

CREDENTIALS ARE NO SUBSTITUTE FOR ACCURACY:
NATHAN KOZUSKANICH, STEPHEN HALBROOK, AND
THE ROLE OF THE HISTORIAN

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The Emperor's New Clothes, 2010 version:

But he hasn't got anything on," a little child said.

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"Oh you foolish imp," replied a Ph.D. in Fashion Studies, whose university institute was funded by the clothing prohibition lobby. "You are very simplistic in your attempts to impose modern views of 'naked/not naked' on such complicated subjects. You are probably a lawyer, who cannot possibly understand these things with the sophistication of a Fashion Design Professor. Your aggressive statement that the Emperor 'hasn't got anything on,' is just law office history, and not very good history at that."¹

Nathan Kozuskanich follows in the footsteps of his mentor, Saul Cornell, by relying on credentials to defend factually inaccurate claims about the history of the right to arms and the scholars who specialize in the area.² In part I of this article, we address the key factual issues in Kozuskanich's article, *History or Ideology? A Response to David B. Kopel and Clayton E. Cramer*.³ In part II, we address Kozuskanich's assertion that only people such as himself are qualified to write legal history.

I. KOZUSKANICH'S MISSING EVIDENCE

In a pair of 2008 law review articles, Nathan Kozuskanich announced that his rendition of the right to bear arms in early Pennsylvania proved that the "Standard Model" of the Second Amendment, as explicated by Judge Silberman in *Parker v. District of Columbia*,⁴ is indisputably wrong.⁵ In *The Keystone of*

¹ See generally HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (Houghton Mifflin, Co. 1949) (1837). This is the authors' modified version of *The Emperor's New Clothes*, as applied to the context of this article. See *id.*

² See Nathan Kozuskanich, *History or Ideology? A Response to David B. Kopel and Clayton E. Cramer*, 19 WIDENER L.J. 321 (2010) [hereinafter *History or Ideology*] (responding to David B. Kopel & Clayton E. Cramer, *The Keystone of the Second Amendment: Quakers, the Pennsylvania Constitution, and the Flawed Scholarship of Nathan Kozuskanich*, 19 WIDENER L.J. 277 (2010) [hereinafter *Keystone*]).

³ *Id.*

⁴ *Parker v. District of Columbia*, 478 F.3d 370, 386-88 (D.C. Cir. 2007) (discussing *United States v. Miller*, 307 U.S. 174, 178-79 (1939)).

the Second Amendment: The Quakers, the Pennsylvania Constitution, and the Flawed Scholarship of Nathan Kozuskanich, we examined Kozuskanich's articles and identified several key errors.⁶

A. The Context of the Pennsylvania Constitution of 1776

Kozuskanich's first major error is his claim about the purportedly 'certain' meaning of the right to arms clause in Pennsylvania Constitution of 1776,⁷ which states "[t]hat the people have a right to bear arms for the defence of themselves and the state."⁸

According to Kozuskanich: "The Pennsylvania assertion of a right to bear arms was an affirmation of a distinctly eighteenth-century civic conception of rights. Defense was for the community, the citizens as a whole, and the responsibility for ensuring community security lay on all of its members."⁹ He writes that Pennsylvania's interpretation was consistent with a broad understanding in the rest of the colonies that discussed the arms right in "a language that focused on collective and not individual defense."¹⁰ Thus Kozuskanich argues that "[w]hen colonists discussed defending themselves they did so in a collective military context"¹¹ and, therefore, "the focus of the public debate centered

⁵ Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041, 1041 (2007) [hereinafter *Defending Themselves*] (quoting Parker, 478 F.3d at 373) (discussing U.S. CONST. amend. II) ("Chalk up a victory for the Standard Model and a defeat for history."); Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413, 415 (2008) [hereinafter *Originalism*] (quoting Parker, 478 F.3d at 384) (discussing U.S. CONST. amend II) (arguing that Judge Silberman's interpretation was "demonstrably false").

⁶ See *Keystone*, *supra* note 2 (discussing *Defending Themselves*, *supra* note 5; *Originalism*, *supra* note 5).

⁷ *Defending Themselves*, *supra* note 5, at 1064-66 (discussing PA. CONST. of 1776, art. XIII).

⁸ PA. CONST. of 1776, art. XIII.

⁹ *Defending Themselves*, *supra* note 5, at 1065-66 (discussing PA. CONST. of 1776, art. XIII).

¹⁰ *Id.* at 1066 (discussing PA. CONST. of 1776, art. XIII).

¹¹ *Id.* at 1067 (discussing PA. CONST. of 1776, art. XIII).

on the right of the collective people to defend themselves."¹² In sum, Kozuskanich asserts: "The language of the Pennsylvania Constitution fits neither the modern individual rights nor the collective rights models that have dominated modern Second Amendment scholarship. In every sense, the 1776 Pennsylvania Declaration of Rights affirmed the right to bear arms as part of civic duty to the community."¹³

We pointed out that Kozuskanich's interpretation of the right to arms clause as merely affirming a "civic duty" is inconsistent with three other clauses of the Pennsylvania Constitution of 1776.¹⁴ Three other times, the Pennsylvania Constitution of 1776 states "[t]hat the people have a right."¹⁵ These clauses guarantee freedom of speech,¹⁶ freedom from warrantless searches,¹⁷ and freedom to assemble and petition.¹⁸ In every case, these rights plainly protect what we, in the twenty-first century, recognize as standard individual rights that are enjoyed by all citizens.¹⁹ These rights are not limited to a select group of individuals, nor are these rights limited to being exercised solely in service of the government.²⁰

Kozuskanich evades these clauses, even in his reply article.²¹ He does write, "I think (and I believe most historians would agree) that one can never have enough context."²² We agree. When a legal

¹² *Defending Themselves*, *supra* note 5, at 1068 (discussing PA. CONST. of 1776, art. XIII).

¹³ *Id.* at 1069 (discussing PA. CONST. of 1776, art. XIII).

¹⁴ *Keystone*, *supra* note 2, at 293-94 (discussing PA. CONST. of 1776, arts. X, XII, XIII, XVI).

¹⁵ *Id.* (quoting PA. CONST. of 1776, arts. X, XII, XVI).

¹⁶ PA. CONST. of 1776, art. XII.

¹⁷ *Id.* art. X.

¹⁸ *Id.* art. XVI.

¹⁹ See *Keystone*, *supra* note 2, at 293-94 (quoting PA. CONST. of 1776, arts. X, XII, XIII, XVI).

²⁰ *Id.* (interpreting PA. CONST. of 1776, arts. VIII, X, XII, XIII, XVI).

²¹ See *Defending Themselves*, *supra* note 5; *History or Ideology*, *supra* note 2; *Originalism*, *supra* note 5.

²² *History or Ideology*, *supra* note 2, at 325. According to Kozuskanich, "legal originalists like Randy Barnett argue that 'too much attention to context' should be avoided." *Id.* (quoting Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 576 (2006)). In the

or historical scholar is trying to interpret the meaning of a phrase in a document, the repeated use of *that very same phrase* elsewhere in the document is an extremely important, indispensable source of 'context.' When an author is writing about the meaning of a phrase in article XIII of the Pennsylvania Constitution of 1776, then the author should also address the context of *the exact same phrase* used in articles X, XII, and XVI.²³ In three articles of the Pennsylvania Constitution of 1776, "[t]hat the people have a right" means that all people have a right.²⁴ Therefore, Kozuskanich's

text of his article, Kozuskanich attributes this purported quote to Barnett. *Id.* (quoting Cornell, *supra*, at 576). Despite Kozuskanich's use of quotation marks, Barnett did not write the words that Kozuskanich attributes to him. *See id.* (quoting Cornell, *supra*, at 576). Kozuskanich's use of the nonexistent Barnett quote appears to be copied from an article written by his mentor, Saul Cornell, which also uses the nonexistent Barnett quote. *See id.* (quoting Cornell, *supra*, at 576). Barnett's article does make the point that context of a term used during the drafting and ratification of a constitutional provision should be the guide for originalist interpretation, rather than looking to the general definition of the term. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 107 (2001).

²³ *Keystone*, *supra* note 2, at 293-94 (quoting PA. CONST. of 1776, arts. X, XII, XIII, XVI). Unlike Kozuskanich, we addressed all parts of the Pennsylvania Constitution of 1776 that used phrases identical to those in the right to arms provision. *Id.* (quoting PA. CONST. of 1776, arts. X, XII, XIII, XVI). For example, we pointed out that "bear arms" appears in the right to arms article and appears separately in article VIII, which articulates various duties of citizens, including service in the militia. *Id.* at 294-95 (quoting PA. CONST. of 1776, art. VIII) (discussing PA. CONST. of 1776, art XIII).

In Kozuskanich's reply article, he also writes, "[d]espite the obvious military construction of 'bear arms' in article VI, section 2, they still maintain that the right to bear arms in article IX, section 21, of the same document pertained to an individual right to self defense outside of the militia." *History or Ideology*, *supra* note 2, at 337 (citing *Keystone*, *supra* note 2, at 282-83) (discussing PA. CONST. of 1790, arts. VI, § 2, IX, § 21). As our *Keystone* article made clear, we believe that the historical evidence shows that "bear" means to 'wear' or 'carry.' *See Keystone*, *supra* note 2. Thus a person can "bear arms" in militia service and can also "bear arms" for personal defense. *See id.* To illustrate, one part of a constitution might affirm a duty of militiamen to 'wear hats when serving in the militia,' while another part of a constitution might guarantee the right of all the people to 'wear hats' generally. The latter guarantee is not limited to militiamen wearing militia hats.

²⁴ *Keystone*, *supra* note 2, at 293-94 (quoting PA. CONST. of 1776, arts. X, XII, XVI).

assertion that, in article XIII, the phrase "[t]hat the people have a right" means 'only militiamen have a right' is implausible.²⁵

However, both our and Kozuskanich's analyses overlooked another important Pennsylvania clause. In our *Keystone* article, we discussed every use of the clause "[t]hat the people have a right" in the Pennsylvania Constitution of 1776, but we missed something else.²⁶ Article III of the Pennsylvania Constitution of 1776 states, "[t]hat the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."²⁷ Here, the phrase "[t]hat the people" is used to express a fundamental principle of government—the right to govern and regulate the internal police is obviously a collective right, not an individual right.²⁸

Kozuskanich rejects the idea that the article XIII arms right is a collective right.²⁹ So the collective right of article III is not direct support for his interpretation of article XIII as a narrow, militia-only individual right. But article III does show that the Pennsylvania Framers could use somewhat similar language to express a broad individual right in one article (e.g., religion) and a collective right in another article (e.g., police governance).³⁰ Therefore, a full examination of the Pennsylvania Constitution's text does not, in itself, conclusively prove that Kozuskanich's reading of article XIII is incorrect.

B. Quaker Sources and the Meanings of "Bear"

Second, we pointed out that Kozuskanich grossly misreported his Quaker and other pacifist sources.³¹ Kozuskanich wrote,

²⁵ See *Defending Themselves*, *supra* note 5, at 1064 (quoting PA. CONST. of 1776, arts. VIII, XIII).

²⁶ See *Keystone*, *supra* note 2, at 293-94 (discussing PA. CONST. of 1776, arts. X, XII, XIII, XVI).

²⁷ PA. CONST. of 1776, art. III. We would like to thank Saul Cornell for pointing this out.

²⁸ See *id.*

²⁹ *History or Ideology*, *supra* note 2, at 327 (citing *Defending Themselves*, *supra* note 5, at 1044-45) (discussing PA. CONST. of 1776, art. XIII).

³⁰ See PA. CONST. of 1776, arts. III, X, XII, XVI.

³¹ *Keystone*, *supra* note 2, at 304-11 (discussing *Originalism*, *supra* note 5, at 421 & n.39).

"while pacifists had no issue with owning or carrying arms, they would not bear those arms in the militia."³² To support this claim, he supplied an impressively long string cite of historical sources.³³

When we investigated the string cite, we found that several sources had nothing to do with Kozuskanich's claim.³⁴ For example, one source quoted French-American immigrants who did not want to fight against the French Army because that Army was composed of their former countrymen, potential relatives, and friends.³⁵ The French-American immigrants were not pacifists.³⁶ Another source was an oath in which Englishmen were required to swear to disregard the Pope's orders to overthrow the King of England.³⁷ The oath was not evidence of pacifist opposition to military service, nor did the oath in any way support Kozuskanich's claim that pacifists had no objection to "owning or carrying arms."³⁸

As for the rest of the cited sources, each contained quotes from or about Quakers who objected to bearing arms in militia service.³⁹ All of the quoted Quakers either explicitly opposed *all*

³² *Originalism*, *supra* note 5, at 421 (citations omitted).

³³ *Id.* at 421 n.39 (citations omitted).

³⁴ *Keystone*, *supra* note 2, at 307-09, 310-11 (discussing *Originalism*, *supra* note 5, at 421-22 n.39); WILLIAM SEWEL, THE HISTORY OF THE RISE, INCREASE AND PROGRESS, OF THE CHRISTIAN PEOPLE CALLED QUAKERS: WITH SEVERAL REMARKABLE OCCURRENCES INTERMIXED 423, 526, 677, 706 (3d ed. corrected, Burlington, N.J., Isaac Collins 1774); 4 VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF PENNSYLVANIA 537 (Philadelphia, Henry Miller 1774) [hereinafter VOTES]; *An Earnest Address, in AN EARNEST ADDRESS TO SUCH OF THE PEOPLE CALLED QUAKERS AS ARE SINCERELY DESIROUS OF SUPPORTING AND MAINTAINING THE CHRISTIAN TESTIMONY OF THEIR ANCESTORS* iii-20 (Philadelphia, John Douglas McDougal 1775).

³⁵ *Keystone*, *supra* note 2, at 309, 311 (citing *Originalism*, *supra* note 5, at 421-22 n.39; 4 VOTES, *supra* note 34, at 537).

³⁶ See *id.* (citing 4 VOTES, *supra* note 34, at 537).

³⁷ *Id.* at 307, 311 (citing SEWEL, *supra* note 34, at 423) (discussing *Originalism*, *supra* note 5, at 421 n.39).

³⁸ *Id.* at 308 (citing, in relevant part, SEWEL, *supra* note 34, at 423, 526, 677, 706); see also *Originalism*, *supra* note 5, at 421 n.39 (citing SEWEL, *supra* note 34, at 423, 526, 677, 706).

³⁹ *Keystone*, *supra* note 2, at 304-07, 309, 311 (discussing *Originalism*, *supra* note 5, at 421-22 n.39; ROBERT BARCLAY, A CATECHISM AND

interpersonal violence or objected to militia service, but none of the sources specifically discussed other types of possession or use of arms or violence.⁴⁰

None of the sources in Kozuskanich's string cite support his assertion that the Quakers "had no issue with owning or carrying arms."⁴¹ As we pointed out in our *Keystone* article, Quaker views on arms were much more diverse than Kozuskanich acknowledged.⁴² Some Quakers were willing to serve in the militia, but other Quakers abhorred all arms.⁴³ Still others objected to defensive gun use of any sort (whether collective or personal), but enjoyed hunting.⁴⁴

At best, Kozuskanich's string cite indicates sloppy work, referencing some sources that have nothing to do with pacifist concerns and others that, in spite of their relevance, did not support his claim that Quakers had "no issue" with owning guns for nonmilitia purposes.⁴⁵ Everybody, including excellent historians, can make mistakes, but when someone points out those mistakes, perhaps the best response is not to claim superior abilities as a historian.⁴⁶

CONFESSON OF FAITH 16 (10th ed., Philadelphia, Joseph Crukshank 1773)); COLLECTION OF SOME WRITINGS OF THE MOST NOTED OF THE PEOPLE CALLED QUAKERS, IN THEIR TIMES 9-13 (Philadelphia, W. & T. Bradford 1767) [hereinafter COLLECTION]; 4 VOTES, *supra* note 34, at 355, 493, 649; JOHN WOOLMAN, *A Journal of the Life and Travels of John Woolman, in the Service of the Gospel, in THE WORKS OF JOHN WOOLMAN*. IN TWO PARTS 86-89 (Philadelphia, Joseph Crukshank 1774).

⁴⁰ *Keystone*, *supra* note 2, at 304-07, 309, 311 (discussing *Originalism*, *supra* note 5, at 421-22 n.39; BARCLAY, *supra* note 39, at 16); COLLECTION, *supra* note 39, at 9-13; 4 VOTES, *supra* note 34, at 355, 493, 649; WOOLMAN, *supra* note 39, at 86-89.

⁴¹ See *Keystone*, *supra* note 2, at 304-11 (citations omitted) (quoting *Originalism*, *supra* note 5, at 421) (discussing *Originalism*, *supra* note 5, at 421-22 n.39).

⁴² *Id.* (citations omitted).

⁴³ *Id.* at 311-13 (citations omitted).

⁴⁴ *Id.* at 312-13 (citing, in relevant part, *Originalism*, *supra* note 5, at 420-21; ELIAS HICKS, *JOURNAL OF THE LIFE AND RELIGIOUS LABOURS OF ELIAS HICKS* 12-13 (5th ed., New York, Issac T. Hopper 1832); LOGAN PEARSALL SMITH, *UNFORGOTTEN YEARS* 75-76 (1939)).

⁴⁵ *Id.* at 307 (quoting *Originalism*, *supra* note 5, at 421 n.39).

⁴⁶ See *History or Ideology*, *supra* note 2, at 341-42.

Kozuskanich writes in his reply article, "If we follow Kopel and Cramer's reasoning, when pacifists asked for an exemption from bearing arms, they could have meant [either] an exemption from personal military service or an exemption from owning guns in general, or possibly both."⁴⁷

As Kozuskanich likes to say, context matters.⁴⁸ The Quakers repeatedly and plainly asked for an exemption from militia service.⁴⁹ They did not require the government to take any action for them to practice individual pacifism; instead, the Quakers could simply accept injury if personally attacked.⁵⁰ Only with respect to militia duty did the Quakers require the government to act, namely, to give them special exemptions from militia duty and from militia-specific taxes or fees.⁵¹ Therefore, the fact that the Quakers requested an exemption from the duty to "bear arms" in the militia does not prove that the phrase "bear arms" refers only to militia-related duties.

By analogy, the Founders were aware of the infamous case in which William Penn was sent to jail "for refusing to doff his hat" to an English judge.⁵² Out of deference to Quaker rights of

⁴⁷ *History or Ideology*, *supra* note 2, at 334 (citing *Keystone*, *supra* note 2, at 311-13).

⁴⁸ See *id.* at 325.

⁴⁹ THOMAS F. GORDON, THE HISTORY OF PENNSYLVANIA, FROM ITS DISCOVERY BY EUROPEANS TO THE DECLARATION OF INDEPENDENCE IN 1776, at 339, 509-10 (Philadelphia, Carey, Lea & Carey 1829).

⁵⁰ *Id.* at 256, 410.

⁵¹ *Id.* at 316, 339, 509-10.

⁵² Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1472 (1990) (citing IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 55-67 (1965)).

One of the most notorious courtroom cases of religious intolerance in England involved William Penn's refusal to remove his hat when he appeared in court to face an indictment for speaking to an unlawful assembly. Penn came to court bareheaded, but knowing his religious scruple, the judge ordered a court official to place a hat on his head. Penn then refused to remove the hat in respect to the court. Although acquitted on the charge on which he was tried, Penn was held in contempt and imprisoned for refusing to doff his hat.

Id. at 1472 (citing BRANT, *supra*, at 56-61). For the original account of the Penn trial, see THE TRIAL OF WILLIAM PENN AND WILLIAM MEAD, AT THE OLD BAILEY, FOR A TUMULTUOUS ASSEMBLY, 22 CHARLES II (1670), reprinted in 6 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH

conscience, North Carolina and Maryland granted Quakers an exemption from the rule that hats must be removed in court.⁵³ The North Carolina statute, for example, made it "lawful for . . . Quakers to wear their hats . . . within the several courts."⁵⁴ When, in the context of a larger discussion of courtroom rules about hats, one reads phrases such as 'pull off his hat' or 'wear their hats,' it would be a mistake to conclude that the phrases are terms of art that pertain only to courtrooms. Only in a courtroom context did Quakers need to ask for an exemption from legal rules about hats. Only in a militia context did Quakers need to ask for an exemption from legal rules about guns. The fact that particular words were used to discuss the exemptions does not prove that the particular words pertain only to courtrooms or militias.

Kozuskanich chides us because we supposedly did not do any "actual research."⁵⁵ To the contrary; we researched the Pennsylvania Constitution and found that Kozuskanich had failed

TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 951, 951-56 (T.B. Howell ed., London, T.C. Hansard 1816).

⁵³ McConnell, *supra* note 52, at 1471-72 (citations omitted).

⁵⁴ Act of Apr. 19, 1784, ch. XXIX, 24 THE STATE RECORDS OF NORTH CAROLINA 593, 594 (Walter Clark ed., 1905) ("That from and after the passing of this Act, it shall be lawful for the people called Quakers to wear their hats as well within the several courts of judicature in this State as elsewhere, unless otherwise ordered by the court."). We shudder to think how a historian working for Hat Control, Inc., would interpret this statute.

⁵⁵ *History or Ideology*, *supra* note 2, at 340. He also claims that "[t]he article is, more or less, cut and pasted from Cramer and Kopel's blogs." *Id.* at 326 n.26. This is true, in a hypertechnical sense, if "more or less" means "less." Our *Keystone* article is over 13,000 words. See *Keystone*, *supra* note 2. Cramer wrote two blog posts about the Kozuskanich articles, and the two posts combined totaled over 4,000 words. See Clayton Cramer's Blog, http://www.claytoncramer.com/weblog/2008_03_02_archive.html (Mar. 8, 2008, 13:19 EST) [hereinafter Posting on Mar. 8]; Clayton Cramer's Blog, http://www.claytoncramer.com/weblog/2008_03_02_archive.html (Mar. 7, 2008, 21:10 EST) [hereinafter Posting on Mar. 7]. Kopel wrote a 717-word post summarizing Cramer's analysis. See Posting of David Kopel to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_03_09-2008_03_15.shtml#1205097507 (Mar. 9, 2008, 17:18 EST). Our *Keystone* article does incorporate many of the points that Cramer initially raised, but those points are largely rewritten. See Posting on Mar. 8, *supra*; Posting on Mar. 7, *supra*. 'Cut and paste' is, therefore, not accurate.

to mention the constitutional provisions that contradicted his militia-only interpretation.⁵⁶ The purpose of our article was not to provide additional research about Pennsylvanians' use of the Standard Model—a topic that has been well covered by scholars such as Stephen Halbrook.⁵⁷ Rather, we were investigating whether Kozuskanich's anti-Standard Model theory was supported by persuasive evidence.⁵⁸

Kozuskanich further chides us because we did not "sift through the hundreds of documents [he] consulted for [his] *University of Pennsylvania Journal of Constitutional Law* article to show that over ninety percent of American newspapers, pamphlets, broadsides, and congressional proceedings used the phrase 'bear arms' to connote military action and never once linked the phrase to a self-defensive action."⁵⁹

Nobody disputes that 'bear arms' was often used in a military sense, and especially so during the political crisis that led to an eight-year war. A few years after the war, there was an intense debate about whether the federal government should have power over the state militias.⁶⁰ Under such conditions, it is no surprise that there would be many military uses of the phrase "bear arms."

However, as Kozuskanich explained in a footnote in his *University of Pennsylvania Journal of Constitutional Law* article, he *only* reported results for the exact phrase " 'bear arms.' "⁶¹ As a result, he overlooked a text written by the author of the *Second Amendment*, which decisively shows that James Madison

⁵⁶ *Keystone*, *supra* note 2, at 292-94 (quoting PA. CONST. of 1776, arts. VIII, X, XII, XIII, XVI) (discussing, generally, *Defending Themselves*, *supra* note 5; *Originalism*, *supra* note 5).

⁵⁷ See 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, 258-79 (1985) [hereinafter *Right to Bear Arms*]; see also STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS (2008) [hereinafter *SECOND AMENDMENT*].

⁵⁸ See *Keystone*, *supra* note 2 (discussing *Originalism*, *supra* note 5; *Defending Themselves*, *supra* note 5).

⁵⁹ *History or Ideology*, *supra* note 2, at 340-41 (citing *Originalism*, *supra* note 5, at 416).

⁶⁰ See *Originalism*, *supra* note 5 (detailing military usages of the phrase "bear arms").

⁶¹ *Id.* at 416 n.11.

considered that to "bear" a weapon was not necessarily a military term.⁶² As a Virginia legislator in 1785, James Madison introduced a bill to restrict people with prior convictions for illegal hunting from carrying firearms:

[I]f, within twelve months after the date of the recognizance he shall *bear* a gun out of his inclosed ground, unless whilst performing military duty, it shall be deemed a breach of the recognizance, and be good cause to bind him anew, and every such bearing of a gun shall be a breach of the new recognizance.⁶³

Furthermore, Kozuskanich fails to consider that English statutes from 1534 to 1748 used "bear" or "bearing" or "bear arms" to plainly refer to nonmilitia carrying of arms.⁶⁴ Significantly, law

⁶² James Madison, *A Bill for Preservation of Deer*, in 2 THE PAPERS OF THOMAS JEFFERSON 443 (Julian P. Boyd ed., 1950).

⁶³ *Id.* (emphasis added).

⁶⁴ See, e.g., 1748, 21 Geo. 2, c. 34, §§ 1, 8-9 (Eng.), reprinted in 19 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE 20TH TO THE 23D YEAR OF KING GEORGE II, at 262, 262-65, 267 (London, Joseph Bentham 1765). The statute required Highlanders to turn in their arms, "restrain[ed] the use of the highland dress," and provided for punishment for those "*having or bearing any arms or warlike weapons.*" *Id.* § 1, at 262-63. Another statute provided

[t]hat from and after the time of affixing any such Summons as aforesaid, no Person or Persons residing within the Bounds therein mentioned, shall be sued or prosecuted for his or their having or having had, bearing or having borne Arms at any time before the several Days to be prefixed or limited by Summons as aforesaid, for the respective Persons and Districts to deliver up their Arms.

1746, 19 Geo. 2, c. 39, § 14 (Eng.), reprinted in 10 THE STATUTES AT LARGE, OF ENGLAND AND OF GREAT-BRITAIN: FROM MAGNA CHARTA TO THE UNION OF THE KINGDOMS OF GREAT BRITAIN AND IRELAND 263, 270 (John Raithby ed., London, George Eyre & Andrew Strahan 1811). For a similar statute, see 1724, 11 Geo., c. 26 (Eng.), reprinted in 15 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE NINTH YEAR OF KING GEORGE I TO THE SECOND YEAR OF KING GEORGE II, at 246, 246-47 (London, Joseph Bentham 1765) ("An act for more effectual disarming the highlands in that part of Great Britain called Scotland; and for the better securing the peace and quiet of that part of the kingdom."). This statute made it unlawful for anyone in Scotland

to have in his, her or their custody, use or bear, broad sword or target, poynard, whingar or durk, side-pistol or side-pistols, or gun, or any other warlike weapons, in the fields, or in the way coming or going to, from or at any church, market, fair, burials, hunttings, meetings or any occasion

books published in the United States used "bear arms" or "bearing weapons" to describe the carrying of arms by ordinary persons.⁶⁵

whatsoever, within the bounds aforesaid, or to come into the low counties armed as aforesaid: and in case any of the said person or persons above described should have in his custody, use or bear arms, otherwise than in the said act was directed.

Id.

Another statute declared:

W[hereas] the custom that has two [sic] long prevailed amongst the Highlanders of Scotland, of having arms in their custody, and using and bearing them in travelling abroad in the fields, and at publick meetings, has greatly obstructed the civilizing of the people within the counties herein after named; has prevented their applying themselves to husbandry, manufactoryes, trade, and other virtuous and profitable employments.

1715, 1 Geo., c. 54 (Eng.), reprinted in 13 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE TWELFTH YEAR OF QUEEN ANNE, TO THE FIFTH YEAR OF KING GEORGE I, at 306 (London, Joseph Bentham 1764).

A different statute made it unlawful for anyone in Wales to bring or bear, or cause to be brought or borne to the same sessions or court, or to any place within the distance of two miles from the same sessions or court, nor to any town, church, fair, market or other congregation . . . nor in the highways, in affray of the King's peace; or the King's liege people; any bill, long-bow, cross-bow, hand-gun, sword, staff, dagger, halbert, morespike, spear or any other manner of weapon.

1534, 26 Hen. 8, c. 6, § 4 (Eng.), reprinted in 4 DANBY PICKERING, THE STATUTES AT LARGE, FROM THE FIRST YEAR OF KING RICHARD III, TO THE THIRTY-FIRST YEAR OF KING HENRY VIII, INCLUSIVE 328, 330 (London, Joseph Bentham 1763); see also *Earl Mansfield States the Law of the Land in Cases of Riots and Insurrections*, 49 LONDON MAG. OR GENTLEMAN'S MONTHLY INTELLIGENCER 468, 468 (1780) ("Earl Bathurst stated the difference between the right of bearing arms for personal defence, and that of bodies of the subjects arraying themselves, without a commission from the king; the latter he declared to be unlawful."). For a larger collection of civilian uses of "bear arms," see Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511 (2008).

⁶⁵ See MATTHEW HALE, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, GOALERS, CORONERS, CONSTABLES, JURY-MEN, AND OVERSEERS OF THE POOR 225 (2d ed., New York, J. Parker 1749) (citation omitted) ("A Justice of the Peace may . . . bind a Man to the Peace," if the man commits an assault in the presence of the justice, for "[c]ontention in hot Words" in the presence of the justice, "[i]f one not authorized go armed offensively, or with an unusual Number of Servants . . . or Servants or Labourers bearing Weapons."); GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 132-33 (Williamsburg, Va., William Parks 1736) (citations omitted). Catholics convicted as recusants for failing to attend the Church of England were barred

Kozuskanich also missed the unquestionably civilian use of "bear arms" by James Wilson, the principal author of the Pennsylvania Constitution of 1790 and a Justice of the Supreme Court of the United States,⁶⁶ and by John Adams.⁶⁷ The use of "bear arms" in a nonmilitary context by the preeminent lawyers of the Founding Era is fatal to Kozuskanich's insistence that 'bear arms' must be military-only.⁶⁸

Like Kozuskanich, we agree that the meaning of words can change over time.⁶⁹ However, as we have just shown, English statutes from the sixteenth century and the eighteenth century as well as three of America's most eminent attorneys and Founders in the period from 1785 to 1794—James Madison, James Wilson, and John Adams—used "bear" or "bear arms" to refer to people carrying guns for personal, nonmilitia uses. To accept Kozuskanich's theory that "bear arms" in the Pennsylvania Constitution of 1776 is militia-only, one must believe that the phrase narrowed its meaning

from practicing medicine or law, could not inherit lands by devise, and could not "bear Arms, [or] keep Weapons, or Ammunition, without Allowance of the Justices, in Open Court." *Id.* (citations omitted).

Whether or not the laws described in this footnote were regularly enforced in Pennsylvania or Virginia is questionable. But the point of this article is that the legal texts show "bear arms" and "bearing weapons" in a nonmilitia context.

⁶⁶ 3 JAMES WILSON, *Lectures on Law*, in THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Philadelphia, Lorenzo Press 1804).

This law, however, is expressly recognised in the constitution of Pennsylvania. "The right of the citizens to bear arms in the defence of themselves shall not be questioned." This is one of our many renewals of the Saxon regulations. "They were bound," says Mr. Selden, "to keep arms for the preservation of the kingdom, and of their own persons.

Id. (citations omitted).

⁶⁷ 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778, at 422 (3d ed., Philadelphia, Budd & Bartram 1797). Adams described measures adopted by new magistrates in Bologna, Italy, writing that "[i]n order to purge the city of its many popular disorders, they were obliged to forbid a great number of persons, under grievous penalties, to enter the palace: nor was it permitted them to go about the city, nor to bear arms." *Id.*

⁶⁸ See 2 JOHN ADAMS, *supra* note 69, at 422; 3 WILSON, *supra* note 68, at 84.

⁶⁹ *History or Ideology*, *supra* note 2, at 325.

between 1748 and 1776 but that by 1785 the phrase was reverting back to its original, broad meaning.

Further, to believe Kozuskanich, one must believe that the drafters of the Pennsylvania Constitution of 1776 thrice used the phrase "[t]hat the people have a right" when they meant to refer to all the people, but strangely used the very same phrase when they meant to say that only militiamen had rights.⁷⁰

C. The Pennsylvania Constitution of 1790

As we detailed in our initial article, James Wilson described the Pennsylvania Constitution of 1790 as encompassing a right to arms for personal self-defense.⁷¹ We addressed Kozuskanich's unconvincing (in our view) efforts to assert that Wilson meant only a militia right.⁷² As a "fallback" argument, Kozuskanich pointed to a 1799 trial in which James Reynolds was charged with various crimes for firing a gun at some rioters who were attacking him.⁷³ Reynolds was not charged with any gun law violation.⁷⁴ The defense attorney, in his argument to the jury, did not invoke the constitutional right to arms, but did invoke the natural right of self-defense.⁷⁵

Kozuskanich, in his reply, writes:

In order to maintain their argument that the Pennsylvania Constitution protected an individual right to bear arms for self-defense, Kopel and Cramer are forced to separate the right to carry a gun from the right to actually use that gun. In their view, only the right to *use* a gun was justified under natural

⁷⁰ See *Keystone*, *supra* note 2, at 293-94 (discussing PA. CONST. of 1776, arts. X, XII, XIII, XVI).

⁷¹ *Id.* at 298-99 (discussing 3 WILSON, *supra* note 68, at 84).

⁷² *Id.* at 299-300 (discussing *Originalism*, *supra* note 5, at 443).

⁷³ *Id.* at 300-04 (discussing *Originalism*, *supra* note 5, at 445).

⁷⁴ *Id.* at 301 (citing THE TRIAL OF WILLIAM DUANE, JAMES REYNOLDS, ROBERT MOORE, AND SAMUEL CUMING FOR RIOT, PHILADELPHIA, PENNSYLVANIA (1799), reprinted in 7 AMERICAN STATE TRIALS 676, 680 (John D. Lawson ed., 1917) [hereinafter TRIAL OF WILLIAM DUANE]).

⁷⁵ *Id.* at 302 (quoting TRIAL OF WILLIAM DUANE, *supra* note 76, at 717).

law, and only the *carrying* of firearms was protected under the Pennsylvania Constitution.⁷⁶

That is a fair description. While many nineteenth and twentieth century state constitutions explicitly affirmed the natural right of self-defense, Pennsylvania's eighteenth century constitution did not.⁷⁷ The Pennsylvania Constitution of 1790 protected the right to own and carry guns for various purposes, including self-defense, but did not separately guarantee the right of self-defense *per se*.⁷⁸ This was a drafting model similar to the 1689 English Declaration of Rights, which guaranteed a right to arms for self-defense but did not formally guarantee self-defense in itself.⁷⁹

After we posted a draft version of our *Keystone* article on the internet, one writer rushed to defend Kozuskanich by quoting a statement by Pennsylvania Governor John Andrews Shulze in an 1829 message to the Pennsylvania General Assembly; the statement supposedly showed that the Pennsylvania right to arms was collective-only.⁸⁰ Governor Shulze told the general assembly that

[t]he right thus guaranteed, seems to me, to impose upon the Legislature the duty of so organizing and disciplining the whole body of the citizens, that they shall be able, not only to bear arms, but to use them with confidence and skill, "in

⁷⁶ *History or Ideology*, *supra* note 2, at 330 (citing *Keystone*, *supra* note 2, at 301-04).

⁷⁷ *Keystone*, *supra* note 2, at 288 (citing Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-205 (2006)); *see also* PA. CONST. of 1776, art. XIII.

⁷⁸ *See* PA. CONST. of 1776, arts. VIII, XIII.

⁷⁹ Compare *id.*, with Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.). "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.); *see* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 118 (1994) (explaining that the English Declaration of Rights was focused on an individual's right to keep arms for personal defense).

⁸⁰ See Posting of J. Aldridge to The Volokh Conspiracy, <http://volokh.com/2009/12/01/new-article-on-the-right-to-arms-in-early-pennsylvania/> (Dec. 1, 2009, 17:29 EST) [hereinafter Posting of J. Aldridge].

defence of themselves and the States," if such a necessity shall arise.⁸¹

It is a mistake to use the above language to invent a false dichotomy between the general individual right and the important objective of an effective militia.

The Pennsylvania Constitution of 1790 guaranteed Pennsylvanians the right to arms for the "defence of themselves and the State"⁸² or, in other words, for personal defense *and* for collective defense. Governor Shulze was reasonable in arguing that the existence of a constitutional provision that was intended, in part, to make a militia possible created an obligation on the part of the legislature to organize the militia.⁸³ As indicated by Governor Shulze's phrase "seems to me," the legislature's militia obligation was not a formal legal obligation, but an implied moral and political obligation.⁸⁴ Governor Shulze's offhand affirmation of a collective purpose of part of the right to arms is not denial of the individual element of the right to arms—particularly when the Constitution, which speaks louder than a gubernatorial conjecture, explicitly acknowledges both elements of the right.⁸⁵

Besides, if Shulze's 1829 statement is evidence of eighteenth century meaning, then so is the discussion of the militia clause during the Pennsylvania Constitutional Convention of 1837 as well.⁸⁶ At this Convention, Delegate Ingersoll traced the history of

⁸¹ John Andrew Shulze, Annual Message to the Assembly—1829, reprinted in 5 PENNSYLVANIA ARCHIVES, PAPERS OF THE GOVERNORS: 1883-1891, at 840, 849 (George Edward Reed ed. series no. 4, 1902). The Governor was slightly misquoting the Pennsylvania Constitution, whose rights to arms provision refers to "the state," not "the states."

⁸² PA. CONST. of 1790, art. IX, § 21.

⁸³ Shulze, *supra* note 83, at 849.

⁸⁴ *See id.*

⁸⁵ *See* Posting of J. Aldridge, *supra* note 82.

⁸⁶ *See* 4 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG MAY 2, 1837, at 113-14 (Harrisburg, Pa., Packer, Barrett, & Parke 1838) [hereinafter PROCEEDINGS AND DEBATES] (statement of Delegate Ingersoll); *see also* Posting of Clayton E. Cramer to The Volokh Conspiracy, <http://volokh.com/2009/12/01/new-article-on-the-right-to-arms-in-early-pennsylvania/> (Dec. 2, 2009, 00:09 EST).

the militia by discussing the militia clause of the Pennsylvania Constitution of 1776,⁸⁷ which provides:

The freemen of this commonwealth and their sons shall be trained and armed for its defence, under such regulations, restrictions and exceptions as the general assembly shall by law direct; preserving always to the people the right of choosing their colonels and all commissioned officers under that rank, in such manner, and as often as by the said laws shall be directed.⁸⁸

Ingersoll made no mention of article 13, which is the right to arms clause.⁸⁹ Later, Ingersoll drew an analogy to the Second Amendment in a way that could be quoted out of context to suggest that the right was *only* for militia purposes:

To bear arms—and the Constitution says this right to bear arms "shall not be infringed." This "well regulated militia," which is "necessary to the security of a free State," is the right of every man to bear arms, and it is a right which "shall not be infringed."⁹⁰

The context, however, shows that Ingersoll recognized that the right to "bear arms" was not limited to a collective duty or a militia-only right:

This right exceeded, was beyond the reach of the federal Constitution—it was supreme, above the supremacy of the Constitution—it was a right which the Constitution could not touch. *It was nothing less than man's right to self-defence*, that power which could not be impaired by any power of government.⁹¹

⁸⁷ 4 PROCEEDINGS AND DEBATES, *supra* note 88, at 110-14.

⁸⁸ PA. CONST. of 1776, ch. II, § 5.

⁸⁹ See 4 PROCEEDINGS AND DEBATES, *supra* note 88, at 110-14; see also PA. CONST. of 1776, art. XIII.

⁹⁰ 4 PROCEEDINGS AND DEBATES, *supra* note 88, at 114 (discussing U.S. CONST. amend. II).

⁹¹ *Id.* (discussing U.S. CONST. amend. II) (emphasis added).

In the ensuing debates, there was considerable argument about whether the universal militia still made sense, but no one disputed Ingersoll's claim about the individual nature of the right to keep and bear arms as part of "man's right to self-defence."⁹²

II. KOZUSKANICH'S CREDENTIALISM ARGUMENT AND HIS CONTINUING, IMPLAUSIBLE CAMPAIGN AGAINST STEPHEN HALBROOK

A. Credentialism

Kozuskanich asserts that we are unqualified to criticize his law review articles because we are "not historians," and he claims that "[b]ecause [we] are not historians, [we] are baffled by change."⁹³ He uses this claim to introduce a paragraph in which he writes, "They ask, with incredulity, could the legal meaning of the phrase 'bear arms in defense of themselves and the state' have changed?"⁹⁴

Let's set the record straight. We discussed nineteenth century Missouri and Kentucky cases that interpreted a phrase in their state constitutions that was identical to the phrase in the Pennsylvania Constitution.⁹⁵ We then wrote, "It is also possible that a collective duty in Pennsylvania changed into a personal right as it was adopted by other American states."⁹⁶ After that, we explained why we think the evidence points to a consistent meaning over time, rather than a changed meaning.⁹⁷ We expressed no incredulity that meanings can change. We just suggested that the meaning of the phrase "for the defense of themselves and the state" did not appear to have changed.⁹⁸

⁹² See 4 PROCEEDINGS AND DEBATES, *supra* note 88, at 114-24.

⁹³ *History or Ideology*, *supra* note 2, at 331.

⁹⁴ *Id.*

⁹⁵ *Keystone*, *supra* note 2, at 296 (discussing State v. Shoultz, 25 Mo. 128, 155 (1857); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 90-93 (1822)); *see also* PA. CONST. of 1776, art. XIII.

⁹⁶ *Keystone*, *supra* note 2, at 297.

⁹⁷ *Id.* (citations omitted).

⁹⁸ *Id.* at 295-97 (discussing KY. CONST. of 1799, art. X, § 23; MO. CONST. of 1820, art. XIII, § 3; PA. CONST. of 1790, art. IX, § 21; PA. CONST. of 1776, art. XIII).

As for Kozuskanich's assertion that we are "not historians,"⁹⁹ it seems silly to have to spend time in a law review article detailing one's background, but given Kozuskanich's declaration that we cannot understand legal history because we are not historians, a little background might be helpful. Cramer, like Kozuskanich, teaches history at the college level.¹⁰⁰ Cramer is also the author of three history books published by scholarly presses¹⁰¹ and wrote/edited two history books published by popular publishers,¹⁰² which is more than can be credited to Professor Kozuskanich at this early stage of his career.¹⁰³ Kopel is merely a law professor, but earned a B.A. in history, with honors, from Brown University and wrote a history thesis that won the year's National Geographic Society prize for best thesis.¹⁰⁴ Perhaps this is small potatoes from the viewpoint of the tenure track at Nipissing University.

In any case, one does not need a Ph.D. to write history. Thucydides¹⁰⁵ did not have a Ph.D., nor did Edward Gibbon.¹⁰⁶

⁹⁹ See *History or Ideology*, *supra* note 2, at 331.

¹⁰⁰ Cramer is currently an Adjunct Professor of History at the College of Western Idaho and previously taught Constitutional History at Boise State University and American History at George Fox University (Boise Center).

¹⁰¹ See CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE (2006); CLAYTON E. CRAMER, BLACK DEMOGRAPHIC DATA, 1790-1860: A SOURCEBOOK (1997); CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS (1994).

¹⁰² See BY THE DIM AND FLARING LAMPS: THE CIVIL WAR DIARIES OF SAMUEL McILVAINE (Clayton E. Cramer ed., 1990); CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999).

¹⁰³ See RETRIEVING THE AMERICAN PAST (Nathan Kozuskanich ed., 2005). This book is published by Pearson Custom Publishing, a press that allows professors to create their own textbooks. See Pearson Learning Solutions, Custom Publications – Publish Your Own Material, <http://www.pearsoncustom.com/custom-publications/publish-your-own-material.php> (last visited Mar. 15, 2010).

¹⁰⁴ See David B. Kopel, The Highbrow in American Politics: Arthur M. Schlesinger Jr. and the Role of the Intellectual in Politics (May 1982) (unpublished B.A. honors thesis, Brown University), available at <http://davekopel.org/Schlesinger/main.htm>.

¹⁰⁵ See THUCYDIDES, THE PELOPONNESIAN WAR.

One certainly does not need a Ph.D. in history to write legal history, as Oliver Wendell Holmes, Jr.,¹⁰⁷ and Frederic Maitland¹⁰⁸ demonstrated. In contemporary times, Lawrence Friedman seems to have performed rather creditably as a legal historian,¹⁰⁹ despite having only a J.D. and an LL.M.¹¹⁰ One can criticize the works of any of these men, from Herodotus to Friedman, but it would be ridiculous to assert that they are not "historians."

The retreat to credentialism was the very same defense raised by Michael Bellesiles when he was charged with academic fraud.¹¹¹ That charge was first raised by the two of us in a book review written shortly after Bellesiles's *Arming America* was

¹⁰⁶ See EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE (J.B. Bury ed., The MacMillan Co. 1914) (1776-1789).

¹⁰⁷ See O.W. HOLMES, JR., THE COMMON LAW (1909).

¹⁰⁸ See FREDERIC WILLIAM MAITLAND, DOMESDAY BOOK AND BEYOND: THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND (London, Cambridge Univ. Press 1897); FREDERIC WILLIAM MAITLAND, ENGLISH LAW AND THE RENAISSANCE (THE REDE LECTURE FOR 1901) (1901); FREDERIC WILLIAM MAITLAND, ROMAN CANON LAW IN THE CHURCH OF ENGLAND: SIX ESSAYS (London, Methuen & Co. 1898); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed., Boston, Cambridge Univ. Press 1899). "Maitland's work has served as the foundation for the creation of 'legal history' as a field of study . . ." Paul Pruitt, *Root and Branch: Contexts of Legal History in Alabama and the South*, 17 J. S. LEGAL HIST. 121, 122 (2009) (citing CHARLES H. HASKINS & FREDERIC WILLIAM MAITLAND, A HISTORICAL SKETCH OF LIBERTY AND EQUALITY: AS IDEALS OF ENGLISH POLITICAL PHILOSOPHY FROM THE TIME OF HOBBES TO THE TIME OF COLERIDGE 2-3 (2000)).

¹⁰⁹ See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2005); LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY (2002). Friedman is the most-cited contemporary legal historian. See Brian Leiter, *Most Cited Law Professors by Specialty*, 2000-2007, BRIAN LEITER'S L. SCH. RANKINGS, Dec. 18, 2007, http://www.leiterrankings.com/faculty/2007/faculty_impact_areas.shtml#LegalHistory.

¹¹⁰ See Lawrence M. Friedman, Stanford Law School, Marion Rice Kirkwood Professor of Law, <http://www.law.stanford.edu/directory/profile/23/> (last visited Mar. 15, 2010).

¹¹¹ See Michael A. Bellesiles, Letter to the Editor, *The Number of Guns in America: The Author Replies*, CHRON. HIGHER EDUC., Oct. 27, 2000, at B16-17. Bellesiles asserted that, "as a nonhistorian, Mr. Cramer may not appreciate that historians do not just chronicle the past, but attempt to analyze events and ideas while providing contexts for documents." *Id.* at B16.

published.¹¹² Cramer continued on the trail and provided extensive documentation of Bellesiles's fraudulent work, which cited to sources that did not support, and often contradicted, his claims.¹¹³ James Lindgren was the scholar who did the most to bring attention to the Bellesiles fraud.¹¹⁴ Lindgren has no degree in history.¹¹⁵

As the Bellesiles incident demonstrates, one does not need a Ph.D. in history to read a piece of historical scholarship and to examine the cited sources to find out if the sources support the claims that the author made.

B. Stephen Halbrook

In our article, we criticized Kozuskanich for mangling a quote from John Adams and for using the mangled quote as purported proof that Stephen Halbrook, who also quoted Adams, had

¹¹² See Clayton E. Cramer & Dave Kopel, *Disarming Errors*, NAT'L REV., Oct. 9, 2000, at 54-55 (reviewing MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE (2000) [hereinafter ARMING AMERICA]). "[M]uch of [Arming America] is highly imaginative fiction. Indeed, a close inspection of Bellesiles's sources reveals that they not only fail to support his argument, but prove precisely the reverse." *Id.* (discussing ARMING AMERICA, *supra*). *Arming America* is "contrary to the historical record" and is "fictional history." *Id.* at 55 (discussing ARMING AMERICA, *supra*).

¹¹³ *Keystone*, *supra* note 2, at 316-17 & n.230 (citing Clayton E. Cramer, *Why Footnotes Matter: Checking Arming America's Claims*, 1 PLAGIARY 149 (2006); University of Michigan Library, Plagiary, <http://quod.lib.umich.edu/p/plag/> (last visited Mar. 15, 2010) [hereinafter Plagiary]). "Plagiary is an interdisciplinary journal published by the University of Michigan Library, the focus of which is 'the study of plagiarism and related fabrications/falsifications.'" *Id.* at 316-17 n.230 (citing Plagiary, *supra*).

¹¹⁴ See generally James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (discussing ARMING AMERICA, *supra* note 114); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777 (2002) (discussing ARMING AMERICA, *supra* note 114).

¹¹⁵ See James Lindgren, Curriculum Vitae, <http://www.law.northwestern.edu/faculty/fulltime/lindgren/lindgrJaCV.pdf> (last visited Mar. 15, 2010). Lindgren has a B.A. in political science from Yale College and a J.D. from the University of Chicago Law School. *Id.* He also earned a Ph.D. in sociology from the University of Chicago Graduate School of Sociology in 2009. *Id.*

misused the quote.¹¹⁶ We supplied the full quote and showed that Halbrook's excerpt came much closer to rendering the full sense of what Adams wrote than did Kozuskanich's garbled version.¹¹⁷

In his reply article, Kozuskanich writes, "Kopel and Cramer also object to my characterization of Stephen Halbrook as an inept historian and list his credentials in an attempt to garner him some respect."¹¹⁸ "Perhaps there are better examples to prove my point about Halbrook's law office history," he continues.¹¹⁹

This dodges the point, which was to highlight how Kozuskanich misused Adams's statement by making it appear that Adams disapproved of gun ownership for personal defense.¹²⁰ The quote, which Kozuskanich twisted, expressed Adams's disapproval of nongovernmental militias and *approval* of arms for "private self-defence."¹²¹

1. Halbrook's Celebration of Jefferson and Beccaria

Kozuskanich then supplies a new litany of Halbrook's purported ineptitude: "Or I could have pointed out Halbrook's celebration of Jefferson and Beccaria despite the historical reality that George Mason was the primary architect of Virginia's

¹¹⁶ *Keystone*, *supra* note 2, at 318-19 (quoting 2 ADAMS, *supra* note 69, at 475; *Originalism*, *supra* note 5, at 414-15 n.6) (discussing Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, LAW & CONTEMP. PROBS., Winter 1986, at 151, 153-55).

¹¹⁷ *Keystone*, *supra* note 2, at 318-19 (quoting 2 ADAMS, *supra* note 69, at 475; *Originalism*, *supra* note 5, at 414-15 n.6) (discussing Halbrook, *supra* note 118, at 153-55). We should point out that Kopel has been a friend of Halbrook's for two decades and coauthored one book and two law review articles with him. See generally DAVID B. KOPEL, STEPHEN P. HALBROOK & ALAN KORWIN, SUPREME COURT GUN CASES: TWO CENTURIES OF GUN RIGHTS REVEALED (2004); Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347 (1999); Cynthia Leonardatos, David B. Kopel & Stephen P. Halbrook, *Miller Versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-Toting in Texas in the Nineteenth Century — and Today*, 9 J.L. & POL'Y 737 (2001).

¹¹⁸ *History or Ideology*, *supra* note 2, at 338 (citing *Keystone*, *supra* note 2, at 318-19).

¹¹⁹ *Id.* (citing *Keystone*, *supra* note 2, at 318-19).

¹²⁰ See *Keystone*, *supra* note 2, at 319-20.

¹²¹ See *id.* at 318-19 (quoting 2 ADAMS, *supra* note 69, at 475; *Originalism*, *supra* note 5, at 414-15 n.6) (discussing Halbrook, *supra* note 118, at 153-55).

Declaration of Rights, which, regardless of what Jefferson wrote in his Commonplace Book, did not guarantee a broad right to bear arms.¹²² This is just strange. Halbrook does indeed write positively about Thomas Jefferson and Cesare Beccaria, for both extolled the advantages of firearms ownership for personal defense.¹²³ Both Jefferson and Beccaria were nationally influential in the United States.¹²⁴ Beccaria, an Italian, is the founder of the social science of criminology and was widely read in the United States in the Founding Era.¹²⁵ It is hard to see why the fact that George Mason wrote the Virginia Declaration of Rights¹²⁶ makes Halbrook "inept" for celebrating Jefferson and Beccaria.

2. Halbrook's Writing on the Pennsylvania Constitution

Another new charge by Kozuskanich is that "Halbrook asserts that Pennsylvania's Declaration of Rights protected an individual right without providing a single piece of evidence or scrap of historical analysis."¹²⁷ But Halbrook's recent book, *The Founders' Second Amendment*, provides six pages of supporting context, quotes, and analysis for the meaning of the Pennsylvania Constitution of 1776.¹²⁸

Much earlier in Kozuskanich's reply article, he indicates that he has read Halbrook's 1985 *Vermont Law Review* article about early American state constitutions.¹²⁹ In that article, Halbrook devotes approximately ten pages to the drafting and context of the arms provision of the Pennsylvania Declaration of Rights in the

¹²² *History or Ideology*, *supra* note 2, at 339 (discussing VA. CONST. of 1776, § 13).

¹²³ Halbrook, *supra* note 118, at 153-54 (citations omitted).

¹²⁴ See *id.* at 153 (citations omitted).

¹²⁵ See *id.* (citations omitted); see also MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 3, 137-38, 141 (1973).

¹²⁶ See Joseph Horrell, *George Mason and the Fairfax Court*, 91 VA. MAG. HIST. & BIOGRAPHY 418, 427 (1984).

¹²⁷ *History or Ideology*, *supra* note 2, at 338 (citing Halbrook, *supra* note 118, at 151).

¹²⁸ SECOND AMENDMENT, *supra* note 59, at 135-41 (citations omitted).

¹²⁹ See *History or Ideology*, *supra* note 2, at 323 n.9 (citing *Right to Bear Arms*, *supra* note 59, at 267-68).

Pennsylvania Constitution of 1776, supported by fifty-nine footnotes.¹³⁰

By the Kozuskanich standard, Kozuskanich is just as "inept" as he imagines Halbrook to be. Kozuskanich's *Widener Law Journal* article quotes the Massachusetts right to arms provision, and Kozuskanich provides his own interpretation of what the Massachusetts provision meant while offering no historical support for that interpretation.¹³¹

We believe that neither Kozuskanich nor Halbrook is inept. It is not unreasonable for a historian to simply discuss the language of a constitutional provision without more. But of course more context is better, and Kozuskanich might have done better to acknowledge that the Massachusetts courts in 1825 and 1896 adopted a position contrary to the interpretation that Kozuskanich proffers.¹³² Perhaps Kozuskanich could have argued that the meaning of the Massachusetts provision changed over time. But the theory that there is any difference between the eighteenth and the nineteenth century meanings would depend solely on Kozuskanich's naked claim about what the Massachusetts provision meant in the eighteenth century.

¹³⁰ *Right to Bear Arms*, *supra* note 59, at 266-75 & nn.67-126.

¹³¹ *History or Ideology*, *supra* note 2, at 340 (citing, in relevant part, MASS. CONST. art. XVII; 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778, at 475 (London, n. pub. 1794); 3 THE ADAMS PAPERS: ADAMS FAMILY CORRESPONDENCE 228 (L.H. Butterfield & Marc Friedlaender eds., 1973)).

¹³² See *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896) (presuming that nonmilitia citizens have a right to carry guns but holding that the right is not violated by a ban on armed parades without a permit); *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 314 (1825) (explaining that the right to arms is like the right to free speech in that abuse of the right to free speech, such as libel, may be punished. The analogy only makes sense if both speech and arms are individual rights that the individual has discretion in how to exercise); see also David Kopel, *What Did They Mean in Massachusetts?*, CATO UNBOUND, July 24, 2008, <http://www.cato-unbound.org/2008/07/24/david-kopel/what-did-they-mean-in-massachusetts/> (discussing *Murphy*, 44 N.E. at 138; *Blanding*, 20 Mass. (3 Pick.) at 314).

3. Halbrook and Webster's Dictionary

Finally, Kozuskanich calls Halbrook "inept" because Halbrook quoted Webster's dictionary, which uses the phrase " 'bear arms in a coat' " and used Webster's as an example of bearing arms for personal defense—of carrying weapons in a garment.¹³³

Kozuskanich writes:

Those familiar with historic idioms will recognize that Webster is referencing armorial bearings, or coats of arms. This fact was driven home to me once again on a recent trip to the Historical Society of Pennsylvania. I was excited to find that the catalogue listed three publications from the late nineteenth and early twentieth centuries with the promising title *Right to Bear Arms*. I was more than a little disappointed to find that all the books were about the right to bear a coat of arms.¹³⁴

The "bear arms" example is part of the third of Webster's three definitions of "bear."¹³⁵ The first definition of "bear" is "[t]o support"¹³⁶—a definition which does not seem relevant to the meaning of 'bear arms' in the Second Amendment. The second definition is "[t]o carry,"¹³⁷ which fits the Standard Model understanding of "bear" in the Second Amendment.¹³⁸ According to the Standard Model, a person who carries a rifle—whether for hunting, for self-defense, or for militia duty—is "bearing arms."¹³⁹

Webster's third definition of "to bear" is "[t]o wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a

¹³³ *History or Ideology*, *supra* note 2, at 338-39 (quoting Halbrook, *supra* note 118, at 157) (emphasis added).

¹³⁴ *Id.* at 339 (citing Henry Stoddard Ruggles, *Right to Bear Arms*, in THE NEW YORK GENEALOGICAL AND BIOGRAPHICAL RECORD 291-95 (Richard Henry Greene et al. eds., 1903)).

¹³⁵ 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) [hereinafter WEBSTER'S DICTIONARY] (defining "bear").

¹³⁶ *Id.* ("To support; to sustain; as, to bear a weight or burden.").

¹³⁷ *Id.* ("To carry; to convey; to support and remove from place to place.").

¹³⁸ See *Parker v. District of Columbia*, 478 F.3d 370, 386-88 (D.C. Cir. 2007).
¹³⁹ *See id.*

name; to *bear* arms in a coat.¹⁴⁰ According to Kozuskanich, "bear arms in a coat" means only to bear a heraldic coat of arms.¹⁴¹ Ergo, Halbrook is inept for suggesting otherwise.¹⁴²

But it's not so simple. Webster's third definition includes "to *bear* a sword."¹⁴³ A sword is not necessarily what Kozuskanich calls "armorial bearings."¹⁴⁴ Rather, "to bear a sword" could be one way that a person—including a commoner—might wear a weapon.

Kozuskanich's narrow focus on an example in one subdefinition misses the main part of the definition: "To *wear*."¹⁴⁵ According to Webster, one way to bear 'X' is to wear 'X'.¹⁴⁶ That would be true whether one is wearing a handgun on a belt holster, a rifle on a sling, a sword in a scabbard, or a handgun in an inside pocket of a coat—and also true if one were wearing a coat of arms on a tunic.

Webster compiled his dictionary, in part, from Samuel Johnson's 1755 dictionary.¹⁴⁷ As Kozuskanich rightly points out, historians must be sensitive to change over time.¹⁴⁸ Therefore, it is important to remember that Webster was consciously creating a dictionary of *American* English—a language that was not identical to British English from three-quarters of a century earlier.

Still, it is helpful to keep Samuel Johnson's advisory at the start of *his* dictionary's definition of "bear" in mind: "To BEAR . . .

¹⁴⁰ WEBSTER'S DICTIONARY, *supra* note 136 (emphasis added) (defining "bear").

¹⁴¹ See *History or Ideology*, *supra* note 2, at 339 (citing Halbrook, *supra* note 118, at 157).

¹⁴² See *id.*

¹⁴³ WEBSTER'S DICTIONARY, *supra* note 136 (emphasis added) (defining "bear").

¹⁴⁴ See *History or Ideology*, *supra* note 2, at 339.

¹⁴⁵ WEBSTER'S DICTIONARY, *supra* note 136 (defining "bear"); see *History or Ideology*, *supra* note 2, at 339.

¹⁴⁶ See WEBSTER'S DICTIONARY, *supra* note 136 (defining "bear").

¹⁴⁷ 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1805); Susan Huebert, *Samuel Johnson and the First English Dictionary: The Lexicographer of the Eighteenth Century and His Accomplishments*, SUITE 101.COM, Feb. 2, 2010, <http://languagebooks.suite101.com/article.cfm/samuel-johnson-and-his-english-dictionary>.

¹⁴⁸ *History or Ideology*, *supra* note 2, at 325, 342.

is a word used with such latitude, that it is not easily explained."¹⁴⁹ Johnson writes that "bear" means to "[t]o carry."¹⁵⁰ In Johnson's dictionary, "to bear arms in a coat" is clearly defined as an example of "[t]o carry as a mark of distinction."¹⁵¹

The Oxford English Dictionary (OED) says that "to bear arms against" is "to be engaged in hostilities with."¹⁵² This is a usage that can encompass military activity as well as interpersonal violence. The OED citations for "bear" include several different types of nonmilitia, nonheraldic forms of carrying and ways of using weapons, from *Beowulf* in the ninth century to 1862.¹⁵³

Today, it is common to wear handguns in the pockets of coats or jackets. As Halbrook knows, such use was also common in the Colonial and Revolutionary Periods and in the early Republic.¹⁵⁴ Halbrook points out that when defining "pistol," Webster wrote, "'Small pistols are carried in the pocket.'"¹⁵⁵ Indeed, some people wore several handguns on the inner side of their coats.¹⁵⁶ Reliable multishot handguns had not yet been invented, so a person who wanted to be able to fire four shots against a gang of attackers would need to carry four handguns.¹⁵⁷ Because handguns were bulkier than they are today, the inside of a large coat would be the best place to wear two or more handguns. It was not unusual for people to wear a "brace of pistols" consisting of a pair of handguns in pockets of the inner lining of their coats.¹⁵⁸

¹⁴⁹ 1 JOHNSON, *supra* note 148 (defining "To BEAR").

¹⁵⁰ 1 JOHNSON, *supra* note 148.

¹⁵¹ *Id.*

¹⁵² 2 THE OXFORD ENGLISH DICTIONARY 21 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., 1989).

¹⁵³ See *id.*

¹⁵⁴ See Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime, and Public: Safety in Early America*, 44 WILLAMETTE L. REV. 699, 707 (2008) (citations omitted).

¹⁵⁵ Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629, 667 n.189 (1989) [hereinafter *Right to Bear Arms in Texas*] (quoting WEBSTER'S DICTIONARY, *supra* note 136 (defining "pistol")).

¹⁵⁶ See Cramer & Olson, *supra* note 155, at 719 (citations omitted).

¹⁵⁷ See *id.* at 719-20 (citations omitted).

¹⁵⁸ *Right to Bear Arms in Texas*, *supra* note 156, at 667.

Further, in terms of American constitutional law, potential heraldic meanings of Second Amendment words cannot be relevant because the Constitution explicitly forbids the granting of titles of nobility.¹⁵⁹

Madison, Wilson, and Adams were not the only Americans who believed a person could "bear" arms without serving in the militia or displaying nobility status. The minority at the Pennsylvania ratifying convention for the United States Constitution demanded constitutional protection for the right of the people "to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game."¹⁶⁰ Hunting, or "killing game," is obviously a personal, nonmilitia purpose for which one could "bear arms."¹⁶¹ As an ardent Federalist advocate of the ratification of the United States Constitution, Noah Webster may well have read about the demands of the anti-Federalists at the Pennsylvania ratifying convention.

Halbrook agrees that "bear arms" can be used in a heraldic sense but argues that the heraldic phrase would be "bear a coat of arms"—not "bear arms *in* a coat."¹⁶² We checked Google Books and found that the only reported uses of 'bear arms in a coat,' other than from people engaged in a Second Amendment argument about the meaning of the phrase, were from the Johnson and Webster's dictionaries or from other dictionaries derived from one of them.¹⁶³ In contrast, Google Books found over 600 sources, many from before 1828, that used the phrase "bear a coat of arms."¹⁶⁴

¹⁵⁹ U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . .").

¹⁶⁰ See THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT 237, 239-40 (Ralph Ketcham ed., New American Library 1986) (1787).

¹⁶¹ See *id.*

¹⁶² SECOND AMENDMENT, *supra* note 59, at 327 (quoting WEBSTER'S DICTIONARY, *supra* note 136).

¹⁶³ Google Books, <http://www.google.com/books> (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search").

¹⁶⁴ *Id.* (type "bear arms in a coat" within quotation marks, and click "Search").

No instances of the phrase "bear arms in a coat" were found in a search of Eighteenth Century Collections Online, with the exception of later editions of the Webster or Johnson dictionaries or dictionaries which copy Webster or Johnson verbatim,¹⁶⁵ nor were any uses found in Nineteenth Century UK Periodicals,¹⁶⁶ Empire Online,¹⁶⁷ or Seventeenth & Eighteenth Century Burney Collection Newspapers.¹⁶⁸

We likewise searched the Readex Archives of American and of Americana databases, but not one of them had a document with the text "bear arms in a coat."¹⁶⁹ Neither Kozuskanich nor Halbrook—nor anyone else as far as we can tell—has been able to find an example of anyone (other than the author of a dictionary or

¹⁶⁵ Gale Databases, Eighteenth Century Collections Online (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search"). There were 150,000 books published in the eighteenth century available in this database. *See id.*

[Editors' Note: Although the Gale Databases, Empire Online, American State Papers, and various Readex archives are accessible online, each database requires either a personal or institutional membership in order to perform a search. Most local universities provide access to these databases, and the results of the cited searches herein are on file with the authors and with the *Widener Law Journal*.]

¹⁶⁶ Gale Databases, Nineteenth Century UK Periodicals (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search").

¹⁶⁷ Empire Online (last visited Mar. 15, 2010) (type "bear arms in a coat," click "Search").

¹⁶⁸ Gale Databases, Seventeenth & Eighteenth Century Burney Collection Newspapers (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search").

¹⁶⁹ American State Papers, Archive of Americana, 1789-1838 (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search"); Readex, Archive of Americana, American Broadsides and Ephemera, Series I, 1760-1900 (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search"); Readex, Archive of Americana, America's Historical Newspapers (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search"); Readex, Archive of Americana, Early American Imprints, Series I: Evans, 1639-1800 (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search"); Readex, Archive of Americana, Early American Imprints, Series II: Shaw-Shoemaker, 1801-1819 (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search").

people engaged in a Second Amendment argument) actually discussing, writing about, or defining "bear arms in a coat."

Halbrook is correct that "bear arms in a coat" is an odd, and apparently unusual, way to refer to heraldic display.¹⁷⁰ However, the phrase appears to be just as odd and unusual when it is used as a way to refer to wearing weapons in outer garments.

Therefore, Halbrook is wrong to suggest that the definition used in Webster's dictionary must *only* mean wearing arms inside a coat.¹⁷¹ Likewise, Kozuskanich is wrong to assert that Webster's definition must mean *only* bearing a coat of arms.¹⁷²

Both Kozuskanich and Halbrook offer plausible readings of Webster's dictionary.¹⁷³ Neither can point to any actual usage of the phrase to support their preferred interpretation.¹⁷⁴ Close examination of the definition reveals that the word "bear" contains more complexity than either Kozuskanich or Halbrook has acknowledged.¹⁷⁵ In the Webster's debate, neither Kozuskanich nor Halbrook is inept but, likewise, neither one is clearly correct.

Accordingly, it is unreasonable for Kozuskanich to assert that Halbrook is "inept" simply because Halbrook takes one side of an interpretation and Kozuskanich takes the other.

4. Halbrook's Ideology

Besides citing three (not particularly persuasive) examples of Halbrook's alleged ineptitude,¹⁷⁶ Kozuskanich resorts to *ad hominem*: "Halbrook's close affiliation with the National Rifle Association (NRA) (which they point out) means that he is

¹⁷⁰ SECOND AMENDMENT, *supra* note 59, at 327 (quoting WEBSTER'S DICTIONARY, *supra* note 136).

¹⁷¹ *Id.* (quoting WEBSTER'S DICTIONARY, *supra* note 136).

¹⁷² *History or Ideology*, *supra* note 2, at 339.

¹⁷³ See SECOND AMENDMENT, *supra* note 59, at 327 (quoting WEBSTER'S DICTIONARY, *supra* note 136); *History or Ideology*, *supra* note 2, at 339 (citations omitted).

¹⁷⁴ SECOND AMENDMENT, *supra* note 59, at 326-27 (quoting WEBSTER'S DICTIONARY, *supra* note 136); *History or Ideology*, *supra* note 2, at 339 (citing Halbrook, *supra* note 118, at 157; Ruggles, *supra* note 135, at 291-95).

¹⁷⁵ See WEBSTER'S DICTIONARY, *supra* note 136 (defining "bear").

¹⁷⁶ *History or Ideology*, *supra* note 2, at 338-40 (citations omitted).

beholden to an individual rights interpretation as much as Bellesiles was to a collective rights ideology."¹⁷⁷

Talk about the pot calling the kettle black! Kozuskanich acknowledges that he was formerly employed by the Second Amendment Research Center, which was housed by The Ohio State University; run by Kozuskanich's mentor, Saul Cornell; and heavily funded by the Joyce Foundation.¹⁷⁸ At the time, the Joyce Foundation was distributing grants to fund projects of the most hardline of the anti-gun lobbies (the Violence Policy Center), social scientists seeking to prove that guns were a public safety menace, and to the Second Amendment Research Center.¹⁷⁹ Suppose that Cornell and Kozuskanich, after conducting further historical research, had concluded, 'What a surprise! The Standard Model is right after all.' Would the flow of Joyce money have continued?¹⁸⁰ This seems very unlikely.

¹⁷⁷ *Id.* at 338 (citing *Keystone*, *supra* note 2, at 318).

¹⁷⁸ *History or Ideology*, *supra* note 2, at 341 n.130; Chad D. Baus, *OSU's Second Amendment Research Center Shut Down; Anti-Gun "Think Tank" Had Ties to Obama*, BUCKEYE FIREARMS ASS'N, Dec. 2, 2009, <http://www.buckeyefirearms.org/node/7008>.

¹⁷⁹ See Scott Helman, *Early Defeat Launched a Rapid Political Climb*, BOSTON GLOBE, Oct. 12, 2007, at A1; Eric Lichtblau & Richard Simon, *Gun-Control Movement Split by Ambition to Ban Handguns; Firearms: Vocal Minority Believes that Building 'Safer' Weapons Could Actually Fuel Violence by Spurring Sales, but Others View Push for Prohibition as Political Folly*, L.A. TIMES, Apr. 18, 2000, at A1; David B. Ottaway, *Legal Assault on Firms Is Armed by Foundations*, WASH. POST, May 19, 1999, at A01; Robert Verbruggen, *The Left Fires a Counter-Volley: Meet the NRA's Little-Known, Highly Influential Opponents*, NAT'L REV., Feb. 25, 2008, http://findarticles.com/p/articles/mi_m1282/is_3_60/ai_n24264118.

¹⁸⁰ See *History or Ideology*, *supra* note 2, at 341 n.130. Kozuskanich writes:

Some have chastised me for working for a time at the defunct Second Amendment Research Center (SARC), funded in part by the Joyce Foundation. It is obvious that such people never actually visited the SARC website, which was an online repository for primary sources as well as scholarship from both individual and collective rights scholars. My time at SARC was spent updating the scholarship database with links to all recent scholarship pertaining to the Second Amendment. In contrast, Kopel's Second Amendment Project website only provides access to his own scholarship.

Id. (citing Dave Kopel, <http://www.davekopel.com/> (last visited Mar. 15, 2010) [hereinafter davekopel.com]). Kozuskanich does not say who chastised him for

The fact that Cornell and Kozuskanich were Joyce-funded does not prove that any of their arguments or their research is wrong. The Cornell-Kozuskanich thesis that the Second Amendment was originally intended to be a narrow, militia-only right¹⁸¹ is an elaboration of a theory propounded by Dennis Henigan, the head attorney for the Brady Center, America's leading gun control organization.¹⁸² Far earlier than most gun control advocates, Henigan argued that the "state's rights" or "collective right" theory of the Second Amendment was intellectually indefensible and elaborated a different alternative to the Standard Model.¹⁸³ The fact that Henigan is an employee of an ideologically

working for an anti-gun research center. *See id.* In any case, Cramer and Kopel have never criticized him for working for the SARC. As an ideologically committed scholar, Kozuskanich has every right to work for a congenial organization. It is also fine that, as part of his Second Amendment work, Kozuskanich updated a website that contained links to scholarship on both sides of the Second Amendment debate. *Id.* As Kozuskanich observed, Kopel's personal website contains his own publications and does not attempt to provide links to articles written by scholars who are not affiliated with the Independence Institute. *See davekopel.com, supra.* Instead, Kopel provided a comprehensive resource in a bibliographical article. *See* David B. Kopel, *Comprehensive Bibliography of the Second Amendment in Law Reviews*, 11 J. ON FIREARMS & PUB. POL'Y 5 (1999). Kopel's article was republished online. *See* David B. Kopel, *Comprehensive Bibliography of the Second Amendment in Law Reviews*, 11 J. ON FIREARMS & PUB. POL'Y 5 (1999), available at <http://www.saf.org/AllLawReviews.html>. The website features links to the full text of every law review article about the Second Amendment that was written from the early twentieth century through 1999. *See id.* The staff of the Second Amendment Foundation (the publisher of the *Journal on Firearms and Public Policy*) continued to update the site through 2002, providing links to the full text of all law review articles, pro and con. *See id.* While the Kozuskanich-Cornell Second Amendment Research Center is defunct, the Second Amendment Foundation is still active and its comprehensive bibliography web page and links remain available to the public. *See id.*

¹⁸¹ Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty"*, 3 TENN. J.L. & POL'Y 120, 125-26 (2007) (discussing Cornell's theory).

¹⁸² THE FEDERALIST SOCIETY, BIOGRAPHICAL INFORMATION FOR DENNIS HENIGAN, <http://www.fed-soc.org/debates/id.472/default.asp> (last visited Mar. 15, 2010).

¹⁸³ *See* Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 45-48 (1989).

invested organization¹⁸⁴ does not in any way undermine the validity of his theory or the validity of the Cornell-Kozuskanich elaborations of that theory. If Henigan, Cornell, and Kozuskanich are wrong, the proper scholarly response is to show flaws in their facts and reasoning and not to criticize them for taking money from organizations with whom they are ideologically sympathetic.

Likewise, pointing out that Halbrook receives NRA money does nothing to prove that what he writes is incorrect or inept.¹⁸⁵ As Kozuskanich notes, one of us, Kopel, works for organizations that have a strong ideological commitment to Second Amendment rights.¹⁸⁶ Both Kopel and Cramer are card-carrying members of the National Rifle Association.¹⁸⁷ We write articles for NRA member magazines. If that makes us unqualified to write legal history on the Second Amendment, then Kozuskanich and his mentor are likewise unqualified because their Second Amendment Research Center funders were just as ideologically committed to one side of the gun issue as the NRA is committed to the other side.¹⁸⁸

Currently pending before the Supreme Court is *McDonald v. City of Chicago*,¹⁸⁹ which will decide whether the Second Amendment applies to state and local governments.¹⁹⁰ Kopel

¹⁸⁴ THE FEDERALIST SOCIETY, *supra* note 184.

¹⁸⁵ *History or Ideology*, *supra* note 2, at 341 (citing Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 318 (1998)).

¹⁸⁶ *Id.* at 341-42 (quoting David B. Kopel & Robert A. Levy, *Restoring the Right to Bear Arms*, in CATO HANDBOOK FOR POLICYMAKERS: CATO INSTITUTE 323, 323 (7th ed. 2009), available at <http://www.cato.org/pubs/handbook/hb111/hb111-31.pdf>.

¹⁸⁷ See Letter from Clayton E. Cramer, Vice President, NRA Members Council of Sonoma County, to Santa Rosa City Council (Oct. 25, 1999) (on file with author); davekopel.com, *supra* note 182. As Kopel's website notes, Kopel is a "Benefactor member." davekopel.com, *supra* note 182. This is three levels above a "Life member" and is the highest membership level that is available for purchase. See Official NRA Membership Application, <https://membership.nrahq.org/forms/signup.asp> (last visited Mar. 15, 2010).

¹⁸⁸ See generally Posting of Randy Barnett to The Volokh Conspiracy, <http://volokh.com/2009/11/25/joyce-foundation-funded-osu-2nd-amendment-center-expires/> (Nov. 25, 2009, 12:08 EST).

¹⁸⁹ *McDonald v. City of Chicago*, 130 S. Ct. 48 (2009).

¹⁹⁰ See *id.*

joined an amicus brief in support of McDonald,¹⁹¹ and Kozuskanich filed an amicus brief in support of the city of Chicago.¹⁹² Both writers are engaged advocates on Second Amendment issues.

Scholarship on controversial social issues such as gun rights, gay rights, abortion rights, women's rights, civil rights, or affirmative action attracts writers who have a strong personal ideological interest on one side of the issue or the other. Some of these writers work with advocacy groups, and others get grants from foundations or other donors that also have a strong ideological viewpoint. From 1936 to 1961, Thurgood Marshall was an attorney for the NAACP¹⁹³—an affiliation that obviously made him (as Kozuskanich would say) "beholden" to particular interpretations of the Equal Protection clause and other constitutional protections.¹⁹⁴ During this period, Marshall not only wrote articles for the NAACP's magazine, *The Crisis*,¹⁹⁵ he also wrote scholarly articles¹⁹⁶ and a scholarly book chapter.¹⁹⁷ It would seem churlish to suggest that merely because Thurgood Marshall and Stephen Halbrook are highly successful attorneys for

¹⁹¹ See Brief of the International Law Enforcement Educators and Trainers Ass'n et al. as Amici Curiae Supporting Petitioners, *McDonald*, 130 S. Ct. 48 (No. 08-1521).

¹⁹² See Brief of Historians on Early American Legal, Constitutional and Pennsylvania History as Amici Curiae in Supporting Respondent, *McDonald*, 130 S. Ct. 48 (No. 08-1521).

¹⁹³ See JAMES HASKINS, THURGOOD MARSHALL: A LIFE FOR JUSTICE 43 (1992).

¹⁹⁴ *History or Ideology*, *supra* note 2, at 338-39.

¹⁹⁵ See, e.g., Thurgood Marshall, "Equal Justice Under Law", *CRISIS*, July 1939, at 199; Thurgood Marshall, *Negro Status in the Boilermakers Union*, *CRISIS*, Mar. 1944, at 77; Thurgood Marshall, *The Gestapo in Detroit*, *CRISIS*, Aug. 1943, at 232.

¹⁹⁶ See generally Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316 (1952); Thurgood Marshall, *Mr. Justice Murphy and Civil Rights*, 48 MICH. L. REV. 745 (1950); Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 101 (1951).

¹⁹⁷ See Thurgood Marshall, *Between the Decision and the Decree*, in SOUTHWIDE INTER-ORGANIZATIONAL CONFERENCE ON ESTABLISHING PATTERNS IN HUMAN RELATIONS 51-58 (Fisk Univ. ed., 1995).

constitutional rights organizations, they are ipso facto incapable of writing good scholarship. If there are flaws in the scholarship of Marshall, Halbrook, or other policy advocates, the solution is to point out the flaws and not to pretend that people who care about an issue are disqualified from writing about it.

In any case, if there is some kind of disinterestedness test that disqualifies Marshall and Halbrook, that same test equally disqualifies Nathan Kozuskanich, Saul Cornell, David Kopel, and Clayton Cramer. Thank goodness the *Widener Law Journal* does not apply such a narrow-minded test. Facts are facts, no matter who writes about them.