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

David B. Kopel* & Clayton E. Cramer**

* The Emperor’s New Clothes, 2010 version:

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

** David B. Kopel is an Adjunct Professor of Advanced Constitutional Law at Denver University, Sturm College of Law, and is employed as the Research Director at the Independence Institute in Golden, Colorado. He is also an Associate Policy Analyst at the Cato Institute in Washington, D.C. In District of Columbia v. Heller, Kopel wrote the amicus brief in support of Mr. Heller on behalf of the International Law Enforcement Educators and Trainers Association, the Southern States Police Benevolent Association, half of the District Attorneys in California, and many other law enforcement organizations and leaders. See Brief of the International Law Enforcement Educators and Trainers Ass’n et al. as Amici Curiae Supporting Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290). He was one of the three lawyers who joined Alan Gura at the Supreme Court of the United States counsel table on March 18, 2008, to assist in the presentation of the oral argument. The authors would like to thank Nelson Lund, Paul Blackman and Trevor Burrus for their helpful comments.

Clayton E. Cramer is an Adjunct Professor of History at the College of Western Idaho. He holds a B.A. in history from Sonoma State University, where he graduated cum laude with distinction in 1994, and an M.A. in history, also from Sonoma State University, which he earned in 1998. Cramer contributed to an amicus brief filed in Heller, in support of Mr. Heller. Brief for Academics for the Second Amendment as Amici Curiae Supporting Respondent at 16, Heller, 128 S. Ct. 2783 (No. 07-290). He is the author of several works discussing the right to bear arms. See generally CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE (2006); CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999); 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). Additionally, he coauthored a recent law review article cited in Heller by Justice Scalia, the author of the majority opinion. Heller, 128 S. Ct. at 2795 (citing Clayton E. Cramer & Joseph Edward Olson, What Did "Bear Arms" Mean in the Second Amendment?, 6 GEO. J.L. & PUB. POL’Y 511 (2008)).
"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."

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. 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. 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, is indisputably wrong. 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.


3 Id.

credentials are no substitute for accuracy

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

---


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

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

9 PA. CONST. of 1776, art. XIII.

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

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

12 Id. at 1067 (discussing PA. CONST. of 1776, art. XIII).
on the right of the collective people to defend themselves."\textsuperscript{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."\textsuperscript{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.\textsuperscript{14} Three other times, the Pennsylvania Constitution of 1776 states "[t]hat the people have a right."\textsuperscript{15} These clauses guarantee freedom of speech,\textsuperscript{16} freedom from warrantless searches,\textsuperscript{17} and freedom to assemble and petition.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20}

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

\begin{itemize}
\item \textsuperscript{12} Defending Themselves, supra note 5, at 1068 (discussing PA. CONST. of 1776, art. XIII).
\item \textsuperscript{13} Id. at 1069 (discussing PA. CONST. of 1776, art. XIII).
\item \textsuperscript{14} Keystone, supra note 2, at 293-94 (discussing PA. CONST. of 1776, arts. X, XII, XIII, XVI).
\item \textsuperscript{15} Id. (quoting PA. CONST. of 1776, arts. X, XII, XVI).
\item \textsuperscript{16} PA. CONST. of 1776, art. XII.
\item \textsuperscript{17} Id. art. X.
\item \textsuperscript{18} Id. art. XVI.
\item \textsuperscript{19} See Keystone, supra note 2, at 293-94 (quoting PA. CONST. of 1776, arts. X, XII, XIII, XVI).
\item \textsuperscript{20} See Defending Themselves, supra note 5; History or Ideology, supra note 2; Originalism, supra note 5.
\item \textsuperscript{21} 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
\end{itemize}
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. In three articles of the Pennsylvania Constitution of 1776, 'that the people have a right' means that all people have a right.

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).

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

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.  

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."  

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.

Kozuskanich rejects the idea that the article XIII arms right is a collective right. So the collective right of article III is not direct support for his interpretation of article XIII as a narrow, militiamen-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). 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. Kozuskanich wrote,
"while pacifists had no issue with owning or carrying arms, they would not bear those arms in the militia." To support this claim, he supplied an impressively long string cite of historical sources.

When we investigated the string cite, we found that several sources had nothing to do with Kozuskanich's claim. 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. The French-American immigrants were not pacifists. Another source was an oath in which Englishmen were required to swear to disregard the Pope's orders to overthrow the King of England. 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."

As for the rest of the cited sources, each contained quotes from or about Quakers who objected to bearing arms in militia service. All of the quoted Quakers either explicitly opposed all
interpersonal violence or objected to militia service, but none of the sources specifically discussed other types of possession or use of arms or violence.  

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

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." 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.

---

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.
\(^{50}\) Id. at 256, 410.
\(^{51}\) Id. at 316, 339, 509-10.
conscience, North Carolina and Maryland granted Quakers an exemption from the rule that hats must be removed in court.\textsuperscript{53} The North Carolina statute, for example, made it "lawful for . . . Quakers to wear their hats . . . within the several courts."\textsuperscript{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."\textsuperscript{55} To the contrary; we researched the Pennsylvania Constitution and found that Kozuskanich had failed


\textsuperscript{53} McConnell, supra note 52, at 1471-72 (citations omitted).

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} Rather, we were investigating whether Kozuskanich's anti-Standard Model theory was supported by persuasive evidence.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{61} As a result, he overlooked a text written by the author of the Second Amendment, which decisively shows that James Madison

\textsuperscript{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).
\textsuperscript{58} See Keystone, supra note 2 (discussing Originalism, supra note 5; Defending Themselves, supra note 5).
\textsuperscript{59} History or Ideology, supra note 2, at 340-41 (citing Originalism, supra note 5, at 416).
\textsuperscript{60} See Originalism, supra note 5 (detailing military usages of the phrase "bear arms").
\textsuperscript{61} Id. at 416 n.11.
considered that to "bear" a weapon was not necessarily a military term. As a Virginia legislator in 1785, James Madison introduced a bill to restrict people with prior convictions for illegal hunting from carrying firearms:

[If, 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.]

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. Significantly, law

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 that 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 dark, 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, hearings, 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:

Whereas 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 public meetings, has greatly obstructed the civilizing of the people within the counties herein after named; has prevented their applying themselves to husbandry, manufactories, 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, and by John Adams. 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.

Like Kozuskanich, we agree that the meaning of words can change over time. 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.


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

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.\footnote{History or Ideology, supra note 2, at 330 (citing Keystone, supra note 2, at 301-04).}

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.\footnote{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.} 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*.\footnote{See PA. CONST. of 1776, arts. VIII, XIII.} 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.\footnote{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).}

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.\footnote{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].} 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
defence of themselves and the States," if such a necessity shall arise.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{86} At this Convention, Delegate Ingersoll traced the history of

---

\textsuperscript{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."

\textsuperscript{82} PA. CONST. of 1790, art. IX, § 21.

\textsuperscript{83} Shulze, supra note 83, at 849.

\textsuperscript{84} See id.

\textsuperscript{85} See Posting of J. Aldridge, supra note 82.

the militia by discussing the militia clause of the Pennsylvania Constitution of 1776, 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.

Ingersoll made no mention of article 13, which is the right to arms clause. 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."

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.

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

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," 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. Cramer is also the author of three history books published by scholarly presses and wrote/edited two history books published by popular publishers, which is more than can be credited to Professor Kozuskanich at this early stage of his career. 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. 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. Thucydides did not have a Ph.D., nor did Edward Gibbon.

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).
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., and Frederic Maitland demonstrated. In contemporary times, Lawrence Friedman seems to have performed rather creditably as a legal historian, despite having only a J.D. and an LL.M. 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. That charge was first raised by the two of us in a book review written shortly after Bellesiles’s *Arming America* was


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).


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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{118} "Perhaps there are better examples to prove my point about Halbrook's law office history," he continues.\textsuperscript{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.\textsuperscript{120} The quote, which Kozuskanich twisted, expressed Adams's disapproval of nongovernmental militias and approval of arms for "private self-defence."\textsuperscript{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

\begin{footnotes}
\item[118] *History or Ideology*, supra note 2, at 338 (citing *Keystone*, supra note 2, at 318-19).
\item[119] *Id.* (citing *Keystone*, supra note 2, at 318-19).
\item[120] See *Keystone*, supra note 2, at 319-20.
\item[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).
\end{footnotes}
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).
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 Stodder 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.").
139 See id.
name; to bear arms in a coat."\textsuperscript{140} According to Kozuskanich, "bear arms in a coat" means only to bear a heraldic coat of arms.\textsuperscript{141} Ergo, Halbrook is inept for suggesting otherwise.\textsuperscript{142}

But it's not so simple. Webster's third definition includes "to bear a sword."\textsuperscript{143} A sword is not necessarily what Kozuskanich calls "armorial bearings."\textsuperscript{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."\textsuperscript{145} According to Webster, one way to bear 'X' is to wear 'X.'\textsuperscript{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.\textsuperscript{147} As Kozuskanich rightly points out, historians must be sensitive to change over time.\textsuperscript{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 . . .

\textsuperscript{140} Webster's Dictionary, supra note 136 (emphasis added) (defining "bear").
\textsuperscript{141} See History or Ideology, supra note 2, at 339 (citing Halbrook, supra note 118, at 157).
\textsuperscript{142} See id.
\textsuperscript{143} Webster's Dictionary, supra note 136 (emphasis added) (defining "bear").
\textsuperscript{144} See History or Ideology, supra note 2, at 339.
\textsuperscript{145} Webster's Dictionary, supra note 136 (defining "bear"); see History or Ideology, supra note 2, at 339.
\textsuperscript{146} See Webster's Dictionary, supra note 136 (defining "bear").
\textsuperscript{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.
153 See id.
154 See Clayton E. Cramer & Joseph Edward Olson, Pistols, Crime, and
(citations omitted).
155 Stephen P. Halbrook, The Right to Bear Arms in Texas: The Intent of
[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.\footnote{U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . . .").}

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."\footnote{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).} Hunting, or "killing game," is obviously a personal, nonmilitia purpose for which one could "bear arms."\footnote{See id.} 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."\footnote{SECOND AMENDMENT, supra note 59, at 327 (quoting WEBSTER'S DICTIONARY, supra note 136).} 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.\footnote{Google Books, http://www.google.com/books (last visited Mar. 15, 2010) (type "bear arms in a coat" within quotation marks, and click "Search").} In contrast, Google Books found over 600 sources, many from before 1828, that used the phrase "bear a coat of arms."\footnote{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, nor were any uses found in Nineteenth Century UK Periodicals, Empire Online, or Seventeenth & Eighteenth Century Burney Collection Newspapers.

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." 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").

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. 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.

Likewise, Kozuskanich is wrong to assert that Webster's definition must mean only bearing a coat of arms.

Both Kozuskanich and Halbrook offer plausible readings of Webster's dictionary. Neither can point to any actual usage of the phrase to support their preferred interpretation. Close examination of the definition reveals that the word "bear" contains more complexity than either Kozuskanich or Halbrook has acknowledged. 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, 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).
behind to an individual rights interpretation as much as Bellesiles was to a collective rights ideology.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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?\textsuperscript{180} This seems very unlikely.

\textsuperscript{177} Id. at 338 (citing Keystone, supra note 2, at 318).

\textsuperscript{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.buckeye firearms.org/node/7008.


\textsuperscript{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 right is an elaboration of a theory propounded by Dennis Henigan, the head attorney for the Brady Center, America's leading gun control organization. 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. 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.


invested organization 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. As Kozuskanich notes, one of us, Kopel, works for organizations that have a strong ideological commitment to Second Amendment rights. Both Kopel and Cramer are card-carrying members of the National Rifle Association. 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.

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

---

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)).


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).


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

190 See id.
joined an amicus brief in support of McDonald, and Kozuskanich filed an amicus brief in support of the city of Chicago. 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 NAACP—an affiliation that obviously made him (as Kozuskanich would say) "beholden" to particular interpretations of the Equal Protection clause and other constitutional protections. During this period, Marshall not only wrote articles for the NAACP’s magazine, The Crisis, he also wrote scholarly articles and a scholarly book chapter. 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).
194 History or Ideology, supra note 2, at 338-39.
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.