THE INVENTION OF THE RIGHT TO 'PEACEABLE CARRY' IN MODERN SECOND AMENDMENT SCHOLARSHIP

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The claim that the Second Amendment was enshrined to protect the peaceable carrying of weapons in public places is relatively new.[1] It was invented in the mid-1970s, largely at the behest of the National Rifle Association (NRA) and other gun rights advocates, as part of a wider, organized campaign to advance a broad, individual rights interpretation of the Second Amendment.[2] However, after the Supreme Court decided *District of Columbia v. Heller*, and historians began examining the history of weapons laws in detail,[3] the 'peaceable carry' interpretation of the Second Amendment was discredited as being based on really nothing more than legal conjecture, historical hyperbole, and even a few myths.[4]

Yet recently, many of the same writers responsible for the now discredited 'peaceable carry' narrative are once again trying to reassert it as true.[5] As this

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1. *See, e.g.*, David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976).

2. *See* PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 279–95 (2018); *see also* J. Warren Cassidy, *Here We Stand*, AM. RIFLEMAN, Feb. 1989, at 7 (acknowledging the NRA's long-term strategy to expand Second Amendment rights through an organized educational campaign); Supported Research, NRA C.R. Def. Fund, Dec. 12, 2012 (on file with author) (showing how the NRA distributed over half a million dollars for research, conferences, and scholarship supporting a broad individual rights interpretation of the Second Amendment, including 'peaceable carry' Second Amendment writers David B. Kopel ($320,000) and Stephen P. Halbrook ($75,000)).

3. *See, e.g.*, Robert J. Spitzer*, Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55 (2017).

4. *See infra* pp. 206.

5. The resurgence of the 'peaceable carry' Second Amendment first appeared in an amicus brief by legal scholars and historians in *Wrenn v. District of Columbia*. *See* Brief of Amici Curiae Historians, Legal Scholars, and CRPA Foundation in Support of Appellees and in Support of Affirmance at 10–13, Wrenn v. District of Columbia, 808 F.3d 81 (D.C. Cir. 2015) (No. 15-7057). From there, many of the same legal scholars and historians began espousing this supposedly revamped 'peaceable carry' Second Amendment in their writings. *See* STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? (2021); David B. Kopel & George A. Moscary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. Hawaii, 2021 U. ILL. L. REV. ONLINE 172 (2021); Stephen P. Halbrook, *The Right*

article will outline, this resurgence of the 'peaceable carry' Second Amendment is based on a similar combination of ideologically inflected legal conjecture, historical distortion, and myth. The writers leading this resurgence are particularly tilting at windmills with the allegation that professional historians are attempting to rewrite the historical record to "negate" or "cancel" the Second Amendment right to "bear arms."[6] One writer has gone so far to label the research and writings of historians an "Illuminati-like conspiracy…to turn the right to bear arms into the crime of bearing arms."[7] Such allegations appear to be nothing more than an attempt to muddle any history that the 'peaceable carry' writers do not favor—history that has consistently shown itself to be reliable and is based on copious amounts of historical evidence.[8]

This article is broken into three parts. Part I explores the story behind the organized campaign to advance a broad, individual rights interpretation of the Second Amendment. Part II examines the precipitous rise and equally dramatic collapse of the 'peaceable carry' Second Amendment. Lastly, Part III examines why the recent resurgence of the 'peaceable carry' Second Amendment is merely the latest example of gun rights advocates advancing a distorted narrative to further a political agenda.

I. THE STORY BEHIND THE ORGANIZED CAMPAIGN TO ADVANCE BROAD SECOND AMENDMENT RIGHTS

To understand how and why the organized campaign to advance a broad, individual rights interpretation of the Second Amendment came about, one must go back to the early twentieth century—a time when the first gun rights movement was just beginning to blossom. Formed with the specific purpose of preventing the proliferation of permit to purchase firearms laws like New York's 1911 Sullivan Law, the first gun rights movement was led by the combined efforts of the United States Revolver Association (USRA) and the editors of sporting, hunting, and shooting magazines, such as *Field and Stream*, *Outdoor Life*, and *Sports Afield*. To these gun rights forebears, the Second Amendment was understood to protect an individual right to acquire, own, and use firearms for

to Bear Arms: For Me, But Not for Thee?, 43 HARV. J.L. & PUB. POL'Y 331, 344–345 (2020); Joyce Lee Malcolm, *The Right to Carry Your Gun Outside: A Snapshot in History*, 83 L. & CONTEMP. PROBS. 195, 197–212 (2020); STEPHEN P. HALBROOK, GOING ARMED: HOW COMMON LAW DISTINGUISHES THE PEACEABLE KEEPING AND BEARING OF ARMS 1 (2016); A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 192, 189–201 (Jennifer Tucker et al. eds., 2019); Joyce Lee Malcolm, *The Right to Be Armed: The Common Law Legacy in England and America, in* FIREARMS AND COMMON LAW 154–66 (Aspen Inst. ed., 2019); David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. L.J. & PUB. POL'Y 127, 130–40 (2016).

6. *See* HALBROOK, THE RIGHT TO BEAR ARMS, *supra* note 5, at 58–65, back cover; *see also* Kopel & Moscary, *Errors of Omission*, *supra* note 5, at 174.

7. HALBROOK, THE RIGHT TO BEAR ARMS, *supra* note 5, at 208.

8. This gun rights tactic dates back more than half a century. *See, e.g.*, E.B. Mann, *Tilting at Windmills*, GUNS MAG., Aug. 1968, at 28–29, 54–56.

national defense, homebound self-defense, and for recreational purposes such as hunting and target shooting.[9]

But the forebears also passionately believed that with this right came limitations. For one, the individual acquiring, owning, and using the firearm had to be "law-abiding" and willing to take part in the national defense.[10] Additionally, these gun rights advocacy forebears believed that the acquisition, ownership, and use of firearms was subject to reasonable regulation.[11] Laws that were considered "reasonable," or what the USRA referred to in its literature as "sane" or "excellent," included prohibitions on the carrying of firearms for non-sporting and non-hunting purposes, except under license and when absolutely necessary to do, the requirement that firearms dealers record all information pertaining to the firearm being sold and to the purchaser, waiting periods, and prohibitions on the selling of firearms to known criminals and minors.[12]

It was only once the USRA and the editors of sports, hunting, and shooting magazines established a successful blueprint for gun rights advocacy that the NRA entered the fray.[13] Initially the NRA worked alongside the USRA and the other gun rights forebears, but eventually commandeered the gun-rights movement as its very own.[14] Still, despite having done so, the NRA did not alter the movement's reasonable regulation interpretation of the Second Amendment,[15] nor did the NRA alter its guiding legislative principles.[16] In fact, from the late 1920s, when the NRA first became involved in gun rights advocacy, through the early 1970s, the NRA consistently maintained that the Second Amendment did not preclude the reasonable regulation of firearms.[17] "There's *no question* that a

9. CHARLES, ARMED IN AMERICA, *supra* note 2, at 189–93.

10. *Id.*

11. *Id.*

12. *See* UNITED STATES REVOLVER ASSOCIATION, SANE REGULATION OF REVOLVER SALES: CRIMINALS NOT MADE BY PISTOLS, Bulletin No. 5, (Feb. 23, 1923) (on file with author); UNITED STATES REVOLVER ASSOCIATION, SANE REGULATION OF REVOLVER SALES: DISARMING THE CRIMINAL, Bulletin No. 3, (Jan. 31, 1923) (on file with author).

13. CHARLES, ARMED IN AMERICA, *supra* note 2, at 194–203.

14. *Id.* at 202–04.

15. *See, e.g.*, NATIONAL RIFLE ASSOCIATION, THE AMERICAN RIFLEMAN'S ORGANIZATION 3 (1927) ("The National Rifle Association Recognizes the fact that in some localities and under some circumstances some kind of control over the sale and use of firearms is justified. On the other hand the Association insists on the right of every citizen…to protect his home, his property and the persons of his family by the use of firearms when necessary.").

16. *Compare Merry Christmas—and Gun Laws*, AM. RIFLEMAN, Dec. 1929, at 6, *with The Effects of Revolver Legislation Upon Hardware Dealers*, AM. ARTISAN, May 25, 1912, at 30.

17. There are examples abound during this period of the NRA conceding that the Second Amendment does not preclude reasonable firearms regulations. *See, e.g.*, Harold W. Glassen, *Right to Bear Arms is Older Than the Second Amendment*, AM. RIFLEMAN, Apr. 1973, at 22 ("It is necessary…for you and me and the millions who think as we do to recognize at nonce 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…that the State has the right of reasonable regulation for the general health, welfare and safety of its citizens…to include…tight regulations on the carrying of concealed firearms, the carrying thereof in public places and the carrying of firearms in automobiles…"); *This is Our Stand*, AM. RIFLEMAN, May 1965, at 16 ("Contrary to the claims by anti-gun forces, members of the [NRA] and millions of other law-abiding citizens do not oppose all proposed firearms legislation."); *Realistic Firearms Controls*, AM. RIFLEMAN, Jan. 1964, at 14 ("The NRA dos not oppose reasonable legislation regulating the carrying of a concealed handgun,

government has a right to restrict who shall use arms,' stated NRA president Harold W. Glassen in a 1968 television debate with Maryland senator Joseph D. Tydings, adding, "[The Second Amendment] is an individual right but that does not mean that there cannot be *reasonable restrictions* upon that right."[18]

The only noticeable difference between the NRA's interpretation of the Second Amendment and that of its gun rights forebears was the frequent use of historicism to galvanize the gun rights community to action.[19] To the NRA, gun rights advocacy was not only about preserving the shooting sports and hunting. It was about presenting the Second Amendment in a way that invoked the spirt of the Founding Fathers.[20] And for two decades the NRA ran a campaign urging membership to "Make America Once Again a Nation of Riflemen."[21]

Although the NRA frequently used historicism as a political motivation tool, until 1964 the NRA was unable to muster any evidence that supported its historical claims. The best that the NRA could come up with were historical inferences through the parsing of text.[22] Concrete evidence was noticeably lacking. To make up for this, the NRA made generalizations about the past, such as that the Second Amendment was based on the "truism that the right of law-abiding citizens to keep and bear arms in a democracy is a necessary corollary to the retention of their rights and liberties as freemen."[23] But in the summer of 1955, the NRA wanted to learn more about the Second Amendment's antecedents and tasked staff member Jack Basil, Jr. with conducting an internal historical study. After consulting with the Library of Congress and examining case law, Basil concluded: "From all the direct and indirect evidence, the Second Amendment appears to apply to a collective, not an individual, right to bear arms. So have the courts, Federal and State, held. Further, the courts have generally upheld various regulatory statutes of the States to be within the proper province of their police

but it does oppose the theory that the target shooter, a hunter, or a collector should be required to meet the same conditions."); *There Ought to be a Law!*, AM. RIFLEMAN, Oct. 1956, at 16 (stating that some firearms controls are "proper and necessary" such as the 48 state regulations on concealed carry).

18. Transcript of Face to Face, a Confrontation on Gun Control Legislation Between Senator Joseph D. Tydings and Harold W. Glassen, Moderated by Mark Evans, Oct. 23, 1967, at 28, *in* HAROLD W. GLASSEN PAPERS, box 1 (Ann Arbor, MI: University of Michigan Bentley Historical Library) (emphasis added) (hereinafter GLASSEN PAPERS).

19. *See, e.g.*, Merritt A. Edson, *Is the Rifleman Outmoded?*, AM. RIFLEMAN, Apr. 1954, at 16; Donald L. Jackson, *The Man with a Rifle*, AM. RIFLEMAN, Dec. 1951, at 13–16;. *Truth—Self Evident*, AM. RIFLEMAN, July 1949, at 10; C. B. Lister, *History vs. Histrionics*, AM. RIFLEMAN, May 1943, at 13; *—Ism*, AM. RIFLEMAN, Feb. 1939, at 2; *Make the Spirit of '76 the Spirit of '32*, AM. RIFLEMAN, July 1932, at 6.

20. *See, e.g.*, *The Individual Rifleman*, AM. RIFLEMAN, Mar. 1942, at 11; *Our Responsibility*, AM. RIFLEMAN, Jun. 1941, at 5; H.P. Sheldon, *An Armed Citizenry*, AM. RIFLEMAN, Sept. 1940, at. 5–8; *Pendulum*, AM. RIFLEMAN, Mar. 1939, at 4.

21. In 1927, the motto read, "America—Once Again—A Nation of Riflemen." *See Barriers Burned Away!*, AM. RIFLEMAN, Nov. 1926, at behind front cover. In 1947, the motto read, "Make American Again a Nation of Riflemen." *See Target for 1947*, AM. RIFLEMAN, Jan. 1947, at 3.

22. *See, e.g.*, Merritt A. Edson, *In Their Own Keeping*, AM. RIFLEMAN, Nov. 1952, at 16; Merritt A. Edson, *To Keep and Bear Arms*, AM. RIFLEMAN, Aug. 1952, at 16; NATIONAL RIFLE ASSOCIATION, THE PRO AND CON OF FIREARMS LEGISLATION 3 (1940).

23. Merritt A. Edson, *As Allowed by Law*, AM. RIFLEMAN, Nov. 1953, at 16.

power to protect and promote the health, welfare, and morals of their inhabitants."[24]

For whatever reason, whether policy or preference, the NRA chose not to divulge Basil's findings. Rather, in the very next edition of the *American Rifleman*, in an editorial titled "The Right to Bear Arms," the NRA cast doubt on any interpretation of the Second Amendment that was not aligned with its own: "There has been so much conflicting 'expert' opinion, so many interpretations of constitutional law, that it is hardly surprising that widespread confusion exists in the minds of sincerely interested persons…Many have attempted varied interpretations of [the Second Amendment's language]. We prefer to believe that the simple, straightforward language means exactly what it says."[25]

The NRA was not alone in having difficulty explaining how history supported a non-militia-based interpretation of the Second Amendment. Other groups, organizations, and individuals devoted to gun rights advocacy were facing the same problem.[26] Even members of Congress who wholeheartedly supported the NRA's interpretation were unable to provide anything historically useful.[27]

But in 1965 the NRA's historical prayers were answered when the American Bar Association (ABA) held its annual Samuel Pool Weaver Constitutional Law Essay Competition. The question posed to essay participants was whether the Second Amendment guaranteed a right to arms for "private purposes" or was the right to arms conditioned on service in a state militia? The winner of the competition was an essay titled "The Lost Amendment."[28] Written by Robert A. Sprecher, who was at the time a lawyer and Illinois Bar Examiner and would later go on to serve on the 7th Circuit Court of Appeals, the essay was the first to delve into eighteenth-century history as a means to extrapolate the Second Amendment's legal meaning. Although Sprecher conceded that the Second Amendment was indeed predicated upon the fear of federal standing armies and the desire for a well-regulated militia to counter them, he thought that "history does not warrant concluding…that a person has a right to bear arms solely…as a member of the militia."[29] To Sprecher, history also supported an individual self-defense interpretation. But in order for such a right to be jurisprudentially recognized, the courts would need to be convinced that armed individual self-defense served "some sound public purpose."[30] This would require a complete reversal

24. Memorandum from Jack Basil to Merritt A. Edson, June 18, 1955, at 4, *in* MERRITT A. EDSON PAPERS, box 27 (Washington, DC: Library of Congress Manuscripts Division).

25. Merritt A. Edson, *The Right to Bear Arms*, AM. RIFLEMAN, July 1955, at 14.

26. *See, e.g.*, Jeff Cooper, *The Right to Keep and Bear Arms: Your Rights and a Gun*, GUNS & AMMO, Nov. 1962, at 26–27; Donald Martin, *Anti-Gun Crusades—Another Step Toward National Suicide?*, GUNS & AMMO, Oct. 1960, at 18–21, 110; William B. Edwards, *Why Not Have a Pro Gun Law?*, GUNS MAG., Sep. 1957, at 22, 54–55; Karl Hess, *Should You Own a Gun?*, AM. MERCURY, Apr. 1957, at 54–60.

27. CHARLES, ARMED IN AMERICA, *supra* note 2, at 229–30.

28. Sprecher's essay was published in two parts. *See* Robert A. Sprecher, *The Lost Amendment*, 51 ABA J. 665 (1965); Robert A. Sprecher, *The Lost Amendment*, 51 ABA J. 554 (1965).

29. Sprecher, *supra* note 28, at 557.

30. *Id.* at 666.

of the legal status quo—a return to "the bravado of the Old West," where individuals were allowed to "protect [themselves] against the ravages and depredations of organized crime through the Second Amendment."[31] Perhaps, then, the courts would "find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms."[32]

As news of Sprecher's essay spread, gun rights advocates seized on it to exalt the Second Amendment as a legally actionable individual right. The NRA in particular used Sprecher's essay as a talking point to counter contemporaneous lawmakers advocating for firearms control.[33] Yet the most significant impact of Sprecher's essay was that it would serve as a scholarly beacon for gun rights advocates in the coming decade.[34] Not only was Sprecher able to breathe life into virtually every one of the historical assertions made by the NRA and other gun rights advocates over the years, but he also provided the academic blueprint for the NRA and other gun rights advocates to follow.[35] The Second Amendment was not antiquated or obsolete, as the overwhelming majority of early to mid-twentieth century scholars had contended. Rather, the Second Amendment's history, purpose, and meaning had simply become lost to time, and, if the American people, lawmakers, bureaucrats, and the courts could be educated on this point, the right to keep and bear arms could be restored to its constitutional pedestal.[36]

In early 1973, educating lawmakers and bureaucrats quickly became foremost on the NRA's and other gun rights advocates' minds. The reason for this was two near-in-time interpretations of the Second Amendment by the federal government—interpretations that the NRA and other gun rights advocates found politically alarming. The first came from the Senate Judiciary Subcommittee on Constitutional Rights' most recent edition of the *Layman's Guide to Individual Rights Under the United States Constitution*, wherein the Second Amendment was cast as an antiquated right.[37] Although the *Laymen's Guide* acknowledged that the Second Amendment was ratified by the Constitution's framers to "provide the freedom of the citizen to protect himself against both disorder in the

31. *Id.* at 668.

32. *Id.* at 669.

33. *See, e.g.*, Tydings-Glassen Debate: Questions and Answers, National Press Club, June 29, 1967, at 8, Glassen Papers, box 1; Harold W. Glassen, Remarks before Duke Law Forum, Feb. 18, 1969, at 9–10, Glassen Papers, box 1; WABC Radio Press Conference, June 22, 1968, at 8, Glassen Papers, box 1; Franklin L. Orth, *What Control Should There Be on Guns?*, GEN. FED. CLUBWOMEN, May–June 1967, at 11, 26.

34. *See, e.g.*, NATIONAL RIFLE ASSOCIATION, 1975 FIREARMS AND LAWS REVIEW 26–32 (1975).

35. *See, e.g.*, Bartlett Rummel, *To Have and Bear Arms*, AM. RIFLEMAN, June 1964, at 38; Edson, *To Keep and Bear Arms*, *supra* note 23, at 16; Charles S. Wheatley, *The People, the Constitution, and Firearms*, OUTDOOR LIFE, June 1930, at 104; *Constitutional Provision on Arms*, OUTDOOR LIFE, Aug. 1921, at 148.

36. *See* Glassen, *Right to Bear Arms Is Older than the Second Amendment*, *supra* note 17, at 22; *The Right to Arms for Self-Defense*, AM. RIFLEMAN, Jan. 1967, at 16; Nicholas V. Olds, *The Second Amendment and the Right to Keep and Bear Arms*, 46 MICH. ST. B.J. 15 (1967); Alan S. Krug, *Firearms Legislation: A Perspective*, Mar. 25, 1966, at 1–17, *in* WILLIAM E. GUCKERT PAPERS, box 6, folder 10 (Pittsburgh, PA: University of Pittsburgh Special Collections).

37. *See* Ashley Halsey, Jr., *Can the Second Amendment Survive?*, AM. RIFLEMAN, Mar. 1973, at 17–19; *How to Kill a Republic*, AM. RIFLEMAN, Mar. 1973, at 16.

community and attack from foreign enemies," such late eighteenth century concerns were now "much less important" given that a "well-trained military and police forces" were available "to protect the citizen."[38] "Hogwash!" decried the editors of the gun rights extremist publication *Gun Week*, adding, "The right to keep and bear arms is more important today than when this country was founded…we're sick and tired of hearing wailing social planners and potential dictators saying otherwise, especially in pamphlets printed at government expense."[39]

The second alarming interpretation of the Second Amendment came from bureaucrats within the Department of Justice, who were in the process of defending the 1968 Gun Control Act in the case *Freeman v. United States* on several grounds, including that it did not violate the Second Amendment.[40] Much to the dismay of the NRA and other gun rights advocates, the Department of Justice argued that any Second Amendment challenge to the Gun Control Act must fail given that "the Amendment applies only to the organized militia of a State and not to individuals…"[41]

It is against this political backdrop that the NRA and other gun rights advocates ramped up their effort to restore the Second Amendment to its constitutional pedestal, and in doing so a broad, individual rights interpretation of the Second Amendment began to proliferate within law reviews.[42] Although there would be many writers to take part in this proliferation, none was more influential and prominent than that of NRA lawyer David I. Caplan,[43] who also happened to be the lawyer challenging the constitutionality of the 1968 Gun Control

38. SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, LAYMAN'S GUIDE TO INDIVIDUAL RIGHTS UNDER THE UNITED STATES CONSTITUTION 8 (1973). The *1973 Layman's Guide*'s portion on the Second Amendment was identical to previous editions. *See* SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, LAYMAN'S GUIDE TO INDIVIDUAL RIGHTS UNDER THE UNITED STATES CONSTITUTION 6 (1966); SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, LAYMAN'S GUIDE TO INDIVIDUAL RIGHTS UNDER THE UNITED STATES CONSTITUTION 4–5 (1962). What was different come 1973, was the overt, national politicization of the Second Amendment and the rise of the 'no compromise' gun rights movement beginning in 1969. *See* PATRICK J. CHARLES, VOTE FOR GUN: THE POLITICS AND POLITICIZATION OF GUN RIGHTS THROUGH 1980, at ch. 7 (forthcoming 2021–22) (manuscript on file).

39. *More Anti-Gun Propaganda*, GUN WEEK, May 4, 1973, at 4.

40. This was particularly alarming to the NRA and other gun rights advocates given that it was occurring under the Richard M. Nixon administration—an administration that had held itself out as a proponent of gun rights. *See* CHARLES, VOTE FOR GUN, *supra* note 38, at ch. 7.

41. *Government Asks Court to Dismiss Challenge of '68 Gun Control Act*, GUN WEEK, Jan. 26, 1973, at 1, 2.

42. *See generally* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000) (outlining the growth of individual rights Second Amendment literature in the late twentieth century).

43. Caplan's work and writings were frequently distributed by the NRA and other gun rights advocates. *See, e.g.*, DAVID I. CAPLAN, CONSTITUTIONAL RIGHTS IN JEOPARDY: THE PUSH FOR 'GUN CONTROL' (1981) (pamphlet published and distributed by the NRA); David I. Caplan, *A Noted Legal Scholar Explains How…Gun Control Jeopardizes All Our Constitutional Rights*, AM. RIFLEMAN, Oct. 1979, at 30; David I. Caplan, *The Second Amendment*, POINT BLANK, May 1977, at 2; David I. Caplan, *The Second Amendment*, POINT BLANK, Apr. 1977, at 2–3; David I. Caplan, *The Second Amendment*, POINT BLANK, Jan. 1977, at 2–3; David I. Caplan, *The Second Amendment*, POINT BLANK, Dec. 1976, at 2–3; David I. Caplan, *The Second Amendment*, POINT BLANK, Nov. 1976, at 2; David I. Caplan, *The Second Amendment*, POINT BLANK, Oct. 1976, at 2.

Act in *Freeman v. United States*.[44] For it was through Caplan's writings that several hyperbolic historical claims took root and quickly gained acceptance among the Second Amendment writers that followed.[45] And chief among Caplan's hyperbolic historical claims were those relating to armed carriage.[46]

II. THE RISE AND FALL OF THE 'PEACEABLE CARRY' INTERPRETATION OF THE SECOND AMENDMENT

At the time Caplan began writing on the Second Amendment, the gun rights community was in almost virtual agreement that the right to keep and bear arms did not include a right to carry firearms in public places, peaceably or otherwise.[47] While certainly there were some gun rights extremists that believed the Second Amendment protected broad carry rights, they were only an insular minority of the wider gun rights community.[48] And chief among the community in declaring that the Second Amendment did not protect a right to carry firearms in public places was the NRA.[49] This included the NRA at one point acknowledging that "[r]egulations covering the carrying of weapons into places of public assembly were common during the Colonial period."[50] Years later, in a press release not long after the assassination of President John F. Kennedy, the NRA made it abundantly clear that "[o]nly those citizens who have a *definite need* to carry concealed weapons should be licensed for this purpose" and that "the words 'to keep and bear arms' *do not mean* that any person may carry concealed weapons at [their] pleasure or without the consent of the proper authorities."[51]

But Caplan's writings on the Second Amendment would prove to be the turning point in altering the NRA's view. It was no secret that Caplan's writings

44. *Freeman Files Lawsuit*, UTAH INDEP. (Salt Lake City, UT), Feb. 21, 1974, at 11.

45. *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, 1733–35 (2012). For Caplan's earliest writings, *see* David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789 (1982); Caplan, *Restoring the Balance*, *supra* note 1; DAVID I. CAPLAN, THE SECOND AMENDMENT: A BASIC UNDERPINNING IN THE CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES (1975).

46. *See* Patrick J. Charles, *The Faces of Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 392–93 (2016).

47. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts Use of History-in-Law*, 67 CLEV. ST. L. REV. 197, 219–22, 248–50 (2019).

48. *See, e.g.*, Edwards, *Why Not Have a Pro Gun Law?*, *supra* note 26, at 53–54; E.B. Mann, *The Pro-Gun Law Takes Shape!*, GUNS MAG., Aug. 1964, at 15, 58. *See also* CHARLES, ARMED IN AMERICA, *supra* note 2, at 166–73 (discussing the rarity of gun rights extremism at the turn of the twentieth century).

49. *See, e.g.*, Glassen, *Right to Bear Arms is Older Than the Second Amendment*, *supra* note 17, at 22; Glassen, Remarks before Duke Law Forum, *supra* note 33, at 8; NATIONAL RIFLE ASSOCIATION, PRO AND CON, *supra* note 22, at 4; *Merry Christmas—and Gun Laws*, *supra* note 16, at 6

50. NATIONAL RIFLE ASSOCIATION, ANNUAL REPORT OF THE EXECUTIVE DIRECTOR AND SECRETARY TO THE BOARD OF DIRECTORS FOR THE CALENDAR YEAR 18 (1947).

51. National Rifle Association, Press Release, Where Does the NRA Stand on Firearms Legislation?, undated [1964], *in* HALE BOGGS PAPERS , box 445, folder Firearms Legislation 1964 (New Orleans, LA: Tulane University Howard-Tilton Memorial Library) (emphasis added). Newspapers reprinted this NRA press release in part or in full. *See, e.g.*, George Kellam, *The Great Outdoors: Firearms Licensing Fought*, FORT WORTH STAR-TELEGRAM (TX), Jan. 15, 1964, at 4.

maintained a highly political, anti-firearms regulation bent to them.[52] This is buttressed by the fact that the history of weapons regulations is almost completely absent from them, except for a brief mention of the 1328 Statute of Northampton, which Caplan admitted was meant to "forbade persons to carry weapons in public places."[53] Yet Caplan quickly dismissed the Statute of Northampton as having taken on a "narrow reading" in the courts by the late seventeenth century.[54] And, as a result of this "narrow reading," by the time the Constitution was drafted, debated, and ratified, it was generally accepted that the right to keep and bear arms protected the public carrying of weapons in a peaceable manner.[55]

What historical evidence did Caplan unearth to come to this conclusion? Not much—just one historical source—the incomplete case summaries of *Rex v. Knight* in the *English Reports*.[56] At no point did Caplan attempt to research the enforcement history of the Statute of Northampton, dive into the restatements of the Statute of Northampton from English legal commentators spanning three centuries, nor even seek to better understand the case history of *Rex v. Knight*. Rather, Caplan came to his 'peaceable carry' conclusion through mere legal inference—the inference being that everyone, from the time *Rex v. Knight* was decided in 1686 to the ratification of the Second Amendment, interpreted the case as he did in 1975—as enshrining a common law right to peaceably carry weapons in public places.

And in making this legal inference, Caplan committed a serious historical error—assume without evidence. Yet despite the lack of evidence supporting Caplan's claim, it was accepted uncritically by the NRA and other gun rights advocates.[57] It was also accepted by the Second Amendment writers that followed[58]—writers who not so coincidently were employed by the NRA in some capacity.[59] Although the follow-on writers were successful in citing and quoting

52. *See, e.g.*, Caplan, *Restoring the Balance*, *supra* note 1, at 31; David I. Caplan, *The Second Amendment*, POINT BLANK, July 1976, at 2; David I. Caplan, *The Second Amendment*, POINT BLANK, June 1976, at 2, 11.

53. Caplan, *Restoring the Balance*, *supra* note 1, at 32. This was in line with all other twentieth century legal scholars, each of whom interpreted the Statute of Northampton as prohibiting the act of carrying dangerous weapons in public places. *See* Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1914); Daniel J. McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 143–44 (1928); John Brabner-Smith, *Firearm Regulation*, 1 L. & CONTEMP. PROBS. 400, 413 (1933); George I. Haight, *The Right to Keep and Bear Arms*, 2 BILL RTS. REV. 31, 41 (1941); Albert Chandler, *The Right to Bear Arms*, 39 BRIEF 15, 20–23 (1940).

54. Caplan, *Restoring the Balance*, *supra* note 1, at 32.

55. *Id.* at 32, 34, 40.

56. *See* Rex v. Knight, 90 Eng. Rep. 330 (1686); Sir John Knight's Case, 87 Eng. Rep. 75 (1686).

57. *See, e.g.*, NRA INSTITUTE FOR LEGISLATIVE ACTION, THE RIGHT TO KEEP AND BEAR ARMS: AN ANALYSIS OF THE SECOND AMENDMENT 4 (1981); *see also infra* note 59.

58. *See, e.g.*, David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 565 (1986); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 49–51 (1984); Robert Dowlut, *The Right to Arms: Does the Constitution of the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 71, n.24 (1983); 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).

59. *See* Bob Groves, '*Every May' Targets Gun-Control Debate*, ALBUQUERQUE JOURNAL (NM), Jan. 23, 1985, at 5B (noting that the NRA special ordered 2,500 copies of Halbrook's book upon publication); Stephen P. Halbrook, *To Bear Arms for Self-Defense*, Nov. 1984, at 28–29, 67 (article both criticizing Don B. Kates understanding of the Second Amendment and advertising Halbrook's book THAT EVERY MAN BE ARMED); Tom

some additional material that seemed to compliment Caplan's 'peaceable carry' conclusion, the historical reality was the citations and quotes were used well outside their intended context.[60] Additionally, like Caplan, the follow-on writers failed to adequately research the history of the law and armed carriage—that is the legal ins, outs, and exceptions of the law, and how and why it changed and developed over time.[61]

Caplan's 'peaceable carry' narrative was given a veneer of academic legitimacy by historian Joyce Lee Malcolm, who was writing on the Second Amendment's English antecedents. As it relates to the law and armed carriage, Malcolm advanced two highly influential historical claims. The first was that until the mid-seventeenth century England maintained an armed society virtually unaffected by the Statutes of the Realm.[62] This included the dubious claim that the 1328 Statute of Northampton was never enforced.[63] Allegedly, according to Malcolm, it was not until the Restoration that arms regulations took hold and the general populace was disarmed by the Stuart monarchy.[64] The second highly influential historical claim advanced by Malcolm related to the backstory of *Rex v. Knight*, where Malcolm fashioned a narrative where James II sought to leverage the Statute of Northampton to disarm his political opponents.[65] But, according to Malcolm, the "King's Bench was not prepared to approve the use of this statute to disarm law-abiding citizens," which forced James II to instead leverage the 1671 Game Act to carry out his devious plans. And what Malcolm ultimately concluded was that the defendant, Sir John Knight, was politically prosecuted under the Statute of Northampton so that King James II could use it as a test case to disarm other political dissidents.[66]

Those writers that had supported Caplan's 'peaceable carry' Second Amendment narrative were quick to praise Malcolm and took to incorporating her work within their own.[67] There was a problem, however, with Malcolm's

Wharton, *NRA: Gun Owners Need Protection*, SALT LAKE TRIB. (UT), Sept. 25, 1983, at B1 (identifying Dowlut as an NRA lawyer); Stephen P. Halbrook, *A New Weapon for the Anti-Gunners*, AM. RIFLEMAN, May 1983, at 34, 35 (noting Halbrook was a "featured speaker" and the NRA's recent product liability seminar); David T. Hardy, *To Keep and Bear Arms*, AM. RIFLEMAN, Aug. 1982, at 34, 35 (identifying Hardy as a member of the NRA general counsel's staff); David T. Hardy, *Guns and State Law*, ARIZ. REPUBLIC (Phoenix, AZ), Mar. 7, 1982, at A6 (identifying Hardy as an NRA legal consultant); Richard E. Gardiner, *NRA Disagrees with Statistics*, GREENVILLE NEWS (SC), Oct. 28, 1981, at 4A (identifying Gardiner as the NRA's general counsel).

60. *See* CHARLES, ARMED IN AMERICA, *supra* note 2, at 61–69, 110–21 (detailing and correcting the historical errors committed by these Second Amendment writers).

61. *Id.*

62. Malcolm, *supra* note 5, at 11.

63. Malcolm made this non-enforcement claim in several writings. *See id.* at 104; 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); JOYCE LEE MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND 7 (1981).

64. *Malcolm*, *supra* note 5, at 31–112.

65. *Id.* at 104–05.

66. *Id.* at 105.

67. *See, e.g.*, NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, AND MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: RIGHTS, REGULATION, AND POLICY 81–82 (2012) (relying on Malcolm's work to conclude that *Rex v. Knight* was transformative for the right to carry arms in public places);

historical claims on the law and armed carriage. They were unsupported by the historical record. As this author has detailed in several writings, at no point did Malcolm even attempt to research the history of the 1328 Statute of Northampton, its subsequent enforcement, or restatements by England commentators.[68] Even worse was that Malcolm whimsically fashioned the claim that James II planned on using the Statute of Northampton (as well as the 1671 Game Act) to disarm political dissidents. To this day, no historian has been able to find a shred of evidence that supports Malcolm's narrative.[69] It is a claim based on nothing more than Malcolm's speculation.

Then there was the Malcolm's backstory of *Rex v. Knight*. According to Malcolm, Knight was politically prosecuted because he had seized a Catholic priest while armed in contravention to James II's proclamation granting religious minorities the right to worship.[70] On its face, the backstory made sense. So much so, in fact, that everyone—including this author—mistakenly overlooked it.[71] However, in 2018, thanks to the research of Tim Harris, historians now know that Knight was prosecuted under the Statute of Northampton for a later in time event where Knight and his servant broke up an Anglican service armed and proclaimed that the parishioners were about to be murdered by Catholics.[72]

Unfortunately for Malcolm and other proponents of the 'peaceable carry' Second Amendment, both within and without the legal academy, Harris has written a transformative essay on the case.[73] Harris offers a rich account of the way the case fits within Anglo-American criminal law around the time of the Glorious Revolution. Although historians may never know why the jury decided to acquit Knight one thing is indisputable: the case does not support the claim that open peaceable carry existed under English law.[74] What is also historically undisputable is that Knight was ultimately held accountable for his actions by being placed on a bond as surety for his good behavior.[75] The point to be made is that

Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1363–64 (2009) (relying on Malcolm's research for contemporary legal analysis on the Statute of Northampton); Kevin C. Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 716–17 (2009); David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 ALB. L. REV. 305, 317 (2005); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1347 (1995).

68. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 13–23 (2012), accord Charles, *Faces, Take Two*, *supra* note 46, at 378–92.

69. *See* Charles, *Historiographical Crisis*, supra note 45, at 1804–07, 1819–22; *see also* Tim Harris, *The Right to Bear Arms in English and Irish Historical Context, in* A RIGHT TO BEAR ARMS?, *supra* note 5, at 27–33.

70. Malcolm, *supra* note 5, at 104.

71. For proof of this author's mistake, *see* Charles, *Faces*, *supra* note 68, at 27–30; Charles, *Faces, Take Two*, *supra* note 46, at 394–99. For this author's acknowledgement and correction of the mistake, *see* CHARLES, ARMED IN AMERICA, *supra* note 2, at 117–18.

72. *See* Harris, *supra* note 69, at 24–27.

73. *Id.* at 26–27.

74. CHARLES, ARMED IN AMERICA, *supra* note 2, at 119–20.

75. *See* NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714, 389 (Oxford 1857); CALENDAR OF STATE PAPERS DOMESTIC: JAMES II, 1686–87, at 313, 349 (1964); 3 THE ENTERING BOOK OF ROGER MORRICE 1677–1691: THE REIGN OF JAMES II, 1685–1687, at 311 (Tim Harris ed., 2007).

what anyone may surmise today about the legal reason for Knight's exoneration is irrelevant. From the time *Rex v. Knight* was decided 1686 to the late nineteenth century, not one court or legal commentator interpreted the case as enshrining a right to 'peaceable carry'.[76]

History should never be inferred or created on a hunch or belief. It requires substantiated evidence and context, which was utterly lacking in the case of the 'peaceable carry' interpretation of *Rex v. Knight*. The recent resurgence of the 'peaceable carry' Second Amendment fares no better.[77] Its writers continue to omit key evidence when summarizing *Rex v. Knight*, as well as invent facts, such as that Knight's armed carriage was known to be "defensive" and "peaceful."[78] Not true. Knight never rested his innocence on "defensive" or "peaceful" carry grounds, nor do the incomplete case summaries in the *English Reports* mention it. What's more historically problematic is that 'peaceable carry' Second Amendment writers have yet to provide any evidence showing that the *Rex v. Knight* was ever interpreted as enshrining a right to peaceably carry.[79] One cannot claim an interpretation of a legal case to be widely accepted, or even a minority view, if there is not any evidence supporting it. There is another name for historical claims lacking the necessary evidence to support them—historical fiction.

III. THE RESURGENCE OF THE 'PEACEABLE CARRY' SECOND AMENDMENT IN LEGAL SCHOLARSHIP—WORSE THAN THE FIRST

All the while the 'peaceable carry' Second Amendment was falling apart under serious historical scrutiny; its writers did their utmost to reassert it. Initially, the writers responded with what can be described as plausible historical deniability—that is denying having taken part in any historical mythmaking.[80] It did not take long, however, before the writers began accusing historians of trying

76. *Rex v. Knight* was first cited in William Hawkins' 1716 A Treatise of the Pleas of the Crown as "3 Mod. 117." 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135, ch. 63, § 9 (1716). But the section accompanying this citation cannot even be remotely read as endorsing a right to peaceably carry dangerous weapons in public places. *Id.* In America, up through 1873, *Rex v. Knight* was only cited for the non-controversial position that the Statute of Northampton was an affirmance of the common law. *See* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAWS OF STATUTORY CRIMES § 784 (1873); *State v. Huntly*, 25 N.C. 418, 421 (1843).

77. *See* HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 42–65; Kopel & Moscary, *Errors of Omission*, *supra* note 5, at 176–78.

78. Kopel & Moscary, *Errors of Omission*, *supra* note 5, at 176.

79. Historically speaking, for this 'peaceable carry' conclusion of *Rex v. Knight* to be even remotely plausible requires one to two evidentiary burdens being satisfied. First, historical evidence of subsequent courts, preferably from 1686 to 1800, citing and interpreting *Rex v. Knight* as enshrining a common law right to peaceably carry weapons in public places. Second, historical evidence of legal commentors, or even several prominent lawyers in personal writings and correspondence, preferably from 1686 to 1800, citing and interpreting *Rex v. Knight* as enshrining a common law right to peaceably carry weapons in public places. But neither burden of proof has ever been satisfied. The fact remains that there is not one example to be found—not one case, legal summary, legal commentary, newspaper or journal article, nor correspondence, public or private, on either side of the Atlantic—where *Rex v. Knight* was discussed or cited as establishing a right to peaceably carry weapons in public places.

80. *See*, HALBROOK, GOING ARMED, *supra* note 5; Malcolm, *Right to Be Armed*, *supra* note 5; Kopel, *First Century*, *supra* note 5.

to negate the Second Amendment right to bear arms. Historian Joyce Lee Malcolm for instance claimed that the historical evidence showing a long tradition of restricting armed carriage in public places was irrelevant given the Supreme Court's decision in *District of Columbia v. Heller*.[81] "It is long past time for [historians] to accept that verdict of the Supreme Court and move on," wrote Malcolm.[82] Other 'peaceable carry' writers adopted the more clever tactic of selectively borrowing from historians to refashion the 'peaceable carry' narrative, and in the process allege it was historians who were tilting at windmills as part of a secret, "Illuminati-like conspiracy" to "negate" or "cancel" the Second Amendment right to bear arms.[83]

Audaciously claiming that there is some secret or insidious effort afoot to "negate" or "cancel" the Second Amendment is nothing new in the politically hyperbolic world of gun rights advocacy. In the late 1920s and 1930s, the NRA whimsically claimed that "gangsters" were secretly funneling money in support of an "anti-gun" campaign.[84] Come World War II, the blame shifted towards fifth columnists and Nazi operatives.[85] This was followed by the Communist Party,[86] and after the passage of the Gun Control Act the NRA alleged there was a secret, "well-organized and well-financed campaign" involving "movie stars, prominent figures and other public relations devices."[87] Come the mid-to-late 1970s, once the NRA and other gun rights advocates initiated their organized campaign to advance a broad, individual rights interpretation of the Second Amendment, anyone and anything that did adhere or accept this interpretation were criticized as either politically biased or anti-gun.[88] For instance, in 1978, the NRA and other gun rights advocates pressured the Xerox Company to cancel

81. Malcolm, *Right to Carry*, *supra* note 5, at 209–12. This is both an odd and rather remarkable response from a member of the history profession. The principal purpose of the history profession is to provide the present and further a better understanding of the past, not leave it up to the courts to decide. A declaration by the courts as to what is and is not history does not make it so in the history profession. Evidence and facts, however, do.

82. *Id.* at 212.

83. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 58–65, 208 back cover; *see also* Kopel & Moscary, *Errors of Omission*, *supra* note 5, at 174.

84. *See, e.g.*, Otto R. Keiter, *Anti-Legislation Plaint*, AM. RIFLEMAN, Oct. 1939, at 36; C.B. Lister, *The Remedy*, DU PONT MAG., Mar. 1924, at 10. Many years later a similar claim would be about regarding the origins of New York's Sullivan Law. *See, e.g.*, Jac Weller, *The Sullivan Law*, AM. RIFLEMAN, Apr. 1962, at 33; Robert Dyment, *The People vs. Sullivan Law*, GUNS MAG., Jul. 1960, at 24–25, 49, 51–52, 54. Yet as this author has shown, this historical claim was created out of thin air to advance an anti-firearms control narrative. *See* CHARLES, ARMED IN AMERICA, *supra* note 2, at 175–79, 182–83, 314.

85. *See, e.g.*, C.B. Lister, *The Nazi Deadline*, AM. RIFLEMAN, Feb. 1942, at 7; *Zero Hour*, AM. RIFLEMAN, Dec. 1940, at 4.

86. *See, e.g.*, *Gun Control Makes Strange Bedfellows*, AM. RIFLEMAN, Sept. 1968, at 18; C.B. Lister, *Simple Arithmetic*, AM. RIFLEMAN, Nov. 1949, at 10; C.B. Lister, *Pattern in Red*, AM. RIFLEMAN, Apr. 1948, at 10.

87. *See, e.g.*, Harold W. Glassen, Remarks Before Stetson University, Deland, Florida, Apr. 14, 1969, *in* GLASSEN PAPERS, box 1, at 2.

88. There is a long history the NRA and other gun rights advocates casting anyone and anything that supported firearms controls as 'bad' or 'evil'. *See* CHARLES, ARMED IN AMERICA, *supra* note 2, at 205–07. It became even more normalized after the passage of the 1968 Gun Control Act. *See* CHARLES, VOTE FOR GUN, *supra* note 38, at ch. 7. Then in the mid-to-late 1970s, the NRA and other gun rights advocates began to take aim at educational materials. *See, e.g.*, *No Anti-Gun Bias in New School Texts*, AM. RIFLEMAN, Mar. 1978, at 58; *Gun Owners Defeat School Book Bias*, AM. RIFLEMAN, Feb. 1978, at 48.

its educational filmstrip titled Right to Bear Arms[89] because, in the words of NRA official Neal Knox, "Gun owners, and those of us who represent their views, are sick and tired of seeing our children subjected to all this educational bias in favor of gun control" and "the arguments for the individual citizen's right to keep and bear arms far outweigh the arguments favoring gun controls."[90]

The current attempt by 'peaceable carry' writers to discredit historians is a continuation of this politically hyperbolic world of gun rights advocacy. Yet in the writers' hasty effort to discredit historians, they casually omit two inconvenient truths. The first being that not one historian writing on the law and armed carriage is trying to negate the Second Amendment right to bear arms.[91] It is something that the writers have fabricated to give the appearance that their view of the Second Amendment outside the home is the only reasonable one.[92] To be clear—so that there is no academic confusion—the historical evidence indisputably supports three conclusions regarding the law and armed carriage up through the late eighteenth century. First, since the thirteenth century, Anglo-American law has imposed restrictions on the preparatory carrying of dangerous weapons in public places.[93] Second, over that same time span, armed carriage restrictions generally did not impede the lawful transportation or carrying of dangerous weapons for hunting, on one's travels, "from one residence to another, from a residence or business to repair, or for legitimate business purposes. . ."[94] Third

89. *See, e.g.*, *Xerox Apologizes to Real Gun Lobby*, POINT BLANK, Mar. 1978, at 1–2; *CCRKBA Produces Pro-Gun Filmstrip*, POINT BLANK, Jan.–Feb. 1978, at 3; *The Corruption of Children*, POINT BLANK, Dec. 1977, at 7.

90. Jim Oliver, *Xerox's Blatant Anti-Gun Filmstrip Subverts Your Children!*, GUNS & AMMO, May 1978, at 32, 34.

91. *See, e.g.*, Patrick J. Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, 13 CHARLESTON L. REV. 125 (2019) (outlining how the law has generally allowed for transporting of weapons); Charles, *Faces, Take Three*, *supra* note 47, at 223–24 (noting that it was generally accepted in the nineteenth and early twentieth centuries that armed carriage laws "could not completely extinguish individuals from exercising their right to self-defense in extreme cases"); Charles, *Faces*, *supra* note 68, at 43 (noting that the prosecutorial scope of the Statute of Northampton should not be construed "as prohibiting the transport of arms…for lawful purposes," nor the transporting of firearms to the shooting range, to one's home or business, for government sanctioned militia service, and for purchase or sale); *id.* at 19 (noting that English prohibitions on "going armed did not extend to the realm's unpopulated and unprotected enclaves").

92. Stephen P. Halbrook has committed this academic sleight of hand many times by selectively quoting this author's writings. *See, e.g.*, Stephen P. Halbrook, *To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few?*, 21 FED. SOC. REV. 46, 48–49, n.17 (2020); Stephen P. Halbrook, *The Common Law of the People to Keep and Bear Arms: Carrying Firearms at the Founding and in the Early Republic*, 1 LINCOLN MEM'L U. L. REV. 40, 44–45, n.22 (2020). What Halbrook conveniently leaves out is that this author also acknowledges several examples where armed carriage is presumed lawful, and therefore would fall under the umbrella of the Second Amendment. *See, e.g.*, CHARLES, ARMED IN AMERICA, *supra* note 2, at 143; Charles, *Faces*, *supra* note 68, at 36, 43.

93. *See, e.g.*, Charles, *Faces, Take Two*, *supra* note 46, at 378–401.

94. Charles, *Basic Right to Transport*, *supra* note 91, at 143l; *see also* Charles, *Faces*, *supra* note 68, at 19, 43. This construction of the Second Amendment outside the home was initially endorsed by Don Kates. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983) ("[The Second Amendment's] language was apparently intended to protect the possession of firearms for all legitimate purposes, but to guarantee the right to carry them outside the home only in the course of militia service. Outside that context the only carrying of firearms which the amendment appears to protect is such transportation as is implicit in the concept of the right to possess—e.g., transporting them between the purchaser or owner's premises and a shooting range, or a gun store or gunsmith and so on.").

and lastly, enforcement of armed carriage restrictions appear to have varied dependent upon several factors, but none more so than the fact that justices of the peace and other government officials were given wide discretion in enforcing the law.[95] Needless to say, the manner in which the law was enforced (nor the manner in which the criminal code operated) up through the late eighteenth century is not one and the same with that of today, or even the mid-to-late nineteenth century.

This brings us to second inconvenient truth omitted by those writers attempting to push the legal invention that is the 'peaceable carry' Second Amendment—one that historically underscores the first. Up through the turn of the nineteenth century, the law treated private and public violence very differently. The former is widely known in Anglo-American law as the 'castle doctrine,' which afforded individuals special legal privileges in defending hearth and home.[96] The latter—public violence—was much more restrictive and based upon absolute necessity, not personal preference. For instance, up through the late nineteenth century, whenever a person exercised self-defense in public, the person exercising it had a duty to retreat, and the evidentiary burden was on said person to prove it during the subsequent legal proceedings.[97] Additionally, in public places, one could not legally assemble their neighbors nor friends,[98] nor go armed without first seeking surety of peace through local government officials.[99] This governmental authority requirement to publicly 'go armed' extended to mustering and training the militia, as well as lawful execution of the hue & cry.[100] No serious historian denies that there were recognized lawful exceptions to public armed carriage restrictions. But exceptions to a rule does not establish the existence of a broad right to 'peaceable carry' anywhere and everywhere. The same bodes true for government-imposed obligations to carry weapons for a particular purpose. To insist otherwise—that is claim such government sponsored carriage was

95. For a useful history on how justices of the peace enforced the law up through 1640, *see* STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND (2000). For a useful history of the surety process used by justices of the peace, *see* David Feldman, *The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers*, 47 CAMBRIDGE L.J. 101 (1988). For a useful history of how the peace was enforced in the context of armed carriage restrictions, *see* Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688–1868*, 93 L. & CONTEMP. PROBS. 73 (2020).

96. *See, e.g.*, 1 HAWKINS, *supra* note 76, at 136, ch. 63, §8; 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223 (1769); SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 161–62 (1644); Seymane's Case, 5 Co. Rep. 91 (1604).

97. *See, e.g.*, JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 203 (1774); GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 177 (1736).

98. *See, e.g.*, 1 HAWKINS, *supra* note 76, at 136, ch. 63, § 8, 158, ch. 65, § 10; COKE, *supra* note 96, at 161.

99. *See, e.g.*, 1 HAWKINS, *supra* note 76, at 135–36, ch. 63, §§ 5, 8; JOSEPH KEBLE, AN ASSISTANT TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 410, 646 (2d ed., 1689); MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 129 (1618).

100. *See, e.g.*, 4 BLACKSTONE, *supra* note 96, at 291; 1 HAWKINS, *supra* note 76, at 136, ch. 63, § 10; DALTON, *supra* note 99, at 30.

an exercise of some common law right to carry dangerous weapons anywhere and everywhere—is to turn the history of law on its head.[101]

Historically speaking, it would be rather odd for English legal commentators, such as William Hawkins, Michael Dalton,[102] and William Lambarde,[103] to write about an exception to the Statute of Northampton for persons who "arm themselves upon a Cry made for Arms to keep the Peace"[104] if there was already a common law right to 'peaceably carry' dangerous weapons. It would essentially make the Statute of Northampton exception for the armed assemblage of the militia and hue & cry, as well as all other Statute of Northampton exceptions regarding public armed carriage, legally superfluous. Furthermore, to historically accept the 'peaceable carry' Second Amendment would also mean having to historically accept that "the people" could at any time supersede any laws restricting armed carriage, as well as any laws relating to riots, tumults, and illegal assemblies, by simply declaring themselves acting in the capacity of the unorganized militia.[105]

And it's not just claims about the hue & cry and military arms bearing where the new and improved 'peaceable carry' Second Amendment goes historically awry. It applies to entire narrative regarding the evolution of the law and armed carriage.[106] Take for instance the latest and alleged "best"[107] book length study on the Second Amendment outside the home. Written by Stephen P. Halbrook, who for four decades has tried historically selling the 'peaceable carry' interpretation of the Second Amendment, [108] the book length study is a tour de force of historical propaganda, in which every aspect of the law and

101. This author has illustrated both the historical and legal fallacy of conflating compulsory arms bearing laws with a right to carry many times. *See, e.g.*, CHARLES, ARMED IN AMERICA, *supra* note 2, at 112–13; Charles, *Historiographical Crisis*, *supra* note 45, at 1837–42.

102. DALTON, *supra* note 99, at 30 (noting the following exception to the Statute of Northampton: "Sheriffes and their officers, in executing the Kings processe; and all others in pursuing Hue and Crie, where any felony, or other like offences be done, may lawfully beare Armour and Weapons").

103. WILLIAM LAMBARDE, THE DUTY AND OFFICE OF HIGH-CONSTABLES 45–46 (NOTING THE FOLLOWING EXCEPTION TO THE STATUTE OF NORTHAMPTON: "Sheriffs and their officers, and other the Kings ministers, and such as be in their companies assisting them in their office, and all others pursuing Hue and Cry where any Felony or other offences against the peace be committed, may lawefully bear Armour or Weapons").

104. 1 HAWKINS, *supra* note 76, at 135–36, ch. 63, § 10. *See also* Sir Richard Bolton, A JUSTICE OF PEACE FOR IRELAND OF TWO BOOKES 22 (1638) (noting the following exception to the Statute of Northampton: "Sheriffes and their officers, and other Kings Ministers, and such as bee in their company assisting them, in executing the Kings processe, or otherwise in executing of their office, and all others in pursuing Huy and Cry where any Treason, Felony, or other like offences against the peace, be done, may lawfully beare armour or weapons").

105. *See generally* Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. L.J. & PUB. POL'Y 324 (2011) (rebutting several ahistorical militia-centric Second Amendment claims).

106. *See generally* HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5; Kopel & Moscary, *Errors of Omission*, *supra* note 5; Malcolm, *Right to Carry*, *supra* note 5.

107. David Kopel, *"The Right to Bear Arms" By Stephen Halbrook: Book Review*, REASON (May 1, 2021), https://reason.com/volokh/2021/05/01/the-right-to-bear-arms-by-stephen-halbrook-book-review/ [https://perma.cc/WY7H-XQEQ].

108. Halbrook is the last of the early 1980s writers to propagate the 'peaceable carry' Second Amendment. *See* HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 58, at 49–51. In crafting this narrative, Halbrook consulted other 'peaceable carry' writers, such as David I. Caplan, Richard E. Gardiner, and Robert Dowlut—all of whom were NRA lawyers. *Id.* at xii.

armed carriage for nearly seven centuries is cast in gun rights-friendly terms. No matter the historical time, location, or event, Halbrook assures the reader that the right to peaceably carry dangerous weapons was constant and unwavering.[109] Allegedly, it was not until the very late nineteenth to early twentieth century, through a combination of vile, racist firearms laws, rampant xenophobia, and the nefarious intentions of corrupt government officials hell-bent on disarming their political enemies that the right to peaceably carry firearms was usurped.[110] This is patently untrue given that the bulk of historical evidence informs otherwise.[111]

However, if one is not well versed in history and its methodologies, Halbrook repeating every couple of pages that the Second Amendment was generally understood to protect the right to peaceably carry firearms—no matter the historical time, location, or event—may prove persuasive. But for experienced historians, Halbrook's illusory tactic does nothing to satisfy the required evidentiary burden of proof that is needed for each of his 'peaceable carry' Second Amendment claims.

There are several examples in Halbrook's recent work to point to. Take for instance Halbrook's narrative on the Statute of Northampton. According to Halbrook, the evidentiary record speaks with one voice that the statute did not apply to peaceable subjects "who might carry weapons to defend themselves from…criminals—but rather armed "gangs who assaulted and robbed others and created terror."[112] What irreproachable evidence did Halbrook unearth to be so certain of this limited interpretation of the Statute of Northampton? Roughly half-a-dozen sources,[113] but sources that—when pulled and read from the English archives—illustrate that the statute prohibited *both* bringing armed force in affray *and* the preparatory carrying of dangerous weapons in public places.[114]

Consider Halbrook's citation to Edward III's orders dated November 10–11, 1328 to all "sheriffs of England."[115] Halbrook cites the orders as proving that the Statute of Northampton was never intended to apply to "peaceable subjects just going about their business…"[116] Yet Edward III's orders are clear that sheriffs are to enforce "all the articles" of the statute relating to "coming" or "going armed…"[117] The orders make no mention of anything relating to peaceably carrying weapons. Another example is Edward III's orders to the mayor and bailiffs of York dated January 30, 1334, which Halbrook believes shows the limited, armed criminal prosecutorial scope of the Statute of Northampton.[118] While

109. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 287–309.

110. *Id.*

111. *See* CHARLES, ARMED IN AMERICA, *supra* note 2, at 141–93.

112. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 30.

113. *Id.* at 28–31 and accompanying notes.

114. The roughly half-a-dozen sources that Halbrook cites were pulled from this author's research, and when read in their entirety rebut any 'peaceable carry' claim. *See* Charles, *Faces*, *supra* note 68, at 12–21 and accompanying notes.

115. 1 CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1327–1330, at 420–21 (1896).

116. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 28.

117. 1 CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1327-1330, at 420-21.

118. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 28–29.

Halbrook would be correct to note that Edward's order was prompted by "several malefactors and disturbers of the peace," who "go about armed and lie in wait" to "beat, wound and rob" the "king's ministers and other lieges," it does nothing to negate the fact that the Statute of Northampton prohibited both bringing force in affray of the peace and going armed in public.[119] Edward III's order states as much: "[I]n the Statute of Northampton…it was ordained that on one except a minister of the king should use armed force *or* go armed in fairs, markets, etc. under pain of loss of his arms and imprisonment during pleasure…"[120]

Needless to say, to Halbrook the enforcement history of the Statute of Northampton indeed matters, but only so long as it is parsed, redefined, and presented in a manner that affords broad carry rights. All anyone needs to do to rebut Halbrook's or any of the other 'peaceable carry' writers limited construction of the Statute of Northampton is go to the historical sources themselves.[121] To read the historical sources as supporting anything other than that the Statute of Northampton prohibited both bringing armed force in affray and the act of going armed in public places is to render the text contained within meaningless.[122]

Ultimately, what Halbrook and the other 'peaceable carry' writers fail to recognize is that the Statute of Northampton implemented several legal reforms in England—reforms that had far reaching effects for centuries.[123] And it pertained to specifically to English criminal law, the Statute of Northampton did not codify just one crime or misdemeanor, but several. The Statute of Northampton's text pertaining to armed carriage underscores this fact, yet it is continuously glossed over by Halbrook and other 'peaceable carry' writers.[124] Just as any historian or legal scholar would be remiss to discuss the First Amendment right to free speech and discard the rights of religion, press, and assembly as not applicable, the same is true of the Statute of Northampton.

Halbrook's ahistorical take on the Statute of Northampton in England is nothing compared to the parade of errors on the evolution of the law and armed carriage in the nineteenth century.[125] Perhaps Halbrook's most fatal error is his unwillingness to accept that Americans maintained a multitude of views on the law and armed carriage in public places.[126] During the Antebellum Era, this was

119. 3 CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1333–1337, at 294.

120. *Id.* at 306 (emphasis added).

121. For a broader list and use of the sources, *see* Charles, *Faces*, *supra* note 68, at 12–21 and accompanying notes.

122. *See id.*

123. *See, e.g.*, Bertha Haven Putnam, *The Transformation of the Keepers of the Peace into the Justices of the Peace*, 12 TRANSACTIONS ROYAL HIST. SOC'Y 19 (1929).

124. 2 Edw. 3, c. 3 (1328) (Eng.) (stipulating that no one shall bring "force in affray of peace, nor to go nor ride armed by day or night, in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere") (emphasis added).

125. According to Halbrook, from the Early Republic through the Civil War, except for a "minority of states restrict[ing] the carrying of concealed weapons," HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 246, and Southern state restrictions on blacks, free and slave, from owning and using firearms, "[g]oing armed was no offense unless done so in a manner to terrorize others," *id.* at 263. *See also id.* at 204–16, 247–62.

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

reflected in the Southern and Northern divide over armed carriage. While Southern jurisdictions often outright prohibited the concealed carrying of dangerous weapons, Northern jurisdictions adopted the Massachusetts Model, which in accord with the tenets of the Statute of Northampton and the longstanding common law surety process, prohibited the carrying of dangerous weapons in public places unless it was absolutely necessary.[127] And despite Halbrook's best effort at lawyering history, the Massachusetts Model was *not* a right to peaceable carry law.[128] Much like *Rex v. Knight*, this atextual interpretation of the Massachusetts Model has yet to produce a single piece of historical evidence that supports it.[129] While Halbrook and other 'peaceable carry' writers would be correct in noting there is not much enforcement data on the Massachusetts Model (which is true of all armed carriage laws up through the nineteenth century), those records that are available inform that the law's principal purpose was to prevent the habitual carrying of dangerous weapons in public, not protect the peaceable carrying of firearms anywhere and everywhere.[130]

The restricting of the habitual carrying of weapons interpretation of the Massachusetts Model is buttressed by the fact that the first armed carriage discretionary licensing laws were derived from it.[131] Rather than individuals deciding and courts adjudicating when it was 'reasonable' for individuals to publicly 'go armed', in a quasi-return to the English surety process, discretionary licensing laws required that the determination first be made by government officials. These discretionary licensing laws were not antecedents of slavery as Halbrook suggests,[132] nor were discretionary licensing laws rarely adopted.[133] Rather, discretionary licensing laws were seen as properly balancing the needs of individuals that needed to carry weapons with that of public safety, and they spread rapidly in jurisdictions across the United States from the mid-to-late nineteenth century through the early twentieth century.[134] Thus, by the time the state of New York passed its discretionary licensing law in 1911, the laws were already well established. This fact is swept under the historical rug by Halbrook.[135]

127. Cornell, *History, Text, Tradition*, *supra* note 95, at 88–94.

128. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 223–40. In pleading his historical case, Halbrook relies exclusively on case law unrelated to the actual enforcement of the Massachusetts Model. This is not what historians would refer to as being the best evidence. Rather, it is the lawyering of history to achieve a desired legal outcome.

129. *See* Charles, *Faces, Take Three*, *supra* note 47, at 240–41.

130. CHARLES, ARMED IN AMERICA, *supra* note 2, at 142–45.

131. *Id*. at 157–61.

132. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 256–63, 297–301. For decades, writers like Halbrook have attempted to lump all firearms restrictions as being an antecedent of slavery. *See, e.g.*, Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995). Not true. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55 (2017). It is a historical narrative that is intentionally misleading. *See* CHARLES, ARMED IN AMERICA, *supra* note 2, at 287–89.

133. HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 287, 301–09.

134. CHARLES, ARMED IN AMERICA, *supra* note 2, at 157–62, 172–73, 184–87.

135. *Compare* HALBROOK, RIGHT TO BEAR ARMS, *supra* note 5, at 301–09, *with* CHARLES, ARMED IN AMERICA, *supra* note 2, at 174–79, 314.

At the time New York adopted its discretionary licensing law, did every American support discretionary licensing laws? No, of course not. Such a conclusion would be ridiculous.[136] Discretionary licensing laws were, however, widely accepted.[137] So much so, in fact that the laws were lobbied for and accepted by the first gun rights movement.[138] The NRA followed suit once it commandeered the gun rights movement.[139]

These historical facts are noticeably absent from Halbrook's most recent scholarly study. Why? The answer is not difficult to surmise.

CONCLUSION

The invention of the 'peaceable carry' Second Amendment is just that—an invention. It was invented in the mid-1970s to advance broad, individual Second Amendment rights with little, if any, evidence to support it. Despite its demise under the weight of overwhelming historical evidence, a few writers have attempted to reassert it. In doing so, however, the writers continue to break the bands of historical elasticity. That history—that is real history—shows the 'peaceable carry' Second Amendment to be based substantially more on historical fiction than historical fact is not to say that some Americans or even local jurisdictions, depending on the period, did not believe in the idea of a 'peaceable carry' in public places. They most assuredly did, but they were in insular minority, and, as attested by actions and statements of the NRA and other gun rights advocates, even more so throughout much of the twentieth century.

136. *Id.* at 166–72.
137. *See infra* note 135.
138. Charles, *Faces, Take Two*, *supra* note 46, at 439–40.
139. *Id.* at 446–66.