. Gun Violence in One Graph*, CNN (Oct. 2, 2015), <http://www.cnn.com/2015/10/02/us/oregon-shooting-terrorism-gun-violence/>.

<sup>562</sup> Changes in firearm technology are generally overlooked in contributing to this legal transformation and the evolution of firearm regulations. In the late eighteenth century, a trained late marksman could fire a rifle or musket no more than three times in a minute with an effective firing distance of 200 yards, and a pistol was only effective at close range. See Charles, *supra* note 38, at 47, and accompanying footnotes. By the late nineteenth century,



For five centuries, armed carriage in the public concourse was at the license of government officials, to include compulsory arms bearing in the militia and the hue and cry.<sup>563</sup> It was not until the Antebellum Era that conflicting legal viewpoints developed. Southern courts developed a legal standard that distinguished between the open and concealed carriage of dangerous weapons, which was a reflection of the South's culture of slavery and preserving individual honor.<sup>564</sup> Meanwhile, in the North, where the Statute of Northampton's legal tenets influenced the Massachusetts Model, the ability to arm oneself defensively in the public concourse was extremely limited.<sup>565</sup> The legal standard embraced by the northern courts was that the government retained broad police powers to ban the carrying of dangerous weapons in public so long as there was an affirmative legal defense available when there was a clear and tangible threat to one's person, family, or property.<sup>566</sup>

But as the United States progressed into the Reconstruction Era the interpretational divide separating the North and South began to diminish.<sup>567</sup> This shift in the law and armed carriage can be seen in state Second Amendment analogues adopted from 1868 to the turn of the twentieth century. The constitutions of Georgia, Texas, Tennessee, Missouri, Colorado, North Carolina, Louisiana, Idaho, Montana, Mississippi, Kentucky, and Utah each adopted an express proviso reinforcing the legislature's police power to regulate armed carriage, particularly concealed weapons.<sup>568</sup> Additionally, cities, towns, and municipalities from across the United States adopted a variety of regulations pertaining to armed carriage, some of which required a permit to go armed in public.<sup>569</sup> This consensus of regulating the act of going armed in public with dangerous weapons was cemented following the Supreme Court's 1886 decision in *Presser v. Illinois*,<sup>570</sup> where the Court upheld the power of states to prohibit individuals from carrying weapons in public under the guise they constituted as the militia.<sup>571</sup>

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with the advent of firearms such as the six-shot revolver and repeating rifle, the lethality, firing range, and rounds per minute far exceeded their eighteenth century predecessors. The increased lethality of firearms was on full display during the Civil War and may have facilitated the growth of firearm restrictions in the late nineteenth century. See "[Truncated Title]," *MEMPHIS DAILY APPEAL*, Feb. 17, 1882, at 2. A similar lethality disparity presents itself upon comparing twenty-first century firearms with their late nineteenth century predecessors. Today's firearms hold thirty round ammunition clips, travel great distances, and discharge piercing or tumbling rounds, and within just a minute a shooter can easily discharge sixty rounds per minute. For the history of firearms technology in general, see SMITHSONIAN, *FIREARMS: AN ILLUSTRATED HISTORY* (2014).

<sup>563</sup> See *supra* pp. 378-400.

<sup>564</sup> See *supra* pp. 408-31.

<sup>565</sup> See *supra* pp. 423-31.

<sup>566</sup> See *supra* pp. 401-31.

<sup>567</sup> See *supra* pp. 401-31.

<sup>568</sup> See Volokh, *supra* note 546, at 211-14.

<sup>569</sup> See *supra* notes 149, 150 & 245.

<sup>570</sup> 116 U.S. 252 (1886).

<sup>571</sup> In the words of John Marshall Harlan, who was one of the Supreme Court Justices that decided the case:

The early twentieth century carried forward the late nineteenth century's view of the law and armed carriage. Of course, not everyone living in the early twentieth century prescribed to this view,<sup>572</sup> but the overwhelming majority of courts and legal commentators, as well as gun advocacy organizations, acknowledged that state and local governments retained the authority to restrict the carrying of dangerous weapons in the public concourse.<sup>573</sup> As NRA Executive Vice-President Milton A. Reckord wrote in 1927, "pistol and revolver traffic should be controlled . . . by controlling the dealer and placing certain restrictions upon the sale of revolvers and pistols and by licensing those who carry a pistol."<sup>574</sup>

While gun advocacy groups by and large did not object to armed carriage licenses or claim them to be unconstitutional,<sup>575</sup> they firmly believed that armed

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The militia is composed of the people outside of the regular forces, and every man is of the militia according to the *law of the state* in which he lives...

The particular object of [the Second Amendment] . . . was to make it certain that the Congress of the United States should never have it in its power to say to any state, "[y]ou shall have no regular trained militia with arms in their hands."

This militia, as contradistinguished from regular troops, are the boys at home around their local government, attached as they ought to be to their home and to their local government, and therefore ready if emergency requires to defend that home government against a government outside. Therefore, the fathers said that is necessary to the freedom of the people, to the security of the people, and therefore an act of Congress which should say that no state should have any militia, should have no troops with guns in their hands, is a nullity. . . . That was the provision of the Bill of Rights, "And the right to keep and bear arms, shall not be infringed."

Well, there was a statute in the state of Kentucky which punished a man for carrying concealed deadly weapons. A man carried a pistol, and he was tried and fined under the statute for carrying concealed deadly weapons. And he said, "[u]nder the Constitution of the United States, as well as the Constitution of Kentucky, I have a right to bear arms." "No," says the court. "It is the militia that may bear arms, and you, going around here among your peaceful neighbors, pretending to be as unprotected as they are but carrying a concealed deadly weapon, that is doing something that the state may prevent."

Josh Blackman et al., *Justice John Marshall Harlan: Lectures on Constitutional Law, 1897-98*, 81 GEO. WASH. L. REV. ARGUENDO 12, 307-09 (2013); see also Joshua H. Hudson, *How to Put a Stop to Murder*, WKLY. NEWS & COURIER (Charleston, S.C.), Jan. 12, 1898, at 5, (South Carolina Judge of the Courts of Common Pleas writing: "The arms contemplated in [the United States and South Carolina constitutions] are such as are to be used for the common defence, and not for assassination. Neither the militia in time of peace nor soldiers in time of war, parade, march or fight with pistols, dirks, daggers and razors dangling at their sides or concealed in their pockets. These are not arms used for the common defence like the shotgun, rifle and musket. There is no constitutional right guaranteed to the citizen to carry on the person, openly or concealed, pistols, dirks, daggers, razors or brass knuckles."); *supra* note 251 and accompanying text.

<sup>572</sup> See, e.g., Phillips, *supra* note 326, at 299 ("The logical method of combatting the activities of the criminal class is not to disarm the law-abiding citizen...but to remove the present restrictions as to the carrying of weapons, and then train the citizen to their use.").

<sup>573</sup> See *supra* pp. 402-24.

<sup>574</sup> Reckord, *supra* note 388, at 18.

<sup>575</sup> See, e.g., *The Anti Anti-Pistol Situation*, *supra* note 332, at 29 ("We believe that [the Revolver Act] is the best law of its kind that we have yet come across and one that ought to be

citizens trained with arms could thwart criminal activity.<sup>576</sup> But despite gun advocacy groups' preference for more armed citizens in public places, they never called into question the constitutionality of armed carriage laws. The prevailing view until the late 1970s was that the "police power" permitted state and local governments to regulate not only the "carrying of concealed firearms," but also "the carrying thereof in public places and the carrying of firearms in automobiles . . ."<sup>577</sup>

What makes this history so important is it confirms that modern perceptions of the law and armed carriage are just that—modern. Those that perceive the Second Amendment as guaranteeing a right to preparatory armed carriage in the public concourse are not resurrecting the past. They are rewriting it. The same is true of those that view the Second Amendment and armed carriage as essential in protecting other individual rights in public, whether it is freedom of speech, of the press, of religion, or of assembly.<sup>578</sup> This rewriting of history can largely be attributed to the rise of the Standard Model Second Amendment, where its architects mischaracterized the Statute of Northampton as requiring the "specific intent" to terrify.<sup>579</sup> This in turn promulgated the myth that by the late eighteenth century there were no laws regulating the peaceful carrying of firearms for self-defense or otherwise.<sup>580</sup>

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on the statute books of every state in the Union that does not already possess one equally as good. By 'equally as good' we mean a law that amply protects the right of the honest citizen to possess and carry pistols and revolvers for the protection of his person, his loved one and his property while at the same time providing the police departments with ample authority and leeway to prevent these weapons from coming into, or remaining in, the hands of lawless or irresponsible persons."); *Merry Christmas—And Gun Laws*, *supra* note 325, at 6 ("We have no objection to obtain a permit to carry a gun concealed, as long as a proper provision is made in the law to enable any honest citizen who is a member of a properly organized target-shooting club to carry his gun to and from the target range. We do not believe that the necessity of a permit to carry concealed weapons will have any appreciable effect on the use of guns by criminals; but if the police believe that such a law will help them, we have no objection to its passage.").

<sup>576</sup> See, e.g., Frederick, *supra* note 380, at 450-51.

<sup>577</sup> Glassen, *supra* note 492, at 22.

<sup>578</sup> See *supra* notes 111 & 117. The view that the Second Amendment and armed carriage protects all other constitutional rights in private and public is based on the Standard Model's flawed reading of William Blackstone's *Commentaries on the Laws of England*. See, e.g., Stephen P. Halbrook, *Second Amendment Symposium-Panelist*, 10 SETON HALL CONST. L.J. 815, 819 (2000) ("Examining Blackstone's commentaries, we see that Blackstone had written that there are certain underlying manners in which the personal rights of private property, personal security, and personal freedom or liberty are protected. One of those rights was to have and use arms for self-preservation and defense. Referring to an individual right to resist criminal attacks, a right to be armed permits an individual to do so. He linked adjunct rights to the primary rights of protection of personal liberty and personal security."). What Blackstone was referring to was the larger principle of lawful revolution and rebellion. See 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, 24-59.

<sup>579</sup> See *supra* pp. 378-400.

<sup>580</sup> See *supra* pp. 378-400.

As it stands today, despite the breadth of evidence proving the Standard Model's history as a false idol, the Model's adherents continue to insist otherwise.<sup>581</sup> Just recently, in a case challenging the District of Columbia's "may issue" licensing regime on Second Amendment grounds, a group of Standard Model scholars presented to the District Columbia Circuit Court of Appeals that "the right to carry arms peaceably was always recognized" and the Statute of Northampton was no impediment.<sup>582</sup> However, in making this claim the scholars continue to omit and ignore the historical evidence contemporaneous with Statute of Northampton's enactment, the historical record of its subsequent enforcement for centuries, as well as all the legal commentary from Lambarde to Dalton.<sup>583</sup>

This is quite damning from a transparency and objectivity perspective, but there are other historical omissions and inaccuracies within the brief. For one, the Standard Model scholars conflate compulsory arms bearing for militia service, security patrols, and the hue and cry with a *right* to "peaceably carry" firearms in the public concourse.<sup>584</sup> The fallacy embodied by this line of historical argument is quite obvious.<sup>585</sup> While the Standard Model scholars are indeed correct that late eighteenth-century citizens were often obligated to take part in providing security, they omit that such armed carriage and firing of those arms was at the license of government, not at the whim or discretion of individual citizens.<sup>586</sup> This is an important legal and historical distinction, yet it is omitted.

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<sup>581</sup> See *supra* pp. 378-400; see also Kopel, *supra* note 38, at 6-14.

<sup>582</sup> Amicus Curiae Brief of Historians, *supra* note 47, at 6.

<sup>583</sup> See *supra* pp. 465-73.

<sup>584</sup> Amicus Curiae Brief of Historians, *supra* note 47, at 10-13.

<sup>585</sup> See, e.g., MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. XVII ("The people have a right to keep and bear arms for the common defence . . . and the military shall always be held in exact subordination to the civil authority and governed by it."); N.C. CONST. OF 1776, DECLARATION OF RIGHTS, art. XVII ("That the people have a right to bear arms, for the defence of the State . . . the military should be kept under strict subordination to, and governed by the civil power."); OHIO CONST. OF 1802, art. VIII, § 20 ("That the people have a right to bear arms for the defense of themselves and the state: and as standing armies in time of peace, are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power."); see also *Houston v. Moore*, 18 U.S. 1, 16-17 (1820) ("the power of the State governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not being prohibited by the instrument, it remains with the States, subordinate nevertheless to the paramount laws of the general government, operating on the same subject"); *id.* at 37 (Johnson, J., concurring) ("extensive as [Congress's] power over the militia is, the United States are obviously intended to be made in some measure dependent upon the States for the aid of this species of force."); *id.* at 50 (Story, J., dissenting) ("the power here given to Congress over the militia; is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are the subject to the control and government of the State authorities.").

<sup>586</sup> This Standard Model fallacy has been rebutted in a previous publication. See Charles, *supra* note 70, at 1800-07, 1822-24, 1832-38; *id.* at 1860 ("Just because an eighteenth century legislature required persons to carry arms to church for militia training, to quell slave revolts, and suppress Indian attacks, does not mean the founding generation perceived it to be a *right* to carry arms . . .") (emphasis added). See also AN ACT FOR REGULATING AND GOVERNING THE MILITIA OF THE STATE OF VERMONT, AND FOR REPEALING ALL LAWS HERETOFORE FOR THAT

Given what is at stake—the extent in which the Second Amendment extends beyond one’s doorstep—it is unlikely Standard Model scholars or gun advocacy organizations will ever acknowledge their historical mischaracterization of the Statute of Northampton or the history of the law and armed carriage in general. The fact of the matter is the Standard Model and the modern Second Amendment rights movement thrives on the perception that Americans have always carried arms in the public concourse for self-defense and criminological purposes.<sup>587</sup> For it to be any other way would undermine the foundation on which the Standard Model rests. It would ultimately concede the utility of public safety over individual liberty and the rule of law over individualized justice.<sup>588</sup>

As it stands today, the history surrounding the law and armed carriage remains highly contested as courts continue to adjudicate the extent in which the Second Amendment extends beyond the home. In this author’s opinion, if history is dispositive in adjudicating the Second Amendment outside the home, the history of armed carriage laws strongly informs us that the government is within its authority to prohibit the preparatory carrying of dangerous weapons in public places as a means to both preserve the peace and prevent public injury.<sup>589</sup> At the very least, the historical evidence conveys that the government retains a substantial, if not a compelling interest in regulating the carriage of dangerous weapons outside the home; that is the government should be given deference to prescribe time, place, and manner conditions on preparatory armed carriage, as well as prescribe reasonable training requirements on the obtainment of an armed carriage license. Additionally, the historical evidence conveys that the government retains a substantial interest in regulating the transportation of firearms for lawful purposes, such as from one’s home to business or from one’s home to the shooting range. Under this standard, the government would be within its police power in ensuring that firearms are transported safely and securely, but could not prohibit firearm transportation altogether, nor could the government place an undue burden on the transportation of firearms.

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PURPOSE § 36 (1793) (“Whereas the good citizens of this State, are often injured by the discharge of single guns . . . no commissioned officer, or private, shall unnecessarily fire a musket, or single gun, in any public road, or near any house, or near the place of parade . . . unless embodied under the command of some officers”); AN ACT FOR FORMING AND REGULATING THE MILITIA WITHIN THE COMMONWEALTH OF MASSACHUSETTS...FOR THAT PURPOSE 15 (1781) (“That no Soldier . . . shall unnecessarily discharge his Firelock from and after his appearing . . . on a Training or Muster-Day, without the express Order or License of his Superior Officer.”).

<sup>587</sup> See, e.g., Robert Dowlut, *A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL’Y REV. 25 (1997); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339 (2009); see also Wayne La Pierre, *Speech Before Conservative Political Action Conference*, CPAC (Mar. 6, 2014), at 14:08-14:17, <https://www.youtube.com/watch?v=AsBMuZrcdDk> (stating twenty-first century gun owners are “exactly what our Founding Fathers were and envisioned us to always be”).

<sup>588</sup> For more on the Founding generations view on life, liberty, the pursuit of happiness and the rule of law, see Charles, *supra* note 33, at 490-517.

<sup>589</sup> See CHARLES, *supra* note 36, at 138-43; Charles, *supra* note 38, at 54-55; Charles, *supra* note 48, at 1834-35.

Ultimately these issues will have to be decided at the Supreme Court and it remains uncertain what role, if any, the history of the law and armed carriage will play. If history matters the Court will once again have to navigate through copious amounts of data, much like it did in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. In the process the Court will have to weigh and consider two very different versions of history, as well as determine what eras of history are important to determining the extent the Second Amendment extends beyond one's doorstep. If the Court finds the Anglo-American origins dispositive it will have to choose whether to continue down the Standard Model path or acknowledge a historical narrative that does not fit quite as neatly into *Heller* and *McDonald's* narrative. If the Court finds the nineteenth century dispositive it will have to choose between the contrasting Antebellum Era and Reconstruction Era, as well as northern and southern attitudes on armed carriage. If the Court finds the twentieth century at all important it will have to determine how important, if at all, the shift from "may issue" to "shall issue" licensing regimes is.

