ARTICLES

ORIGINALISM, HISTORY, AND THE SECOND AMENDMENT: WHAT DID BEARING ARMS REALLY MEAN TO THE FOUNDERS?

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Few areas of constitutional law have been more deeply originalist in spirit than Second Amendment scholarship. Thousands of pages have been written over the past few decades seeking to uncover the original meaning of the words of the Amendment. In the process, the meaning of the text, including phrases like "the people" and "bear arms," have been vigorously debated. Whatever one may think about originalism as a theory, there is little question that any evaluation of its potential depends on the degree to which it accurately reflects history.[1] One of the problems plaguing the quest for original intent has been the lack of a coherent methodology for divining such intent. The theoretical defenses of originalism have not grappled with the complex empirical and interpretive issues necessary to properly contextualize and understand Founding-Era writings.[2] The more recent trend towards plain-meaning originalism suggests that all

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1 For an historian's perspective on originalism, see INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990). For overviews of the legal debate over originalism, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999), Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989), and Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). For attempts to defend this methodology, see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–08 (2001), and Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999). On the need for standards for originalists, see H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

2 For proposed rules of originalist interpretation, see Powell, *supra* note 1. For critiques of "law office history" and the need for standards for originalists, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523–29 (1995), Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003), and Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 913–14 & n.26 (1996).

sources are of equal value as long as they were part of the public discourse of the Founding Era. Indeed, in *Parker v. District of Columbia*, Judge Silberman obviously was operating from an unstated assumption that one can use any text as long as it was written by a "competent" speaker of the English language.[3] For a constitutional historian, such a methodology is deeply problematic.

The debate over the meaning of the Second Amendment has largely revolved around whether the right to bear arms protects an individual right to possess guns or a state right to preserve the militia.[4] As such, the original meaning of the phrase "bear arms," and what the Founders intended when they employed that phrase, has been at the heart of much scholarship. One approach to uncovering original intent has been to look at government records, and previous studies have conclusively demonstrated that Congress overwhelmingly used "bear arms" in a military context.[5] Given that Congress drafted the Second Amendment ought to end the discussion, since it would be nothing short of astonishing if this usage were the only time Congress departed from its orthodox meaning. Although implausible, one might argue that outside Congress the term was used in a less precise way. Individual Rights scholars have been quick to point out that there are some instances where "bear arms" was not used to connote military action.[6] Yet surely the issue of how this phrase was un-

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3 478 F.3d 370, 385 n.10 (D.C. Cir. 2007). For an example of the most recent use of plain-meaning originalism to interpret the Second Amendment, see Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty,"* 3 TENN. J.L. & POL'Y 183 (2007). Halbrook asserts that Tucker interpreted the Amendment as protecting an individual right to bear arms, and that Tucker's views are a significant reflection of the intent of the Framers. He also supports modern plain-meaning originalism, or how "humble people" interpret the Second Amendment, and chides "a segment of the not-so-humble" who "appear to disagree when it comes to the right of 'the people' to keep and bear arms." *Id.* at 184.

4 The parameters of the modern debate are best charted in Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898 (2004) (book review).

5 The best two examples are Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000), and David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000). Stephen Halbrook provides an individual rights interpretation of the phrase "bear arms," but his conclusions are not based on research into congressional sources. Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS., Winter 1986, at 151.

6 *See* Halbrook, *supra* note 5, at 153. Halbrook's scholarship is a textbook example of the problems with so much originalist scholarship. His propensity to cherry-pick quotations and rip them from their contexts to fit his own ideology does a disservice to the historical actors about whom he is writing. For example, in his examination of John Adams's *A Defense of the Constitutions of Government of the United States of America*, Halbrook tells us that Adams "upheld the right of 'arms in the hands of citizens, to be used at individual discre-

derstood turns precisely on which meanings were orthodox and which were idiosyncratic. On this point, Blackstone's method of determining original intent is instructive: "Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use."[7] And all words must be carefully contextualized.[8] The pressing historical question that many scholars fail to ask is whether the idiosyncratic individual usage had any actual impact on the drafting of the Second Amendment. Did Congress ever employ "bear arms" in an individual sense? Did an individual construction of "bear arms" have any currency in the colonial and American press? These are empirical questions, and, when properly framed and exhaustively researched, the answer to both is a decisive no. Ignoring such pertinent historical questions and clear evidence that the overwhelming use of "bear arms" in the Founding Era was in a military context, Judge Silberman argues that "the public understanding of 'bear Arms' also encompassed the carrying of arms for private purposes such as self-defense."[9] This claim is in fact demonstrably false, as this Article will show.

Comprehensive digital archives with keyword-searching capabilities are now making it possible to recover the meanings and uses of key constitutional phrases like "bear arms." Readex's *Early American Imprints* and *Early American Newspapers*, and the Library of Congress website together encompass most of the American newspapers, pamphlets, broadsides, and Congressional proceedings published in the

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tion, . . . in private self-defense." *Id.* at 154–55. What Halbrook does not tell his readers is that the quotation comes from a discussion of the militia in which Adams actually supports the regulation of firearms (i.e., "The arms of the commonwealth should be lodged in the hands of that part of the people which are firm to its establishment."). JOHN ADAMS, 2 A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (3d ed., Phila., Budd & Bartram 1797). While Adams does support using arms for private self defense, he argues that "arms in the hands of citizens, to be used at individual discretiou . . . is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man." *Id.*

7 WILLIAM BLACKSTONE, 1 COMMENTARIES *59.

8 Again, Blackstone is instructive:

> If words happen to be still dubious, we may establish their meaning from the *context*, with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proem, or preamble, is often called in to help the construction of an act of parliament.

Id. at *60.

9 Parker v. District of Columbia, 478 F.3d 370, 384 (2007). Silberman goes on to argue, without giving a single example, that "it would hardly have been unusual for a writer at that time (or now) to have said that, after an attack on a house by thieves, the men set out to find them 'bearing arms.'" *Id.*

crucial period of 1763 to 1791.[10] The comprehensive nature of these archives can give scholars a high degree of certainty that keyword searches accurately reflect common usage since they contain most of the surviving printed material from the colonies and early Republic. The *Early American Imprints* series contains over 15,500 documents from 1763 to 1791 alone, 273 of which use the phrase "bear arms."[11] If we discard the many reprints of the Bill of Rights, all quotations of the text of the Second Amendment in congressional debate, irrelevant foreign news, reprints of the Declaration of Independence, and all repeated or similar articles, 111 hits remain, of which only two do not use the phrase to connote a military meaning.[12] Using the same method of sorting results from the 132 papers published from 1763 to 1791, the *Early American Newspapers* database returns 115 relevant hits, with all but five using a military construction of "bear arms."[13] A search of the exact phrase "bear arms" in the Library of Congress database (which includes *Letters of Delegates to Congress, Journals of the Continental Congress, Elliot's Debates,* and the House and Senate *Journals of the First Congress*) between 1775 and 1791 returns forty-one relevant hits, of which only four do not use the phrase "bear arms" in an explicitly collective or military context.[14]

The sources prove that Americans consistently employed "bear arms" in a military sense, both in times of peace and in times of war, showing that the overwhelming use of "bear arms" had a military meaning. The results show that the militia and the common defense

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10 That is, from the end of the French and Indian War to the ratification of the Bill of Rights. Subscriptions to the databases are available through http://www.readex.com.

11 The phrase "bear arms" was searched in all the text from documents printed between and including the years 1763 and 1791. Hits returned contain the exact phrase "bear arms" and not any variations (i.e., bearing arms, bears arms).

12 It should be noted that foreign news that used the phrase "bear arms" always discussed war and troop movements. While this further buttresses a military reading of "bear arms," I have not included such news items in my tally of relevant articles. For example, the February 7, 1763, issue of the *Green & Russell's Boston Post-Boy & Advertiser* reported that the "King of Prussia is impressing all the men in Saxony that are able to bear arms." GREEN & RUSSELL'S BOSTON POST-BOY & ADVERTISER, Feb. 7, 1763, at 2.

13 A search of all text for the exact phrase "bear arms" returned 502 hits.

14 The Library of Congress site is http://rs6.loc.gov/ammem/amlaw/. By "explicitly collective or military context," I mean that the phrase "bear arms" appears in an obvious discussion of the militia (and citizens' civic obligation to participate in the militia), the army, or people banding together to protect the community. The four documents in question, which do not use "bear arms" in such a context, concern the proposed changes in the House and Senate to what would become the Second Amendment. Because the meaning of the Second Amendment itself is so contentious, I have considered these documents to be in the ambiguous column. I have also not included references to the Declaration of Independence, the text of the Second Amendment, or foreign news.

were a perennial concern, often discussed in pamphlets and newspapers, unlike the individual right to self defense. While not every single source uncovered from these digital archives uses "bear arms" in an explicitly military sense, the handful that do not are merely ambiguous; at most, they tend to show that "bear arms," on rare occasion, was paired with additional language to mean, idiosyncratically, "carry guns." The results also show that the Individual Rights and Collective Rights paradigms are too limiting in their conception of arms bearing and ownership in early America. The historical record is clear that Americans owned guns (which Individual Rights scholars have proven), but it is also equally clear that those guns were subject to robust regulation, most often by the militia organizations and through the militia service laws. The right of self defense was widely accepted as a natural right that had been incorporated into the common law, but none of the sources in these databases make the crucial link between personal safety and a constitutional right to bear arms. Also, many people of the time saw the militia as a key component in securing personal safety. Indeed, Americans of the colonial period and Early Republic had a more nuanced view of bearing arms than either the Individual Rights or Collective Rights Models can accommodate, a view intimately tied to notions of civic duty and communal responsibility. Rather than an individual or collective right, Americans viewed the right to bear arms as a civic right linked to militia service.[15]

I. PUBLIC SAFETY AND THE RIGHT TO BEAR ARMS: A LOOK AT THE EVIDENCE

In the wake of the French and Indian War, the American colonists sought to secure the frontiers and bring order to the newly expanded empire.[16] To ensure this security, men had to fulfill their obligations

15 The Civic Rights Model is best explained in SAUL CORNELL, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006).

16 Maintaining a coherent militia had been a concern throughout the French and Indian War, especially in Virginia, Pennsylvania, and New York where the French had concentrated their attacks. The minutes of the New York General Assembly from the war, published in 1764, convey this fear and the need for men to fulfill their duty to the militia. "It may be proper," the Assembly argued in 1754,

> to revise the *Militia Act*, to make it more effectual for the Purposes intended, and to insert a Clause, *to form those who are exempted by Law, yet able to bear Arms, into Companies*, to appear once a Year, and as often as the publick Service shall require it for the Defence of the Province; and to provide a Quantity of Arms and Accoutrements to be lodged in the Cities of *New-York* and *Albany*, to be ready upon any Emergency.

to participate in the militia and subject their personal firearms to robust regulation. In 1765, Georgia passed "An Act for the better ordering the Militia of this Province" which demanded that "every person liable to appear and bear arms at any muster . . . shall constantly keep and bring with him to such muster . . . one gun or musket fit for service . . . ."[17] Needless to say, concern for the common safety was heightened in Georgia because of the slave population. In the same year, the Assembly passed an act "for the security and defence of this province" mandating that white men "be obliged to carry fire-arms" in places of public worship.[18] The law was very explicit in restricting such carrying of arms to "every white male inhabitant . . . who is or shall be liable to bear arms in the militia."[19] The distinction between "carry" and "bear" is quite clear and shows that the two terms were not synonymous, as some Individual Rights scholars have claimed.[20] While men could carry arms in church, they could not be said to be bearing them since that was reserved for militia service.[21]

The number of men able to serve in a military capacity was a pressing concern throughout the colonial period. Royal instructions to New Jersey demanded a tally of the number of men "fit to bear arms in the militia of our said province."[22] Reports from the Georgia

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2 JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW-YORK. BEGAN THE 8TH DAY OF NOVEMBER, 1743; AND ENDED THE 23D OF DECEMBER, 1765., at 386 (N.Y., Hugh Gaine 1766).

17 ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 33, 35 (Savannah, James Johnston 1765).

18 ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 1 (Savannah, James Johnston 1770).

19 ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 20, 21 (Savannah, James Johnston 1766). When the Act was due to expire in 1770, the Assembly enacted a new law, again restricting the carrying of arms to those men "liable to bear arms in the militia." ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 1 (Savannah, James Johnston 1770).

20 The most recent example of this claim is Clayton E. Cramer & Joseph Olson, *What Does Bear Arms Imply?* 6 GEO. J.L. & PUB. POL'Y (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086176.

21 It is also clear that in New Jersey "bearing arms" and "owning arms" were not synonymous because the members of the constitutional convention ordered state militia colonels "to disarm all such persons . . . whose religious principles will not permit them to bear arms." JOURNAL OF THE VOTES AND PROCEEDINGS OF THE CONVENTION OF NEW-JERSEY. BEGUN AT BURLINGTON ON THE 10TH OF JUNE 1776, AND THENCE CONTINUED BY ADJOURNMENT AT TRENTON AND NEW-BRUNSWICK TO THE 21ST OF AUGUST FOLLOWING. TO WHICH IS ANNEXED, SUNDRY ORDINANCES, AND THE CONSTITUTION. 48 (Burlington, N.J., Isaac Collins 1776).

22 SAMUEL SMITH, THE HISTORY OF THE COLONY OF NOVA-CÆSARIA, OR NEW-JERSEY: CONTAINING AN ACCOUNT OF ITS FIRST SETTLEMENT, PROGRESSIVE IMPROVEMENTS, THE ORIGINAL AND PRESENT CONSTITUTION, AND OTHER EVENTS, TO THE YEAR 1721. WITH SOME PARTICULARS SINCE; AND A SHORT VIEW OF ITS PRESENT STATE. 247 (Burlington, N.J.,

frontier told of the people's resolve "to defend themselves, if attacked" by building forts "for the safety of the women, children, and those unfit to bear arms."[23] For American colonists, the added factor of Indian tribes as either allies or enemies made the issue of safety and defense all the more salient. Thus, newspapers made note of the death by smallpox of forty Creek men "able to bear arms" in South Carolina in 1764,[24] and in 1768 reported that "[t]he last Advices from the Creek Country inform us, that all the Men in the Upper-Towns able to bear Arms, were gone and going out against a Body of the Choctaws and Chickesaws."[25] One pamphleteer cheered Superintendent of Indian Affairs Sir William Johnson's success in getting "all the males of [the Wappinger] tribe, that were fit to bear arms," to enter His Majesty's Service.[26] After the battles at Lexington and Concord, the Massachusetts House of Representatives was interested to learn from a chief of the Cagnawaga that there were "Five Hundred Men able to bear Arms" in his tribe, and wondered how many of the Iroquois were "fit to bear Arms."[27]

Needless to say, the imperial crisis greatly influenced talk of the militia and military preparedness. When the Stamp Act of 1765 soured relations between Britain and her colonies and led to violent confrontations, concern over the number of men able to bear arms took on a new significance. Benjamin Franklin, Pennsylvania's agent in London, was called before the House of Commons in 1766 to answer questions about the recently repealed Act. What would be a "sufficient military force to protect the distribution of the stamps in every part of America[?]," the assembly wanted to know.[28] "A very great force," Franklin replied, as "the disposition of America is for a

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James Parker 1765). These instructions came from Queen Anne to Lord Cornbury in 1702. *See id.* at 230.

23 N.Y.J., OR GEN. ADVERTISER, Feb. 24, 1774 (Supp.), at 2.

24 N.Y. MERCURY, Aug. 13, 1764, at 1.

25 N.Y. GAZETTE; & WKLY. MERCURY, Aug. 1, 1768, at 1.

26 A GEOGRAPHIC, HISTORICAL SUMMARY; OR NARRATIVE OF THE PRESENT CONTROVERSY, BETWEEN THE WAPPINGER TRIBE OF INDIANS, AND THE CLAIMANTS, UNDER THE ORIGINAL PATENTEE OF A LARGE TRACT OF LAND IN PHILIPSE'S UPPER PATENT, SO CALLED. CONTAINING, A BRIEF, BUT FAITHFUL ACCOUNT OF THE PROCEEDINGS THEREON, FROM THE FIRST RISE OF THE DISPUTE, UNTIL THE 12TH DAY OF MARCH, ANNO DOMINI, 1767., at 4–5 (Hartford, Conn., Green & Watson 1768).

27 A JOURNAL OF THE HONORABLE HOUSE OF REPRESENTATIVES OF THE COLONY OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND, BEGUN AND HELD AT THE MEETING-HOUSE IN WATERTOWN, IN THE COUNTY OF MIDDLESEX, ON WEDNESDAY THE NINETEENTH DAY OF JULY, ANNO DOMINI, 1775, at 35, 80 (Watertown, Mass., Benjamin Edes 1775).

28 N.H. GAZETTE & HIST. CHRON., Nov. 7, 1766, at 2

general resistance."[29] When asked about "the number of men in America able to bear arms, or of disciplined militia," Franklin objected to the question and refused to answer.[30] The assembly was not distinguishing between gun owners and militia men because some colonists belonged to voluntary militia units that were not officially "disciplined militia," as they had no oversight from the state. Franklin himself had advocated such voluntary groups in Pennsylvania as early as 1747.[31] Of course, Parliament ultimately wanted to know how many men could be mustered to enforce British taxation with military might.[32]

In Pennsylvania, the only province that lacked a state-sanctioned militia and whose frontier was hard hit during the French and Indian War, bearing arms had an undeniable military meaning. In early 1764, several hundred frontiersmen (dubbed the Paxton Boys) grabbed their guns and marched to Philadelphia to decry the pacifist Quakers that controlled government and demand a militia law. Quakers were aghast that the Paxtonians would demand "[t]hat all the Inhabitants of the Province, without regarding the conscientious Scruples of religious Societies should be alike obliged to bear Arms, and be subject to military Discipline."[33] Pacifists in Pennsylvania and other provinces resisted any attempt to force them into physical service or pay fines to support the militia, especially as the Revolution drew near and military readiness became a pressing issue.

Pacifist writings and petitions further prove that to bear arms was not widely understood to include the use of arms for non-military

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29 *Id.*

30 *Id.*; *see also* THE EXAMINATION OF DOCTOR BENJAMIN FRANKLIN, BEFORE AN AUGUST-ASSEMBLY, RELATING TO THE REPEAL OF THE STAMP-ACT 10 (Phila., Hall & Sellers 1766). One commentator in Britain, concerned about tbe way the colonies were being treated, warned that "[e]very male from sixteen to sixty able to bear arms is enrolled in the militia. Their numbers are very considerable and they are fast multiplying." BOSTON EVENING-POST, Oct. 8, 1770, at 1.

31 *See* BENJAMIN FRANKLIN, PLAIN TRUTH: OR, SERIOUS CONSIDERATIONS ON THE PRESENT STATE OF THE CITY OF PHILADELPHIA, AND PROVINCE OF PENNSYLVANIA. BY A TRADESMAN OF PHILADELPHIA (2d ed., Phila., Franklin 1747). Franklin's volunteer militia (or associator) movement raised thirty-three companies in Lancaster County, twenty-six in Chester County, nineteen in Bucks County, twelve in Philadelphia City, and eight in Philadelphia County by 1749. SAMUEL J. NEWLAND, THE PENNSYLVANIA MILITIA: THE EARLY YEARS, 1669–1792, at 42 (1997).

32 The December 12, 1765, edition of the *Massachusetts Gazette* ran a tally of "[t]he numbers of men in each Colony able to bear arms," putting the number at 800,000. MASS. GAZETTE, Dec. 12, 1765, at 1.

33 TO THE FREEHOLDERS AND OTHER ELECTORS FOR THE CITY AND COUNTY OF PHILADELPHIA, AND COUNTIES OF CHESTER AND BUCKS 1 (Phila., Franklin & Hall 1764).

purposes. William Penn himself recognized Pennsylvanians' "liberty to fowl and hunt upon the Lands they hold."[34] Hunting was carefully regulated by the state, and Pennsylvania's "Act to prevent the Killing of Deer out of Season" forbade any person "to carry any Gun or hunt on any improved or enclosed Lands" without the permission of the owner, or face a ten shilling fine.[35] While Quakers owned and carried arms and used them to kill food, they refused to bear them. As one Quaker pamphleteer wrote in the midst of the Paxton crisis, when Quaker founder George Fox refused to join Cromwell's army, "he was committed to a loathsome stinking Jaile . . . for no other Reason but because he would not bear Arms."[36] Mennonites as well made it "an article of their faith never to bear arms"[37] and petitioned the House of Burgesses in Virginia, asking to be "exempt from the Penalties . . . for declining military Duty" because they were "forbidden by the Dictates of Conscience to bear Arms."[38] Indeed, while pacifists had no issue with owning or carrying arms, they would not bear those arms in the militia.[39]

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34 THE EXCELLENT PRIVILEDGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND. 60 (Phila., William Bradford 1687); *see also* A COLLECTION OF CHARTERS AND OTHER PUBLICK ACTS RELATING TO THE PROVINCE OF PENNSYLVANIA 33 (Phila., Benjamin Franklin 1740).

35 THE CHARTERS OF THE PROVINCE OF PENSILVANIA AND CITY OF PHILADELPHIA 198–99 (Phila., Benjamin Franklin 1742).

36 AN ANSWER, TO THE PAMPHLET ENTITULED THE CONDUCT OF THE PAXTON MEN, IMPARTIALLY REPRESENTED: WHEREIN THE UNGENEROUS SPIRIT OF THE AUTHOR IS MANIFESTED, &C. AND THE SPOTTED GARMENT PLUCKT OFF. 16 (Phila., Anthony Armbruster 1764).

37 MORGAN EDWARDS, MATERIALS TOWARDS A HISTORY OF THE AMERICAN BAPTISTS, IN XII VOLUMES. 96 (Phila., Crukshank & Collins 1770).

38 JOURNAL OF THE HOUSE OF BURGESSES. 42 (Williamsburg, Va., William Rind 1770).

39 The use of "bear arms" in pacifist literature is consistent and always denotes military action. *See, e.g.*, The Address to the People Called Quakers, *in* AN EARNEST ADDRESS TO SUCH OF THE PEOPLE CALLED QUAKERS AS ARE SINCERELY DESIROUS OF SUPPORTING AND MAINTAINING THE CHRISTIAN TESTIMONY OF THEIR ANCESTORS. 1 (Phila., n. pub. 1775); *see also* ROBERT BARCLAY, A CATECHISM AND CONFESSION OF FAITH, WHICH CONTAINETH A TRUE AND FAITHFUL ACCOUNT OF THE PRINCIPLES AND DOCTRINES OF THE PEOPLE CALLED QUAKERS. TO WHICH IS ADDED, THE ANCIENT TESTIMONY OF THE SAID PEOPLE REVIV'D, WITH SOME OF THE RULES OF THE DISCIPLINE ESTABLISHED AMONG THEM. 16 (Supp., Phila., Joseph Crukshank 1773); COLLECTION OF SOME WRITINGS OF THE MOST NOTED OF THE PEOPLE CALLED QUAKERS, IN THEIR TIMES. COLLECTED TOGETHER, IN ORDER THAT SUCH WHO PROFESS THAT WAY MAY NOW COMPARE THEIR SENTIMENTS WITH THOSE OF THEIR FOREFATHERS, AS THEY TERM THEM, OR SUCH AS WERE DEEMED WORTHY ANCIENTS, WHOSE WRITINGS HAVE BEEN APPROVED OF BY THE SOCIETY IN GENERAL. 9–10 (Phila., W. & T. Bradford 1767); WILLIAM SEWEL, THE HISTORY OF THE RISE, INCREASE AND PROGRESS, OF THE CHRISTIAN PEOPLE CALLED QUAKERS; WITH SEVERAL REMARKABLE OCCURRENCES INTERMIXED. 423, 526, 677, 706 (3d ed., corrected, Burlington, N.J., Isaac Collins 1774); 4 VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF

While refusing to bear arms often came with a price, so did failure to comply with militia law. The Georgia Assembly levied a fine against "any person liable to appear and bear arms at musters" who failed to arrive "compleatly armed and furnished."[40] It is obvious here that personal firearms were subject to regulation, and that bearing arms was a term reserved for militia action. While Georgians owned arms, and were expected to use them in their militia service, they could not be said to be "bearing arms" until they appeared at muster. Who could bear arms was also defined by legislation. Rhode Island demanded that men aged sixteen to fifty "bear Arms in the respective trained Bands whereto by Law they shall belong,"[41] while Connecticut required men of the same age to "bear Arms, and duly attend all Musters and Military Exercises."[42] Nearby New Hampshire legislated that men as old as sixty must "bear arms, and duly attend all musters."[43]

The onset of the American Revolution only solidified the military meaning of bearing arms that had been employed throughout the late colonial period. "A good Militia is the best Security against all Enemies," wrote one essayist, proudly championing the fact that "half a Million of Men fit to bear Arms" lived in the colonies.[44] As British regular troops quelled the rebellion in Boston, the *Connecticut Gazette* reported that "[i]n many towns almost every man able to bear arms, march'd, for their relief."[45] One commentator, wary of Britain's treatment of the colonies, argued that "[n]othing can more effec-

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PENNSYLVANIA 355, 493, 537, 649 (Phila., Henry Miller 1774); JOHN WOOLMAN, THE WORKS OF JOHN WOOLMAN. IN TWO PARTS. 88 (Phila., Joseph Crukshank 1774).

40 ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 24 (Savannah, James Johnston 1773). New Jersey levied a four shilling per month tax on all "effective men . . . who shall refuse to enrol themselves and bear arms." EXTRACTS FROM THE JOURNAL OF PROCEEDINGS OF THE PROVINCIAL CONGRESS OF NEW-JERSEY, HELD AT TRENTON IN THE MONTHS OF MAY, JUNE, AND AUGUST, 1775. 30 (Burlington, N.J., Isaac Collins 1775).

41 THE CHARTER, GRANTED BY HIS MAJESTY, KING CHARLES II. TO THE GOVERNOR AND COMPANY OF THE ENGLISH COLONY OF RHODE-ISLAND AND PROVIDENCE-PLANTATIONS, IN NEW-ENGLAND IN AMERICA. 179 (Newport, R.I., Samuel Hall 1767).

42 ACTS AND LAWS OF HIS MAJESTY'S ENGLISH COLONY OF CONNECTICUT IN NEW-ENGLAND IN AMERICA 157 (New-London, Conn., Timothy Green 1750).

43 ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND. WITH SUNDRY ACTS OF PARLIAMENT. 92 (Portsmouth, N.H., Daniel & Robert Fowle 1771).

44 N.H. GAZETTE, & HIST. CHRON., July 5, 1771, at 1–2. The May 16, 1772, issue of the *Providence Gazette* estimated the number of inhabitants in Rhode Island to be 34,000, and estimated that the colony had 9,000 men "able to bear Arms." PROVIDENCE GAZETTE; & COUNTRY J., May 30, 1772, at 1. The July 22, 1774, issue of the *New-Hampshire Gazette* estimated that New England could raise 100,000 "effective Men able to bear Arms." N.H. GAZETTE, & HIST. CHRON., July 22, 1774, at 2.

45 CONN. GAZETTE; & UNIVERSAL INTELLIGENCER, Sept. 9, 1774, at 3.

tually shew the ignorance of the present ministry respecting the Americans, than their ideas of opposing them. There are no less than forty thousand men, able, skilful, and willing to bear arms, in the single province of South Carolina."[46] Confident in the sheer number of men ready for military service, another essayist gloated that

> [b]y the common estimate of three millions of people in America, allowing one in five to bear arms, there will be found 600,000 fighting men, who would (a very few excepted) rather die gloriously in the field of battle, than give up the country to the disposal of the ministry.[47]

Thomas Howard, the Earl of Effingham and a Captain in General Gage's forces destined for Boston, gained notoriety in the colonies when he informed George III on April 12, 1775, that he could not "bear arms against [his] fellow-subjects in America."[48] At least six colonial newspapers reprinted the letter, and it is impossible to believe that the colonists would have interpreted this as Howard's refusal to own or physically carry a gun.[49]

By mid-April 1775, armed conflict had already broken out at Lexington and Concord. Early the next month, the Continental Congress urged the colonies to help with military preparations against Britain, but assured those "who, from religious principles, cannot bear arms" that Congress intended "no violence to their consciences."[50] Reverend Robert Cooper, preaching to a crowd in Shippensburg, Pennsylvania, assured all of those "called to bear arms" that war against Britain was lawful and just.[51] Likewise, Virginia Baptists agreed "that it is lawful for christians . . . [t]o bear arms in defence of

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46 N.Y.J.; OR, GEN. ADVERTISER, Jan. 19, 1775, at 3.

47 PROVIDENCE GAZETTE; & COUNTRY J., May 27, 1775, at 1.

48 STORY & HUMPHREY'S PA. MERCURY, & UNIVERSAL ADVERTISER, June 23, 1775, at 3.

49 Reprints of Howard's letter appeared chronologically in PA. GAZETTE, June 28, 1775, at 4; CONN. COURANT, & HARTFORD WKLY. INTELLIGENCER, July 3, 1775, at 2; MASS. SUN OR, AM. ORACLE OF LIBERTY, July 5, 1775, at 3; NEW-ENG. CHRON.; OR, ESSEX GAZETTE, July 6–13, 1775, at 2; CONN. GAZETTE; & UNIVERSAL INTELLIGENCER, July 7, 1775, at 2; PROVIDENCE GAZETTE; & COUNTRY J., July 8, 1775, at 2.

50 JOURNAL OF THE PROCEEDINGS OF THE CONGRESS, HELD AT PHILADELPHIA, MAY 10, 1775, at 189 (Phila., William & Thomas Bradford 1775).

51 ROBERT COOPER, COURAGE IN A GOOD CAUSE, OR THE LAWFUL AND COURAGEOUS USE OF THE SWORD. A SERMON, PREACHED NEAR SHIPPENSBURGH, IN CUMBERLAND COUNTY, ON THE 31ST OF AUGUST, 1775,—TO A LARGE AUDIENCE, IN WHICH WERE UNDER ARMS, SEVERAL COMPANIES OF COL. MONTGOMERY'S BATTALION; AND PUBLISHED AT THEIR REQUEST. 8 (Lancaster, Pa., Francis Bailey 1775).

their country, when unjustly invaded."[52] But perhaps no event pushed Virginians to bear arms against Britain more than Governor Lord Dunmore's Proclamation of November 7, 1775, establishing martial law in Virginia and inviting "all indented Servants, [and] Negroes . . . that are able and willing to bear Arms" to join the British army.[53] The New York and Pennsylvania papers reprinted Dunmore's words, and Americans knew he was not issuing an invitation for blacks to own guns, but rather to join the British in putting down the colonial rebellion.[54]

The surviving print material from the Revolution reveals that the Americans colonists were not concerned about arming themselves for personal self-defense; they were preoccupied with mobilizing communities so that they could defend themselves. On July 18, 1775, John Dickinson proposed to the Continental Congress that it be "earnestly recommended to such of the Inhabitants of these Colonies, as have not already entered into Associations for learning the military Exercise, that all who are capable of bearing arms, do immediately associate themselves."[55] British officials were likewise seeking out pockets of loyal supporters that they could arm for their own purposes. As John Hancock reported to George Washington, Lord Dartmouth had written from Whitehall to North Carolina governor, Josiah Martin, "recommending him to embody such of the men in

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52 DAVID THOMAS, THE VIRGINIAN BAPTIST: OR A VIEW AND DEFENCE OF THE CHRISTIAN RELIGION, AS IT IS PROFESSED BY THE BAPTISTS OF VIRGINIA. 20 (Baltimore, Enoch Story 1774).

53 JOHN, EARL OF DUNMORE, PROCLAMATION OF NOV. 7, 1775, at 1 (Norfolk, Va., John H. Holt & Co. 1775).

54 *Compare* PA. EVENING POST, Dec. 5, 1775, at 557 (reprinting proclamation), *with* PA. EVENING POST, Dec. 12, 1775, at 570 ("Since Lord Dunmore's proclamation made its appearance here, it is said he has recruited bis army, . . . including his black regiment . . . ."); PA. GAZETTE, Dec. 13, 1775, at 2 ("Since the troops under Col. Woodford's command began their march, Lord Dunmore issued a proclamation inviting the slaves of rebels, as he pleased to say, to repair to his standard."); ESSEX J. & N.H. PACKET, Dec. 15, 1775, at 3 ("Governor Dunmore of Virginia, has issued a proclamation . . . calling upon indented servants, negroes, &c. to join his Majesty's troops for the speedy reducing that colony to (what his Lordship is pleased to call) '*a proper sense of it's* [sic] *duty.*'"); N.Y. GAZETTE: & WKLY. MERCURY, Dec. 18, 1775, at 2 ("Lord Dunmore's cruel policy begins at length to be discovered by the blacks, who have lately deserted from him to a considerable number. When his Lordship first went down to Norfolk, he gave great encouragement to unwary Negroes, but, such was his baseness, some of them, it is confidently said, he sent to the West-Indies, where these unfortunate creatures were disposed of to defray his Lordsbip's expences . . . .").

55 John Dickinson, John Dickinson's Proposed Resolutions, July 18, 1775, *in* 1 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 633, 633 (Wash., D.C., Library of Congress 1976–2000).

four counties (which Gov. Martin had represented as favourable to the views of administration) as are able to bear arms."[56] The ability to bear arms had nothing to do with firearms proficiency and everything to do with meeting the legal requirements for participation in the militia. It is certain that neither Dickinson nor Dartmouth were requesting that the colonists rush out and buy guns for their personal defense. Rather the focus was on collecting and associating men in viable military units.

Given the daunting military task facing the American patriots in the wake of the Declaration of Independence, it is no surprise that every mention of bearing arms in the newspapers from 1777 to 1784 was made in that context. As states mustered militias and the Continental Army managed to survive year after year, "bearing arms" was certainly understood as being exclusively military in nature. "It is said that the General Assembly of this State have enrolled in the Militia List every Person, able to bear Arms, from 16 to 60," reported the *Norwich Packet*.[57] New Hampshire's militia law stipulated that upon the sounding of the alarm, "all the trained Soldiers, and others capable to bear Arms . . . shall forthwith appear compleat with their Arms & Ammunition, at the usualPlace [sic] of Rendezvous."[58] In Rhode Island, the General Assembly passed a resolution to assemble together "all male Persons subject by Law to bear Arms, whether of the Militia, Alarm List or Independent Companies."[59]

The push to persuade more men into military service prompted pacifists throughout the colonies to once again assert their right not to bear arms. As one observer lamented, "small parties of unthinking Men are forcing others to enrol [in the militia] who are principled ag[ainst] bearing Arms."[60] The Sandemanians in New England announced that they had "no inclination to bear arms or become sol-

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56 Letter from John Hancock to George Washington (July 24, 1775), *in* 1 LETTERS OF DELEGATES TO CONGRESS, *supra* note 55, at 662, 663.

57 NORWICH PACKET & CONN., MASS., N.H., & R.I. WKLY. ADVERTISER, Jan. 20, 1777, at 3.

58 An Act for Forming and Regulating the Militia Within the State of New-Hampshire in New-England, and for Repealing all the Laws Heretofore Made for that Purpose, *in* ACTS AND LAWS OF THE COLONY OF NEW-HAMPSHIRE 27, 34 (Exeter, N.H., n. pub. 1776).

59 STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS. IN GENERAL ASSEMBLY. DECEMBER SESSION, A.D. 1776., at 1 (Providence, R.I., Carter 1776).

60 Letter from Thomas Johnson, Jr., to Samuel Purviance, Jr., (Jan. 23, 1775), *in* 1 LETTERS OF DELEGATES TO CONGRESS, *supra* note 55, at 298, 300. Johnson was upset that a local Maryland Committee of Observation was collecting contributions for arms and ammunition, and publicly accusing those who would not contribute of being Tories. *See id.* at 300 n.2.

diers."[61] In New York, many were dismayed that the Shakers believed that it was "contrary to the gospel to bear arms . . . [and] that it is a great error to have any thing to do with war and fighting."[62] Quakers in Pennsylvania sought protection of their liberty of conscience, and were rightfully worried about the test acts and oaths of office instituted under the new state constitution.[63] Supporters of the new frame of government denied that these oaths violated the Quakers' rights, arguing that they contained "no obligation to bear arms and fight."[64] The obligation was, of course, to the militia. Thomas Paine insisted that the American cause was pure, as they were defending themselves from an unprovoked attack, and begged the Quakers not

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61 PA. EVENING POST, Jan. 27, 1778, at 41. So-called because of their founder, Robert Sandeman, the Sandemanians were affiliated with the Glasites of Scotland, formed by Sandeman's father-in-law, John Glas.

62 VALENTINE RATHBUN, AN ACCOUNT OF THE MATTER, FORM, AND MANNER OF A NEW AND STRANGE RELIGION, TAUGHT AND PROPAGATED BY A NUMBER OF EUROPEANS, LIVING IN A PLACE CALLED NISQUEUNIA, IN THE STATE OF NEW-YORK. 8 (Providence, R.I., Bennett Wheeler 1781). In the second edition, Rathbun added a dialogue between George III and his ministers, in which they revealed their nefarious plot to let the "Shaking Quakers . . . cut the sinews of [the] rebellion, as the numerous converts will refuse to bear arms against the forces sent to subdue the Americans." VALENTINE RATHBUN, A BRIEF ACCOUNT OF A RELIGIOUS SCHEME, TAUGHT AND PROPAGATED BY A NUMBER OF EUROPEANS, WHO LATELY LIVED IN A PLACE CALLED NISQUEUNIA, IN THE STATE OF NEW-YORK, BUT NOW RESIDING IN HARVARD, COMMONWEALTH OF MASSACHUSETTS, COMMONLY CALLED, SHAKING QUAKERS. 34 (Worcester, Mass., n. pub. 1782).

63 The militarization of Pennsylvania had been an ongoing concern for the Quakers. In October 1775 they sent an address to the Assembly, reminding the members that "we, as a religious Society, have declared to the World that we could not for Conscience Sake bear Arms, nor be concerned in warlike Preparations, either by personal Service or by paying any Fines, Penalties or Assessments, imposed in Consideration of our Exemption from such Services." 6 VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF PENNSYLVANIA. BEGINNING THE FOURTEENTH DAY OF OCTOBER, 1767., at 634 (Phila., Henry Miller 1777). Bearing arms in a militia was also a concern for the Moravians of Pennsylvania, and Bishop Nathaniel Seidel asked Benjamin Franklin to be their advocate in Congress so that they would not have to violate their pacifism. Franklin counseled Seidel that it would "operate in the Minds of People very greatly in your Favour" if the Moravians declared that although they could not "in conscience compell their young Men to learn the use of Arms," they would not "restrain such as are so disposed." Letter from Benjamin Franklin to Nathaniel Seidel (June 2, 1775), *in* 1 LETTERS OF DELEGATES TO CONGRESS, *supra* note 55, at 433, 433–34.

64 PA. PACKET OR GEN. ADVERTISER, June 17, 1778, at 1. The 1790 Pennsylvania Constitution contained a clause stating: "The freemen of this commonwealth shall be armed and disciplined for its defence. Those, who conscientiously scruple to bear arms, shall not be compelled to do so; but shall pay an equivalent for personal service." ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, PASSED AT A SESSION, WHICH WAS BEGUN AND HELD AT THE CITY OF PHILADELPHIA ON TUESDAY, THE SEVENTH DAY OF DECEMBER, IN THE YEAR ONE THOUSAND SEVEN HUNDRED AND NINETY, AND OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA, THE FIFTEENTH., at xxxii, § II (Phila., Hall & Sellers 1791).

to use their pacifism to fuel political partisanship. "If the bearing arms be sinful," he told them,

> the first going to war [i.e., Britain] must be more so, by all the difference between wilful attack and unavoidable defence. Wherefore, if ye really preach from conscience, and mean not to make a political hobby-horse of your religion, convince tbe world thereof by proclaiming your doctrine to our enemies, *for they likewise bear* ARMS.[65]

Many states were willing to grant pacifists an exemption from physical service, but they also felt that these men should fulfill their civic duty in other ways. One essayist proposed "a tax of two-dollars . . . on every man able to bear arms, and not actually in the Continental army."[66] Paying fines was the most common way for pacifists to contribute to the war effort. The Maryland Assembly rejected a petition from pacifist sects to get exempted from such fines, arguing

> that every indulgence, consistent with the defence and security of the state, should be given to religious people, but that to release persons able to bear arms from military duty tends to weaken the defence of tbe state, and that such exemptions ought not to be granted till the war is ended.[67]

Those who signed New Jersey's military association agreed that doing so was "consistent with [their] religious principles," and the Committee of Safety recommended that "at this time of public danger," religious objectors should "bear an equal proportion of the public expences, as an equivalent for an exemption from bearing arms."[68]

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65 THOMAS PAINE, COMMON SENSE; ADDRESSED TO THE INHABITANTS OF AMERICA app. at 140–41 (2d ed., Phila., R. Bell 1776). In a later article written to sway men to the Whig cause, Paine included the minutes of a meeting of the Pennsylvania Council of Safety in which the members agreed that they knew of "no instance in which the Quakers have been compelled to bear arms" THOMAS PAINE, THE AMERICAN CRISIS. 55 (London, Fishkill 1777).

66 INDEP. LEDGER, & AM. ADVERTISER, May 15, 1780, at 1. The movement to tax pacifists, or make them contribute to the common defense, found support with the Continental Congress, such that in 1775 it had encouraged pacifists "to contribute liberally, in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed country, which they can consistently with their religious principles." JOURNAL OF THE PROCEEDINGS OF THE CONGRESS, HELD AT PHILADELPHIA, MAY 10, 1775, at 194 (Phila., William & Thomas Bradford 1775); 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 189 (Worthington Chauncey Ford ed., 1905).

67 VOTES AND PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND. NOVEMBER SESSION, 1781., at 56 (Annapolis, Md., Green 1782).

68 JOURNAL OF THE VOTES AND PROCEEDINGS, AS WELL OF THE COMMITTEE OF SAFETY, AT A SITTING IN JANUARY, 1776, AS THE PROVINCIAL CONGRESS OF NEW-JERSEY, AT A SITTING AT NEW-BRUNSWICK, BEGAN JANUARY 31, AND CONTINUED TO THE SECOND DAY OF MARCH FOLLOWING. 98–99 (N.Y., John Anderson 1776). Under decree of the Provincial Congress, pacifists between sixteen and fifty years of age had to pay four shilling per month,

Bearing arms for the state was an obligation for every man who enjoyed the protections of the state. This duty, or liability, has been effectively ignored by much of the modern scholarship on the right to bear arms. And yet, it is crucial to understanding bearing arms in the early years of United States nationhood. When the British declared any persons taken "not in arms, but peaceably in their own houses" to be "prisoners of war on parole," South Carolina's Governor, John Rutledge, proclaimed that all men were still "liable to bear arms in defence of the State"[69] The next year, desperate for men to fight against the ongoing British invasion of the Carolinas, Rutledge ordered that "no person able to bear arms, and now in town, quit or absent himself."[70] North Carolina's Assembly ordered "all persons who can be armed, and are able to bear arms, to assemble themselves under Major-General Caswell to form an army."[71]

American victory at Yorktown in 1781 brought the beginning of the end of the American Revolution, and writers celebrated the country's military prowess in the pages of newspapers and pamphlets. One author, commemorating the soldiers' deaths "earn'd by virtue," recalled that at Saratoga "[e]very male able to bear arms went forth to the battle [while] the women and children were paraded along the main street."[72] Another article, celebrating South Carolina patriot Colonel Isaac Hayne, related that when the British arrested Hayne he unequivocally stated, "I never will bear arms against my country. My new masters can require no service of me but what is enjoined by the

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or face the sale of their personal property to pay their pubic deht. AN ORDINANCE FOR REGULATING THE MILITIA OF NEW JERSEY, PASSED AT A SITTING OF THE PROVINCIAL CONGRESS, HELD AT TRENTON IN THE MONTH OF OCTOBER, 1775, TO WHICH IS ANNEXED THE CONTINENTAL ARTICLES OF WAR. 10 (Burlington, N.J., Isaac Collins 1776).

69 PA. PACKET OR GEN. ADVERTISER, July 6, 1779, at 2. In 1776, South Carolina's Provincial Congress had resolved that

> every person liable to bear arms, shall appear completely armed, once in every fortnight, on the day and at the place appointed by his Captain for the exercising bis company; the privates under a penalty not exceeding three pounds current money, and the officers under the penalty of twenty-five pounds, for every default."

EXTRACTS FROM THE JOURNALS OF THE PROVINCIAL CONGRESS OF SOUTH-CAROLINA. HELD AT CHARLES-TOWN, FEBRUARY 1ST, 1776., at 121 (Charles-Town, S.C., Peter Timothy 1776).

70 MASS. SUN OR, AM. ORACLE OF LIBERTY, May 4, 1780, at I. Clinton had issued his own proclamation as well, which, according to the July 26, 1780, issue of the *New-Jersey Gazette*, discharged "from their paroles all who had taken them, and requir[ed] their immediate attendance to swear allegiance and bear arms in favour" of the King. N.J. GAZETTE, July 26, 1780, at 2.

71 CONN. COURANT & WKLY. INTELLIGENCER, Mar. 27, 1781, at 2.

72 CONTINENTAL J. & WKLY. ADVERTISER, Apr. 11, 1782, at 2.

old militia-law . . . which substitutes a fine in lieu of personal service. That I will pay as the price of my protection."[73] *Andrews History of the Late War with America* noted that "almost all men . . . that were able to bear arms, made it their business to acquire the use of them by constant practice and exercise."[74] Once again, writers celebrated the Earl of Effingham for refusing to "bear arms against [his] fellow subjects in America."[75]

The role of arms in the new republic came under serious scrutiny with the uprising of veterans of the Revolution in Western Massachusetts. When Daniel Shays and his band of rebels stormed the Northampton Courthouse and eventually the Springfield Armory in early 1787, it brought discussion of the right to bear arms to the fore. One author estimated that the Shaysites would not be able to "muster in all their united force . . . more than 2000 men, if they all turned out, who would bear arms."[76] The author also argued that "[p]rovided there was a force against them, their numbers would be less."[77] Indeed, it was by mustering a private militia that leaders in Boston were able to suppress Shays's Rebellion. In the aftermath of the violence, the General Court passed "[a]n act for the more speedy and effectual suppression of tumults and insurrections," which plainly stated in the first sentence that "the people have a right to bear arms for the common defence"[78] As such, all "virtuous citizens" needed to "hold themselves in readiness" and be prepared to ensure the "safety of the state"[79] In the new republic, as during the Revolution, recognizing and fulfilling one's duty of militia service was an essential element of citizenship.

The violence of Shays' Rebellion helped solidify the criticism of the Articles of Confederation that led to the Constitution of 1787, with its federalist focus on maintaining good order, or domestic tranquility. In *The Federalist*, Alexander Hamilton, James Madison, and John Jay effectively assuaged fears that the new government would be in essence a police state. "The highest number to which . . . a stand-

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73 INDEP. GAZETTEER; OR, CHRON. OF FREEDOM, Feb. 11, 1786, at 2.

74 COLUMBIAN HERALD, OR INDEP. COURIER OF N. AM., Mar. 6, 1786, at 2.

75 WILLIAM GORDON, 1 THE HISTORY OF THE RISE, PROGRESS, AND ESTABLISHMENT, OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA; INCLUDING AN ACCOUNT OF THE LATE WAR; AND OF THE THIRTEEN COLONIES, FROM THEIR ORIGIN TO THAT PERIOD. 335 (N.Y., Hodge, Allen & Campbell 1789).

76 INDEP. J.: OR, GEN. ADVERTISER, Dec. 23, 1786, at 2.

77 *Id.*

78 AM. RECORDER, & CHARLESTOWN ADVERTISER, Mar. 30, 1787, at 1.

79 *Id.*

ing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms," Madison argued in the forty-sixth installment.[80] Since such an army "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands," Madison asserted that "[i]t may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops."[81] Madison employed the phrase "bear arms" in exactly the same way his contemporaries did, and it goes without saying that we should assign extra weight to his words.

The attempt to ratify the new Constitution revealed and revived a host of worries that had manifested themselves during the Revolution, among which was the duty to bear arms in the federal militia. One Federalist, calling himself "Plain Truth," tried to calm fears that conscientious objectors would be compelled to duty by arguing that while Congress could call forth the militia, only the states could raise a militia. Because "men conscientiously scrupulous by sect or profession are not forced to bear arms in any of the states," there was nothing to worry about.[82] Another author scoffed at the idea of forcing pacifists into military service: "There is not the least danger of the federal government compelling persons of a scrupulous conscience to bear arms, as the United States would be poorly defended by such."[83] In Rhode Island, where the Constitution was not ratified until 1790, a Federalist assured his opponents that "although the President of the United States is a man of defensive principles," he would never "suffer any man to be dragged into the field of battle who was fully convinced that it was not right for him to bear arms."[84] In true Anti-Federalist fashion, pacifists wanted a specific exemption. "[T]here is room to fear," wrote one critic of the new frame of government, "that a majority of those who composed the Convention were deists, or men of little or no religious principles—as they have made no provision for those who refuse to bear arms; especially the Society of Friends."[85] Non-pacifists also worried that Congress would

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80 2 THE FEDERALIST: A COLLECTION OF ESSAYS, WRITTEN IN FAVOUR OF THE NEW CONSTITUTION, AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787, at 90 (N.Y., J. & A. McLean 1788).

81 *Id.*

82 N.Y.J., & DAILY PATRIOTIC REG., Nov. 21, 1787, at 2.

83 FED. GAZETTE, & PHILA. EVENING POST, Nov. 18, 1788, at 2.

84 NEWPORT HERALD, Feb. 25, 1790, at 3.

85 U.S. CHRON.: POL., COM., & HIST. (Providence, R.I.), Mar. 27, 1788, at 4. When the *History of the Life and Character of Benjamin Franklin* was printed in the December 7, 1790, issue

have too much control over the militia. The men in Maryland's ratification convention fretted that "all other provisions in favour of the rights of man, would be vain and nugatory, if the power of subjecting all men able to bear arms to martial law at any moment, should remain vested in Congress."[86] A moral tale titled "The Soldier by Compulsion" graced the pages of the *New York Weekly Museum*.[87] The protagonist, William Bensley, cannot pay his debts, is considered a vagabond, and is forced into the army.[88] Bensley "could not endure the thoughts of being *forced* to bear arms," but is compelled under the circumstances to endure life as a soldier.[89] In Anti-Federalist New York, the moral was not lost.

During the ratification debates, Americans openly discussed the role that bearing arms would play in the new nation. Given the importance of the militia in the Revolution, it should come as no surprise that many commentators and ratifiers wanted to ensure the longevity of that institution. The Virginia convention asked that a lengthy Bill of Rights be added to the Constitution that included the following provision: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state."[90] That the Virginia delegates differentiated bearing arms from being "trained to arms" is significant. Another proposed clause for the Bill of Rights sought an exemption for "any person religiously scrupulous of bearing arms," provided that that person make "payment of an equivalent to employ another to bear arms in his stead."[91] One could be trained to use a firearm, and one could own a firearm, but one could not be forced to serve in a militia (i.e., "bear arms") if he conscientiously objected. However, if he was to forego physical

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of the *Federal Gazette*, readers were reminded that, "In Pennsylvania, the prevalence of the quaker interest prevented the adoption of any system of defence, which would compel the citizens to bear arms." FED. GAZETTE & PHILA. DAILY ADVERTISER, Dec. 7, 1790, at 2.

86 PA. PACKET, & DAILY ADVERTISER, May 8, 1788, at 2; 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTIONS AT PHILADELPHIA, IN 1787. TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN'S LETTER, YATES'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98–'99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION 552 (Jonathan Elliot ed., 2d ed., Phila., J.B. Lippincott & Co. 1836) [hereafter ELLIOT'S DEBATES].

87 N.Y. WKLY. MUSEUM, Oct. 18, 1788, at 1.

88 *Id.*

89 *Id.*

90 3 ELLIOT'S DEBATES, *supra* note 86, at 659. The North Carolina Convention used the same language. *See* 4 *id.* at 244.

91 3 *id.* at 659.

service, he had to contribute his share in another way. It is impossible to imagine how bearing arms in someone's stead had anything to do with personal self-defense. The Rhode Island convention also asked for a Bill of Rights that, in part, also recognized the importance of bearing arms: "That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people *capable of bearing arms,* is the proper, natural, and safe defence of a free state."[92]

Madison himself proposed a specific exemption to the militia bill for those conscientiously scrupulous of bearing arms, asserting that the "pride of the federal constitution [was] that the rights of man had been attended to."[93] Madison reasoned that while "[i]t was possible to oppress their sect," no one had ever been able "to make [the Quakers] bear arms," and so Congress would be wise to "make a virtue of necessity, and grant them the privilege."[94] Representative Jackson of Georgia opposed the exemptions on the grounds that men would be tempted to evade militia duty "by a pretended attachment to religious principles."[95] If Quakers were to be exempt from personal service then they would have to pay a fine to contribute to the common defense. Representative Giles also opposed the exemption, arguing that "[p]ersonal service . . . was a debt every member owed to the protection of government, a debt which it was immoral not to pay."[96] Representative Sherman questioned if Congress could give an exemption to pacifists because "the state governments had [not] given out of their hands the command of the militia, or the right of declaring who should bear arms?"[97] He went on to argue that it was the

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92 1 *id.* at 335. The New York Convention used the same language. *See* 1 *id.* at 328.

93 GEN. ADVERTISER, & POL., COM., AGRIC. & LITERARY J. (Phila.), Dec. 27, 1790, at 2.

94 *Id.*

95 *Id.* When considering ratifying the Articles of Confederation, the Georgia Assembly had proposed changes to Article IV to underscore that non-whites and those who refused to bear arms were not entitled to the full benefits of the law. The rejected changes were as follows: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free *white* inhabitants of each of these States, paupers, vagabonds, *all persons who refuse to bear Arms in defence of the State to which they belong, and all persons who have been or shall be attainted and Judged guilty of high treason in any of the United States,* and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . . ." (proposed changes are in italics). *See* 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 66, at 671.

96 GEN. ADVERTISER, & POL., COM., AGRIC. & LITERARY J. (Phila.), Dec. 27, 1790, at 2.

97 PA. PACKET, & DAILY ADVERTISER, Dec. 21, 1790, at 2.

> privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack made upon his liberty or property, by whomsoever made. The particular states, like private citizens, have a right to be armed, and to defend, by force of arms, their rights, when invaded. A militia existed in the United States, before the formation of the present constitution: and all that the people have granted to the general government, is the power of organizing such militia. The reason of this grant was evident; it was in order to collect the whole force of the union to a point, the better to repel foreign invasion, and the more successfully to defend themselves.[98]

These men lend credence to a civic interpretation of the right to bear arms. Bearing arms was a privilege, a right, and a duty, and one that was integral to the survival of the militia. Indeed, for Americans to successfully defend themselves, they could not shirk their duty to the militia.

The civic element of militia duty is seen in some representatives' hesitance to give any exemptions from militia service, even to political leaders, as it would unfairly burden non-exempt citizens. Representative Burke of South Carolina argued that exemptions would "oblige the midling and poorer class of citizens to the toils and dangers of military service" while the "wealthy, the potent, and influential" could escape service, leading to the "disgrace [of] the militia."[99] Even so, he agreed that no man should be forced to bear arms against his conscience. Burke had no love for the Quakers, and during the Revolution he had been in charge of imprisoning all Quakers in Charlestown who "refused to bear arms" and disobeyed the governor's orders "to defend the town."[100] While most of the men agreed, they felt that state governments, and not Congress, should be entitled to give exemptions. In the end, Madison's proposed exemption was defeated. As the *Providence Gazette & Country Journal* reported, "It was not, however, the sense of the House that [conscientious objectors] should be forced to bear arms."[101]

On August 21, 1789, the House agreed to sixteen amendments to the Constitution. The Fifth Amendment read in full, "A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms shall not be infringed; but no one religiously scrupulous of bearing

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98 *Id.*

99 FED. GAZETTE & PHILA. DAILY ADVERTISER, Dec. 28, 1790, at 2.

100 *Id.* at 3.

101 PROVIDENCE GAZETTE & COUNTRY J., Jan. 15, 1791, at 3.

arms, shall be compelled to render military service in person."[102] Four days later, the Senate considered the proposed amendments, and on September 4, a motion to accept the amendment as written passed in the affirmative.[103] By September 9, what would become the Second Amendment had been considerably pared down. A motion to add the phrase "for the common defense" after "bear arms" was struck down, and the Senate agreed that the Amendment should now read, "A well regulated militia being the security of a free state, the right of the people to keep and bear arms shall not be infringed."[104] These journals are problematic sources because they do not include any text of the debates, or any idea of why certain proposals were accepted or rejected. To assume that the common defense clause was rejected because the Second Amendment was written to support an individual right to bear arms is as reckless as arguing that the representatives assumed the clause to be redundant and so voted it down. The original amendment, with its provision for pacifists, was certainly military in purpose. It is unlikely that over the span of a few days the Senate would have completely changed the meaning of the Amendment. And, within the context of the documents discussed in this Article, a military reading of the Second Amendment would not be unreasonable.

The vast majority of the documents from the three online databases support a civic and military interpretation of bearing arms. There are, of course, a few uses of the phrase that do not fall neatly into such a reading. However, the documents that do not mention bearing arms in an explicitly military manner are by no means ringing endorsements of an individual rights interpretation. The April 23, 1776, issue of the *Pennsylvania Evening Post* reprinted a story from the French and Indian War reporting that forty or fifty American vessels bound for foreign islands in the Caribbean had been seized.[105] "The inhabitants of [these] islands were so incensed against the Americans, that [some of] those who happened to be there

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102 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, BEING THE FIRST SESSION OF THE FIRST CONGRESS: BEGUN AND HELD AT THE CITY OF NEW YORK, MARCH 4, 1789, AND IN THE THIRTEENTH YEAR OF THE INDEPENDENCE OF SAID STATES. 85 (Wash., D.C., Gales & Seaton 1820).

103 *See* JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA, BEGUN AND HELD AT THE CITY OF NEW YORK, MARCH 4, 1789, AND IN THE THIRTEENTH YEAR OF THE INDEPENDENCE OF SAID STATES. 63–64, 71 (Wash., D.C., Gales & Seaton 1826).

104 *Id.* at 77.

105 PA. EVENING POST, Apr. 23, 1776, at 201.

were . . . shackled, and thrown into a dungeon."[106] Others abandoned their property and went to the French to get the "protection they could not find among the English."[107] One such man was Mr. Peter Wikoff, who had reportedly been seen "bear[ing]-arms about twelve months before in Philadelphia."[108] It is unclear exactly what Wikoff was doing, but it was enough to prompt Governor Shirley of Massachusetts to offer a five hundred pound reward for his capture.[109] It seems certain, though, that he was not defending his property from attack. The second document to be considered is somewhat less ambiguous but by no means clear: a report of the settlement on the Genesee tract in New York in 1791. An article in the *General Advertiser* related that there were "upwards of six thousand persons, already established in this new country, half of whom may be presumed able to bear arms, [which] gives the most perfect security to the settlers."[110] While it is reasonable to assume this "perfect security" came from men banding together for the common defense, there is no explicit mention of any militias or military associations. And, while it is plausible that the author was describing the measure of personal safety that came with owning a firearm on the frontier, it is unlikely that he meant for the term "able to bear arms" to be equated with "owned a gun." Certainly many a young man owned or could use a firearm without being old enough to bear that arm in a military association.

More illuminating is the debate over the Massachusetts Constitution that arose in late 1786 when people in the western part of the state met in Portland to discuss establishing a separate government. One critic, Senex, dismissed the members of the Portland Convention as "mobs . . . usurpers of the rights of our legislators, . . . strangers and enemies."[111] Another writer, Scribble-Scrabble (actually George Thatcher, who sat in the First Congress that wrote the Second Amendment), was willing to be more lenient to the Convention, and over the span of a few weeks submitted many essays to

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 GEN. ADVERTISER & POL., COM. & LITERARY J., Aug. 5, 1791, at 2; WILLIAM TEMPLE FRANKLIN, AN ACCOUNT OF THE SOIL, GROWING TIMBER, AND OTHER PRODUCTIONS, OF THE LANDS IN THE COUNTRIES SITUATED IN THE BACK PARTS OF THE STATES OF NEW-YORK AND PENSYLVANIA, IN NORTH AMERICA. AND PARTICULARLY THE LANDS IN THE COUNTY OF ONTARIO, KNOWN BY THE NAME OF THE GENESEE TRACT, LATELY LOCATED, AND NOW IN THE PROGRESS OF BEING SETTLED. 36 (London, n. pub. 1791).

111 CUMBERLAND GAZETTE (Portland, Mass.), Sept. 21, 1786, at 2.

the *Cumberland Gazette* that offered his understanding of the Massachusetts Constitution.[112] He rejected the idea that the Bill of Rights limited personal freedoms by placing negatives on rights not mentioned. Scribble-Scrabble acknowledged that in a state of nature "individuals have a right to keep arms—say muskets" which they could use "to kill game, fowl, or in self-defence, or in defence of their fellow-creatures."[113] Although the Massachusetts Constitution stated that "the people have a right to keep and bear arms in their common defence," Scribble-Scrabble asserted that this provision did not deprive the people of their natural right "of using arms when they are attacked individually, and not in common and together."[114] Indeed, the constitution did not prevent citizens from using or owning arms. As he argued, "Who will say that if an honest farmer were to discharge his musket, ten times a day, at pigeons or or [sic] other game, he thereby becomes an enemy to the constitution?"[115] It is important to note that Scribble-Scrabble acknowledged that the constitutional right to keep and bear arms was a communal right, not to be confused with the natural right to keep arms for self defense. He also strongly supported regulation, arguing, "The right to keep and bear arms, generally, for all purposes, is undoubtedly an alienable right; and the legislature have a power to controul it in all cases, except the one mentioned in the bill of rights, whenever they shall think the good of the whole require it."[116] In this nonidiomatic usage, he is expressing his belief that owning firearms for uses other than the common defense could be restricted.

It is evident that bearing arms was different from owning arms or using arms. In his pamphlet, *The Virginia Chronicle*, Baptist minister John Leland wrote that most Baptists in Virginia, "hold it their duty to obey Magistrates, to be subject to the law of the land, [and] to pay their taxes . . . . They are not scrupulous of taking an oath of God upon them to testify the truth before a magistrate or court . . . . Their religion also allows them to bear arms in defence of their life, liberty and property . . . ."[117] With no explicit mention of the militia, Leland's words are open to interpretation. If one were to ignore how

112 For Scribble-Scrabble's identity, see 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 226 (Charles Kind ed., N.Y., G.P. Putnam's Sons 1894–1900).

113 CUMBERLAND GAZETTE (Portland, Mass.), Mar. 16, 1787, at 4.

114 *Id.*

115 CUMBERLAND GAZETTE (Portland, Mass.), Dec. 8, 1786, at 1.

116 *Id.*

117 JOHN LELAND, THE VIRGINIA CHRONICLE: WITH JUDICIOUS AND CRITICAL REMARKS UNDER XXIV HEADS. 41 (Norfolk, Va., Prentis & Baxter 1790).

the phrase "bear arms" had been employed since 1763, Leland's statement could be read to support that "bear arms" means "carry guns." But even then, he links the right to bear arms with other civic obligations: obeying leaders and the law, testifying in court, and paying taxes. Leland makes the same connection in another section, noting that "the only *Virginia Baptist church* that I know of in the state, that refuse to bear arms, or take an oath before a magistrate, is one in Shenandoah; the chiefest of whom are the natural descendants of the Mennonists."[118] Given the long debate over exempting pacifists from military duty, it makes sense that Leland used "bear arms' in the collective and civic sense.

While in a handful of these texts "bear arms" is unaccompanied by the typical express military language, none of these uses amounts to an unambiguous endorsement of a wholly individual right to carry guns. The historical record of usage clearly shows that, before 1791, "bear arms" was used in its idiomatic sense to denote military service and the like, and that usage to denote non-military conduct was rare and idiosyncratic. This is not to say that no one believed that Americans should own guns or should be able to protect themselves, only that the overriding usage of the term leading up to and during the time of the ratification debates was idiomatic. The plain meaning of this term, the meaning that so many originalists claim defines the Second Amendment, does not support the Standard Model. While Individual Rights scholars have been quick to point to people like Thomas Jefferson and his belief that "no free man shall be debarred from the use of arms" on his own lands,[119] Jefferson's ideas never became entrenched in the constitutional tradition. The Virginia Bill of Rights was drafted primarily by George Mason who, instead of adopting Jefferson's language, venerated the militia as "the proper, natural, and safe defence of a free State."[120] And, of course, Jefferson was in Paris while Americans debated the Constitution.

Because the term "bear arms" so overwhelmingly appears within a military context, Individual Rights scholars have looked for other evidence that would support a personal right to self defense. One of the most popular phrases pulled from the historical record is "bear arms for the defense of themselves," which has most often been asserted to

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118 *Id.* at 18.

119 1 THE PAPERS OF THOMAS JEFFERSON 353 (Julian P. Boyd ed., Princeton Univ. Press 1950).

120 *Virginia Declaration of Rights*, *in* 1 FOUNDERS' CONSTITUTION 6 (Philip Kurland & Ralph Lerner eds., 1987).

be synonymous with personal self-defense.[121] Indeed, much has been made of the 1787 *Dissent of the Minority*, drafted by Robert Whitehill and the Anti-Federalists in Pennsylvania's ratification convention. The *Dissent* declared that "the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game," and demanded "[t]hat the power of organizing, arming and disciplining the militia . . . remain with the individual states."[122] It is curious that Individual Rights scholars want to pin their interpretation on a proposal by a losing faction from the debates, as if the idiosyncratic usage by a minority dissent from one state somehow dictated the meaning of the language used by the Federalists in the Second Amendment. This is not to say that Anti-Federalists' ideas in general did not shape the Bill of Rights, but rather to point out that Whitehill and his supporters were so politically weak that the ratifying convention refused to send their *Dissent* on to Congress. In the final analysis, the Second Amendment addressed only concerns about the militia (a concern present in most states), not the right to hunt, showing that Whitehill's *Dissent* had very limited currency.

Nevertheless, the *Dissent* continues to hold a sacred place in Individual Rights scholarship, perhaps because James Wilson, Pennsylvania Supreme Court Justice and influential Federalist, wrote that the 1790 Pennsylvania constitution and its provision of a right to bear arms supported "the great natural law of self preservation."[123] As a Federalist, Wilson opposed the Bill of Rights, considering it to be

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121 Individual Rights scholars have taken their cue from Stephen P. Halbrook, *The Right To Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255 (1985). Halbrook's interpretation that "defense of themselves" is synonymous with "self defense" has gone unchallenged until now. Saul Cornell argues that "the Pennsylvania Declaration of Rights . . . had little to do with public concern over an individual right to keep arms for self-protection." *See* CORNELL, *supra* note 15, at 22. Cornell's assertion is based on my dissertation, For the Security and Protection of the Community: The Frontier and the Makings of Pennsylvanian Constitutionalism, (2005) (unpublished Ph.D. dissertation, Tbe Ohio State University), *available at* http://www.ohiolink.edu/etd/send-pdf.cgi?osu1133196585.

122 *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, PA. PACKET, & DAILY ADVERTISER, Dec. 18, 1787, at 2. Compare this personal self-defense usage to the collective self-defense usage, *id.* at 3, which lists among objections to the federal military power that "[t]he rights of conscience may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms." Because any provision for conscientious objectors was clearly military in nature, Whitehill's use of "bear arms" is contradictory and a testament to his poor draftmanship. *See* CORNELL, *supra* note 15, at 50–53.

123 JAMES WILSON, 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Phila., Bird Wilson ed., Lorenzo Press 1804).

"superfluous and absurd," and advocated a strong army that could effectively protect the United States.[124] "[N]o man, who regards the dignity and safety of his country," Wilson declared to a crowd in Philadelphia in 1787, "can deny the necessity of a military force, under the controal [sic] and with the restrictions which the new constitution provides."[125] By 1790, Wilson headed up a convention set to rewrite the 1776 Pennsylvania Constitution, long considered to be too radical because of its provision for an unchecked unicameral legislature. Article I, Section 21 of the new frame of government declared that "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."[126] But "defense of themselves" had been used long before Wilson and the Convention employed it in 1790, and in Pennsylvania the phrase had been tied to a tradition of community defense stretching back to the French and Indian War. It is important to note that the language used in 1776 and 1790 changed in subtle ways, and that a little historical context sheds much needed light on these changes.

The Pennsylvania Assembly's failure to ensure the safety of its own citizens shaped a reactionary constitutional ideology that valued physical protection and community safety.[127] A 1754 petition drafted by inhabitants of Lancaster County, in which residents pleaded with the governor to provide them with ample protection from the French and their Indian allies, succinctly captured this conception of public defense. Sensible to the dangers of being on the frontier, the petitioners asked the government "to put Us in a Condition that We may be able to defend Ourselves," guaranteeing in return that they would do their part to "join with all that We can do for the Safety of the Province."[128] Indeed, many of the people of the frontier saw the solution to their problems in the passage of a coherent and effective militia law that would compel men to serve. With a lack of an organized militia, Pennsylvania residents, like those in Lancaster, banded to-

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124 PA. PACKET, & DAILY ADVERTISER, Oct. 10, 1787, at 2.

125 *Id.*

126 PA. CONST. art. 1, § 21.

127 By "reactionary" I do not mean to imply that it was new, rather that it was a reaction to Quaker policies. The constitutional guarantee of safety and protection was well established in English law by the time of the Revolution. For a detailed analysis of the impact of the frontier experience on the 1776 Pennsylvania Constitution, see Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 RUTGERS L.J. 1041 (forthcoming 2008).

128 Petition of the Inhabitants of Donegal, in Lancaster County, to the Governor (26 July 1754)," *in* 6 PENNSYLVANIA COLONIAL RECORDS 131 (Samuel Hazard ed., Harrisburg, Pa., n. pub. 1852).

gether for protection. As the *New York Mercury* reported, "The People on the West-side of Susquehanna . . . are gathering together to defend themselves."[129] When the Library Company of Philadelphia received a collection of Roman coins depicting "the military Glory of which that People were so fond, and which at last proved their Ruin," one commentator considered them to be "the properest Present," since in Pennsylvania, "[a] military Force for necessary Self-defence, is often wanted."[130]

The idea of community self-defense was solidified during the Paxton Riots in 1764. The barrage of pamphlets that circulated in Philadelphia following the riots prompted the Paxton Boys to issue an apology explaining the constitutional reasons they had embarked on their expedition. In language that would be echoed in the 1776 Declaration of Rights, the Apology explained that "the far greater part of our Assembly were Quakers, some of whom made light of our Sufferings & plead Conscience, so that they could neither take Arms in *Defense of themselves or their Country.*"[131] The Paxtonians believed that every man who enjoyed the protections of government should contribute to the common defense, and it was this vision that became reality in the 1776 Constitution. This idea was exemplified in Clause VIII of the Declaration of Rights: "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary . . . ."[132] Those who were religiously opposed to bearing arms were protected by the law as long as they paid money to compensate for their lack of military service. No longer could Quakers or other pacifists resist appropriating funds to the defense of the state either personally or in the Assembly. In language borrowed from the frontier petitions of the French and Indian War, Paxton pamphlets, and radical committees, Clause XIII guaranteed the right to bear arms for community safety: "That the people have a right to bear arms for the

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129 N.Y. MERCURY, Aug. 4, 1755, at 3.

130 CHARTER, LAWS, AND CATALOGUE OF BOOKS, OF THE LIBRARY COMPANY OF PHILADELPHIA 129 (Phila., B. Franklin & D. Hall 1757).

131 The Apology of the Paxton Volunteers (Phila. 1764), *reprinted in* THE PAXTON PAPERS (John R. Dunbar ed., 1957) (emphasis added).

132 PA. CONST. OF 1776, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH, OR STATE OF PA., cl. VIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3083 (Francis Newton Thorpe ed., 1909) [hereafter FEDERAL AND STATE CONSTITUTIONS].

defence of themselves and the state . . . ."[133] Standing armies in peace time were discouraged, reinforcing the premise of Clause III by stating that "the military should be kept under strict subordination to, and governed by, the civil power."[134]

The Pennsylvania assertion of a right to bear arms was an affirmation of a distinctly eighteenth-century civic conception of rights. Defense was for the community, the citizens as a whole, and the responsibility for ensuring community security lay on all of its members. To underscore this fact the committee passed an associator ordinance on September 14, 1776. Associators, they reasoned, had given their time, money, and bodies to the defense of the country while non-associators had "pursued their [personal] business to advantage."[135] Thus, it was ordained that every non-associator from age sixteen to fifty pay twenty shillings for each month he was not in physical military service.[136] In addition, every associator over twenty was required to pay an additional four shillings for every pound his estate was valued.[137] The money collected would go to support the poor associators throughout the state "who are by the service rendered incapable of supporting themselves and their families."[138] Even those above fifty years of age were not exempt. Even though they were unable "to bear the fatigue of military duty," the committee considered it "just and reasonable that they should contribute towards the security of their property . . . ."[139]

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133 PA. CONST. OF 1776, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH, OR STATE OF PA., cl. XIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 132, at 3083. Although the Pennsylvania convention borrowed language from the recently passed Virginia Declaration of Rights, it was the first state to guarantee a right to bear arms. As John K. Alexander argues, the Constitution's authors were innovators, and no other state "matched Pennsylvania in translating those [Revolutionary] words into reality." John K. Alexander, *Pennsylvania: Pioneer in Safeguarding Personal Rights*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 321 (Patrick T. Conley & John P. Kaminski eds., 1992).

134 PA. CONST. OF 1776, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH, OR STATE OF PA., cl. XIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 132, at 3083.

135 1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA. BEGINNING THE TWENTY-EIGHT DAY OF NOVEMBER, 1776, AND ENDING THE SECOND DAY OF OCTOBER, 1781. WITH THE PROCEEDINGS OF THE SEVERAL COMMITTEES AND CONVENTIONS, BEFORE AND AT THE COMMENCEMENT OF THE AMERICAN REVOLUTION. 82 (Phila., John Dunlap 1782).

136 *Id.*

137 *Id.* at 83.

138 *Id.*

139 *Id.* at 84.

The 1776 Pennsylvania Constitution survived an examination by the Council of Censors in 1783, but on March 24, 1789, a constitutional convention met to draft a new frame of government. On December 23, a sub-committee delivered its report on "the great and essential principles of liberty and free government" to the rest of the convention.[140] Clause XIX's declaration that "the right of the citizens to bear arms in defence of themselves and the state, and to assemble peaceably together," was followed in the next clause by a guarantee that "those who conscientiously scruple to bear arms shall not be compelled to do so" if they paid a fine.[141] Clause XXI decried a standing army and demanded that the military be subordinate to the civil power, and Clause XXII disallowed the quartering of troops in houses without the consent of the owner.[142] Taken together, these four clauses have a distinct military meaning, and it would be odd if the committee used "bear arms" in an individual sense in Clause XIX but then used it in a military sense in the very next clause when talking about conscientious objectors.

By February 5, 1790, the Convention had revised the original declaration of rights by merging the right to bear arms and the allowance for conscientious objectors into one clause.[143] Here the military meaning is undeniable because conscientious objectors owned arms but would not serve in the militia. This clause was followed by the previous prohibitions on standing armies and quartering troops. On February 23, one of the members proposed striking out the provision for conscientious objectors, but the motion was defeated 42 to 9, with James Wilson voting against the measure. The "bearing arms" clause survived a reading on February 26, 1790, and another on August 18, 1790, despite revived attempts to strike out the provision for conscientious objectors, which Wilson voted against once again.[144] Finally,

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140 THE PROCEEDINGS RELATIVE TO THE CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, at 161 (Harrisburg, Pa., John Wiestling 1825) [hereinafter PROCEEDINGS].

141 *Id.* at 163.

142 *See id.*

143 Section XX now read, "That the right of the citizens to bear arms in defence of themselves and the state shall not be questioned. But those who conscientiously scruple to bear arms shall not be compellable to do so, but shall pay an equivalent for personal service." *Id.* at 175.

144 The February 26 and August 18 versions replaced the period with a colon: "That the right of the citizens to bear arms in defence of themselves and the state shall not be questioned: But those wbo conscientiously scruple to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service." *Id.* at 244, 263–64.

on September 2, 1790, the convention ratified the new state convention, which stated in Article VI, Section II,

> The freemen of this commonwealth shall be armed and disciplined for its defence: Those who conscientiously scruple to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service. The militia officers shall be appointed in such manner and for such time as shall be directed by law.[145]

The military meaning of "bear arms" is undeniable here. The Bill of Rights had changed, however, with Section XXI providing a right "to bear arms in defence of themselves and the state" but not repeating the provisions for pacifists in Article VI.[146] While this might be interpreted as an endorsement of an individual right, it seems unlikely that the convention, under Wilson's leadership, would have employed two distinctly different definitions of the term "bear arms." Given the dominant usage of "bear arms" and "defense of themselves" in Pennsylvania, it is not unreasonable to conclude that Wilson considered community militia mobilization as an essential guarantor of personal safety.

Such a conclusion is even more plausible when we consider the way that Americans employed the phrase "self defense" during the Founding Era. While some pamphleteers acknowledged that murder was justified in cases of "necessary Self-Defence,"[147] others considered self defense to be part of community and militia mobilization against threats.[148] In fact, in his support of a strong federal militia during the Constitutional Convention, Wilson himself argued that since "[t]he power of self-defence had been urged as necessary for the State Governments—It was equally necessary for the General Government."[149] The importance of the militia in providing community, state, or governmental self defense was not Wilson's invention. In June 1775, John Cármichael preached a sermon to a company of militia men in Lancaster, Pennsylvania, titled *A Self Defensive War Proved Lawful*, in

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145 *Id.* at 302.

146 *Id.* at 305.

147 CHARLES CHAUNCY, THE HORRID NATURE, AND ENORMOUS GUILT OF MURDER. A SERMON PREACHED AT THE THURSDAY-LECTURE IN BOSTON, NOVEMBER 19TH 1754. THE DAY OF THE EXECUTION OF WILLIAM WIEER, FOR THE MURDER OF WILLIAM CHISM 6–7 (Boston, Thomas Fleet 1754).

148 For self defense as justifiable homicide, see *id.* Such pamphlets show that the right to self defense was tied strongly to natural law. JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT 123 (Boston, Edes & Gill 1773), argued that "[s]elf-defence is a part of the law of nature."

149 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 391 (Max Farrand ed., 1911) [hereafter RECORDS].

which he argued that Britain had forced Americans into an "unavoidable and necessary" war of self defense.[150] In South Carolina, men were encouraged to respond to the "animated Spirit of Self-Defence" that had diffused through the colonies by enlisting in the province's artillery regiment.[151] In New York, the Provincial Congress justified retaliation against the British based on "the immutable Laws of Self-defence,"[152] and in Massachusetts Pastor Samuel Williams extolled the "cause of Self-Defence, of Public Faith, and of the Liberties of Mankind, that America is engaged in."[153]

Wilson's congressional colleagues also used "self defence" to connote America's collective military undertakings. In an August 10, 1779, letter to Governor William Greene, the Rhode Island delegates in the Continental Congress praised the "Sense of Self Defence . . . exerted by the whole Body of the good People of our State," and hoped that the neighboring states would soon realize that "their Qwn Security [was] most intimately connected" with Rhode Island's.[154] On June 2, 1775, the Congress read a letter from Massachusetts which talked of the "principles of self defence, roused in the breasts of freemen by the dread of impending slavery" and the absolute need to "raise an Army" to defend "all America from the further butcheries and devastations of our implacable enemies."[155] Even more importantly, Wilson's collective understanding of self defense was echoed by his fellow delegates in the Constitutional Convention and members of the state ratifying conventions. George Mason agreed with Wilson that an efficient government "ought to have the faculty of self-defence," but argued that state governments should be given "the same power of self defence."[156] More to the point, Maryland delegate and Attorney General Luther Martin ultimately opposed the Constitution, in part because it removed "any possible

150 JOHN CÁRMICHAEL, A SELF-DEFENSIVE WAR PROVED LAWFUL, PROVED IN A SERMON 12 (Phila., John Dean 1775).

151 John F. Grimkie, ALL GENTLEMEN VOLUNTEERS, WHO ARE READY, WILLING, AND ABLE, TO SERVE THE CAUSE OF AMERICA IN GENERAL, AND SOUTH-CAROLINA IN PARTICULAR (Charleston, S.C., Peter Timothy 1775).

152 IN PROVINCIAL CONGRESS, NEW-YORK, Sept. 1, 1775, at 1 (N.Y., John Holt 1775).

153 Samuel Williams, A DISCOURSE ON THE LOVE OF OUR COUNTRY; DELIVERED ON A DAY OF THANKSGIVING, DECEMBER 15, 1774, at 26 (Salem, Mass., Samuel & Ebenezer Hall 1775) (emphasis omitted).

154 Letter from Rhode Island Delegates to William Greene (Aug. 10, 1779), *in* 13 LETTERS OF DELEGATES TO CONGRESS, *supra* note 55, at 355.

155 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 66, at 77.

156 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 149, at 407.

means of self-defence" from the states by "taking away . . . the right of organizing, arming, and disciplining of the militia."[157]

But, even if Wilson did subscribe to an individual rights understanding of "bear arms," such an interpretation did not seem to have any currency in the Pennsylvania courts.[158] In 1799, Dr. James Reynolds stood trial for assault with intent to murder after he had tried to fend off a Federalist mob, angry about his opposition to the Alien and Sedition Acts, by brandishing a pistol. What is illustrative about this case is that neither the prosecution nor the defense considered Reynolds's possession or use of his gun to be a matter of constitutional law. If the individual right to bear arms was protected under the 1790 Pennsylvania Constitution, then why did Alexander Dallas, Reynolds's lawyer, fail to justify his client's actions under Article VI or Section XXI? It is also important to note that Reynolds was never considered to have borne arms, for the term never appears in the trial transcripts. Dallas argued that "there did exist a conspiracy to assassinate Dr. Reynolds," and that since there was "no law in Pennsylvania to prevent it; every man has a right to carry arms who apprehends himself to be in danger."[159] That right, however, came not from the state constitution but from "the law of nature and the law of reason," which allowed deadly force "if necassary [sic] to [one's] own safety."[160] The prosecution disagreed, taking their cue from Blackstone and arguing, "The law says, if a man attack you by a sword, you have no right to kill him, till you have made every attempt to escape."[161] In the end, the jury sided with the defense and acquitted Reynolds. The case clearly demonstrates that using a gun in self defense was legally different from bearing arms in "defense of themselves and the state."[162]

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157 1 ELLIOT'S DEBATES, *supra* note 86, at 372.

158 The textual differences between the 1776 provision and the 1790 provision also merit some comment since in the former case the right to bear arms was set against the danger of a standing army, and in the latter the two were treated separately. Given this fact, from a strictly textual analysis, the case for reading the latter text as more individualistic is somewhat stronger than the implausible case for reading the former text in this fashion.

159 William Duane, A REPORT OF THE EXTRAORDINARY TRANSACTIONS WHICH TOOK PLACE AT PHILADELPHIA, IN FEBRUARY 1799 IN CONSEQUENCE OF A MEMORIAL FROM CERTAIN NATIVES OF IRELAND TO CONGRESS, PRAYING A REPEAL OF THE ALIEN BILL 33 (Phila., Office of the Aurora 1799).

160 *Id.* at 32.

161 *Id.* at 45.

162 PROCEEDINGS, *supra* note 140, at 305.

II. GETTING ORIGINALISM RIGHT

In the final analysis, Judge Silberman's claim that the public understanding of "bear arms" included the carrying of private arms for self defense is not supported by the historical record. To base one's analysis of original intent off an idiosyncratic use of language is bad history and misconstrues the intentions of the people of the past. Rather than accept such methodologically unsound analysis, academics and courts alike have a right to demand that originalism meet the highest standards of historical scholarship. While it would be unrealistic to expect every constitutional scholar to retrain as an historian, comprehensive digital archives offer one solution by providing legal scholars access to a far wider range of materials than the modern collections typically consulted for such work. Although the new digital archives are an important resource, interpreting Founding-Era texts still requires an appreciation for context and for the basic tools of historical methodology. Indeed, careful contextualization is crucial to sound originalism and reveals that the individual and collective models do not accurately reflect how Founding Era Americans understood the right to bear arms. If we are going to understand original intent, we must first appreciate the overriding concern for the militia and men's obligation to that institution that dominated the Era. Recognizing that the meaning of "bear arms" does not fit either modern gun rights or the gun control model should hardly come as a surprise. The Founders wrote the Second Amendment to solve their own problems, not ours.