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The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving Forward

Patrick J. Charles

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**THE SECOND AMENDMENT IN
HISTORIOGRAPHICAL CRISIS: WHY THE
SUPREME COURT MUST REEVALUATE THE
EMBARRASSING “STANDARD MODEL”
MOVING FORWARD**

*Patrick J. Charles**

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INTRODUCTION

In the coming years the Second Amendment will face a historical crossroads. Following the Supreme Court’s decisions in *McDonald v. City of Chicago*¹ and *District of Columbia v. Heller*,² it is settled, as a matter of constitutional jurisprudence, that the Second Amendment protects armed self-defense in the home with a handgun, and applies equally to the federal and state governments. In both opinions, the majority was guided by a historical theory dubbed the Standard Model³ right to arms.⁴ Under this Model, the Second Amendment

1. 130 S. Ct. 3020 (2010).

2. 554 U.S. 570 (2008).

3. For the purpose of historiography, in previous writings I referred to the Standard Model as the Individual Right Model. As a matter of original intent, meaning, purpose, and understanding, I have always interpreted the Second Amendment as guaranteeing both an individual and collective right to participate in defending one’s liberty in a government sanctioned militia. Standard Model writers often refer to this interpretation as the “modified collective right” approach. See PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS

provides an individual right to possess and use arms, divorced from government sanctioned militias, as a means to (1) check government tyranny through an armed citizenry,⁵ (2) provide the means to repel force with force should one be assailed in private or public,⁶ and (3) provide for the common defense.⁷ Indeed, the history supporting an “individual right” to arms is vast and undeniable.⁸ However, the historical evidence supporting the Standard Model theory is circumstantial at best,⁹ leaving the future of Second Amendment

INTERPRETATION BY THE STATES AND THE SUPREME COURT (2009) [hereinafter CHARLES, THE SECOND AMENDMENT]. This right was derived from the English 1689 Declaration of Rights. See Patrick J. Charles, “Arms for Their Defence”?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in *McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 352 (2009) [hereinafter Charles, “Arms for Their Defence”?]. For more on this author’s historiography, see *infra* notes 9 and 18.

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

5. See *Heller*, 554 U.S. at 600 (“If . . . the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia—if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny.”) (citations omitted).

6. See *id.* at 592 (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”); *id.* at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”).

7. See *id.* at 595 (“In *United States v. Miller*, we explained that ‘the Militia comprised all males physically capable of acting in concert for the common defense.’ That definition comports with founding-era sources.”) (citations omitted).

8. Prior to the *Heller* decision, historians were in agreement that the Second Amendment and its English predecessor enshrined an individual right connected to militia service. See SAUL CORNELL, *A WELL-REGULATED MILITIA AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 74–78 (1981); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 165 (2003).

9. The *Heller* Court relied on a textual approach to constitutional interpretation. See 554 U.S. at 578–603. The Court buttressed this claim by relying on the flawed thesis of historian Joyce Lee Malcolm. See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994). Lois G. Schwoerer was the first historian to point out numerous problems with Malcolm’s thesis. See Lois G. Schwoerer, Book Review, 61 J. S. HIST. 570 (1995) (reviewing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)) [hereinafter Schwoerer, Book Review]; Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, in *THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS* 207, 207–21 (Carl T. Bogus ed., 2000) [hereinafter Schwoerer, *To Hold*

history at a critical juncture. Which end of the historical spectrum is to guide future opinions? Does the evidence have to gain the support of the historical community? Does it have to be clear and convincing, or does it merely have to be circumstantial and plausible through hypothetical word association?¹⁰

The answers to these questions are significant for a number of reasons, including the long-term validity and objectivity of new originalist paradigms in constitutional interpretation, the role that accepted historical methodologies should play in constitutional jurisprudence, and whether judges can objectively weigh historical evidence or recognize poor and subjective analyses.¹¹ All three issues are intertwined when examining the constructs of the Standard Model right to arms. A close look at the past four decades of the Model's scholarship reveals that it was the repeated advancement of poor historical paradigms—particularly incomplete research, textualism, legal hypotheticals, and word games—that pushed aside accepted historical methodologies, which in turn led to ahistorical conclusions.¹² To be more candid, a survey of the past four decades of

and Bear Arms]. Malcolm has never answered for these scholarly deficiencies. Since then, I have found numerous other problems with Malcolm's thesis, both factually and methodologically speaking. See generally Charles, "Arms for Their Defence"?, *supra* note 3; Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. 1821, 1836–37 (2011) [hereinafter Charles, *Scribble Scrabble*]; Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1 (2012) [hereinafter Charles, *The Faces*]; Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18 [hereinafter Charles, *The Right of Self-Preservation*]. To date, the historical consensus is that Malcolm's thesis is severely flawed and unacceptable. See Brief for English/Early American Historians as Amici Curiae in Support of Respondents, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (supported by twenty-one scholars and historians).

10. This question is not only important as an everyday practical matter. It also presents itself in Justice Antonin Scalia's concurrence in *McDonald v. City of Chicago*, where he stated that conducting "historical analysis can be difficult," yet found it to be "the *best means available* in an imperfect world." 130 S. Ct. at 3056–58 (Scalia, J., concurring).

11. For an interesting discussion of this dilemma before the *Heller* and *McDonald* decisions were decided, see G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002).

12. For historians' critiques of the Standard Model approach taken by the *Heller* and *McDonald* majorities, see Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 629 (2008) [hereinafter Cornell, *Originalism on Trial*]; Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"*, 56 UCLA L. REV. 1095, 1106–07 (2009) [hereinafter Cornell, *Heller, New Originalism*]; Paul

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Standard Model scholarship reveals numerous errors that break the bounds of historical elasticity, leaving the entire Model unreliable moving forward.

The errors come in all forms, such as ad hoc textualism, creating historical myths with circumstantial or no historical evidence, and a minimalist understanding of the ideological and intellectual origins of the right to arms. In some cases, Standard Model scholarship discards historical methodologies altogether. One such example is a continued reliance on rebutted historical facts or conclusions. One historical myth has been cited to build another, and so on, until separating historical reality from fairytale is something that only a handful of scholars can do. As Robert J. Spitzer has catalogued, this has been an ongoing affair in law reviews for quite some time, and unless the Supreme Court discards or significantly tailors the Standard Model to be in line with accepted historical methodologies, there may be no end in sight.¹³

The purpose of this Article is *not* to question or discard the holdings in *Heller* and *McDonald*. A homebound right to armed self-

Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 267–82 (2008); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1297–1334 (2009) [hereinafter Konig, *Why the Second Amendment Has a Preamble*]; David Thomas Konig, *Heller, Guns, and History: The Judicial Invention of Tradition*, 3 NORTHEASTERN L.J. 175, 178 (2011) [hereinafter Konig, *Heller, Guns, and 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, 446 (2008); William G. Merkel, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 SANTA CLARA L. REV. 1221, 1225–26 (2010) [hereinafter Merkel, *Heller as Hubris*]; William G. Merkel, *District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 352–54 (2009) [hereinafter Merkel, *Scalia's Perverse Sense of Originalism*].

13. See ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING 33–60 (2008); Robert J. Spitzer, *Why History Matters: Saul Cornell's Second Amendment and the Consequences of Law Reviews*, 1 ALB. GOV'T L. REV. 312, 321–52 (2008); Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI-KENT L. REV. 349, 352 (2000); see also Robert E. Shalhope, Book Review, 108 AM. HIST. REV. 1442, 1442 (2003) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)) (“[L]aw reviews ranging from the most prestigious to the least distinguished offer their readers any number of interpretations of the [Second Amendment’s] original meaning as well as the manner in which it should be read today. The result has been an abundance of sound and fury and a dearth of intellectual substance. All suffer from the same handicap: a lack of understanding of the historical context within which the Second Amendment was written.”) (emphasis added).

defense with a handgun was neither the impetus for the 1689 Declaration of Rights¹⁴ or the 1791 Second Amendment.¹⁵ Still, as a jurisprudential matter, the core holding can be squared in either one of two ways. The first is the acceptance of the castle-doctrine, with “common use” weapons, as a part of a longstanding Anglo-American tradition.¹⁶ The second is through a living Constitution approach, which recognizes that many state constitutions protect armed defense of the home in some form.¹⁷ Either of these approaches provides the necessary constitutional justification for a right to armed self-defense in the home.¹⁸

14. 1 W. & M. sess. 2 c. 2 (1688–89) (Eng.) (“By causing several good subjects being protestants to be disarmed at the same time when papists were both armed and employed contrary to law. . . . That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.”); Charles, *The Right of Self-Preservation*, *supra* note 9, at 42–54 (showing the “have arms” provision was adopted to secure concurrent Parliamentary power over the militia).

15. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”); *see also* Patrick J. Charles, *The Constitutional Significance of a “Well-Regulated Militia” Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NORTHEASTERN L.J. 1, 67–71 (2011) (showing the neglected intellectual history of a “well regulated militia” and its republican link to arms bearing) [hereinafter Charles, *Constitutional Significance*].

16. *See, e.g.*, 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136, ch. 63, § 8 (1716). As a matter of historical context, it should be noted that Hawkins makes no mention of a right to guns, arms or any modern weaponry to exercise this right. Hawkins is merely talking about the larger natural right principle of self-defense. However, at least one prominent founder, James Wilson, viewed the Pennsylvania Constitution, not the United States Constitution, as protecting this right. *See* 2 JAMES WILSON, THE COLLECTED WORKS OF JAMES WILSON 1142 (Kermit L. Hall & Mark David Hall eds., 2007). Wilson described the Second Amendment of the United States Constitution in terms of the “common defence.” *Id.* at 1141.

17. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 594–98 (2009); Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108, 111 (2008); David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 122. For a survey of state constitutional “bear arms” provisions, *see* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

18. In terms of personal historiography, my initial disagreement with the *Heller* opinion rested with its misuse and abuse of the Constitution’s text and the historical record, not the recognition of self-defense as a natural right. *See generally* CHARLES, THE SECOND AMENDMENT, *supra* note 3. When *McDonald* came before the Court, my argument remained that the historical record was severely flawed and needed to be corrected, or at a minimum squared, before the *Heller* opinion should be incorporated to the states. *See* Charles, “Arms for Their Defence”?, *supra* note 3, at 455–56; Charles, *The Right of Self-Preservation*, *supra* note 9; *5 Questions for Patrick J. Charles (Britannica Contributor) on Gun Control and the Second Amendment*, ENCYCLOPEDIA BRITANNICA BLOG (June 1, 2010), <http://www.britannica.com/blogs/2010/6/5-questions-for-patrick-j-charles-britannica-contributor-on-gun-control->

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Instead, the purpose of this Article is to educate legal academics, lawyers, and jurists, and to steer the proverbial ship away from Standard Model myths back to historical reality. This Article sets out to accomplish this in three parts. In Part I, this Article exposes the Standard Model for what it is *not*—an objective and thoroughly researched history. It identifies four unquestioned historical methodologies to which the Model has failed to adhere and how one poor account has been built upon another, which ultimately has made the “modern” Second Amendment unrecognizable to the founding generation.

Part II then summarizes why historians view the Standard Model as nothing short of a historical embarrassment. In particular, Part II focuses on the rise and fall of Joyce Lee Malcolm’s work on the right to arms. It then illustrates the interpretative consequences that Malcolm and other Standard Model accounts have had on the Anglo-American understanding of the right to arms.

Lastly, Part III discusses the prudential reasons for reevaluating the Standard Model. In particular, it weighs three historical options that the Supreme Court could adopt for adjudicating future Second Amendment cases and controversies. It then concludes that there is a simple and reasonable construct available to the Court when weighing history. Known as a “historical guidepost” approach, the construct not only ensures the preservation of our history in context, but also allows for constitutional jurisprudence to evolve in the process.

I. THE STANDARD MODEL SECOND AMENDMENT EXPOSED

For over thirty-five years now, aspects of the Standard Model have appeared consistently in law reviews. From the Model’s early beginnings in the 1970s, its architects have pawned assumptions and opinions as historical fact. Take, for instance, a 1976 article published

and-the-second-amendment. Associate Justice Stephen Breyer, joined by Associate Justices Ruth Bader Ginsburg and Sonia Sotomayor, agreed with this argument before proceeding with incorporation. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3120–22 (2010) (Breyer, J., dissenting). Since *McDonald*, my stance remains that the historical model advanced by the *Heller* majority is incorrect and problematic moving forward, but can be gradually amended or fixed through “historical guideposts.” *See* Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: “Historical Guideposts” and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON J. CONST. L. & POL’Y 7, 17-39 (2010) [hereinafter Charles, *Historical Guideposts*].

by this Journal.¹⁹ Authored by David I. Caplan, a former board member of the National Rifle Association, the article contained a significant number of false claims: notably, the purpose and history of the Statute of Northampton,²⁰ the “have arms” provision in the 1689 English Declaration of Rights,²¹ and the events of the American Revolution.²² Yet the most damaging myth that Caplan pawned to the public was his mischaracterization of the Founders’ well-regulated militia. According to Caplan, the right to “keep and bears arms” in a “well-regulated militia” ensured (1) “the people’s ability to organize the militia would be guaranteed and strengthened by their prior anonymous keeping of arms,” and (2) “the people’s right to keep arms [would] not depend upon the actual existence of an organized militia” because Congress has the power to terminate it.²³

In advancing this theory, Caplan did not even attempt to meet the required historical burden. Instead, he relied exclusively on two pages of constitutional debates—out of context—as a theoretical launching point to reach a number of unsupported conclusions.²⁴ This

19. See David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976); see also Kates, *supra* note 4, at 1213 (discussing Caplan’s important role in the Standard Model movement).

20. Caplan’s understanding of the Statute of Northampton was based solely on a subjective reading of *Rex v. Knight*, [1686] 90 Eng. Rep. 330, not on the history of the case itself, nor the Statute’s text, enforcement, history, or public understanding. Caplan, *supra* note 19, at 32. For a complete history of the Statute of Northampton, see Charles, *The Faces*, *supra* note 9, at 7–41.

21. Caplan primarily relied on nineteenth century case law for the history of the 1689 Declaration of Rights, not primary sources from either the late seventeenth or early eighteenth centuries. Caplan, *supra* note 19, at 33–34. For a detailed history of the 1689 Declaration of Rights “have arms” provision, see generally Charles, “*Arms for Their Defence*”?, *supra* note 3, at 356–85 and SCHWOERER, THE DECLARATION OF RIGHTS, *supra* note 8, at 74–78. Caplan also takes William Blackstone out of context. Compare Caplan, *supra* note 19, at 34, with Charles, *The Right of Self-Preservation*, *supra* note 9, at 26–60.

22. Caplan audaciously claimed there was a Second Amendment link between the British confiscating arms and the Second Amendment. See Caplan, *supra* note 19, at 35–36. This myth continues today, primarily through the work of Stephen P. Halbrook. See, e.g., STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS (2008). To date, no historian, scholar, or originalist has found any substantiated evidence linking the two. See Charles, *supra* note 15, at 55–56 and Charles, “*Arms for Their Defence*”?, *supra* note 3, at 443–49. Also, the historical claim makes little sense seeing the Founders did the same to suspected loyalists and those who were not in support of just government. See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 41–42, 81–87 (addressing the disarming of Shays’ Rebellion insurgents); Charles, *supra* note 15, at 59–61 (addressing the disarming during the American Revolution).

23. Caplan, *supra* note 19, at 39.

24. See *id.*

is not only problematic in terms of historical objectivity, but we know today that Caplan's theory is not even historically viable.²⁵ This issue will be unpacked in various segments of this Article, but for now the point worth making is that Standard Model scholars have propped up a political theory as historical fact without the required evidence. Worse yet, the four corners of Caplan's theory remain the foundation upon which the Model is built.

A. The Historical Dilemma Presented by the Standard Model

It is from this weak foundation that numerous myths have formed and flourished. With the Model's folklore stretching over a thirty-five year period, it has created a layered web of illusions and deceptions so thick that only a handful of historians and scholars can pinpoint the inconsistencies or problems.²⁶ The objective dilemma this presents can have a number of legal consequences, particularly, what role—if any—accepted historical works and methodologies are to be used for future constitutional questions. If we use *Heller* as the benchmark, accepted historical methodologies are insignificant and objective legal history is in peril, for the *Heller* majority essentially acquiesced to a Necessary and Proper Clause approach to history.²⁷

For those unfamiliar with Necessary and Proper Clause jurisprudence, since 1805 the Supreme Court has stated that Congress has the “choice of means, and must be empowered to use *any means* which are in fact conducive to the exercise of a power granted by the Constitution.”²⁸ This deferential approach to congressional power

25. See Charles, *Constitutional Significance*, *supra* note 15, at 1–101; Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323, 339–390 (2011) [hereinafter Charles, *The 1792 National Militia Act*].

26. One such mistake is the continued reliance on a 1770 Georgia law as evidence that the Second Amendment ensures individuals have a right to be armed for public safety. See Brief and Required Short Appendix of Plaintiffs-Appellants at 34 & n.14, *Shepard v. Madigan*, No. 12-1788 (7th Cir. Apr. 11, 2012) (“[C]olonial statutes required individual arms-bearing for public safety Some colonies even *required* citizens to carry their firearms to church services and other public gatherings.”) (citing An Act for the Better Security of the Inhabitants, By Obliging the Male White Persons to Carry Fire Arms To Places of Public Worship (Ga. 1770), *reprinted in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA* 157–58 (1800)). That statute was *not* an endorsement of the right to public carriage, but an attempt to maintain the institution of slavery. See CHARLES, *THE SECOND AMENDMENT*, *supra* note 3, at 18.

27. See, e.g., Cornell, *Heller*, *New Originalism*, *supra* note 12 (discussing how *Heller* picked and applied historical evidence selectively).

28. *United States v. Fisher*, 6 U.S. 358, 396 (1805) (emphasis added). For a history of the origins of Chief Justice Marshall's approach to the Necessary and

was restated by Chief Justice John Marshall in 1819²⁹ and remains the law of the land today.³⁰ If we apply this standard to historical analysis, it stipulates that constitutional text and historical evidence may be adapted to support *any* conclusion so long as the author, lawyer, or jurist believes it to be *plausible*. Universally recognized historical methodologies, however, do not accept such a deferential or “choice of means” approach.³¹ It is accepted among historians that historical methodologies require something more substantial.³² If anything, to reasonably adapt the evidentiary means to support a desired historical end is contrary to intellectual integrity and objectivity, for it fails to take into account the whole historical equation of the era and topic at issue.³³

Therein lies a problem with the foundation upon which the Standard Model rests—it is full of historical adaptations and false conclusions that resemble the approach assumed by the Court’s Necessary and Proper Clause jurisprudence. Take for instance two recent Standard Model historiographies by Don B. Kates and David T. Hardy.³⁴ Both authors claim that any interpretation other than the Standard Model is unsupported by the historical record. Beginning with Hardy, he writes there remains “*no evidence* of any understanding that the right to arms was restricted to militia service.”³⁵ Instead, he believes there is “strong evidence of in an

Proper Clause, see Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529 (2010).

29. See *McCulloch v. Maryland*, 17 U.S. 316, 419–36 (1819).

30. See *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010).

31. See Quentin Skinner, *The Limits of Historical Explanations*, 41 PHIL. 199, 202 (1966) (stating that the role of historian is to not suggest a “casual relation,” but that events and ideas are intimately connected).

32. See *id.* at 209 (“To see historical relationships in terms of repeated patterns of thought or action is to imply not merely that thinking or acting are uniformly purposive, but that they do characteristically result in patterns. There is thus a very strong predisposition, particularly evident in histories of thought, to ignore the difficulties about proper emphasis and tone which must arise in making any sort of paraphrase of a work, and to assume instead that its author must have had some doctrine, or a ‘message’, which can be readily abstracted and more simply put.”).

33. See J.G.A. Pocock, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, 9 POL. THEORY 353, 362–64 (1981) (discussing how “law-centered” paradigms lead to “liberal” historical claims because they do not take into account the whole).

34. See David T. Hardy, *The Rise and Demise of the “Collective Right” Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315 (2011); Kates, *supra* note 4.

35. Hardy, *supra* note 34, at 330 (emphasis added).

intent to recognize an individual right to arms that is *independent* of militia service.”³⁶ Similarly, Don B. Kates claims any state-sanctioned or government militia interpretation is “gibberish” or “ahistorical.”³⁷ And in agreement, both claim that any militia right limitations are nothing more than a fabrication of the twentieth century.³⁸ Not true.

Before dissecting these misguided historiographies, it is worth noting that in the thirty-five years of Standard Model scholarship, not one publication has ever sought to examine the ideological, intellectual, legal, and constitutional significance of the Founders’ well-regulated militia.³⁹ Indeed, many Model supporters wrote their personal opinions on the subject. However, each made generalized claims as to its legal character without conducting a proper historical inquiry or conducting intensive research. And this somehow manifested into the myth that an “unorganized,” “ill-regulated,” or “unregulated” militia was the equivalent of a constitutional “well regulated militia.”⁴⁰ Again, not true.

Hardy even went so far as to equate a well-regulated militia with a “well-regulated” appetite or family.⁴¹ Meanwhile, Standard Model

36. *Id.* at 329 (emphasis added).

37. Kates, *supra* note 4, at 1227–30.

38. *See id.* at 1231; Hardy, *supra* note 34, at 342–59.

39. *See generally* Charles, *Constitutional Significance*, *supra* note 15 (rebutting nearly four decades of Standard Model conceptions of what constitutes the Founders’ well regulated militia).

40. *See, e.g.*, STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 85 (2d ed., 1994) [hereinafter HALBROOK, *THAT EVERY MAN BE ARMED*] (arguing that the Second Amendment should be interpreted to read: because a “well-organized militia is necessary to security of a free State” that the people should be armed); *id.* at 144 (“Recognition of the right of the people to have arms promoted a well-regulated militia.”); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 *TEX. L. REV.* 237, 275 (2004) (reviewing UVILLER & MEREL, *supra* note 8) (“What the federal government cannot do . . . is abolish the militia altogether rather than to leave it unorganized. Nor can Congress abolish the individual right to arms simply by failing to well-regulate the militia-of-the-whole.”); Stephen P. Halbrook, *St. George Tucker’s Second Amendment: Deconstructing “The True Palladium of Liberty”*, 3 *TENN. J.L. & POL’Y* 120, 130 (2007) (“[T]he Second Amendment was prompted by the perceived need to protect the right of individuals to keep and bear arms, which would encourage a well-regulated militia.”); Nelson Lund, *D.C.’s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 *GEO. MASON U. C.R. L.J.* 229, 246–47 (2008) (arguing that the purpose of the Second Amendment was not “exclusively, or even primarily” connected with a well-regulated militia, but was a means to check tyranny by the people being armed); *see also* Caplan, *supra* note 19, at 36–41; David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 *CHI.-KENT L. REV.* 62, 67–78 (1974).

41. *See* David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 2010 *CARDOZO L. REV. DE NOVO* 61, 67.

writers have gotten away with playing word scenarios by parsing text, using dictionaries to elicit meaning, and reassembling the whole.⁴² This is *not* history nor does it objectively aid in constitutional interpretation.⁴³ As I show in a forthcoming Article, such ad hoc approaches to deduce constitutional meaning are problematic for a number of prudential reasons.⁴⁴ It also does not help Standard Model writers when the historical record unequivocally shows us that a constitutional well-regulated militia consisted of a state-sanctioned body of citizen soldiers *capable* of bearing arms.⁴⁵ This is confirmed by the English origins of the right,⁴⁶ the excruciatingly detailed seventeenth and eighteenth century tracts on the constitutional significance and purpose of a well-regulated militia,⁴⁷ the inclusion of a “well regulated militia” protection in five state constitutions by 1789,⁴⁸ and the First and Second congressional debates over implementing a national well-regulated militia.⁴⁹

In addition to these findings, I have found even more evidence illustrating that the Standard Model’s depiction of the Second Amendment is more of a fantasy and illusion than an objective history. For our purposes now, two examples will be provided: (1) Thomas Jefferson’s recollection of the adoption of the Bill of Rights

42. See, e.g., HALBROOK, *supra* note 22, at 323–38; HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 40, at 84–87; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 801–12 (1998) (defining the Second Amendment’s operative clause with hypothetical wordplay and parsing text).

43. See Patrick J. Charles & Kevin Francis O’Neill, *Saving the Press Clause From Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. (forthcoming 2012) (manuscript at 56), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012563 (showing the interpretational consequences when relying upon text and word scenarios to find constitutional meaning).

44. See *id.* at 8–11, 56. For some scholarly rebuttals to textualism, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009); Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489; William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007).

45. See Charles, *Scribble Scrabble*, *supra* note 9, at 1836. For the importance of being “capable” to bear arms, see Charles, *The 1792 National Militia Act*, *supra* note 25, at 336–39, 367–72.

46. See Charles, *The Right of Self-Preservation*, *supra* note 9, at 40–54.

47. See Charles, *Constitutional Significance*, *supra* note 15, at 9–35.

48. DEL. CONST. of 1776, art. IX; MD. CONST. of 1776, art. XXV; N.H. CONST., art. XXIV; N.Y. CONST. of 1777, art. XL; VA. CONST. of 1776, § XIII. For a breakdown of the right to arms in state constitutions circa 1789 and 1803, see Charles, *Historical Guideposts*, *supra* note 18, at 43–49.

49. See Charles, *The 1792 National Militia Act*, *supra* note 25, at 331–47.

in 1803, and (2) Massachusetts Adjutant General William Donnison's articulation of the right to "keep and bear arms" in general orders dated March 1, 1794.

Starting with Thomas Jefferson, Standard Model writers often claim the former president understood the right to "keep and bear arms" to include a right to hunt, and that he believed an armed citizenry was the equivalent of a well-regulated militia.⁵⁰ Given such frequent mischaracterizations of Jefferson have been corrected by historian David Thomas Konig, they will not be restated or elaborated here.⁵¹ The historical piece worth mentioning, however, is Jefferson's direct opinion on the purpose of the Bill of Rights in relation to Article I, Section 8.

The opinion can be found in an 1802 letter to Joseph Priestly, and, not surprisingly, not one Standard Model work has ever addressed it.⁵² In the letter, Jefferson corrected Priestly's belief that he "more than any other individual" had "planned and established" the Constitution.⁵³ First, Jefferson confirmed that he was in "Europe when the Constitution was planned and established, and never saw it till after it was established."⁵⁴ Second, the only contribution Jefferson could claim was the push for a Bill of Rights:

On receiving it I wrote strongly to Mr. Madison, urging the want of provision for the freedom of religion, freedom of the press, trial by jury, habeas corpus, *the substitution of militia for a standing army*, and an express reservation to the States, of all the rights not specifically granted to the Union. [Madison] accordingly moved, in the first session of Congress, for these amendments, which were agreed to and ratified by the States as they now stand. This is all the hand I had in what related to the Constitution.⁵⁵

50. See, e.g., Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511, 517–18 (2008) (using Jefferson's failed hunting law as evidentiary proof of a broad interpretation of "bear arms"); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1519 ("Thomas Jefferson . . . promoted the right to arms for reasons totally unconnected to the militia.").

51. See David Thomas Konig, *Historical Approach: Thomas Jefferson's Armed Citizenry and the Republican Militia*, 1 ALB. GOV'T L. REV. 250 (2008).

52. See Konig, *supra* note 51, at 268–69; H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 494 (2000).

53. Letter from Thomas Jefferson to Joseph Priestly (June 19, 1802), in 2 LIFE AND CORRESPONDENCE OF JOSEPH PRIESTLY 483, 485 (London, R. Hunter, M. Eaton, and C. Fox 1832).

54. *Id.*

55. *Id.* (emphasis added).

Jefferson's request for a provision that substituted a "militia for a standing army" was the very essence and purpose of the Second Amendment—a constitutional counterpoise to a standing army.⁵⁶ A well-regulated militia was never intended to be a policy option for the common defense—i.e. a standing army *or* a well-regulated militia. It was the palladium of liberty or the very essence by which liberty was to be understood and earned.⁵⁷ This explains why Elbridge Gerry⁵⁸ preferred that the Second Amendment read "necessary to the security of a free state" rather than "being the best security of a free state."⁵⁹ He feared the latter insinuated that while a militia was the "best security," it also admitted that a standing army was a secondary option. Gerry moved that it should read, a "well regulated militia, trained to arms," because this version would make it the federal government's duty to ensure that a militia was maintained.⁶⁰ Although the motion was not seconded (most likely because the Constitution already vested the states with plenary power to train), the language reading "being the best security of a free state" was eventually removed. The phrase "necessary to the" replaced "the best," thus making the Amendment constitutionally protect what Gerry, Jefferson, and the framers wanted it to—a "well-regulated militia" that was to be the *only* security of a free state.⁶¹

What is also intriguing about Jefferson's 1802 letter is that memory served him correctly. Frequently, when historical figures recollect past events there are a number of inconsistencies. Jefferson's

56. *Id.*; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400 (1765) ("[The militia] is the constitutional security, which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence; and which the statutes declare is essentially necessary to the safety and prosperity of the kingdom."); accord Stephen Skinner, *Blackstone's Support for the Militia*, 44 AM. J. LEGAL HIST. 1 (2000).

57. The palladium of liberty did not have to do with "arms" per se, but with a constitutional "well-regulated militia." This is confirmed by numerous sources where not one commentator referred to "arms" or individual self-defense as the "palladium of liberty." See Charles, *Constitutional Significance*, *supra* note 15, at 71–82.

58. In 1810, Elbridge Gerry also referred to the militia, not "arms" or individual self-defense, as the palladium of liberty. See Elbridge Gerry, *A Proclamation, for a Day of Public Thanksgiving, Praise and Prayer*, THE SUN (Pittsfield, Ma.), Nov. 7, 1810, at 2; Elbridge Gerry, *A Proclamation, for a Day of Public Thanksgiving, Praise and Prayer*, VERMONT REPUBLICAN (Windsor, Vt.), Nov. 12, 1810, at 1 ("For the patriotic and marital spirit which animates the Militia, that great and sole palladium of liberty . . .").

59. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 188–89 (Neil H. Cogan ed., 1997).

60. *Id.* at 188.

61. *Id.* at 175.

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memory, however, was exact in more than one instance. For example, when Jefferson reminisced on the Declaration of Independence's intellectual origins nearly forty years after drafting it, he properly recalled its inspiration and sentiment.⁶²

The same can be said here with the Second Amendment. In a letter dated December 20, 1787, Jefferson did in fact urge Madison to include a Bill of Rights that included a protection against standing armies:

There are other good things [in the Constitution] of less moment. I will now tell you what I do not like. First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, *protection against standing armies*, restriction of monopolies, the eternal and unremitting force of habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land, and not by the laws of nations.⁶³

Standard Model writers will undoubtedly continue to claim that an “armed citizenry” is what Jefferson meant as the constitutional “protection against standing armies.” The intellectual and ideological origins of a well-regulated militia do not support this conclusion. The historical record, including the legal works of early eighteenth century commentators, is clear that an armed rabble or unorganized militia—i.e. a mere “armed citizenry”—was a danger to republican liberty, not an advancement of it.⁶⁴

Furthermore, it is important to highlight and separate Jefferson's enforcement of national militia policy with his preference for a select militia. The latter confirms and illustrates that Jefferson did not believe that an armed citizenry was sufficient for the national defense. In terms of policy enforcement, the 1792 National Militia Act prescribed that every person enrolled shall “provide” the prescribed arms and accoutrements.⁶⁵ The manner in which the arming provision was enforced remained a state matter, *not* a federal one, as the Act's

62. See 10 THE WRITINGS OF THOMAS JEFFERSON 343 (New York, G.P. Putnam's Sons 1899); Patrick J. Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 470–71, 477–501 (2011) [hereinafter Charles, *Restoring*].

63. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 2 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 273, 275 (Thomas Jefferson Randolph ed., 1829).

64. See Charles, *Constitutional Significance*, *supra* note 15, at 8, 21, 67.

65. 1 Stat. 271 (1792).

debates and subsequent implementation prove.⁶⁶ In some cases the arms were provided by the individual—who would then be subject to fines for non-compliance—and in other cases the arms were provided by the state.⁶⁷ Jefferson never showed a preference for either solution. He merely sought to arm all militia members enrolled, and Jefferson became particularly alarmed upon learning that nearly half (forty-eight percent) of the 429,200 militiamen enrolled were unarmed.⁶⁸

Jefferson's efforts to arm the entire *enrolled* militia according to the letter of the law, however, does not coincide with his preference for a class-structured militia. Jefferson made numerous attempts to discard the 1792 National Militia Act and replace it with a select-militia, consisting of men between the ages of twenty and twenty-six.⁶⁹ He personally felt that the general militia, enrolled through the National Militia Act, would not slow down an army of regulars, and he hoped that Congress would adopt some medium solution that prevented the maintenance of a permanent standing army.⁷⁰

66. See Charles, *The 1792 National Militia Act*, *supra* note 25, at 340–43.

67. See *id.* at 344. For a more inclusive history on the problems of enforcing the 1792 National Militia Act's arming provision, see CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 71–79, 139–53.

68. See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 146.

69. See Konig, *supra* note 51, at 277. Naturally, Jefferson was not the first or only Founder to support a class structured or select militia. Both George Washington and Henry Knox supported such plans given their experience with militia in the field of battle. See 26 THE WRITINGS OF GEORGE WASHINGTON 374–98 (John C. Fitzpatrick ed., 1931); HENRY KNOX, A PLAN FOR THE GENERAL ARRANGEMENT OF THE MILITIA OF THE UNITED STATES (1786). For a historical narrative, see Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 42–43 (1998).

70. See Thomas Jefferson, Draft of First Inaugural, March 4, 1801, in 8 THE WRITINGS OF THOMAS JEFFERSON 1, 5–6 (New York, G.P. Putnam's Sons 1897) (“A well discipld militia, our best reliance in peace, & for ye first moments of war, till regulars may relieve them”); Letter from Thomas Jefferson to William A. Burwell, (Jan. 15, 1806), in 8 THE WRITINGS OF THOMAS JEFFERSON 416 (New York, G.P. Putnam's Sons 1897) (“The classification of the [select] militia has been reported against by a committee. But if any judgment can be formed from individual conversations it will be established. If it is, we need never raise a regular *in expectation of war*. A militia of young men will hold on until regulars can be raised, & will be the nursery which will furnish them.”); THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, FROM WASHINGTON TO HARRISON 142 (New York, Edward Walker 1841) (“For a people who are free, and who mean to remain so, a well-organized and armed militia is their best security. It is therefore, incumbent on us, at every meeting, to revise the condition of the militia, and to ask ourselves if it is prepared to repel a powerful enemy at every point of our territories exposed to invasion.”); Letter from Thomas Jefferson to John Armstrong (May 2, 1808), in 9 THE WRITINGS OF THOMAS JEFFERSON 193, 194 (H.A. Washington ed.,

Jefferson even once wrote to Madison that a “militia of all ages” was “entirely useless for distant service.”⁷¹ At first, Jefferson’s push for militia reform can be attributed to his concern over the rise of Napoleon Bonaparte and the threat the French Revolution ideologically presented.⁷² However, Jefferson also maintained larger fears—the national defense—and the War of 1812 served as the “I told you so” moment for the former President.⁷³

In the end, Jefferson’s hope for militia reform never materialized. Congress made it clear throughout Jefferson’s and subsequent presidencies that the duty to make the militia a bulwark in war rested upon the diligence of state governments, not the federal government.⁷⁴ As the 1810 Senate informed then-President Madison, “[t]he constitution of the United States gives to Congress only a *qualified agency* on the subject of the militia If the States are anxious for an effective militia, *to [the States] belong the power, and to [the States] belong the means* of rendering the militia truly our bulwark in war, and safeguard in peace”⁷⁵

This brings us to the second piece of *new* historical evidence that conflicts with the Standard Model: Massachusetts Adjutant General William Donnison’s articulation of the right to “keep and bear arms” as being intimately linked with a well-regulated militia. Again,

New York, Derby & Jackson 1859) (“Against great land armies we cannot attempt it but by equal armies. For these we must depend on a classified militia, which will give us the service of the class from 20 to 26, in the nature of conscripts, composing a body of about 250,000, to be specially trained.”).

71. Letter from Thomas Jefferson to James Madison (May 5, 1807), *in* 9 THE WRITINGS OF THOMAS JEFFERSON 49, 49 (New York, G.P. Putnam’s Sons 1898).

72. Letter from Thomas Jefferson to James Brown (Oct. 27, 1808), *in* 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 71, at 211 (“I as little fear foreign invasion. I have indeed thought it a duty to be prepared to meet even the most powerful, that of a Bonaparte, for instance, by the only means competent, that of a classification of the militia, & placing the junior classes at the public disposal; but the lesson he receives in Spain extirpates all apprehensions from my mind.”).

73. *See* Letter from Thomas Jefferson to William H. Crawford (Feb. 14, 1815), *in* 8 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 259 (J. Jefferson Looney ed., 2011) (“As to men, nothing wiser can be devised than what the Secretary at war [James Monroe] proposed in his Report at the commencement of Congress. It would have kept our regular army always of necessity full, and by classing our militia according to ages, would have put them into a form ready for whatever service, distant or home, should require them. Congress have not adopted it, but their next experiment will lead to it.”).

74. Charles, *The 1792 National Militia Act*, *supra* note 25, at 348–50.

75. Report of a Committee on the Militia System of the United States (Mar. 6, 1810), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 256 (Washington, Gales and Seaton 1832), *available at* <http://memory.loc.gov/llsp/101610200102620256.tif> (emphasis added).

according to Standard Model writers, any governmental militia understanding of the Second Amendment is “gibberish,” “ahistorical,” and the record allegedly provides us with “*no evidence*” to support it.⁷⁶

However, Donnison provides us with *more* proof illustrating otherwise. In General Orders dated March 1, 1794, Donnison wrote to the state’s militia officers the following:

A well regulated Militia, composed of the great body of the Citizens, is always the chief dependence of a free people for their defence. Americans have ever esteemed the right of keeping and bearing Arms, as an honorable mark of their freedom; and the Citizens of Massachusetts, have ever demonstrated *how highly they prize that right, by the Constitution they have adopted, and the laws they have enacted, for the establishment of a permanent Militia*—by the readiness and alacrity with which they equip themselves, and march to the field—and by the honest pride they feel whenever they put on the exalted character of Citizen-Soldiers.⁷⁷

Donnison’s linking of arms bearing with a well-regulated militia is consistent with other late seventeenth century, eighteenth century, and early nineteenth century writings on the right to arms.⁷⁸ Undoubtedly, Donnison understood the virtuous link between militia arms bearing, liberty, and the advancement of the public good.⁷⁹ In General Orders dated May 1, 1798, he confirmed that “the advantages” of an “efficient Militia” were “incalculable.”⁸⁰ This especially held true in a democratic republic, where the people were the means and ends of the Constitution, including its defense:

In Peace as well as in War, every State has found it necessary to have a Military Establishment. This is necessary not only to repel the Foe from without, but for the preservation and tranquility within the body politic. In arbitrary States the Military Power is confided to a Standing Army; but in those that are free, the Citizens themselves form the bulwark of their own Liberty and Independence. Thus it is in the United States, the Free Citizens of America are their own Guardians; *they constitute the Military Force*

76. See Hardy, *supra* note 34, at 330 (emphasis added); Kates, *supra* note 4, at 1227–30.

77. William Donnison, General Orders, Head-Quarters, Boston (March 1, 1794) (emphasis added) (on file with author).

78. See Charles, *Constitutional Significance*, *supra* note 15, *passim*.

79. See *id. passim*.

80. William Donnison, General Orders, Head-Quarters, Roxbury (May 1, 1798) (on file with author).

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destined to preserve the Peace of the Community, and to guard against Foreign Invasion. In a Nation thus situated, there can be no real cause of jealousy between the Civil and Military Powers. The Citizens composing the Militia having the same interests in the welfare of the community, they will be the faithful guardians of the Commonwealth. Hence it is reasonable for the Commander in Chief to expect, that every Individual will do his duty with alacrity, *that the Laws for regulating the Militia will be punctually obeyed; that order and subordination will be maintained, and that regularity and discipline will be fully established throughout the Militia of this Commonwealth.*⁸¹

Donnison's observations on the constitutional role of a well-regulated militia is consistent with Article XVII of the 1780 Massachusetts Constitution: "The people have a right to keep and to bear arms for the common defence . . . and the military power *shall always* be held in an exact subordination to the civil authority and be governed by it."⁸² Article XVII makes no mention of a militia, yet eighteenth century contemporaries understood this right to be linked to militia service.⁸³ Take for instance the following statement, which was drafted by the Massachusetts Assembly in the midst of Shays' Rebellion:

Whereas in a free government, where the people have a right to bear arms for the common defence, and the military power is held in subordination to the civil authority, it is necessary for the safety of the State that the virtuous citizens thereof *should hold themselves in readiness, and when called upon, should exert their efforts to support the civil government,* and oppose the attempts of factious and wicked men, who may wish to subvert the laws and Constitution of their country⁸⁴

The Assembly's wording to "hold themselves in readiness . . . to support the civil government" was a direct reference to militia service. Furthermore, the statement denounced the actions of Shays' insurgents as contrary to what Article XVII protects. The same interpretation was conveyed in a series of editorials penned by Judge

81. *Id.* (emphasis added).

82. MASS. CONST., pt. I, art. XVII (emphasis added).

83. For a different view, see James A. Henretta, *Collective Responsibilities, Private Arms, and State Regulation: Toward the Original Understanding*, 73 *FORDHAM L. REV.* 529, 536 (2004) (showing that there were proposals for Article XVII to read "The people have a right to keep and bear arms for *their own* as the common defence") (emphasis added).

84. Act of Feb. 20, 1787, ch. 59, 1787 Mass. Acts 291 (emphasis added).

George Thatcher, a member of the First Congress.⁸⁵ Thatcher agreed that the Bill of Rights imposes constitutional limits on the legislature.⁸⁶ However, in the case of Article XVII, this meant that the “right to keep and bear arms for the common defence” was “prefixed to the [C]onstitution” and was “never to be infringed.”⁸⁷ Whereas all other uses of arms were “alienable right[s]” and could be “abridged by the legislature as they may think for the general good.”⁸⁸

To summarize the two case studies, both Jefferson and Donnison provide us with more evidence that calls into question the Standard Model as a viable theory moving forward.⁸⁹ What is particularly troubling with the Model is its advancement of a general or universal militia divorced from government.⁹⁰ Its supporters view “the people” as the individual keepers of public and private violence, yet the history of public arms regulation and what constituted a well-regulated society runs counter to this very idea.⁹¹ Again, the purpose of these studies is not to question the holdings of *Heller* and *McDonald*. But if the Supreme Court moves forward with the Standard Model in its entirety, the Court will be advancing false notions of history. And rather than preserving or restoring the Founders’ Second Amendment, the Court will be rewriting history altogether.

B. Excavating the Standard Model’s Poor Foundation

Perhaps the largest dilemma facing the Supreme Court as it moves forward with Second Amendment jurisprudence is separating fact

85. See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 161 (2007).

86. See *id.*

87. *Scribble Scrabble*, CUMBERLAND GAZETTE (Portland, Me.), Dec. 8, 1786, at 1.

88. Charles, *Scribble Scrabble*, *supra* note 9, at 1826–27. For more on Thatcher’s understanding of the right to arms and the 1780 Massachusetts Constitution, see *id.* at 1822–35.

89. For this author’s previous writings that call the Standard Model into question following the *McDonald* decision, see Charles, *The 1792 National Militia Act*, *supra* note 25; Charles, *Constitutional Significance*, *supra* note 15; Charles, *Scribble Scrabble*, *supra* note 9.

90. See HALBROOK, *supra* note 22, at 181–83; Hardy, *supra* note 34, at 330; Hardy, *Ducking the Bullet*, *supra* note 41, at 67 n.32. For a discussion on how any unorganized militia or independent militia association rights are historically unsupported, see Charles, *The 1792 National Militia Act*, *supra* note 25, at 374–90. The Supreme Court has even held there are no independent militia rights. See *District of Columbia v. Heller*, 554 U.S. 570, 620 (2008); *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886).

91. See Charles, *The Faces*, *supra* note 9, at 11–41.

from fiction. Again, for over thirty-five years Standard Model writers have succeeded in building a mythical construct that proves difficult to separate and deconstruct. What makes this task particularly complicated is the number of layers the Model is built on. One article is built upon another, and so on, even in cases where previous articles have been rebutted or shown to be historically unacceptable.

What proves even more problematic is that many of the Model's historical claims are unsupported. Often, Standard Model works seek to deduce historical meaning through hypothetical word scenarios that they claim prove "public understanding," or, if conducted properly, what historians would refer to as a combination of social and intellectual history.⁹² Certainly, the way in which the public understood the Constitution is important for any historical inquiry.⁹³ But conducting an objective social and intellectual history requires more than parsing text and finding a favorable interpretation.⁹⁴ All historical inquiries, including that of social and intellectual history, require historical context. This means the writer must take into account "beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day."⁹⁵ A proper social and intellectual history also requires the conducting of the most basic methodologies, such as comprehensive research, reading and incorporating the seminal accepted works on the subject (or at least distinguishing one's

92. See Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295, 297–304 (2011) (discussing the problems with deducing eighteenth century public meaning for constitutional interpretation); Barry Friedman, *Discipline and Method: The Making of the Will of the People*, 2010 MICH. ST. L. REV. 877, 891 (2010) (agreeing with historians that legal works need to adhere to reasonable historical "standards regarding how they search, what claims they make, on what evidence, and to what end").

93. This author agrees that the text of the Second Amendment provides historians with an interpretational starting point. However, we must understand those words in their legal context, and the place to start is an exhaustive examination of eighteenth century militia laws and treatises because of the Second Amendment's prefatory language, "A well-regulated militia." See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 15–34.

94. See Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 6–7 (1969) [hereinafter Skinner, *Meaning*] (discussing how a focus on text often brings to "bear some of one's own expectations about what he must have been saying" and converting "scattered and quite incidental remarks" into doctrine); Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 NEW LITERARY HIST. 393, 407–08 (1972) [hereinafter Skinner, *Motives*] (stating the importance of interpreting historical text is focusing on the "writer's mental world" and any factors linked to the text's creation).

95. Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 378 (1998).

conclusions from said works), separating historical realities from political propaganda, pinpointing what may have intellectually or ideologically influenced the writer, and weighing the credibility of the writer's opinion with others of the same period.⁹⁶ Most Standard Model works do not meet these standardized burdens, and it remains the reason why professional historians generally do not accept these works.⁹⁷

The repercussions that poor methodologies can have on historical objectivity and preserving our past are of particular concern to historians.⁹⁸ A lack of professional and objective norms leads to myths. As a result, history runs astray, and generations are socialized to believe historical fictions are realities.⁹⁹ Some Founding Era myths that have matriculated as a result of poor methodologies include the likes of limited immigration powers,¹⁰⁰ a natural rights interpretation of the Declaration of Independence,¹⁰¹ and a presumption of liberty when interpreting the Constitution and Bill of Rights.¹⁰² Each of

96. *See id.* at 389–96, 451 (discussing the importance of historical expertise in objectivity).

97. *See* Brief for English/Early American Historians as Amici Curiae in Support of Respondents, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (twenty-one scholars and historians disagreeing with the Standard Model); Shalhope, *supra* note 13, at 1442 (discussing how law review articles have polluted the history of the Second Amendment).

98. *See* Konig, Heller, *Guns, and History*, *supra* note 12, at 177–97.

99. Constitutional revisionism is nothing new in our Anglo-American legal tradition. *See* J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (1957) (discussing the use of history and contemporary understandings of the common law to mold constitutional interpretation); *see also American Constitution in 1787 and 1866*, in 2 *THE INTERNATIONAL REVIEW* 604, 619 (New York, A.S. Barnes & Co. 1875) (discussing how, even in the late nineteenth century, constitutional interpretation is subjective).

100. *Compare* Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions*, 15 *TEX. REV. L. & POL.* 61, 67 (2010) (addressing the international and Anglo origins of immigration and its imprint on American constitutionalism), *with* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of The Early Republic: Prospectivity, Uniformity, and Transparency*, 96 *VA. L. REV.* 359, 369 (2010) (improperly claiming the immigration power was limited to norms of prospectivity).

101. *See* David Armitage, *The Declaration of Independence and International Law*, 59 *WM. & MARY Q.* 39, 46–47, 62 (2002) (confirming the Declaration had nothing to do with individual natural rights, and everything to do with the law of nations).

102. *See generally* Charles, *Restoring*, *supra* note 62, at 477–78 (rebutting Randy Barnett's claim that the founding generation prescribed to a legal "presumption of liberty" when interpreting the Constitution); *see also* Jack Rakove, *Book Review*, 1 *N.Y.U. J.L. & LIBERTY* 660, 669 (2005) (reviewing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) and arguing the

these myths, if ever taken seriously by the Supreme Court, will not only give false perceptions of history to future generations, but will affect jurisprudence drastically as to amend the Constitution itself.

This historical burden is something that the Court bears on a day-to-day basis when weighing arguments and writing opinions, whether each Justice knows it or not.¹⁰³ Just one historical mistake by a majority can lead to countless others, especially given that the lower courts often are bound to restate the Supreme Court's historical mistakes as historical facts.¹⁰⁴ Thus, the Court's duty to maintain a sense of historical consciousness is not something the Justices should take lightly.¹⁰⁵ They must remain cognizant that any cherry-picking of historical events will have dire consequences on society at large, especially when it adopts unproven and mythical writings as historical authority.¹⁰⁶

A fitting example as to how far a myth can supersede historical reality is the story of George Washington's teeth. One will never find the subject litigated in a court of law, and its history will likely never impact the outcome of a case. Still the subject as to whether Washington's teeth were made of wood has latched itself onto the first President. It is uncertain how the myth polluted American discourse, but numerous studies by historians and other scholars have all dismissed it as unsupported.

The earliest study was a 1948 work entitled *An Introduction to the History of Dentistry*. Written by Bernhard Wolf Weinberger, the two-volume work provided the first exhaustive examination of dental history and found no support for the Washington myth.¹⁰⁷ Later

main fault with Barnett's "presumption of liberty" thesis is that "the Constitution . . . was much more about powers than rights").

103. See Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 ALB. L. REV. 91 (1998).

104. See Jeffery S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1184-92 (1998) (discussing the risks of using history and how jurists may reduce that risk).

105. In the words of Oliver Wendell Holmes, "In order to know what [the law] is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. *But the most difficult labor will be to understand the combination of the two into new products at every stage.*" OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (emphasis added).

106. See J.G.A. POCOCK, *POLITICAL THOUGHT AND HISTORY: ESSAYS ON THEORY AND METHOD* 3-20, 189 (2009) (discussing the importance of historical consciousness in articulating the past divorced from one's present social awareness).

107. See 2 BERNARD WOLF WEINBERGER, *AN INTRODUCTION TO THE HISTORY OF DENTISTRY* 291-334 (1948).

histories reinforced this point, including John Woodforde's *The Strange Story of False Teeth* and Robert Darnton's *George Washington's False Teeth*.¹⁰⁸ Yet the wooden teeth myth lives on. As Edward G. Lengel astutely points out, this is because individuals make cognitive choices that "reveal more about us" than they do about what the historical record provides.¹⁰⁹ It is natural for individuals to "define themselves" through their own knowledge and beliefs of history rather than seek truth or clarity. This does not mean that historians will ever concede to accepting myth as historical fact.

One of the historian's primary roles is to educate the public about the past for the sake of understanding the past, whether the people choose to accept it or not. This includes subjects that have no political or legal significance (such as Washington's teeth). The Mount Vernon Ladies Association has gone so far as to dedicate a portion of its museum to debunk the wooden teeth myth, which includes an informational video from the History Channel.¹¹⁰ The Association also lists the myth on the Association's website as the first "falsehood" worth correcting.¹¹¹ There is even a children's book dedicated to the cause, its purpose being to educate children (and hopefully parents too) that "contrary to popular belief, [Washington] never had a set of wooden teeth."¹¹²

In one important aspect, the Standard Model account of the Second Amendment is akin to Washington's wooden teeth. Both will persist no matter how much historical evidence is unearthed or literature is published. Despite historians' best efforts, individuals, groups, political parties, and advocacy groups will hold onto the Standard Model or variations of the Model because it is what they heard or read somewhere, a personal belief they hold dear and agree with, or a political agenda from which to benefit. Few, if any, will disagree that it is every person's right to believe as they wish.

108. See ROBERT DARNTON, *GEORGE WASHINGTON'S FALSE TEETH: AN UNCONVENTIONAL GUIDE TO THE EIGHTEENTH CENTURY*, at xv, 23–24 (2003); JOHN WOODFORDE, *THE STRANGE STORY OF FALSE TEETH* 98–108 (1968).

109. EDWARD G. LENGEL, *INVENTING GEORGE WASHINGTON: AMERICA'S FOUNDER, IN MYTH & MEMORY*, at xviii (2011).

110. Press Release, Mount Vernon, Mount Vernon Exhibits George Washington's Presidential Dentures & His Last Tooth, Encased as a Souvenir by his Dentist (Oct. 13, 2009), available at <http://www.mountvernon.org/miscellaneous/news-press/release-archive/mount-vernon-exhibits-george-washington's-presidential-dent>.

111. *Facts & Falsehoods About George Washington*, MOUNT VERNON (Jan. 18, 2006), <http://www.mountvernon.org/content/facts-falsehoods-about-george-washington-0>.

112. DEBORAH CHANDRA ET AL., *GEORGE WASHINGTON'S TEETH* (2007).

However, a person's freedom to believe "X" as historical fact, does not make it a fact unless it is supported by the employment of proper historical methodologies and the gathering of substantiating historical evidence in context.

At the same time, the Standard Model and Washington's teeth differ in terms of public education through advocacy. There are, of course, no public or private interest groups dedicated to Washington's wooden teeth. The opposite holds true of the Standard Model. Groups like the National Rifle Association and the Second Amendment Foundation emphasize that the Founders viewed guns as the centerpiece of republican liberty, and they endorse and finance works that only advance this baseline conclusion.¹¹³ There is even a children's book that advances this controversial notion of history, which at no point emphasizes the significance that the founding generation placed on a "well-regulated militia," its relationship to a republican government, or that the right of self-preservation and resistance is very narrowly tailored as the Declaration of Independence spells out. Instead, the book simplifies the Second Amendment as a "privilege, responsibility, and right to own our own guns, and be ready to fight" against enemies foreign and domestic, *i.e.* an urban militia or armed rabble.¹¹⁴ It is by having "rifles by [our] sides" that we protect American liberty and honor our fallen. This laissez-faire depiction of the right to arms is troubling to historians, and the book's indexed quotations, which seek to teach "parents and grandparents" about the ideological importance of owning guns, is borderline historical propaganda.

There is an important yet simple lesson from this comparison—historical myths are difficult to remove from society at large, including the ridiculous and unfinanced myth of Washington's wooden teeth. Just pause to think—the Washington myth has been academically disproven for over sixty years, yet people still connect the first President with having wooden teeth, and it is a myth that

113. See *Frequently Asked Questions*, SECOND AMENDMENT FOUNDATION, http://www.saf.org/default.asp?p=saf_faq (last visited Nov. 29, 2012); *Supported Research*, NRA C.R. DEF. FUND, <http://www.nradefensefund.org/supported-research.aspx> (last visited Nov. 29, 2012) (showing \$264,000 in research grants for a four month period to Standard Model writers that include David T. Hardy, Don B. Kates, David B. Kopel, and Kenneth Klukowski).

114. KIMBERLY JO SIMAC, *WITH A RIFLE BY MY SIDE: A SECOND AMENDMENT LESSON* (2010). This book was financed by the author, and endorsed by the Gun Owners of America. Although the book was personally financed, it does give readers information to contact gun advocacy groups like the Gun Owners of America and the National Rifle Association.

retains no political, philosophical, or ideological affiliation. This last point is important because often an individual or group's historical perception is influenced by these factors. In other words, one's historical view of a given constitutional provision is often not based upon the search for the truth, but by latching onto a textual interpretation for an ideal already maintained.

This scenario particularly presents itself to most Standard Model analyses on the Second Amendment, and it is one of the reasons why it has been able to thrive by pandering myth and assumption as historical fact. For the most part, historians have identified the Model's fundamental problems and see it for what it truly is—a house of cards. By removing *any* of the building blocks upon which the Model rests, the historian sees that it easily falls. Even though historians have witnessed the Model collapse on numerous occasions,¹¹⁵ its supporters have managed to get around this by citing disproven or abandoned historical works as academic authority.¹¹⁶ Other tactics include interpreting text out of context, ad hoc wordplay, claiming that circumstantial evidence is the best historical evidence, and filling in historical gaps with personal opinion because they fail to do the research.

These are just some of the ways that Standard Model writers have rewritten the history of the Second Amendment to the point that it is

115. See, e.g., Saul Cornell, "Don't Know Much About History": *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 681–82 (2002).

116. One prominent example is the work of historian Robert E. Shalhope. In 1982, he wrote an article in the *Journal of American History* on the ideological origins of the right to arms. See Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982) [hereinafter Shalhope, *The Ideological Origins*]. Numerous Standard Model works then pawned and manipulated Shalhope's article to support their conclusions, not realizing its purpose was to facilitate a discourse and establish a research agenda. See Robert E. Shalhope & Lawrence Delbert Cress, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. AM. HIST. 587 (1984). In fact, by 1985 Shalhope criticized the Standard Model in a review of Stephen P. Halbrook's book *That Every Man Be Armed*. See Robert E. Shalhope, *The Right to Bear Arms: A View From the Past*, 13 REVS. AM. HIST. 347, 349-52 (1985) (book review) [hereinafter Shalhope, *The Right to Bear Arms*]. In 2003, Shalhope then endorsed William G. Merkel and H. Richard Uviller's book linking the Second Amendment to a militia right. See Shalhope, *supra* note 13 at 1442. In 2008, Shalhope joined a number of prominent historians that sided against the Standard Model, thus showing further disagreement with Model writers that mischaracterized his work. See Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer et al. in Support of Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). Despite this fact, Standard Model writers still cite to Shalhope as supporting their argument and being in their camp. See, e.g., Kates, *supra* note 4, at 1213–14, 1217.

virtually unrecognizable to the founding generation. There are indeed others, but the remainder of Part I will focus on illuminating the four most common deficiencies. These include (1) a persisting lack of historical context, (2) the advancement of a poor research agenda, (3) the failure to adhere to objectivity norms, and (4) a failure to meet the historian's evidentiary burden. These deficiencies will be highlighted by focusing on the most frequently cited and relied-upon Standard Model works—what I refer to as the Standard Model pillars.

1. *History Lesson 101: Interpreting Text Without Historical Context Is Just a Con*

Any student who majors in history immediately learns the importance of historical context in writing an objective account.¹¹⁷ Context is even more essential when deducing a writer's intentions or written words—what is traditionally referred to as the “history of ideas” or “intellectual history.”¹¹⁸ Historians know that words are inert or that they must be placed in the time of their construction.¹¹⁹ If the writer's meaning changes it is only due to the “imaginative processes of their human inventors and users” that misinterpreted it, not the original author.¹²⁰ Thus, the historian must remain cognizant to balance historical texts, images, and theories responsibly, with precision, and “connect them to a particular historical world.”¹²¹ A historian cannot simply assume meaning with a modern predisposition.¹²² The historian must import the language into the proper historical construct, “point out conventions and regularities that indicate what could and could not be spoken in the language, and

117. See HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 20–21 (1931); *id.* at 16 (“Perhaps the greatest of all the lessons of history is the demonstration of the complexity of human change and the unpredictable character of the ultimate consequences of any given act or decision of men; and on the face of it *this is a lesson that can only be learned in detail.*”) (emphasis added).

118. See Skinner, *The Limits of Historical Explanations*, *supra* note 31, at 213–14 (stating the importance of providing historical context to the “greatest detail” whenever possible).

119. See Joyce Appleby, *One Good Turn Deserves Another: Moving Beyond the Linguistic; A Response to David Harlan*, 94 *AM. HIST. REV.* 1326, 1328 (1989).

120. *Id.*

121. Anthony Grafton, *The History of Ideas: Precept and Practice, 1950–2000 and Beyond*, 67 *J. HIST. IDEAS* 1, 30 (2006).

122. See BUTTERFIELD, *supra* note 117, at 22–23; see also J.G.A. POCOCK, *POLITICS, LANGUAGE, AND TIME* 106 (1971) (discussing the methodological problems with assuming the relation of ideas to historical social reality).

in what ways the language *qua* paradigm encouraged, obliged, or forbade its users to speak and think.”¹²³

Perhaps a better way to summarize this placement of text into historical context is to follow Quentin Skinner’s three steps to conducting intellectual history:

1. [Historians] need to recover an author’s intentions in writing in order to understand the meaning of what he writes.
2. In order to recover such intentions, it is . . . essential to surround the given text with an appropriate context of assumptions and conventions from which the author’s exact intended meaning can then be decoded.
3. This yields the crucial conclusion that a knowledge of these assumptions and conventions must be essential to understanding the meaning of text.¹²⁴

To ignore these rules—that is, to interpret text loosely—is to commit what Herbert Butterfield termed a “pathetic fallacy” because it abstracts conclusions apart from the author’s purpose.¹²⁵ Yet sadly this is the interpretative foundation upon which much of the Standard Model is built. This dismissal of the most important of all historical methodologies has been accomplished by promoting dictionaries and the general usage of words above any contextual, intellectual, social, or ideological framework existing at that time.¹²⁶ Perhaps the best way to summarize what is taking place in terms of methodology is through Randy Barnett’s “reasonable speaker” approach,¹²⁷ and here is how it is packaged when inquiring into the scope of the Second Amendment:

123. J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY 10 (1985); *see also* J.G.A. Pocock et al., *The History of British Political Thought: A Field and its Futures*, in BRITISH POLITICAL THOUGHT IN HISTORY, LITERATURE AND THEORY, 1500–1800, at 10, 11 (David Armitage ed., 2006) [hereinafter Pocock et al., *The History of British Political Thought*] (“The historian is interested in what the author meant to say, succeeded in saying, and was understood to have said, in a succession of historical contexts now distant in time.”).

124. Quentin Skinner, *Hermeneutics and the Role of History*, 7 NEW LITERARY HIST. 209, 216 (1975).

125. BUTTERFIELD, *supra* note 117, at 20.

126. *See* Merkel, *Scalia’s Perverse Sense of Originalism*, *supra* note 12, at 379–80 (objecting to the use of dictionaries for constitutional meaning); *accord* Charles & O’Neill, *supra* note 43, at 56.

127. *See* Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (noting that instead of searching for subjective meanings that the Framers personally adopted, one should seek the “meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted”).

What did “militia” mean in 1791? Or “well-regulated” or “arms” or “bear” or “right” or “the people”? . . . Discerning the original public meaning of the text requires an examination of linguistic usage among those who wrote and ratified the text as well as the general public to whom the Constitution was addressed. Evidence of specialized meaning or intent by framers or ratifiers is only relevant if it is shown that such specialized meaning would have been known and assumed by a member of a general public. Where more than one contemporary meaning is identified, it becomes necessary to establish which meaning was dominant. Any such historical claim is an empirical one that requires actual evidence of usage of substantiate.¹²⁸

When one compares Barnett’s approach with that of intellectual historians, the difference is telling.¹²⁹ The former, which is now a staple of New Originalism,¹³⁰ finds it acceptable to parse text, define each part, and reassemble the whole, albeit often out of its intended context.¹³¹ Meanwhile, intellectual historians require substantially more, such as placing words in the writer’s context, applying it to the period, determining its intended application to society as a whole, and weighing it with prominent intellectual influences.¹³²

Another problem with Barnett’s approach is that it is difficult to determine, first, what constitutes a “reasonable speaker” in the eighteenth century and, second, which “contemporary meaning” was “dominant.”¹³³ As historian Saul Cornell has pointed out, the

128. Barnett, *supra* note 40, at 239–40.

129. It should be noted that eight years earlier Barnett co-authored an article with Don B. Kates endorsing the Standard Model as historically supported. See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1143 (1996).

130. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 245 (2009) (explaining how the proper inquiry is how the words of the Constitution “would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (“Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.”).

131. This interpretational dilemma has been going on for quite some time. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

132. See Skinner, *supra* note 124, at 216.

133. See Merkel, Heller as *Hubris*, *supra* note 12, at 1227 (discussing the problems with relying on “original public meaning” and how the historical burden should rest with “original public meaning adherents to show that their preferred understanding—while inconsistent with that of the text’s authors—is nonetheless in harmony with that of its ratifiers”).

varieties of interpretation that can be found in any historical era are numerous.¹³⁴ Certainly they cannot all be reasonable, nor can historians accept each and every viewpoint as correct or “dominant.”¹³⁵ The fact remains that the historical evidence, and the resulting conclusions, must be intimately related, and not merely be a twenty-first century reader’s plausible interpretation. In other words, history requires something more than finding a few instances where the use of language is favorable to a particular interpretation.¹³⁶

A perfect historical example of the interpretational divide between the Standard Model method and that of intellectual historians can be found in an examination of William Blackstone’s *Commentaries on the Laws of England*.¹³⁷ Since this journal’s publication of David I. Caplan’s 1976 article, the Standard Model has consistently pawned Blackstone as articulating a “strong and clear common law tradition” of the “citizen’s right to possess and carry arms for individual self-

134. See, e.g., Cornell, *Originalism on Trial*, *supra* note 12, at 630–31.

135. For a discussion, see Cornell, *The People’s Constitution*, *supra* note 92, at 295–304. See also Gordon Wood, *Rhetoric and Reality in the American Revolution*, 23 WM. & MARY Q. 3 (1966) (discussing the historian’s dilemma in separating political propaganda, changing arguments, and political realities). For a working example of the interpretational divide that can result from a “reasonable speaker” approach versus a deeper historical inquiry, compare Clayton E. Cramer et al., “*This Right is Not Allowed By Governments That Are Afraid of the People*”: *The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 855–62 (2010) (claiming that by the time the Fourteenth Amendment was ratified, the Second Amendment was understood as an individual right to resist tyranny and to protect against public violence), with Charles, *Historical Guideposts*, *supra* note 18, at 57–76 (showing there is evidence to suggest that John Bingham, members of the 39th Congress, and Freedman interpreted the Second Amendment as a right to take part in constitutional militias).

136. This is essentially what happened with the Second Amendment phrase “bear arms.” See Barnett, *supra* note 40, at 245–47 (relying on a failed hunting law and the Pennsylvania Minority proposals to determine meaning); Cramer & Olson, *supra* note 50 (locating sources that interpreted “bear arms” broadly). For a historian’s dissent to this methodological approach see Kozuskanich, *supra* note 12. For a historian’s view that the digitalizing of history can be partly at fault for poor historical interpretations by non-historians, see Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry Into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585 (2009).

137. See BLACKSTONE, *supra* note 56. Compare Charles, *The Right of Self-Preservation*, *supra* note 9, at 24–60 (showing the political and ideological restraints placed on the right of revolution), and Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 253–55 (2000) (dissenting to the Standard Model view of Blackstone), with Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 87–104 (1992) (claiming the founding generation saw no difference in individual armed self-defense and rebelling against tyranny).

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preservation and collective defense.”¹³⁸ This is a rather poor and cursory reading of Blackstone, for he eloquently articulated the right as follows:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.¹³⁹

Blackstone’s reference to “the natural right of resistance and self-preservation” does not refer to armed self-defense for private purposes.¹⁴⁰ It is a *public* allowance (under due restrictions) of a “natural right”—and that allowance is made for a particular, *public* purpose: to “restrain the violence of oppression” from a tyrannical sovereign.¹⁴¹ This indeed is the only interpretation that comports with Blackstone’s definition of an “auxiliary right”: a means to ensure that rights “ascertained, and protected by the dead letter of the laws, [would remain in force] if the constitution had provided no other method to secure their actual enjoyment.”¹⁴² The first auxiliary right (the first means to protect primary rights) is Parliament’s exercise of its powers; the second is the sovereign; and the third is the courts of justice.¹⁴³ When those fail, the people may resort to the fourth auxiliary right: the right to petition Parliament or the King for the “redress of grievances.”¹⁴⁴ And only after *that* right is exhausted may the people resort to “having arms.”¹⁴⁵ Thus, in Blackstone’s construct, the Declaration’s guarantees—the right to petition and the allowance of “having arms”—are means by which individuals preserve and protect their liberties if Parliament, the sovereign, and the courts fail them.¹⁴⁶

138. Caplan, *supra* note 19, at 34. For some other prominent and influential Standard Model examples misinterpreting Blackstone, see HALBROOK, *THAT EVERY MAN BE ARMED*, *supra* note 40, at 45, 54; MALCOLM, *supra* note 9, at 130, 142–43.

139. 1 BLACKSTONE, *supra* note 56, at 139.

140. See *supra* note 138 for Standard Model writers attempting to link Blackstone to a common law right of self-defense against public and private aggression.

141. 1 BLACKSTONE, *supra* note 56, at 139.

142. *Id.* at 136.

143. *Id.* at 136–38.

144. *Id.* at 138–39.

145. *Id.* at 139.

146. For a full discussion see Charles, *The Right of Self-Preservation*, *supra* note 9, at 24–60. Subsequent early nineteenth century treatises similarly understood

At no part did Blackstone link the right of personal security with the possession of arms, nor did he cite to the Declaration of Rights' "having arms" provision in his discussion of personal security.¹⁴⁷ The omission was deliberate, for Blackstone was referring to a rather distinct principle—lawful rebellion and resistance to restore the Constitution.¹⁴⁸ Parliament controlled this right as a means to check a tyrannical sovereign, particularly one that maintained an oppressive or unlawful standing army.¹⁴⁹ In such instances, Parliament maintained the authority to call forth the people as a militia—"suitable to their condition and as allowed by law"—to restore the Constitution and the people's liberties in the process.¹⁵⁰

Historians refer to this as *history in context*, yet somehow Standard Model scholars read Blackstone as advancing an individual right to carry arms to preserve the peace. How so? Easy—one just has to insert personal opinion or modern sentiment in lieu of historical context.¹⁵¹ Take, for instance, Don B. Kates. In his mind, the right to arms "emerged from a tradition which viewed general possession of arms as a positive social good as well as an indispensable adjunct to the individual right of self-defense."¹⁵² He comes to this conclusion by taking numerous commentators out of context, particularly Blackstone. According to Kates, Blackstone "described the right to arms . . . emphasiz[ing] both the individual self-protection rationale and the criminological premises, which are so foreign to the terms of the modern debate over the Second Amendment."¹⁵³ History in context, however, does not support such a conclusion.

Blackstone in this construct. See JEAN LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND, OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 316–17 (David Lieberman ed., Liberty Fund 2007) (1816); FRANCIS PLOWDEN, *THE CONSTITUTION OF THE UNITED KINGDOM OF GREAT BRITAIN & IRELAND* 158 (n.p., J. Ridgway 1802).

147. 1 BLACKSTONE, *supra* note 56, at 125–30. Blackstone cites to the Declaration of Rights in other sections of his *Commentaries* including his discussions on excessive fines, unreasonable bail, and dispensing and suspending the laws. See *id.* at 131, 138; 4 BLACKSTONE, *supra* note 56, at 472.

148. See Charles, *The Right of Self-Preservation*, *supra* note 9, at 26–40.

149. See Charles, "Arms for Their Defence"?, *supra* note 3, at 356–57.

150. Charles, *The Right of Self-Preservation*, *supra* note 9, at 42, 45.

151. The intellectual historian would describe such persons as theorists. The theorist only reconstitutes history "in terms set by the theoretical enterprise," which is not a method "the historian of political thought will use in reconstituting a history of language and discourse." Pocock et al., *The History of British Political Thought*, *supra* note 123, at 11.

152. Kates, *supra* note 137, at 93.

153. *Id.*

This leads us to an important empirical question: what is the harm in stretching text beyond its intended context—or what one may refer to as breaking the bounds of historical elasticity? The answer is that one false interpretation can lead to a domino effect that creates a web of false historical and legal paradigms.¹⁵⁴ This is exactly what has happened to Blackstone’s fifth auxiliary right as Standard Model writers then applied this poor construct to the founding generation.¹⁵⁵ In such instances, historical context is replaced with modern misconceptions of text or the importation of personal opinion as historical fact. Some lawyers have even selectively quoted Blackstone—completely out of context—to argue that the Second Amendment was naturally understood to protect a right to carry arms for “protection against violence in public.”¹⁵⁶ This ahistorical conclusion is reached by classifying the 1689 Declaration of Rights “having arms” provision as a libertarian auxiliary right, which serves principally as a barrier “to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.”¹⁵⁷ To be precise, lawyers are misconstruing history

154. In the case of Kates’ understanding of the right to arms against public and private violence, a number of Standard Model writers have cited to his article as historical authority. See Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL’Y 187, 189, 192 (2006); David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 481 (1997); Kopel, *supra* note 50, at 1364, 1401, 1454; Kopel, *supra* note 17, at 137; Lund, *supra* note 40, at 248; Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 14, 61 (1996); Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 379 (2009); Reynolds, *supra* note 4, at 465, 467. For more on the “domino effect” see *infra* Part II.B.

155. See HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 40, at 58; HALBROOK, *supra* note 22, at 20–21; Hardy, *supra* note 34, at 318–19; Hardy, *supra* note 41, at 74, 81; Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1345–46 (2009).

156. See, e.g., Memorandum in Support of Plaintiffs’ Motion for Preliminary and/or Permanent Injunction at 5, *Shepard v. Madigan*, 863 F. Supp. 2d 774 (S.D. Ill. 2011) (No. 11-cv-00405).

157. *Id.* (internal quotation marks omitted) (quoting 1 BLACKSTONE, *supra* note 56, at 136); see also Presentation by Alan Gura, Esq., Partner, Gura and Possessky, P.L.L.C. to The City Club of Cleveland, The City Club of Cleveland (July 7, 2008), available [at](http://www.cityclub.org/mediacenter/cityclubpodcast/podcastpsting/tabid/194/default.aspx) <http://www.cityclub.org/mediacenter/cityclubpodcast/podcastpsting/tabid/194/default.aspx> (“The right to arms was well established . . . from Blackstone’s conception of a right of self-preservation. If you have the right to preserve your own life, Blackstone reasoned, you have an auxiliary right to arms with which you would do so, and that is what the English law protected, and that is the right the English king started to encroach upon . . . and it is very well documented.”).

to argue that, by the late eighteenth century, arms were seen as the means and ends to preserve a person's security, liberty, and property on a day-to-day basis in both public and private spheres, that is to say a Wild West version of history.

This cannot even be remotely classified as history in context, and the fault can be attributed to incomplete and inadequate research methodologies. As I have shown in previous articles, the founding generation properly restated and applied what Blackstone meant by the fifth auxiliary right many times over—the right of lawful revolution and resistance to restore the Constitution.¹⁵⁸ Numerous sources support this proposition, including the writings of Samuel Adams in conjunction with the 1768 Boston Town Council affair,¹⁵⁹ James Otis's pamphlet entitled *A Vindication of the British Colonies*,¹⁶⁰ the legal works of St. George Tucker,¹⁶¹ and even more generalized writings in the popular print culture.¹⁶² All confirm the Standard Model approach to interpreting Blackstone is without context and must be discarded as embarrassing.

2. *History Lesson 102: Answering Any Historical Query First Requires Substantiated Evidence to Support It*

The second lesson that any student of history learns is that a thesis conclusion requires substantiated evidence to prove and support it. When assembling evidence, this not only requires applying the

158. See Charles, *The Right of Self-Preservation*, *supra* note 9, at 37–38, 60.

159. See Charles, “*Arms for Their Defence*”?, *supra* note 3, at 421–34.

160. See *id.* at 441.

161. See *id.* at 419; Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. COLLOQUY 406, 411 (2009).

162. See *Extract of a Letter from a Worthy Member of the Committee of Correspondence in Boston*, THE ESSEX GAZETTE (Salem, Mass.), Apr. 6, 1773, at 143 (“The *Law of Nature* with respect to communities, is the same that it is with respect to individuals; it gives the collective body a right to preserve themselves; to employ undisturbed the means of life . . . and the power to defend themselves, the surest pledge of their safety. This affords us the strongest encouragement that our countrymen are by no means fallen into that state of pusillanimous indifference about their Rights and submission to the invasion of them, which Judge Blackstone holds so criminal and degradatory to an Englishman.—These invaluable and unalienable birthrights, this same great jurist tells us, are to be vindicated first by petition, and failure of this, by ARMS.”); *Defence of Machiavel*, LITERARY MAG. & AM. REG., Jan. 1807, at 33 (tracing the right of self-preservation of government back to Machiavelli, including Blackstone's recognition of “resistance on the part of the people in defence of their invaded liberties; he acknowledges both the right and necessity of such resistance in extreme cases, however, in very unequivocal terms.”); see also *supra* note 146.

evidence in its proper context, but also that the evidentiary links between sources be intimately related. History that applies a “choice of means” approach—i.e. to reasonably adapt the evidentiary means to support a desired historical end—is completely unacceptable. Indeed, a historian may try to piecemeal the evidence to advance an interpretative theory. However, this is a *historical theory*, not a proven or supported *historical thesis*.

What differentiates the two? The answer is that a historical theory provides a research agenda for other historians to prove or disprove. It is a history in progress so to speak. Meanwhile, a verified historical thesis incorporates substantial and intimately woven evidence that speaks for itself. Initially its findings may not be accepted outright should it not comport with the historical consensus, but this can change with time and subsequent historical exchanges.

Herein enters the Standard Model Second Amendment, which its writers claim is an incontestable thesis based upon hard historical evidence.¹⁶³ In the words of Kates, the Standard Model makes sense because the Second Amendment must “mean *something*.”¹⁶⁴ He then asserts that any other interpretation is either “historically false,” “patently nonsensical,” “gibberish,” or “nonsense on stilts.”¹⁶⁵ If this is true, then why have the overwhelming majority of professional historians steered away from endorsing the Model? Much of the answer lies with the research agenda, and the conclusions reached upon that construct. To put it another way, the Standard Model fails the historian’s “smell test.”

To begin, historians are in general agreement that the Second Amendment protects an individual right in one form or another.¹⁶⁶ Where there remains disagreement among historians and Standard Model writers are the purpose, scope, and limits of the individual right to keep and bear arms.¹⁶⁷ The reasons for this divide are the

163. See, e.g., Barnett & Kates, *supra* note 129, at 1141 (“Research conducted through the 1980s has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is *no tenable textual or historical argument against a broad individual right view* of the Second Amendment.”) (emphasis added).

164. Kates, *supra* note 4, at 1226.

165. *Id.* at 1226–29.

166. See *supra* notes 8–9, 12 and accompanying text (historian views).

167. Take for instance Stephen B. Halbrook’s most recent book on the subject, which was funded by a \$60,000 grant from the National Rifle Association. See *Supported Research*, NRA C.R. DEF. FUND, <http://www.nradefensefund.org/previous-years-research.aspx> (last visited Nov. 29, 2012). It asserts the Second Amendment individually protects against public and private violence, but provides

methodologies employed. Take for instance Kates's seminal 1983 *Michigan Law Review* article, *Handgun Prohibition and the Original Meaning of the Second Amendment*.¹⁶⁸ The article begins its inquiry by parsing the Second Amendment's language, particularly what constituted the Founders' militia:

The Founders stated what they meant by "militia" on various occasions. Invariably they defined it in some phrase like "the whole body of people," while their references to the organized-military-unit usage of militia, which they called a "select militia," were strongly pejorative.

In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia. In this respect it would never have occurred to the Founders to differentiate between the arms of the two groups in the context of the amendment's language. The personally owned arms of the individual were the arms of the militia. Thus, the amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.¹⁶⁹

Here, Kates reaches a number of conclusions based upon one historical truth—early state and colonial militias generally consisted of all persons capable of bearing arms.¹⁷⁰ However, three of these conclusions are unsupported by the historical record. First, Kates

virtually no research on eighteenth century arms restrictions, nor does it provide any of the ideological or philosophical limits on the right. See HALBROOK, *supra* note 22, at 328–30 (stating that even "subtle interferences" would violate the Second Amendment under its "shall not be infringed" language). What Halbrook leaves out is there were numerous eighteenth century arms restrictions. See Charles, *Historical Guideposts*, *supra* note 18, at 23–25; Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 L. & HIST. REV. 197 (2007); David Thomas Konig, *Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic?*, 25 L. & HIST. REV. 177 (2007).

168. Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

169. *Id.* at 216–17.

170. *Id.* at 215–16. David T. Hardy and John Stompoly arguably wrote the first Standard Model article to make this connection with similar evidence. See Hardy & Stompoly, *supra* note 40, at 70 ("First, as used by the framers, the term 'Militia' referred to all citizens capable of bearing arms, and not merely to those persons enrolled in formal state military units. Thus, even should the second amendment be construed to protect only members of the 'Militia' its protections would extend to all persons capable of bearing arms.").

improperly distinguishes between a general militia and a select-militia.¹⁷¹ Indeed, the former consisted of all persons *capable* (an important qualifier) of bearing arms (generally males between eighteen and forty-five years of age), but it too was a state or government-controlled force under strict discipline and orders.¹⁷² The only distinguishing factor between a militia and select-militia rested on class structure.¹⁷³ As was seen with the example of Thomas Jefferson, a select-militia merely burdened one age group over others for the common defense.¹⁷⁴

The second error is Kates's assumption that every colony or state's militia arms were comprised of the people's "personally owned arms."¹⁷⁵ In some instances, the colony or state provided the arms to enrolled militia members upon being mustered,¹⁷⁶ and in other cases those persons deemed capable were taxed with providing the required arms and accoutrements.¹⁷⁷ Even after the adoption of the 1792 National Militia Act, the states prescribed different rules for arming the militia.¹⁷⁸ This led to a number of attempts to amend the Act, but Congress deferred to the states every time. Why? The answer rests with the fact that Congress conceived its arming powers to be limited to prescribing the type of arms.¹⁷⁹ Meanwhile, any powers associated with individual armament were considered a state matter.¹⁸⁰

Kates's third and last error is the most problematic given the potential legal repercussions. With but one historical truth (eighteenth century militias consist of all persons capable of bearing arms), Kates informs us what the Second Amendment protected wholesale.¹⁸¹ He even goes so far as to claim that "the people

171. Kates, *supra* note 168, at 216; *see also* MALCOLM, *supra* note 9, at 148, 150, 163 (equating a select-militia with a standing army).

172. This is confirmed by nearly a century of militia law preambles. *See* Charles, "Arms for Their Defence"?, *supra* note 3, at 450–52 and accompanying footnotes. Furthermore, there is no substantiated evidence to suggest the people could form their own militias without government approval. *See* Charles, *The 1792 National Militia Act*, *supra* note 25, at 374–90.

173. *See* Charles, *The 1792 National Militia Act*, *supra* note 25, at 367–70.

174. *See supra* notes 68–76 and accompanying text.

175. Kates, *supra* note 168, at 217.

176. *See* CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 31–33.

177. *See id.* at 28–29.

178. *See id.* at 71–79.

179. *See* Charles, *The 1792 National Militia Act*, *supra* note 25, at 346–50.

180. *See id.*

181. *See* Kates, *supra* note 168, at 217.

possessed of their individually owned arms” is what was “necessary to the security of a free state,” not training, discipline, or organization.¹⁸² This conclusion is nothing short of premature, especially given the Second Amendment does not stipulate that an “armed citizenry,” “armed populace,” or even a general “militia” is “necessary to the security of a free state.”¹⁸³ The Second Amendment expressly states it is a “well regulated militia,” a rather distinct constitutional military body of citizen-soldiers.¹⁸⁴ To be clear, Kates never addresses the “well regulated” language of the Second Amendment before providing his conclusions. But more importantly, Kates does not even inquire about the constitutional significance of a “well regulated militia” in republican thought at *any point* within the article.

The rest of Kates’s article presents similar problems in that it applies fragments of evidence to make conclusions—all of which have proven to be historically unsupported or untenable.¹⁸⁵ The total number of historical errors is rather striking for anyone who has studied the right to arms, but correcting Kates’s article wholesale is not the purpose or scope of this Article.¹⁸⁶ The point worth making is

182. *Id.*

183. Furthermore, the intellectual history of what constituted a constitutional “well-regulated” militia disproves the “armed citizenry” or “armed populace” construct. *See generally* Charles, *supra* note 15.

184. U.S. CONST. amend. II; *see* Charles, *supra* note 15, at 9–86.

185. In the words of Herbert Butterfield: “[T]he more [historians] are making inferences instead of researches, then the more whig our history becomes if we have not severely repressed our original error . . .” BUTTERFIELD, *supra* note 117, at 6.

186. For some of Kates’s unsupported or disproven historical claims, compare Kates, *supra* note 168, at 221–22 (claiming arms in the hands of the people is what preserved liberty), with Charles, *supra* note 15, at 8–9, 21, 51–86 (showing the founding generation viewed an untrained and undisciplined populace as dangerous to liberty). *Compare* Kates, *supra* note 168, at 225 (claiming the Second Amendment had nothing to do with Article I, Section 8 of the Constitution), *with* Charles, *supra* note 15, at 62–68 (showing an affirmative link between Article I Section 8 of the Constitution and the Second Amendment), *and* Higginbotham, *supra* note 69, at 40. *Compare* Kates, note 168, at 228–29 (claiming the Second Amendment was drafted in response to British disarmament during the American Revolution), *with* Charles, “*Arms for Their Defence?*”, *supra* note 3, at 435–40 (showing that Standard Model writers have not produced one document linking the two events, and that the founding generation similarly disarmed loyalists). *Compare* Kates, *supra* note 168, at 238–39 (claiming the 1689 Declaration of Rights “have arms” provision had nothing to do with the employment of Catholic officers), *with* Charles, *The Right of Self-Preservation*, *supra* note 9, at 44–52 (showing the “have arms” provision had everything to do with the employment of Catholic Lieutenants in the militia).

that this ad hoc approach to constitutional meaning is one of the pillars supporting the Standard Model.¹⁸⁷

This is both embarrassing and problematic in terms of preserving the historical record, and some might be surprised that such methodologies have passed as “history” in closed circles for so long. This can be attributed to a number of factors, but the most important being that there existed only one scholarly alternative at the time—the pure collective rights approach.¹⁸⁸ The collective rights understanding of the Second Amendment contained no individual component and viewed the right to “keep and bear arms” as solely a state matter.¹⁸⁹ In fact, until *Heller*, the collective rights interpretation had grown to dominate Second Amendment jurisprudence to a point that many federal Courts of Appeals adopted it wholesale.¹⁹⁰ However, there remained a problem with a pure collective rights view—the Second Amendment was a right of “the people” in one form or another.¹⁹¹ It is for this reason that the Standard Model gained sway in the 1990s, and even received a nod from noted legal academics like Sanford Levinson and William Van Alstyne.¹⁹² But

187. See Kates, *A Modern Historiography of the Second Amendment*, *supra* note 4, at 1219 (showing Kates himself claims it to be the “single most influential and comprehensive law review” on the Second Amendment today); David Hardy, *Next Generation RKBA Scholars Conference, OF ARMS & THE LAW* (Jan. 11, 2012, 9:06 AM), http://armsandthelaw.com/archives/2012/01/next_generatin.php (stating the “critical role” Kates played “in developing the modern (and correct) view of the right to arms”).

188. In the 1990s, the Standard Model was packaged and sold as if it was the *only* interpretation consistent with Federalist and Anti-Federalist concerns. See Barnett & Kates, *supra* note 129, at 1213–14.

189. See, e.g., 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, 7 (1989).

190. The Fourth, Sixth, Seventh, and Ninth Circuits adopted the pure collective rights interpretation. See *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976). The First, Third, Eighth, and Tenth Circuits recognized the Second Amendment protected an individual right, but linked it to service in a well-regulated militia. See *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Wright*, 117 F.3d 1265, 1267 (11th Cir. 1977); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942). Meanwhile, before the Supreme Court’s decision in *Heller*, only the Fifth and D.C. Circuits adopted the Standard Model. See *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001).

191. U.S. CONST. amend. II.

192. See William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1249 n.45 (1994) [hereinafter Alstyne, *The Second*

neither Levinson nor Alstyne tested the Standard Model's historical theory or its methodological approach.¹⁹³ Both authors merely assumed that the Model's foundation was sound, and even fell victim themselves to placing eighteenth century words outside the limits of their intended context.¹⁹⁴

In sum, when examining the Second Amendment's historiography, the rise of the Standard Model can be attributed to a doctrinal deficiency—the need to decode “the people” and its relation to the prefatory “well regulated militia” language—not superior historical methods or well researched conclusions.¹⁹⁵ The deficiency, in turn, aided in the erection of other Standard Model pillars¹⁹⁶ such as Joyce Lee Malcolm's research on the English right,¹⁹⁷ Eugene Volokh's analysis on the Second Amendment's prefatory language,¹⁹⁸ Kates's analysis on the right to arms in both a public and private violence ideological construct,¹⁹⁹ three decades of research by Stephen P. Halbrook,²⁰⁰ and Glenn Harlan Reynolds's critical legal analysis.²⁰¹

In some ways the pillars stand on their own in that each takes on different Second Amendment questions and issues. At the same time, a close look at the footnotes and methodology reveals that each pillar relies heavily on the foundation of the one previously erected,

Amendment]; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 645–46 (1989) [hereinafter Levinson, *Embarrassing*]. Both Levinson and Alstyne would each write another article on the Second Amendment. See William Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas*, 10 GREEN BAG 469 (2007) [hereinafter Alstyne, *A Conundrum*]; Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel, the Militia Right to Arms*, 12 WM. & MARY BILL RTS. J. 315 (2004) [hereinafter Levinson, *Superb History*].

193. See Alstyne, *The Second Amendment*, *supra* note 192, at 1244–49; Levinson, *Embarrassing*, *supra* note 192, at 645–51.

194. See sources cited *supra* note 193.

195. Standard Model writers naturally believe otherwise. See, e.g., George A. Mocsary, *Monopoly of Violence*, CLAREMONT REV. BOOKS, Summer 2010, at 46 (reviewing ROBERT H. CHURCHILL, *TO SHAKE THEIR GUNS IN THE TYRANT'S: LIBERTARIAN POLITICAL VIOLENCE AND THE ORIGINS OF THE MILITIA MOVEMENT* (2009)) (“To date, the best research on the Second Amendment has been done by legal scholars. Historians have largely been funded by organizations that favor gun control, with predictable results.”).

196. See Kates, *supra* note 4, at 1219–26.

197. See MALCOLM, *supra* note 9.

198. See Volokh, *supra* note 42.

199. See Kates, *supra* note 137.

200. The entirety of Stephen P. Halbrook's publications will not be cited here. However, one can find a compilation of Halbrook's research in his 2008 book. See HALBROOK, *supra* note 22.

201. See Reynolds, *supra* note 4.

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making it reasonable to state that, as a result, each pillar suffers from the same historical deficiency and falls accordingly.²⁰²

3. *History Lesson 103: Lawyering Historical Sources Is Not an Objective History*

Perhaps what makes history such a controversial and misunderstood social science is that every person maintains ideals, beliefs, attitudes, and hopes as to what the future will bring. When a typical person looks back at history or reads through primary sources, they look for ideas, events, and figures that they can either relate to or that are so polarizing that they desire to understand the past on their own terms. While this desire and curiosity is a noble individual pursuit, it does not represent the totality of what history is—the objective recreation of the past in context.

Indeed, modern events, issues, and problems often motivate a historian to research a topic under a different paradigm or construct, but the historian should resist letting these modern variables impact or influence analysis. The end goal is not to understand the past for the sake of the present, but to answer questions of the past for the sake of understanding the past. This means the historian must never overlook the “first condition of historical enquiry, which is to recognize how much other ages differed from our own.”²⁰³ Also, historians must keep this condition in mind as they acquire evidence, for “the more we examine the way in which things happen, the more we are driven from the simple to the complex.”²⁰⁴

Herbert Butterfield provides an adequate summary on the role of the historian in this regard, writing:

[When a historian is engaged upon a piece of research] he comes to his labours conscious of the fact that he is trying to understand the past for the sake of the past, and though it is true that he can never entirely abstract himself from his own age, it is none the less certain that this consciousness of his purpose is [a] very different one from that of the whig historian, who tells himself that he is studying the past for the sake of the present. Real historical understanding is not achieved by the subordination of the past to the present, but rather

202. This Article later refers to this phenomenon as the “domino effect” and “domino defect.” *See infra* Part II.B.

203. BUTTERFIELD, *supra* note 117, at 23.

204. *Id.* at 15.

by our making the past our present and attempting to see life with the eyes of another century than our own.²⁰⁵

Lawyers and legal academics consistently take the opposite approach to claiming history supports “X” or “Y.” For lawyers and legal academics history is viewed as subordinate to the present. In other words, the past is not accepted on its own terms and almost never in complete context. In its place, pieces of historical text are taken piecemeal and explained away. Lawyers and legal academics either simplify complex issues or seize upon those persons and parties from the past whose ideas are more analogous to their own.²⁰⁶

This is *not* history, but a fleeting attempt to justify one’s present actions or recourse under the guise of history. As Butterfield aptly characterizes it:

[The historian] who studies the past with too direct reference to the present day, it may be said that his method of procedure actually defeats his original confessed purpose which was to use the past for the elucidation of the present. If we look for things in the course of history only because we have found them already in the world of today, if we seize upon those things in the sixteenth century which are most analogous to what we know in the twentieth, *the upshot of all our history is only to send us back finally to the place where we began, and to ratify whatever conceptions we originally had in regard to our own times.*²⁰⁷

Therein lies an objective dilemma for jurists—much of our constitutional system is built upon layers of history or precedent that becomes history. Thus, although relying on the past to answer the present is objectively problematic in most instances, it remains essential that jurists use history—in some form or fashion—as an adjudicative tool.²⁰⁸ In doing so, however, jurists need to be mindful as to what is and what is not historically viable, and understand that scholarship which seeks to explain away history does not qualify.

205. *Id.* at 16; see also J.G.A. Pocock, *The Origins of Study of the Past: A Comparative Approach*, 4 COMP. STUD. SOC’Y & HIST. 209, 211–14 (1962) (discussing the importance of a historian’s “social awareness” of the past before one can ever relate history to the present).

206. For a more in depth discussion on the problems identified in this paragraph, see Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003).

207. BUTTERFIELD, *supra* note 117, at 62–63 (emphasis added).

208. See Sutton, *supra* note 104, at 1181–84.

Historical conclusions are something that must be proven through acquiring evidence and weighing that evidence in the construct of the era. It cannot be emphasized enough that it remains the burden of the historian to support his conclusions; a burden that most Standard Model writings cannot even remotely satisfy. What Model writers view as methodologically acceptable is nothing more than an illusion masking itself as an objective history. It is easy for any writer to pay lip service to history, but to replace accepted methodologies with an unsupported opinion is historical fiction, not fact. It is what this Article refers to as *explaining away history*.²⁰⁹

For a working example, let's return to one of the pillars upon which the Standard Model rests—Eugene Volokh's work on the Second Amendment's prefatory language.²¹⁰ According to Kates, Volokh *proves* to us that the founding generation “understood that if a rights clause was more sweeping, a prefatory clause did not limit it.”²¹¹ This is simply not true. As historian David Thomas Konig has detailed, “preambles were explicit statements of purpose” and often viewed as “necessary to restrain the operative clauses that followed because the broad grant of state powers required the express definition and delimitation of those powers being conferred.”²¹²

One historical deficiency with Volokh's thesis is his reliance on mid-to-late nineteenth century treatises to claim “statutory construction used in the late 1700s” proves the “justification clause can't take away what the operative clause provides.”²¹³ Yet Volokh's greatest fault is he seeks to *explain away* the right to arms by comparing the Second Amendment's structure with contemporary state constitutional provisions, rationalizing those findings in twentieth century terms, and then parsing the Amendment's text only

209. See, e.g., BUTTERFIELD, *supra* note 117, at 54 (“It might be said that out of the dissemination of historical studies there has been born into the world a new form of nonsense, a new realm of specious generalizations and vague plausibilities, built up out of confusions of thought that were not known before, characterized by the bold handling of concepts that do not represent anything capable of genuine concrete visualization . . .”).

210. See Kates, *supra* note 4, at 1220–21 (confirming its importance to the Standard Model); Volokh, *supra* note 42.

211. Kates, *supra* note 4, at 1221.

212. Konig, *Why the Second Amendment Has a Preamble*, *supra* note 12, at 1327–28; see also David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 L. & HIST. REV. 119 (2004) [hereinafter Konig, *A Missing Transatlantic Context*].

213. Volokh, *supra* note 42, at 807.

to reassemble the whole as to what it *might* mean.²¹⁴ This is legal advocacy, *not* history, and it leads to a historically perplexing conclusion for any historian specializing in late eighteenth century American political thought:

Those who enacted the Bill of Rights . . . meant to constrain courts, not to leave them with complete discretion to do justice any way they think best. The enactors had broad ends in mind, but they chose to serve those ends by enacting into law some particular means.

So it is with the Second Amendment. The Framers *may have* intended the right to keep and bear arms as a means towards the end of maintaining a well-regulated militia—a well-trained armed citizenry—which in turn would have been a means towards the end of ensuring the security of a free state. But they didn't merely say that "a well-regulated Militia is necessary to the security of a free State" (as some state constitutions said), or "Congress shall ensure that the Militia is well-regulated," or even "Congress shall make no law interfering with the security of a free State." Rather, they sought to further their purposes through a very specific means.

Congress thus may not deprive people of the right to keep and bear arms, even if their keeping and bearing arms in a particular instance doesn't further the Amendment's purposes²¹⁵

No one disputes that in terms of legal advocacy, Volokh's analysis is extremely clever and arguably brilliant.²¹⁶ However, in terms of a history that objectively lays out the concept of a well-regulated militia in eighteenth century society, it proves rather problematic.²¹⁷ What Volokh leaves out is that the phrases "well-regulated militia," "well organized militia," "well-ordered militia," "well-disciplined militia," and other variations were never associated with a mere armed citizenry.²¹⁸ The "armed citizenry" conclusion is something that

214. *See id.* at 799–806.

215. *Id.* at 805–06 (emphasis added) (citations omitted).

216. *See* Konig, *Why the Second Amendment Has a Preamble*, *supra* note 12, at 1326–27; *see also* Cornell, *Originalism on Trial*, *supra* note 12, at 632–34 (discussing how Associate Justice Antonin Scalia essentially adopted Volokh's approach, but that the approach is inconsistent with eighteenth century understanding); Merkel, *Scalia's Perverse Sense of Originalism*, *supra* note 12, at 365–66 (criticizing both Scalia and Volokh's approach to the Second Amendment's prefatory language).

217. *Compare* Volokh, *supra* note 42, at 797–812, *with* Charles, *supra* note 15, at 1–101.

218. As stated elsewhere in this Article, such a concept was dangerous to republican liberty. *See supra* note 64 and accompanying text.

Standard Model writers have created virtually out of thin air,²¹⁹ with one writer going so far as to mislead us that the “Framers never defined a ‘well regulated’ militia.”²²⁰ Not true, especially given the fact that the above stated “militia” variations are regularly found in eighteenth century militia laws.²²¹ This fact alone debunks Volokh and other Standard Model writers’ simplistic understanding of the Founders’ well-regulated militia and its constitutional pieces.

The Second Amendment’s prefatory clause was not intended to be an interpretative option as Volokh claims,²²² but rather the paradigm by which the right was understood. For some working examples to illustrate this point, this section will provide two mid-eighteenth century debates relating to militia law preambles. The first is Lord Harwicke’s disfavor with England’s 1757 Militia Act on the grounds that it did not live up to the preamble stipulating: “Whereas a well-ordered and well-disciplined Militia is essentially necessary to the Safety, Peace and Prosperity of this Kingdom.”²²³ Harwicke stated that such preambles were constitutionally significant because they referenced “known established law, and declared . . . express acts of parliament still in force.”²²⁴ He even hoped that such preambles would be “always repeated by way of continual claim,” for “[i]t is right in such fundamental points.”²²⁵

Another notable example is a 1744 address by Pennsylvania Governor Lewis Morris. Upset with the Pennsylvania Assembly’s inability to draft a suitable militia law, the following was delivered by His Majesty’s Council:

219. *See, e.g.*, Reynolds, *supra* note 4, at 474 (“A well regulated militia was thus one that was well-trained and equipped; not one that was well-regulated in the modern sense of being subjected to numerous government prohibitions and restrictions.”).

220. Hardy, *supra* note 41, at 67 n.32.

221. For a list of terms being used in eighteenth century militia laws and constitutions, see Charles, “*Arms for Their Defence*”?, *supra* note 3, at 450–52 and accompanying footnotes.

222. Volokh, *supra* note 42, at 805–06.

223. 30 Geo. 2, c. 25, § 1 (1757) (Eng.).

224. 15 THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 727 (London, T.C. Hansard 1813) [hereinafter 15 THE PARLIAMENTARY HISTORY OF ENGLAND]; *see also* 2 JAMES BURGH, POLITICAL DISQUISITIONS, bk. III, ch. I, at 419–20 (London, 1775) (“Let us no longer acknowledge the importance of a militia in the preamble in many of our statutes, yet render this very militia ineffectual by suffering such destructive clauses to remain, as will reduce the statute itself to a mere form of words . . .”).

225. 15 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 224, at 727–28.

The People of this Colony . . . have no other way of defending themselves than by a well regulated Militia; yet such has been the Conduct of the House of Assembly at this Time, that they have denied the People the only Means in their Power of preserving themselves, their Wives, their Children, and their Fortunes from becoming an easy Prey to the first Invader. *That the Law for the better Regulation of the Militia of this Province as this Time is absolutely necessary, stands confessed by the Title and Preamble to their own Bill. . . .* Some People, perhaps, may imagine, that by the Method proposed by the Council, the Militia would be put under a stricter Discipline that is necessary . . . *but if such People would consider, that unless a Militia be well disciplined, and under good Regulation, they never will be able to make any tolerable Defence. . . . since it is for the Peoples own sakes that such are proposed; since such Discipline can only be designed for the Preservation of the People, their Liberties and Estates. . . . such a Discipline, must be looked upon as absolutely necessary at this Time.*²²⁶

In many respects, this address is important to understand the larger ideological construct of a “well-regulated militia,” but given that I have addressed that elsewhere it will not be restated here.²²⁷ Instead, the point is that *explaining away* constitutional text is *not* a substitute for history,²²⁸ for the former is frequently at odds with what the historical record actually provides us.²²⁹ Explaining away history is nothing more than a guessing game. Certainly Volokh may argue that his approach to constitutional meaning is an objective endeavor,²³⁰ but in the case of the Second Amendment it ends up

226. 13 DOCUMENTS RELATING TO THE COLONIAL, REVOLUTIONARY AND POST-REVOLUTIONARY HISTORY OF THE STATE OF NEW JERSEY 390–91 (N.J. Historical Soc’y 1890) (emphasis added).

227. See Charles, *supra* note 15, at 47–51.

228. See POCOCK, *supra* note 122, at 7 (“The non-historical practitioner is not concerned with what the author of the statement made in a remote past meant by it so much as with what he in his present can make it mean.”).

229. For perhaps the first Standard Modern textualist or linguistic attempt to define the Second Amendment, see Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,”* 49 L. & CONTEMP. PROBS. 151 (1986).

230. See Volokh, *supra* note 42, at 812–13 (“For better or worse, interpreting legal texts is a mushy business. Lawyers who support a particular result on policy grounds can often come up with an interpretation that reaches this result, and even persuade themselves that it’s the best interpretation One way of testing one’s interpretative approach—of distinguishing honest interpretation from mere inscription of one’s own policy preferences on the text—is applying it to a wide array of texts of different political valences. It’s easy enough to craft an interpretative trick that reaches the result one wants in the case for which it was crafted. But when one

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muddling, rather than clarifying, the intellectual and constitutional origins of the right to arms. It is one thing to state that the prefatory language of a right *may* not always constrain the operative clause.²³¹ However, it is another to use something that is not historically certain, jumble constitutional text, and issue broad historical conclusions, all of which turn out to be contradicted by an actual historical inquiry.

Naturally, Volokh is not the first or the last writer to *explain away* history as a means to prop up the Standard Model. Throughout the 1990s Glenn Harlan Reynolds authored or co-authored a number of articles endorsing the Model.²³² At first, he merely agreed with other Standard Model works, writing a historiography of sorts that outlined a research agenda to further understand the Second Amendment.²³³ In later writings, however, Reynolds took the rather bold step of explaining away history. One of the more influential of these articles was coauthored with Don B. Kates and entitled *The Second Amendment and States' Rights: A Thought Experiment*.²³⁴ By characterizing the article as a “thought experiment,” the title itself gives the impression that the article is not a history. Still, many of its conclusions apply Standard Model constructs to assert the right to keep and bear arms cannot be limited in any way by its prefatory language. According to Reynolds and Kates, to do so must lead us to conclude that the National Guard and many federal gun laws are unconstitutional.²³⁵

tests it against other provisions, one sees more clearly whether it's a sound interpretative method.”).

231. This proved to not be the case as David Thomas Konig shows us. *See* Konig, *Why the Second Amendment Has a Preamble*, *supra* note 12. However, if Volokh would have limited his thesis to this conclusion it would have correctly set a research agenda for future researchers.

232. *See* Brannon P. Denning & Glenn Harlan Reynolds, *It Takes a Militia: A Communitarian Case for Compulsory Arms Bearing*, 5 WM. & MARY BILL RTS. J. 185 (1996); Reynolds, *supra* note 4; Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) [hereinafter Reynolds & Kates, *The Second Amendment*].

233. *See* Reynolds, *supra* note 4, at 505–07 (discussing the need to look further into the idea of armed rebellion and its connection with the Declaration of Independence). For an answer to Reynolds's inquiry on the right to arms, see Charles, *The Right of Self-Preservation*, *supra* note 9, at 24–60; *see also* Charles, *supra* note 62, at 477–502 (discussing the political philosophy behind the Declaration of Independence's preamble).

234. Reynolds & Kates, *The Second Amendment*, *supra* note 232.

235. *Id.* at 1749–64.

The fatal flaw with Reynolds and Kates's methodology is that it "studies the past with too direct reference to the present day," which "actually defeats [the] original confessed purpose which was to use the past for the elucidation of the present."²³⁶ This holds particularly true where Reynolds and Kates compare and contrast the National Guard with eighteenth century militias.²³⁷ They ahistorically characterize the National Guard as a "select-militia" because it does not consist of every person.²³⁸ First, the Founders' definition of a select-militia was not a band of semiprofessional part-time volunteers.²³⁹ This is a Standard Model myth, and as addressed earlier in this Article, the distinguishing factor between a militia and select-militia rested on a class structure. The latter merely burdened one age group over others for the common defense, yet both required its members to be physically capable and in support of just government, and both were supposed to be professionally trained.²⁴⁰

Second, the National Guard falls within the Founders' intent in ratifying the Constitution. It is a well-regulated militia—a professionally disciplined, organized, and trained military body instructed by state officers—that provides for the common defense and serves as a constitutional counterpoise to standing armies.²⁴¹ The current National Guard may not consist of every person capable of bearing arms as the 1792 National Militia Act prescribed, but it does not arbitrarily exclude persons based upon class or age.²⁴² It is a

236. BUTTERFIELD, *supra* note 117, at 35.

237. Reynolds & Kates, *The Second Amendment*, *supra* note 232, at 1758–62.

238. *Id.* at 1760–61.

239. *See id.* at 1760 n.77.

240. *See supra* notes 64–71, 170–74 and accompanying text.

241. *See* Charles, *The 1792 National Militia Act*, *supra* note 25, at 339, 346–58 (showing that this was the purpose and intent of the 1792 National Militia Act and a constitutional militia as a whole); Charles, *supra* note 15, *passim* (tracing the constitutional significance of a well-regulated militia as a counterpoise to tyrannical armies and government).

242. *Compare* 1 Stat. 271 (1792), *with* 32 Stat. 775 (1903). For a call for militia reform just prior to the 1903 Militia Act, see J.D. Whelpley, *The Militia Force of the United States*, 174 N. AM. REV. 275 (1902). For a contemporary endorsement and critique of the 1903 Militia Act, see James Parker, *The Militia Act of 1903*, 177 N. AM. REV. 278 (1903). For further discussion, see Charles, *The 1792 National Militia Act*, *supra* note 25, at 338–40, 367–74 (discussing the rationale behind enrolling persons between 18 and 45 years of age, and congressional power to define which classes were deemed capable). At least one military judge advocate foresaw a constitutional problem with the 1916 Militia Act. *See* S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471 (1917) (stating the National Guard's assumption of "new and onerous obligations to render military service to the Federal Government" may cause constitutional problems).

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volunteer militia, which was not uncommon while the 1792 National Militia Act was in force.²⁴³

These historical facts are important, yet they are missing from Reynolds and Kates's analysis. The moral of the story is a simple one. Before one can ever compare and contrast history with the present, one must have a complete and total understanding of the past. Otherwise historical conclusions not only turn out to be wrong, but can matriculate into other works, thus morphing into or propping up other ahistorical conclusions.

Volokh's *The Commonplace Second Amendment* again provides us a case in point.²⁴⁴ As discussed earlier, Volokh explained away history in order to negate the Second Amendment's prefatory language.²⁴⁵ In his conclusion, Volokh then relies on Reynolds and Kates's problematic analysis to support his overarching thesis, writing:

What's more, under the Militia Clauses, the federal government could at any time take direct command of the militia away from the states. If the right was only a right to possess arms under the supervision of one's militia superiors—who might well be under federal command—then the right would impose little constraint upon the federal government.²⁴⁶

Volokh's is just one of many Standard Model works that rely on Reynolds and Kates in this regard. Other Standard Model works include the likes of Randy Barnett, Brannon P. Denning, David B. Kopel, George Mocsary, and Nelson Lund, just to name a few.²⁴⁷ This literature then manifested itself into the myth that the Second

243. See Lena London, *The Militia Fine 1830–1860*, 15 MIL. AFF. 133, 141–42 (1951); Frederick P. Todd, *The Militia and Volunteers of the District of Columbia 1783–1820*, 50 RECS. COLUM. HIST. SOC'Y 379, 385 (1950); Jean Martin Flynn, *South Carolina's Compliance with the Militia Act of 1792*, 69 S.C. HIST. MAG., Jan. 1968, at 26, 39–40; Paul Tinch Smith, *Militia of the United States from 1840–1860*, 15 IND. MAG. HIST., Mar. 1919, at 20, 25; see also Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 190–96 (1940) (discussing how the “National Guards” from the mid-nineteenth century developed and the 1903 Militia Act was adopted).

244. Volokh, *supra* note 42.

245. See *supra* notes 214–15 and accompanying text.

246. Volokh, *supra* note 42, at 812.

247. See Barnett & Kates, *supra* note 129, at 1225–26; Brannon P. Denning, *Gun Shy: The Second Amendment as an “Underenforced Norm,”* 21 HAR. J.L. & PUB. POL'Y 719, 747 (1998); Kopel & Little, *supra* note 154, at 476; Lund, *supra* note 154, at 28–29; George Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Non-Individual Right*, 76 FORDHAM L. REV. 2113, 2144–45, 2169 (2008).

Amendment would be moot if interpreted as a militia-focused constitutional right because the federal government could preempt any state militia laws.²⁴⁸ This is not true, not true at all. Such a conclusion runs afoul of how the founding generation viewed federal-state militia powers.²⁴⁹ It is also inconsistent with Supreme Court precedent.²⁵⁰

4. *History Lesson 104: Be True to What the Historical Record Provides*

In the preceding sections this Article gave working examples as to how the history of the Second Amendment has gone astray and become a historical embarrassment. Whether it is taking words outside their intended context,²⁵¹ coming to unsupported conclusions based upon a few shards of historical evidence,²⁵² or failing to understand the past on its own terms,²⁵³ the Standard Model has consistently failed to meet the requisite burden. If there is one rule of thumb that combines the Standard Model's failure to adhere to even these most basic methodologies, it is that the historical record should speak for itself in context. Researching, analyzing, and writing an objective history is a difficult endeavor for even the most seasoned historian. It not only requires asking the right questions, but knowing how to answer those questions through extensive research and reassembling the whole. Indeed, part of the historian's task is to recreate the past, but the historian should be true to what the historical record provides and not *infer* or *create* history that is not there.²⁵⁴

248. See Hardy, *supra* note 41, at 72; David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272, 273 n.12 (2008); J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39, 71–72 (2001); Kates & Cramer, *supra* note 155, at 1348.

249. See sources cited *infra* notes 277 and 370.

250. See *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886); accord Charles, *The 1792 National Militia Act*, *supra* note 25, at 358–66; see also Merkel, *Scalia's Perverse Sense of Originalism*, *supra* note 12, at 362.

251. See *supra* notes 151–65 and accompanying text.

252. See *supra* notes 23–28 and accompanying text.

253. See *supra* notes 203–07 and accompanying text.

254. See generally BUTTERFIELD, *supra* note 117, at 100–02; WILLIAM KELLEHER STOREY, *WRITING HISTORY: A GUIDE FOR STUDENTS* 44 (1999) (“Real historical writers probe factual uncertainties but they do not invent convenient facts and they do not ignore inconvenient facts. People are entitled to their own opinions, but not to their own facts.”).

From the outset, Standard Model writers seemed to ask all the right questions.²⁵⁵ They read the text of the Second Amendment and recognized an interpretative conundrum. What is a well-regulated militia? Is the right to keep and bear arms related to a well-regulated militia or separate? Who are “the people” that may exercise this right? What arms does the Second Amendment protect? Unfortunately, when answering these questions, Standard Model writers took words out of context, did not conduct sufficiently extensive research, explained away history to fill the evidentiary gaps, and used dictionaries to supplant the ideological, intellectual, and practical origins of the right.²⁵⁶ Furthermore, they did not ask subsequent questions as they compiled evidence.²⁵⁷ Instead, they reached conclusions without establishing even a modest link between pieces of historical evidence, and in many cases they asked the wrong follow-up questions.

This process and its results do *not* qualify as history. An illustration of the problem presents itself when Standard Model writers claim that the Second Amendment was drafted, in part, as a response to the British disarming the colonists during the American Revolution. This is another myth that arguably originated with David I. Caplan’s 1976 article. Based upon rather scant evidence, Caplan claimed that “the colonists complained of deprivations of [the right to possess arms] and of the repeated efforts of the British Governor, General Gage, to prevent the formation of a militia by the tactic of

255. See Barnett, *supra* note 40, at 248–60 (asking whether the framers sought to limit the operative clause); Hardy & Stompoly, *supra* note 40, at 68 (stating that the language of the Second Amendment must guide us in some form); Kates, *supra* note 168, at 211 (stating that the language and philosophical origins much guide interpretation); Reynolds, *supra* note 4, at 464 (asking what each of the words in the Second Amendment means); Reynolds & Kates, *The Second Amendment*, *supra* note 232, at 1741 (asking what are the states’ interests in the Second Amendment); Volokh, *supra* note 42, at 796–97 (asking whether the prefatory language limits the operative language); see also Levinson, *Embarrassing*, *supra* note 192, at 643–51 (correctly noting the importance of text and history).

256. BUTTERFIELD, *supra* note 117, at 57 (discussing that the “sin” in historical composition is not “bias,” but when the writer seeks “to abstract events from their context and set them up in implied comparison with the present day, and then to pretend that by this ‘the facts’ are being allowed to ‘speak for themselves’”).

257. *Id.* at 6 (“[T]he more we are discussing and not merely enquiring, the more we are making inferences instead of researches, then the more whig our history becomes if we have not severely repressed our original error [being honest and self-critical].”). In some cases, follow up questions were asked, but they were the wrong questions. See, e.g., Kates, *supra* note 137, at 94 (inferring that Blackstone may have grouped the right to arms with political rights, and that this can be explained away).

disarming the colonists and confiscating their stores of arms.”²⁵⁸ From this point forward, the myth grew as Standard Model writers continued to rewrite the historical record.²⁵⁹ As of today, it is audaciously claimed that it was the British disarming of the colonists that sparked the American Revolution, and the militia that assembled at Lexington and Concord did so to defend their right to keep and bear arms.²⁶⁰ Both of these conclusions are blatantly false.²⁶¹

For a historian to even advance this conclusion, a few basic methodological ground rules must be followed. First, the historian needs to break down the events of Lexington and Concord to the minutest detail—prior to, during, and after the event.²⁶² This is what Quentin Skinner refers to as “total historical context” or eliciting context to the “greatest detail.”²⁶³ Second, the historian must determine the causes and effects of Lexington and Concord, including the motivations and perceptions of both sides of the conflict, before and after the event. It is only upon conducting these steps that one can draw *any* historical conclusions, let alone the conclusion that the American Revolution was sparked by the British violating the right to keep and bear arms.²⁶⁴

258. Caplan, *supra* note 19, at 35.

259. See STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 1–17 (1989); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 7 (1984); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91, 112 (1989); Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms*, 7 WM. & MARY BILL RTS. J. 347, 356–57 (1999); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 15 HARV. J.L. & PUB. POL’Y 559, 591–92 (1986); Kates, *supra* note 137, at 101; Kopel & Little, *supra* note 154, at 520.

260. See, e.g., HALBROOK, *supra* note 22, at 75–108, 328–30.

261. This myth has been addressed by historians. See, e.g., Jack Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 104 (2000); see also Charles, “Arms for Their Defence”?, *supra* note 3, at 435–49; Charles, *supra* note 15, at 55–60.

262. See Skinner, *supra* note 31, at 202 (“[A historian states results] in the form of ‘inner connections’ traced between ideas or events, to suggest not a casual relation but just that they ‘belong together in a specially intimate way.’”); *id.* at 203 (“The historian’s typical ‘significant narrative’ is thus said to be built up as the description of a pattern of influences bearing on an idea or event and constituting of itself an explanation.”).

263. *Id.* at 214.

264. See *id.* at 204 (“The inner connection between two ideas or events, such that one is said to have influenced the other, has to be shown on the one hand to be sufficiently close to be separable from chance . . . [.] not merely to present random collections of facts which might seem to bear on it.”).

Therein lies an evidentiary problem for Standard Model writers. There is not one piece of historical evidence that speaks to their claim. Not one participant, observer, or subsequent contemporary account of the battle ever claimed the right to arms was violated or ever perceived that it could have been violated if Gage proved successful. Certainly the colonists thought it important to protect their military stores from government seizure.²⁶⁵ Similar situations presented themselves in Maryland, North Carolina, and Virginia, and appropriate measures were taken in each case.²⁶⁶ Yet for Standard Model writers, it does not matter whether it is the events of Lexington and Concord, Maryland, North Carolina, or Virginia because there is not one letter, pamphlet, newspaper account, and so forth, that stated that the British government was violating their right to have, keep, or bear arms through such seizures.²⁶⁷

Hypothetically speaking, could there be one or two pieces of historical evidence that give *any* weight to the Standard Model's view of the American Revolution? Perhaps, but in over thirty-five years of searching, Standard Model writers are still missing even *one* account linking the event to the conclusion they cling to. Still, for argument's sake, even if one or two pieces of actual evidence can be produced through future efforts, what is a professional historian to do with the hundreds or thousands of pieces of evidence that view the American Revolution differently? The historian's reply would be that those one to two pieces of evidence are the outliers and the views of an insular minority, not the majority.²⁶⁸

Historians understand that history must be substantially supported by the record. It is when writers pawn personal inferences as fact that "history" becomes more of a myth or fairytale. To put it another

265. See Konig, *A Missing Transatlantic Context*, *supra* note 212, at 152; Rakove, *supra* note 266, at 104.

266. See Charles, "Arms for Their Defence"?, *supra* note 3, at 435 n.602, 435–49. For a background of what took place in North Carolina and Maryland, see PATRICK J. CHARLES, *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE 94–95* (2008).

267. Stephen P. Halbrook's most recent work goes to great lengths to claim the founding generation viewed these seizures as a violation of their right to keep and bear arms. See HALBROOK, *supra* note 22, at 75–108. However, he does not produce one piece of historical evidence connecting the two. He merely *explains away* that this is what was taking place. This is *not* history because historians require something substantially more. See William G. Merkel, Book Review, 114 *AM. HIST. REV.* 1074 (2009) (reviewing STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008)) (discussing how Halbrook has not met the historian's burden).

268. See Cornell, *supra* note 92, at 301.

way, the deciding factor as to whether an account is a “history” or a “fairytale” depends on whether the historian is honest about his findings. We must ask ourselves whether the historian is stating that the conclusion is theoretical or proven. The former is without the essential pieces of historical evidence to solidify the thesis, while the latter is clear through the evidentiary record.

There is nothing wrong when a historian theorizes conclusion “X” or “Y” as possibilities. However, when doing so, the historian must be honest and forthright as to what the record does or does not provide, and answer why they proceeded down path “X” or “Y.” Herein enters the Standard Model myth that the cause and effect of the American Revolution was the right to keep and bear arms. The claim is unproven, yet Standard Model writers somehow link the drafting of the Second Amendment to Revolutionary War disarming and British embargoes.²⁶⁹ How can this be if we do not have *one* piece of historical evidence that expressly links the two?²⁷⁰ Neither the debates, state ratifying conventions, letters, pamphlets, nor newspaper editorials on the Constitution support this conclusion. It is a figment of the popular imagination that the Model writers created. The interpretation is also problematic in that it conflicts with the fact that Congress, colonial governments, and the local committees of public safety frequently disarmed suspected loyalists or persons who did not take an oath of allegiance.²⁷¹ If this disarmament too was never claimed to be a violation of the right to keep and bear arms by either the disarmers or the disarmed, how can anyone assert there is a historical connection?²⁷²

To counter this scathing critique, one could argue that the New Hampshire State Ratifying Convention proposed an amendment

269. See, e.g., HALBROOK, *supra* note 22, at 75–108.

270. Nevertheless, the *Heller* majority agreed with this interpretation. See *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (“And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760’s and 1770’s, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.”). Indeed, the *Heller* majority cited to two sources in support of its conclusion, but both are taken out of historical context. For the history and context behind the two sources relied upon, see Charles, “*Arms for Their Defence*”?, *supra* note 3, at 421–35.

271. See Charles, *supra* note 15, at 59–61.

272. This historical deficiency is rather important, for the same cannot be said when either loyalists or rebels interfered with the press. In such instances, violations of a “free press,” “liberty of the press,” or the “freedom of the press” were openly claimed by both sides. See Charles & O’Neill, *supra* note 43, at 34–47.

stating, “Congress shall never disarm any citizen, unless such as or have been in actual rebellion.”²⁷³ Thus, one would assert that this proves the Framers remained cognizant of the events of the American Revolution and sought to prevent it.²⁷⁴ However, when one places the New Hampshire proposal in context, one learns that it was a response to the events of Shays’ Rebellion, not the American Revolution.

Shays’ Rebellion is a rather important event for anyone examining the origins of the Constitution.²⁷⁵ It proved to be a significant factor as to why the Framers dispensed with the Articles of Confederation²⁷⁶ and adopted a more resolute system of government specifying the federal-state division over war and militia powers.²⁷⁷ Shays’ Rebellion was not quelled by an existing federal or state military force, but rather by an independent military force authorized and raised by the Massachusetts Assembly, and led by Revolutionary War veteran

273. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 359 (Jonathan Elliot ed., Washington, Johnathan Elliot 1836).

274. Numerous Standard Model works, in fact, have taken the New Hampshire recommendation beyond its historical context. For some examples, see Hardy, *supra* note 34, at 325 (inferring the recommendation showed the Second Amendment had “dual roots” of “individual self defense” and “social self defense”); Kates, *supra* note 168, at 221–22 (inferring the recommendation was to ensure the people always possess arms); Kopel, *supra* note 50, at 1517–21 (using the recommendation to support the Standard Model interpretation and not linking it to Shays’ Rebellion). In an earlier work, Stephen P. Halbrook made no reference to Shays’ Rebellion when discussing the importance of the New Hampshire recommendation. See HALBROOK, *supra* note 40, at 75. In Halbrook’s most recent book this deficiency is fixed. See HALBROOK, *supra* note 22, at 213. However, in doing so, he goes beyond the New Hampshire amendment’s intended purpose. He improperly infers that the Second Amendment and the New Hampshire recommendation are one and the same. *Id.* This conclusion also omits that the Massachusetts Assembly affirmed the right to keep and bear arms was intimately linked to the common defense. See *supra* notes 82–88 and accompanying text.

275. See Charles, *Scribble Scramble*, *supra* note 9, at 1822–29. For a comprehensive account of Shays’ Rebellion, see IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION (Robert A. Gross ed., 1993) [hereinafter IN DEBT TO SHAYS]; LEONARD L. RICHARDS, SHAYS’S REBELLION: THE AMERICAN REVOLUTION’S FINAL BATTLE (2002). For the useful contemporary account of Reverend Bezaleel Howard, see Richard D. Brown, *Shays’s Rebellion and Its Aftermath: A View from Springfield, Massachusetts, 1787*, 40 WM. & MARY Q. 598 (1983); see also Paul Finkelman, “A Well Regulated Militia”: The Second Amendment in Historical Perspective, 76 CHI.-KENT L. REV. 195, 209–12 (2000) (discussing the importance of the federal government being able to call forth the militia).

276. For a historian’s dissent that the impact of Shays’ Rebellion is often overstated, see Robert A. Feer, *Shays’s Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388 (1969).

277. See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 123–24.

Benjamin Lincoln.²⁷⁸ To prevent this embarrassing situation from ever presenting itself again, the Constitution ensured that Congress was vested with the authority to “provide for calling forth the Militia to execute the Laws of the Union, *suppress Insurrections* and repel Invasions.”²⁷⁹ As John Wheelock, President of Dartmouth College, conveyed to Lincoln in the midst of ratifying the Constitution, “The issue of the rebellion in the [sic] Massachusetts has been no small cause, that has given credit to those principles of permanent government, which are gaining ground in America, and on which the intelligent and good conceive the future renown and wealth of the confederacy depends.”²⁸⁰

Where the disarming provision comes into the fold is that New Hampshire was rather sympathetic to the plight of the insurgents,²⁸¹ many of whom were losing their farms after failing to pay their debts.²⁸² One must understand that both Massachusetts and New Hampshire’s courthouses had been closed for most of seventeen years, a period where creditors were unable to collect their debts. Thus, when the courts reopened, numerous farmers were faced with foreclosure.²⁸³ This led to the armed revolt that was Shays’ Rebellion, and upon it being quashed, many of the insurgents fled to New Hampshire, where there was similar sentiment against creditors.²⁸⁴ The rebels that remained were subjected to the stiff penalty of disarmament, disqualification from office, and stripped of the right to vote for a period of three years.²⁸⁵

Regarding disqualification from office and the right to vote, George Washington, James Madison, Benjamin Lincoln, and the New

278. *See id.* at 83.

279. U.S. CONST. art. I, § 8, cl. 15 (emphasis added).

280. Letter from John Wheelock to Benjamin Lincoln (May 17, 1788) (on file with Mass. Hist. Soc’y and author).

281. It should be noted that New Hampshire was in the minority in terms of its sympathy for Shays’ insurgents. Most states viewed Shays’ Rebellion as dangerous to the New Republic. *See* Joseph Parker Warren, *The Confederation and the Shays Rebellion*, 11 AM. HIST. REV. 42, 43 (1905). This included the likes of Samuel Adams. *See* William Pencak, *Samuel Adams and Shays’s Rebellion*, 62 NEW ENG. Q. 63 (1989).

282. For an analysis of the debt litigation during this period, see Claire Priest, Note, *Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays’ Rebellion*, 108 YALE L.J. 2413 (1999).

283. *See* Walter A. Dyer, *Embattled Farmers*, 4 NEW ENG. Q. 460, 463 (1931).

284. *See* Michael Lienesch, *Reinterpreting Rebellion: The Influence of Shays’s Rebellion on American Political Thought*, in IN DEBT TO SHAYS, *supra* note 275, at 161, 163.

285. *See* CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 84.

Hampshire Ratifying Convention all expressed displeasure with the stiff penalties imposed.²⁸⁶ Yet not one of them stated, inferred, or implied that the disarmament provision was a violation of the right to keep and bear arms.²⁸⁷ Only the New Hampshire Ratifying Convention chimed in on the subject by requesting it be shown that the person was in “Actual Rebellion” before being disarmed.²⁸⁸ This request was likely in response to the reports of injustice and poor due process bestowed upon the insurgents,²⁸⁹ but there may have been a larger dissatisfaction with the handling of Shays’ Rebellion altogether.²⁹⁰ Whatever the reason, the New Hampshire language was never included in any draft of the Bill of Rights. Instead, the importance of a state sponsored well-regulated militia was reaffirmed in conjunction with the right to keep and bear arms,²⁹¹ with one of the militia’s chief functions being to quell rebellions.²⁹²

The lesson lawyers, legal scholars, and jurists need to take from this example is that history can be misinterpreted if it is not fully

286. *See id.* at 86–87

287. *See id.* At that time the 1780 Massachusetts Constitution protected the right to “keep and bear arms for the common defence.” MASS. CONST., pt. I, art. XVII. Contemporary historical evidence confirms the “core” of this right was limited to government controlled militia service. *See Charles, Scribble Scrabble, supra* note 9, at 1824–29.

288. CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 87.

289. *See Brown, supra* note 275, at 609–10 (describing the process by which many insurgents were examined, generally by “Gun and Bayonet”); Alan Taylor, *Regulators and White Indians: Forms of Agrarian Resistance in Post-Revolutionary New England*, in IN DEBT TO SHAYS, *supra* note 275, at 145, 148 (discussing the disarming that took place in New Hampshire). This was not the case for everyone, and there is evidence that proper grand jury indictments were issued in some cases. *See Sidney Kaplan, A Negro Veteran in Shays’ Rebellion*, 33 J. NEGRO HIST. 123, 124–25 (1948).

290. *See James Leamon, In Shays’s Shadow: Separation and Ratification of the Constitution in Maine*, in IN DEBT TO SHAYS, *supra* note 275, at 281, 281–96.

291. *See* U.S. CONST. amend. II.

292. For some examples supporting this point, see THE MILITIA LAW, BEING ALL THE ACTS OF PARLIAMENT THEREOF, METHODICALLY DIGESTED, at vii (London, Eliz. Natt & R. Gosling 1718) (“The Militia of England is the natural Strength, and in its Original Constitution the great standing Army, and Safeguard of the Nation in Case of Insurrection, or Rebellion at home, or Invasion from abroad.”); THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY, HELD AT BURLINGTON ON FRIDAY THE TWENTY-SECOND OF JUNE 1744, at 16 (Philadelphia, Bradford 1744) (“Whereas a due Regulation of the Militia and making Provision in Cases of Insurrection, Rebellion or Invasion, is absolutely necessary for the Security, Preservation and Defence of this Province at this time when His Majesty is engaged in a most just War with *France* and *Spain*.”).

unpacked and understood.²⁹³ It is easy to abridge the historical record, take those portions we like, and repackage it to support a legal conclusion. However, when one does so, as is the case with many Standard Model accounts, one writes historical fiction.²⁹⁴ There is no doubt that history has an important part to play in constitutional jurisprudence, but jurists should tread lightly and carefully in accepting historical advocacy as historical fact.²⁹⁵ To proceed otherwise will ultimately lead to layers of myths.

Take, for instance, a recent article published by David B. Kopel in the *Charleston Law Review*.²⁹⁶ Not only does Kopel continue to pawn the myth that British disarmament is linked to the Second Amendment, but he takes it a step further by arguing the judiciary should apply a presumption of liberty, so to speak, when adjudicating the constitutionality of certain gun control laws:

From the events of 1774-75, we can discern that import restrictions or bans on firearms or ammunition are constitutionally suspect—at least if their purpose is to disarm the public, rather than for the normal purposes of import controls We can discern that broad attempts to disarm the people of a town, or to render them defenseless, are anathema to the Second Amendment; *such disarmament is what the British tried to impose, and what the Americans fought a war to ensure could never again happen in America*. Similarly, gun licensing laws that have the purpose or

293. See BUTTERFIELD, *supra* note 117, at 15–16 (discussing the difference in a “microscopic” interpretation versus a “bird’s-eye view”); *id.* at 20–21 (discussing how a microscopic view drives a “simple” interpretation of history to a “complex” one).

294. Take for instance an article by Kevin C. Marshall, which discusses the history of disarming criminals. Kevin C. Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695 (2009). Marshall dismisses the disarming of suspected loyalists during the American Revolution in defining the scope of the Second Amendment because there were no “civil liberties” during the American Revolution. *Id.* at 725. Such disarming, however, cannot be dismissed for two reasons. First, such disarming was never claimed to be a violation of the right to have, bear, or keep arms in private correspondence or the popular print culture. Meanwhile, violations concerning the freedom of the press were stated both privately and publicly. See Charles & O'Neill, *supra* note 43, at 37, 43. Second, Marshall never looks into the events of Shays' Rebellion, and the importance of the person being in support of just government. See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 83–87, 95–130. For purposes of historiography, Marshall served as counsel of record for the Cato Institute and Joyce Lee Malcolm in *District of Columbia v. Heller*. See Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent [The Right Inherited from England], *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

295. See *supra* notes 206–21 and accompanying text.

296. David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283 (2012).

effect of allowing only a minority of the people to keep and bear arms would be unconstitutional.²⁹⁷

What substantiated historical evidence does Kopel provide to support such a “liberal” and “law-centered” interpretation of the Second Amendment?²⁹⁸ For the majority of the article, Kopel advances nothing more than the same Standard Model myths that historians have already disproven as unsupported, out of context, or poorly researched. These include such myths as the Second Amendment is intimately linked to the confiscation of arms, the import ban,²⁹⁹ the Battle of Lexington and Concord,³⁰⁰ the *Declaration of the Causes and Necessity for Taking Up Arms*,³⁰¹ and militias independent of government control.³⁰² Like that of so many Standard Model writers before him, Kopel’s work lacks those direct pieces of evidence that prove that the British violated an Anglo-American right to arms, and that the Second Amendment was drafted as a result of these alleged violations.

In addition to these rebutted claims, Kopel attempts to provide a new example. He writes that it was the “Americans’ refusal to surrender their firearms” that prompted Admiral Samuel Graves to

297. *Id.* at 285–86 (emphasis added).

298. See Pocock, *supra* note 33, at 362–64 (discussing how lawyers liberally construe history to support a desired end).

299. See Charles, “*Arms for Their Defence*”?, *supra* note 3, at 435–49. It is also worth noting that the colonists used the import ban to their advantage in recruiting the indigenous tribes. They never stated to the tribes that the British were violating a right to arms. See *Letter to the Reverend Mr. Kirkland, with an Address to the Mohawks* (Apr. 4, 1775), in 1 AMERICAN ARCHIVES: DOCUMENTS OF THE AMERICAN REVOLUTION, 1774–1776, at 1350 (Peter Force ed., Ser. No. 4, 1837) (“Brothers . . . they have told us we shall have no more Guns, no Powder to use and kill our Wolves and other game, nor to send to you, for you to kill your victuals with, and to get Skins to trade with us to buy you Blankets, and what you want. How can you live without Powder and Guns? But we hope to supply you soon with both, of our own making.”); *Letter to the Eastern Indians* (May 15, 1775), in 2 AMERICAN ARCHIVES: DOCUMENTS OF THE AMERICAN REVOLUTION, 1774–1776, at 610 (Peter Force, Ser. No. 4, 1839) (“[The British] prevent us from having guns and powder to use and kill our deer and wolves, and other game, or to send to you for you to kill your game with, and to get skins and furs to trade with us for what you want. But we hope soon to be able to supply you with both guns and powder of our own making.”). For history on the recruitment of Indians by both sides, see CHARLES, *supra* note 266, at 213–70.

300. See *supra* notes 258–67 and accompanying text.

301. See Charles, “*Arms for Their Defence*”?, *supra* note 3, at 443–47 (placing Gage’s seizure of arms in historical context).

302. See Charles, *The 1792 National Militia Act*, *supra* note 25, at 374–90 (placing the history of independent militias in historical context).

order “all seaports north of Boston be burned.”³⁰³ The working example Kopel provides is Captain Henry Mowat’s shelling of Falmouth, Massachusetts (today’s Portland, Maine).³⁰⁴ Kopel informs us that Mowat acted as he did solely because the inhabitants failed to deliver up their arms and ammunition.³⁰⁵ This in turn led to the grievance in the Declaration of Independence, which proclaimed: “[King George III] has plundered our seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our people.”³⁰⁶

It would be easy for a casual reader unfamiliar with the history of the American Revolution to fall prey to Kopel’s narrative. After recasting the Revolution as an arms-centric quarrel where independent militias ensured that rights would be protected, why not link the burning of Falmouth with the right to arms as well? Kopel is indeed correct in stating that Falmouth was burned and that this event in turn led to a grievance in the Declaration.³⁰⁷ But these are the only two historical facts that Kopel gets right.

There are a number of problems with Kopel’s “history,” particularly with what prompted Graves to push for coastal bombardment and the unfolding of events at Falmouth. Neither is placed in total historical context.³⁰⁸ To begin, Kopel is correct that Mowat ordered the Falmouth Committee to deliver up their arms or he would set fire to the town.³⁰⁹ However, Kopel fails to mention the complex series of events that led to the order. Prior to the outbreak of hostilities at Lexington and Concord, Mowat was seized and held hostage by Colonel Samuel Thompson’s militia company.³¹⁰ This was just the beginning of tensions, for Thompson’s company also placed Falmouth’s inhabitants in a rather precarious situation by seizing and harassing suspected loyalists, vandalizing homes, and even firing upon the British ship *Canceaux* without provocation.³¹¹

303. Kopel, *supra* note 296, at 323.

304. *See id.*

305. *Id.*

306. *Id.* at 323–24 (quoting THE DECLARATION OF INDEPENDENCE para. 26 (U.S. 1776)).

307. *See* CHARLES, *supra* note 266, at 135–71.

308. *See* Skinner, *supra* note 31, at 214.

309. *See* Kopel, *supra* note 296, at 323; *see also* CHARLES, *supra* note 266, at 161–63.

310. *Id.* at 156–57.

311. *See id.* at 157–58.

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Despite all of this, Mowat showed great restraint and left Falmouth unscathed.³¹² By October 1775 Mowat received new orders. Admiral Graves obtained approval to retaliate against port towns known to have been conspiring against the British government. After months of frustrating events and disappointments, it was the order Graves had been waiting for. There were no orders given related to arms confiscation.³¹³

It is here that the story takes an interesting turn, for Mowat deviated from Graves' orders and offered Falmouth leniency on the condition that the inhabitants deliver up all arms and ammunition.³¹⁴ In good faith, the inhabitants complied by delivering ten stands of arms that very evening.³¹⁵ This extended the inhabitants' timetable to deliver the rest by 9:00 the next morning. Failure to comply would mean the devastation of the town. However, by 9:00, the remaining arms were undelivered and the town was not evacuated.³¹⁶ One patriot account claims the inaction was to illustrate the colonists' solidarity to advance the cause of liberty.³¹⁷ This account makes little sense, especially seeing that Falmouth's inhabitants initially complied with Mowat's orders. This brings us to the historically accepted account, which is that the Sons of Liberty threatened to burn Falmouth if the inhabitants complied.³¹⁸ This would have placed the town in a dangerous dilemma: Should the town comply with Mowat's orders and risk being torched by rebel militia or hope Mowat would show further leniency as exhibited earlier that year? The historical evidence suggests that Falmouth's inhabitants chose the latter, and after meeting with Mowat, the inhabitants were given an additional forty minutes to evacuate.³¹⁹

As this historical example and others illuminate, Standard Model writers are continually leaving important facts out, implying others, and thus writing history completely out of context. Kopel once even defended the Standard Model against historian dissents, writing:

312. *See id.* at 158–59.

313. *Id.* at 161–62.

314. *Id.* at 162.

315. *Id.*

316. *Id.*

317. *Id.* at 163.

318. *Id.*

319. *See id.* at 163–64; *see also* Leamon, *supra* note 290, at 283–84 (discussing how Thompson endangered Falmouth and the inhabitants blamed him for the destruction of the town).

“Facts are facts, no matter who writes about them.”³²⁰ Historians undoubtedly agree with this statement. However, if one does not have all the facts, and fails to make an honest effort to place those facts in historical context, what is the point of conjuring the past for use in the present?

Let us return to Kopel’s rather tenuous connection with the Second Amendment, Falmouth, and the Declaration of Independence. Here is how Kopel recasts the historical record in a recent interview on the topic:

Interviewer: I want to . . . talk about the Declaration of Independence, because I thought this was a real fascinating question, and something that could be easy to overlook. The Declaration as we know lists many . . . grievances against the king, but one of the [grievances] is conspicuously absent. Why is gun confiscation not one of the grievances against the king cited in the Declaration?

David B. Kopel: The manner in which the gun confiscation was carried out was one of the grievances. As things escalated, by the fall of 1775, the British admiral says, “Let’s burn down the towns on the New England coast.” So the British go up to . . . Portland Maine, which at the time was Falmouth, Massachusetts.

Interviewer: The direct order is all sea ports north of Boston must be burned.

David B. Kopel: Yes. The British Navy shows up at Falmouth and says, “Give us all your guns or we will burn you down.” The people of Falmouth say, “Ok,” and turn over eight muskets and [one] cannon. The British say, “That is not enough.” So they huff and they puff, and they burn the town down. That is not the only time they do that.³²¹ This is mentioned in the Declaration of Independence. It says they have ravaged our sea coasts and destroyed our towns. You can find plenty of things the Americans objected to, which later appear in the Bill of Rights or the rest of the Constitution as responses to the British abuses that are not in the

320. David B. Kopel & Clayton E. Cramer, *Credentials Are No Substitute for Accuracy: Nathan Kozuskanich, Stephen Halbrook, and the Role of the Historian*, 19 WIDENER L.J. 343, 378 (2010).

321. It is unclear whether Kopel is claiming that this is “not the only time” the British bombarded a coastal town or whether he is inferring the British burned a number of towns after the colonists failed to deliver arms. If it is the former, Kopel is correct, but this history is not as black and white as some may think. See CHARLES, *supra* note 266, at 135–71. If it is the latter—i.e. that the British confiscated arms and burned towns after failing to comply—there is no other example that this author has found or that Kopel can produce.

Declaration of Independence. . . . It is certainly an indictment, but if you look at the Bill of Rights and see where are the antecedents of that in the Declaration of Independence, there are actually only a few things in the Bill of Rights that you can directly tie to a clause in the Declaration of Independence.³²²

This account leaves historians scratching their heads in disbelief. An uninformed lawyer, scholar, or jurist is led to believe the American Revolution was fought, and independence was later declared over arms confiscation. History in context, however, dispels Kopel's account as nothing short of an ideological fairytale.³²³ In fact, the grievance Kopel touts as a Second Amendment antecedent was actually in reference to multiple coastal towns being destroyed, including the likes of Bristol, Rhode Island, Portsmouth, New Hampshire, and Norfolk, Virginia.³²⁴

Each instance retains a unique background story and a close examination of the grievance, as a whole, does not support the pageant of gun freedom as Kopel describes it. One must remember the Revolutionary War was a British civil war³²⁵ where its participants frequently changed allegiances and both sides committed injustices.³²⁶ The burning of Falmouth provides us with a case in point, but it was not the only town to have been destroyed under rather difficult circumstances. The case of Norfolk, Virginia is another that was victimized by an overzealous militia. At one point, the militia's commander even requested permission to burn the town because of its suspected loyalist element. The Virginia Assembly denied the request outright, but this did not prevent the militia from provoking

322. *Firearms Law and the Second Amendment: Chapter 3*, IVOICES (May 9, 2012), <http://www.ivoices.org/category.php?subject=Second%20Amendment>.

323. Kopel's discussion on the Declaration of Independence, its grievances, and the Bill of Rights is equally problematic. For historian accounts of the Declaration and its intended purpose, see CHARLES, *supra* note 266 (addressing the social history of the Declaration's grievances); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997) (addressing the drafting and social history of the Declaration); Armitage, *supra* note 101 (discussing the Declaration's purpose in terms of international law); Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness"*, *supra* note 62 (discussing the role of the Declaration's preamble in constitutional jurisprudence).

324. See CHARLES, *supra* note 266, at 167–210.

325. See, e.g., J.G.A. POCOCK, *THREE BRITISH REVOLUTIONS: 1641, 1688, 1776* (1980).

326. See, e.g., BERNARD BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* (1974); CLAUDE H. VAN TYNE, *LOYALISTS IN THE AMERICAN REVOLUTION* (2001).

British retaliation and then participating in most of the town's destruction.³²⁷

Despite the rebels being responsible, either in part or whole, for Falmouth and Norfolk, it was the British, not the rebel militia, who were held accountable in the popular print culture.³²⁸ This is not surprising. Historians who have waded through the Revolution's historical record can attest to the high level of propaganda that took place.³²⁹ This includes many of the grievances in the Declaration of Independence.³³⁰

Another problem with Kopel's "history" to consider is that if the American Revolution was precipitated by gun control, why were there plenty of laws restricting the carriage, use, and firing of guns?³³¹ Why did colony or state laws require government consent for the militia to train?³³² Why did some states adopt the Statute of Northampton or acknowledge the English common law regarding the carrying of arms in the public concourse?³³³ These are important historical variables that are left unexplained and that contradict Kopel's plea for a presumption of liberty when adjudicating gun control laws.³³⁴ And this is not even taking into account those writers who falsely claim that there were virtually *no* gun control laws in the late eighteenth century.³³⁵

The moral of the story is a simple one—the Second Amendment will be in historical crisis if we continue down the Standard Model path, and to do so would be embarrassing. This author maintains no reservations that Standard Model writers personally *believe* their

327. See CHARLES, *supra* note 266, at 191–200.

328. See *id.* at 190–91, 202–03.

329. See, e.g., PHILIP GRANT DAVIDSON, *PROPAGANDA AND THE AMERICAN REVOLUTION, 1763–1783* (1941).

330. CHARLES, *supra* note 266, at 85–325.

331. See Charles, *Historical Guideposts*, *supra* note 18, at 23–25; Cornell, *Early American Gun Regulation and the Second Amendment*, *supra* note 167; König, *Arms and the Man*, *supra* note 167; see also Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597 (2006) [hereinafter Winkler, *The Reasonable Right to Bear Arms*]; Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007) [hereinafter Winkler, *Scrutinizing the Second Amendment*].

332. See Charles, *Scribble Scrabble*, *supra* note 9, at 1833–34; Charles, *The 1792 National Militia Act*, *supra* note 25, at 326 n.17. For a full analysis on the states' plenary power to train the militia, see *id.* at 374–90.

333. See Charles, *The Faces of the Second Amendment*, *supra* note 9, at 7–41.

334. See Kopel, *supra* note 296, at 285–86.

335. See, e.g., Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 FORDHAM URB. L.J. 1617 (2012).

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interpretation of history to be just, fair, and in the best interests of the American public. In other words, they see themselves as the pendulum of truth in the advancement of liberty. However, the role of history and the historian is to educate the public about the past, not disparage it in the advancement of what one believes or hopes the record provides.

II. THE EMBARRASSING STANDARD MODEL SAGA CONTINUES

For those who study historiography, the Second Amendment proves to be a fascinating subject.³³⁶ As seen throughout Part I, from the 1970s to the present day, the right to arms has undergone an interpretative transformation that is virtually unrivaled. Standard Model writers see this transformation as restoring a forgotten relic to its proper podium, but historians see it as flipping the Constitution on its head and advancing a bundle of make-believe rights that would be ridiculed by the Framers in scathing dissents. Take for instance Noah Webster's sarcastic critique of the Pennsylvania Minority, which sought to propose a series of rights³³⁷ that had nothing to do with establishing a constitutional republic:

But to complete the list of unalienable rights, you would insert a clause in your declaration, *that every body shall, in good weather, hunt on his own land, and catch fish in rivers that are public property.* Here, Gentlemen, you must have exerted the whole force of your genius! Not even the *all-important* subject of *legislating for a world* can restrain my laughter at this clause! As a supplement to that article of your bill of rights, I would suggest the following restriction: "That Congress shall never restrain any inhabitant of America from eating and drinking, at *seasonable times*, or prevent his lying on his *left side*, in a long winter's night, or even on his back,

336. In fact, some historians use the Second Amendment as a teaching tool to writing an objective history. See, e.g., *Department of History: Faculty and Staff Profiles*, U.N.H., <http://www.unh.edu/history/index.cfm?ID=2B1966F3-AC44-D4E7-54A916E20D9C7ED4> (last visited Nov. 28, 2012) (listing Professor Eliga Gould's class, "HIST 797: Senior Colloquium (Anglo-American Right to Bear Arms)").

337. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania, to their Constituents (December 17, 1787)*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 618 (Merrill Jensen ed., 1976). The *Heller* majority found the Pennsylvania Minority to be "highly influential" even though there is no evidence that their "Reasons of Dissent" ever influenced Madison. See *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008). If this is true, then the courts need to accept their limitations, which include disarming criminals and dangerous persons, and regulating arms to prevent "public injury" or what is in the interest of the "public good." See Charles, *Historical Guideposts*, *supra* note 18, at 27–29.

when he is fatigued by lying on his *right*.” . . . But to be more serious, Gentlemen, you must have had in idea the forest-laws in Europe, when you inserted that article; for no circumstances that ever took place in America, could have suggested the thought of a declaration in favor of hunting and fishing. Will you forever persist in error? . . . You may just as well ask for a clause, giving license for every man to till *his own land*, or milk *his own cows*.³³⁸

Webster’s critique is important because the drafters of the Bill of Rights sought to include those rights vital for a continuance of a democratic republic.³³⁹ They were rights that the founding generation frequently referred to as the palladiums of liberty. The description is often misunderstood or taken out of context by legal commentators to assert broad individual rights separate from government.³⁴⁰ However, the terminology was not intended to describe libertarian notions of liberty. In the eighteenth century, the “palladium of liberty” distinctly described rights or governmental checks that balanced the Constitution in favor of “the people.” These rights and governmental checks included political representation,³⁴¹ the writ of habeas corpus,³⁴² the freedom of election,³⁴³ the right to trial by jury,³⁴⁴ and the freedom of the press.³⁴⁵

338. THE DAILY ADVERTISER (N.Y.C.), Dec. 31, 1787, at 2; see also NOAH WEBSTER, *An Address to the Dissenting Members of the Late Convention in Philadelphia*, in A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS: ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 142, 149 (Scholars’ Facsimile & Reprints 1977) (1790).

339. When the Bill of Rights was submitted for ratification, it included the following preamble:

The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, *in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added*; and as extending the grounds of public confidence in the Government will best insure the beneficent ends of its institution.

JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA, BEGUN AND HELD AT THE CITY OF NEW YORK, MARCH 4TH, 1789, AND IN THE THIRTEENTH YEAR OF THE INDEPENDENCE OF THE SAID STATES 123 (New York, Thomas Greenleaf 1789) (emphasis added).

340. For an example see Charles & O’Neill, *supra* note 43, at 11, 25–26.

341. See THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 430 (Jonathan Elliot ed., 1845) (describing Parliament as the “palladium of liberty”).

342. See 7 LETTERS OF THE DELEGATES TO CONGRESS, 1774–1789, at 574 (Paul H. Smith ed., 1981) (describing Pennsylvania’s writ of habeas corpus as the “palladium of liberty”); 2 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 901 (Philadelphia, Bronson & Chauncey 1804) (describing the writ of habeas corpus as the “great palladium of liberty”).

Most importantly for our purposes, one of the palladiums also included the right to keep and bear arms in a well-regulated militia.³⁴⁶ Not once did the founder generation conflate or confuse armed individual self-defense—in private or public—as a palladium of liberty. The phrase was distinctly used to describe the right to keep and bear arms in a state sanctioned militia, and rightfully so.³⁴⁷ The truth of the matter is that a “well-regulated militia” was seen as crucial to a republic. This cannot be overstated enough. The constitutional body not only provided cost effective physical security, but it was the means and ends by which liberty was to be understood. Furthermore, it provided an efficient counterpoise to standing armies and an oppressive government.³⁴⁸

Of course, this was all theoretical and idealistic of the Framers.³⁴⁹ The militia, even after the 1792 National Militia Act, never lived up to its intended constitutional and ideological purpose.³⁵⁰ By 1818 the militia was described by one anonymous commentator as a “national curse.”³⁵¹ Even Revolutionary War patriot, militia instructor,

343. See BENJAMIN AUSTIN, CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALLACIOUS FEDERALISM 89 (Boston, Adams & Rhoades 1803) (describing the freedom of election as the “palladium of liberty”).

344. See JOHN GRAHAM, SPEECHES, DELIVERED AT THE CITY-HALL OF THE CITY OF NEW-YORK IN THE COURTS OF OYER AND TERMINER, COMMON PLEASE, AND GENERAL SESSIONS OF THE PEACE 19 (Albany, Banks and Gould 1812) (describing the right to trial by jury as the “grand palladium of all liberty and justice”); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 221 (Max Farrand ed., 1911) (describing the right to trial by jury as the “palladium of liberty”).

345. See 10 ANNALS OF THE CONGRESS OF THE UNITED STATES 81–82 (1799) (discussing the freedom of the press the real palladium of our liberties); GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS 27, 34 (Richmond, Samuel Pleasants, Junior 1803) (describing the freedom of the press as the “palladium of liberty” and “bulwark of freedom”); 23 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 815 (Washington, Gov’t Printing Office 1914) (1782) (describing freedom of the press as the “palladium of liberty”).

346. The late and great military historian Don Higginbotham was the first to make this connection. See Higginbotham, *supra* note 69, at 40.

347. See Charles, *supra* note 15, at 71–82.

348. See *generally* 1 BLACKSTONE, *supra* note 56, at 400; Charles, *supra* note 15.

349. Despite all the political rhetoric in favor of a well-regulated militia throughout seventeenth and eighteenth century England, the militia as a functioning military entity had failed repeatedly. See *generally* LINDSAY BOYNTON, THE ELIZABETHAN MILITIA, 1558–1638 (1967); J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY: THE STORY OF A POLITICAL ISSUE, 1660–1802 (1965); Eliga H. Gould, *To Strengthen the King’s Hands: Dynastic Legitimacy, Militia Reform and Ideas of National Unity in England 1745–1760*, 34 HIST. J. 329 (1991).

350. See Charles, *The 1792 National Militia Act*, *supra* note 25, at 347–58.

351. Vox Communis, *Remarks on Militia Laws*, in 2 AMERICAN MONTHLY MAGAZINE AND CRITICAL REVIEW 337 (New York, D. Fanshaw 1817).

pamphleteer,³⁵² and Federalist Timothy Pickering wrote that a “well disciplined militia, as the palladium of liberty, is an empty phrase in the mouth of every Patriot.”³⁵³ Pickering would later refer to it as a “public evil” both in terms of its expense and the national defense.³⁵⁴

Somehow Standard Model writers view the Second Amendment much differently than the record depicts. This includes seventeenth century England historian Joyce Lee Malcolm, who demoted the constitutional significance of a “well-regulated militia” to being “merely . . . well-trained.”³⁵⁵ Malcolm’s puzzling over-simplification of the American right stems from her work on the “have arms” provision of the 1689 Declaration of Rights.³⁵⁶ Just as the Standard Model was coming to the fold, so too was Malcolm’s research on the English right. And not surprisingly, the former fed off the latter for historical credibility.³⁵⁷

352. In 1770, Timothy Pickering wrote two editorials discussing the importance of training, disciplining, and regulating the militia. See Timothy Pickering, Editorial, *THE ESSEX GAZETTE* (Salem), Jan. 31, 1769, at 107; Timothy Pickering, Editorial, *THE ESSEX GAZETTE* (Salem), Apr. 10, 1770, at 147. Five years later, Pickering wrote a militia treatise. See TIMOTHY PICKERING, *AN EASY PLAN OF DISCIPLINE FOR A MILITIA* (Salem, Samuel and Ebenezer Hall 1775). The treatise was so influential and timely that it was adopted by the Massachusetts Assembly for the training of its militia and even George Washington ordered personal copies. See Letter from Timothy Pickering to George Washington (Dec. 1775), in 2 *THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY SERIES* 627–28 (Philander D. Chase ed., 1987); *Timothy Pickering’s Plan of Military Discipline to be Hereafter Used and Practised in the Colony*, in 5 *AMERICAN ARCHIVES: DOCUMENTS OF THE AMERICAN REVOLUTION, 1774–1776, FOURTH SERIES*, at 1300 (Washington 1840), available at <http://lincoln.lib.niu.edu/cgi-bin/philologic/getobject.pl?c.15272:1.amarch>.

353. *Timothy Pickering*, 3 AM. HIST. REC. 33, 35 (1874).

354. Letter from Timothy Pickering to Hon. James Lloyd (Dec. 20, 1822) (on file with Historical Manuscript Collection, Society of the Cincinnati, Washington, DC).

355. Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. 85, 106 (2010) (internal quotation marks omitted).

356. For this author’s dissent to Malcolm’s over-simplification of the constitutional significance of a well-regulated militia, see Charles, *Scribble Scrabble*, *supra* note 9, at 1835–39.

357. Malcolm’s first professionally published article on the subject appeared around the same time as Don B. Kates’s influential *Michigan Law Review* article, and the latter relied on the former “heavily.” Kates, *supra* note 168, at 204, 206–07, 215. For Malcolm’s first published article, see Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983) [hereinafter Malcolm, *The Right of the People*]. However, two years earlier, the National Rifle Association reprinted and distributed Malcolm’s 1980 paper delivered to the Mary Ingraham Bunting Institute of Radcliffe College. See JOYCE LEE MALCOLM, *DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND* (1981) [hereinafter MALCOLM, *DISARMED*].

The collaboration began as early as 1981 when the National Rifle Association reprinted and distributed Malcolm's first research on the subject.³⁵⁸ Instantly, Standard Model writers fell into line as they imported Malcolm's research and conclusions into their own writings.³⁵⁹ This would not be a problem if Malcolm's thesis were historically viable. But as will be discussed in detail below, Malcolm's research and conclusions turned out to be completely "unacceptable," thus further discrediting the Standard Model as viable moving forward.³⁶⁰

A. The Rise and Fall of Joyce Lee Malcolm's Thesis on the Anglo-American Right

For purposes of historiography, when Malcolm published her first article on the English right to arms, historians had just begun debating the Second Amendment.³⁶¹ Other than a scholarly exchange between historians Lawrence Delbert Cress and Robert E. Shalhope, and J.G.A. Pocock's classic work *The Machiavellian Moment*, very few historians had dabbled in the subject, let alone examined the historical record extensively.³⁶² What made Malcolm's inquiry unique

358. See MALCOLM, *DISARMED*, *supra* note 357.

359. See David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 DETROIT C.L. REV. 789, 797–98 (1982) (relying on Malcolm's research for the legal understanding of the English right); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 181 (1982) (citing to Malcolm for English origins of right); Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113, 113–14 (1982) (relying on Malcolm for English right origins of Second Amendment); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1, 7 (1981) (citing to Malcolm for English origins of right); Hardy, *supra* note 259, at 572–83 (relying on and citing to Malcolm for English origins); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1, 18–24 (1987) (relying on Malcolm for account of English right).

360. See Schwoerer, *To Hold and Bear Arms*, *supra* note 9, at 208; Brief for English/Early American Historians as Amici Curiae in Support of Respondents at 14, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

361. See Malcolm, *The Right of the People*, *supra* note 357.

362. See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 213 (1975). See generally Lawrence Delbert Cress, *Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia*, 40 J. HIST. IDEAS 43 (1979); Lawrence Delbert Cress, *Republican Liberty and National Security: American Military Policy as an Ideological Problem, 1783 to 1789*, 38 WM. & MARY Q. 73 (1981); Shalhope, *The Ideological Origins*, *supra* note 116; Shalhope & Cress, *supra* note 116. For some prominent works that discussed the politics of standing armies and militias, which were in print at this time, see BOYNTON, *supra* note 349; LOIS G. SCHWOERER, "No

was it set out to be the first attempt of an historian to connect Article VII of the 1689 Declaration of Rights with the Second Amendment. Like Standard Model writers before her,³⁶³ Malcolm read the text of the Second Amendment and spotted an interpretative conundrum:

Was [the prefatory language] a qualifying or an amplifying clause? That is, was the right to arms guaranteed only to members of “a well-regulated militia” or was the militia merely the most pressing reason for maintenance of an armed community? The meaning of “militia” itself is by no means clear.³⁶⁴

To Malcolm, the “key” in settling the debate rested with “the English tradition the colonists inherited, and the English Bill of Rights from which much of the American Bill of Rights was drawn.”³⁶⁵ Malcolm’s connection between the English and American right to arms has proved to be both astute and proper. James Madison referenced Article VII in his notes and a number of early nineteenth century constitutional commentators viewed the Second Amendment as its lineal descendant.³⁶⁶ The only significant difference between the two was that Article VII was linked to socio-economic status,³⁶⁷ with the Second Amendment containing no such restriction.³⁶⁸ Another notable difference between the two rights was the structure of government. England consisted of one national government, with concurrent power over the militia divided between the crown and Parliament.³⁶⁹ However, in the United States it was a bit more complicated. Not only was there a division of power

STANDING ARMIES!”: THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (1974); WESTERN, *supra* note 349; John Miller, *The Militia and the Army in the Reign of James II*, 16 HIST. J. 659 (1973).

363. *See supra* Part I.B.4.

364. Malcolm, *The Right of the People*, *supra* note 357, at 287.

365. *Id.*

366. *See* James Madison, Notes for Speech in Congress (June 8, 1789), available at <http://www.consource.org/document/notes-for-speech-in-congress/>; ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 238–39 (Clyde N. Wilson ed., Liberty Fund, Inc. 1999) (1803); 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 143 n.40 (Philadelphia, William Young Birch and Abraham Small 1803); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (Philadelphia, Philip H. Nicklin 1829).

367. *See* ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA (1964).

368. *See* Charles, “Arms for Their Defence”?, *supra* note 3, at 358, 365, 378–80, 383, 385–86, 396, 398–99, 402, 403, 407.

369. Charles, *The Right of Self-Preservation*, *supra* note 9, at 45–52.

between Congress and the President, but there was also a complex division of federal-state powers, with some of them overlapping.³⁷⁰ But other than linking the Anglo origins of the right to the Second Amendment, Malcolm's thesis fails to meet its burden.

For those unfamiliar with Malcolm's work, the thrust of her argument is that in the late seventeenth century arms-bearing transformed from a societal duty into a common law right of armed self-defense—in both private and public—and Article VII of the 1689 Declaration of Rights acknowledged this transformation.³⁷¹

To date, only those unfamiliar with late seventeenth century English history have applauded this interpretation. David B. Kopel wrote, “[Malcolm] sweeps away over two centuries of American—and British—misunderstanding of the British right to arms, providing the first clear picture of what the right to arms meant to the British of 1689, as well as what it meant to the Americans of 1791”³⁷² Jeremy Rabkin described it as a “careful history, as much a work of social and political as of legal history.”³⁷³ Robert J. Cottrol and Raymond T. Diamond heralded it as a “meticulously researched work in political and legal history.”³⁷⁴ And before eighteenth century American historian Robert E. Shalhope abandoned the Standard Model as a false prophecy,³⁷⁵ he too believed that Malcolm proved the right to arms protected “*both* the individual's right to keep arms and the community's right to protect itself by means of an armed militia.”³⁷⁶

In contrast to these appraisals, Lois G. Schworer knew something was amiss.³⁷⁷ In 1981, Schworer wrote what has become an essential guide to understanding the 1689 Declaration of Rights. Regarding

370. For the complexities of this system within the constraints of the 1792 National Militia Act, see Charles, *The 1792 National Militia Act*, *supra* note 25, at 331–36.

371. *See generally* MALCOLM, *supra* note 9.

372. David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1336 (1995) (book review).

373. Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231, 235 (1995) (book review).

374. Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1013 (1995) (book review).

375. *See* Shalhope, *supra* note 13, at 1443.

376. Robert E. Shalhope, Book Review, 82 J. AM. HIST. 209, 210 (1995). For some other endorsements by non-seventeenth century English historians, see James E. Ely, Jr., Book Review, 52 WM. & MARY Q. 212, 212–13 (1995); Eliga H. Gould, Book Review, 111 ENG. HIST. REV. 1290, 1290–91 (1996); Scott A. Merriman, Book Review, 61 J. MIL. HIST. 158 (1997); Allan D. Olmstead, Book Review, 24 CONTEMP. SOC. 58, 58–59 (1995).

377. Schworer, Book Review, *supra* note 9, at 570–71.

Article VII, she concluded the “have arms” provision was connected to “neo-Harringtonianism” and gave “men the right to possess arms according to their social and economic standing” as a means to check government corruption.³⁷⁸ It was a thesis that Malcolm “apparently rejected,” but never squared.³⁷⁹ Still, there were other problems with Malcolm’s book, the most important being that Malcolm failed to prove her interpretation was “universally intended” or “advocated” by those who adopted the English Bill of Rights.³⁸⁰ As a result, Schwoerer concluded Malcolm’s bottom line thesis “suffer[ed] accordingly,” and may not convince other historians specializing in this area.³⁸¹

Schwoerer’s view only became stronger upon reexamining the subject five years later.³⁸² It was concluded that Malcolm’s thesis was “unacceptable,” and the criticisms were not minor tit-for-tat discrepancies.³⁸³ Instead, the evidentiary record unveiled rather fundamental methodological and research problems, such as mischaracterizing English arms restrictions, the history of the 1689 Convention, subsequent English history, and taking speakers’ words out of context.³⁸⁴ Malcolm never replied to Schwoerer’s critique nor has Malcolm ever supplemented her thesis.³⁸⁵ At the time, it was unknown whether Malcolm’s silence constituted acceptance or whether she dismissed Schwoerer outright. Based on subsequent writings, it must be assumed that it was the latter.³⁸⁶

378. SCHWOERER, *supra* note 8, at 78.

379. Schwoerer, Book Review, *supra* note 9, at 571.

380. *Id.*

381. *Id.*

382. See Brief for English/Early American Historians as Amici Curiae in Support of Respondents at 14, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

383. Schwoerer, *To Hold and Bear Arms*, *supra* note 9, at 208.

384. See *id.* at 209–21.

385. Malcolm has only directly replied to one critique of her work. Compare Michael A. Bellesiles, Book Review, 14 L. & HIST. REV. 382, 382–86 (1996), with Joyce Lee Malcolm, *Response to Bellesiles’s Review of To Keep and Bear Arms: The Origins of an Anglo-American Right*, 15 L. & HIST. REV. 339 (1997).

386. The first such evidence is a 2003 article discussing historian fraud, when Malcolm restated her thesis to be the correct one. See Joyce Lee Malcolm, *Disarming History*, REASON MAG. (Mar. 2003), <http://reason.com/archives/2003/03/01/disarming-history> [hereinafter Malcolm, *Disarming History*]. The second such evidence is Malcolm’s amicus brief filed in *District of Columbia v. Heller*. See Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). The third piece of evidence is Malcolm’s endorsement of Justice Antonin Scalia’s opinion in *Heller* as a “carefully reasoned and scholarly opinion.” Joyce Lee Malcolm, *The*

Such a dismissal would not be problematic if other historians or experts had come to Malcolm's defense by supplementing or reinforcing her claims. This did not occur.³⁸⁷ The opposite took place,³⁸⁸ with historical antagonism only strengthening over time.³⁸⁹ This is because a close look at the evidence reveals Scwoerer's initial suspicions were true.³⁹⁰ Suffice it to say, the historical conclusions that Malcolm claims to be substantiated are nothing more than a number of independent historical theories, with little if any connection between them.³⁹¹ Such problematic theories include:

1. England maintained a virtually unregulated armed society in both private and public, which advanced public safety and deterred crime.³⁹²
2. The Convention of 1689 debates and the drafting history of Article VII convey the Declaration of Rights sought to protect an

Supreme Court and the Uses of History: District of Columbia v. Heller, 56 UCLA L. REV. 1377, 1378 (2009) [hereinafter Malcolm, *The Supreme Court*].

387. Indeed, Standard Model writers state Malcolm's history as the correct and true version. However, none of these Standard Model works have produced any new evidence to advance Malcolm's problematic conclusions. See, e.g., Hardy, *supra* note 41, at 73–75.

388. See TIM HARRIS, *REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720*, at 343 (2006); Konig, *A Missing Transatlantic Context*, *supra* note 212; Brief for English/Early American Historians as Amici Curiae in Support of Respondents at 14, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

389. See Charles, "Arms for Their Defence"?, *supra* note 3, at 356–418; Charles, *The Right of Self-Preservation*, *supra* note 9, at 24–60; Charles, *The Faces*, *supra* note 9, at 7–31.

390. See Schwoerer, Book Review, *supra* note 9, at 571; Schwoerer, *To Hold and Bear Arms*, *supra* note 9, at 208.

391. Malcolm herself does not describe her methodological approach as that of other intellectual historians by eliciting "total historical context." Compare Skinner, *supra* note 31, at 202 ("[A historian states results] in the form of 'inner connections' traced between ideas or events, to suggest not a casual relation but just that they 'belong together in a specially intimate way'."), with MALCOLM, *supra* note 9, at xi ("In investigating the origins of this right, *I have been concerned to cast as wide a net as possible*. This was essential not only because the subject overlaps many separate fields, but because all legal and constitutional history is best understood in context; indeed, *where direct evidence is deficient there is no satisfactory alternative but to dredge clues from the context.*") (emphasis added).

392. See MALCOLM, *supra* note 9, at 16–30, 65; Malcolm, *The Right of the People*, *supra* note 357, at 290–95; Joyce Lee Malcolm, *The Creation of a "True Antient and Indubitable" Right: The English Bill of Rights and the Right to Be Armed*, 32 J. BRIT. STUD. 226, 229–34 (1993) [hereinafter Malcolm, *The Creation*]; Joyce Lee Malcolm, Remarks, Address at the Seton Hall Second Amendment Symposium (Summer 2000), in 10 SETON HALL CONST. L.J. 829, 831 (2000) [hereinafter Malcolm, Address].

individual right to armed self-defense against public and private threats to one's person.³⁹³

3. Article VII was prompted by individual disarmament through both the 1662 Militia Act and 1671 Game Act.³⁹⁴

4. William Blackstone described Article VII as a right to armed individual self-defense, divorced from the militia, against both private and public violence.³⁹⁵

5. American colonists understood the English right and Blackstone as advancing a right to be armed, but not necessarily that they be trained to arms.³⁹⁶

Each of these unsupported conclusions will be addressed in turn.

1. *England's Ahistorical Armed Public Against Private and Public Violence*

One consistent theme of Malcolm's writings is that England maintained an armed society that was almost unaffected by the Statutes of the Realm.³⁹⁷ According to Malcolm, "It is apparent that

393. See MALCOLM, *supra* note 9, at 113–21; Malcolm, *The Right of the People*, *supra* note 357, at 305–08; Malcolm, *The Creation*, *supra* note 392, at 243–46; Joyce Lee Malcolm, *The Role of the Militia in the Development of the Englishman's Right to Be Armed—Clarifying the Legacy*, 5 J. FIREARMS & PUB. POL'Y 139, 140, 144–45 (1993) [hereinafter Malcolm, *The Role of the Militia*]; Malcolm, Address, *supra* note 392, at 832; Malcolm, *The Supreme Court*, *supra* note 386, at 1388–91.

394. See MALCOLM, *supra* note 9, at 77–112, 121–28; Malcolm, *The Right of the People*, *supra* note 357, at 302–05; Malcolm, *The Creation*, *supra* note 392, at 234–43; Malcolm, *The Role of the Militia*, *supra* note 393, at 143–44.

395. See MALCOLM, *supra* note 9, at 130, 134; Malcolm, *The Right of the People*, *supra* note 357 at 285; Malcolm, *The Creation*, *supra* note 392, at 248; Malcolm, *The Role of the Militia*, *supra* note 393, at 146–47; Malcolm, Address, *supra* note 392, at 832; Malcolm, *The Supreme Court*, *supra* note 386, at 1389–90.

396. See MALCOLM, *supra* note 9, at 135–64; Malcolm, *The Right of the People*, *supra* note 357, at 308, 312, 314; Malcolm, *The Role of the Militia*, *supra* note 393, at 148–49; Malcolm, Address, *supra* note 392, at 834–36; Malcolm, *The Supreme Court*, *supra* note 386, at 1392–93.

397. For the purpose of historiography, Malcolm was the first historian specializing in some facet of English history to make this claim, particularly early seventeenth century English history. However, around the same time, Stephen P. Halbrook and David T. Hardy also mischaracterized the enforcement of the Statutes of the Realm from the Norman Conquest through Early Modern England. See HALBROOK, *THAT EVERY MAN BE ARMED*, *supra* note 40, at 37–43; Hardy, *supra* note 259, at 562–79. Not only did Malcolm, Halbrook, and Hardy omit the history of the Statute of Northampton's enforcement (not to mention other statutes), but they also misunderstood Sir John Knight's case on the subject. Compare Charles, *The Faces*, *supra* note 9, at 27–30 (rebutting Malcolm, Halbrook, and Hardy's history of Sir John Knight's case), with HALBROOK, *THAT EVERY MAN BE ARMED*, *supra* note 40, at 49–51, MALCOLM, *supra* note 9, at 104–05, and Hardy, *supra* note 259, at 565.

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the regulations in effect before 1640 did not interfere with the basic duty of the English people to keep arms for the defence of themselves, their neighbors or the realm.”³⁹⁸ Allegedly, it was not until the Restoration that arms regulations took hold and the general populace was disarmed by the Stuart Monarchy—threatening the people’s right to have arms for personal self-defense—which in turn led to the drafting of Article VII.³⁹⁹ This historical account is misleading and must be qualified.

To understand arms-bearing in English society one must first come to terms with the fact that the possession of weapons was based on socio-economic status. A 1285 militia statute attests to this fact, and stipulated, “Every Man between Fifteen Years of Age, and Sixty Years, shall be assessed and sworn to armor according to the Quantity of their Lands and Goods”⁴⁰⁰ Such class-structured restrictions on arms remained intact even following the 1689 Declaration of Rights.⁴⁰¹ And they were lawful because Article VII left Parliament to define which persons were “suitable to their [c]onditions” through statute.⁴⁰² Thus, not everyone could lawfully possess certain arms or use them—a restriction that remained in force through the late eighteenth century.⁴⁰³

Another important aspect concerning arms in English society is that the people were not the enforcers of the public peace except for limited circumstances. Malcolm audaciously suggests that citizens were individually authorized to raise a hue and cry to alert their neighbors and pursue criminals.⁴⁰⁴ Such a loose assessment needs to

398. MALCOLM, *supra* note 9, at 11.

399. *See id.* at 31-112; Malcolm, *The Right of the People*, *supra* note 357, at 294-305.

400. 13 Edw., c. 6, § 2 (1285) (Eng.).

401. Charles, “*Arms for Their Defence*”? *supra* note 3, at 384-85 (discussing Thomas Erle’s failed proposal to extend arms ownership to “every substantial shareholder” with ten pounds or more); *id.* at 394-95 (discussing the conflict of laws between the Game Acts and the 1662 Militia Act, which was still in force).

402. 1 W. & M. 2, c.2 (1688) (Eng.).

403. *See* GRANVILLE SHARP, TRACTS, CONCERNING THE ANCIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA 17-18 (London, Granville Sharp 1782).

404. *See* MALCOLM, *supra* note 9, at 2-3 (qualifying that the hue and cry was under the “supervision” of the constable or sheriff, but does not retract that the individual citizen may raise it when necessary); Malcolm, *The Creation*, *supra* note 392, at 229 (“Men were expected to defend themselves and their families and, if need be, their neighbors as well. But the duty was not merely defensive. Anyone who discovered a crime was required to raise a ‘hue and cry’ and join, ‘ready appareled,’ in pursuit of the culprit if necessary.”); Malcolm, *Address*, *supra* note 392, at 831 (“if [a person]

be qualified, for it suggests that England was an ordered society based upon the efforts of an armed populace enforcing the law at will. This is blatantly false. As numerous legal treatises attest, the hue and cry could only be assembled by a government official, most often a Justice of the Peace.⁴⁰⁵ The only common law exception to the rule was the castle doctrine, when the hue and cry could be called to prevent one's home from being assailed.⁴⁰⁶ There were no other common law exceptions to the rule, and not even the sources Malcolm cites to infer otherwise. This includes Blackstone.⁴⁰⁷

Seventeenth century English barrister and court reporter Joseph Keble effectively summed up the rule of law on this point in his 1689 edition of *An Assistance to the Justices of the Peace*:

[I]f a Man, hearing that another will fetch him out of his House and beat him, do assemble company with force, it will be no unlawfull

saw a crime take place he was to raise 'a hue and cry' then join in pursuit of the culprit"); Malcolm, *The Right of the People*, *supra* note 357, at 291.

405. See, e.g., 1 JOHN BOND, A COMPLEAT GUIDE FOR JUSTICES OF PEACE 153 (London, Richard and Edward Atkins 1696) ("Any person in the Company of one Murdered or Robbed, may forthwith repair to the next Constable . . . and give notice thereof, and cause him to raise Huy and Cry after the Felon."); *id.* ("The Officer of the Town where the Huy and Cry is levied ought to send the same in Writing to every Town . . ."); *id.* at 96-97 (showing a template warrant by the Justice of the Peace to raise the hue and cry); *id.* at 101, 108 (punishing the constable for not calling forth the hue and cry when necessary); MICHAEL DALTON, THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 75 (London, Miles Flesher, James Haviland, and Robert Young 1635) ("Every Justice of the Peace may cause Huy and Crie . . . upon murder, robbery, theft, or other felonie committed."); WILLIAM SHEPPARD, A NEW SURVEY OF THE JUSTICE OF PEACE HIS OFFICE 38 (London, J.S. 1659) ("Any one Justice of the Peace upon Notice, or Report of it, may send forth his Warrant under his hand, of Hue and Cry . . ."); *id.* at 53 (a Justice of the Peace "may bind . . . such as shall raise false Hue-and-Cry without any cause"); see also Charles, *supra* note 15, at 98-99 and accompanying footnotes.

406. See, e.g., 1 HAWKINS, *supra* note 16, at 136, ch. 63, §§ 8, 10.

407. 4 WILLIAM BLACKSTONE, *supra* note 147, at 291. Malcolm relies almost exclusively on a treatise written by Richard Burn for her interpretation. See MALCOLM, *supra* note 9, at 2 n.4; Malcolm, *The Creation*, *supra* note 392, at 229 n.14. However, even Burn's treatise confirms the hue and cry was to be raised by a Justice of the Peace. See 2 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 17 (Savoy, Henry Lintot 1755) ("When any felony is committed, or any person is grievously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or night; the party grieved, or any other, *may resort to the constable of the vill[age]*. . . they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, *and to make [the] hue and cry after such as may be probably suspected . . .*") (emphasis added). Indeed a watchman could call the hue and cry, but the watchman was appointed by town officials, such as the constable and would have maintained temporary authority to call the hue and cry as a deputy of sorts. See *id.*

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Assembly, for his House is his hold and Castle. . . . But if he be only threatened that he shall be beaten, if he go to the Market, then may he not assemble Company for his aid [i.e. raise the hue and cry], because he needeth not to go thither, and he may provide for himself by Surety of the Peace [i.e. an appeal to sheriff, constable, or justice of the peace for protection]⁴⁰⁸

Keble's legal analysis of the hue and cry confirms the last and most important aspect concerning arms in English society: it was unlawful to go armed in the public concourse without the license of government.⁴⁰⁹ This included a prohibition on shooting or carrying "Hand guns" unless under the provisions stipulated by statute.⁴¹⁰ Michael Dalton's *The Country Justice* is one of a number of legal treatises that confirms this rule of law was still in force by the turn of the eighteenth century.⁴¹¹ Dalton wrote the Statute of Northampton applied to any person that might "wear or carry any Guns, Dags or Pistols charged," including any "persons . . . so armed or weaponed for their defence upon any private quarrel, & c."⁴¹² The prudential reason for the broad prohibition was that the people could always seek the assistance of the constable or the Surety of the Peace to have "the Peace against the other persons" enforced.⁴¹³ "And besides," wrote Dalton, it is the act of going or riding armed that "strieth a fear and terror into the King's Subjects."⁴¹⁴

Somehow Malcolm completely overlooked these tenets of English law. It is an omission that utterly negates Malcolm's thesis as a

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

409. See 2 Edw. 3, c. 3 (1328) (Eng.); 20 Rich. 2, c. 1 (1396-97) (Eng.).

410. See 33 Hen. 8, c. 6 (1541) (Eng.); KEBLE, *supra* note 408, at 313, 709. For Malcolm's unsupported interpretation of Henry VIII's statute that remained in force throughout the eighteenth century, see MALCOLM, *supra* note 9, at 87-120. For two dissents placing Henry VIII's statute in context, see Charles, "Arms for Their Defence"?, *supra* note 3, at 394-95, 398, 399; Schwoerer, *To Hold and Bear Arms*, *supra* note 9, at 57-59.

411. MICHAEL DALTON, THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 92-93, 261 (London, William Rawlins and Samuel Roycroft 1705).

412. *Id.* at 264.

413. *Id.*

414. *Id.*

whole, for she relies on the notion that arms restrictions were not seriously enforced until the Restoration, which in turn led to the recognition of a right to be armed.⁴¹⁵ Not true.

How did Malcolm come to omit such important and damaging historical facts? The answer may rest with her intentions to link the 1671 Game Act to Article VII⁴¹⁶ or to dispel any notion that Article VII was linked to militia service and socio-economic status.⁴¹⁷ Most of the blame, however, can be attributed to Malcolm brushing aside the Statute of Northampton as insignificant with little, if any, research on the topic. In 1980, for example, Malcolm virtually dismissed an entire series of weapon statutes, and as a result mischaracterized the Statute as prohibiting the “brandish[ing of] a firearm so as to terrify others,”⁴¹⁸ when the Statute actually prohibited the act of carrying arms in public.⁴¹⁹ Over a decade later, Malcolm again brushed aside the Statute as nothing more than a law “against riding armed in disturbance of the peace” that was no longer enforced.⁴²⁰ And upon publishing her book in 1994, Malcolm ahistorically claimed the Statute “had never been enforced” and only applied in circumstances that may “terrorize” the public.⁴²¹

Wherever the fault lies for Malcolm’s historical omission and mischaracterization, we know for certain that the Statute of Northampton was strictly enforced as a prohibition on going armed in public.⁴²² It was a misdemeanor resulting in forfeiture of arms and up to thirty days imprisonment.⁴²³ There was no requirement that the accused have a specific intent to terrify the public or cause harm.⁴²⁴

415. MALCOLM, *supra* note 9, at 31-112.

416. *See id.* at xii; *see also supra* note 393 and accompanying text.

417. Malcolm, Address, *supra* note 392, at 831 (“It was [militia- and nobility-focused] distortions, so at odds with the historical record, that prompted me to bring my study to the development of a common law right to be armed to the attention of American legal scholars and to deploy that history to clarify the original intent of the American Second Amendment.”).

418. MALCOLM, DISARMED, *supra* note 357, at 7 (although reprinted in 1981 by the NRA, the article was first copyrighted in 1980). Malcolm restated this conclusion again three years later. *See* Malcolm, *The Right of the People*, *supra* note 357, at 293.

419. *See* Charles, *The Faces*, *supra* note 9, at 11-31.

420. Malcolm, *The Creation*, *supra* note 392, at 242.

421. MALCOLM, *supra* note 9, at 104.

422. Charles, *The Faces*, *supra* note 9, at 11-31.

423. 20 Rich. 2, c. 1 (1396-97) (Eng.).

424. Malcolm may have been influenced by David I. Caplan in regards to the Statue of Northampton. *See* Caplan, *supra* note 19, at 32. Malcolm’s incomplete research and false characterization of the Statute have had far reaching implications in Standard Model scholarship, which has proved detrimental in maintaining an

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This behavior was a separate crime in itself—a felony no less.⁴²⁵ Instead, it was considered terrifying by itself to go armed without the license of government.⁴²⁶

It does not help Malcolm's thesis that even before Parliament passed the Statute, there is evidence to suggest that going armed in public, without the government's license, violated the common law and endangered the safety of the kingdom.⁴²⁷ One such case occurred in Oxford. In 1320, six years prior to Edward II's proclamation prohibiting the carrying of arms in the public concourse and eight years prior to the Statute of Northampton,⁴²⁸ the University of

objective historical account of the legality of going armed in public. For a list of works misled by or agreeing with Malcolm's unsupported conclusions on the Statute, see David T. Hardy, *District of Columbia v. Heller and McDonald v. City of Chicago: The Present as Interface of Past and Future*, 3 *NORTHEASTERN U. L.J.* 199, 205 (2011) (relying on Malcolm's research for contemporary legal analysis on the Statute of Northampton); Kopel, *supra* note 372, at 1347 (same); David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 *ALB. L. REV.* 305, 317 (2005) (same); David B. Kopel and Clayton Cramer, *State Court Standards of Review for the Right to the Keep and Bear Arms*, 50 *SANTA CLARA L. REV.* 1113, 1127, 1133-34 (2010) (same); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 *HASTINGS L.J.* 1371, 1378-79 (2009) (questioning whether the Statute of Northampton was ever enforced); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. REV.* 1343, 1363-64 (2009) (relying on Malcolm's research for contemporary legal analysis on the Statute of Northampton); Marshall, *supra* note 294, at 716-17 (same). Eugene Volokh does not cite to Malcolm, but still may have been influenced by Malcolm either directly or by other Standard Model writers that relied on her work. See Eugene Volokh, *The First and Second Amendments*, 109 *COLUM. L. REV. SIDEBAR* 97, 101 (2009) [hereinafter Volokh, *The First and Second Amendments*]; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 *UCLA L. REV.* 1443, 1481 (2009) [hereinafter Volokh, *Implementing the Right to Keep and Bear Arms*].

425. See 25 *Edw.* 3, c. 2, § 13 (1350) (Eng.) (if "any Man of this Realm ride armed covertly or secretly with Men of Arms against any other . . . shall be judged Felony"); 1 *Jac.* 1, c. 8 (1603-04) (Eng.) (also known as the Statute of Stabbing).

426. See, e.g., DALTON, *supra* note 411, at 264.

427. See HAWKINS, *supra* note 16, at 136, ch. 63, § 4; 2 FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 583 (1968) ("before the end of Henry III's reign there were ordinances which commanded the arrest of suspicious persons who went about armed without lawful cause"); see also 13 *Edw.* (1285) (Eng.) (Statutes for the City of London) (prohibiting the public carrying of arms "unless he be a great Man or other lawful Person of good repute").

428. For Edward II's proclamation, see 4 *CALENDAR OF CLOSE ROLLS, EDWARD II*, 1323-1327, at 559-70 (H.C. Maxwell-Lyte ed., 1898) (proclaimed April 28, 1326, Kenilworth). Edward II issued a similar proclamation a month earlier. See *id.* at 547-52 (proclaimed March 6, 1326, Leicester) (ordering the sheriff of York to arrest "any

Oxford's Chancellor petitioned the king concerning armed assaults on his clerks, scholars, and masters:

[T]hat the chancellor of the said town of Oxford decrees that the King's peace should be kept and protected there, and the study of masters and scholars should be [kept] in tranquility. Thus he has established and commanded that no one in his jurisdiction should carry arms, day or night, if he is walking towards the said town, [or] leaving the town [if he is] a foreign stranger . . . on pain of imprisonment and of losing his arms. In addition to this, everyone who bears arms against the peace of the university is excommunicated by the said chancellor. The laity in the said town ordinarily bear arms, from which it happens too often that many scholars who go out without arms are mistreated, killed and wounded. And the offenders carrying out [these various] kinds of crimes are, because of biased interrogation of their neighbours, too easily acquitted before the justices. His aforesaid clerks ask that when a man is arrested because he has killed or wounded a clerk, that inquiries into the said crimes be made in public and made use of in front of justices, with foreigners as well as with inhabitants. Besides this, *they ask that the bearing of arms should be completely forbidden*, by the laity as well as clerks, and that the chancellor, in default of the mayor, may punish them on all occasions which are necessary.⁴²⁹

The king's council returned an answer that mirrored what would become the Statute of Northampton. Just as the Statute restricted public arms carrying to government officials, the Mayor was instructed to "forbid any layman *except town officials* to wear arms in the town."⁴³⁰ Of course, it was not until the Statute went into effect that prohibition was enforced universally. What helped its enforcement, in particular, was that the Statute provided a slew of legal reforms, including the establishment of the office of Justice of the Peace.⁴³¹ It also purged corruption within local government, unified the kingdom under a body of law, and ensured that the peace

man hereafter [that] go armed on foot or horseback, within liberties or without"). For the text of the Statute of Northampton and its amendments, see *supra* note 409.

429. Petition of the Chancellor, Masters and Scholars of the University of Oxford to the King and King's Council (1320) (Manuscripts Division, British Library, London, UK) (emphasis added). The petition was translated and transcribed by the joint efforts of Tessa Webber and Judy Weiss, both of whom are at the University of Cambridge. For another translation of the manuscript, see COLLECTANEA: THIRD SERIES 119 (Oxford, Clarendon Press 1896).

430. COLLECTANEA, *supra* note 429 (emphasis added).

431. See Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 ENG. HIST. REV. 842, 849 (1993).

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was maintained.⁴³² In fact, the Statute's tenets were of such importance to facilitating a well-ordered society that, upon England annexing Wales, a prohibition on going armed in the public concourse proved to be one of the bases of its new legal system. No person was allowed:

[To carry any] hand-gun, sword, staff, dagger, halberd, morespikes, spear or any other weapon, privy coat or armour defensive by any person or persons dwelling or residing within *Wales* . . . of what estate degree or condition soever he or they be . . . unto any Sessions or Courte to be holden within *Wales* . . . or to any place *within the distance of two miles* from the same Sessions or Courte, nor to any town, church, fair, market, or other congregation, except it be upon the hue and outcry made of any felony or robbery done or perpetrated . . . [or] except it be by the commandant, *licence or assent* of the said justices, steward or other officer . . .⁴³³

In sum, Malcolm's vision of an armed English society, protecting against both private and public violence, is without historical merit. Her lack of clarification that the hue and cry was almost solely at the discretion of the appropriate officials was careless, and to this day is used by lawyers to ahistorically advance a right to carry arms in public without license.⁴³⁴ Furthermore, Malcolm's omission of the Statute of Northampton's purpose and enforcement is embarrassing, which in turn causes her thesis to suffer as a whole. Not only did numerous sovereigns decree the Statute in force to prevent or deter crime, but late seventeenth and early eighteenth century treatises prove that the public carriage of arms violated the law, unless it was for lawful purposes, i.e. at the license of government.⁴³⁵

2. *Correcting False Notions of Article VII*

Article VII of the 1689 Declaration of Rights states, "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."⁴³⁶ The impetus for

432. See Bertha Haven Putnam, *The Transformation of the Keepers of the Peace into the Justices of the Peace*, 12 TRANSACTIONS ROYAL HIST. SOC'Y 19, 21-48 (1929).

433. 26 Hen. 8, c. 6, § 3 (1534) (Eng.) (emphasis added).

434. See, e.g., Brief and Required Short Appendix of Plaintiff-Appellants at 34, *Shepard v. Madigan*, No. 12-1788 (7th Cir. Apr. 11, 2012).

435. See Charles, *The Faces*, *supra* note 9, at 23-31; see also 7 ACTS OF THE PRIVY COUNCIL: A.D. 1558-1570, at 101 (John Roche Dasent ed., 1974) (that the sheriff and justices of the peace in Buckes County shall "take order that *none* be suffred in that county to ryde with any goonne or dagge in suspicious maner") (emphasis added).

436. 1 W. & M. 2, c. 2, art. VII (1688) (Eng.).

its adoption was James II “causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law.” Like the Second Amendment, Article VII presents a textual conundrum for anyone wishing to decipher its authors’ intent and constitutional purpose.

Numerous questions are presented, such as in what stations were papists employed as to disarm Protestants? What made such disarmament “contrary to law”? What does the language “arms for their defence” speak to—individual armed self-defense, collective defense, etc? What “condition[s] as allowed by law” can be imposed and who can impose them? To the twenty-first century layman, the answers to these questions are to be guided by defining the text of Article VII piecemeal and reassembling the whole. Such persons argue because there is no reference to a militia, Article VII must be interpreted as an unequivocal right to armed self-defense in both private and public. It is also an argument that Malcolm consistently asserts as “history” in context.⁴³⁷ This is not always true.

The intellectual historian knows better and understands words *always* have an intended meaning and purpose, which requires eliciting “total historical context.”⁴³⁸ This principally holds true with the text of 1689 Declaration of Rights, where the House of Commons turned twenty-eight grievances into thirteen rights, with the language of each carefully edited by both Houses of Parliament.⁴³⁹ This includes Article VII, where four grievances epitomize its origins:

1. The pretended power of dispensing or suspending laws, or the execution of the laws by royal prerogative, without consent of Parliament, is illegal.

....

5. The acts concerning the militia are grievous to the subject.
6. The raising or keeping a standing army within this kingdom in time of peace, unless it be with the consent of Parliament, is against the law.
7. It is necessary for the public safety, that the subjects, which are Protestants, should provide and keep arms for their common

437. See, e.g., Malcolm, *The Supreme Court*, *supra* note 386, at 1390 (arguing that any reading of “militia service into an English right that does not mention [a militia] doesn’t qualify as history”).

438. See Skinner, *supra* note 31, at 214; see also POCOCK, *supra* note 106, at 106-18 (discussing the importance of interpreting text according to the writer’s intent and the events it references).

439. See SCHWOERER, *supra* note 8, at 22-27, 223-31, 243-47, 295-300.

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defense, and that arms which have been seized and taken from them be restored.⁴⁴⁰

Out of these four grievances, three became stand-alone articles in the Declaration of Rights. Yet all are intimately linked when examined in the light of the Parliament-Crown dispute over military powers. To begin, it must be understood that the power of the crown to raise and maintain standing armies without some form of parliamentary consent remained a seriously contentious issue from the 1640s to the end of the seventeenth century.⁴⁴¹ Parliament never questioned the crown's authority to command the army. Instead, it was the crown's maintenance of a standing army, without a national security threat, that was perceived to violate English liberty.⁴⁴² It is for this reason that Article VI stipulated: "That the raising or keeping a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against law."⁴⁴³ The article is particularly important because it served as the first time that Parliament retained *any* concurrent power over the army.⁴⁴⁴

Power over the militia, however, operated much differently. As early as the thirteenth century, Parliament defined who may have arms for militia service suitable to their condition and estate.⁴⁴⁵ This power continued virtually unquestioned until the end of Charles I's reign, when he was accused of maintaining an illegal standing army.⁴⁴⁶ It is here that Parliament and the popular print culture advanced the somewhat radical idea of lawful resistance, with the militia serving as the constitutional counterpoise to do so.⁴⁴⁷ It was an idea that would resurface in the midst of the Exclusion Crisis and continue through the Glorious Revolution.⁴⁴⁸

440. *Id.* at 299.

441. See SCHWOERER, *supra* note 362, at 15-154.

442. *Id.* at 137-54.

443. 1 W. & M. 2, c. 2, art. VI (1688) (Eng.).

444. See SCHWOERER, *supra* note 8, at 71-74.

445. For some thirteenth century examples, see 7 Edw. (1279) (Eng.); 13 Edw., c. 2 (1285) (Eng.); 13 Edw., c. 6 (1285) (Eng.).

446. See SCHWOERER, *supra* note 362, at 33-50.

447. Charles, *The Right of Self-Preservation*, *supra* note 9, at 27-29, 42-44; see also Lois G. Schwoerer, "The Fittest Subject for a King's Quarrel": *An Essay on the Militia Controversy 1641-42*, 11 J. BRIT. STUD. 45 (1971). It should be noted that the doctrine of lawful resistance predated the mid to late seventeenth century. See 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION* 302-48 (1978) (detailing the right of resistance in the sixteenth century).

448. See Charles, *The Right of Self-Preservation*, *supra* note 9, at 32-34, 49-54.

The resurgence of parliamentary resistance and self-preservation doctrine stems from the division of militia powers as stipulated by the 1661 and 1662 Militia Acts. In both statutes, Parliament vested nearly all militia powers with the restored monarchy.⁴⁴⁹ As the Speaker of the Commons stated on July 31, 1661, “[W]e held it our Duty to undeceive the People, who have been poisoned with an Opinion, that the Militia of this Nation was in themselves, or in their Representatives in Parliament; and, *according to the ancient known Laws, we have declared the sole right of the Militia to be in Your Majesty.*”⁴⁵⁰

Even more problematic was the fact that Parliament declared the doctrine of resistance and self-preservation to be unconstitutional. The 1662 Militia Act expressly proclaimed that “both or either of the Houses of Parliament cannot nor ought to pretend [to have command of the militia] . . . nor lawfully may raise or levy any War offensive or defensive” against the sovereign.⁴⁵¹ This is not to say Parliament felt completely unprotected against a tyrannical sovereign. Members did retain the assurance that the day-to-day militia operations rested with the landed gentry.⁴⁵² Members also secured—at least so they thought—the long-established guarantee that only well affected Protestant Lieutenants would command the militia.⁴⁵³ This assurance was short lived, for during the reign of James II, Protestant Lieutenants were replaced by Catholics in violation of the statute.⁴⁵⁴ This was legally problematic in many respects, but most importantly because Lieutenants were the keepers of the armories. It was through their direction that the people as a militia were armed, arrayed, and the Constitution was secured.⁴⁵⁵

449. SCHWOERER, *supra* note 362, at 85-88.

450. 11 H.L. JOUR. 329 (1661) (emphasis added). Charles II responded by declaring a sole right over the Militia. *See* THE LETTERS, SPEECHES AND DECLARATIONS OF KING CHARLES II, at 116 (Arthur Bryant ed., 1935); *see also* THE SPEECH OF MR. HIGGONS IN PARLIAMENT AT THE READING OF THE BILL FOR THE MILITIA (London, Roger Norton 1661) (arguing why the power over the militia must be vested with the crown).

451. 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

452. *See* SCHWOERER, *supra* note 362, at 82-83.

453. 13 & 14 Car. 2, c. 3, § 2 (1662) (Eng.).

454. *See* Charles, *The Right of Self-Preservation*, *supra* note 9, at 45.

455. *See* 13 & 14 Car. 2, c. 3, § 14 (1662) (Eng.); *see also* A METHOD FOR EXECUTING THE POWERS, RELATING TO THE MILITIA AND TRAINED-BANDS, ACCORDING TO THE ACTS OF PARLIAMENT SINCE THE HAPPY RESTAURATION OF OUR GRACIOUS SOVEREIGN K. CHARLES THE II, at 13 (London 1684) (“The Lord Lieutenant may *alone* perform, and cause to be put in Execution, all, and every [one of] the Powers in the Acts for the Militia.”); A NECESSARY ABSTRACT OF THE LAWS

It is here that Article VII is intimately related to Articles I and II of the Declaration of Rights.⁴⁵⁶ One must understand that Catholics were deemed a viable threat to public safety, and statutorily forbidden from assuming governmental office.⁴⁵⁷ Although a fair number of Catholics resided within the realm, they were viewed as a national threat and treated with disdain. Thus from 1685 to 1688, when James II removed Protestant Lieutenants and replaced them with Catholics, it was genuinely feared that the law was at an end, and that Parliament and the people were left without redress.⁴⁵⁸

As early as the Exclusion Crisis (1678-81), members of the Commons foresaw such a scenario should James the Duke of York—who later became James II—assume the throne. In order to prevent Catholics from assuming public office, to include militia Lieutenants, on December 7, 1678 the Commons advanced a bill that would permit the people to disarm any Catholic commissioned by the king.⁴⁵⁹ Hugh Boscawen promoted the law, stating:

If we have a Popish Successor, it is likely that Commissions will be given to those of his opinion. Will you make a Law, that those Commissions shall be void? [A]s the Lawyers say, “voidable.” And till that is done, will you sit still, and have your throats cut, and be mastered by the lesser part of the nation? If Commissions be given to Papists, suppose an hundred, and they endeavor to cut throats, must I go and desire the Sheriff to raise the *Posse Comitatus*? And, it may be, the Sheriff is one of them. If Gentlemen will propose any other way than what has been moved, to secure us, I would willingly hear it⁴⁶⁰

When Thomas Meres dissented proposing that any illegal commissions should be handled by the magistrate, not through the exertions of the people, a number of members hissed in disapproval.⁴⁶¹ In the end, however, the provision that would have allowed “any Protestant” to seize a Catholic in arms, even if commissioned by the king,⁴⁶² did not pass.⁴⁶³ This is because such a

RELATING TO THE MILITIA, REDUCED INTO A PRACTICAL METHOD 2-6 (London, Robert Vincent 1691) (discussing the militia powers of Lieutenants).

456. 1 W. & M. 2, c. 2, arts. I–II (1688) (Eng.).

457. 25 Car. 2, c. 2, § 2 (1672) (Eng.).

458. Charles, *The Right of Self-Preservation*, *supra* note 9, at 45.

459. 6 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS 329 (1769).

460. *Id.* at 331–32.

461. *Id.* at 332.

462. *Id.* at 329.

463. For the bill in statute form, see 30 Car. 2, c. 1 (1678) (Eng.).

provision would have legalized “disorder in the Government,” “popular sedition,” or a “popular rising.”⁴⁶⁴ As a result of these concerns, the bill instead strengthened the Test Act through oaths of allegiance.⁴⁶⁵ Now even the crown’s servants were required to take an oath under penalty of fine.⁴⁶⁶

Months later, the Commons again brought up the possibility of James II employing Catholic militia officers and the constitutional consequences that may result. After numerous discussions on how to best secure the country from popish enemies, a number of amendments to the 1662 Militia Act were proposed and debated. Richard Cust sought an amendment requiring “all Offices” to be placed under the appointment of Parliament, not the king.⁴⁶⁷ John Coventry replied that there was “little hope of succeeding” in such a proposition.⁴⁶⁸ Still, members like John Trevor thought some medium solution could be accomplished. Trevor offered that “the Officers of the Navy and Militia, &c. may be by the King told in Parliament, that [Parliament] may advise and inform him, whether [the appointments] be faithful and fit to be trusted, or not.”⁴⁶⁹ In other words, it would be Parliament that confirmed or denied the king’s appointments through some form of parliamentary procedure.

Thomas Player responded that advising appointment selections alone was insufficient. To Player, it was necessary to amend the 1662 Militia Act’s non-resistance provision:

But you will find it absolutely necessary to alter the Oath in the Militia Act, about taking up arms against such as are commissioned by the King, &c. Under [Charles II] we are not under any temptation to break that Oath [of non-resistance]. I believe nobody will plunder me, or cut my throat. A Popish Successor [like James II] may send Popish Guards, and we shall not have the honour of ancient Martyrdom in flames, but die like dogs, and have our throats cut; and I must not take up arms to defend myself against such rogues [because of the 1662 Militia Act]. Considering how near we are to that danger, let us do something speedily, that we poor Protestants may be secured from Popish Successors.⁴⁷⁰

464. 6 GREY, *supra* note 459, at 330, 333.

465. *Compare* 30 Car. 2, c. 1 (1678) (Eng.), *with* 25 Car. 2, c. 2, § 2 (1672) (Eng.).

466. 30 Car. 2, c. 1 (1678) (Eng.).

467. 7 ANCHITELL GREY, *supra* note 459, at 142.

468. *Id.*

469. *Id.* at 143.

470. *Id.* at 151.

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Two weeks later, Colonel John Birth also commented on the problem of excluding James the Duke of York from the throne and the non-resistance provision of the 1662 Militia Act:

If we can have no safety by a Popish Prince [like the Duke of York], it is your duty to take some resolution. Whilst the [1662] Law of the Militia is in being, which obliges a declaration [of non-resistance], &c. we cannot fight against any commissioned Popish Successor.⁴⁷¹

That same day, Boscawen delivered similar sentiments to the Commons. He thought it “utterly impossible ever to secure the Protestant religion under a Popish Success[or]” unless Parliament “totally disable[d]” James II from assuming the throne.⁴⁷² Boscawen argued it was Parliament’s duty to “maintaine our Religion, and secure ourselves, and oppose any violence that shall be offered us from abroad, then being in danger of having our throats cut every moment by those that are amongst us.”⁴⁷³ Thus, it was “out of Necessity” that Boscawen felt Parliament needed to “disable” James, especially when “his principales [are] so contrary and destructive to the Lawes and S[t]atutes and constitucions of this government.”⁴⁷⁴ In stating his opinion, however, Boscawen made it clear that the parliamentary right of self-preservation and resistance did not vest with the people individually. Such authority could only be administered by Parliament:

Now as for the point of law I must say that for a private person to rise against his Prince is Rebellion. But when there is an *Act of parliament* of King Lords and Commons to disable him and that upon good grounds and reasons as we[] have read against him it is reasonable to all the world and we[] have pre[cedents] of that kind.⁴⁷⁵

Boscawen’s words are significant in understanding what would become Article VII or what William Blackstone dubbed the “fifth and last auxiliary right.”⁴⁷⁶ It was Parliament that determined who “may have arms . . . suitable to their conditions, and *as allowed by*

471. *Id.* at 242.

472. 2 ROGER MORRICE, *ENTRING BOOK OF ROGER MORRICE* 158 (John Spurr ed., 2007).

473. *Id.* at 159.

474. *Id.*

475. *Id.* (emphasis added).

476. BLACKSTONE, *supra* note 56, at 139; see 1 W. & M. 2, c. 2, art. VII (1688) (Eng.).

law.”⁴⁷⁷ In other words, Article VII was more of a parliamentary right to check the crown than an individual right, for it was through the medium of Parliament that the people were armed, arrayed, and capable of restoring the English Constitution against a tyrannical sovereign. This is not to say Article VII was not an individual right in any form or fashion. It just means the right was intimately connected with government, particularly with the people as a militia.⁴⁷⁸

One must remember that Article VII has an operating clause: “By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law”⁴⁷⁹ The operating clause was not empty rhetoric.⁴⁸⁰ Not only did a similar and more detailed grievance appear in the Scottish Claim of Right,⁴⁸¹ but also the popular print culture contemporary with the Declaration of Rights reveals there was general concern over the employment of Catholics as militia Lieutenants, and the implications this imposed on the Constitution.⁴⁸² It was this very concern that members of Parliament conveyed when James II suppressed Monmouth’s Rebellion with Catholic military officers.⁴⁸³

Malcolm overlooks the historical record in this regard.⁴⁸⁴ The mistake was intentional, for she purposefully set out to disprove the notion that Article VII was at all linked to Parliament’s right of self-

477. 1 W. & M. 2, c. 2, art. VII (1688) (Eng.) (emphasis added); *accord* Charles, *The Right of Self-Preservation*, *supra* note 9, at 46-54.

478. *See* Charles, “*Arms for Their Defence*”?, *supra* note 3, at 363-86 (discussing the intended purpose of Article VII, and weighing Joyce Lee Malcolm’s approach to the historical record); *see also* John Hamden, *Some Short Considerations Concerning the State of the Nation*, reprinted in 2 A COLLECTION OF STATE TRACTS, PUBLISH’D DURING THE REIGN OF KING WILLIAM III 327 (London 1706) (discussing Article VII’s link with militia service and the defense of the nation).

479. 1 W. & M. 2, c. 2, art. VII (1688) (Eng.).

480. Standard Model writers mistakenly claim Article VII had nothing to do with the employment of Catholic militia Lieutenants. *See, e.g.*, Hardy, *supra* note 259, at 581-82.

481. 9 A.P.S. 28 (1822) (Scot.) (“Disarmeing protestants while at the same tyme he Employed papists in the places of greatest trust, civil and military; such as Chancellor Secretaries, Privie Counsellors, and Lords of Sessione, thrusting out protestants to make roome for papists, and Intrusting the forts and magazins of the Kingdome in ther hands [that the] Disarmeing of Protestants and Imploying papists [was] Contrary to Law.”). It is worth noting that the Scottish Claim of Right “went further” in its constitutional claims than the Declaration of Rights. *See* J.C.D. CLARK, *THE LANGUAGE OF LIBERTY 1660-1832*, at 230-32 (1994).

482. For a discussion of these sources, *see* Charles, *The Right of Self-Preservation*, *supra* note 9, at 49-51.

483. *See* Charles, “*Arms for Their Defence*”?, *supra* note 3, at 360-62.

484. *See supra* note 396 and accompanying text.

preservation and resistance, and James II's employment of Catholic militia Lieutenants.⁴⁸⁵ According to Malcolm, any militia reading of Article VII "doesn't qualify as history" because the word "militia" is absent.⁴⁸⁶ Instead Article VII boiled down to an individual right to personal self-defense because of its "clear language" of an individual right divorced from militia service, and the "accompanying historic record."⁴⁸⁷

Each of Malcolm's arguments must be taken in turn. To begin, Malcolm's insistence on a textual approach undermines her entire thesis when examining the historical record in context.⁴⁸⁸ There were three alterations as to what became Article VII. The first draft, from the Heads of Grievances, stipulated:

It is necessary for the public safety that the subjects, which are Protestants, should provide and keep arms for their common defense, and that arms which have been seized and taken from them be restored.⁴⁸⁹

This language conveyed the political fears and concerns that existed among members of Parliament at that time—i.e. there needed to be a constitutional means for Parliament to check a tyrannical sovereign and restore the English Constitution. The phrase ordering that arms be "restored" was subsequently removed and for good reason. For one, the massive disarming this language described did not happen in England, but in Ireland when the Earl of Tyrconnel assembled the Protestant militia only to disarm them and turn the arms over to Catholics.⁴⁹⁰ The other reason for removing the clause was parliamentary support for the disarming of dangerous and disaffected persons. Throughout the reigns of Charles II, James II,

485. See, e.g., Malcolm, Address, *supra* note 392, at 831.

486. Malcolm, *The Supreme Court*, *supra* note 386, at 1390.

487. Malcolm, *The Right of the People*, *supra* note 357, at 306.

488. See POCOCK, *supra* note 122, at 30-31 (discussing the importance of testing language by the rules of historical evidence).

489. SCHWOERER, *supra* note 8, at 299. According to Roger Morrice, the phrase "common defence" originally read "own defence." 4 MORRICE, *supra* note 472, at 518.

490. See CHARLES CAESAR, *NUMERUS INFAUSTUS. A SHORT VIEW OF THE UNFORTUNATE REIGNS OF WILLIAM THE SECOND, HENRY THE SECOND, EDWARD THE SECOND, RICHARD THE SECOND, CHARLES THE SECOND, JAMES THE SECOND* 55 (London 1689); *AN ACCOUNT OF A LATE, HORRID AND BLOODY MASSACRE IN IRELAND, OF SEVERAL THOUSANDS OF PROTESTANTS, PROCUR'D AND CARRY'D ON BY THE BY THE L[ORD DEPUTY] TYRCONNEL AND HIS ADHERENTS* 2 (n.p., n.d.); *THE POPISH CHAMPION: OR, A COMPLEAT HISTORY OF THE LIFE AND MILITARY ACTIONS OF RICHARD EARL OF TYRCONNEL* 13, 18, 19 (London, John Dutton 1689).

and even William & Mary, Parliament never questioned these powers. If anything, Parliament encouraged said searches and seizures.⁴⁹¹ Their grievance with James II was that Catholic Lieutenants were disarming well-affected Protestants without cause.⁴⁹² In fact, the 1662 Militia Act's search and seizure provision remained untouched and unaltered until the adoption of the 1757 Militia Act.⁴⁹³

Perhaps the most significant alteration to the Heads of Grievances was the removal of "should provide and keep arms" in favor of "may provide and keep arms."⁴⁹⁴ Malcolm believes the change took place because "should" "smacked too much of preparation for popular rebellion to be swallowed by the more cautious Lords or, for that matter William."⁴⁹⁵ This explanation is somewhat viable, but needs clarification.⁴⁹⁶ It is important to keep in mind that the Declaration of Rights was about parliamentary rights more than individual rights. The use of "should" would have implied that the right of self-preservation and resistance was vested more with Protestant subjects than Parliament. This was corrected to "may" as to denounce such a dangerous idea in the seventeenth century—one that the popular print culture consistently reflected.⁴⁹⁷

Popular rebellion without the medium of government was also an idea that members of Parliament denounced. In the midst of the Exclusion Crisis, Hugh Boscawen stated only an "Act of parliament of King Lords and Commons" could "disable" the people as to rebel against the crown.⁴⁹⁸ This idea of parliamentary-approved resistance was repeated in the House of Commons while forming the Declaration of Rights. On January 22, 1689, the Commons expressly denounced the doctrine of non-resistance stipulated in the 1662 Militia Act.⁴⁹⁹ This included John Vaughn who stated:

Our lives, our Estates, our Wives and Children are our own, and if the King Commission any persons whatsoever to take them from us before Tr[ial], *We our selves may resist*, those [so] Commissioned may call in the Constable and our neighbours to our assistance, may call in the Sheriff of the County with his Posse Comitatus, and if

491. See Charles, "Arms for Their Defence"?, *supra* note 3, at 372–83.

492. See *id.* at 410.

493. See *id.* at 403–11.

494. 10 H.C. JOUR. 21 (1689).

495. MALCOLM, *supra* note 9, at 119.

496. See Schwoerer, *To Hold and Bear Arms*, *supra* note 9, at 40–41.

497. Charles, *The Right of Self-Preservation*, *supra* note 9, at 49–51.

498. 2 MORRICE, *supra* note 472, at 159.

499. See *id.* at 493; 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

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he be not strong enough may call in the sheriffs of other Countyes, and so all the Kingdome may rise by force to oppose all those Commissioned by the King [illegally].⁵⁰⁰

Vaughn's reference to "our selves" was to the authority of Parliament.⁵⁰¹ It was an idea that had been gaining support for some time. Just before the Glorious Revolution, Roger Morrice recorded how rumors were circling of William III's intent to invade England. As a result, Morrice found it strange how quickly "mens interest change their opinions."⁵⁰² Before news of a potential revolution, members of Parliament "alwa[ys] condemned [the] principle of tak[ing] up Arms in defence of their Religion or civill Rights," but "now thinke it both lawfull, highly laudable and absolutely necessary Perfectum."⁵⁰³

In a way, Article VII served as the legal justification for the Glorious Revolution. Leading up to the Revolution, members of Parliament differed in opinion as to whether armed rebellion was lawful. This attitude immediately changed as the landed gentry began seizing militia stores, replacing the Catholic militia Lieutenants with well affected Protestants, and raising a military force against James II.⁵⁰⁴ Questions were asked about the "lawfullnesse of this undertakeing, and how it was consistent with the Oath of Allegiance, or with the other Acts of Parliament . . . especially that clause That it was not lawfull upon any pretence Whatsoever" to take up arms against the king.⁵⁰⁵

To quell such concerns Parliament needed to denounce the doctrine of non-resistance in a manner that ensured the right of self-preservation and resistance was lawful, yet limited in scope. This brings us to Article VII in its final form as modified by the House of Lords. Other than the phrase, "That the Subjects which are Protestants may," the rest of the language was drastically altered.⁵⁰⁶ The new language, "may have Arms for their Defence suitable to their Conditions, and as allowed by Law," adequately placed

500. 4 MORRICE, *supra* note 472, at 493-94 (emphasis added).

501. *Id.*

502. *Id.* at 318.

503. *Id.*

504. *See id.* at 406.

505. *Id.* at 407.

506. Compare 1 W. & M. 2, c. 2, art. VII (1688) (Eng.), with 10 H.C. JOUR. 21 (1689).

concurrent power over the sword with Parliament.⁵⁰⁷ Not only did the language ensure Parliament *may* arm Protestants to exercise its right of resistance, but it ensured that Parliament could define which persons may be armed—“suitable to their Condition”—and under what circumstances those arms may be borne—“as allowed by Law.”⁵⁰⁸

In contrast, Malcolm contends the revisions, especially the removal of the phrase “common Defence,” denoted a shift away “from the public duty to be armed and toward the keeping of arms solely as an individual right” for self-defense.⁵⁰⁹ Malcolm does not provide one broadside, pamphlet, letter, or record of the debates—prior to, during, or immediately following the adoption of the Declaration of Rights—that agrees with this interpretation. This evidence is important for Malcolm’s evolutionary or customary right thesis to be even considered plausible, yet is completely absent.⁵¹⁰

Even Malcolm’s account of the Convention debates is problematic. As Lois G. Schworer and this author have extensively outlined, Malcolm’s historical assessment of the Convention is consistently at odds with each speaker’s intended context and the social literature available at the time.⁵¹¹ Given those critiques have been stated elsewhere there is no need to repeat them here, except to say that Malcolm’s history is troubling on a number of levels.⁵¹² This includes a pure textualist approach to Article VII, for if “arms for their Defence” definitively speaks to a non-militia or parliamentary independent right to “have arms,” there should be a number of examples advancing Malcolm’s interpretation. But this evidence too is non-existent. It does not help Malcolm’s cause that there exist numerous instances where members of Parliament stated “arms for

507. Conflict over the militia powers culminated in the midst of the Exclusion Crisis, and remained an issue of discontent upon James II assuming the throne. See 2 DAVID OGG, ENGLAND IN THE REIGN OF CHARLES II 574 (2d ed. 1955); ANNABEL PATTERSON, THE LONG PARLIAMENT OF CHARLES II 219–20; WESTERN, *supra* note 349, at 81–85.

508. Charles, *The Right of Self-Preservation*, *supra* note 9, at 47–54.

509. MALCOLM, *supra* note 9, at 118.

510. See POCOCK, *supra* note 122, at 29–31 (discussing how words can have multiple meanings, which places importance on placing those words in context through historical evidence and tests).

511. Charles, “*Arms for Their Defence*”?, *supra* note 3, at 368–81; Schworer, *To Hold and Bear Arms*, *supra* note 9, at 209–19.

512. See MALCOLM, *supra* note 9, at 118.

their defence” or some alteration of the phrase as a parliamentary right of self-preservation and resistance.⁵¹³

3. *The 1662 Militia Act and 1671 Game Act Evidentiary Debacle*

Malcolm’s interpretation of Article VII may be attributed to her mischaracterization of the roles that the 1662 Militia Act and 1671 Game Act served in precipitating the Glorious Revolution.⁵¹⁴ Her thesis hinges on the personal belief that the drafters of the Declaration of Rights sought to undo the alleged atrocities committed under both acts by codifying a personal right to have arms for all Protestants.⁵¹⁵ According to Malcolm this in turn required Parliament to adopt “future legislation” that eliminated the discrepancies between what Article VII guaranteed and what the acts prescribed.⁵¹⁶ It is here that Malcolm’s thesis unravels even further. Not only is there *no evidence* linking the 1671 Game Act with Article VII (a deficiency admitted),⁵¹⁷ but Malcolm completely misunderstands the grievance with the 1662 Militia Act.

Starting with the latter, Malcolm asserts members of the Convention not only objected to, but hoped to alter the search and seizure provision as a violation of the right to have arms.⁵¹⁸ There is no evidence of such an objection, at least not when one places the Convention debates in context.⁵¹⁹ In terms of amending the act itself, Malcolm provides as evidence a failed 1689 militia bill approved by the House of Commons.⁵²⁰ Indeed, the bill did not contain a search and seizure provision akin to the 1662 Militia Act, but there is *no*

513. Charles, “*Arms for Their Defence*”?, *supra* note 3, at 387–91, 405–06; Charles, *The Right of Self-Preservation*, *supra* note 9, at 53–54.

514. Since 1980, Malcolm has persisted with this claim despite a lack of substantiating evidence. See MALCOLM, *DISARMED*, *supra* note 357, at 18–23.

515. See, e.g., Malcolm, *The Creation*, *supra* note 392, at 242–43, 246.

516. MALCOLM, *supra* note 9, at 120.

517. See MALCOLM, *supra* note 9, at 116 (“It was this political use of disarmament [through the 1662 Militia Act] to enhance the Crown and its standing army, not the stringent qualifications of the Game Act, that [Parliament] objected to.”); Malcolm, *The Creation*, *supra* note 392, at 244 (“The Game Act was not specifically mentioned” during the Convention debates); Malcolm, *The Role of the Militia*, *supra* note 393, at 145–46 (“Although the Game Act of 1671 had not been specifically mentioned during the Convention debates . . .”).

518. See MALCOLM, *supra* note 9, at 115–16, 123; Malcolm, *The Creation*, *supra* note 392, at 243–44, 246; Malcolm, *The Right of the People*, *supra* note 357, at 306.

519. Compare Charles, “*Arms for Their Defence*”?, *supra* note 3, at 368–81, and Schwoerer, *To Hold and Bear Arms*, *supra* note 9, at 209–19, with MALCOLM, *supra* note 9, at 115–21.

520. See, e.g., MALCOLM, *supra* note 9, at 123.

evidence that suggests or infers the reason for its omission. The only historical certainty is that the bill was rejected outright by the House of Lords,⁵²¹ with William III and Parliament continuing the use of the search and seizure provision to disarm dangerous and disaffected persons.⁵²² No one ever questioned these seizures as a violation of a right to arms in either Parliament or the popular print culture.⁵²³ This includes the seizures conducted during the reigns of Charles II and James II.⁵²⁴

Not even Thomas Erle,⁵²⁵ who scribbled down detailed militia reforms to the Convention, objected to the search and seizure of arms.⁵²⁶ A member of the Convention, in 1683 Erle was one of the Deputy Lieutenants instructed to carry out disarmament orders in the town of Poole, and likely carried out similar orders until sacked from office in 1688.⁵²⁷ It is interesting that Erle never expressed dissatisfaction with the search and seizure of arms, yet took issue with the employment of Catholic officers.⁵²⁸

This view was expressed twice within Erle's instructions. One instance appears where Erle advocated for punishing persons "not being legally qualified" for public office to have "£500 levied upon them accord to law."⁵²⁹ The other instance appears when Erle urged the Convention to place "militia arms into such hands that have estates of their own [rather] than into lewd dissolute persons' custody that will as soon fight for any body else as those that entrust him."⁵³⁰ The mention of "lewd dissolute persons" referenced James II dispensing with the Test Acts and employing Catholic officers.⁵³¹ Being a former Deputy Lieutenant himself, Erle knew the 1662

521. See WESTERN, *supra* note 349, at 87-88.

522. Charles, "Arms for Their Defence"?, *supra* note 3, at 382-83.

523. The opposite held true for the employment of Catholic militia officers and the passive obedience. See Charles, *The Right of Self-Preservation*, *supra* note 9, at 31-34, 40-54.

524. Charles, "Arms for Their Defence"?, *supra* note 3, at 365-68, 373-75.

525. Thomas Erle is important because Malcolm cites to him in support of her interpretation. See MALCOLM, *supra* note 9, at 116-17. For two earlier dissents to Malcolm's characterization of Erle, see Charles, "Arms for Their Defence"?, *supra* note 3, at 384-85; Schworer, *To Hold and Bear Arms*, *supra* note 9, at 217.

526. See Mark Goldie, *Thomas Erle's Instructions for the Revolution Parliament, December 1688*, in 14 PARLIAMENTARY HIST. 337, 337-47 (1995).

527. *Id.* at 342.

528. *Id.*

529. *Id.* at 344.

530. *Id.*

531. *Id.* at 342, 344.

Militia Acts placed the powers of arming, arraying, and organizing the militia with the Lieutenants⁵³²—a status quo that was problematic if the Lieutenants were inimical to Parliament and the Protestant religion. Erle sought to fix this problem from ever presenting itself again by not only ensuring militia officers complied with the Test Act, but by also requiring each to “have a *good estate* to bear the expense of such an office, as it hath been in ancient times.”⁵³³

All together, these facts severely undermine Malcolm’s historical assessment. This is not to say Malcolm is completely wrong in characterizing the 1662 Militia Act as a matter of tension between Parliament and the crown. As discussed in Part II.A.2 of this Article, the provisions that vested sole authority over the militia with the crown, and prohibited parliamentary resistance, were an issue of discontent from the 1670s through the Glorious Revolution. This dissatisfaction can be found in both Parliament and the popular print culture—a fact that Malcolm completely ignored.⁵³⁴ It does not help Malcolm’s case that the provision against parliamentary resistance was immediately amended and discarded following the Glorious Revolution,⁵³⁵ but the search and seizure provision remained intact until the passing of the 1757 Militia Act.⁵³⁶

Malcolm’s errors concerning the 1662 Militia Act are amenable compared to her treatment of the 1671 Game Act. There is no mention of any game act, let alone the 1671 Game Act, being an issue of discontent among members of the Convention Parliament. There is nothing in the Heads of Grievances or different drafts of the Declaration of Rights that infers it.⁵³⁷ Still, Malcolm assures historians that James II turned to the 1671 Game Act in an attempt to disarm the political dissenters, and Parliament sought its amendment to comply with Article VII.⁵³⁸ There is no substantiating evidence for

532. *See supra* note 455.

533. Goldie, *supra* note 526, at 345 (emphasis added).

534. *See supra* note 515.

535. 1 W. & M., c. 8, § 11 (1688) (Eng.).

536. 30 Geo. 2, c. 25, § 1 (1757) (Eng.).

537. Malcolm admits to this historical deficiency in her scholarship, but still stresses that there is a connection. *See supra* note 514. However, in her 1980 article, Malcolm contended there was a link. *See MALCOLM, DISARMED, supra* note 357, at 22 (“Such disarmament of Protestants, which Parliament’s passage of the Militia Act and Game Act had made possible, shocked and outraged its own members and was cited in the Declaration of Rights as infringing upon the ancient right of Englishmen to keep and bear arms.”).

538. MALCOLM, *supra* note 9, at 105, 120; Malcolm, *The Creation, supra* note 392, at 242–44, 246; Malcolm, *The Right of the People, supra* note 357, at 305, 308–09.

these claims either, leaving historians to ponder where the “accompanying historical record”⁵³⁹ is that Malcolm clings to.

Malcolm’s 1671 Game Act claim would not be so damaging if limited to the *suspicion* that James II used the Act to disarm political dissidents. This is a plausible link on its face, but it unravels once we learn there is *no evidence* suggesting this was James II’s intent—*none*. The same evidentiary deficiency presents itself in Malcolm’s claim that the 1671 Game Act was “plainly at odds” with Article VII, with Parliament seeking to remove guns from the “prohibited devices” on all game laws.⁵⁴⁰ Neither Malcolm, Schwoerer, nor this author have found any evidence stating, implying, or inferring Parliament viewed the game acts as an impediment to Article VII. When one places the subsequent amendments to the 1671 Game Act, the 1692 Game Act, and the 1706 Game Act in context, it was done to correct a conflict of laws, not advance a right to have arms against both public and private violence.⁵⁴¹ In fact, one of the few pieces of evidence Malcolm points to as proof actually undercuts her thesis altogether.⁵⁴² Overall, there is nothing in the text of the laws themselves or the debates even suggesting Malcolm’s theory to be plausible.⁵⁴³

4. *William Blackstone Said What?—Misconceptions of the “Fifth Auxiliary Right” Continue*

Part I.B.1 of this Article corrected the Standard Model’s continued perversion of Blackstone’s *Commentaries on the Laws of England*.⁵⁴⁴

539. Malcolm, *The Right of the People*, *supra* note 357, at 306.

540. Malcolm, *The Creation*, *supra* note 392, at 246; *see* MALCOLM, *supra* note 9, at 126.

541. 4 W. & M., c. 23, (1692) (Eng.); 6 Ann., c. 16 (1706) (Eng.); Charles, “*Arms for Their Defence*”? *supra* note 3, at 393–98.

542. *Compare* MALCOLM, *supra* note 9, at 128, *with* 1 BURN, *supra* note 407, at 443 (“And indeed it was not at all necessary to insert a gun in this act, since the carrying of a gun is prohibited under double the penalty by the statute of H.8. hereafter following.”).

543. Michael Dalton’s different editions of *The Country Justice* do not help Malcolm either. They show that Henry VIII’s statute was to be strictly enforced to the letter of the law. *See* DALTON, *supra* note 411, at 92–93, 261 (showing Henry VIII’s statute was to be strictly enforced); MICHAEL DALTON, *THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE, AS WELL IN, AS OUT OF SESSIONS* 92–93, 261 (London, John Walthoe 1715) (same); MICHAEL DALTON, *THE COUNTRY JUSTICE: CONTAINING THE PRACTICE, DUTY AND POWER OF THE JUSTICES OF THE PEACE, AS WELL IN, AS OUT OF SESSIONS* 141–43, 377, 562 (Savoy, E. Nutt, R. Nutt, and R. Gosling 1727) (same).

544. *See supra* Part I.B.1.

It seems that David I. Caplan was the first to advance the false notions of Blackstone's "fifth auxiliary right,"⁵⁴⁵ but Malcolm is undoubtedly the first professional historian to concur and give weight to such an assessment. A close examination of Malcolm's publications reveals slight variations as to the four corners of Blackstone's "fifth auxiliary right."⁵⁴⁶ Yet, in all her writings, Malcolm contends or infers that Blackstone was articulating a right to be armed in public and private.⁵⁴⁷

Perhaps Malcolm's loose interpretation is best defined in a presentation that she gave at Seton Hall Law School. There, Malcolm deferred to Stephen P. Halbrook's interpretation, with the latter stating:

Examining Blackstone's commentaries, we see that Blackstone had written that there are certain underlying manners in which the personal rights of private property, personal security, and personal freedom or liberty are protected. One of those rights was to have and use arms for self-preservation and defense. *Referring to an individual right to resist criminal attacks, a right to be armed permits an individual to do so.* He linked adjunct rights to the primary rights of protection of personal liberty and personal security.⁵⁴⁸

Malcolm agreed with Halbrook's armed public thesis by asserting that Blackstone was understood to be advancing the constitutionality of "armed crowds" and the forming of "voluntary armed groups."⁵⁴⁹ As discussed in Part II.A.1, such an advancement of English law turns history on its head.⁵⁵⁰ When one reads Blackstone in context there is no advancement of such a right. In fact, Blackstone expressly wrote the calling of the hue and cry—the means by which the people may (at the license of government) be publicly armed to repel violence—required the person reporting the felony to "acquaint the constable of the vill[age] with all the circumstances which he knows of the felony, and the person of the felon."⁵⁵¹ It is at that point the constable may raise the hue and cry, resulting in the "*constable and his attendants*

545. Caplan, *supra* note 19, at 34.

546. *See supra* note 392.

547. *See supra* note 392.

548. Stephen Halbrook, Address at the Seton Hall Second Amendment Symposium (Summer 2000), *in* 10 SETON HALL CONST. L.J. 815, 819 (2000) (emphasis added). Attorney Alan Gura, who litigated both *Heller* and *McDonald*, is of a similar opinion of William Blackstone. *See* Gura, *supra* note 157.

549. Malcolm, Address, *supra* note 392, at 832–34.

550. *See supra* Part II.A.1.

551. 4 BLACKSTONE, *supra* note 407, at 291.

hav[ing] the same powers” of “protection, and indemnification, as if acting under the warrant of a justice of the peace.”⁵⁵²

In all fairness, there are instances where Malcolm grasps Blackstone’s articulation of the “fifth auxiliary right” in context.⁵⁵³ However, in most places, she breaks the bounds of historical elasticity by casting Blackstone in modern libertarian terms.⁵⁵⁴ Such an interpretation is embarrassing, especially when one compares Blackstone with the writings of other contemporary authors.⁵⁵⁵ In the four volumes of the *Commentaries* there is not one instance of Blackstone stating or inferring such a libertarian understanding of the right. He does not mention a right to arms in his sections of life, personal liberty, personal security, the hue and cry, or self-defense and homicide.⁵⁵⁶ If anything, Blackstone undercuts Malcolm’s interpretation when he affirmed the Statute of Northampton as a lawful exercise of police power⁵⁵⁷—the very same statute that Malcolm mischaracterizes and claims was never in force.⁵⁵⁸

5. *The Anglo-American Intellectual Deficiency*

Given the aforementioned problems with Malcolm’s writings, it should come as no surprise that there are substantial deficiencies when applied to the Second Amendment. Indeed, Malcolm is correct to point out Article VII is a lineal ancestor to the Second Amendment.⁵⁵⁹ Other than this fact, however, Malcolm’s American thesis suffers from the same methodological flaws as her English one.

From her first publication in 1983, Malcolm made the fatal mistake of equating a well-regulated militia with an armed citizenry. This is unsupported by the evidentiary record.⁵⁶⁰ She wrote that the Second Amendment’s prefatory language is clearly “an amplifying rather

552. *Id.* (emphasis added).

553. See, e.g., MALCOLM, *supra* note 9, at 142–43.

554. See, e.g., Malcolm, *The Creation*, *supra* note 392, at 248 (“[Blackstone] accepted the contention, spelled out in the original draft of the arms article by the convention, that a right to have arms was necessary for public safety. Indeed, he regarded it as a vital prop of all the rights of Englishmen.”).

555. See *supra* notes 146, 159–62.

556. See 1 BLACKSTONE, *supra* note 56, at 119–36; 3 BLACKSTONE, *supra* note 56, at 3–4; 4 BLACKSTONE, *supra* note 56, at 183–95, 290–92.

557. 4 BLACKSTONE, *supra* note 147, at 168–69.

558. See Malcolm, *The Creation*, *supra* note 392, at 242; Malcolm, *The Right of the People*, *supra* note 357, at 293.

559. See *supra* Part II.A.2.

560. See generally Charles, *supra* note 15; Charles, *The 1792 National Militia Act*, *supra* note 25.

than a qualifying clause,” and the “twin concepts of a people armed and a people trained to arms were linked, but not inseparably.”⁵⁶¹ In coming to this conclusion, Malcolm relied solely on a rudimentary understanding of eighteenth century militia laws, and made no effort to conduct an intellectual inquiry into the American right.⁵⁶²

In a 1993 article, Malcolm again imported her problematic thesis to the Second Amendment.⁵⁶³ The rich intellectual history of a well-regulated militia was again cast aside to be nothing more than a “preference for a militia over a standing army.”⁵⁶⁴ Only the operative clause mattered. Like Article VII, it preserved “a right to be armed for individual self-defense,” but differed in that the Americans “*never copied* English restrictions on the right” because the Second Amendment forbids “any ‘infringement’ upon the right of ‘the people’ to keep and bear arms.”⁵⁶⁵

Malcolm makes a rather broad statement that needs qualification. While she is correct that the American right was not limited to Protestants or socio-economic status,⁵⁶⁶ Malcolm is incorrect to assume the founding generation did not import English laws touching upon arms, weapons, guns, etc. For instance, we know that the common law touching upon affrays, riots, discharging arms, the prohibition of public carriage of arms, and laws to prevent public injury were all part of eighteenth century American law.⁵⁶⁷ Furthermore, eighteenth century militia laws strictly regulated the arming, arraying, disciplining, mustering, training, and discharging of arms.⁵⁶⁸ There is no historical evidence (at least in historical context) to suggest the people had an independent right to associate in their own militias without government consent.⁵⁶⁹ But Malcolm came to

561. Malcolm, *The Right of the People*, *supra* note 357, at 314.

562. *See id.* at 289, 314.

563. *See* Malcolm, *The Role of the Militia*, *supra* note 393.

564. *Id.* at 147-48.

565. *Id.* at 148 (emphasis added).

566. *Compare id.* at 148, with Charles, “*Arms for Their Defence*”?, *supra* note 3, at 449.

567. *See* Charles, *Scribble Scrabble*, *supra* note 9, at 1822-35; Charles, *Historical Guideposts*, *supra* note 18, at 23-26.

568. *See* Charles, *The 1792 National Militia Act*, *supra* note 25, at 326-27 and accompanying footnotes.

569. *Id.* at 374-90.

the opposite conclusion with no supporting evidence.⁵⁷⁰ She then restated this thesis in a 2010 article.⁵⁷¹

In Malcolm's defense, up to this point, however, she dedicated but a few pages to the Second Amendment. It was not until her 1994 book *To Keep and Bear Arms* that Malcolm dedicated a chapter to the American right.⁵⁷² Yet the additional pages of analysis did little to advance the understanding of the right, for most of the chapter affirmed what historians already knew—the founding generation preferred a well-regulated militia over a standing army.⁵⁷³ Regarding the constitutional scope of the American right, Malcolm did not deviate from her earlier assessments.⁵⁷⁴ At no point did she examine the intellectual origins and constitutional pieces of a well-organized militia in depth. Instead, Malcolm once again brushed aside its significance, writing, “The reference to a ‘well regulated’ militia was meant to encourage the federal government to keep the militia in good order”—nothing more.⁵⁷⁵

To date, Malcolm has never examined or acknowledged the rich intellectual history of a well-regulated militia, nor has she provided historians with any subsequent evidence affirming her conclusions.⁵⁷⁶ It is also problematic that Malcolm asserts the founding generation understood Blackstone's “fifth auxiliary right” in modern libertarian terms.⁵⁷⁷ They did no such thing. James Otis, Samuel Adams, the Boston Town Council, and a number of other writings all confirm that the founding generation understood Blackstone in context.⁵⁷⁸ To conclude otherwise, by interpreting text loosely, is to commit what Herbert Butterfield termed a “pathetic fallacy,”⁵⁷⁹ an act of which Malcolm and Standard Model writers are undoubtedly guilty.

570. See Malcolm, Address, *supra* note 392, at 832-34 (asserting “armed crowds” and the forming of “voluntary armed groups” are protected by the right to arms).

571. See Rosenthal & Malcolm, *supra* note 355, at 104.

572. See MALCOLM, *supra* note 9, at 135-64.

573. See *id.* at 143-59.

574. Compare *id.* at 162-63, with Malcolm, *The Role of the Militia*, *supra* note 393, at 147-49, and Malcolm, *The Right of the People*, *supra* note 357, at 314.

575. MALCOLM, *supra* note 9, at 164; see also Rosenthal & Malcolm, *supra* note 357, at 106 (stating a well-regulated militia was “merely . . . well-trained”).

576. Based upon a 2009 *U.C.L.A. Law Review* article, one can assume that Malcolm sees no fault with her methodological approach or thesis, for she applauded the *Heller* majority as employing “historical analysis according to the proper rules for historical investigation.” Malcolm, *The Supreme Court*, *supra* note 386, at 1397.

577. See MALCOLM, *supra* note 9, at 144-45, 157, 162.

578. See *supra* notes 146, 159-62.

579. BUTTERFIELD, *supra* note 117, at 30.

B. The Standard Model “Domino Effect” and Subsequent “Domino Defect”

Despite all the methodological faults and unproven conclusions, Malcolm’s work on the Anglo-American origins of the right retains iconic status among Standard Model writers. Starting as early as 1980, the Standard Model adopted and endorsed her work without question.⁵⁸⁰ This reliance only strengthened after the publication of Malcolm’s 1983 article *The Right of the People to Keep and Bear Arms*.⁵⁸¹ By the time of her 1994 book, Malcolm and the Standard Model were already entwined to the point that one could not write about the latter without citing the former.⁵⁸² And as of today this reliance has not changed, not one iota.⁵⁸³

This phenomenon may be referred to as the “domino effect.” It occurs when a historical work (or any work for that matter) is so influential that a number of writers rely on it as a foundation for their own propositions. Neither the general thesis nor its findings are questioned. Instead, the writers get behind a thesis or certain conclusions because it meshes with their own ideological predispositions or presumptions about a subject. Under such conditions the dominos easily fall one after the other in harmony.

What happens, however, when the relied-upon writing, i.e. the first domino(es) or a number of intermediate dominoes, are removed from the sequence as historically unattainable or unproven? The answer is it produces a “domino defect,” meaning the domino chain falls out of the necessary sequence as to permit the other dominos to fall. This would include any subsequent domino chains built upon the initial or intermediate domino sequence, for they too cannot fall without the aid and assistance of the preceding dominoes.

The Standard Model’s unshaken reliance on Malcolm’s work qualifies as a “domino defect,” for upon disproving the historical viability of Malcolm’s work, all works reliant upon her findings suffer from the same defect. The “domino effect” and consequent “domino

580. See *supra* note 359.

581. See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 313-14, 321, 324 (1991).

582. See, e.g., Reynolds, *supra* note 4, at 467, 474-77. According to Lexis, Joyce Lee Malcolm’s problematic findings have been cited in over two hundred law review articles. Indeed, some of these articles are dissents from non-Standard Model writers, but these critiques are in the minority. For some of the Standard Model works that have relied on her findings, see *supra* note 424.

583. See, e.g., Hardy, *supra* note 34, at 318-21.

defect” is not limited to the Model’s reliance on Malcolm’s work.⁵⁸⁴ It also appears frequently as a result of Standard Model writers relying heavily on each other’s historically suspect works. Whether it is Don B. Kates’s problematic 1983 *Michigan Law Review* article or Eugene Volokh’s interpretation of preambles in the wrong century, Standard Model writers have been quick to fall into line with one another without ever questioning each other’s findings.⁵⁸⁵ It has created an unprecedented domino web of overlapping layers that refuses to fall when all the interlinking dominoes are removed. In the words of late historian Don Higginbotham, “[B]orrow[ing] heavily from each other” and “recycling the same body of information” is the Standard Model’s “fundamental testament.”⁵⁸⁶ Yet, at the same time, it is the Model’s downfall. Not only is the Model’s “narrowly legalistic” approach frequently at odds with historical context,⁵⁸⁷ but more importantly, it is in direct conflict with the goal of historical scholarship—to understand the past for the sake of understanding the past.⁵⁸⁸

This last point is crucial, for one of the historian’s functions is to continuously improve one’s understanding of the past. This process often requires revisiting the evidentiary foundation upon which previous historical writings rest. It also requires engaging in an intellectual discourse with other historians in search of the truth. Such was the case in the 1980s when Lawrence Delbert Cress and

584. Since Lois G. Schwoerer’s devastating critique of Joyce Lee Malcolm’s book in 2000, neither Malcolm nor any of her Standard Model colleagues have addressed, corrected, or supplemented the historical errors. See Schwoerer, Book Review, *supra* note 9. The same dilemma presents itself to this author’s critiques published in 2009 and 2010 respectively. See Charles, “Arms for Their Defence”?, *supra* note 3; Charles, *The Right of Self-Preservation*, *supra* note 9. Since 2009, the only Standard Model writer to even attempt to defend Malcolm is David T. Hardy. But Hardy does not address, correct, or supplement any of the errors. See Hardy, *supra* note 34, at 318-21; Hardy, *supra* note 41, at 73-75; David T. Hardy, McDonald v. City of Chicago: Fourteenth Amendment Incorporation and Judicial Role Reversals 26-27 (May 17, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061920. Hardy merely claims that Malcolm is correct without reconciling the errors or providing any new evidence. This is discouraging in terms of intellectual transparency, for the role of a historian is to understand the past for the sake of the past, not merely advance what they personally agree with.

585. See *supra* Part I.B.5 (showing the problems with a number of Standard Model theses and the impact those theses have had on subsequent works).

586. Don Higginbotham, *The Second Amendment in Historical Context*, 16 CONST. COMMENT. 263, 263-64 (1999).

587. *Id.* at 263.

588. See *supra* Part I.B.5.

Robert Shalhope debated the “collective” versus “individual” right theories.⁵⁸⁹ The debate provided historical academia with the first responsible look at both sides of the argument. Furthermore, it established a research agenda to guide future historians.⁵⁹⁰ As a result, we know today that the Second Amendment was meant to guarantee both an individual and collective component.⁵⁹¹ This includes the interests of state governments to the chagrin of Standard Model writers that argue otherwise.⁵⁹²

Therein lies a problem with the Standard Model. There has been no serious disagreement among its proponents nor has there been any strengthening of the poor foundation upon which the Model rests. One methodological error is built upon another without ever fixing the initial errors. It seems the *last* and *only* serious disagreement between Standard Model writers occurred in the 1980s,⁵⁹³ when Don B. Kates withdrew his original conclusion that the Second Amendment did not protect the right to carry guns outside the home, unless “in the course of militia service” or at the license of government.⁵⁹⁴ In 1986, Kates altered this stance by agreeing with Stephen P. Halbrook, with the latter asserting it is “inconceivable” that the founding generation “would have tolerated the suggestion” that the people needed the “permission of state authority” to carry arms in the public concourse.⁵⁹⁵ Kates replied:

[My earlier] conclusion was based upon a historical/linguistic analysis which I leave to Professor Halbrook’s reply, since I must concede that his evidence invalidates my position. Nothing in

589. See Shalhope & Cress, *supra* note 116.

590. See Higginbotham, *supra* note 69.

591. Shalhope modified his original stance on the Second Amendment from the 1980s in light of later historical findings. See Shalhope, *supra* note 13. For some historical writings in this debate, see *supra* notes 8, 9, and 12.

592. Compare Charles, *supra* note 15, at 3-9, 64-71 (showing the state interests considered and protected by the Second Amendment), with Kates, *supra* note 4, at 1215 (inaccurately claiming “not a single comment can be found describing the Second Amendment as a collective right or a right of the states”). State interests and powers concerning the right to arms is more than sufficiently catalogued with the history of the 1792 National Militia Act. See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 71-79, 139-53; Charles, *The 1792 National Militia Act*, *supra* note 25, at 331-58.

593. This is something that Standard Model writers admit. See Kates, *supra* note 4, at 1222 (stating Halbrook “demolished” the theory the Second Amendment was limited to the home).

594. Kates, *supra* note 168, at 267.

595. Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,”* 49 LAW & CONTEMP. PROBS. 151, 162 (1986).

Professor Halbrook's linguistic evidence, however, gainsays the fact that, from early common law, the right to carry arms abroad was not absolute—as was the right to possess ordinary arms in the home. A statute of Edward II, reenacted in the time of Richard II, seems to have forbidden both the carrying of arms abroad in general and the carrying of them into particular places, such as courtrooms and Parliament. This common law tradition would suggest the validity of the many substantially similar American gun controls.⁵⁹⁶

From this point onward, the Standard Model view of the right to bear arms has been virtually unlimited in scope.⁵⁹⁷ Its proponents argue that any limits on armed self-defense, in public or private, are a serious impediment on the Second Amendment.⁵⁹⁸ It does not matter how many public regulations or restrictions are unearthed by historians, with *no evidence* of them being an infringement on the English or American right to arms.⁵⁹⁹ Regardless, Standard Model writers like Nelson Lund will continue to advance the notion that the Founders “enjoyed an almost unlimited right to keep and bear arms” and there is “virtually no historical evidence” about its limits.⁶⁰⁰

Lund's “no historical evidence” viewpoint may be attributed to denial, and perhaps his continued association with the National Rifle Association.⁶⁰¹ Lund is well aware of the voluminous literature that

596. Don B. Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 149 (1986).

597. See, e.g., HALBROOK, *supra* note 22, at 328-30.

598. See, e.g., Volokh, *Implementing the Right to Keep and Bear Arms*, *supra* note 424, at 1515.

599. See *supra* note 167.

600. Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 ENGAGE 30, 30 (2012). The lack of any research and the failure to acknowledge any eighteenth century police powers may have to do with Standard Model works being predominantly funded by the National Rifle Association. Within a period of fourteen months, the National Rifle Association distributed over half a million dollars for research, conferences, and scholarship supporting their view of the Second Amendment. This includes grants to David B. Kopel (\$320,000), David T. Hardy (\$52,000), Stephen P. Halbrook (\$75,000), Clayton Cramer (\$15,000), and Don B. Kates (\$6,000). *Supported Research*, NRA C.R. DEF. FUND, <http://www.nradefensefund.org/previous-years-research.aspx> (last visited Dec. 2, 2012).

601. Nelson Lund's chair as Patrick Henry Professorship of Constitutional Law at George Mason School of Law is funded by the National Rifle Association. See *Foundation Endows Law Professorship*, TRADITIONS: A PUBLICATION OF THE NRA FOUND. (Spring 2003), at 5, 18. Lund also represents the National Rifle Association as an advisor. See ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 57-59, 150, 284-86 (2011).

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contradicts this conclusion.⁶⁰² In addition, some of the blame can be traced to Joyce Lee Malcolm, Lund's colleague at George Mason Law School. Again it was Malcolm who advanced false notions of England's armed society,⁶⁰³ which in turn precipitated a "domino effect" of ahistorical legal scholarship. This especially holds true with the notion that the common law only punished the carrying of weapons with the "specific intent" to terrify the people.⁶⁰⁴ If Standard Model writers are correct on this point,⁶⁰⁵ why are historians without any historical examples supporting it?⁶⁰⁶ Also, why does all the historical evidence point to the fact that public arms-bearing was at the license of government, either in one's individual capacity or as a member of the militia?⁶⁰⁷

Overall, there are numerous examples of how the "domino effect" and subsequent "domino defect" applies to Standard Model scholarship. While they cannot all be restated here, the Model's vision of an individualized militia or "the people" as an urban militia that deters crime provides a great working example. Just recently, in a case before the Seventh Circuit Court of Appeals,⁶⁰⁸ the Second Amendment Foundation advanced this alleged "history" by citing a series of loose unconnected sources, and then interpreting those sources well beyond the bounds of historical elasticity. The Foundation briefed the court as follows:

[In Sir John Knight's case] the carrying of arms was not forbidden as a matter of public safety or crime reduction, but because doing so might hurt the King's public image. Of course, the King wanted to preserve his own power, and looking weak may have encouraged revolt or usurpation. Nevertheless, the court imposed a judicial gloss on the Statute [of Northampton], that for a conviction the prosecution must prove that the carrying of arms was "to terrify the

602. See *supra* note 167; see also Winkler, *Scrutinizing the Second Amendment*, *supra* note 331; Winkler, *The Reasonable Right to Bear Arms*, *supra* note 331.

603. See *supra* Part II.A.1.

604. See MALCOLM, *supra* note 9, at 104-05.

605. See *supra* note 424 and accompanying text.

606. See generally Charles, *The Faces*, *supra* note 9. See also POCOCK, *supra* note 122, at 106 (discussing the need for historical evidence that can be tested and "making as few assumptions" as possible).

607. See generally Charles, *The Faces*, *supra* note 9; see also Charles, *Scribble Scrabble*, *supra* note 9, at 1830-39; *General Election, New Hampshire*, WORCESTER MAG., July 1786, at 162, 164 (noting that Major General John Sullivan "hopes the privates will avoid a practice so unsoldierly, expensive and dangerous; all firing should be *when troops are embodied, and such as the commanding-officer present may direct.*" (emphasis added)).

608. *Moore v. Madigan*, No. 12-1269 (7th Cir. filed Feb. 6, 2012).

King's subjects," or "with evil intent"—"malo amino." [I]n order to preserve the common law principle of allowing "Gentlemen to ride armed for their Security." Since the term "Gentlemen" included "one, who, without any title, bears a coat of arms, or whose ancestors have been freemen," this would include in America all members of the militia; that is "all citizens capable of bearing arms."⁶⁰⁹

To paraphrase, according to the Second Amendment Foundation, we are to understand the "domino effect" of an individual right to publicly carry arms as an unorganized militia as follows:

(1) The holding in Sir John Knight's case required "evil intent" → (2) the Statute of Northampton punished only "evil intent" → (3) this confirms a right for "gentlemen" to ride armed → (4) English "gentlemen" and American citizens are legal equivalents → (5) every citizen is a member of militia → (6) the people as an unorganized militia have a right to carry arms for their security to deter crime.

Here the Foundation advances five domino links that require the historical integrity of the former link for any subsequent links to fall. Thus, should *any* of the links prove historically untenable, the Foundation's alleged "domino effect" results in a "domino defect." Not surprisingly, given the poor foundation upon which the Standard Model is built, the Foundation's "domino defect" presents itself at numerous points. In fact, all five domino links can be dismissed by illuminating three very serious historical errors: (1) a misunderstanding of Sir John Knight's case, (2) the mischaracterization of the Statute of Northampton's prosecutorial scope, and (3) applying these two errors to claim the Founders believed a publicly armed populace or unorganized militia prevents and deters crime.

Beginning with Sir John Knight's case,⁶¹⁰ as early as the 1980s, Standard Model writers have consistently misinterpreted the facts, legal issue, and holding as supporting a right to carry arms for self-defense,⁶¹¹ when the case's history actually undercuts it.⁶¹² At issue was whether Knight could be charged in violation of the Statute of Northampton, which stipulated that no person shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of

609. Appellants' Reply Brief at 6-7, *Moore v. Madigan*, No. 12-1269 (7th Cir. May 23, 2012) (citations omitted).

610. *See* *Rex v. Knight*, [1686] 90 Eng. Rep. 330; [1686] 87 Eng. Rep. 76.

611. *See, e.g.*, Caplan, *supra* note 359, at 794-95.

612. *See* Charles, *supra* note 9, at 27-30.

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the Justices or other Ministers, nor in no part elsewhere.”⁶¹³ It is important to note that a violation of the Statute was a misdemeanor, not a felony, meaning that the day-to-day enforcement of its provisions did not require a jury. Knight’s case, however, was different. He was not just any person carrying arms in the public concourse. Knight was one of a number of armed government officials who seized a Catholic priest much to the anger of James II, yet he was also the only person imprisoned and charged with violating the law.⁶¹⁴

Aware of the political nature of the charges and without any proof that Knight acted outside the scope of his authority, the jury acquitted him.⁶¹⁵ Knight never rested his defense on a right to go armed for personal self-defense. Instead, he defended his case in terms of “[l]oyalty.”⁶¹⁶ In particular, Knight relied upon the public official exception to the Statute of Northampton.⁶¹⁷ This is why the *English Reports* reference “evil intent,” for the crown’s attorney would have been required to prove that Knight intentionally acted beyond the scope of his employment—a burden the attorney failed to prove.

There is absolutely *no indication* in either the *English Reports* or other contemporary sources that Knight’s case stands for the proposition that “the carrying of arms was not forbidden as a matter of public safety or crime reduction.”⁶¹⁸ The Second Amendment Foundation’s argument in this regard is not history, but the lawyering of historical sources to advance its own interests. In fact, the opposite held true regarding the Statute’s purpose, scope, and subsequent enforcement. There are a number of examples where the Statute was enforced to prevent crime and maintain the peace.⁶¹⁹

613. 2 Edw. 3, c. 3 (1328) (Eng.).

614. CALENDAR OF STATE PAPERS DOMESTIC: JAMES II, 1686-87, at 118 (May 1, 1686); see also *id.* (June 7, 1686, Sir John Knight to Earl of Sunderland).

615. Charles, *The Faces*, *supra* note 9, at 28-29.

616. *Id.* at 29-30.

617. 20 Ric. 2, c. 1 (1396-97) (Eng.); see also DALTON, *supra* note 411, at 37-38 (“[T]he King’s Servants in his presence, and Sheriffs, and their Officers, and the other Kind’s Ministers, and such as be in their company assisting them in executing the King’s Process, or otherwise in executing of their Office, and all others pursuing the Hue and Cry . . . may lawfully bear Armour or Weapons.”).

618. Appellants’ Reply Brief at 6, *Moore v. Madigan*, No. 12-1269 (7th Cir. May 23, 2012) (citations omitted).

619. See Charles, *The Faces*, *supra* note 9, at 21-22.

The Foundation's second historical error is the mischaracterization of the Statute of Northampton.⁶²⁰ In Joseph Keble's 1689 treatise alone there are numerous sections that prove that the public carriage of arms was highly regulated.⁶²¹ This included restrictions on shooting, traveling, or assembling with arms without the license of government.⁶²² One such example appears when Keble paraphrases Henry VIII's statute⁶²³ prohibiting the use or discharging of handguns:

Every Person finding or seeing any to offend the Statute [of Henry VIII] against the shooting in Cross-bows and Hand-Guns, may arrest and bring or convey him to the next Justice of the Peace of the County where he was found offending, who upon due Examination and Proof thereof before him made, may be his Discretion Commit him to the Goal, there to remain till he shall truly pay the one Moiety to such first bringer or conveyor.⁶²⁴

Then there is Keble's analysis discussing the Statute of Northampton's prosecutorial scope, which clearly prohibited the carrying of arms without the license of government:

Yet may an Affray be, without word or blow given; as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon other that be not armed as he is; and therefore both the Statutes of Northampton (2 Ed. 3. 3.) made against wearing Armour, do speak of it, by the words, *Affray del pais & in terrorem pouli, surety*.⁶²⁵

Keble's reference to arms "not usually worn" did not mean that individuals maintained a *right* to go armed with "common weapons" as some Standard Model writers have concluded.⁶²⁶ Instead, the phrase "not usually worn" confirms that there were instances where a person was licensed to carry arms in public, the most common

620. Appellants' Reply Brief at 6-7, *Moore v. Madigan*, No. 12-1269 (7th Cir. May 23, 2012).

621. See KEBLE, *supra* note 408, at 147-51, 311-14, 644-66, 708-10.

622. *Id.*; see also 4 & 5 Phil. & M., c.2, § 17 (1557-58) (Eng.) (providing that anyone required to supply an arquebus could "carye not or use not the same Haquebut in any Highe waye, oneles it be coming or going to or from the Musters, or marching towares or from the Service of Defece of the Realme"); 8 TUDOR ROYAL PROCLAMATIONS 703 (Paul L. Hughes & James Francis Larkin eds., 1964) (proclamation of 1579 forbidding persons to carry calivers, etc. "under cover of learning or exercising to shoot therein to the service at musters (a matter to be in good sort favored, but not to be misused)").

623. See 25 Hen. 8, c. 17 (1533-1534) (Eng.).

624. KEBLE, *supra* note 408, at 709.

625. *Id.* at 147.

626. See, e.g., Volokh, *The First and Second Amendments*, *supra* note 424, at 101.

exception when “the Sheriff, or any of his Officers, for the better Executing of their Office . . . carry with them Hand-guns, Daggers, or other Weapons, invasive or defensive,” notwithstanding such prohibitions.⁶²⁷ There were indeed other exceptions—militia service, the hue and cry, and the nobility with armed attendants—but all were regulated by statute and at the license of government.⁶²⁸ To read Keble’s treatise otherwise would make his reference to striking “a fear upon other that be not armed as he is” superfluous.⁶²⁹ Also it conflicts with another portion of Keble’s treatise that confirms that the prohibition was general:

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

⁶³⁰

Keble’s analysis is consistent with other contemporary legal commentators. In 1705, for instance, Michael Dalton wrote that the Statute of Northampton prohibited the “wear[ing] or carry[ing] any Guns, Dags or Pistols charged” in the public concourse. Preparatory self-defense was not an excuse.⁶³¹ As Dalton noted, “persons . . . so armed or weaponed for their defence upon any private quarrel” were not immune because they could seek the assistance of constable to have “the Peace against the other persons” enforced.⁶³² Like Keble,⁶³³

627. KEBLE, *supra* note 408, at 711; *see also* 20 Ric. 2, c. 1 (1396-97) (Eng.).

628. Charles, *The Faces*, *supra* note 9, at 11-41.

629. KEBLE, *supra* note 408, at 711.

630. *Id.* at 224.

631. DALTON, *supra* note 411, at 264.

632. *Id.*; *see also* 1 HAWKINS, *supra* note 16, at 126, ch. 40, § 1 (“[A]ny justice of the peace may, according to his discretion, bind all those to the peace who in his presence shall make any affray, or shall threaten to kill or beat any person . . . or shall go about with unusual weapons or attendants, to the terror of the people.”); *id.* at § 2 (“[A]ll persons whatsoever, under the king’s protection, being of sane memory . . . have a right to demand surety of the peace.”); KEBLE, *supra* note 408, at 646 (“[I]f he be only threatened that he shall be beaten, if he go to the Market, then may he not assemble Company for his aid [i.e. raise the hue and cry], because he needeth not to go thither, and he may provide for himself by Surety of the Peace.”).

633. *See* KEBLE, *supra* note 408, at 709.

Dalton described going or riding armed as an act that “strikereth a fear and terror into the King’s Subjects,”⁶³⁴ not a fabricated Standard Model intent requirement.⁶³⁵

Even William Hawkins’ *Pleas of the Crown* comports with this interpretation, when read in both sequence and context. Hawkins wrote that “any Justice of the Peace, or other person . . . empowered to execute” the Statute of Northampton may “seize the Arms” of “any Person in Arms contrary” to its provisions.⁶³⁶ This included the seizure of arms for preparatory self-defense in the public concourse. As Hawkins aptly put it, “[A] Man cannot excuse the wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears is for the Safety of his Person from his Assault.”⁶³⁷

There were three legal exceptions to the general prohibition. The first exception was homebound self-defense. The rationale being “because a Man’s House is . . . his Castle,” there shall be no penalty for a person “assembling his Neighbours and Friends in his own House, against those who threaten to do him any violence therein.”⁶³⁸ The second exception applied to persons carrying arms with the license of government. There was no legal presumption to “terrify the People” if a “Person[] of Quality,” i.e. person licensed for public carriage, wore “common Weapons” approved by law.⁶³⁹ The third and last exception was the assembling of arms for the hue and cry, *posse comitatus* or militia.⁶⁴⁰ In the words of Hawkins, there is no violation of the Statute of Northampton when a person “arms himself to suppress or resist such Disturbers of the Peace or Quiet of the Realm.”⁶⁴¹ This exception was not a free license to enforce the peace at an individual’s pleasure. Instead, the assembling of the hue and cry, *posse comitatus* or militia was solely at the discretion of government.⁶⁴²

634. *Id.*

635. *See supra* note 424.

636. 1 HAWKINS, *supra* note 16, at 135, ch. 63, § 5.

637. *Id.* at 136, ch. 63, § 8.

638. *Id.*

639. *Id.* at 136, ch. 63, § 9. Handguns and crossbows were prohibited to be worn and borne by any person, regardless of condition or station; *see* 25 Hen. 8, c. 17 (1533-1534) (Eng.); KEBLE, *supra* note 408, at 709.

640. *See supra* Part II.

641. 1 HAWKINS, *supra* note 16, at 136, ch. 63, § 10.

642. *See supra* Part II.

Somehow Standard Model writers⁶⁴³ and the Second Amendment Foundation⁶⁴⁴ arrive at the opposite conclusion. They read the licensing exception as the general rule, which would swallow Hawkins' other sections as superfluous. This argument is best articulated by Standard Model writer Eugene Volokh, who writes that "public carrying 'accompanied with such circumstances as are apt to terrify the people' was . . . seen as prohibited," but "'wearing common weapons' in 'the common fashion' was legal."⁶⁴⁵ This interpretation is untenable upon examining the historical record. Not only does it conflict with the clear intent and enforcement of the Statute of Northampton for four centuries,⁶⁴⁶ but it would require erasing Sections 5, 8, and 10 of Hawkins's *Pleas of the Crown*.⁶⁴⁷ Furthermore, historians would have to exclude legal commentators like Keble and Dalton from the historical record in order for Volokh's analysis to be credible. To be blunt, the Standard Model approach to history is not history.

This brings us to the Second Amendment Foundation's third historical error—asserting that the founding generation perceived the "militia" as a publicly armed populace that would prevent and deter crime.⁶⁴⁸ Indeed, there were instances where the colonies armed, arrayed, and mustered the militia to conduct security patrols to prevent Indian attacks and potential slave revolts.⁶⁴⁹ However, these forces were regulated by law and called forth by a government-appointed officer.⁶⁵⁰ There was no independent right to go publicly

643. See Kates, *supra* note 168, at 261; Kopel, *supra* note 50, at 1386 n.96; David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 173-74 (1999); Marshall, *supra* note 294, at 716-17; Volokh, *The First and Second Amendments*, *supra* note 424, at 101-02.

644. See Appellants' Brief and Required Short Appendix at 37, *Moore v. Madigan*, No. 12-1269 (7th Cir. Mar. 2, 2012).

645. Volokh, *The First and Second Amendments*, *supra* note 424, at 102 (quoting 1 HAWKINS, *supra* note 16, at 136, ch. 63, § 9).

646. Compare Charles, *The Faces*, *supra* note 9, at 7-36 (providing substantiated research on the Statute of Northampton in historical context), with Volokh, *The First and Second Amendments*, *supra* note 424, at 101-02 (selectively quoting Hawkins and other legal treatises).

647. 1 HAWKINS, *supra* note 16, at 135-36, ch. 63, §§ 5, 8, 10.

648. Appellants' Reply Brief at 6-7, *Moore v. Madigan*, No. 12-1269 (7th Cir. May 23, 2012).

649. See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 18, 74.

650. See, e.g., GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 223-24 (Williamsburg, William Parks 1736).

armed and enforce the law,⁶⁵¹ yet this is what the Second Amendment Foundation tries to advance by equating the people with an unorganized militia that deters crime.⁶⁵²

The Foundation's argument weakens further by the fact that the Supreme Court has actually denounced such an interpretation of the right to arms. In 2008, the *Heller* majority made it clear "no one supporting [the individual right] interpretation has contended that States may not ban" independent militias.⁶⁵³ In other words, the Court upheld and affirmed its nineteenth century holding in *Presser v. Illinois*, which stipulated:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government . . . the States cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.⁶⁵⁴

The *Presser* Court was clear that individuals do not possess a right to go publicly armed under the disguise of effectuating the Second Amendment's "well-regulated militia":

It cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States, and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations, are authorized by the militia laws of the United States. *The exercise of this power by the states is necessary to the public peace, safety, and good order.*⁶⁵⁵

The *Presser* Court was not articulating a novel concept. Calling forth the militia was a power that had always been left to the political

651. For a history of independent militias in the late eighteenth century, see Charles, *The 1792 National Militia Act*, *supra* note 25, at 374-90.

652. This is not the first time the Second Amendment Foundation has advanced this argument before the Seventh Circuit. See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction at 11-12, *Ezell v. City of Chicago*, No. 10-cv-05135 (N.D. Ill. Oct. 12, 2010); Complaint at ¶ 12, *Ezell v. City of Chicago*, No. 10-cv-05135 (N.D. Ill. Oct. 12, 2010).

653. *United States v. Heller*, 554 U.S. 570, 620 (2008).

654. *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

655. *Id.* at 267-68 (emphasis added).

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branches, inherent in sovereignty, and that government had always regulated.⁶⁵⁶ The Founders undoubtedly agreed with this constitutional principle, as is evidenced in contemporary state Second Amendment analogs referencing subordination to the civil authority.⁶⁵⁷ Standard Model writers have argued, however, that most of *Presser* should be cast aside as dicta and inconsistent with modern Fourteenth Amendment jurisprudence.⁶⁵⁸ Another argument is that *Presser* has nothing to do with the right to arms, and everything to do with the federal-state spheres of government concerning the militia. Thus, it should have no impact on how the Supreme Court interprets the Second Amendment moving forward.⁶⁵⁹

The *Heller* majority disagreed.⁶⁶⁰ The Court confirmed *Presser's* holding that the Second Amendment does not protect an independent militia right of association or a right of the people to go publicly armed under the auspices of an unorganized militia.⁶⁶¹ Certainly, Standard Model writers will continue to argue that *Presser*

656. See JEAN LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 298–99 (David Lieberman ed., 2007); 1 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 338–39 (Richard Tuck ed., 2005); SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE* 200 (Ian Hunter & David Saunders eds., 2003).

657. See, e.g., MASS. CONST., Declaration of Rights, art. XVII (“The people have a right to keep and to bear arms for the common defence . . . and the military power shall always be held in an exact subordination to the civil authority and be governed by it.”); N.C. CONST. 1776, Declaration of Rights, art. XVII (“That the people have a right to bear arms, for the defence of the State . . . the military should be kept under strict subordination to, and governed by, the civil power.”); OHIO CONST. 1802, art. VIII, § 20 (“That the people have a right to bear arms for the defense of themselves and the State; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up: and that the military shall be kept under strict subordination to the civil power.”).

658. See Cottrol & Diamond, *supra* note 581, at 348; Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 987–89 (1999); Kopel, *supra* note 50, at 1460. Not all Standard Model writers view *Presser* in a negative light. See Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 980–81 (1995) (stating the opinion stands for the proposition that the “state’s right to restrict the lawful bearing of arms is not absolute”); Brannon P. Denning, *Gun Shy: The Second Amendment as an “Underenforced Constitutional Norm,”* 21 HARV. J.L. & PUB. POL’Y 719, 761 (1998) (stating the opinion confirms the Second Amendment protects an “armed populace” of “unorganized militia”).

659. Kopel & Little, *supra* note 154, at 530–31.

660. See *United States v. Heller*, 554 U.S. 570, 620–21 (2008).

661. See *id.*

is bad law, but the 1886 decision was unanimous.⁶⁶² One of the Justices was John Marshall Harlan, who later delivered a series of constitutional lectures at Columbia Law School. When addressing the Second Amendment, Harlan dispelled the notion that a publicly armed citizenry or unorganized militia was the “militia” constitutionally triggered by the Second Amendment’s prefatory language. Harlan stated:

What do you mean by militia here? Why, it means the men that are not in the regular forces . . . The militia is composed of the people outside of the regular forces, and every man is of the militia according to the law of the state in which he lives. He may be called into service. That is necessary to the security of a free people, and it is because it is necessary for the security of a free people that this country has never had a large standing army

[The militia] would be mustered then in the service of the United States. Being thus mustered in the service of the United States they are under the control of the United States from thenceforward. The particular object of [the Second Amendment], however, was to make it certain that the Congress of the United States should never have it in its power to say to any state, “You shall have no regular trained militia with arms in their hands.” *This militia, as contradistinguished from regular troops, are the boys at home around their local government, attached as they ought to be to their home and to their local government, and therefore ready if emergency requires to defend that home government against a government outside.* Therefore, the fathers said that is necessary to the freedom of the people, to the security of the people, and therefore an act of Congress which should say that no state should have any militia, should have no troops with guns in their hands, is a nullity. It is a declaration, to put it in plain English, that the Congress of the United States, now keep within the limits of your power; execute the laws of the union; carry out the Constitution of the United States; don’t you come down here to our states to overturn our local government, to interfere with our domestic affairs; if you do we have a right under this Constitution to have a militia to meet you, and defend, if need be. That was the provision of the Bill of Rights, “And the right to keep and bear arms, shall not be infringed.” Well, there was a statute in the state of Kentucky which punished a man for carrying concealed deadly weapons. A man carried a pistol, and he was tried and fined under the statute for carrying concealed deadly weapons. And he said, “Under the Constitution of the United States, as well as the Constitution of

662. See *Presser v. Illinois*, 116 U.S. 252 (1886).

Kentucky, I have a right to bear arms.” “No,” says the court. “*It is the militia that may bear arms, and you, going around here among your peaceful neighbors, pretending to be as unprotected as they are but carrying a concealed deadly weapon, that is doing something that the state may prevent.*”⁶⁶³

A close reading of Harlan’s words reveals what historians have already proven to be true. First, Harlan confirms that the militia is under the concurrent authority of the federal and state governments,⁶⁶⁴ and traditional preemption doctrine cannot constitutionally negate state militia powers.⁶⁶⁵ This means that the states retain concurrent authority in deciding when the militia “may be called into service” within their territorial confines, and that the federal government is prohibited from legislating that “no state should have any militia.”⁶⁶⁶ Second, Harlan gives the proverbial nod to states prohibiting the carrying of dangerous weapons in the public concourse. In doing so, Harlan properly inferred that persons, in their individual capacities, were not “the militia.”⁶⁶⁷

In summary, the Second Amendment Foundation’s “domino effect” that connects an armed public with the Founders’ well-regulated militia is completely without historical merit. It suffers from a “domino defect” at every link in the chain, and is in direct conflict with the fact that the Constitution was ratified to prevent a “disjointed, unregulated, and unwieldy mass” of a militia.⁶⁶⁸ There are indeed other “domino defects” present in Standard Model

663. Brian L. Frye et al., *Justice John Marshall Harlan: Lectures on Constitutional Law, 1987-98*, at 233-34 (Hofstra Univ. Sch. Of Law Legal Studies Research Paper Series, Research Paper No. 12-05), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2003116.

664. See Charles, *supra* note 15, at 63-71; see also Higginbotham, *supra* note 69. For some Standard Model works that ahistorically advance that the Second Amendment protects no state interests, see Kates, *supra* note 4, at 1215; Hardy, *supra* note 34, at 329-30.

665. See Charles, *The 1792 National Militia Act*, *supra* note 25, at 340-66. For Standard Model works that advance the federal preemption myth, see *supra* note 248.

666. Frye et al., *supra* note 663, at 233-34.

667. *Id.* Other late nineteenth century writings show that the power over the militia was seen as concurrent. See Charles E. Lydecker, *An Unconstitutional Militia*, 134 N. AM. REV. 631 (1882); Albert Ordway, *A National Militia*, 134 N. AM. REV. 395 (1882).

668. William H. Sumner, *An Inquiry into the Importance of the Militia to a Free Commonwealth*, 19 N. AM. REV. 275, 276 (1824); see also *id.* at 287 (“There is something seducing to unmilitary or inexperienced minds in an encampment. It is believed that if men are placed under the canvass a few weeks, they become expert soldiers. There is doubtless a great error in this.”).

literature, but they are beyond the scope of this Article. Instead, the point here is that the historical record can be easily manipulated through either misguided scholarship or carefully crafted litigation. It is only upon the conducting of proper historical methodologies that one may discern the truth. Still, the important question moving forward is whether the Supreme Court can and should differentiate faux history from real history. The next section takes up these questions.

III. WHAT'S THE SUPREME COURT TO DO WITH THE EMBARRASSING STANDARD MODEL?—ASSESSING THREE HISTORICAL OPTIONS

In a June 1838 edition of the monthly periodical *Common School Assistant* there appeared a question-and-answer article entitled *The Judiciary*.⁶⁶⁹ The questions asked and answered covered a number of constitutional issues such as state privileges and immunities, trial by jury, excessive bail, warrantless searches, and so on. The second to last question and answer was in regard to the Second Amendment, and read as follows:

Q.—Have the people of the United States a right to keep and bear arms?

A.—Yes; inasmuch as a well-regulated militia is necessary to the security of a free country.⁶⁷⁰

For nearly four decades, legal academics, historians, and laymen have written thousands of pages over the meaning of the Second Amendment, yet within the span of only twenty-nine words a teaching assistant's book succinctly asked and answered a constitutional question as the Founding Fathers envisioned. A well-regulated militia was not merely an armed citizenry.⁶⁷¹ It was so much more. In the words of Secretary of War James Barbour, a well-regulated militia was an unquestionable “political maxim . . . universally subscribed to . . . [as] the natural defence of a free people.”⁶⁷² It was of such importance to the success of the Early

669. *The Judiciary*, COMMON SCH. ASSISTANT (June 1838), at 46, 46.

670. *Id.* at 47.

671. See Charles, *Scribble Scrabble*, *supra* note 9, at 1835-39.

672. James Barbour, *Militia of the United States Circular*, NILES' WKLY. REG., Aug. 12, 1826, at 423. These sentiments are in line with James Madison's during the debate of the 1792 National Militia Act. See *Militia Bill, Under Consideration*, FED. GAZETTE & PHILA. DAILY ADVERTISER, Jan. 10, 1791, at 4 (“[W]e cannot but be convinced, that the authority was intended to be given us for the establishment of an

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Republic that Barbour requested the states amend and improve the 1792 National Militia Act accordingly. He hoped “in an object of such vital importance as a well regulated militia, minor objections will be sacrificed to the attainment of so great a good.”⁶⁷³

Today there is little, if any, dispute that the necessity of a well-regulated militia in our everyday life is minimal. In the late eighteenth century and early nineteenth century, however, a well-regulated militia served a larger societal purpose. Its “advantages” were not “confined to its military and civil uses exclusively.”⁶⁷⁴ A well-regulated militia also provided a “moral influence on society and individual character” that was so “deserving” of American admiration.⁶⁷⁵ As stated in an 1833 article published in *The Military and Naval Magazine of the United States*:

It regulates the eccentricities of youth, inculcates subordination to authority, teaches obedience to the laws, and respect for those who are entrusted with their administration. Its associations promote civility, good manners, and friendly intercourse in society. Its exhibitions are public, encouraging cleanliness of person, and eliciting that pride of character which leads to the fear of reproach, and enlivens the desire of distinction. Its employments are active, requiring judgment and decision. Its exercises are manly, giving grace to the person, vigor to the muscle, and energy to the mind. Its duties are scientific, inciting to study, and inducing inquiry. Its objects are patriotic, animating the best feelings of the heart. Its offices, open to all, are the incentives of honorable ambition, affording to those in humble stations, whose merits might otherwise remain unnoticed, opportunities for disclosing those virtues and talents which recommend them for civil preferment, as well as military promotion; and thus it is, this truly republican institution, in connection with our systems of public education and establishments of religious instruction, contributes to produce that

effective militia—a militia that hitherto was not so effectually established as to censure a sufficient defence against foreign invaders; or efficient enough to destroy the necessity of a standing national force; or in case of such a force being raised, and turned against the liberties of our fellow-citizens, adequate to repel the hostile attacks of mad ambition. Let us not, by false construction, admit a doctrine subversive of the *great end* which the constitution aimed to secure, namely, perfection to the union, the means of insuring domestic tranquility, and providing for the common defence.” (emphasis added).

673. Barbour, *supra* note 672, at 423.

674. *Militia of the United States*, 1 MIL. & NAVAL MAG. U.S. 352, 352 (1833).

675. *Id.* at 352.

just subordination in society which influences all its conduct, and constitutes an orderly community.⁶⁷⁶

After reading this powerful narrative it is dumbfounding how anyone can equate a well-regulated militia with a mere armed society. Yet this poor definition is what so many Standard Model writers have prescribed.⁶⁷⁷ What is worse is that *Heller's* dicta seems to have endorsed it with but one sentence: “[T]he adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.”⁶⁷⁸ Then in an attempt to sync the Second Amendment’s prefatory language with its operative clause, the Court wrote:

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew It is therefore entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.⁶⁷⁹

Here, the Court’s reference to a “citizens’ militia” is perplexing. One may read such dicta to protect unorganized militias independent of government. Given that the Court upheld *Presser* as good law, however, this interpretation is unlikely.⁶⁸⁰ Only one interpretative option remains—that the Court consents to a tyranny model of the Second Amendment.⁶⁸¹ This means that the “citizens’ militia” cannot be negated to prevent “the people” from exercising lawful rebellion.⁶⁸² But this interpretation is also perplexing because the historical record reveals that the right of self-preservation and resistance rested with the legislative branches of government, not the

676. *Id.* at 353.

677. *See, e.g.,* Hardy, *supra* note 41, at 67.

678. 554 U.S. at 597.

679. *Id.* at 598-99 (citations omitted).

680. *Id.* at 620-21.

681. *See, e.g.,* Reynolds, *supra* note 4, at 467-68.

682. *Heller*, 554 U.S. at 600.

people in their individual capacities.⁶⁸³ This fact is evidenced by the history of the Glorious Revolution,⁶⁸⁴ documents like the *Declaration of the Causes and Necessity of Taking Up Arms*⁶⁸⁵ and the *Declaration of Independence*,⁶⁸⁶ and the historical fact that the militias of the American Revolution were arrayed, armed, trained, and mustered at the direction of legislative bodies.⁶⁸⁷ Furthermore, there is the overwhelming amount of historical evidence that the Second Amendment was drafted to quell state fears of federal tyranny.⁶⁸⁸

These are just some of the historical facts that are missing from the Court's hypothetical "tyranny" interpretation of the Second Amendment. There are indeed more, but the point worth making is that *Heller's* dicta consists of countless reefs and shoals that have yet to be navigated and squared with proper historical methodologies. The worst thing the Court can do is move forward under the assumption that *Heller's* dicta advances a comprehensive and objective "history" of the Second Amendment.

683. See Charles, *The Right of Self-Preservation and Resistance*, *supra* note 9, at 47-59. My position in this Article and previous articles overrides my 2009 conclusion that the Second Amendment "does not support" that "the people may employ arms to usurp unjust government." CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 95. A well-regulated militia was a constitutional means through which this end could be accomplished. Charles, *supra* note 15, at 51-86.

684. See Charles, *The Right of Self-Preservation and Resistance*, *supra* note 9, at 26-27.

685. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775) ("Our cause is just. Our *union* is perfect. . . . Lest this declaration should disquiet the minds of our friends and fellow-subjects in any part of the empire, we assure them that we mean not to dissolve *that union* which has so long and so happily subsisted between us, and which we sincerely wish to see restored. . . . In our own native land, in defence of the freedom that is our birthright, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our fore-fathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before." (emphasis added)).

686. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776) ("In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated petitions have been answered only by repeated Injury."); see also Charles, *The 1792 National Militia Act*, *supra* note 25, at 376-77 (Representative Michael Stone confirming that the Revolution was not based on "outrage and violence," but on the legislative consent of the state and continental governments); Charles, *supra* note 62, at 481-82, 488, 490-502 (discussing the "right of self-preservation and resistance" and the role the Declaration of Independence played in forming a new government on equitable principles).

687. See, e.g., Charles, *The 1792 National Militia Act*, *supra* note 25, at 374-90.

688. See *supra* note 658; see also THE FEDERALIST NO. 45 (James Madison).

Thus, the Second Amendment is in historical crisis. As this Article has demonstrated, the Model's general approach to "history" is not history, even in a basic form. Instead the Model picks and chooses evidence at its leisure and casts it in a manner that supports a desired end. Acclaimed historian J.G.A. Pocock would describe the Model's approach as being "designed to produce, or elicit, formal relationships or empirically testable propositions, *not* with what *eigentlich* happened or—the special form which this take in the history of thought—what *eigentlich* was meant."⁶⁸⁹ In other words, the Model "is *not* concerned with what the author of the statement made in a remote past meant by it so much as with what he in his present can make it mean: what he can do with it for purposes of his own, which may or may not—and therefore do not have to—coincide with those of the author."⁶⁹⁰

The question moving forward is whether the Supreme Court will make the effort to square its dictum with the historical record. Certainly the Court is within its right to continue down the Standard Model path laid by *Heller*. That path remains one of the three options available as future challenges come before the Court. There are two other options, however, that allow the holdings in *Heller* and *McDonald* to stand, yet guide Second Amendment jurisprudence down a more historically conscious path. All three options will be explored below, including the benefits and consequences of each.

A. Option 1: Standard Model Dictum Wins, History Loses—But Should It?

One of the first lessons that law students learn is that court precedent is more persuasive than secondary sources. Whether the secondary source is a legislative record, legal dictionary, legal treatise or law review article, precedent is the foremost guidepost by which the judiciary decides cases and controversies. When the case is Supreme Court precedent, there is no higher source. The reason why lawyers rely more on precedent than secondary sources lies in its predictability and reliability. It is important for legislative bodies and the people to be informed of the means and bounds by which the law operates, especially the powers of the legislature and the rights of the people.

689. POCOCK, *supra* note 122, at 7 (emphasis added).

690. *Id.* (emphasis added).

If one applies this simple “lesson” to Second Amendment jurisprudence, it is fair for advocates to argue that *Heller* and *McDonald’s* texts comprise the central guidepost from which all future Supreme Court decisions must be decided. This guidepost includes the dictum that facially endorses the Standard Model view.⁶⁹¹ If this is the case, scholarship endorsing that bottom line should receive persuasive primacy as well, thus making *Heller* and *McDonald’s* dicta a jurisprudential springboard from which other Second Amendment rights will be acknowledged. Meanwhile, any scholarship that criticizes or is inconsistent with the Standard Model should be discarded as inconsistent with Supreme Court precedent.⁶⁹²

The following jurisprudential construct is exactly what advocacy groups like the Second Amendment Foundation⁶⁹³ advance. Their briefings draw heavily from sections of *Heller* and *McDonald’s* dicta, and are then supplemented with Standard Model historiography. In these instances, they discard historical objectivity and accuracy.⁶⁹⁴ This is understandable, seeing that it is neither the goal nor duty of the advocate to be a historian, nor has it ever been.⁶⁹⁵ If anything, the advocate is the anti-historian, for the advocate’s entire purpose is to pick and choose evidence that places his or her client in the best position.⁶⁹⁶ And in an adversarial system such as ours, in many cases both sides advance false notions of history, leaving it solely to the judiciary to retain some sense of historical consciousness.

Historians are not aloof to the adversarial system, nor do historians naïvely believe that the judiciary will get history right all the time. This does not mean historians cannot educate the judiciary about poor historical paradigms in an attempt to preserve our past.⁶⁹⁷ This especially holds true when a paradigm will lead to major historiographical consequences. It is part of the historian’s role to ensure that the judiciary remains cognizant of its historical duty, for

691. See *supra* notes 5–8 and accompanying text.

692. See, e.g., Plaintiffs-Appellants Reply Brief at 4-5, *Shepard v. Madigan*, No. 12-1788 (7th Cir. 2012).

693. See, e.g., Appellants’ Reply Brief, *Moore v. Madigan*, No. 12-1269 (7th Cir. 2012).

694. Charles, *Historical Guideposts*, *supra* note 18, at 11.

695. Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

696. Melton, *supra* note 95, at 382.

697. See Paul Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77-78 (1963).

by selecting history “X” as true, the judiciary props up the belief that it is.⁶⁹⁸ As historian David Thomas Konig aptly puts it:

When [myths are] given constitutional status, these invented traditions become norms, and they reinforce popular beliefs Put bluntly, once a court uses the past as a foundation for an opinion, the court redefines the meaning of the past and gives a new, expanded use for that past to a court with a much broader jurisdiction—the court of public opinion, whose black letter law is the dreaded conventional wisdom. When judges re-write history, they give it legitimacy that serves their needs and the needs of the regime they lead. That is, historical argument, when employed to give a decision more constitutional authority, confers social and political constitutive authority.⁶⁹⁹

Herein lays the problem with the Supreme Court seemingly endorsing the Standard Model view.⁷⁰⁰ It has propped up the belief that “arms” are the centerpiece of the Second Amendment in both private and public.⁷⁰¹ This runs in direct contradiction to the key maxim behind the right to arms—“every citizen is a soldier, and every soldier a citizen.”⁷⁰² The ancient Machiavellian principle⁷⁰³ does not stand for the notion that every person be able to carry “common use” weapons, in both public and private, to deter crime and prevent invasions twenty-four hours a day.⁷⁰⁴ Instead, it emphasized that in a

698. Konig, Heller, *Guns, and History*, *supra* note 12, at 177.

699. *Id.* at 177-78.

700. For a discussion on the Second Amendment and popular constitutionalism, see Blocher, *supra* note 17.

701. *See, e.g.*, Kates, *supra* note 137.

702. *See, e.g.*, *Militia of the United States*, *supra* note 674, at 361 (“But is not our wish to turn citizens into soldiers in time of peace. The object of our military establishments, on the contrary, is to preserve to us the enjoyment of our civil blessings. . . . The term citizen soldier accurately conveys the character of an American militia man: and the constitutional object and design of his enrollment and instruction cannot be better expressed, or defined, than by the use of those convertible terms. The citizen soldier of peace is to become the soldier citizen of war; but, neither in peace nor war, is the character of either the citizen or soldier to be merged in the other. Thus will the principles of military subordination contribute to the good order of civil society, and the pride of honorable distinction furnish new incentives to virtuous efforts.”).

703. For a history on the Machiavellian influence on the right to arms, see POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 362, at 124, 137, 148, 176, 201-3, 209, 231-32, 240, 244, 248, 263, 272-73, 289-95, 306-7, 312, 317, 293, 410-20, 427, 431-32, 435, 442, 450, 458, 507, 528. For a discussion on the use of arms in the public discourse, including the hue and cry, see *supra* Part II.

704. One recent judicial opinion improperly inferred that the Second Amendment ensures we “have a lawfully armed populace” that “makes it less likely that a band of terrorists could make headway in an attack on any community before more

well-regulated society there was a time and a place to take up arms in the advancement of government,⁷⁰⁵ i.e. through a well-regulated militia, and there was a time and a place to return to civil society.⁷⁰⁶ In either instance, obedience and support of just government were the end goals, not individual preferences.⁷⁰⁷

Maintaining historical accuracy in this regard is not something only historians should care about. Seeing that jurisprudence relies on history for accuracy, it is also important that the judiciary make the attempt to get history right.⁷⁰⁸ At the same time, it is equally important that the judiciary adhere to its own precedent and rationales supporting it. The question moving forward is how should the two necessities of accuracy and legitimacy be balanced? On the one hand, to give *Heller* and *McDonald's* dictum complete weight would lead to the continuance of numerous historical inaccuracies. On the other, to give no weight might call into question the Supreme Court's legitimacy. Here again, the point of this Article is not to question *Heller's* holding of armed self-defense in the home with a handgun. It is to merely point out that the Court is holding a double-edged sword.

professional forces arrived.” See *Nordyke v. King*, 563 F.3d 439, 464 (9th Cir. 2009) (Gould, J., concurring), *vacated en banc*, 575 F.3d 890 (9th Cir. 2009).

705. This is what the founding generation referred to as the “public good.” For a working example in late eighteenth century literature, see Charles, *Scribble Scrabble*, *supra* note 9, at 1824-29. For historical analysis on the founding generation's view of a well-regulated society, see Charles, *supra* note 62, at 490-517.

706. The principle is immortalized by the story of the River Rubicon. In Roman times, it was unlawful for armies to cross the Rubicon. Any soldier that disobeyed this law was declared a public enemy. To remind soldiers of their duty to the state, and the importance of civil regulation or arms bearing, an inscription was erected, stating, “If any general, or soldier, or tyrant in arms whosoever thou be, stand, quit thy standard, and lay aside thy arms, or else cross not this river.” See CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 114. This is also reflected in state Second Amendment analogues placing the civil authority superior to the military. See *supra* note 657.

707. See Charles, *supra* note 15, at 86-102; CHARLES, THE SECOND AMENDMENT, *supra* note 3, at 97-130.

708. See *Ogden v. Saunders*, 25 U.S. 213, 332 (1827) (Marshall, C.J., dissenting) (“Much, too, has been said concerning the principles of construction which ought to be applied to the Constitution of the United States. On this subject, also, the Court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; *that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended*; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; is to repeat what has been already said more at large and is all that can be necessary.” (emphasis added)).

It does not help matters moving forward when *Heller's* dictum only sharpens the sword.⁷⁰⁹ At numerous sections, the majority contradicts itself in terms of methodology, historical accuracy, and conclusion. A few examples are listed below in Chart I.

CHART I—*Heller's* CONFLICTING DICTA

	STATEMENT 1	STATEMENT 2	CONFLICT
OUTSIDE OF HOME DICTUM	“[T]he right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.” 554 U.S. at 594.	“From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 554 U.S. at 626.	If the Second Am-endment protects against both “public and private violence,” yet does not extend to “any weapon” in “any manner,” what is the scope of the right beyond the home? Does judicial balancing or history determine the answer?
MILITIA DICTUM	“[I]f . . . the <i>organized</i> militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny.” 554 U.S. at 600.	“[N]o one supporting [the individual right] interpretation has contended that States may not ban such [paramilitary] groups.” 554 U.S. at 620.	How can the Second Amendment protect a “citizens’ militia” separate from government, yet allow the states to ban paramilitary or independent military groups?
HISTORICAL METHODOLOGY DICTUM	“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the	“But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than <i>Reynolds v. United States</i> , 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter	Does the presumption of constitutionality solely apply to the list provided by the <i>Heller</i> majority or to all gun control regulations seeing that the Court did not “clarify the entire field”? Also, what is the historical burden of proof necessary to support a “longstanding prohibition”? Does the

709. For critiques of *Heller's* dictum, compare Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012), with Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in McDonald v. City of Chicago*, 63 FLA. L. REV. 487 (2011).

carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. at 626–27.	certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.” 554 U.S. at 635.	burden fall upon the government to show a “historical tradition” of regulation or to the challenger to prove a history of perceived unconstitutionality?
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Chart I illustrates a serious problem with relying on *Heller’s* dicta—confusion and unpredictability.⁷¹⁰ Lower courts have been forced to balance and choose which dicta to rely upon or give primacy, which in turn has led to a myriad of analyses.⁷¹¹ The lower courts’ conflicting precedents are reason enough to discard most of *Heller* and *McDonald’s* dicta and start anew. Discarding *Heller* and *McDonald’s* dicta would leave the Court’s core holding—armed self-defense in the home with a handgun—untouched, yet ensure each Second Amendment case or controversy is given its proper consideration in light of the historical evidence.⁷¹² As Chief Justice John Marshall aptly put it:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their

710. In addition to Chart I, see Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008).

711. For some critiques on the different standards of review employed by the lower courts, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water (Mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009); Darrell Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489 (2012); Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425 (2009).

712. I have referred to this in past writings as the “historical guidepost” approach. See Charles, *Historical Guideposts*, *supra* note 18, at 21-27.

relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.⁷¹³

In other words, jurists should tread cautiously in applying either needless or conflicting dicta to future cases and controversies. It ensures the judiciary's primary virtues of accuracy and legitimacy are met and sustained.⁷¹⁴ And if one applies this rule of thumb to *Heller* and *McDonald* it means discarding the Court's "general expressions" in subsequent suits.⁷¹⁵ There are many ways to distinguish what constitutes an opinion's general expressions from the necessary analytical foundations. It is generally accepted, however, that a court will examine the material facts of a prior case and the legal analysis concerning those facts when distinguishing dictum from holding.⁷¹⁶

Seeing that *Heller* and *McDonald* were both about whether armed self-defense in the home, with a handgun, was within the constitutional scope of the Second Amendment, this would require the reexamination of all statements unnecessary to this outcome. Now there is room for debate as to which statements and analyses by the Court qualify in this regard,⁷¹⁷ but there is general agreement by the lower courts that neither the facts nor holding of either case had anything to do with the Second Amendment as a militia right or outside the home.⁷¹⁸ And in the case of *McDonald*, references to both hunting rights and the Amendment's "well regulated militia"

713. *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821).

714. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000-09 (1994).

715. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935); see also *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (stating that broad language "cannot be considered binding authority").

716. *United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988).

717. At least one Standard Model writer, Nelson Lund, has expressed disfavor with *Heller's* dictum, albeit for different reasons than this Article sets out. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

718. For some lower courts that have stated that neither *Heller* nor *McDonald* defined the scope of the Second Amendment outside the home, see *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012); *United States v. Mahin*, 668 F.3d 119, 122-23 (4th Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 466 (4th Cir. 2011); *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1100 (C.D. Ill. 2012); *Shepard v. Madigan*, 863 F. Supp. 2d 774, 777 (S.D. Ill. 2012). However, a minority of federal district courts has relied on *Heller's* dictum to extend the Second Amendment beyond the home. See *Moore v. Madigan*, 2012 U.S. App. LEXIS 25264 (7th Cir. 2012); *Bateman v. Perdue*, No. 5:10-cv-265-H, 2012 U.S. Dist. LEXIS 47336, at *11-12 (E.D.N.C. Mar. 29, 2012); *United States v. Weaver*, No. 2:09-cr-00222, 2012 U.S. Dist. LEXIS 29613, at *11 (S.D. W. Va. Mar. 7, 2012).

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language were noticeably absent, further illustrating the narrowness of the holding.⁷¹⁹

The dictum problem is not limited the Court's conflicting statements on the Second Amendment's scope. The problem also presents itself in terms of historical methodology, particularly in terms of what role, if any, historical evidence should play in defining the Second Amendment right. If one follows the methodology employed by the *Heller* majority, historical sources should be reasonably adapted to support modern conceptions of the right to arms.⁷²⁰ In *McDonald*, however, it seems the majority backed off from this "pathetic fallacy"⁷²¹ by admitting there is "room for disagreement about *Heller's* analysis of the history of the right to keep and bear arms."⁷²² Indeed, the *McDonald* majority did not reexamine the historical record, but this was due to the fact that *McDonald* contained the same constitutional question as *Heller*, not because history should not be given its due weight.

Justice Scalia's *McDonald* concurrence sheds important light on this point. In *Heller*, Scalia stated that the Court's historical analysis was not "exhaustive," and that it would "expound upon the historical justifications" in future cases or controversies.⁷²³ Here, Scalia left open the question of how historical evidence was to be utilized for future Second Amendment controversies. In *McDonald*, however, Scalia elaborated on the use of history for constitutional adjudication:

Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it. I will stipulate to that. But the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world. Or indeed, even more narrowly than that . . . I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First

719. For the absence of hunting from *McDonald*, compare *Heller*, 554 U.S. at 599, with *McDonald*, 130 S. Ct. at 3021-88. For the absence of the Second Amendment's "well regulated militia" language from the opinion, see *McDonald*, 130 S. Ct. at 3108, 3113.

720. See *supra* Part I for discussion.

721. This is Herbert Butterfield's term for interpreting text loosely. See BUTTERFIELD, *supra* note 117, at 30.

722. 130 S. Ct. at 3048 (2010).

723. 554 U.S. at 626, 635.

Principles whose combined conclusion can be found to point in any direction the judges favor. In the most controversial matters brought before this Court . . . *any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion. Moreover, the methodological differences that divide historians, and the varying interpretive assumptions they bring to their work, are nothing compared to the differences among the American people (though perhaps not among graduates of prestigious law schools) . . .

⁷²⁴

On the one hand, Scalia informs us that history will have an important role to play in jurisprudentially defining the Second Amendment moving forward. Yet, on the other, many questions about methodology are left unanswered. For instance, who qualifies as a “historian”—members of historical academia, those who write works accepted by historical academia, or any amateur historian without academic approval? How much evidence is required to meet Scalia’s “body of evidence susceptible of reasoned analysis”? Does the evidence have to affirmatively state what its author’s claim, i.e. total historical context, or can it be susceptible to any modern interpretation? Lastly, what “historical methodolog[ies]” are acceptable, and which are not, to meet the “plausible standard of proof”?

The answers to these questions are taken up in Part III.B. It provides the Court with two historical paradigms that respect both historical methodologies and the evidentiary record.

B. Options 2 and 3—the Judiciary, Historical Consciousness, and Preserving the Historical Record

There is no denying that history and constitutional interpretation have a love-hate relationship.⁷²⁵ As long as there have been politicians, lawyers, and legal academics, historical pieces of evidence have been used to advocate for “X” or “Y” in order to advance

724. 130 S. Ct. at 3057-58 (Scalia, J., concurring).

725. See Kelly, *supra* note 131; Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J.L. & POL. 809 (1997); see also Jonathan Lahn, *The Uses of History in the Supreme Court’s Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233 (2006) (discussing the objective and context problems of the use of history for takings clause jurisprudence); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 897 (2002) (arguing the Supreme Court’s use of history for Fourth Amendment adjudication is unpredictable).

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certain ideals.⁷²⁶ Even should some professional guidelines be adopted as to hold advocates and legal academics accountable for advancing false notions of history, the practice will never stop. Of course this does not mean our jurisprudence should needlessly embrace false notions of history. It is here that the judiciary plays historical gatekeeper, and serves the vital role of preserving the Constitution's historical origins for both present and future generations.

It is indeed impossible for the judiciary to get history right all the time. Errors will be made either through insufficient pleadings, the use of ideological scholarship masquerading as "history," the lack of a historical consensus on a subject matter, and even the judge's own personal bias. The best anyone can hope for is that jurists maintain some form of historical consciousness when interpreting the Constitution. This requires understanding the Constitution's historical origins and sins before importing the past for use in the present.⁷²⁷ In other words, the past must be understood by its own terms and on the face of the record, not what can be inferred or created.

To maintain "historical consciousness" is *not* necessarily the same as using one's "historical imagination." The two are distinct in terms of what the evidentiary record provides. The latter is theoretical, which can be dangerous in terms of building a historically objective foundation. Moreover, it often involves importing the societal conditions of the past piecemeal as a means to better understand our present.⁷²⁸ Meanwhile, the former is based on total historical context, a substantiated evidentiary foundation, and being true as to what the historical record provides.⁷²⁹ In other words, historical consciousness requires a "generalized awareness of the structure and behavior" of the society's past as a whole.⁷³⁰

726. See *supra* note 102 and accompanying text.

727. See J.G.A. Pocock, *British History: A Plea for a New Subject*, 47 J. MODERN HIST. 601, 614-15 (1975) (discussing the importance of historical consciousness).

728. See BUTTERFIELD, *supra* note 117, at 16 (discussing how this approach to history is whiggish).

729. See *supra* Part I.B.4 for working examples.

730. POCKOCK, *supra* note 106, at 148. At least one post *McDonald* concurrence has agreed with this approach. See *Ezell v. City of Chicago*, 651 F.3d 684, 714 (7th Cir. 2011) (Rovner, J., concurring) ("If [the courts] are to acknowledge the historical context and the values of the period when the Second and Fourteenth Amendments were adopted, then we must accept and apply the full understanding of the citizenry at that time.").

Applying this basic construct to constitutional jurisprudence, there are two interpretational options available for the courts to preserve the historical record. The first is the importation of accepted *historical methodologies wholesale*, and the second is the responsible use of *historical guideposts*. Each will be taken in turn.

Of the two, the more difficult option would be to import of accepted historical methodologies wholesale. What this entails is the interpretation, understanding, and application of historical evidence in total historical context.⁷³¹ The judiciary can neither read nor infer interpretational constructs that are not there or use its “historical imagination.” If the judiciary should feel the need to fill any historical gap(s), it must rely on *accepted* historical works to do so.⁷³² An accepted work is not one that a respective jurist agrees with, but a work that garnered a consensus among academic historians in the field.⁷³³

If one applies this interpretational option to Second Amendment jurisprudence, the Standard Model, as currently constituted, must be cast out as untenable. This would not require the Supreme Court to overrule its previous holdings in *Heller* and *McDonald*.⁷³⁴ It just means that both opinions’ dicta are historically problematic moving forward. As discussed throughout Parts I and II, the Model is built upon a poor foundation and its historical claims break the bounds of historical elasticity many times over.⁷³⁵ It is the persistence of these methodological errors that prevents the Model and its writers from garnering a consensus among historians. Indeed, there are a few historians who prescribe to the Model, including Joyce Lee Malcolm

731. Skinner, *supra* note 31, at 214.

732. At least one Supreme Court Justice, Stephen Breyer, seems to agree with this approach. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 77 (2010) (“If there is no historical material directly on point, what should the Court do? Create historical ‘assumptions’ designed to draw answers from a historical void? Or refuse to answer a question of practical importance . . . on the basis of a skimpy, uncertain record of eighteenth century practice? If the Court is to decide major constitutional questions on the basis of history, then why not ask nine historians, rather than nine judges, to provide these answers?”).

733. I do not disagree with David B. Kopel and Clayton Cramer, who argue that historical “[f]acts are facts, no matter who writes about them.” Kopel & Cramer, *supra* note 320, at 378. However, when claiming that a conclusion is a historical fact, they need to be proven through accepted historical methodologies, which in turn will receive the approval of academia.

734. See *supra* Part III.A, discussing how the holdings in *Heller* and *McDonald* can be jurisprudentially squared.

735. See *supra* Parts I and II.

and Robert Cottrol, but acceptance by a few academic historians is not a consensus. It is an insular minority.

Certainly, the wholesale adoption of historical methodologies is not without objectivity concerns. For one, the use of history to adjudicate the law can often lead to more questions than answers, including the difficulty of accepting the moral opinions of generations prior as guiding the present.⁷³⁶ In many instances, what was deemed moral in the eighteenth century is no longer moral today.⁷³⁷ As Kent Greenawalt aptly put it, “Customary law depends on existing customary practice. What has once been a rule of customary law can cease to be so if customary morality or practice alters radically.”⁷³⁸ Thus, *solely* relying on history to interpret the Constitution fails in that it does not take into account the evolution of legal customs, particularly as guided by judicial precedent.⁷³⁹

Another objectivity concern is whether jurists will know which historical pieces to credit and discredit.⁷⁴⁰ As historian Saul Cornell has pointed out, the varieties of interpretation that can be found in any historical era are voluminous.⁷⁴¹ Not every statement or interpretation can be reasonable or consistent with the intent of the Constitution. This dilemma only multiplies when legal scholarship masquerades as objective history. Search engines have made it easy for any advocate, clerk, or jurist to cut methodological corners by searching for and finding an interpretation with which they agree. Of course, if the rule regarding *accepted* historical works is followed, this problem should be extinguished. Yet this author and others have doubts that the judiciary will always exercise due diligence in locating, reading, and digesting the relevant and accepted historical works.

It is due to these concerns that a third interpretational option would be more prudent. Known as a historical guidepost approach, it operates on the presumption that the past and the present are not one and the same.⁷⁴² The past is only to be applied to a legal case or

736. See RONALD DWORKIN, *LAW'S EMPIRE* 363-65 (1986) (discussing the difficulty in conducting historical analysis with integrity).

737. See *id.* at 387-99 (discussing the different outcomes of *Brown v. Board of Education* should one apply different objectivity theories, including originalism).

738. KENT GREENAWALT, *LAW AND OBJECTIVITY* 183 (1992).

739. Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 452-55, 474-95 (1984).

740. This was Justice Stevens' concern. See *McDonald*, 130 S. Ct. at 3116-18 (Stevens, J., dissenting).

741. See Cornell, *Originalism on Trial*, *supra* note 12, at 626-31.

742. Charles, *Historical Guideposts*, *supra* note 18, at 21-27.

controversy in the context of what is affirmatively proven. Meanwhile, what remains unknown, i.e. what the historical record does not prove on its face, is not *explained away* in an attempt to ideologically prop up modern ideals.⁷⁴³ This means that the judiciary needs to be honest and forthright in staking out the unknown, which in turn preserves the historical record.⁷⁴⁴ To do otherwise would let the imaginative processes dictate history—a premise that is in direct conflict with the concept of historical consciousness.

What weighs in favor of a historical guidepost approach is that it has already gained traction in the Supreme Court. Just last year, in *Brown v. Entertainment Merchant Association*, the Court surveyed the historical record to weigh the constitutionality of a California statute prohibiting the sale or rental of violent video games to minors.⁷⁴⁵ In particular, the Court held that the statute was outside of scope of the California legislature's powers, stating "new categories of unprotected speech may not be added to the list" outside of those prescribed when the Constitution was ratified.⁷⁴⁶ The Court further stated that the protective scope of the First Amendment cannot be altered by any legislature "without *persuasive* [historical] evidence" that the "content is part of a long tradition . . . of proscription."⁷⁴⁷

A year earlier, the Court applied a similar approach in *United States v. Stevens*, when it struck down a federal statute that criminalized depictions of animal cruelty.⁷⁴⁸ In the process, the government's invitation to hold that depictions of animal cruelty are categorically unprotected by the First Amendment was rejected. The Court instead stressed that it is disinclined to recognize new categories of unprotected speech.⁷⁴⁹ Writing for an 8-1 majority, Chief Justice Roberts suggested that speech will be deemed

743. For a discussion on what constitutes as explaining away history, see *supra* Part I.B.5.

744. To accomplish this objective the Supreme Court has the authority to request court appointed amicus briefs. See *United States v. Providence Journal Co.*, 485 U.S. 693, 703-04 (1988) ("[I]t is well within this Court's authority to appoint an amicus curiae to file briefs and present oral argument in support of that judgment.").

745. 131 S. Ct. 2729 (2011).

746. *Id.* at 2734.

747. *Id.* (emphasis added).

748. 130 S. Ct. 1577 (2010). The challenged statute, 18 U.S.C. § 48, was aimed primarily at the interstate market for "crush videos," which depict women slowly crushing small animals like mice or hamsters to death "with their bare feet or while wearing high heeled shoes," sometimes while "talking to the animals in a kind of dominatrix patter." *Id.* at 1583 (quoting H.R. Rep. No. 106-397, at 2 (1999)).

749. *Id.* at 1586.

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categorically unprotected only if it has so been treated by longstanding historical tradition:

Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.⁷⁵⁰

If one applies this jurisprudential approach to the Second Amendment, it stipulates that the federal and state legislatures retain the authority to regulate arms, in both public and private, if there is evidence that there has been a “long tradition” of regulation in the prospective area. And if what constitutes a “long tradition” is the equivalent of regulations dating back to the eighteenth century, this means that legislatures have deference to pass gun control laws that protect the public against injury, aliens, hunting, felons and the mentally ill, the carrying of arms in public, concealed weapons; that limit the types of arms individuals may possess, the transportation of arms, and the discharging of arms in public.⁷⁵¹ These were all areas of regulation that are consistent with the founding generation’s perception of the “public good.”⁷⁵²

This leads us to the question: “What kind of legislative deference should be given to regulate on these areas?” As it stands today, a number of Circuit Courts have answered this question by adopting a historical test that extinguishes the Second Amendment claim should the challenged conduct fall *outside* the scope of the right circa 1791.⁷⁵³ It is only when the conduct falls *within* the protective scope of the Second Amendment that the court applies “some level of ‘means-ends’ scrutiny to establish whether the regulation passes

750. *Id.*

751. See Charles, *Historical Guideposts*, *supra* note 18, at 23-25.

752. See Charles, *Restoring*, *supra* note 62, at 502-17; Charles, *Scribble Scrabble*, *supra* note 9, at 228-35.

753. The First, Third, Fourth, Seventh, and Tenth Circuits have adopted this approach. See *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 35 (3d Cir. 2010); *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009).

constitutional muster.”⁷⁵⁴ To date, however, only a few federal courts have decided a Second Amendment case or controversy by applying the historical test.⁷⁵⁵

This essentially leaves open the question of how the Supreme Court should weigh and assess historical regulations into Second Amendment jurisprudence. On the one hand, the Court could place the burden on the challenging party to provide historical evidence that the above mentioned areas of regulation were perceived as violating the right to keep and bear arms. On the other hand, the Court could place the burden on the government to show a “long tradition” of regulation. Wherever the burden is placed, the Court’s test should be flexible enough⁷⁵⁶ as to allow legislatures to update or tailor the “long tradition” of regulation by taking into account the capabilities of modern weapons and firearms.⁷⁵⁷

Most importantly, when incorporating, analyzing, and applying historical guideposts to Second Amendment jurisprudence the Court needs to remain cognizant as to what the evidence does and does not provide. Just because an eighteenth century legislature required persons to carry arms to church for militia training, to quell slave revolts, and suppress Indian attacks, does not mean the founding generation perceived it to be a right to carry arms to church.⁷⁵⁸ The Court needs to understand that laws like these reflect the government’s power to array, arm, and muster its militia accordingly for the common defense, not that an armed citizenry is the equivalent

754. *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010).

755. *See United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012) (upholding firearm prohibitions on unlawful aliens based upon historical evidence); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (upholding New York’s gun licensing scheme based upon historical evidence of regulation); *NRA of Am. V. Bureau of Alcohol*, 700 F.3d 185 (5th Cir. 2012) (upholding federal prohibition on sale of firearms to persons under 21 years of age based on historical evidence). However, the majority of cases rely on “means-ends” scrutiny despite the fact that the historical test is meant to be flexible. *See United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (stating that modern gun control regulations do not need to “mirror” 1791 restrictions).

756. Charles, *Historical Guideposts*, *supra* note 18, at 15 (“It will be a rare occasion that a modern Second Amendment issue, case, or controversy will exactly replicate eighteenth century facts or restrictions on the ‘right to keep and bear arms’ circa 1791. However, this should not disparage that there existed longstanding political and philosophical restrictions on arms circa 1791.”).

757. For a “social costs” discussion between eighteenth century and modern firearms, see Charles, *The Faces*, *supra* note 9, at 45-48.

758. *See, e.g., An Act for the Better Security of the Inhabitants, By Obliging the Male White Persons to Carry Fire Arms To Places of Public Worship* (Ga. 1770), in *A DIGEST OF THE LAWS OF THE STATE OF GEORGIA* 157-58 (1800).

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of a well-regulated militia, or that the people have an individual right to enforce the law through armed force.⁷⁵⁹

The same holds true with historical evidence showing the founding generation owned pistols or loved arms. Just because eighteenth century persons owned, used, and loved arms does not mean it was perceived to be a constitutional right to do “X” or “Y” with arms.⁷⁶⁰ The distinction is important. Today most people prefer to drive over the speed limit and jaywalk at their leisure.⁷⁶¹ However, just because people prefer or love to do these things, it does not stand for the proposition that it is their constitutional right to do so and the legislatures should be prohibited from passing laws in advancement of the public good.

Therefore, it cannot be stressed enough that when applying a historical guidepost approach to constitutional interpretation, the Court needs to remain historically conscious of what the evidence *actually* provides in understanding the eighteenth century rule of the law. Let us return again to the Statute of Northampton, which prohibited the act of carrying dangerous weapons in the public concourse.⁷⁶² From the fourteenth century to the nineteenth century, the Statute’s tenets were enforced in England, Wales, Ireland, the American colonies, and the subsequent American states.⁷⁶³ Throughout this entire period of history, historians, legal academics, and Standard Model writers have not found *any* evidence that this prohibition was a violation of the right to have, keep, or bear arms. There have indeed been modern misinterpretations of the Statute’s prosecutorial scope by legal academics,⁷⁶⁴ but this was due to poor research and spinning historical text to make up for their methodological deficiencies.⁷⁶⁵

759. For a discussion, see *supra* Part II.

760. See, e.g., Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime, and Public Safety in Early America*, 44 WILLAMETTE L. REV. 699 (2008) (showing that eighteenth century persons owned pistols, but ahistorically claiming there were “no apparent limitations concerning handguns” as compared to other firearms).

761. William Schultz, *Would You Drive 55?*, TIME, July 25, 2008 (claiming that only twenty percent of the American population follows the highway speed limits).

762. 2 Edw. 3, c. 3 (1328) (Eng.).

763. Charles, *The Faces*, *supra* note 9, at 7-41.

764. See *supra* note 424.

765. See, e.g., Dowlut & Knoop, *supra* note 359, at 202 n.105 (explaining away the Statute of Northampton with limited research).

This still leaves open the question whether jurists can distinguish *real* from *faux* history.⁷⁶⁶ Again, a legal database search can turn up any number of law review articles that support preferred stance “X” or “Y.”⁷⁶⁷ Yet, how is a jurist to know whether stance “X” or “Y” is historically viable or has been rebutted through accepted historical methodologies? Does the jurist even understand historical methodologies in the first place? Certainly, one cannot expect jurists to look at a law review article’s footnotes and decipher whether the author’s claim is historically credible. For the most part (but not always), only historical experts in the field at question are capable of pinpointing these deficiencies. This is why professional history journals require some form of peer review before publication. Law reviews, however, work much differently. Law students with virtually little, if any, knowledge of historical subjects or methodology are selecting, cite checking, and reviewing so-called “history.” How are law students to know that their prospective author is citing to and relying on works that have proven to be historically false and are based on poor methodologies?⁷⁶⁸

And given these concerns, it is fair to argue that any historical approach to adjudicating the Second Amendment is objectively problematic. Seeing that our constitutions and precedent are history in themselves, however, the need to use history for constitutional jurisprudence, in some form or fashion, is undeniable.⁷⁶⁹ Given that the importation of historical methodologies wholesale results in more problems than solutions,⁷⁷⁰ the use of history for constitutional

766. For a discussion on the difficulty of using history in context to adjudicate cases and controversies, see William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986).

767. See, e.g., *State v. Christian*, 274 P.3d 262, 286 (Or. Ct. App. 2012) (Armstrong, J., dissenting) (stating commentators are “split as to the interpretation” of the Statute of Northampton, yet never comparing the evidentiary foundation and research methodology of the different commentators).

768. See *supra* note 13.

769. Charles, *Historical Guideposts*, *supra* note 18, at 11-13; Richards, *supra* note 725, at 890; see also Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745 (2006) (showing a consistent use of the First Congress’s records by the Supreme Court since 1803); Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555 (1938) (discussing the use of history for constitutional interpretation); Robert M. Spector, *Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method*, 12 AM. J. LEGAL HIST. 181 (1968).

770. See *supra* Part II.

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interpretation must adhere to a guidepost approach.⁷⁷¹ Of course, like any jurisprudential test, the guidepost approach is not perfect, but it is a starting point to adjudicating the Second Amendment consistent with historical tradition and preserving the historical record so long as the following guidelines are followed:

1. Historical sources must be read and understood in total historical context, not merely presented as some “random collections of facts which might seem to bear on it.”⁷⁷² The ultimate goal of the Supreme Court is to *avoid* “law office history” or the use of evidence in such a way as to distort the historical record.⁷⁷³
2. Eighteenth century legal understanding should *first* be discerned in terms of longstanding policies or restrictions—philosophical, ideological, and political—on the use of arms in both public and private.⁷⁷⁴ This provides the legal presumption or standard of scrutiny by which the Court can adjudicate modern laws restricting the use of arms.⁷⁷⁵
3. The legal presumption can be defeated with proof that such policies or restrictions were unconstitutional. This requires historical evidence facially stating that such policies or restrictions were unconstitutional or a serious impediment on the right to have, keep, or bear arms. The legal presumption *cannot* be defeated with historical inferences or one’s historical imagination. It can only be defeated by substantiated evidence that policy or restriction “X” was deemed unconstitutional or a serious impediment on the right.
4. If the legal presumption is defeated, a higher level of scrutiny applies.

What differentiates the historical guidepost approach from the adoption of historical methodologies wholesale is that the latter would require discarding *Heller* and *McDonald’s* dictum altogether. Meanwhile, the former will iron out *Heller’s* dictum case by case. It

771. See, e.g., Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 538-40 (2006).

772. Skinner, *supra* note 31, at 204.

773. Murphy, *supra* note 697, at 77.

774. Charles, *Historical Guideposts*, *supra* note 18, at 14.

775. The legal presumption or standard of scrutiny can be applied in a number of ways. For a categoricalism approach, see Blocher, *supra* note 711. For a historical balancing approach, see Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017288. For a traditional level of scrutiny approach dependant on historical category, see Charles, *Historical Guideposts*, *supra* note 18, at 21-33.

will give historians, legal academics, and Standard Model supporters the time to explore and debate the subject further while allowing the courts to move ahead with Second Amendment jurisprudence. In other words, the historical guidepost approach is what will best facilitate an open discourse about the past with accepted historical methodologies. This approach allows the free press to serve as a historical pendulum of truth as the founding generation intended.⁷⁷⁶

In the words of John Toland:

[T]he more important any Controversy is, the more Reasons there is for the Liberty of the Press, that [the people] may examine with all diligence imaginable the Tenets of their adversaries as well as of their Guides; and that the more they heard the one Party, the more they should read the other; and that if they fall into any Error by so doing, they would not be accountable for it.⁷⁷⁷

CONCLUSION

Writing in 1989, Sanford Levinson wrote “it will no longer do” for “members of the legal academy” to “treat[] the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable,” amendments in the Constitution.⁷⁷⁸ Thus, to Levinson, it is *embarrassing* not to “take rights seriously” in light of their text, history, and tradition.⁷⁷⁹ Historians maintain no qualms with these statements so long as the historical record is respected and preserved in the pursuit. When the historical record is manipulated to achieve ahistorical ends, however, is it not equally if not more embarrassing? Does not the Standard Model qualify as an embarrassment in this regard?

Historians understand that in our adversarial system it is accepted that arguments will be advanced that stretch the foundation of law and history so that the respective party can succeed on the merits. In this pursuit, history will be carefully tailored to comport with a desired end. This scenario alone thrusts the judiciary in the position of historical gatekeeper whether it wants to acknowledge it or not. It is not a duty that judges should ever take lightly, for the picking and choosing of history can have far-reaching consequences.

⁷⁷⁶ Charles & O’Neill, *supra* note 43, at 14-16, 22, 52-53.

⁷⁷⁷ JOHN TOLAND, A LETTER TO A MEMBER OF PARLIAMENT, SHEWING, THAT A RESTRAINT ON THE PRESS IS INCONSISTENT WITH THE PROTESTANT RELIGION, AND DANGEROUS TO THE LIBERTIES OF THE NATION 14-15 (London 1698).

⁷⁷⁸ Levinson, *Embarrassing*, *supra* note 192, at 658.

⁷⁷⁹ *Id.*

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Of course, the consequences are not limited to Second Amendment. The lack of a historically conscious judiciary can equally impact other constitutional provisions so far as to amend the Constitution itself, and even impact future generations' understanding of our past. Unless the Supreme Court is willing to engage historians when presented with controversial history or accept their methodologies wholesale (both of which are doubtful), the best the Court can do is use history as a responsible guidepost. Oliver Wendell Holmes knew this when he wrote that the "consult[ing] of history and existing theories of legislation" was "the most difficult labor" for any judge.⁷⁸⁰ It required linking the past with the present, yet being able to distinguish the two responsibly.

Again, historians understand this burden and accept that the Supreme Court will not get history right all the time. The historian's role is limited to furnishing the Court with "complementary modern architectural materials so that [the Justices do] not have to rely upon scrap lumber, salvage bricks, and raw stone for its buildings."⁷⁸¹ In this pursuit, historians must ensure they produce the "most accurate, thoroughly documented, and impeccable history" they are capable of producing.⁷⁸² This in turn places the Court in the best position to remain historically conscious. So long as the Justices respond in kind by not letting their historical imagination overcome what historians have shown to be the historical reality, our jurisprudence will progress in a manner that both acknowledges the importance of our past and preserves it. Hopefully the same can be said for the future of Second Amendment jurisprudence as we move beyond *Heller* and *McDonald*.

780. HOLMES, *supra* note 105, at 5.

781. Murphy, *supra* note 697, at 78.

782. *Id.* at 79.