

**Passages of Arms:
The English Bill of Rights and the American Second Amendment**

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*“Die Weltgeschichte ist das Weltgericht.”
—Friedrich Schiller¹*

I. Introduction

The 1689 Bill of Rights is a major component of the unwritten British constitution, alongside Magna Carta and the 1628 Petition of Right.² The Convention Parliament, not summoned by any monarch, offered the throne to William and Mary in conjunction with their acceptance of the 13 February 1689 (NS) Declaration of Rights

³ Whether William and Mary’s acceptance of the Crown was conditioned on acceptance of the Declaration of Rights is a matter of bluntness. Subtly and conciliatorily, Parliament’s own website history article explains that “[c]ontrary to common belief, Parliament did not present the Declaration to William and Mary as a condition which they had to accept to be made King and Queen.”⁴ The Parliamentary history webpage notes that the Convention Parliament had already, on 6 February 1689, resolved to offer the Crown to William and Mary.⁵ This is true, but it is also true that no offer was conveyed until the grand ceremonial reading of the Declaration of Rights, and when the Declaration was recorded as a statute, the official account of the acceptance appended

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¹ A COMPANION TO THE WORKS OF FRIEDRICH SCHILLER 70 (Steven D. Martinson ed., 2005).

² “With Magna Charta and the Petition of Right it forms the Legal Constitutional Code to which no additions of equal importance (except the Constitutional provisions of the Act of Settlement . . .) have since been made by Legislative enactment.” THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 529 (7th ed. revised by Philip A. Ashworth, 1911) (1879) (“[E]ven the greatest of these [subsequent] enactments—the Reform Act of 1832, supplemented by the Act of 1867—have been of the nature of amendments . . .”).

³ *Id.* at 519–20.

⁴ *The Convention and Bill of Rights*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/overview/billofrights/> (last visited July 25, 2021).

⁵ *Id.*

to the declared rights sounded patently transactional: “Upon which their said Majestyes did accept the Crowne and Royall Dignitie of the Kingdoms of England France and Ireland and the Dominions thereunto belonging according to the Resolution and Desire of the said Lords and Commons contained in the said Declaration.”⁶ A constitutional scholar later described the Convention Parliament’s approach as setting out constitutional principles “in the instrument by which the Prince and Princess of Orange were called to the throne . . . so that the right of the king to his crown and of the people to their liberties might rest upon one and the same title-deed.”⁷ If the Declaration of Rights was not crassly expressed as a condition of the offered Crown, it was nonetheless inextricably bound up with the political and legal conditions under which William and Mary became elective monarchs. If the “common belief” on this point is mistaken, it is perhaps a salutary mistake that keeps non-specialists from missing the larger point.

Historical and legal ambiguity and nuance adhere not only to the circumstance of the 1689 Bill of Rights but also to its Article VII in which the Lords Spiritual and Temporal, and the Commons, declared that their rights and liberties included “[t]hat the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.”⁸ Scholarly debate on this article’s meaning—in history and in law—has raged in America for the last few decades and reached the United States Supreme Court in 2008 in *District of Columbia v. Heller*, a case interpreting the American Constitution’s Second Amendment.⁹ The majority and dissenting opinions engaged in a spirited debate on the relevance of the English Bill of Rights, citing the works of Professor Lois G. Schworer, America’s leading authority on the English Bill

⁶ Bill of Rights 1688, 1 W. & M. 2 c. 2 (Eng. & Wales) <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>.

⁷ TASWELL-LANGMEAD, *supra* note 2, at 520.

⁸ Bill of Rights 1688, 1 W. & M. 2 c. 2 (Eng. & Wales) <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>.

⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

of Rights,¹⁰ and those of Joyce Lee Malcolm, a historian who argued that American colonial leaders believed the liberties of Englishmen included an individual right to bear arms. More specifically, Professor Malcolm argued that Article VII established an individually-held right as part of the British constitution.¹¹ This historical view was juridically ratified by the *Heller* decision.

In a book published after *Heller*, Professor Schwoerer acknowledged the decision's finality in the context of American law, but she maintained that the *Heller* court and Professor Malcolm are wrong regarding certain points of historical fact and their necessary implications. *Gun Culture in Early Modern England*, published in 2016, is a book primarily about the origin and early development of the English firearms industry and the enthusiasm for firearms among the upper crust of English society in Tudor and Stuart England.¹² The book's conclusion, however, is a sustained attack on Professor Malcolm's published views on the meaning and consequence of Article VII.¹³ Although Professor Schwoerer is not a lawyer, her language is prosecutorial: Professor Malcolm "admits" or "confesses" certain things, and her interpretation is "inadmissible."¹⁴ The chapter concludes with a thoroughgoing denunciation of Professor Malcolm's assertion of continuity between the English Bill of Rights and America's Second Amendment: "If the Americans did grant an individual right to arms, as the United States Supreme Court ruled, they got that idea from someplace other than the 1689 English Bill of Rights."¹⁵

¹⁰ LOIS G. SCHWOERER, "NO STANDING ARMIES!" THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (1974); LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689 (1981); THE REVOLUTION OF 1688–89: CHANGING PERSPECTIVES (Lois G. Schwoerer ed., 1992).

¹¹ JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS (1994).

¹² LOIS G. SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND (2016).

¹³ *Id.* at 162–70.

¹⁴ *Id.* at 164, 162.

¹⁵ *Id.* at 170.

Professor Schwoerer refused to yield the historical battlefield in light of the legal defeat. She adhered to the position she stated in a law review article in 2000: “There was no ancient political or legal precedent for the right to arms.”¹⁶

II. A Series of Passages of Arms

Lois G. Schwoerer is Professor Emerita at George Washington University’s Columbian College of Arts and Sciences, and Joyce Lee Malcolm is Professor Emerita at George Mason University’s Antonin Scalia Law School.¹⁷ Both are historians by training and experience; neither is a lawyer. Like the French military officers in Joseph Conrad’s novella *The Duel*, they have exchanged cuts and salvos in books and articles disputing certain historical facts and points of interpretation over the course of many years. They are hardly the lone combatants in this field. Still, they are the champions for each camp on specific points of history relevant to Anglo-American law, to wit, the English Bill of Rights and the scope of private firearms ownership in England in past centuries.

In 1994, Professor Malcolm distilled many years’ work into a book describing her view that the English Bill of Rights of 1689 was a landmark event in Anglo-American legal history. *To Keep and Bear Arms*¹⁸ argued that, broadly speaking, the right of the English population to privately hold arms “was born in 1689.”¹⁹ She considered the characterization of this right in the Bill of Rights as “ancient” as a Whig rhetorical flourish, but she found evidence that the right to

¹⁶ Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 34 (2000).

¹⁷ Not only has the law school been named for the author of *Heller* since 2016, but Professor Malcolm also held an endowed professorship named for Patrick Henry at George Mason University. Those names should serve as a reminder that profound constitutional disputes are as old as the Constitution, as neither George Mason nor Patrick Henry supported ratification of the Constitution.

¹⁸ MALCOLM, *supra* note 11.

¹⁹ *Id.* at ix.

bear arms became widely accepted as a British constitutional principle, which then was imported into the American constitution as a traditionally held right of the people.²⁰

To Keep and Bear Arms was generally well-received and well-reviewed.²¹ In 1994, law professors Robert J. Cottrol and Raymond T. Diamond were among those who favorably reviewed *To Keep and Bear Arms*.²² Their review included considerable comment on eras beyond the temporal focus of *To Keep and Bear Arms*, which contained only a brief “Afterword” on British and American history following the ratification of America’s Second Amendment.

Professor Schwoerer’s 1995 review of *To Keep and Bear Arms* was critical but not entirely dismissive.²³ The review insisted that the 1689 Bill of Rights “did not mean to confer a universal right to possess arms” as evidenced by its “careful limiting language.”²⁴ However, she agreed that the book was “both provocative and instructive” even if “some may conclude that its thesis has not been proved.”²⁵ Professor Schwoerer commended the work for “showing the influence of the English legacy and William Blackstone’s *Commentaries on the Laws of England* on the Second Amendment to the American Bill of Rights.”²⁶ By the standards of gun rights discourse, this was civility.

²⁰ *Id.* at 115.

²¹ “[H]er book was enthusiastically received by American historians, legal commentators, and the gun community.” Schwoerer, *supra* note 16, at 29 (noting that only she and Michael Bellesiles had dissented).

²² Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L. J. 995 (1995). A January 1994 review of a 1994 book implies advance coordination, and Professors Cottrol and Diamond are thanked in the book’s preface. Garry Wills, writing about “wacky scholars” in the *New York Review of Books*, made this kind of thing sound a bit conspiratorial (“a kind of inner circle of Standard Modelers”). Garry Wills, *To Keep and Bear Arms*, N.Y. REV., Sep. 21, 1995. In 2000, a law review article by David Yassky called Professor Malcolm’s side “revisionist scholars.” David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 590 (2000). His acknowledgements unsurprisingly thanked Saul Cornell and Michael Bellesiles.

²³ Lois G. Schwoerer, *Book Review: To Keep and Bear Arms: The Origins of an Anglo-American Right*, 61 J.S. HIST. 570 (1995).

²⁴ *Id.* at 571.

²⁵ *Id.*

²⁶ *Id.*

In a much more heated review in 1996, Professor Michael Bellesiles called *To Keep and Bear Arms* “a fascinating work of advocacy” that presented “a revisionist record” of British history.²⁷ After having accused Professor Malcolm of exaggerating her case for widespread possession of firearms in Britain, Professor Bellesiles favored the reader with quite a sweeping statement of his own: “Gun ownership in Britain, as in America at the same time, was a collective right, collectively denied.”²⁸ He also asserts that William Blackstone was “struck,” whatever that may mean, by the limitations contained in Article VII of the 1689 Bill of Rights.²⁹ Professor Malcolm took the unusual step of responding to this review, decrying Professor Bellesiles’s “lamentable lack of objectivity and to a signal failure to come to grips with unpleasant evidence.”³⁰ Her criticisms were well-founded. In 2000, Professor Bellesiles published *Arming America: The Origins of a National Gun Culture*, which argued the extraordinary thesis that few people in early America owned guns, apparently in an effort to challenge interpretations of the original understanding of the Second Amendment that relied in part on widespread private gun ownership during the colonial period.³¹ The book excited the collective-right scholars and won the 2001 Bancroft Prize, but it did not withstand scrutiny showing that the book based its thesis on fraudulent research. The Bancroft Prize was rescinded, and Mr. Bellesiles resigned his position in 2002.³²

Professor Bellesiles would soon be *hors du combat*, but for whatever reasons, by 2000, Professor Schwoerer’s views on *To Keep and Bear Arms* had apparently hardened in comparison

²⁷ Michael A. Bellesiles, *Book Review: To Keep and Bear Arms: The Origins of an Anglo-American Right*, 14 L. & HIST. REV. 382 (1996).

²⁸ *Id.* at 383.

²⁹ *Id.*

³⁰ 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, 341 (1997).

³¹ Carl T. Bogus, *Book Review: Arming America*, 79 TEX. L. REV. 1641 (2001).

³² Scott McLemee, *Amazing Disgrace*, INSIDE HIGHER ED (May 19, 2010), <https://www.insidehighered.com/views/2010/05/19/amazing-disgrace>.

with the views she had expressed in her 1995 book review, and she took up the cudgels in a law review article (titled “To Hold and Bear Arms”) that was a direct attack.³³ “To dissent from Malcolm’s interpretation,” she noted, “some might say, is foolhardy” in light of the generally positive reviews of Professor Malcolm’s work.³⁴ Nevertheless, her article offered both specific and broad criticisms of *To Keep and Bear Arms*.

Professor Schwoerer described the parliamentary debate on abuses of the Stuart kings, including their creation of a standing army, in peacetime and without parliament’s consent, under the 1661 Militia Act.³⁵ Relying on the extant records of the parliamentary debates, Professor Schwoerer demonstrated that Professor Malcolm was probably mistaken in her interpretation of “elliptically reported comments by a Tory, the Honorable Heneage Finch, in the debate on 28 January 1689.”³⁶ Professor Schwoerer’s broader conclusions are less convincing. She opined that we know by reference to Erasmus, Sir Thomas More, and James Harrington, that the “Renaissance heritage” favored the militia over the professional army, but she insisted that this pro-militia sentiment must not be confused with an individual right to arms.³⁷ Based on her reading of the debates and the historical context, she concluded as an historian:

The idea, then, of giving individual Protestants the right to provide and keep arms must have been a response to immediate experience. It almost certainly came from members who may have remembered the moves toward arming the populace taken a decade before, and who had received rough treatment at the hands of a zealous militia operating under the command of the king during the two previous reigns.³⁸

³³ Schwoerer, *supra* note 16.

³⁴ *Id.* at 29.

³⁵ The King’s Sole Right over the Militia Act of 1661, 13 Car. II. c. 6 (Gr. Brit.).

³⁶ Schwoerer, *supra* note 16, at 32.

³⁷ *Id.* at 34.

³⁸ *Id.* at 37.

She argued that there was no intent to create a right, and no such effect, in that the three forms of restriction (Protestantism, socioeconomic “condition,” and the crucial qualifier “as allowed by law”) vitiated any real effect in the form of widespread individual gun ownership.³⁹

In light of these historical conclusions, Professor Schwoerer made express her legal conclusions on the matter:

There was no ancient political or legal precedent for the right to arms. The Ancient Constitution did not include it; it was neither in Magna Charta 1215 nor in the Petition of Right 1628. No early English government would have considered giving the individual such a right.⁴⁰

. . . .
. . . Article VII is properly regarded not as a gun-rights law, but as a gun-control measure. It gives no right to all Protestants to possess guns; it gives that right to upper-class Protestants. In effect, it armed a small minority—perhaps no more than three percent—of the population. This, I submit, was the original meaning of Article VII.⁴¹

Professor Schwoerer’s academic clash with Professor Malcolm was covered in the paper of record, which interviewed her prior to the article’s publication. Professor Schwoerer said in an interview that Professor Malcolm’s conclusions were “unthinkable” and “very bad history” which involved “errors in interpretation and handling of evidence.”⁴² The context of the *Times* article was scholarly participation in *United States v. Emerson*.⁴³ *Emerson* apparently seemed like a big deal at the time, but soon would come *District of Columbia v. Heller*.

Justice Antonin Scalia’s majority opinion in *Heller* noted that the two sides in the case presented “very different interpretations” of the Second Amendment, with one side arguing that it protects “only the right to possess and carry a firearm in connection with militia service,” while

³⁹ *Id.* at 42–45.

⁴⁰ *Id.* at 34.

⁴¹ *Id.* at 48.

⁴² William Glaberson, *Dueling Scholars Join Fray Over a Constitutional Challenge to Gun Control Laws*, N.Y. TIMES, Sep. 21, 2000, at A26.

⁴³ *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

the other side saw “an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”⁴⁴ In reviewing the Anglo-American history, Justice Scalia cited Professors Malcolm and Schworer jointly for the uncontroversial assertion that the Stuart kings had used the select militia to disarm their opponents.⁴⁵ Justice Scalia cited Professor Malcolm for a more controversial point: “[b]y the time of the founding, the right to have arms had become fundamental for English subjects.”⁴⁶ Crucially, his next sentence read, “Blackstone, whose works, we have said, ‘constituted the preeminent authority on English law for the founding generation,’ cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.”⁴⁷ The fact that Blackstone made this characterization is not susceptible to reasonable dispute.

Professor Schworer was cited again by Justice Scalia in support of his characterization of the limitations on Article VII in the context of English law: “[t]o be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament.”⁴⁸ Query whether the succeeding “*see*” citation is entirely appropriate, as Justice Scalia’s point may be more accurately described as a rejoinder to the works cited than a reliance on them.⁴⁹ Professor Schworer’s reading of Article VII as a very limited right addressed to a very specific historical situation more closely accords with its use and citation in Justice John Paul Stevens’s dissent.⁵⁰

⁴⁴ *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

⁴⁵ *Id.* at 592.

⁴⁶ *Id.* at 593.

⁴⁷ *Id.* at 593–94 (citation omitted) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136, 139–40 (1765)).

⁴⁸ *Id.* at 593.

⁴⁹ *Id.*

⁵⁰ *Id.* at 664.

And so, Professor Schwoerer’s 2016 work, *Gun Culture in Early Modern England*, may be seen as, at least in part, a continuation of this controversy. Professor Schwoerer opens the book by imputing its origin not to the longstanding dispute that came to a head in *Heller*, but rather to her reflections on two “horrific gun massacres in Great Britain” in 1987 and 1996:⁵¹

All this led me, as a historian of early modern England, to wonder what the English government and people in that earlier era thought about guns and gun possession. These questions lay unexplored in my mind for almost ten years as other projects preempted them, but they never completely faded.⁵²

This explanation is not incompatible with the book’s contentious polemic conclusion. Much of the book concerns the English gun industry’s reformation under Henry VIII, its commercial expansion, and the social history of gun use among the English aristocracy and gentry. As Professor Malcolm opened her 2017 review, “[t]he book presents new information about firearms manufacture in England and adds to current information on the use of guns by various social classes.”⁵³ The final passage of the book’s last substantive chapter, however, directly addresses the Second Amendment controversy and shows how much of the book was written in service of the Article VII feud.

III. The Case Against *Heller*: *Gun Culture in Early Modern England*

Professor Schwoerer described the importance of Henry VIII in building on the firearms infrastructure he inherited, including his recruitment and solicitous treatment of immigrating gun makers.⁵⁴ In that era, the gunmakers did not have a guild of their own but instead were obliged to join the Blacksmiths’ Guild, the Armourers’ Guild, or the Joiners’ Guild.⁵⁵ After an eighty-year

⁵¹ SCHWOERER, *supra* note 12, at 1.

⁵² *Id.*

⁵³ Joyce Lee Malcolm, *Book Review: Gun Culture in Early Modern England*, 48 J. INTERDISC. HIST. 87, 88 (2017).

⁵⁴ SCHWOERER, *supra* note 12, at 14–15.

⁵⁵ *Id.* at 11–25.

struggle with the medieval guilds, the gunmakers received a charter from King Charles I on March 14, 1638 as “The Worshipfull [*sic*] Company of Gunmakers.”⁵⁶

One of the merits of *Gun Culture* is its Appendix A, “What Is a Gun?”, which contains some technical information about early modern firearms. A defect in the entire book is evident in a terminological shift from the Appendix’s title to its opening line: “What *was* a handgun that existed four to five hundred years ago in early modern England?”⁵⁷ Four pages later, after explaining the development of cannons, she returns to “the handgun, which by definition was a firearm that one person could discharge with or without a rest.”⁵⁸ That is of course not the modern definition of the word, and the book’s use of “gun” and “handgun” interchangeably can be confusing, especially with regard to Henry VIII’s arms control statute of 1541, which prescribed a *minimum* size (one whole yard) for legally-held private firearms to make concealment a practical impossibility.⁵⁹ Professor Schwoerer explained that “it allowed persons living outside urban areas to keep guns of the prescribed length to protect themselves, their family and their house,”⁶⁰ as well as those exempt because their annual income was above £100.⁶¹ In her review of the book, Professor Malcolm pointed out that the scope of the exemption was broader than suggested by Professor Schwoerer and included many inhabitants of cities, boroughs, and market towns.⁶²

Indeed, throughout *Gun Culture in Early Modern England*, Professor Schwoerer tended to stress restriction and minimize indicia of widespread gun ownership, calling to mind what Michael Bellesiles’s book review said of Joyce Lee Malcolm: “[a]lternative readings of [her] research arise

⁵⁶ *Id.* at 11–12, 24.

⁵⁷ *Id.* at 177.

⁵⁸ *Id.* at 181.

⁵⁹ *Id.* at 59.

⁶⁰ *Id.*

⁶¹ *Id.* at 48.

⁶² Malcolm, *supra* note 53, at 88 (citing An Act Concerning Crossbows and Handguns 1542, 33 Hen. VIII c. 6 (Gr. Brit)).

constantly.”⁶³ Although Professor Schwoerer emphasizes regulation and denies any thoroughgoing legal “right” to possess arms, this is simply her spin on facts that are subject to other interpretations, which she acknowledges cursorily:

In [Convention Parliament] debate on the Act [disarming Catholics], John Maynard expressed the thought that Catholics should bring their “firearms in, unless for the necessary defence of their Houses.” Evidently, members of the Convention were sensitive to the natural and common law right of self-defense and did not deny it.⁶⁴

. . . .

In 1689, one remembers, a gun was allowed for self-protection, even for Catholics, and in 1706 it was allowed for killing vermin. However, it could not be used in hunting.⁶⁵

Passages like these suggest that the debate about an English right is semantic to the point of turning on whether their conception of a right sufficiently matches our conception of a right. As discussed below, what we see in the seventeenth century debates is what we should expect to see in the way of an English political and legal antecedent to a modern American right.

Professor Schwoerer described an élite gun culture but acknowledged that “[m]en down the social scale also wanted firearms and expressed opposition to the restrictions placed on their possessing and using them.”⁶⁶ Notably, she phrased this to emphasize the restriction. Similarly, in describing the Elizabethan gun industry’s opposition to the aristocracy’s efforts against “poaching” by the lower orders, Professor Schwoerer tended to emphasize the effort at restriction, rather than the evidence of widespread gun possession: “[t]he government’s condemnation of subjects’ using ‘pistols and birding pieces’ suggests not only how difficult it was to enforce gun restrictions but

⁶³ Bellesiles, *supra* note 27, at 382.

⁶⁴ SCHWOERER, *supra* note 12, at 160.

⁶⁵ *Id.* at 165.

⁶⁶ *Id.* at 9.

how popular guns were.”⁶⁷ Indeed—and the condemnation was on the *use* of the firearms, not the possession of them.

As a work of social history, *Gun Culture* described the enthusiasm for firearms among the aristocracy and gentry and their desire to enforce robust game laws to keep the poorer classes from poaching. To this end, Professor Schwoerer described “two gun cultures” centered on men of high social standing, one military and one “domestic,” with a “focus” on the latter.⁶⁸ The “focus” on domestic gun culture as opposed to the military gun culture may partly explain the curious paucity of comment on the English Civil Wars. She noted at the outset that by military experience, generally, “men down the social scale learned about guns and participated in both cultures.”⁶⁹ Surely, however, service in the Civil Wars differed in light of their ideological component. *Gun Culture in Early Modern England* included only one sentence that even approached this point: “First, from 1642 to 1648 the Civil Wars brought into play armies, each composed of Englishmen of all socioeconomic standing, fighting each other.”⁷⁰

That sentence does not even acknowledge the social disruption of the Civil Wars, and on the page preceding it, Professor Schwoerer defended her linkage of gun culture and the higher orders:

As late as World War I, war was still seen by English people as “the occupation of the nobility and gentry.” It was commonly held that a “British officer should be a gentleman first and an officer second.” Until World War II, the majority of officers came from the aristocracy.⁷¹

This is generally true, but a book spending so much time in the seventeenth century might be expected to mention at least the existence of the New Model Army, which *Gun Culture* does not.

⁶⁷ *Id.* at 39.

⁶⁸ *Id.* at 2–3.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 80.

⁷¹ *Id.* at 79.

Oliver Cromwell and the interregnum are mentioned only in passing. Sir Winston Churchill, a great hater of Oliver Cromwell, noted that the parliamentary forces in the Civil Wars were “led by men who had risen in the field and had no other standing but their military record and their religious zeal.”⁷² “Oliver’s officers, said another account, were ‘not such as were soldiers or men of estate,’ but ‘common men, poor and of mean parentage,’ ‘such as have filled dung carts both before they were captains and since.’”⁷³ Crucially, this was not a failed uprising by the lower orders; it was a regime. The Civil Wars were not only long in duration, large in scale, and internecine, but also disruptive of the social order. In its defense of English gun culture as an elite phenomenon, the book omitted any serious consideration of the military experience of the middling and lower classes.

Instead, the book closed with a nine-page polemic on the intent of the drafters of the 1689 Bill of Rights that began with an odd etymological argument, apparently originated by Garry Wills, that “arms” necessarily meant military weapons. “As Wills wittily put it, one does not use ‘arms’ to shoot a rabbit.”⁷⁴ The relevance of this assertion, even if true, is dubious when the question was private ownership of firearms for purposes including self-defense. In what was meant to be a clinching argument, Professor Schwoerer cited a 1660 letter from Charles II to his lord lieutenant in Buckinghamshire:

The king wrote that the court had “certain knowledge” that “persons of Loose Principles and knowne disaffection to us and our government” were so heavily armed that they must intend an uprising. He instructed Bridgewater to employ the militia to seize “any quantity [of “arms”] . . . discovered in a house . . . above what may reasonably be believed necessary for [the person’s] safeguard and defence.” Here, too, “Arms” are differentiated from what weapon an individual might need for personal defense.⁷⁵

⁷² 2 WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH SPEAKING PEOPLES* 256 (1956).

⁷³ CHRISTOPHER HILL, *GOD’S ENGLISHMAN* 66 (1970).

⁷⁴ SCHWOERER, *supra* note 12, at 160.

⁷⁵ *Id.* at 161 (alterations original to Professor Schwoerer).

Surely the “quantity” of arms “above” that necessary to self-defense was the apparent concern, not some qualitative distinction between “arms” and weapons for self-defense.

Next, Professor Schwoerer dilated on the importance in Article VII of the Bill of Rights of two qualifying phrases: “suitable to their conditions” and “as allowed by law.”⁷⁶ It was largely by her reading of these qualifications that Professor Schwoerer concluded that “Article VII did not grant an individual right to all English Protestant subjects to possess a gun, and that it was not the progenitor of the Second Amendment to the Constitution of the United States.”⁷⁷ Her conflation of these two concepts is profoundly unhelpful.

IV. The English Bill of Rights as Political and Legal Precedent

Surely an expert on British parliamentary history—even if not a lawyer by training—must be familiar with the principle of parliamentary supremacy. The Civil Wars and the Glorious Revolution cemented this principle in political reality. Sovereignty resides in the Crown-in-Parliament, its absolute power classically stated by Blackstone:

It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible⁷⁸

If Professor Schwoerer did not immediately see the relevance of this principle to the question of whether Article VII should be construed as a British constitutional right—and how that would differ from a right under the written American Constitution, it was explicitly pointed out in 1994 by the Cottrol-Diamond review of *To Keep and Bear Arms*: “Under British constitutional doctrine

⁷⁶ *Id.* at 162–64.

⁷⁷ *Id.* at 10.

⁷⁸ BLACKSTONE, *supra* note 47, at 379–80.

of Parliamentary supremacy, the provision could not restrict subsequent acts of Parliament.”⁷⁹ Rights of any kind were held against the monarch, not against parliament. The harmonization of the Bill of Rights with existing laws such as the Militia Act and the game laws was an example of the British legal system at work.

If we try to convert the traditional British constitution into something analogous to the modern concept—that is, to treat it as a set of rules establishing and regulating the activity of governing—the constitution may seem random. It is revealed as a miscellaneous collection of statutes, rules, and guidelines, none of which constitute ‘higher law’ and many of which make no sense until they are interpreted in the light of innumerable political understandings.⁸⁰

An authority on the British constitution writing in 1879 annotated Article VII by noting that Blackstone’s description of the article as a “public allowance” must be understood in conjunction with both preexisting and subsequent statutes.⁸¹ The qualification “as allowed by law” was merely a recitation, akin to an American statute or rule including the phrase “except as required by the Constitution.” Its inclusion or omission changes nothing.

As to the limitation that arms be suitable to the “conditions” of various persons, such was the understanding before equality before the law was established.⁸² Rights were not universal; they were particular and stratified. “Virtually every male in [colonial] Virginia could be ranked according to the size of animals that he was allowed to kill for pleasure.”⁸³ And that is an example of how English law was understood, even as adapted to local conditions. The later theory of the

⁷⁹ Cottrol & Diamond, *supra* note 22, at 1010 n.65.

⁸⁰ MARTIN LOUGHLIN, *THE BRITISH CONSTITUTION: A VERY SHORT INTRODUCTION* 21 (2013).

⁸¹ TASWELL-LANGMEAD, *supra* note 2, at 524.

⁸² “Before these [American and French] revolutions, rights and liberties were invariably treated as concessions to be extracted from the sovereign. This is precisely the form in which rights are expressed in the celebrated English charters of Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689).” MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 198 (2000). In what seems one of the more unhinged polemics in this area, collective-right partisan Saul Cornell—ironically in my view—accuses the other side of “presentism.” Saul Cornell, “*Half Cocked*”: *The Persistence of Anachronism and Presentism in the Academic Debate over the Second Amendment*, 106 J. CRIM. L. & CRIMINOLOGY 203 (2016).

⁸³ DAVID HACKETT FISCHER, *ALBION’S SEED* 362 (1989).

English common law's transference to America was a legal fiction, not a seventeenth century practice. In Virginia, for example, codes—draconian in character, and *codes* in the first place—were promulgated in 1612, 1620, and 1662 with English common law's subsidiary role very much in doubt even as a matter of principle.⁸⁴ This important distinction between what happened (legal history) and the accepted legal theory of the transfer of the common law to America demonstrates an important point about the role of history in law.

People living in the British colonies in the seventeenth and *early* eighteenth centuries were in some confusion about whether they lived in places controlled by the English common law. Indeed, Blackstone's conceptual framework for the role of English common law in lands other than England and Wales under British rule ("plantations or colonies in distant countries") distinguished between those "where the lands are claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country" and those "gained by conquest or ceded to us by treaties."⁸⁵ The "American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties."⁸⁶ Being in this category meant they were "no part of the mother country" but rather dependent dominions (like Ireland) subject to the will of Parliament but "not bound by common acts of parliament, unless particularly named," and *not* under the English common law.⁸⁷

This theory was not universally accepted, however, and legislative authorities in the various colonies expressed divergent views. In 1684, proving that Blackstone's view of the subject

⁸⁴ Paul Samuel Reinsch, *The English Common Law in the Early American Colonies* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 404–06, 411 (American Association of Law Schools, ed., 1907).

⁸⁵ BLACKSTONE, *supra* note 47, at 276.

⁸⁶ *Id.* at 260.

⁸⁷ *Id.* at 259–260.

was not an innovation, both houses of the Maryland Assembly bristled at being characterized by a British authority as a conquered or subject people for purposes of deciding the governing legal paradigm.⁸⁸ The Pennsylvania Assembly in 1718 opined that it was a “settled point” that “the common law is the birthright of English subjects,” but agreed with Blackstone that “Acts of Parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts.”⁸⁹ Americans seem to have preferred the language of a 1720 Attorney-General opinion, written in the context of a dispute in Jamaica, regardless of whether it was strictly applicable to their situations:

The common law of England is the common law of the plantations, and all statutes in affirmance of the common law, passed in England antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes, made since those settlements, are thus in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear.⁹⁰

Given the conflicting legal paradigms and the disputes as to which statutes and how much of the common law applied in any particular overseas colony, it makes sense that an American essayist in the early eighteenth century would opine, “No one can tell what is law and what is not in the plantations.”⁹¹

American colonial enthusiasm for English common law increased as legal sophistication increased and as Americans looked for justifications for their claims of political rights. As Professor Reinsch described the shift, “The struggles with the mother country caused a wide spread of legal knowledge, and the common law came to be revered as a muniment of personal liberties. Blackstone was outdone by American lawyers in extravagant panegyrics.”⁹²

⁸⁸ St. George Leakin Sioussat, *The Theory of the Extension of English Statutes to the Plantations* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 424 (American Association of Law Schools, ed., 1907).

⁸⁹ *Id.* at 427.

⁹⁰ *Id.* at 420.

⁹¹ *Id.* at 429.

⁹² Reinsch, *supra* note 84, at 367.

I rehearse some of this untidy history in part to contrast it with the tidiness of Justice Joseph Story's theory of presumptive transfer. Writing as a circuit court judge in *United States v. Wonson*,⁹³ and as a Supreme Court justice in *Van Ness v. Pacard*,⁹⁴ Justice Story championed the view that English common law tradition was the "grand reservoir" of our jurisprudence, except as departure was justified by American conditions. "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."⁹⁵

Professor Reinsch summarized this theory as the legal fiction that "the common law was *from the first* looked upon by the colonists as a system of positive and subsidiary law, applying where not replaced by colonial enactments or by special custom suited to the new conditions."⁹⁶ He approved of the simplified theory's utility while noting that "it is not complete enough to afford an adequate synthesis of colonial legal facts for the historian."⁹⁷ Although "the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume,"⁹⁸ he implied no doctrinal legal consequence to his elaboration of the historical facts.

To illustrate by an analogy, historians must understand that the validity of a scientific theory is not always the heart of the matter when discussing the history of science. "Rain follows the plow," believed Charles Dana Wilbur, arguing that farmers could change the weather by overturning the soil.⁹⁹ More recently, his work has been, to use a word dear to historians,

⁹³ *United States v. Wonson*, 28 F. Cas. 745 (C.C.D. Mass. 1812).

⁹⁴ *Van Ness v. Pacard*, 27 U.S. 137 (1829).

⁹⁵ *Id.* at 144.

⁹⁶ Reinsch, *supra* note 84, at 368 (emphasis added).

⁹⁷ *Id.* at 369. *See also* Sioussat, *supra* note 88, at 423 ("[T]he legal theory is not universally supported by the actual facts in the legal history of the colonies.") (discussing the theory's shortcomings for historians).

⁹⁸ Reinsch, *supra* note 84, at 415.

⁹⁹ CHARLES DANA WILBUR, *THE GREAT VALLEYS AND PRAIRIES OF NEBRASKA AND THE NORTHWEST* 68 (1881).

“discredited.” Nevertheless, his theory may have contributed to the settlement of the Great Plains because some people believed it at that time. I am not defending the use of bad history in the context of law, but I am defending the use of history according to the context of law. Given sequential eras A, B, and C, what people in Era B believed about Era A may be political and legal precedent in Era C. Correction of the historical record may allow people in Era C to understand Era A more accurately, but the ship has sailed with regard to political and legal precedent. Americans of the Revolutionary generation believed the liberties of Englishmen were their birthright. If historical inquiry shows that in some sense they were rewriting their own legal history, that does not prove that they did not believe what they wrote on this subject. And the liberties of Englishmen the founding generation believed belonged to them were those described by Blackstone.

“When Blackstone’s *Commentaries* were published (1765–69), Americans were among his most avid customers. At last there was an up-to-date shortcut to the basic themes of English law.”¹⁰⁰ The *Commentaries* became “ubiquitous on the American legal scene” and “the Bible even in far-off jurisdictions.”¹⁰¹ As I noted above, Justice Scalia’s decision in *Heller* contained a single sentence how Blackstone *made* the English Bill of Rights a political and legal precedent to the American Second Amendment: “Blackstone, whose works, we have said, ‘constituted the preeminent authority on English law for the founding generation,’ cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.”¹⁰²

Robert J. Cottrol and Raymond T. Diamond, whose extended book review of Professor Malcolm’s *To Keep and Bear Arms* I have noted above, are lawyers, and their review made this

¹⁰⁰ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 59 (3rd ed. 2005).

¹⁰¹ *Id.* at 59, 69.

¹⁰² *District of Columbia v. Heller*, 554 U.S. 593–40 (2008) (internal citations omitted) (citing BLACKSTONE, *supra* note 47, at 136, 139–40).

connection quite clearly.¹⁰³ Placing Blackstone’s role as the bridge between English and American law in the foreground, the law review article was titled *The Fifth Auxiliary Right*, highlighting Blackstone’s position that a right to bear arms was a protection of the other liberties of Englishmen: “Blackstone understood these auxiliary rights as the mechanisms that protected the subjects’ natural or inherent rights.”¹⁰⁴ This point of British constitutional law, whatever it may have meant to the drafters of the English Bill of Rights, was mediated to colonial America by Blackstone’s *Commentaries* in this form.

Contra this understanding of the matter, Professor Schwoerer asks, “Is this really what Blackstone wrote and meant to say?”¹⁰⁵ She reiterated her irrelevant point about the right not being “unrestricted,” concluding “Blackstone’s language shows that he was not advocating an unrestricted right of the individual to have arms.”¹⁰⁶ Similarly, Justice Scalia did not opine that the American Second Amendment is an unrestricted right of the individual to have arms.

As noted above, Professor Schwoerer’s 1995 review of *To Keep and Bear Arms* commended the book for its “decided contribution” in “showing the influence of the English legacy and William Blackstone’s *Commentaries on the Laws of England* on the Second Amendment to the American Bill of Rights.”¹⁰⁷ This may be the middle ground on which many of the belligerents might meet, and those not wishing to be belligerent may stake a place between the camps. Whatever the 1689 Bill of Rights meant to its drafters, what it meant to colonial American leaders was what Blackstone told them it meant.

¹⁰³ Cottrol & Diamond, *supra* note 22.

¹⁰⁴ *Id.* at 1011.

¹⁰⁵ SCHWOERER, *supra* note 12, at 168.

¹⁰⁶ *Id.*

¹⁰⁷ Schwoerer, *supra* note 23, at 571.

In an oddly worded sentence in an earlier paragraph of the book review, Professor Schwoerer presaged this view of the subject: “It is not so much the legacy of the 1689 Bill of Rights as it is the subsequent readings of that article in the different circumstances of postrevolutionary eighteenth-century England that lie *au fond* of our Second Amendment.”¹⁰⁸ Query why Professor Schwoerer distinguishes the “subsequent readings” of Article VII from its “legacy.” For a lawyer for the working day, there is no meaningful distinction.

In *Gun Culture in Early Modern England*, Professor Schwoerer insisted that the limitations of Article VII prove that it was not the political and legal precedent for the Second Amendment, saying as part of her summation, “If the Americans ‘swept’ away the restrictions of religion, socioeconomic status, and ‘as allowed by law,’ then, logically, they were not following the terms of Article VII.”¹⁰⁹ The word “swept” was in quotation marks because she was responding to Professor Malcolm’s assertion that “Americans swept aside these limitations and forbade any ‘infringement’ upon the right of the people to keep and bear arms.”¹¹⁰ Professor Malcolm’s assertion accords with the difference between British and American constitutional law, our rejection of religious tests, and our ongoing project of eliminating status-based discrimination in the law. My only quibble with Professor Malcolm would be on the verb tense; it would be more accurate to use the present continuous tense: *we are sweeping* aside such limitations.

V. Conclusion

As a forensic matter, Professor Schwoerer may have lost this fight when she acknowledged, in a sentence in her 2000 article attacking Professor Malcolm, that the debate on continuity is not strictly a matter of the intent of the drafters of the 1689 Bill of Rights, the subject on which

¹⁰⁸ *Id.*

¹⁰⁹ SCHWOERER, *supra* note 12, at 170. See also *id.* at 169 for a more explicit reference to the words in *To Keep and Bear Arms*.

¹¹⁰ MALCOLM, *supra* note 11, at 162.

Professor Schwoerer is the greater expert. The debate has interpretative and political components. “There was no ancient political or legal precedent for the right to arms,” Professor Schwoerer asserted.¹¹¹ In this context, “ancient” does not mean pre-medieval; it means the Whiggish interpretation of the common law and the British constitution. As argued above regarding the reception of the common law and the mediation of English law to the colonies by Blackstone’s *Commentaries*, even an historical misconception written into law by courts and legislatures and state and national conventions becomes the law, and valid legal precedent, regardless of its historical merits. On both sides of the Atlantic, especially in an era before social science research was available to political and legal authorities, popular and élite perceptions are political precedents.

On the interpretation of the Second Amendment in American law, Professor Schwoerer recognized that “the point is now settled, at least for the time being.”¹¹² Her book in rebuttal has been cited in one reported case by the dissent. In a Delaware case decided on state constitutional grounds, the battle over Anglo-American history was again joined, and the minority would not yield to the majority (historical) opinion in *Heller*:

Our friends in the Majority ground an unwritten right to bear arms in our English law heritage. But the English regulatory tradition does not support the notion that our founders considered our English law heritage to be the source of an unwritten right to bear arms. In fact, one of the only things the nine federal Justices who were split five-to-four in *Heller* agreed on was that any right to bear arms in England was subject to restriction by Parliament.¹¹³

This essay explained above why an English right being “subject to restriction by Parliament” is a truism, not a point of any consequence.

¹¹¹ Schwoerer, *supra* note 16, at 34.

¹¹² SCHWOERER, *supra* note 12, at 169.

¹¹³ *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 672 (Del. 2017) (Strine, C.J., dissenting) (overturning a ban on firearms in state parks).

Professor Schwoerer’s pre-*Heller* work has also been cited once in a case decided after *Heller* and *McDonald v. Chicago*¹¹⁴ when the Seventh Circuit was asked to side with Professor Schwoerer’s interpretation of history over Professor Malcolm’s view. “The parties and the amici curiae have treated us to hundreds of pages of argument, in nine briefs. The main focus of these submissions is history.”¹¹⁵ The court noted submissions relying on work by collective right advocates such as Saul Cornell, Lois G. Schwoerer, Paul Finkelman, Don Higginbotham, and Roy Weatherup.¹¹⁶ The court held that the historical debate was settled as a matter of law: “The Supreme Court rejected the argument. The appellees ask us to repudiate the Court’s historical analysis. That we can’t do. Nor can we ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one’s home.”¹¹⁷

Like historians, journalists are often scandalized and infuriated by what lawyers and judges do. Often cases have been written about by journalists who establish, to their two-source journalistic satisfaction, that they know what happened. The journalists then write articles declaring the legal process a travesty. Similarly, frustrated historians perceive lawyers as failing to appreciate some nuance in the thinking of past generations. Their objections often have some validity, but lawyers do not claim to be writing history when they examine history for purposes of legal analysis. Every profession is self-governing, and historical expertise is not a license to practice law. *Zapateros, a sus zapatos*.

¹¹⁴ *McDonald v. Chicago*, 561 U.S. 742 (2010).

¹¹⁵ *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012).

¹¹⁶ *Id.*

¹¹⁷ *Id.*