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Revisiting the Original Congressional Debates About the Second Amendment

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ABSTRACT

Many scholars and courts have written about the historical background of the Second Amendment, either to emphasize its connection to state-level citizen militias or to argue that the Amendment protects an individual right to own and carry guns for self-defense. While many authors have mentioned the original congressional debates about the Second Amendment, the literature is missing a thorough, point-by-point analysis of those debates, situating each statement in Congress within the context of the speaker's background and political stances on issues overlapping with the right to keep and bear arms. This Article attempts to fill this gap by providing a methodical discussion of each comment or argument made in Congress when the Second Amendment was under consideration. This discussion addresses how each of the congressmen's comments connect to public statements made by the same members of Congress in the months that followed on related topics: taxation and public debt related to militias, the supply of available firearms and their legal status as private or public property, the institution of slavery, westward expansion, and especially the complications for each of these issues posed by the Quakers, who became the center of attention during the debates about the Second Amendment. These original congressional debates have taken on more importance following the Supreme Court's recent holding that courts should decide Second Amendment challenges based on historical evidence from the years immediately preceding and following ratification. While this Article does not take a position on current litigation over modern firearm regulations, the discussion here can offer courts and commentators new insights into the original public meaning of the Second Amendment.

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I. INTRODUCTION

"Not all history is created equal," propounded Justice Thomas recently in a majority opinion for the Court.[1] In context, he was referring to the use of historical evidence in constitutional interpretation, and specifically to the Second Amendment: "The Second Amendment was adopted in 1791; the Fourteenth in 1868," Thomas continued, "Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years."[2] Fourteen years earlier, in *District of Columbia v. Heller*,[3] the Court had undertaken an in-depth review of the background history for the Second Amendment; Justice Thomas followed his "not all history is created equal" quip in *Bruen* with a crucial line from *Heller*: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."[4] In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court doubled down on the history-as-law approach to the Second Amendment that the Court had first taken fourteen years earlier in *Heller*.[5] Rejecting the lower court's two-step intermediate scrutiny approach in the case, the Court not only took a hard stance on its historical approach, but narrowed the window of historical documents that would receive weight in constitutional analysis.[6] As a consequence of the *Bruen* Court's history forward reasoning, future Second Amendment cases will turn mostly on historical arguments and evidence, though modern means-and-ends analysis may play some role in the analogical reasoning the Court contemplates.

In the years since *Heller*, several book-length histories about the Constitutional Convention,[7] the Ratification debates,[8] and the First Congress have appeared,[9] providing richer context and background about

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[1] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022).

[2] *Id.*

[3] 554 U.S. 570 (2008).

[4] *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–35).

[5] *See id.* at 2128–34.

[6] *Bruen*, 142 S. Ct. at 2125–26.

[7] *See, e.g.*, JOHN R. VILE, THE MEN WHO MADE THE CONSTITUTION: LIVES OF DELEGATES TO THE CONSTITUTIONAL CONVENTION (2013); DAVID O. STEWART, THE SUMMER OF 1787 (2007) (released while the *Heller* appeal was already pending, so it was realistically not available for consideration at the time).

[8] *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–88 (2010).

[9] *See, e.g.*, FERGUS M. BORDEWICH, THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT (2016); *see also* JONATHAN GIENAPP, THE SECOND CREATION:

each of the representatives who contributed their thoughts about the text of what we know today as the Second Amendment. This Article revisits those debates to develop more context for what the members of Congress actually said,[10] and from there draws new inferences about the original public meaning of the Amendment that can inform courts today as they apply the Court's current rubric to cases challenging state and federal firearm laws.

The Court's originalist methodology may have evolved in the years since *Heller*, and its current trajectory makes it especially important to revisit a specific part of Second Amendment history—the original congressional debates (only the House debates survive) and the draft version of the Amendment that the House voted to adopt. Over the last two decades, several academic commentators have discussed the comments of one or two of the House members and summarized a few of the others,[11] but only one article predating *Heller* considered the original debates argument-by-argument.[12]

As acknowledged in *Heller*,[13] the original congressional debate about the Second Amendment focused on militias and Quakers, or more generally, on religious pacifists as conscientious objectors.[14] The militia

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FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018) (heavy emphasis on the debates in the First Congress about the meaning of the Constitution).

[10] *See* 5 ANNALS OF CONG. 749–52, 766–67 (1789).

[11] *See, e.g.*, NOAH SHUSTERMAN, ARMED CITIZENS: THE ROAD FROM ANCIENT ROME TO THE SECOND AMENDMENT 206–14 (2020) (briefly summarizing the House debates about the Second Amendment); SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 60–62 (2006) (same); *see also* Todd B. Adams, *Should Justices Be Historians? Justice Scalia's Opinion in* District of Columbia v. Heller, 55 U.S.F. L. REV. 301, 325 (2021) (discussing Elbridge Gerry's comments at the debates and summarize a few others); Douglas Walker, Jr., *Necessary to the Security of Free States: The Second Amendment As the Auxiliary Right of Federalism*, 56 AM. J. LEGAL HIST. 365, 381 (2016) (discussing Elbrige Gerry's comments in the House debates); Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 CONST. COMMENT. 383, 387 (2014); Patrick J. Charles, *The Constitutional Significance of a "Well-Regulated Militia" Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NE. U. L.J. 1, 62 (2011) (discussing Gerry's comments and the response to them) (same); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1185 (2009).

[12] *See* H. Richard Uviller and William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 495–510 (2000).

[13] *See, e.g.*, D.C. v. Heller, 554 U.S. 570, 589–90 (2008).

[14] Quakers were by far the most prominent and problematic group in this category. Several excellent historical monographs about the Quakers in the Founding era have also appeared since *Heller* that clarify their position in the social and political landscape of the Founding era, as well as their internal norms about nonviolence and self-defense. *See, e.g.*, ESTHER SAHLE, QUAKERS IN THE BRITISH ATLANTIC WORLD

issue overlapped with other hot topics in the First Congress—most importantly, whether the federal government would assume the states' unpaid war debts (mostly to militia members for their service) and the relatedly thorny question of how to finance the national defense and national security in the future. Militias and armies touched on the most fundamental political divide of the day: the allocation of power or freedom between the federal and state governments. Most of the academic debate about the historical meaning of the Second Amendment has focused on the militia-or-individual right dichotomy. This dichotomy, however, is misleading because both personal gun ownership and militias overlapped with complicated, pressing policy questions related to the public fisc, taxation, federalism, Native American affairs, westward expansion, and slavery.[15] Of course, regardless of whether someone at the time thought that the Second Amendment was about individual self-defense or state militia service, the supply or availability of firearms was part of a set of background assumptions, the lens through which they thought about both self-defense and militias. As twentieth-century novelist L.P. Hartley observed, "The past is a foreign country; they do things differently there."[16]

The most novel contribution of this Article relates to the Quaker part of the discussion, which has been a neglected topic in the literature about the Second Amendment. The First Congress had to confront what I will call "the Quaker Factor" on at least four occasions in its inaugural two years: (1) when it discussed the Second Amendment, (2) a few months later when the Quakers petitioned Congress to end the slave trade and/or

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1660–1800 (2021); RICHARD C. ALLEN & ROSEMARY MOORE, EDS., THE QUAKERS: 1656–1723 (2018); JANET MOORE LINDMAN, A VIVIFYING SPIRIT: QUAKER PRACTICE & REFORM IN ANTEBELLUM AMERICA (2022); SARAH CRABTREE, HOLY NATION: THE TRANSATLANTIC QUAKER MINISTRY IN AN AGE OF REVOLUTION (2015).

[15] Also inseparable from any discussion of militias was the question of "Indian affairs," especially on the frontiers of the states and in the new territories—there were armed conflicts underway with native tribes in some parts of the country at the time Congress debated the Second Amendment, and there were intense debates about how much the federal government should help the state militias in this regard. Militias also implicated the policy debates about slavery, as militias played an important role in suppressing or deterring slave revolts, and in some states, in conducting routine slave patrols. There were also armed insurrections among the citizenry fresh in the minds of the Congress (most famously Shay's Rebellion and the later Whiskey Rebellion), and armed conflicts among settlers along the disputed boundaries of some states—the Yankee-Pennamite wars between citizens of Connecticut and Pennsylvania, and the armed conflicts between Pennsylvania and Virginia—both of which involved legally complicated militia activity immediately before, and to a lesser extent after, the War of Independence. *See generally* FREDERICK W. GNICHTEL, THE TRENTON DECREE OF 1782 AND THE PENNAMITE WAR (1920) (describing how the conflict arose and played out in its early phases).

[16] L.P. HARTLEY, THE GO-BETWEEN 17 (1953).

abolish slavery, (3) when they debated about the location for the permanent home of Congress, and (4) when Congress considered the first federal Militia Act.[17] A number of the same members of Congress spoke on two or more of these occasions, expressing similar sentiments, so these three other debates about the Quakers shed light on their comments while debating the Second Amendment.[18] Moreover, as evident by occasions when Quakers came up as a point of discussion, the Quaker Factor overlapped with militia issues and the slavery topic. Less well known is that the Quakers posed serious complications for Native American policy (they had friendly relations with tribes that were hostile to other settlers), taxation (Quakers were wealthy and engaged in widespread tax protests related to wars), state war debts owed to veterans (Quakers refused to pay taxes earmarked for veterans' benefits),[19] the gun supply, and westward expansion (Quaker settlers streaming into the new territories). Analyzing or discussing the right to bear arms in isolation from other related issues will inevitably shortchange our understanding of the original public meaning of the Second Amendment and its text.

The Society of Friends (Quakers) emerged amid the political and social upheaval of seventeenth-century England. Apart from the persecution they experienced merely for being part of a non-Anglican sect (something other sects endured as well),[20] the Quakers early on adopted some tenets that made them uniquely unpopular with those in power. They refused to take loyalty oaths (or *any* oaths), which was problematic in an era of political coups and revolutions, when those who seized power would require loyalty oaths from their constituents.[21] They also eschewed everyday conversation signals that recognized differences in social class. For example, they would not remove their hats in the presence of dignitaries, much less bow or curtsey, and they insisted on using "thee" and "thou" long after the rest of the population started using "you" (singular), when at the time, addressing someone with "thee" or "thou" was considered disrespectful.[22] After their first decade or so, they adopted an official position of pacifism and refused to serve in the military. They further refused to pay tithes to support the Anglican church, which was

[17] *See generally* Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J. L. & PUB. POL'Y 323, 376–77 (2011) (discussing the passage of the Militia Act and the controversy over exempting religious pacifists).

[18] *See generally* SHUSTERMAN, *supra* note 11, at 206.

[19] *See* ARTHUR J. MEKEEL, THE QUAKERS AND THE AMERICAN REVOLUTION 367–68 (1996).

[20] *See* RICHARD C. ALLEN & ROSEMARY MOORE, THE QUAKERS: 1656-1723 124–47 (2018).

[21] *See id.* at 191–96.

[22] *See id.* at 13.

required by law (basically a tax).[23] Of these, the two tenets that subjected them to the most persecution were the refusal to take oaths (which meant they were automatically suspected of being insurrectionists) and their refusal to pay tithes or religious taxes—even if it meant imprisonment or confiscation of property worth far more than the tax itself—a point that is relevant for understanding their practices during and after the American War of Independence.

As the following discussion will show, Quakers not only became the center of discussion when the First Congress debated the Second Amendment, but on other occasions as well. Looking at those discussions together can help our understanding of what the drafters of the Second Amendment hoped to accomplish and what they wanted to prevent, as well as how their constituents—who would ultimately ratify the Amendment—understood its terms.

Part II is a quick review of the exchange between Justice Scalia and Justice Stevens in their respective opinions in *Heller* about the congressional debates in August 1789 regarding the proposed amendment protecting the right to keep and bear arms. Both Justices made some valid or plausible points, but both also made some mistakes, either misstating or misunderstanding the history. The *Bruen* opinion did not mention the congressional debates at all, and therefore neither affirmed nor rejected Justice Scalia's assessment in *Heller* about this specific piece of history. On the other hand, *Bruen* adopted an approach that much more explicitly relies on history than did *Heller*, and simultaneously restricts such reliance to a historical period narrower than that embraced or considered in *Heller*—the period immediately before, during, and after the adoption of the Second Amendment. This narrower, more focused window of time includes the congressional debates about the Amendment and makes those debates a larger component of the relevant history for future Second Amendment analyses.

Parts III and IV move methodically though the debates speaker-by-speaker, scrutinizing each speaker's arguments in detail and putting each comment (and its author) in context. Because the debates spanned two days in 1789—August 17 and 20—I have devoted a Part to each. Part III is about the debates and the debaters on August 17 and is the lengthier of the two Parts. Part IV is about the brief debate that resumed on August 20—an important exchange between Thomas Scott of Pennsylvania and Elias Boudinot from New Jersey.

Part V presents some reflections on the debates as a whole—what topics were discussed, what topics were *not* discussed, and what inferences we can draw today when evaluating Second Amendment objections to modern statutes and regulations. By such inferences, I present two alternative theories about the "public meaning" of the Second

[23] *See id.* at 12–15.

Amendment. The first is that there was *no universal public meaning* because the Amendment meant different things to different people at the time depending heavily on the region and the other political positions the individual held, such as the assumption debate and federalism. The alternative theory is novel; I argue that the Second Amendment's original purpose was to prevent any state, or the federal government, from adopting the type of antimilitary or pacifist policy—as an official state policy—that Pennsylvania had adopted for most of its history before 1776, and that the individual right to keep and bear arms was related to this preemptive blocking of any official pacifist policy. This is posited as an alternate theory, and if the first theory is correct—that the Second Amendment at the time of ratification was understood differently in different parts of the country—then the alternate theory could still have represented the understanding of some portion of the voting citizenry at the time. Part VI is a brief conclusion, recapping the main takeaways from the Article and identifying some points that deserve further research and commentary.

II. BACKGROUND: THE *HELLER* DISCUSSION

Heller arose as a Second Amendment challenge to an unusual ordinance in the District of Columbia that generally prohibited possession of most operational firearms.[24] The larger issue in the case, however, was whether the Second Amendment protected an individual right to keep and bear arms, versus a state right to maintain a local militia of nonprofessional combatants.[25] The latter was the traditional view, but the former, more modern view had grown in popularity among legal academics in the twenty years leading up to *Heller*, and no one disputed that most of the Founders believed in some kind of individual right to own weapons—apart from the question of whether the Second Amendment codified that individual right—as opposed to preserving the Founding-era state militia system.[26] The majority decided that this question should turn on what was the original public meaning of the Second Amendment at the time is was ratified,[27] which meant both the majority and dissenting opinions extensively scrutinized the paltry legislative history of the Amendment as well as relevant excerpts from *The Federalist Papers*, state statutes and constitutions, Blackstone's *Commentaries on the Laws of England*, and even medieval English legal texts. One might have expected that the debates in the First Congress about the text of the Second Amendment,

[24] For a classic account of the unique ordinance at issue and the origin of the legal challenge to it, *see* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 3–14 (2011).

[25] *See id.; see also id.* at 95–122.

[26] *See* D.C. v. Heller, 554 U.S. 570, 576–77 (2008).

[27] *See id.* at 265–90.

which went through a few revisions, would have been central to answering the question of original meaning. The House debates, which are the only congressional legislative history that has survived, disappoint in this regard, because there is no mention of the question of whether individuals have a constitutionally protected right to own firearms. Instead, the House debates centered around conscientious objectors to military service, which were predominantly Quakers at the time, with a few digressions into the dangers of a permanent federal army comprised of professional soldiers.[28] The *Heller* Court was focused on answering the question of individual gun ownership rights, so the majority opinion had to look outside the congressional debates for evidence in this regard, and the Court devoted most of its opinion to sources other than the legislative history of the Amendment.[29]

Even so, both the majority opinion in *Heller* and the dissent from Justice Stevens devote some discussion to what they called the "conscientious-objector clause," and it deserves a bit more attention.[30] The draft of what is now the Second Amendment that was debated in and adopted by the House of Representatives included a clause exempting those who are "religiously scrupulous" from bearing arms; the Senate dropped the clause, for unknown reasons.

Both *Heller* opinions get some things wrong, and both leave some significant unanswered questions when they move on to other issues. Justice Scalia wrote:

> Justice STEVENS places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." He argues that this clause establishes that the drafters of the Second Amendment intended "bear Arms" to refer only to military service. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process. In any case, what Justice STEVENS would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming." The Pennsylvania Militia Act of 1757 exempted from service those *"scrupling the use of arms"* – a phrase that no one

[28] *See* 5 ANNALS OF CONG. 749–52, 766–67 (1789).

[29] *See Heller*, 554 U.S. at 579–98 (discussing various sources of interpretation considered).

[30] *See id.* at 589–90; *id.* at 660–61 (Stevens, J., dissenting).

> contends had an idiomatic meaning. Thus, the most natural interpretation of Madison's deleted text is that those opposed to carrying weapons for potential violent confrontation would not be "compelled to render military service," in which such carrying would be required.[31]

All this was in response to this passage of Justice Stevens' dissent:

> Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both. The objections voiced to the conscientious-objector clause only confirm the central meaning of the text. Although records of the debate in the Senate, which is where the conscientious-objector clause was removed, do not survive, the arguments raised in the House illuminate the perceived problems with the clause: Specifically, there was concern that Congress "can declare who are those religiously scrupulous, and prevent them from bearing arms."[25] The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment—to protect against congressional disarmament, by whatever means, of the States' militias. The Court also contends that because "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever," the inclusion of a conscientious-objector clause in the original draft of the Amendment does not support the conclusion that the phrase "bear Arms" was military in meaning. But that claim cannot be squared with the record. In the proposals cited *supra*, both Virginia and North Carolina included the following language: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent *to employ another to bear arms in his stead*." There is no plausible argument that the use of "bear arms" in those provisions was not unequivocally and exclusively military: The State simply does not compel its citizens to carry arms for the purpose of private "confrontation," or for self-defense. The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger.[32]

Justice Stevens' argument here is straightforward—the fact that they had a conscientious objector clause at all, and that many state versions included one, suggests the entire Amendment was about militia service. To make a similar argument from the modern era, the government now has a mechanism—forms and a submission process—for conscientious

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[31] *Id.* at 589–90 (internal citations omitted).

[32] *Id.* at 660–61 (Stevens, J. dissenting) (internal citations omitted).

objectors to designate themselves as such officially and legally, but it is available *only* when one has received a military draft notice.[33] When I registered for the selective service at age eighteen (back then this involved filling out a card at the local post office), the postal clerk suggested that I scrawl "conscientious objector" in pen across the back of the card, because there was no place on the front of the card to designate oneself as such. I later learned, of course, that my handwritten note at the time of registering for the draft had no legal effect.

Justice Scalia responded to the dissent by arguing that the Amendment must mean more than that, because Quakers did not carry arms for self-defense either—he singled out one pacifist group and ignored Mennonites, Dunkers, and other pacifist groups from the era. On this point, Justice Scalia was only partly right; Quakers at the time had degrees of rules and norms, and they were not "forbidden" to use arms to defend families in the same formal sense that other activities were prohibited. In the American Society of Friends in the 1770s and 1780s, military service was grounds for excommunication ("disowning") and fighting or violence against another person *could* be, although an isolated incident of fisticuffs would probably have drawn a less drastic sanction.[34] They did disown *many* members for joining the military during the War of Independence.[35] At the same time, it would be incorrect to say that Quakers at the time "forbid" gun ownership, at least in the sense of it being grounds for disowning.

Justice Scalia was correct, however, that the accepted norms of the Quaker communities would have discouraged it, and they could enforce these norms socially. Quaker writings from the period indeed suggest that they went about unarmed, leaving themselves vulnerable to attacks from animals as well as humans. Further, we have *many* records of militias or

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[33] *See* 32 C.F.R. § 1630.11 (Class 1–A–0: Conscientious objector available for noncombatant military service only); 32 C.F.R. § 1630.17 (Class 1–O–S: Conscientious objector to all military service); 32 C.F.R. § 1636.1 (Alternative service for conscientious objectors is available); Welsh v. United States, 398 U.S. 333, 340 (1970) (beliefs which are purely ethical or moral, even if not religious, which impose a moral duty to refrain from participating in any war at any time, make conscientious objector exemption applicable); United States v. Seeger, 380 U.S. 163, 187–88 (1965) (upholding moral but irreligious objection to combat as valid under the exemption); United States v. Macintosh, 283 U.S. 605, 633 (1931), *overruled in part* by Girouard v. United States, 328 U.S. 61 (1946) (". . .'in the forum of conscience, duty to a moral power higher than the state has always been maintained.'"); Arver v. United States, 245 U.S. 366, 389–90 (1918) (upholding religious and conscientious objection exemptions to the Draft Act of 1917).

[34] JACK D. MARIETTA, THE REFORMATION OF AMERICAN QUAKERISM, 1748–1783, 4–31 (1984); PETER BROCK, PACIFISM IN THE UNITED STATES 81–132, 183–258 (1968).

[35] *See* MEKEEL, *supra* note 19, at 152–311 (1996) (state by state survey of disownments).

local authorities imposing distraints (confiscation of property) on Quakers during the War for their refusal to participate or pay war taxes,[36] but it is incredibly rare that these include confiscation of firearms.[37] And there are stories from the colonial era of Quakers being surprised at the sight of a Quaker family that owned guns, even for hunting.[38] Quakers were prolific record-keepers and journal-writers. There is an incredibly large corpus of surviving diaries and travel journals from eighteenth-century Quakers, both because journaling was encouraged in their communities, and because the sect would publish many of these texts after the diarist's death for the edification of their members.[39] The travel journals of Quaker ministers sometimes lamented being stuck taking passage on a ship that happened to be armed for self-defense. Apart from official rules and disownments, Quakers could enforce unofficial or uncodified norms through the refusal of "certificates" that members needed in order to travel and visit other Quaker congregations, which commented on many details of the person's lifestyle through pre-marital inquiries, visitation (in-person exhortations), and the pre-screening of their business contacts within the community.[40]

The full story is even more remarkable than Scalia probably knew. Native Americans even outside Pennsylvania quickly learned that Quakers were both unarmed, friendly, and useful trade partners, and there are stories of Native American raids in other colonies where all the Quaker homes would be spared, but everyone else killed and their houses burned.[41] Quaker ministers would ride circuit unarmed and without incident through areas where Native Americans were routinely ambushing Europeans.[42] In one widely-retold incident, a group of Native Americans ambushed two settlers who were out walking in the wilderness, and immediately killed the one carrying a musket, but spared the other, as he was unarmed—they assumed he was a Quaker.[43] The survivor protested to the Native Americans that his companion was also a Quaker, who in a moment of spiritual weakness, had decided to arm himself when he traveled through

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[36] *See, e.g.*, DAVID M. GROSS, AMERICAN QUAKER WAR TAX RESISTANCE 194–97 (2d ed. 2011).

[37] For an example, see *id.* at 111. They confiscated everything else that could be useful to a military regiment, such as horses, wagons, kitchen pans and utensils, farm tools, etc.

[38] *See* SAMUEL BOWNAS, THE CAPTIVITY OF ELIZABETH HANSON 61 (2016 ed.).

[39] *See* Betty Haglund, *Quakers and Print Culture*, in OXFORD HANDBOOK OF QUAKER STUDIES 477–91 (2013).

[40] *See* MARIETTA, *supra* note 34, at 5.

[41] MARGARET E. HIRST, THE QUAKERS IN PEACE AND WAR, AN ACCOUNT OF THEIR PRINCIPLES AND PRACTICE 336–40 (1923); BROCK, *supra* note 34, at 359–60.

[42] *See* Hirst, *supra* note 41, at 337 (recounting stories from the *Life of Thomas Story*, published in 1747).

[43] *See id.* at 338.

a dangerous area.[44] The Native Americans responded that his death was his own fault, for they could not help but assume he was not a Quaker because he had a gun.[45] Repeated incidents of Native Americans sparing Quakers but attacking non-Quaker Europeans led to resentment by their non-Quaker neighbors, unsurprisingly, but merely confirmed for the Quakers that they were right in their belief that being armed for self-defense actually made someone less safe.[46] This was a point that I think Justice Scalia missed: armed self-defense for the non-Quakers on the frontier primarily meant defending against Native American attacks (or reprisals), not defending against crimes like burglary from a criminal element in their own community. In that sense, personal self-defense and having a militia would have been hard to distinguish—the scenarios and the enemies involved were the same, and the only difference was whether one was ambushed or fighting alone or in a group.

Justice Scalia's main argument against Justice Stevens was that the "religiously scrupulous" clause could not have meant that the Second Amendment pertained only to militia service, because the Quakers (and other Founding-era pacifist sects he simply ignores) refused to keep or bear arms for *personal self-defense* as well. Strangely, he relied on Quakers' refusal to use violence in self-defense as further support for the idea that the Second Amendment must have included an individual right to bear arms in self-defense besides the right of states to raise and regulate armed militias. But if the "religiously scrupulous" clause also referred to personal self-defense, what does that mean today in practical terms? The majority's reasoning in *Heller* implies some type of affirmative right to exclude oneself or opt out from the right to self-defense. I have argued elsewhere that the federal government should allow personal pacifists to self-enroll in the national NICS system of those ineligible to buy firearms—the database used for background checks when purchasing guns.[47] During the War of Independence, colonies with an exemption in their militia enactments for religious pacifists often required the individuals obtain official certification as members in good standing of a pacifist sect.[48] The government today should provide some sort of process and certification (even if this were an emailed official confirmation) of

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[44] *See id.*

[45] *See id.*

[46] *See id.* at 339–43. *See also* RAYNER WICKERSHAM KELSEY, FRIENDS AND THE INDIANS, 1655–1917, 77–78 (1917).

[47] *See* Dru Stevenson, *Going Gunless*, 86 BROOKLYN L. REV. 179, 179–80 (2020). Ian Ayers and Fred Vars have argued for something similar, though their primary focus is suicide prevention *See* IAN AYERS & FRED VARS, WEAPON OF CHOICE (2020).

[48] *See* BROCK, *supra* note 34, at 197–99 (describing the proof of membership Quakers had to provide in order to avail themselves of a statutory exemption in the relevant militia act); MEKEEL, *supra* note 19, at 251–58, 284, 318.

self-enrollment in the do-not-sell registry.[49] Similarly, Joseph Blocher has argued that there is a right not to own guns that could have implications for neighborhood associations and employers[50]—albeit based on other areas of constitutional law rather than the "religiously scrupulous" clause.

There must be more to this than merely not exercising one's right to own a gun or defend oneself. Why did the First Congress, and so many state legislatures in the Founding era, think it was necessary to codify an exemption from the right to bear arms, if it meant nothing more than the obvious fact that individuals were free to not use the right? And if the conscientious objector clause meant nothing more than *not* exercising one's right to keep and bear arms, why was there such a heated argument about it in the First Congress?

Justice Stevens, when discussing the conscientious objector clause, also made some small mistakes. First, he overstates the "arguments" raised in the House about the potential for the federal government to falsely designate identifiable groups in the population as pacifists in order to disarm them—only one member of Congress, Eldridge Gerry, suggested that this might occur, and everyone else ignored him.[51] While certain groups in the colonies had been disarmed (like Native Americans and some foreigners), there was simply no historical example of a government falsely designating a group as pacifists, much less disarming them based on such a pretext. If anything, everyone knew that pacifists had trouble convincing government officials that they were, in fact, "religiously scrupulous against bearing arms," as opposed to being either afraid of fighting or sympathizers with the enemy.[52]

The idea that the federal government in the new republic could, or would, take it on itself to misattribute pacifism to some large, familiar group of citizens like Anglicans or Presbyterians must have seemed incredibly far-fetched to Gerry's colleagues, and in fact the rest of the debates focused on more realistic problems with accommodating conscientious objectors. Gerry's imagined scenario would only make sense if the hypothetical group (being misclassified as pacifists) was large enough that disarming them would deplete the state's militia, and in that case the misclassification would not be credible to anyone, because the group would be too familiar to the general population. Misclassifying a small, obscure group would not serve the purpose of depleting the state militia, which Gerry set forth as the sinister purpose behind this hypothetical action.

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[49] *See* Stevenson, *supra* note 47.

[50] *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 23–25, 54 (2012).

[51] *See* 5 ANNALS OF CONG. 749–52, 766–67 (1789).

[52] *See, e.g.*, MEKEEL, *supra* note 19, at 251–58.

It is also confusing that Justice Stevens would even bring up this point, because Gerry's arguments in the House debates actually support Justice Scalia's point that preserving militias was intertwined with individuals keeping (possessing) guns. If Justice Stevens was correct that there was nothing more to the Second Amendment than preserving the state militias, it makes more sense that the fear would be that someday the federal government would simply *disband* the militia—forbid their assembly as a seditious conspiracy and treat them as our modern federal government would treat a suspected terrorist organization.

The original congressional debates do have much to offer, however, in terms of understanding the scope and public meaning of the Second Amendment post-*Bruen*, even if the *Heller* majority did not find there any direct answer to the question of individual-versus-collective rights that the *Heller* Court had to decide. The next Part will undertake this inquiry, but first I want to offer a few points of background about the Founding-era Quakers that may not have been familiar to Justice Scalia or Justice Stevens when they penned their opinions for *Heller*.

Founding-era Quakers functioned as a "society within the society."[53] Quakers called themselves the Society of Friends, and during the War of Independence, some prominent Quakers started using this rhetoric about being a "society within the [larger] society" to justify their refusal to cooperate with American "patriots" and the British alike.[54] After the War, they were still a significant, tightly-knit, and influential force that the First Congress wanted simultaneously to appease and to keep in check. An important piece of context for the discussion that follows is the connection between Quakers and the *absence* of a state militia. A historian of early Pennsylvania history put it this way:

> Pennsylvania stood alone among the British colonies for its complete lack of a militia law or state-sanctioned military service. Under Quaker Party rule, which was able to maintain legitimacy up to the Revolution because of its inclusiveness and tolerance, religious

[53] CRABTREE, *supra* note 14, at 4. Crabtree argues that Quakers "during this period the Society of Friends formed a "holy nation": a transnational community of like-minded believers united in opposition to *un*holy governments and laws." Sarah Crabtree, *Quaker, Whaler, Coward, Spy! William Rotch and the Age of Revolutions*, AGE OF REVOLUTIONS (Mar. 28, 2016), https://ageofrevolutions.com/2016/03/28/quaker-whaler-coward-spy-william-rotch-and-the-age-of-revolutions/ [https://perma.cc/3NNL-MNTA].

[54] RICHARD GODBEER, WORLD OF TROUBLE: A PHILADELPHIA QUAKER FAMILY'S JOURNEY THROUGH THE AMERICAN REVOLUTION 126–29 (2019) (describing public statements of Henry Drinker).

> conscience and personal liberty trumped any perceived obligation to the common defense.[55]

For the last few decades before the War of Independence, official state-sponsored pacifism had become the primary source of political controversy[56]—perhaps second only to the troubled relationship with Penn's non-Quaker heirs, known as the Proprietors, and even these controversies overlapped—and was arguably the driving force behind the new state constitution in 1776, which represented the complete triumph of the anti-Quaker party.[57] The long period of pacifist governance had also been a source of contention with neighboring colonies when they would request military help (militia detachments) from Pennsylvania in their own conflicts, especially with the Native American population.[58]

III. THE CONGRESSIONAL DEBATES ABOUT THE SECOND AMENDMENT

James Madison first tried to introduce a long list of proposed amendments from the states in May 1789,[59] but after extended debate about whether amendments were premature and whether to incorporate them into the body of the existing Constitution or as an appendix at the end, Congress finally decided in late July to appoint a committee with one member from each state to re-draft the amendments and make a report.[60] Comprising this committee were Madison himself as the Virginia representative, as well as Abraham Baldwin (GA), Egbert Benson (NY), Elias Boudinot (NJ), Aedanus Burke (SC), George Clymer (PA), George Gale (MD), Nicholas Gilman (NH), Benjamin Goodhue (MA), Roger Sherman (CT), and John Vining (DE).[61] Five of these men, plus seven others, would speak when the House as a whole debated the amendments,

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[55] NATHAN ROSS KOZUSKANICH, "FOR THE SECURITY AND PROTECTION OF THE COMMUNITY:" THE FRONTIER AND THE MAKINGS OF PENNSYLVANIAN CONSTITUTIONALISM, Doctoral Dissertation, Ohio State University at 4 (2005) (hereinafter FOR THE SECURITY AND PROTECTION OF THE COMMUNITY).

[56] *See id.* at 15.

[57] *See generally id.*

[58] *See* Nathan R. Kozuskanich, *Pennsylvania, the Militia, and the Second Amendment*, 133 PENN. MAG. OF HIST. & BIOGRAPHY 119, 121–24 (2009). I will use the term "pacifism" throughout this paper, though the term is anachronistic—it was not widely used at the time, and Quakers referred to their commitment to nonviolence as the "peace testimony."

[59] *See* Uviller & Merkel, *supra* note 12, at 496.

[60] *See id.*; 1 ANNALS OF CONG. 685–90 (Joseph Gales & William Seaton eds., 1789).

[61] *See* Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1778 n.147 (2005).

as discussed in what follows. This select committee (which I will refer to as the drafting committee) submitted their report on July 28, 1789, and Congress finally took up debate on August 13.[62]

The committee had rewritten the text of what became the Second Amendment.[63] It changed Madison's original "well-armed militia" to "well-regulated militia,"[64] and added a clause qualifying the militia as "composed of the body of the people."[65] The committee also substituted "free state" where Madison had written "free country,"[66] probably as an accommodation to anti-federalists, who were concerned about protecting states' rights. It had rearranged the clauses so that the "well-regulated militia" clause came first,[67] a move that became significant in the *Heller* decision, as Justice Scalia designated it the "prefatory clause."[68] The change that elicited the most discussion in the House debates that would follow was dropping "serve in person," from the "religiously scrupulous" provision at the end, "suggesting that religious pacifists might well have a constitutional right not only to avoid militia duty, but to avoid paying for a substitute as well."[69]

On August 17, 1789, the proposition that became the Second Amendment was introduced for discussion this way:

> The House again resolved itself into a committee, Mr. Boudinot in the chair, on the proposed amendments to the constitution. The third clause of the fourth proposition in the report was taken into consideration, being as follows: "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 person religiously scrupulous shall be compelled to bear arms."[70]

A. Elbridge Gerry (MA)

Elbridge Gerry from Massachusetts spoke first. His opening volley was the longest statement in the debates on the Second Amendment. Gerry had a reputation for being tediously long-winded and confusing in his

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[62] *See* Uviller & Merkel, *supra* note 12, at 499.

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See* D.C. v. Heller, 554 U.S. 570, 577–78 (2008).

[69] *See* Uviller & Merkel, *supra* note 12, at 499.

[70] 1 ANNALS OF CONG. 749–52 (August 17, 1789), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 210–11 (Philip B. Kurland & Ralph Lerner eds., 1987) (hereinafter *Annals*, with Kurland & Lerner edition page numbers).

oratory.[71] He began: "Well, this declaration of rights, I take it, is intended to secure the people against maladministration of government. But the final clause would allow those in power to destroy the constitution itself, because they can declare those who are religiously scrupulous and prevent them from bearing arms."[72]

Gerry—probably best remembered today for his name being memorialized in the verb "gerrymander"[73]—was paradoxically both an anti-federalist and an anti-populist.[74] A few weeks earlier, in Congress, he had initially opposed the introduction of the draft Amendments from a special committee, proposing instead (unsuccessfully) that Congress consider *all* the amendments that the states had proposed.[75] Gerry's home state of Massachusetts had significant outstanding war debts that they needed the federal government to assume, though southern states were opposed to this.

He continued:

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[71] *See* MAIER, *supra* note 8, at 51 (". . .At the convention he was, according to William Pierce, 'a hesitating and laborious speaker' – he struggled with a stammer – who nonetheless spoke extensively but was 'only sometimes clear in his arguments.'"); STEWART, *supra* note 7, at 114 (". . .[Gerry spoke at the Constitutional Convention] in the stammer that one delegate mocked as a 'profusion of those hems that never fail to lengthen out and enliven his oratory'. . . .").

[72] *Annals*, *supra* note 10, at 210.

[73] *See* Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word Or Constitutional Principle? The Case In Maryland*, 54 MD. L. REV. 242, 252–53 (1995) (detailed account of the origin story for the word "gerrymander"); *see also* Jamal Greene, *Judging Partisan Gerrymanders Under The Elections Clause*, 114 YALE L.J. 1021, 1042 (2005) ("Although the first gerrymander is often reported as the meticulously crafted districting scheme engineered by the Massachusetts legislature and approved by the eponymous Bay State governor Elbridge Gerry in 1812. . . ."); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 785 (2005) ("The very term 'gerrymander' is nearly 200 years old – having been coined in 1812 in reference to Massachusetts Governor Elbridge Gerry and the salamander-like district he helped to create-- and the practice much older still."); Michael E. Lewyn, *How To Limit Gerrymandering*, 45 FLA. L. REV. 403, 406 (1993) ("After the bill was signed into law by Democratic Governor Elbridge Gerry, a Boston newspaper described the plan as a 'gerrymander' by combining Governor Gerry's name 'and the salamander, which the most convoluted senate district was said to resemble. Ever since 1812, the term 'gerrymander' has been used to describe highly partisan redistricting plans."); David L. Anderson, *When Restraint Requires Activism: Partisan Gerrymandering and The Status Quo Ante*, 42 STAN. L. REV. 1549, 1550–51 (1990) ("The Boston Gazette, describing the redistricting plan, coined the now infamous term, 'Gerrymander,' after Elbridge Gerry, the Democratic governor, and the salamander, which the most convoluted senate district was said to resemble.").

[74] STEWART, *supra* note 7, at 220.

[75] *See* GEORGE C. ROGERS, JR., EVOLUTION OF A FEDERALIST: WILLIAM LOUGHTON SMITH OF CHARLESTON (1758-1812) 176 (1962).

> What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.[76]

At that point, Rep. Joshua Seney of Maryland, interrupted Gerry to ask wryly, "What question there was before the committee, in order to ascertain the point upon which the gentleman was speaking."[77]

Rep. Gerry replied that he was trying to propose a motion to edit the "religiously scrupulous of bearing arms" clause, though he did not want to remove it. He added,

> No attempts that they [i.e., the colonial Assembly of Massachusetts] made were successful, until they engaged in the struggle which emancipated them at once from their thraldom. Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head.[78]

He then explained that he wanted the words to say, ". . .persons *belonging to a religious sect* scrupulous of bearing arms."[79]

In other words, he wanted the text to specify up front which pacifist groups or churches were included, so that the federal government could not maliciously designate other groups as such later as a pretext for disarming them. In theory, it is also possible to read his proposed new verbiage as specifying only those who were true members of groups that taught pacifism as a tenet and required of their members, versus those with

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[76] *Annals*, *supra* note 10, at 210.

[77] *Id.* This was probably a jab at Gerry's reputation for being confusing and tediously long-winded. *See* MAIER, *supra* note 8, at 51. Seney made no other contributions to the discussion that day. His comments on other subjects suggest Seney was a strict constructionist who had a narrow view of Congress' powers under the Constitution. *See* William C. diGiacomantonio, *To Form the Character of the American People: Public Support for the Arts, Sciences, and Morality in the First Federal Congress*, in INVENTING CONGRESS 215–16 (Kenneth R. Bowling & Donald R. Kennion, ed. 1989).

[78] *Annals*, *supra* note 10, at 210.

[79] *Id.*

personal, individualized conscientious objections to war. This reading fits less well with his speech, which was focused on the potential for using the clause as a pretext for disarming large segments of the population at once, not one-by-one.[80]

As mentioned in the Introduction, this concern is puzzling. Even though many anti-federalists at the time feared that an ascendant federal government would become despotic and disarm the population to prevent uprisings, no government entity had ever done what he describes (falsely attributing pacifist tenets to a large religious sect), nor was it imaginable that the federal government in the new republic would do so. While England and the colonies certainly had a history of persecuting religious groups—Gerry's own state, Massachusetts, had for decades banned Quakerism and had executed Quaker missionaries, including women—there is no instance of the British or colonial governments falsely designating sects as pacifist. The closest example I have found was when the British government in 1660 briefly accused the nascent Quaker movement of being involved with Fifth Monarchists (an attempted military coup by a group trying to fulfill biblical prophecies about the End Times).[81] The incident is somewhat relevant to our topic because it was the occasion for the early Quaker leadership to assert for the first time—officially, in submissions to the government—that their members disavowed all violence and wars. Historians still debate about how many Quakers were pacifists before this date, but from that point on, pacifism became one of their core tenets, and serving in the military became grounds for disownment or excommunication. But it seems unlikely that Eldridge Gerry was thinking about this incident when he imagined the situation in reverse—that instead of the government accusing pacifists of mounting an armed insurrection, they would falsely label people as pacifists who were armed and wanting to serve in their state militias.

More confusingly, Gerry claimed that sinister factions in the federal government could undertake to abolish the state militias simply by declaring the populace of certain states or regions to be "religiously scrupulous of bearing arms," even if those people were not pacifists and wanted to serve in the militia or "keep and bear arms." His point seems to be that a federal declaration designating large sections of the populace as religious pacifists would be an effective pretext to prevent local militias from organizing—registering members and assigning them into regiments, appointing officers, conducting regular training, stockpiling munitions,

[80] *See* Uviller & Merkel, *supra* note 12, at 500.

[81] *See* Rosemary Moore, *The Early Development of Quakerism*, in RICHARD C. ALLEN AND ROSEMARY MOORE, THE QUAKERS: 1656-1723 20–23 (2018); CRAIG W. HORLE, THE QUAKERS AND THE ENGLISH LEGAL SYSTEM 1660-1668 68–71 (1988).

and creating systems for emergency musters or calls to arms.[82] If he *was* talking about a personal right to keep and bear arms, then he must have been imagining that the federal government would falsely designate the populace of an area as religious pacifists, then go door to door confiscating the weapons of war that these "pacifists" owned. If the federal government had in fact had the power to disarm so many people, the pretext would have been an unnecessary step—they could simply label them all as insurrectionists or sympathizers with some foreign enemy.

On the other hand, it is not clear whether he envisioned personal disarmament (gun confiscations) or simply exclusion from participating in the militia. Women, children, and some other groups like Native Americans were excluded from the militias, so it seems more plausible that Gerry was talking about exclusion from participation in militia service as opposed to the federal government going door to door to confiscate guns. He does not mention the problem of gun possession, unless there was an accepted tacit assumption that weapon possession was permissible only for militia members. Gerry's main point was that he was worried about disbanding state militias; he thought militias were the only hope of blocking a standing federal army, and conversely, that the disbanding of militias would be used to justify the creation or expansion of a standing army to fill the gap left by the absence of state militias. In other words, "[d]iscretionary authority to declare whole segments of the population ineligible for service would vitiate the militia, or at the very least sap its republican character."[83]

Remarkably, Gerry's point elicited no real response from anyone else in Congress. No one even acknowledged Gerry's far-fetched claim that the federal government might start declaring *other* religious groups to be pacifists as well. I take this collective shrug-off as evidence that his suggestion seemed completely fanciful to everyone else. The debate proceeded on the "religiously scrupulous" clause, but it took a different turn. It is worth noting that "Gerry's hostility arose not from any contempt for those of tender conscience—in fact he proposed replacing the draft language with a clause more narrowly tailored to protect exclusively those belonging to religious sects scrupulous of bearing arms—but from his arch-antifederal and republican principles."[84]

Some background on Gerry may add important context to his remarks about the proposed Amendment. Before this, Gerry had spoken extensively about the dangers of the federal government *and* ad-hoc militias at the Constitutional Convention, and a few months after the

[82] *See id.* ("Gerry feared that the proposed clause would empower the federal government to declare per se rules as to conscientious ineligibility, thereby excluding whole groups from military service and effectively disarming the militia.").

[83] *Id.* at 501.

[84] *Id.* at 500.

debates about the "religiously scrupulous" clause, Gerry spoke when Congress returned to the topic of the Quakers for one of the most heated debates of the session.

At the 1787 Constitutional Convention, two years before the debates about the Second Amendment, "[w]ealthy merchant Elbridge Gerry of Massachusetts, a member of the 'codfish aristocracy' north of Boston, warned against the excess of democracy."[85] Shay's Rebellion, which had occurred in his home state, influenced Gerry into becoming both an anti-populist and also an anti-Federalist.[86] On the latter point, Gerry harbored a mistrust of a federal Senate, a view he shared with other prominent anti-federalists, but he "particularly detested the prospect of a national military and standing army, a concern few others shared."[87] At the same time, the debacle of Shay's Rebellion had made Gerry wary of purer forms of democracy.[88] "In Massachusetts, he reported, 'the worst men get into the legislature.' There were, he continued, 'men of indigence, ignorance and basements, who spare no pains however dirty to carry their point against men were superior to the artifices practiced.'"[89] It is unlikely that Gerry would have supported the Amendment if he thought it was designed to ensure that lower-class citizens had easy access to firearms, or that the threat of popular, armed insurrections would keep government power in check.

His comments in the House in 1789 during the debate about the Second Amendment echoed his prolix speeches about state militias exactly two years earlier at the 1787 Constitutional Convention: "The Massachusetts delegate pressed his military concerns on Friday, August 17th, as the Convention debated whether the national government might send troops to oppose a rebellion even if no state government asked for help. After the battles with captain Shays and his compatriots, the question was hardly academic."[90] Gerry's speeches about militia concerns continued for several days. "On August 18th, Gerry rose to express his concern that the constitution did "not prohibit standing armies in times of peace."[91] He thought the Constitution's omission on this point would turn public opinion against it and prevent ratification.[92] He proposed "at least limiting the standing army to 3,000 men in peacetime."[93] He also strenuously objected to granting Congress control over state militias, again

[85] STEWART, *supra* note 7, at 63.
[86] *See id.* at 200.
[87] *Id.*
[88] *See id.*
[89] *Id.*
[90] *Id.* at 221.
[91] *See* VILE, *supra* note 7, at 102.
[92] *Id.*
[93] *Id.* at 103.

suggesting this would prove so unpopular that it could doom the chances of ratification.[94]

On August 23, 1787, he again insisted the national government power should not have authority over state militias, which he called "a system of despotism."[95] At one point, he exclaimed that "he would just as soon see the *citizens of his state disarmed* 'as to take the command from the states, and subject them to the general legislature.'"[96] This is particularly striking, given his comments in the debates about the Second Amendment, where he was the only congressman who mentioned a concern about the potential disarming of sectors of the citizenry.

The Constitutional Convention had ignored his objection about the military.[97] When the Convention concluded, Gerry refused to sign the Constitution.[98] He offered eight reasons why he had decided not to sign the constitution, mostly reiterating anti-federalist concerns he had raised during the debates.[99] He left the Convention believing the nation was headed toward an eventual civil war,[100] a fear he had expressed openly when discussing whether state or national governments should appoint officers of the militia.[101]

In 1789 and 1790, Gerry clashed with Madison in Congress about Hamilton's proposal for a national bank and for the federal government assuming the war debts of the states.[102] The pressing issue of state militia debts is important background for the Second Amendment and its protection of "well-regulated" militias and free states; militias necessarily involved a public finance issue, and Congress at the time was haggling over this very problem. On the issue of assumption (the federal government taking on the unpaid debts to state militiamen), Gerry broke from his usual anti-federalist views and forcefully advocated for Hamilton's vision of public finance; Madison had quoted Gerry's statements from the ratification conventions to highlight the seeming contradiction.[103] In response, Gerry then attacked Madison's citation of reports or records from state ratification debates over the Constitution: "Elbridge Gerry, meanwhile, had been even more strident; 'The debates

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[94] *Id.* at 101.
[95] STEWART, *supra* note 7, at 222.
[96] VILE, *supra* note 7, at 102 (emphasis added).
[97] STEWART, *supra* note 7, at 222.
[98] MAIER, *supra* note 8, at 45.
[99] VILE, *supra* note 7, at 104.
[100] *Id.* at 105.
[101] *Id.* at 102.
[102] GIENAPP, *supra* note 9, at 295.
[103] *Id.* at 212.

of the state conventions, as published by the shorthand writers,' he asserted, 'were generally partial and mutilated.'"[104]

It would be a mistake to take Gerry's concerns about the "religiously scrupulous" clause in the Second Amendment as a hostility toward Quakers—though, as will be seen below, some of his colleagues in the House were openly hostile to Quakerism. He sided with the Quakers on what had become, at least by then, their most controversial position: the abolition of slavery. A few months after the Second Amendment debates, Quakers petitioned Congress to end the slave trade and the institution itself, provoking outrage from the southern states' congressmen. Elbridge Gerry defended the Quakers' petition,[105] though he recognized that slave owners had become financially dependent on the free labor.[106]

To summarize Gerry's opening speech, he objected to the conscientious objector clause, not because he thought these individuals should be forced to serve in the military, but because he thought it would be twisted into an excuse to other disfavored groups from either militia participation or gun ownership. The first option, that he was concerned that it would be used as a prohibition from militia service rather than a permissive exemption, seems more likely given his digression into the evils of a federal standing army. In other words, he was concerned that in the future, a power-hungry federal government would twist the conscientious objector clause into an excuse to deplete any state militia it wanted by imposing the "scrupulous of bearing arms" status on citizens who were not, in fact, scrupulous of bearing arms. Regarding the modern debates about individual-versus-militia rights to bear arms, this tends to support the view that the Founders thought the Amendment was about protecting state militias from being supplanted by a federal standing army. At the same time, his focus on the conscientious objector clause shows that it was, in itself, significant to the Founders, and that the modern trend of dismissing it might be a mistake.

B. James Jackson (GA)

James Jackson from Georgia spoke next, saying that he:

> did not expect that all the people of the United States would turn Quakers or Moravians; consequently, one part would have to defend the other in case of invasion. Now this, in his opinion, was unjust, unless the constitution secured an equivalent: for this reason he moved

[104] *Id.* at 295.

[105] JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 86 (2000).

[106] *Id.*

> to amend the clause, by inserting at the end of it, "upon paying an equivalent, to be established by law."[107]

In other words, he thought pacifists were freeloaders. James Jackson was an aggressive duelist and had even killed the governor of Georgia in a duel.[108] Unlike many members of Congress, he had served in his state militia against the British and in conflicts with Native American tribes.[109] In contrast to Gerry, Jackson was a staunch supporter of slavery,[110] and a fierce opponent of federalist plans to assume states' war debts (his own state had none).[111] Given Jackson's years of military experience and history of duels, it is not surprising that he was unsympathetic toward pacifists. Jackson was also opposed to any constitutional amendments, including but not limited to the Second Amendment, and he had objected to their introduction at the outset.[112] It is not surprising that he felt the impulse to speak as soon as Gerry concluded, as they were on opposite sides of issues each one was passionate about.

The debates about what became the Second Amendment replayed themselves to some extent when the same Congress later took up a militia bill, and Jackson's comments then shed light on his contribution during the debates about the Second Amendment. When the militia bill came up

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[107] *Annals*, *supra* note 10, at 210.

[108] *See, e.g.*, WILLIAM O. FOSTER, JAMES JACKSON: DUELIST AND MILITANT STATESMAN 1757–1806, 5–6, 29–31 (1960) (duels with George Wells and duels with Thomas Gibbons); *see also* THOMAS U.P. CHARLTON, THE LIFE OF MAJOR GENERAL JAMES JACKSON 98 fn. (1809) (mentioning "many duels" due to his "strong temperament").

[109] For Jackson's militia battles with the British forces, *see* FOSTER, *supra* note 108, at 8–23; *see also* BORDEWICH, *supra* note 9, at 288. For his militia campaigns against Native American tribes, *see* FOSTER, *supra* note 108, at 39–43.

[110] *See id.* at 86–88. During the debate over the Quaker petition to abolish slavery, Jackson accused the Quakers of being "fond" of intermarriage with freed slaves, which he said would produce a "motley breed." *Id.* at 87.

[111] *See id.* at 82; *see also* BORDEWICH, *supra* note 9, at 188–89. One episode in the debates about this issue is revealing about Jackson's personality, reputation, and tense relationship with Gerry:

> The volatile James Jackson of Georgia – whose state was allotted the comparatively paltry sum of $300,000 – cried that the entire funding represented a vast and sinister plot by those who sought to absorb "the whole of the state powers within the vortex of the all devouring general government." Do not impose upon Americans "this enormous and iniquitous debt [which] will beggar the people and bind them in chains," he cried, "bellowing and rebellowing so loudly, with his eyes uplifted to heaven," as one newspaper reported, "that the Senate had to once again shut its windows to block him out despite the summer heat. To this, Elbridge Gerry curtly retorted that Georgia was such an "infant state" and had contributed so little to the Revolutionary War that it deserved no more than it got.

Id.

[112] *See* FOSTER, *supra* note 108, at 74–75.

for consideration, "Jackson seemed to relish the spotlight more than ever, jumping up at every opportunity, needling haranguing and attacking with his customary fervor everything that annoyed him."[113] Historian Fergus Bordewich summarizes Jackson's views of the Quakers this way:

> Jackson regarded the Quakers as hopeless idealists who "fancy that wars are now to cease, and all its horrors to be dispelled like a mist before the all-reviving ray of the sun of peace." Where would it end? How would Americans have fared if "this meek spirit of non-resistance" had held sway while the states were under attack by the British? If everyone who claims to refuse to bear arms as a matter of conscience was to be exempted, Quakerism would speedily become the national religion. "People will sit at home in the hour of invasion enjoying domestic ease, while their neighbor is torn from his family and exposed to perils and hardships." What would become of America's people, the government, and the nation? They will be oppressed, overturned, and scattered in the air.[114]

The freeloading idea Jackson invoked here and during the debates about the Second Amendment was a common complaint about the Quakers—that they benefitted from public safety and national security but would not contribute to it.[115] Most of the colonies had tried to force pacifists to pay an equivalent (the cost of the militia hiring a mercenary in their place), but the Quakers would simply not pay it. They were willing to suffer imprisonment, acquiesce to confiscation of their property (called "distraints"), or even death, rather than compromise in this way. Note that Jackson did not expect the Quakers to succeed in converting *everyone*, but he thought they were a big enough force—and perhaps had enough growth potential—to create a significant problem with freeloading.[116] Freeloading is not a policy problem when it is merely at the margins. During the subsequent debates about the militia act, Jackson had ended one round of heated argument saying that people's fear of legal sanctions would always outweigh their religious convictions.[117] He thought there

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[113] BORDEWICH, *supra* note 9, at 288. Bordewich adds:

> [Jackson] turned everything into a fight. Earlier, reacting to those who had suggested that the proposed whiskey tax would discourage drunkenness, he violently declared "that his constituents claim a right to get drunk, that they have long been in the habit of getting drunk, and that they will get drunk in defiance of all excise duties which Congress might be weak or wicked enough to impose."

Id.

[114] BORDEWICH, *supra* note 9, at 289.

[115] *See* FOSTER, *supra* note 108, at 85–86.

[116] *See id.* at 88, where he exclaimed on the floor of Congress, "Let the Quakers go to Africa and mix their blood and convert the natives there rather than cause confusion here." *Id.*

[117] *See* BORDEWICH, *supra* note 9, at 290.

was no reason to accommodate religious conscientious objectors at all, because if they faced punishment, they would get in line. On this point he was clearly misinformed—many, many Quakers had steadfastly endured confiscation of property, imprisonment, and beatings during the War over their refusal to participate.

It is important to put Jackson's comments about the "religiously scrupulous clause" in the Second Amendment in context with his overall mistrust of Quakers and resentment toward them. "He detected even more sinister motives behind the benign smiles of the [according to Jackson] misnamed Society of Friends."[118] During the debates a few months later over the Quaker abolitionist petitions:

> James Jackson actually made menacing faces at the Quakers in the gallery, called them outright lunatics, then launched into a tirade so emotional and incoherent that reporters in the audience had difficulty recording as words. The gist seemed to be that any decision to receive the committee report was tantamount to the dissolution of the union.[119]

In sum, Representative Jackson was focused on the conscientious objector clause of the proposed Amendment, not on the issue of individual gun ownership. In terms of the modern debates about militia-versus-individual interpretations of the Second Amendment, this tends to support the militia view. On the other hand, there is a third option that would find support in Jackson's comments—that the Amendment originally was primarily intended to address conscientious objectors and pacifism (Jackson's focus in his comments) rather than pacifists being a minor tertiary point related to state militia requirements. Jackson wanted to force conscientious objectors to buy their way out of military service.

C. William Loughton Smith (SC)

Returning to the Second Amendment debates, after Jackson's comment, another southerner, William Loughton Smith of South Carolina seconded Jackson's proposed change that would require Quakers and other conscientious objectors to pay the cost of hiring a substitute soldier to serve in their stead. Smith suggested in this regard that they should check about the verbiage used by other southern states in their proposals:

> Mr. Smith, of South Carolina, inquired what were the words used by the conventions respecting this amendment. If the gentleman would conform to what was proposed by Virginia and Carolina, he would

[118] ELLIS, *supra* note 105, at 82.

[119] *Id.* at 97.

> second him. He thought they were to be excused provided they found a substitute.[120]

Like James Jackson, William Loughton Smith hated the Quakers, as evidenced by his long tirades against them in congressional debates the following February and thereafter,[121] discussed more below.

Some background on William Loughton Smith may be helpful in providing more context to his comments here. Smith, who at thirty was one of the youngest members of the House,[122] was also unique among members of Congress for having faced an embarrassing challenge, upon his arrival, to his legal eligibility for his seat. His opponent in the election (who lost to Smith) formally challenged Smith's eligibility to serve in Congress, claiming that Smith—who was born in South Carolina—had not been a citizen for the requisite seven years, because Smith had spent most of the Revolutionary War living in Europe and had not taken a loyalty oath to the state upon his return.[123] The challenge implied that Smith was "insufficiently patriotic, if not a closet Tory."[124] "So when the house assembled in New York in March-April 1789 they had to deal with a petition challenging Smith's eligibility."[125] Smith laid out several arguments in his own defense,[126] and was supported by James Madison (who would eventually become Smith's nemesis in the House),[127] Elias Boudinot, and James Jackson.[128] This was the first contested election brought before Congress.[129] Congress agreed to give Smith the seat he had won, "but a whiff of impropriety clung to him notwithstanding."[130]

This experience may have contributed to Smith's suspiciousness toward his peers in the federal government about their potential to misuse their authority.[131] He "worried about how a cavalier attitude about the use of the Constitution and swollen executive power could threaten the

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[120] *Annals*, *supra* note 10, at 210.

[121] *See id.*; *see also* ROGERS, *supra* note 75, at 197.

[122] *See* BORDEWICH, *supra* note 9, at 62 ("A staunch Federalist, the youthful Smith - he was only 30 - descended from a blended line of wealthy South Carolina planters in Boston merchants, whose investments range from banking and shipping to the slave trade."). He was a lawyer and had married into "the most powerful political clan in the state." *Id.*

[123] ROGERS, *supra* note 75, at 166–69.

[124] BORDEWICH, *supra* note 9 at 62.

[125] ROGERS, *supra* note 75, at 169–71.

[126] *Id.* at 169–70.

[127] *Id.* at 170.

[128] *Id*

[129] *Id.* at 171.

[130] BORDEWICH, *supra* note 9 at 62.

[131] GIENAPP, *supra* note 9, at 134.

institution of slavery."[132] Smith therefore spent his first year in Congress insisting that his colleagues adhere closely to the text of the Constitution: "Smith's relentless prodding moved the constitution to the very center of discussion."[133] He insisted that it was not enough "merely to claim that the constitution could not have meant to deny the federal government of power that happened to be convenient."[134] During the early debates about the president's removal powers over agency officials, Smith took an absolutist position that presidential appointees could be removed only by impeachment.[135] "Many members believed that Smith's suggestion verged on the absurd, and few agreed that impeachment exhausted the options for removal."[136]

Regarding the proposed Constitutional Amendments—including, but not limited to the Second Amendment—Smith feared that allowing *any* amendments would eventually lead to federal interference with slavery.[137] To friends, Smith expressed this concern about amendments opening the door to abolitionism.[138] Smith confided to one friend that "Our state is weak in the union—it certainly is—we have no other state to support our peculiar rights, particularly that of holding slavery. The other states are all against us. . . ."[139] Smith was overestimating South Carolina's isolation on this point, but it is worth keeping in mind, as we read his comments about a specific Amendment, that he was wary of all amendments, even ones that he might have otherwise supported, because he thought it would open a door to something else he feared.

To the extent that the Second Amendment related to slavery—that is, southern states needing their militias to suppress slave revolts or conduct slave patrols—it is worth observing how strongly Smith supported the preservation of the institution of slavery, and how he viewed the Quakers as a serious menace. During one or more of his congressional speeches, he openly threatened civil war if Congress ever tried to abolish slavery.

In one famous rant at his colleagues from northern states about the Quaker petitions to end slavery, he quipped, ". . .[W]e made a compromise on both sides. We took each other with our mutual bad habits and respective evils, for better or worse; the northern states accepted us with our slaves, and we adopted them with their Quakers."[140] As one historian

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[132] *Id.*
[133] *Id.*
[134] *Id.* at 135.
[135] *Id.* at 126–27.
[136] *Id.* at 127.
[137] BORDEWICH, *supra* note 9 at 125.
[138] *Id.* at 92.
[139] *Id.*
[140] BORDEWICH, *supra* note 9, at 217.

put it, "*Southerners were just as disgusted with the Quakers as northerners professed to be with the South's toleration of slavery.*"[141]

Smith was a Federalist, but he became an opponent of Madison the next year over the "Dinner Table Bargain" to move the capitol to the Potomac in exchange for the federal government assuming the war debts of the states."[142] "Smith certainly did not wish to see the government lodged amid a band of Quakers."[143] A fierce struggle over the permanent location of the nation's capital was looming in the background of the debates about the Second Amendment, with its provision protecting Quakers and similar religious pacifist groups. Smith, and presumably others, specifically feared having the seat of government in a city dominated by Quakers.[144] A pacifist-dominated capital city could be an inviting target for foreign military attacks, or worse, could even exert influence over national security and foreign policy.

When the Quakers submitted their petitions to Congress to end slavery in February 1790, several of them visited congressmen individually to lobby them.[145] William Loughton Smith received a visit from Warner Mifflin himself—one of the leading abolitionists, regarded as something like a prophet in Quaker circles—and they tried in vain for hours to convince each other of their views on slavery.[146] Smith later remarked on the Quaker efforts at moral suasion: "When we entered into this confederacy, we did it from political, not moral motives, and I do not think my constituents want to learn morals from the petitioners."[147]

Over objections, the petitions were assigned to a committee, which by early March had prepared a report. Southern representatives expressed "outrage that the forbidden subject was again being allowed into public view. William Loughton Smith pointed up to the anti-slavery advocates who had stacked the galleries 'like evil spirits hovering over our heads.'"[148] Eventually, the House voted down the petitions, but "the episode left behind it a residue of southern resentment that bled corrosively

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[141] *See id.* (emphasis added).

[142] *See* HERBERT E. SLOAN, PRINCIPLE & INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT 165–67 (1995).

[143] *See* ROGERS, *supra* note 75, at 197.

[144] *See id.* at 222 ("For Smith, who feared that the capital might long continue in the land of the Quakers, this prospect [of an alternate location in the South] was indeed pleasing.").

[145] *See* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1155–56 (2016) (describing how Quakers lobbied the First Congress by "loitering in the lobbies to approach members as they left formal proceedings, visiting members' temporary capital lodgings, and inviting members of Congress to discuss the issue over meals.").

[146] BORDEWICH, *supra* note 9, at 204.

[147] *Id.* at 201.

[148] ELLIS, *supra* note 105, at 97.

into the funding debate."[149] Smith blamed the melting support for the assumption plan on the Quakers.[150] "Along with other key southerners, Smith now felt seriously alienated from the Pennsylvanians, who had defended the Quakers, and now adding outrage to insult, demanded the nation's future seat of government for their state."[151]

Returning to Smith's comments during the Second Amendment debates, James Jackson responded to Smith with the specific wording he wanted: "No one, religiously scrupulous of bearing arms, shall be compelled to render military service, in person, upon paying an equivalent."[152] He thought conscientious objectors should have to buy their way out of military service the same way that many wealthy elites might do.

D. Roger Sherman (CT)

Countering the arguments of William Loughton Smith and James Jackson, Roger Sherman of Connecticut, the oldest member of Congress, spoke next:

> Mr. Sherman conceived it difficult to modify the clause and make it better. It is well-known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other; but he did not see an absolute necessity for a clause of this kind. We do not live under an arbitrary Government, said he, and the States, respectively, will have the government of the militia, unless when called into actual service; besides, it would not do to alter it so as to exclude the whole of any sect, because there are men amongst the Quakers who will turn out, notwithstanding the religious principles of the society, and defend the cause of their country. Certainly, it will be improper to prevent the exercise of such favorable dispositions, at least whilst it is the practice of nations to determine their contests by the slaughter of their citizens and subjects.[153]

This is a combined response to both proposed floor amendments from James Jackson and Elbridge Gerry, though in reverse order. Regarding Jackson's proposal, Sherman argued that requiring payment in lieu of militia service was pointless, because Quakers would simply refuse to pay it.[154] Quakers began as a martyr movement, and their willingness to suffer

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[149] *Id.* at 224.
[150] *Id.*
[151] *Id.*
[152] *Annals*, *supra* note 10, at 210.
[153] *Id.* at 211.
[154] *Id.*

or die for their convictions was well-known and an integral part of their faith. Responding to Gerry, he contended that it would be inappropriate to specify up front which groups were exempt, because in the War of Independence, hundreds of Quakers (possibly even two or three thousand) had abandoned the Society of Friends to enlist in the military.[155] There was no reason to exclude such individuals, and Sherman predicted (correctly) that in every war, some members of the pacifist sects would sympathize with the *casus belli* and want to enlist, and designating their sect by name might disqualify them from service. This lends support to the idea that Gerry was *not* talking about door-to-door gun confiscation of an entire region, but rather that the pacifist designation would exclude large groups of citizens who wanted to serve in the militia from doing so. Sherman therefore wanted to keep the conscientious objector clause in its original form.

Gordon Wood describes Roger Sherman as one of the few Founders who was a truly devout Christian,[156] which may have helped him understand the Quaker resolve on matters of religious conviction. John Adams, a longtime friend of Sherman, admired his puritanism and honesty; Sherman "was so deeply religious that he objected to Congress scheduling a meeting on Sunday."[157] Adams recorded in his notes about the First Congress that Roger Sherman spoke "often and long, but very heavily."[158]

By 1789, Sherman "was one of the most experienced political men in the country, having served in the Continental Congress, on its treasury board, and on the committee charged with drafting the Declaration of Independence. At the constitutional convention, he was the principal author of the great compromise,"[159] which granted smaller states equal representation in the Senate. Like James Jackson and Thomas Hartley, he was part of a minority in Congress who actually brought personal experience in the military to their debates about militias and the right to bear arms. Sherman understood not only combat and strategy, but also supply, equipment, and budgetary issues, having served "as commissary for the Connecticut troops at Albany in 1759."[160] Like Gerry and Madison, Sherman had played a prominent role in the Constitutional Convention.[161]

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[155] *Id.*

[156] GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789–1815, 577 (2009).

[157] BORDEWICH, *supra* note 9, at 118–19.

[158] DAVID MCCULLOUGH, JOHN ADAMS 85 (2001).

[159] BORDEWICH, *supra* note 9, at 118–19.

[160] E. WAYNE CARP, TO STARVE THE ARMY AT PLEASURE: CONTINENTAL ARMY ADMINISTRATION AND AMERICAN POLITICAL CULTURE 1773-1783 20 (1984).

[161] VILE, *supra* note 7, at 311–20 (2013).

Like many of his colleagues in Congress, Sherman approached amendments grudgingly. ". . . Roger Sherman of Connecticut, a brilliant but clumsy speaker and as stiff as starched linen, one of the House's Federalist lions, suggested that 'taking up the subject of amendments at this time would alarm more persons then would have their apprehensions quieted thereby.'"[162] He insisted that any Amendments be appended to the end of the existing Constitution, rather than being incorporated into it.[163] "The Constitution was probably imperfect, Sherman conceded, but what in the world wasn't? 'I do not expect any perfection on this side of the grave in the works of man.'"[164] He found himself on the drafting committee for the Amendments and became its most forceful member,[165] albeit as a bit of an obstructionist; he "believed that was too much too soon to tamper with the constitution, whose shortcomings, if it had any, would surely be dealt with by conventional lawmaking. 'Experience will show best if it is deficient or not.'"[166] But by midsummer of 1789, he suddenly changed his mind and "decided that Madison's proposals were probably harmless."[167] At the time the Second Amendment was under consideration, Sherman was privately suffering over a series of family tragedies—one of his grown sons was an alcoholic and financially destitute; another son, also bankrupt, had been accused of stealing from his regiment during the war and died suddenly in 1789; and a third son had also suffered recent business failures.[168]

Sherman was being a realist in observing that the Quakers would not yield to pressure or agree to pay a penalty that would support the military, but his comments also demonstrate something deeper. The fact that Sherman had originally resisted having Amendments at all highlights the significance of his support for the original "religiously scrupulous" clause and his view that it must remain unchanged. It illustrates the importance of the clause that members of Congress who generally opposed Amendments still thought it was important to keep this provision.

E. Jack Vining (DE)

Agreeing with Roger Sherman, John Middleton "Jack" Vining from Delaware added:

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[162] BORDEWICH, *supra* note 9, at 90–91.
[163] GIENAPP, *supra* note 9, at 180.
[164] BORDEWICH, *supra* note 9, at 90–91.
[165] *Id.* at 117.
[166] *Id.* at 118.
[167] *Id.* at 118–19.
[168] *See id*.

> Mr. Vining hoped the clause would be suffered to remain as it stood, because he saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight.[169]

Vining, who had helped draft the wording of the proposed Amendments,[170] sympathized with the Quakers at least as far as being consistent in their principles. While Sherman had taken a pragmatic approach—requiring payment for a substitute would be ineffective, as the Quakers would refuse—Vining suggested the Quakers have a point in thinking the two are morally indistinguishable.

Like his fellow Federalist Roger Sherman, Jack Vining had initially been skeptical about the timing of amending the new Constitution: "The people are waiting with anxiety for the operation of the government . . . Is not the daily revenue escaping us? Let us not perplex ourselves by introducing one weighty and important question after another, till some decisions are made."[171] During the early debates about whether the Constitution allowed the President to remove executive agency officials, Vining thought the original Constitution allowed plenty of latitude. "The 'constitution authorizes a complete government,' he argued, it was the only adequate way to understand its underlying purpose, and 'leaves it to the legislature to organize it on such principles as shall appear to be most conducive to the public good.'"[172] He thought the more drastic proposed amendments from the states, which called for major structural changes in the government, would require a new Constitutional Convention, rather than being suited for the amendment process.[173]

After Madison's second unsuccessful attempt to bring proposed Amendments up for debate and a vote,[174] the select committee of eleven members formed and met to redraft the proposed amendments.[175] Vining chaired the committee.[176] His committee's revisions to the militia amendment evidence an effort to make it more focused on the idea that "an organized, officially sanctioned body" would keep and bear arms.[177]

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[169] *Annals*, *supra* note 10, at 210.

[170] *See* Hon. Randy J. Holland, *The Bill of Rights and John Vining, the First State's First Congressman*, 9 DEL. LAW. 33 (1991) (discussing Vining's contribution to the redrafting of Amendments to bring to the House floor for debate).

[171] BORDEWICH, *supra* note 9, at 93.

[172] GIENAPP, *supra* note 9, at 137.

[173] *See* Mazzone, *supra* note 61, at 1777.

[174] BORDEWICH, *supra* note 9, at 117.

[175] *Id.*

[176] *Id*.

[177] *Id.* at 123.

F. Michael Jenifer Stone (MD)

Michael Jenifer Stone from Maryland then posed an interesting question: to what did "religiously scrupulous" refer?[178] Bearing arms? Or something more? From the standpoint of the *Heller* opinion, this is a tantalizing question—was he distinguishing "bearing arms" from being "religiously scrupulous" of *keeping* arms? Or was he aware that the various pacifist sects across the states had subtle differences in their versions of pacifism, refusal to pay war taxes, and exceptions to their pacifist rules? Or, perhaps he was concerned that the phrase "religiously scrupulous" might refer to being extremely pious and religiously abstinent from other activities? Of course, the Quakers themselves used the "to scruple" (verb) and "scruples" (noun) for many of their distinctive convictions of conscience, including their refusal to take oaths, eschewing gambling or drunkenness, refusal to take off their hats indoors, or even their boycott of the fruits and instrumentalities of slavery.[179]

Stone was one of the most frequent and effective speakers in the House during the First Congress,[180] even though his contributions to the debates about what became the First and Second Amendments were a bit paltry. At the same time, he was chronically ill and often absent.[181] The rumor among his colleagues was that his ailments were symptoms of venereal disease,[182] but Stone blamed it on the "air, the water, and the scents of New York," which he claimed "have made war upon my weakly frame."[183] Like Roger Sherman, Stone had opposed the incorporation of amendments into the original Constitution, insisting instead for amendments appended to the end: "How exactly would additions be tracked in the public mind? Confusion was avoided, rather than encouraged by amending through supplement."[184] We should read Stone's contribution to the debate through the lens of his cautiousness about amending the Constitution at all.

Regarding the Constitution, Stone was a strict constructionist—he would later join Madison in opposing Hamilton's proposal for a national bank, arguing "that the constitution was a self-contained instrument and that Congress' primary job was not to exercise creative discretion, but to

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[178] *Annals*, *supra* note 10, at 211.

[179] *See, e.g.*, Richard Jordan, *A Journal of Richard Jordan*, *in* A JOURNAL OF THE LIFE AND RELIGIOUS LABORS OF RICHARD JORDAN 13, 103, 107 (Philadelphia, Thomas Kite, 1829); Job Scott, *Last Letter from Ireland*, *in* THE LETTERS OF JOB SCOTT 149, 150 (Friends Library Publ.); Thomas Shillitoe, Chapter XVII *in* JOURNAL OF THOMAS SHILLITOE 188, 199–200 (Friends Library Publ.).

[180] GIENAPP, *supra* note 9, at 226.

[181] BORDEWICH, *supra* note 9, at 142.

[182] *Id.* at 209.

[183] *Id.* at 142.

[184] GIENAPP, *supra* note 9, at 180.

decipher the tasks necessarily described for it by that instrument."[185] Stone's desire for clarification in the Amendment itself about the referent for the "religiously scrupulous" clause was consistent with his usual opposition to legislative discretion in interpreting and applying the Constitution.[186] He would argue that "the sober discretion of the legislature. . . was the very thing intended to be curbed and restrained by our constitution."[187] He thought there would be no limits on freewheeling legislative impulses once they were allowed at all: "[I]f gentlemen are allowed to range in their sober discretion for the means, it is plain they have no limits."[188]

A point of relevance for the Second Amendment, though not about the clause that the House debated, arose in one of the speeches made while arguing about having parallel federal and state courts located throughout the country: "If a man raised rebel army in New York, for instance, didn't that constitute a rebellion against a state? It had nothing to do with the federal government."[189] This seems to rebut the idea that the Framers viewed the Second Amendment as a right to engage in armed insurrection when the government adopted policies unacceptable to the armed citizens.

Also related to his views of militias and armed citizens was his staunch opposition to the federal government assuming the debts. He either thought forcing states to pay their own militia debts would force states to stay within their means when it came to militia activities, or he feared states externalizing their costs onto other states. Stone asked rhetorically, "Why should Maryland, which had paid her debts, be obliged to contribute toward South Carolina's?"[190] Stone worried that finding implied powers for Congress in the Constitution, rather than explicit grants of authority, would remove any boundaries on the federal government's power.[191] "In Stone's view, the idea that Congress had implicit as well as express enumerated powers would destroy a core constitutional principle."[192]

Further insight into Stone's view of the "right to keep and bear arms" comes from his comments later regarding the 1792 National Militia Act.[193] Stone insisted, "[E]very man who has joined our government, is bound to

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[185] *Id.* at 225.

[186] *Id.* at 227.

[187] *Id.*

[188] *Id.* at 230.

[189] BORDEWICH, *supra* note 9, at 142.

[190] *Id.* at 210.

[191] *See* Richard Primus, "*The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 472 (2018).

[192] *Id.*

[193] *See* Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J. L. & PUB. POL'Y 323, 376 (2011).

the performance of militia duty."[194] Particularly striking is the fact that Stone used "self-defense" not to refer to individual self-defense against criminal assaults, but rather the armed, organized, and democratic secessionist movement of the War of Independence—the state militias and the Continental Army.[195] His point was that mob violence of independent insurrectionist groups—which he described as "outrage and violence"—were a threat to democracy and were not included in the right to "self-defense," which he viewed as a right of the entire society, not a small group, sect, or association.[196]

G. Egbert Benson (NY)

Unfortunately, Stone's important and fascinating question—the answer to which would have been illuminating for future generations—went unanswered, because Egbert Benson from New York jumped in with another proposed floor amendment:

> Mr. Benson moved to have the words "but no person religiously scrupulous shall be compelled to bear arms," struck out. He would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals. I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.[197]

Egbert Benson, a close friend of Alexander Hamilton and John Jay, "enjoyed a reputation as one of the foremost legislative draftspersons of his day."[198] Particularly relevant for our discussion here was his focus, while in Congress and thereafter, on establishing the federal judiciary.[199]

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[194] *Id.* at 339.

[195] *See id.* at 376–77.

[196] *See id.* at 377.

[197] *Annals*, *supra* note 10, at 211.

[198] WYTHE HOLT AND DAVID A. NOURSE, EGBERT BENSON: FIRST CHIEF JUDGE OF THE SECOND CIRCUIT 1801-1802 41 (1987). Benson had been the first Attorney General for the state of New York and had served for more than a decade in the New York legislature and the Continental Congress, eventually becoming the first Chief Judge of the Second Circuit Court of Appeals. *See id.* at 3.

[199] *See id.* at 41–52.

It is not surprising, therefore, that his comments during the debate focused on how the drafted text would be interpreted by the federal judiciary in the future, and how surplusage in the proposed Amendment could inadvertently generate endless litigation. In the years immediately preceding his time in Congress, he had litigated a confusing case about Loyalists' property rights under the Treaty of Peace and conflicting state statutes;[200] he was intimately aware of how higher-level legal texts like treaties and constitutions could conflict with state legislation. Benson's primary contributions in Congress came behind the scenes,[201] but he could sometimes offer ingenious solutions to move the body past gridlock on an issue.[202]

"Benson, like Madison, was concerned that the Constitution not become cluttered with guarantees of rights that were not fundamental to political liberty, and which would therefore routinely require balancing against other rights and the demands of sound government."[203] His comments made some of the more sophisticated points of the entire debate, though. First, he thought the legislature—whether Congress or the states—could easily include an exception for conscientious objectors in their militia enactments, as many had already done. Conscientious objectors could be protected statutorily; moreover, the Constitution should be reserved for fundamental or "natural rights," and he did not think refusal of military service was a natural right (Quakers would have strongly disagreed with this, as they argued from the beginning that following one's conscience was the most fundamental or natural of all rights). On the other hand, Benson clearly approved of legislatures protecting the right by statute, and this would also make it easier to tailor the exemption as necessary or repeal it if the privilege were abused. Including it in the Constitution had important implications for judicial review—he could foresee that a Constitutional exemption or express "right not to" in the Second Amendment would mean that every Congressional enactment related to the military would be subject to judicial review to ensure it did not violate *that* right. It is not clear if he foresaw the day when the Supreme Court would decide to protect non-religious conscientious objectors from the draft, which eventually happened in *United States v. Seeger*.[204] More likely, he anticipated that the Quakers, many of whom practiced war tax resistance, would be entitled (constitutionally) to exemption not only from war taxes, but from paying whatever proportion of general taxes that went toward military spending. Quakers refused to participate in national celebrations on Independence

[200] *See id* at 25–30.

[201] *See* GIENAPP, *supra* note 9, at 159.

[202] *Id.*

[203] Uviller & Merkel, *supra* note 12, at 501–02.

[204] 380 U.S. 163 (1965).

Day (July 4) or other war-related holidays.[205] At the time of these debates, some states had implemented special taxes to try to pay their obligations to veterans from the Revolutionary War—and some Quakers refused to pay these as well. Perhaps he could foresee that eventually pacifists might object to federal subsidies of the fledgling gun industry (such as Eli Whitney's plan for mass production of guns with interchangeable parts), and he worried about the implications of their being able to assert an affirmative constitutional right to these things.

Benson's awareness of the roles of both the legislature and the judiciary in interpreting the Constitution was consistent with his arguments in Congress on other occasions;[206] he saw the Constitution as an evolving concept. He argued that the Constitutional Convention could "produce an unfinished constitution one that would serve only as the beginning, not the end, of an evolving conversation."[207] Benson thought it was simply impossible for humans to create a perfect system of government, or even a perfect foundational document for its legal system: "It is not in the compass of human wisdom to frame a system of government so minutely that it would close all gaps and eliminate all silences."[208] Benson maintained that legislatures were supposed to exercise discretion and engage in creative gap-filling; they were obliged "to take the Constitution by construction."[209] The implications of his theory for the Second Amendment were twofold: the details could be left to the legislature, and any attempts at precision in the Constitutional Amendments themselves would simply generate litigation, and thereby generate ever-expanding judicial interpretations.

Benson's motion was seconded (by someone unnamed in the record) but when put to a vote, it narrowly failed by two votes. Twenty-two members voted for his proposal, while twenty-four voted against it. This is perhaps the best evidence supporting the idea that the Senate dropped the clause intentionally as being out of place and/or unnecessary in the Second Amendment—if almost half the House thought so, it is easy to imagine at least a simple majority in the Senate would have held this view. This is by no means *proof* of what the Senate was thinking, but it is probably the best argument on the side of the those who think the clause was dropped deliberately for being either problematic or redundant.

In the House, the majority voted against Benson and rejected his argument, and it is possible that the majority of Congress reflected the

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[205] Devout Quakers would not close their businesses, decorate their homes, or attend parades for Independence Day observances. *See* GODBEER, *supra* note 54, at 207; MEKEEL, *supra* note 19, at 244–45.

[206] *See* GIENAPP, *supra* note 9, at 139.

[207] *Id.* at 137.

[208] *Id.*

[209] *Id.* at 139.

views of most in the Senate or most of the public on this point. Conversely, this vote could be taken as specific repudiation of the idea that the Second Amendment does not include a *negative right*—a right not to own guns, a right not to be associated with gun culture or military culture in any way—because when Congress was confronted with this specific point—that the clause implied a judicially-enforceable negative right—the majority voted to keep the clause.

H. Elbridge Gerry (Reprise)

At that point in the debate, Elbridge Gerry proposed *another* floor amendment, the first time the debates turned to other topics besides the conscientious objector clause:

> Mr. Gerry objected to the first part of the clause, on account of the uncertainty with which it is expressed. A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one. It ought to read, "a well regulated militia, trained to arms;" in which case it would become the duty of the Government to provide this security, and furnish a greater certainty of its being done.[210]

The gist of this proposal was that the rest of the Second Amendment was not merely a permission to do something (keep and bear arms) or an *option* citizens had by right. Rather, he viewed the Second Amendment as an affirmative duty of the states to maintain the militia even in peacetime, to run weekend training drills—one weekend per month, or perhaps every few months, was a custom in the colonies—so that they were combat-ready whenever conflict erupted. There was a financial aspect to this—militiamen were paid for their time spent at weekend drills, officers were paid more, and equipment (including guns or bayonets for those who lacked them) were provided at the state's expense. Gunpowder and rounds would be used in practice during the drills, and someone had to pay for that. What is unclear is whether Gerry was implying that the federal government should have to reimburse the states for these costs (which was consistent with the position he was taking on war debts), or that the states needed to budget for this. No one seconded his proposal—he did not have even one colleague in agreement with him on this, even though some of the state proposals included this very verbiage. It was recorded as "not seconded."[211]

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[210] *Annals*, *supra* note 10, at 211.

[211] *Id.*

I. Aedanus Burke (SC)

A confusing exchange then occurred. Aedanus Burke, the other Representative from South Carolina, spoke for the first time that day and said he would support Gerry's proposal:

> Mr. Burke proposed to add to the clause just agreed to, an amendment to the following effect: "A standing army of regular troops in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subordinate to the civil authority."[212]

Someone seconded this proposal (there is no record of who it was), which seemed to turn the entire discussion back to the concerns about standing armies that animated Gerry's introductory remarks. It is worth mentioning, as an aside, that Burke had served on the drafting committee for the amendments, though his real contributions are unknown; it may have struck some of his colleagues as strange to have someone from the drafting committee propose such a complete rewriting of the amendment during the floor debates.[213]

Jack Vining raised a procedural problem with this proposal:

> Mr. Vining asked whether this was to be considered as an addition to the last clause, or an amendment by itself. If the former, he would remind the gentleman the clause was decided; if the latter, it was improper to introduce new matter, as the House had referred the report specially to the Committee of the whole.[214]

In other words, Gerry's proposal had already failed, because no one seconded it, and this was an improper motion to reactivate it and expand it. On the other hand, it was inappropriate to add so much new content to the proposals that had already gone through the drafting committee—this was essentially a new Amendment requiring a two-thirds majority for any enactment raising or maintaining a standing federal army—a significant change from the existing War Powers clause in the Constitution. Vining thought it was out of order.

Burke seemed flustered at this point:

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[212] *Id.*

[213] *See* JOHN C. MELENEY, THE PUBLIC LIFE OF AEDANUS BURKE: REVOLUTIONARY REPUBLICAN IN POST-REVOLUTIONARY SOUTH CAROLINA 169 (University of South Carolina Press, 1989).

[214] *Annals*, *supra* note 10, at 211. For more details about Congressman Vining, see *supra* Subpart E of this Part.

> Mr. Burke feared that, what with being trammelled in rules, and the apparent disposition of the committee, he should not be able to get them to consider any amendment; he submitted to such proceeding because he could not help himself.[215]

He complained about the burden of the procedural formalities and that it kept him from considering the Amendment he really wanted but then conceded the point, obviously frustrated.[216] Put to an immediate vote without further debate, Burke's proposed floor amendments were defeated by a whopping thirteen votes.[217]

Burke's proposal focused on limiting the national army rather than protecting militia rights or an individual right of self-defense. He had a military background; unlike some of his younger or wealthier colleagues in Congress, Burke had served in both the Continental Army and his state militia.[218] British forces had captured Burke's garrison in the Charleston militia during the occupation of that city in 1780;[219] years later he wrote that he had spent sixteen months as a prisoner of war.[220] In terms of his worldview, his modern biographer observes, "Burke tended to view his world in terms of absolutes, corruption opposed to virtue, power opposed to liberty. He had vision only for problems and his reactions were essentially defensive."[221]

Aedanus Burke and Elbridge Gerry, as anti-federalists, had teamed up before, as when they argued it was premature to consider Amendments.[222] "Burke, who was outspoken and quick tempered, warned that failing to discuss amendments satisfactorily 'would occasion a great deal of mischief,'"[223] even though he favored amending it in general.[224] Anti-federalists were more likely to call for a complete overhaul, or major structural changes, to the Constitution.

As mentioned earlier, Burke had served on the drafting committee for the Amendments,[225] but it became clear as the floor debates progressed

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[215] *Id.*

[216] ROGERS, *supra* note 75, at 176–77.

[217] *See* MELENEY, *supra* note 213, at 172.

[218] *See id.* at 61.

[219] *See id.*

[220] *See id.*

[221] *Id.* at 207.

[222] *See id.* at 205 (Burke and Gerry objecting together to a newspaper excise tax); *see also* MAIER, *supra* note 8, at 446 ("Even members of the House of Representatives such as Massachusetts Elbridge Gerry and South Carolina's Aedanus Dennis Burke, who had long argued for amendments, thought Congress had more pressing issues to settle first.").

[223] GIENAPP, *supra* note 9, at 192.

[224] ROGERS, *supra* note 75, at 175.

[225] *See* MELENEY, *supra* note 213, at 169.

that he had been frustrated with the limited proposals that came forth. He was "initially quiet, as the house began working through the amendments in the report, until it got to provision about speech, assembly, and petitions . . . ."[226] (i.e., what became our modern First Amendment). At that point, he launched into an extended diatribe, arguing that the proposed Amendments were inadequate,[227] a type of appeasement measure or political decoy. He waved around copies of some more substantial structural amendments that states had proposed, which Madison's committee had seemingly ignored.[228] He likened them to "whipped syllabub [a foamy dessert of the era], frothy and full of wind formed only to please the palate."[229] He wanted express provisions for civilian control of the military, and a complete prohibition against standing armies in times of peace.[230] He compared the final proposed amendments under consideration to the tub thrown by sailors to distract whales in Jonathan Swift's 1704 *Tale of a Tub*—that is, they were a distraction or decoy.[231]

An immigrant from Ireland, Burke was a well-known judge in South Carolina,[232] who had gained fame by publishing a scathing attack on the Society of the Cincinnati—a fraternity for Revolutionary War officers and their descendants.[233] His opposition to the Cincinnati (which established a lineage-based aristocracy for army officers) overlapped with his strident opposition to professional standing armies, the point he raised during the Second Amendment debates. Burke's time in Congress had a downward trajectory, at least in terms of his reputation and influence; "after an active beginning, Burke was no more than a supporting player, somewhat erratic, on occasion disruptive."[234] As his modern biographer observes, "The limited focus of his thought on major issues frustrated both his personal ambitions and his capacity to represent effectively the interest of his 'country.'"[235] As seen when Congress subsequently debated the Militia Act, Burke wanted a military without officer elites: "The radically democratic—except when it came to slavery—Aedanus Burke of South Carolina argued that the ranks should be filled with '[r]ich and poor alike, young old and young, the powerful and the powerless, without distinction.'"[236]

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[226] *Id.* at 170.
[227] *See id.* at 171.
[228] BORDEWICH, *supra* note 9, at 125.
[229] *Id.*; MAIER, *supra* note 8, at 452; MELENEY, *supra* note 213, at 171.
[230] BORDEWICH, *supra* note 9, at 125; MELENEY, *supra* note 213, at 171.
[231] GIENAPP, *supra* note 9, at 166.
[232] ROGERS, *supra* note 75, at 167.
[233] *Id.*; MAIER, *supra* note 8, at 2.
[234] MELENEY, *supra* note 213, at 164.
[235] *Id.* at 207.
[236] BORDEWICH, *supra* note 9, at 288.

It is possible to draw some larger inferences about the Second Amendment from the Gerry-Burke floor proposals. The most cautious inference is that at least *some* of the members of Congress thought they were talking about the balance of power between state militias and the federal army, not about personal self-defense. Even though their proposals were ignored or roundly rejected, at most this suggests that there was no single public meaning of the Second Amendment. Even if some thought it was about self-defense, and others thought it was about slave patrols or conquering more territory from the Native tribes, at least some thought it was about offsetting or obviating a large, professional standing army.

Burke's personal correspondence in the months that followed supplies some additional context for his floor proposal to add more clauses to what became the Second Amendment. In letters to friends in South Carolina, he set forth his emerging theory of the federal Constitution—an elaborate conspiracy theory, in fact.[237] Burke alleged that the recently-ratified Constitution was merely one step or phase in a conspiracy by power-hungry elites to reinstitute some type of tyrannical monarchy.[238] "By manufactured crises, scare tactics, and illegal action, the conspirators had forced on the people a plan of government deliberately contrived to deprive them of their liberty."[239] Burke claimed in his correspondence, which he probably hoped to publish at some point, that a type of coup or second revolution had already occurred, benefitting the elites at the expense of everyone else.[240] He therefore demanded "more information on the background and proceedings of the Constitutional Convention in Philadelphia."[241] In November (three months after the debates about the right to bear arms), he queried:

> Who proposed it and why? Was there in 1786 such a condition of anarchy, or spirit of licentiousness, or disregard of proper governmental authority, sufficient to warrant fundamental change in the structure of government? What were the reasons for economic distress in 1786? Were there influential men unfavorable to a popular government and favorable to a regal one? Was there any party inclined to avail themselves of the popularity of a certain patronage (presumably Washington) to bring about a revolution in government? Did that certain percentage take any active part in framing the system? Were the Cincinnati in evidence? The questions clearly implied that the delegates exceeded their authority and that the people neither

[237] *See* MELENEY, *supra* note 213, at 177.
[238] *See id.*
[239] *Id.*
[240] *See id.*
[241] *Id.*

> intended or expected "that the Republican system of government would be overturned or materially altered."[242]

Thus, even while serving his term in Congress, Burke was beginning to circulate conspiracy theories and suggest the illegitimacy of the federal government forged in 1787. Reading his comments regarding the Second Amendment in this light, his proposal suggests that he thought the terms of the Amendment, both as it was proposed and as it was adopted, were insufficient to achieve their purpose or protect the security of a free state. Some modern readers may see Burke's populist conspiracy theories as a reason to disregard his contributions to the debate as the inappropriate interjections of a crackpot, but Burke was (1) not alone in his views, and (2) even if his views did not represent those of the majority, it is telling that no one objected that Burke was wandering wildly off-topic.

Burke's hostility to the federal government, and federal military, is also evident in his later correspondence with James Monroe about the suppression of the Whiskey Rebellion by federal troops; he sympathized with the rebels and lamented that the debacle played into the hands of the federalists and provided an excuse for an increasingly centralized government and military.[243]

Regarding individual gun rights, one aspect of the issue in the Founding era was the use of handguns in duels, and the extent to which duels were viewed as a ritualized form of self-defense—at the least, defense of one's honor or social capital. Burke, like some of his colleagues in the First Congress,[244] had personal experience with duels. In 1799, Burke had acted as a second to Aaron Burr in a duel with John B. Church, the brother-in-law of Alexander Hamilton.[245] An example of Burke's seemingly paradoxical views of dueling and gun rights came after his term in Congress when Burke had returned to serving as a judge in South Carolina, in a case before Burke, in which the winner of a duel was facing prosecution for murder.[246] When he delivered the jury instructions at the end of the trial, "Burke observed that, although dueling was in point of Law and capital offense, yet such was the prevalence of custom that dueling might be considered as the law of some countries."[247] He acknowledged that clergymen decried the practice as sinful and that lawyers would "harangue against it with all the powers of eloquence," but

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[242] *Id.*

[243] ROGERS, *supra* note 75, at 270.

[244] *See supra* note 108 and corresponding text regarding James Jackson's duels. Congressman Tucker (SC) had been badly injured in a duel with Senator Ralph Izard (SC), who was William Loughton Smith's father-in-law. *See* ROGERS, *supra* note 75, at 128.

[245] *See* MELENEY, *supra* note 213, at 28.

[246] *See id.* at 252.

[247] *Id.*

then reminded the jury, "Yet so long as mankind continued to consider the fighting of as the only manner in which points of honor could be adjusted, it was improbable that dueling would fall into disuse."[248] This sounds like a way of saying "laws against dueling do not work," but then he charged the jury that he would accept no verdict lighter than manslaughter.[249] Dueling was a common use for pistols at the time, and he thought this was simultaneously understandable, inevitable, and punishable.

Given how much of the discussion in Congress on August 17 centered on Quakers and similar religious pacifists, it is somewhat remarkable that Burke did not weigh in on the Quaker Factor at this time, because he was openly hostile toward them on other occasions that session. The following February, while Congress was in the middle of debating Hamilton's proposal for the federal government to assume state militia debts from the war—which Burke strongly supported, because South Carolina had overwhelming war debts[250]—the Quakers submitted their three "memorials" or petitions about slavery and engaged in aggressive lobbying of individual members of Congress.[251] Burke's response was a series of fiery speeches expressing his contempt for, and fear of, the Quakers. Almost immediately, Burke was on his feet, along with William Loughton Smith, to claim "the rights of Southern States ought not to be threatened, and their property endangered, to please people who would be unaffected by the consequences."[252] Burke did not share the admiration some of his colleagues had for Quaker austerity and spiritual dedication: he ". . . did not believe they had more virtue or religion than other people nor perhaps so much, if they were examined to the bottom, notwithstanding their outward pretenses."[253] He declared that the pacifist Quakers were "blowing the trumpet of sedition" and said the House gallery "should be cleared of all speculators and newspaper reporters,"[254] as numerous Quakers sat in the public gallery to watch the debates about their petitions.

The petitions went to a committee, which brought a report to the House floor a few weeks later. On the morning of March 17, Burke rose and "delivered a vitriolic attack on the substance of the memorials and the

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[248] *Id.*

[249] *See id.*

[250] *See* ROGERS, *supra* note 75, at 195. This was another point Burke had in common with Elbridge Gerry of Massachusetts. *See id. See also* BORDEWICH, *supra* note 9, at 210–11 ("The war had left Maryland completely unscarred, Burke seethed, while South Carolina's debts had been undertaken in the common defense. There is not a road in the state but has witnessed the ravages of war. . . .").

[251] *See* McKinley, *supra* note 145, at 1155–56.

[252] MELENEY, *supra* note 213, at 187.

[253] *Id.* at 188.

[254] ELLIS, *supra* note 105, at 84.

good faith of the Quakers."[255] In a speech that would affect the remainder of his career in national office, he exclaimed:

> Who were these Quakers, Burke asked, who would make us believe they came forward as volunteers in the cause of freedom? Were they not, during the war, the devout friends and supporters of the most abject slavery, a slavery attempted on their countrymen from the disgraceful galling yoke of foreigners? They acted as spies for the enemy, for no other purpose but to rivet the shackles of slavery on their country. Now they have assumed another mask, that of enemies of slavery, offering one hand in friendship, and wielding in the other a torch to set flame to one part of the union, and sow discord throughout the whole of it, holding out the pretext of emancipation and the South, and selling the seeds of insurrection and public calamity in the North.[256]

Burke thought the Quakers posed a serious threat to the country and that their emancipation efforts were in fact a ruse to foment division and the unraveling of the country. Burke then compared the Quakers to the deceptively-disguised Lucifer in Milton's *Paradise Lost*,[257] at which point Burke was called to order as wandering off-point and being too harsh and inflammatory.[258] Burke responded he had a duty to expose the Quakers for what they were: "a set of men, who, under the cloak of religion, with the pretenses of a religious society, who are night and day carrying on the arts and management of a political faction."[259] Burke was called to order a second time and stopped his tirade, but resumed it the next day.[260]

Even though Burke did not join the criticisms of Quakers the previous August when they debated the Second Amendment, his comments in March support the idea that a number of Americans at the time viewed the Quakers as a powerful, influential political faction, capable of forcing their political will on others. If there was a genuine fear that Quakers might orchestrate the abolition of slavery, it follows that there would be a similar worry that Quakers could force a policy of state pacifism, at least in some parts of the country, as they had done for decades in Pennsylvania. It is worth considering whether the Second Amendment itself was, at least in part, directed at Quakers, attempting to forestall the abolition of a state militia should the Quakers achieve sufficient power again in any of the states. To frame this question another way: from the standpoint of someone in 1790, whether a congressman or a state legislator voting on

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[255] MELENEY, *supra* note 213, at 188.
[256] *Id.* at 189.
[257] *See id.*
[258] *See id.*
[259] *Id.*
[260] *See id.*

ratification, would it have seemed more likely that Quakers could and would try to orchestrate the dissolution of some state's militia, or that the federal government would try to do so? The conventional modern view is that there was a fear (as Elbridge Gerry hinted in his introductory remarks) that the federal government would try to dissolve one or more of the state militias, but the Quakers had in fact already succeeded in demilitarizing an entire state in recent memory, and their relentless lobbying against slavery seemed to be gaining traction.[261] As Burke said on March 18, "[The Quakers] are seeking to strip us of the little strength and resources we have, and to weaken the southern states, weak and feeble enough already; they are eagerly striving to excite private conspiracies, and finally to raise the standard of insurrection in our country."[262] As Burke saw it, the committee report—even though it concluded that Congress lacked authority to intervene in state regulation of slavery—confirmed the apprehensions the southerners had about the Quakers' intentions and influence.[263]

Burke had another opportunity to rail against the Quakers when Congress debated about a permanent location for the federal seat of government. Burke opposed Philadelphia as the permanent capital mostly because there were so many Quakers there.[264] "I would [just] as soon pitch my tent beneath a tree in which was a hornets' nest," than, as a representative from South Carolina, have "the government in a settlement of Quakers."[265] Burke then reminded his colleagues in Congress about the gallery sit-in the Quakers conducted during the debates about their abolitionist petitions, as well as "their incessant seizing and obtrusions on the members in their houses, in the streets, and in the lobby."[266] As his rhetoric grew more shrill, Burke was once again called to order.[267] "As

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[261] *See* McKinley, *supra* note 145, at 1155–56:

> One of the first comprehensive lobbying campaigns was waged by the Quakers, a community that still prides itself today on its vigorous legislative advocacy. The Quakers coupled their attempts to petition the First Congress to abolish slavery with an impressive lobbying campaign that included "looming" over the galleys, loitering in the lobbies to approach members as they left formal proceedings, visiting members' temporary capital lodgings, and inviting members of Congress to discuss the issue over meals. Not surprisingly, the Quakers' aggressive methods cultivated an incredible hostility by members against any and all forms of lobbying. The Quakers' conduct was unprecedented. Very few organized interests existed in the capital at that time, and none circumvented the petition process in ways similar to the Quakers.

[262] MELENEY, *supra* note 213, at 190.

[263] *See id.*

[264] *See id.* at 199.

[265] *Id.* at 200.

[266] *Id.*

[267] *See id.*

before, his excitable temper apparently carried him away. Except this time there was no point to it at all."[268]

Burke's attacks on the Quakers, along with a public feud he had with Hamilton, cost him dearly in terms of his political reputation.[269] Regarding his time in Congress, Meleney concludes:

> Thus, Burke failed to establish himself in a position of leadership or influence, even with this in his own delegation. After three sessions, he was an unpredictable, hot tempered, sometimes rough Irishmen from South Carolina who had once written a famous pamphlet attacking the Cincinnati. His relative isolation is confirmed by a mass of negative evidence. None of the contemporary records of his colleagues attach significance or weight to his presence.[270]

Burke later changed his mind about the Quakers—or at least changed his position. It is hard to tell whether this was due to a change of heart, an attempt to rehabilitate his public image after he tarnished it by overreacting to the Quakers in March 1790, or if it is just another example of Burke being erratic. A little over a year after Congress debated the Second Amendment, the body took up the Uniform Militia Act, which included an exemption for Quakers, who had appeared in person to petition for an exemption.[271] Surprisingly, "[t]he debate began when Aedanus Burke of South Carolina spoke out in favor of exempting Quakers not only from militia service but also from any attendant fines or payments for non-service."[272] Burke argued that it was unjust "to make those conscientiously scrupulous of bearing arms pay for not acting against the voice of their conscience."[273] Burke went so far as to frame the issue of making Quakers pay for a substitute (or a fine in lieu of service) as making "a respectable class of citizens pay for a right to a free exercise of their religious principles: It was contrary to the constitution; it was contrary to that sound policy, which ought to direct the house in establishing the militia."[274] The comments of other members—James Jackson, Roger

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[268] *Id.*

[269] *See id.* at 206 ("Even in Charleston, a leading paper commented that the Quakers, as a society, 'have been treated with a degree of acrimony and infective, which ill becomes American legislators, in particular, and must inevitably lessen that respect the ingenuity of their arguments might otherwise have inspired.'").

[270] *Id.* at 205.

[271] *See* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 911–12 (2019).

[272] Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 272 (2018).

[273] *Id.* (citing GEN. ADVERTISER (Phila.), Dec. 23, 1790, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS at 115 (Linda Grant De Pauw et. al. eds., 1972)).

[274] *Id.*

Sherman, and Jack Vining—mostly reiterated their comments when debating the "religiously scrupulous" clause of the Second Amendment a year or so before;[275] only Burke seems to have reversed himself.

The point is that we artificially narrow the scope of our inquiry into the original Congressional meaning of the Second Amendment if we confine ourselves to the comments made only on the two days that they debated the Amendment itself. The terse comments congressmen made on those two days touched on subjects that they returned to on other occasions, elaborating on their views. It is a mistake to take the discussion about the conscientious objector clause in isolation, because their comments on other days in that first session of Congress show that they connected Quakers and their pacifism with other complex policy issues, such as the preservation of slavery, Native American affairs, the national debt, and the location of the nation's capital. These other discussions can inform our reading of the discussions of the Second Amendment itself. Modern legal writers may think of gun rights as a distinct, standalone right, but for the Founders, weapons and war were inseparable from slavery, conquest of Native American territories, and taxes, and the Quakers were a primary voice of political dissent on each of these interrelated points.

J. Thomas Hartley (PA)

Returning to our discussion of the Second Amendment debates, after Burke, Thomas Hartley from Pennsylvania (not a Quaker) objected to Burke's proposal on the merits, rather than procedure:

> Mr. Hartley thought the amendment in order, and was ready to give his opinion on it. He hoped the people of America would always be satisfied with having a majority to govern. He never wished to see two-thirds or three-fourths required, because it might put it in the power of a small minority to govern the whole Union.[276]

His concern was that supermajority requirements end up giving too much power to a small number of holdouts in Congress; supermajority rules are inherently undemocratic. The fascinating thing about this particular exchange between Burke, Vining, and Hartley is that it lends credence to the theory that the Second Amendment was primarily, or perhaps exclusively, about state militias as a necessity to prevent a permanent standing army. The text of the Second Amendment itself did not mention anything about fractions or proportions, but no one suggested that Hartley's comments were completely off-topic. Rather, his reference to supermajorities appears to be a reference to the number of votes needed to

[275] *See* Storslee, *supra* note 271, at 912–14.

[276] *Annals*, *supra* note 10, at 211.

declare war, which is pertinent if the discussion were about an amendment related to state militias, but it would be completely off-topic if the discussion were about individual rights to own and carry firearms. In that sense, his argument for simple majorities, in the context of discussing the Second Amendment, is more in line with the militia view. Hartley's comments are also consistent with the variation on the militia view proposed here—that the Second Amendment was designed to prevent a pacifist political faction, like the Quakers, from forcing the adoption of pacifism as state or national policy, as they had done in Pennsylvania for many decades.

Hartley, an ardent federalist,[277] (though on this point he was siding with anti-federalists) was one of the few members of Congress who had served in the army during the Revolutionary War.[278] He was a member of the Society of the Cincinnati, which Burke had publicly attacked.[279] His military service and election to the Pennsylvania Assembly in 1778, during the period of feverish anti-Quaker politics, suggest he would not have been a political ally of the Society of Friends. [280]

Earlier in the session, he had opposed the strict constructionists, like William Loughton Smith, and argued that the Constitution gave the legislature flexibility: "'The constitution has expressly pointed out several matters which we can do and some which we cannot . . . but in other matters is this silent and leaves them to the discretion of the legislature.'"[281] He contended, "Since the Constitution gave lawmakers no firm direction, they were at liberty to determine what ought to be."[282] Hartley would have thought the legislature had freedom to regulate militias and arms; he argued that constitutional silence on a point not only gave Congress wide room to legislate under the "necessary and proper" clause,[283] but that in the absence of legislation the president had broad

[277] BORDEWICH, *supra* note 9, at 93.

[278] *See* John W. Jordan, *Biographical Sketch of Colonel Thomas Hartley of the Pennsylvania Line*, 25 PENN. MAGAZINE HISTORY & BIOGRAPHY 303, 303–05 (1901) (detailing his military career); John B.B. Trussell, Jr and Harold L Meyers, *The Battle of Wyoming and Hartley's Expedition*, HISTORIC PENNSYLVANIA LEAFLET NO.40, Pennsylvania Historical and Museum Commission (1976) (describing one of Hartley's more famous expeditions). Hartley's official Congressional biography says he "served in the Revolutionary War as lieutenant colonel of Irvine's regiment and as colonel of the Sixth Pennsylvania Regiment in 1776; commanded an expedition against the Indians in 1778." *Thomas Hartley, 1748-1800*, CONGRESSIONAL BIOGRAPHY, available at https://bioguide.congress.gov/search/bio/H000299 [https://perma.cc/65HF-HJVK]. *See also* BORDEWICH, *supra* note 9, at 93 (noting Hartley's military background); GIENAPP, *supra* note 9, at 138 (same).

[279] *See* Jordan, *supra* note 278, at 305.

[280] *See id.* at 304.

[281] GIENAPP, *supra* note 9, at 138.

[282] *Id.*

[283] *Id.* at 140.

executive powers, including the removal of presidential appointees at will.[284]

The debates reveal that three of the twelve congressmen to speak during the debates over the Second Amendment—Gerry, Burke, and Hartley—wanted to focus on the dangers of a standing federal army, to which they seemed to think state militias were the antidote. The silence of the other nine members makes it a matter of speculation as to what they were thinking. On the other hand, if the others thought the Second Amendment was about individual gun ownership rather than the question of state militias versus a federal army, we would expect more interjections that these three members were completely off topic. We can infer from the majority voting in favor of the Amendment with its "religiously scrupulous" clause intact that the majority were comfortable with this language. After Hartley's interjection and the voting down of Burke's proposal,[285] the debates ended for the day, and the House voted to approve the draft version.

IV. POST-VOTE DEBATES ON AUGUST 20

They resumed three days later, on August 20—but only for a brief exchange between Thomas Scott,[286] an anti-Quaker representative from western Pennsylvania,[287] and Elias Boudinot, who had chaired the committee and had pre-approved the language in the proposed Amendment. Remarkably, the exchange occurred after the House had already voted to approve the committee version of the proposed Amendment.[288] Scott reiterated concerns about the conscientious objector clause, albeit with some new arguments, while Boudinot insisted the clause was necessary. [289]

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[284] *See id.* at 160.

[285] *See* ROGERS, *supra* note 75, at 176–77.

[286] Scott expressed concern on another occasion about the situation with natives on the frontier—he feared they would either combine as one continent-wide nation or become subjects to Spain. *See* BORDEWICH, *supra* note 9, at 8.

[287] *See* BORDEWICH, *supra* note 9, at 148 (describing Scott as a "huge, rough-hewn Federalist from the state's backcountry"). The United States House official biography of Scott notes that he was from the western frontier of Pennsylvania (primarily settled by Ulster Scots), and was first elected to the Pennsylvania legislature as part of the new government (replacing the Quaker party) established in 1776; he was a Federalist or pro-Administration. *See* United States House of Representatives: History, Art, & Archives, *SCOTT, Thomas,* available at https://history.house.gov/People/Listing/S/SCOTT,-Thomas-(S000186) [https://perma.cc/692Z-TE2Y].

[288] Uviller & Merkel, *supra* note 12, at 504.

[289] *Id.*

A. Thomas Scott (PA)

On August 20, when debate resumed about the Amendment, Thomas Scott wanted the "religiously scrupulous" exemption dropped:

> Mr. Scott objected to the clause in the sixth amendment, "No person religiously scrupulous shall be compelled to bear arms." He observed that if this becomes part of the constitution, such persons can neither be called upon for their services, nor can an equivalent be demanded; it is also attended with still further difficulties, for a militia can never be depended upon. This would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army. I conceive it, said he, to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.[290]

He sandwiched three rather substantial objections into one. First, he thought that excusing conscientious objectors from military service would deplete the militia to the point that it could not function dependably.[291] This reveals how prevalent he perceived pacifism to be—this was not just a tiny group or fringe sect, but enough to render the militia seriously undermanned.[292] This led to his second point, which is very confusing. He seemed to think there was "another article of the Constitution which secures the right of the people of keeping arms."[293] There is no other

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[290] *Annals*, *supra* note 10, at 211.

[291] Professor George Mocsary, in his student note published in the Fordham Law Review, took this statement by Scott to be a reiteration of the concern Elbridge Gerry expressed at the opening of the discussion – that the government would disarm individuals as a way of nullifying and abolishing the militia. *See* George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2121 (2008). I think Scott's concern was the spread of pacifism and voluntary renunciation of firearm ownership by individuals.

[292] Scott expressed concern on another occasion about the need for militia supplies to support the massive westward expansion, settlement, and conquest he anticipated. Scott "warned that millions of people would be crossing the mountains in years to come, and it would hardly be in the national interest 'to have the country settled by unprincipled banditti.'" BORDEWICH, *supra* note 9, at 92.

[293] Josh Blackman and his co-author keenly observe that Scott uses "the right of keeping arms," which they take as strong evidence that "keeping arms" was a distinct concept (ownership) from "bearing arms" (public carry). *See* James C. Phillips & Josh

clause in the Constitution that touches on this right. Some commentators assume he was talking about the "keep and bear arms" clause in the Second Amendment itself, but it is strange he would refer to this as being a clause of the Constitution, as it was still merely a "proposition" in the House. Perhaps he was mixing up the constitution of his home state—which *did* have a standalone provision guaranteeing the right to keep or possess weapons, apart from "bearing" them. Scott did not distinguish between a right to keep arms for public safety (militia service) versus private use (self-defense); rather, he distinguished between keeping arms for public service and the rights of conscientious objectors.[294] "His concern was that constitutional protection for objector status would undermine the sense of public duty and obligation that alone rendered the right to arms meaningful."[295]

Representative Scott's last point is fascinating. He expected American society to become entirely secular or irreligious. Moreover, he foresees that eventually, courts would extend the exception to those with purely philosophical or secular, rather than sectarian, objections to serving in the military. Even though he was wrong about the disappearance of organized religion, he was prescient on the point about non-religious conscientious objectors receiving legal protection.[296] In a sense, this argument has two prongs: the exemption for "religiously scrupulous" individuals would become unnecessary and irrelevant when religion disappeared from American society; and he assumed none of his colleagues would ever want to give legal protection to non-religious conscientious objectors—which could happen someday if they kept the clause. As an aside, this raises a fascinating point for originalist interpretive approaches to the Constitution. It suggests the Framers simultaneously were aware that courts would extend or change its meaning or application over time—that is, they knew this would be a "living constitution" whose meaning would evolve—and at the same time, the

Blackman, *Corpus Linguistics and* Heller, 56 WAKE FOREST L. REV. 609, 664 (2021). This is a counterargument to the idea that "keep and bear" is a hendiadys, a word pair that has a single meaning (like "bequeath and devise" in other legal contexts). It is an interesting example, of course, but an outlier – evidence rather than proof, in this author's opinion. It seems equally likely that "keeping arms" was a metonymy or shorthand for the larger concept of "keep and bear." On the other hand, the unique situation on the Pennsylvania frontier – before, during, and after the War of Independence – was a remarkable dearth of firearm ownership (discussed below), even among non-Quakers, and the Whig constituents in Pennsylvania that Scott represented wanted arms provided to them by the state or federal government. The situation in Pennsylvania was not a problem with people being forbidden to own guns they would otherwise have procured, but guns not being available, even though they were fully legal.

[294] *See* Uviller & Merkel, *supra* note 12, at 505.

[295] *Id.*

[296] United States v. Seeger, 380 U.S. 163 (1965).

Framers were willing to preempt and foreclose future generations from adapting it in specific ways the Founders deemed unacceptable.[297]

Representative Elias Boudinot spoke next and replied to Scott, but before turning to that, some additional background about Scott can add context to his statements about the "right to keep arms." Among the members of the First Congress, Thomas Scott was unique in two ways relevant to the discussion of the Second Amendment. First, he was the only congressman at the time from the westernmost frontier[298]—he was born, raised, and lived his adult life in the southwest corner of what is now Pennsylvania.[299] He had first-hand knowledge of the issues facing settlers on the frontier, including the source of violence and frontier use of firearms, and he was able to foresee massive settlement and rapid western expansion in ways that representatives from coastal cities could not.[300] The second way in which Scott was unique was his uniquely bad personal experience with local and state militias.

In January 1774, the Pennsylvania Governor had appointed Thomas Scott, who was then thirty years old, to be Justice of the Peace for the newly created Westmoreland County in southwest Pennsylvania.[301] The Governor of Virginia, which claimed the area for its colony (the charter supposedly set its western boundary as the Pacific Ocean), sent the Virginia state militia to occupy nearby Fort Pitt and secure the area.[302] The militia commander was John Connolly, who after arriving at Fort Pitt, issued a militia muster for all Virginian settlers in the vicinity.[303] This prompted one of the local Pennsylvania judges (not Scott) to have

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[297] A more famous exchange between Scott and another member of Congress is revealing about his views of the judiciary. Scott, though apparently not a Quaker (given his election to the anti-Quaker Pennsylvania Assembly in 1776), had adopted the Quakers' abolitionist ideals, and was president of his county's abolition society. During the debates about the Quaker petition for Congress to abolish slavery, Scott interjected:

> I look upon the slave trade as one of the most abominable things on earth. I do not know how far I might go if I was one of the judges of the United States and those people were to come before me and claim their emancipation, but I am sure I would go as far as I could.

BORDEWICH, *supra* note 9, at 203. Rep. Jackson retorted, "I believe his judgment would be of short duration in Georgia . . . perhaps even the existence of such a judge might be in danger." *Id.; see also* ELLIS, *supra* note 105, at 84 (recounting and discussing the same exchange).

[298] JOHN CALDWELL, THOMAS SCOTT: WESTERN FEDERALIST 99 (2008).

[299] *See id.* at 1–2.

[300] *See, e.g.*, Scott's speech *On Western Lands*, delivered in the House of Representatives on July 13, 1789, a month before the House took up debate on what became the Second Amendment, reprinted in CALDWELL, *supra* note 298, at 101–07.

[301] *See* CALDWELL, *supra* note 288, at 2.

[302] *See id.* at 3.

[303] *See id.*

Connolly arrested, but he was soon released on bail and returned to Fort Pitt.[304] Connolly then raised a militia force of 150 Virginians, which by April 1774 entered and took in the county seat of Westmoreland County.[305] The Virginia militiamen arrested all the Westmoreland county magistrates for illegally holding a Pennsylvania court in Virginia territory.[306] Thomas Scott, who had become Justice of the Peace only four months earlier, was one of those taken into custody by the Virginia militia.[307] He argued his case unsuccessfully before the Virginia Governor (Lord Dunmore),[308] who ordered him to pay an exorbitant fine and serve a years' probation, during which he must refrain from acting as a Pennsylvania magistrate.[309] Apparently unable to pay such a large sum, Scott remained in custody with other Pennsylvania local officials for over a year. He wrote petitions to the Governor of Pennsylvania to no avail.[310] In June 1775, the new Pennsylvania sheriff of Westmoreland County led a posse of twenty men in a raid on Fort Pitt; they freed the captives, including Thomas Scott, and arrested Connolly, the leader of the Virginia militia there.[311] The next year, when John Adams and the Continental Congress orchestrated the installment of a new state government in Pennsylvania, under a new state constitution, Thomas Scott found himself representing his county in the Pennsylvania Assembly.[312] Once the new constitution was in place and a new Assembly was seated, including Scott, one of their first actions was to pass a new Militia Act.[313] When in Congress, his views on assumption of war debts, and especially on soldiers who sold their vouchers, were not in line with some of his fellow Federalists.[314]

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[304] *See id.*

[305] *See id.*

[306] *See id.*

[307] *See id.*

[308] *See id.* at 4–5.

[309] *See id.* at 4–5.

[310] *See id.* at 5–6.

[311] *See id.* at 6.

[312] *See id.* at 7–8.

[313] *See id.* at 8.

[314] Thomas Scott opposed federal assumption of the states' Revolutionary War debts – an issue that divided the Representatives from Pennsylvania. *See* E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE 1776–1790 300 (1961) (discussing the opposition of Scott and others to the assumption proposal; Scott wanted Congressional action postponed until the debt to be "ascertained and liquidated," which probably meant he wanted states to devalue the debt by devaluing their wartime currency values). An issue related to the War debt was what to do about soldiers who, desperate for cash and doubtful of ever being paid for their service—had sold their I.O.U.s as securities to speculators. *See* BORDEWICH, *supra* note 9, at 189–90. Everything about the militias and the "right to keep and bear arms" touched on issues of the public fisc—Congress knew that the states and federal government had overwhelming debts from the last war, so the cost of militia

A few months later, when the House considered the Quaker petitions to abolish slavery, Scott defended their petition,[315] though there is no reason to think he himself was a Quaker. There is no historical record of Scott's religious affiliation, including in his will and the fact that he was willing to take loyalty oaths when he accepted state office in 1776.[316] Scott echoed the remarks of others who defended the petitions and/or the petitioners, "suggesting that the defining text was not the Constitution, but the Declaration of Independence, which clearly announced that it was 'not possible that one man should have property in person of another.'"[317] One confusing paradox about Scott was his open support for the abolition of slavery (a possible indication of how much social influence Quakers exerted on non-Quakers at the time) and his ongoing ownership of two household slaves until the end of his life.[318]

Overall, Scott's comments support the view that the Second Amendment was originally about state militias rather than personal ownership of firearms. His concern about the conscientious objector clause is that it would eventually apply to secular pacifists, and if enough people invoked this exception, it would deplete a given state's militia enough to make a federal army a practical necessity by default. This supports the idea that the Second Amendment was originally about militias. His comments would also align with the specific variation on the militia view set forth in this Article: the concern was not merely to prevent a permanent federal army that would supplant state militias, but rather that a pacifist faction might be numerous enough in some states to force the dissolution of the militia there. Scott's unique twist on this problem was that he could foresee *secular* pacifists as a faction capable of doing this in the future, with help from the courts, rather than *religious* pacifists doing this, which was what the proposed text contemplated. I believe his point about secular militia depletion necessitating a federal army in its place was an appeal to other members of Congress who were particularly concerned about the prospect of a permanent federal army. It is striking that his experience of being taken captive by the Virginia militia had not soured him on state militias in general, but I infer from this that he may have blamed his misfortunate on the Pennsylvania militia's failure to protect him from a rogue militia posse from a neighboring state. If someone in

activities—paying men for their service time and buying weapons and supplies—was painfully obvious. Thomas Scott expressed special contempt for soldiers who sold their securities, comparing them on one occasion to "whores who have since wedded to Mr. Speculator, by which they have lost all title to the honorable appellation of a soldier." *Id.* at 190 (internal quotations omitted).

[315] ELLIS, *supra* note 105, at 84.

[316] For his will, see CALDWELL, *supra* note 298, at 107–09. For his military service, s*ee id*. at 98.

[317] ELLIS, *supra* note 105, at 86.

[318] *See* CALDWELL, *supra* note 298, at 65.

that era thought the Pennsylvania militia was undermanned and poorly equipped with arms, it would have been logical to blame that on the long period of Quaker pacifist control that had only recently ended and the lingering dearth of militia volunteers and guns due to Quaker social and commercial influence. Scott could imagine a similar scenario happening again in the future with secular pacifists, whom he suggested could become far more numerous than religious pacifists had been.

B. Elias Boudinot (NJ)

Returning to Elias Boudinot's reply to Scott, it was Boudinot who had read the proposed Amendment three days earlier to begin the debates, and now offered the final word in the debates about the Amendment:

> Mr. Boudinot thought the provision in the clause, or something similar to it, was necessary. Can any dependence, said he, be placed in men who are conscientious in this respect? [O]r what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them? He adverted to several instances of oppression on this point, that occurred during the war. In forming a militia, an effectual defense ought to be calculated, and no characters of this religious description ought to be compelled to take up arms. I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person. Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.[319]

Boudinot insisted the "religiously scrupulous" clause was necessary for a pragmatic reason and an ideological one. As much as military types may resent conscientious objectors and want to force them to serve despite their scruples against it, such conscripts end up being useless in warfare, because they simply will not fight. There were indeed many anecdotes in circulation supporting his point—local militia leaders in the Revolution who basically arrested Quakers who refused to enlist and forced them, in chains, to march with the others toward the battle lines. The Quakers could be surprisingly stubborn—in most such cases, the officers eventually gave up and let the Quakers go, because they were deadweight for the regiment and were demoralizing the other men by preaching pacifism to them along the way. Others had died. Boudinot then offered a more transcendent reason—it was important for the new federal government not to interfere with citizens' private religious beliefs and religious obligations. Moreover, with the prospect of a long fight for ratification of the amendments looming, it was important to reassure the public that the new,

[319] *Annals*, *supra* note 10, at 211.

centralized federal government would not overreach in matters of personal faith and conscience. Dropping the clause, he warned, would signal the opposite.

Of all the comments and arguments made in the congressional debates about the Second Amendment, Boudinot's closing remark comes the closest to addressing the idea of public meaning—the American public's understanding of what was being offered for ratification. The implication of his closing remark is that he would have prioritized personal conscience and legal protection of individual religious beliefs above whatever they thought the Second Amendment was protecting.

Elias Boudinot owed his election to Congress to the Quaker community in New Jersey.[320] Even though he had been President of the Continental Congress for one term, when he ran for a House seat in the new Congress, he won election only narrowly.[321] He campaigned directly to West Jersey Quakers, telling them the alternative, if he lost, would be "Scotch-Irish Presbyterians" who would persecute them and force them to serve in the militia.[322] Quakers by then had started discouraging their members (internally) from voting in elections at all.[323] Boudinot told the Quaker community that the election presented an existential crisis for their community, and if ever there should be an exceptional case in which they cast votes, this was it.[324] Boudinot himself was not a Quaker; he was a devout Presbyterian, descended from French Huguenots. In his later years, Boudinot published religious books about eschatology and the Native Americans being the Lost Ten Tribes of Israel,[325] as well as *The Age of Revelation,* a rebuttal to Thomas Paine's *Age of Reason.*[326] He was the

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[320] *See* GEORGE ADAMS BOYD, ELIAS BOUDINOT: PATRIOT AND STATESMAN, 1740–1821 154–55 (1952).

[321] *See id.* George P. Schmidt, *The First Congressional Election in New Jersey*, 4 J. RUTGERS UNIV. LIBRARY 46, 48–50 (1941).

[322] *See id.* at 48.

[323] *See id.* at 50 ("The Peaceable Quaquer, says, 'No, I don't feel a Freedom, Thee must excuse me, I never intend to interfere in Government-matters, it is against my Principles.'").

[324] *See* Schmidt, *supra* note 321, at 49–50:

> You don't feel a 'Freedom'[!] You will loose Your freedom, Your Liberty and Your Property, nay more, Your Religion, if You do not; we Church People see very clearly these Presbyters want to rule, and, then, there will be no other Religion suffered in this Country, but Presbyterianism, the most arbitrary and tyrannic of all Religions. [The opposing candidates] are bloody men, are men for War, they want another War, that they may make their fortunes by distress from the Quaquers, and, if they get into Congress, they will join with the New-England-Congress Men and we shall have War & Bloodshed immediately.

[325] *See* ELIAS BOUDINOT, A STAR IN THE WEST, OR, A HUMBLE ATTEMPT TO DISCOVER THE LONG LOST TEN TRIBES OF ISRAEL (1816).

[326] *See* BOYD, *supra* note 320, at 253.

first President of the American Bible Society,[327] and is credited with inventing Thanksgiving as a federal holiday.[328] His closing remarks in the congressional debates about the Second Amendment partly reflected the importance he placed on personal faith, as he was unfashionably devout for the time. At the same time, his comments reflected his central campaign promise to the Quaker community in New Jersey: that he would protect them from compelled military service.

Many years before, as a young lawyer, Boudinot had apprenticed himself to attorney Richard Stockton, another prominent Revolutionary War hero, signer of the Declaration of Independence, and member of the Continental Congress.[329] Boudinot and Stockton each married the other's sister, and they became quite close.[330] The Stocktons had been a Quaker family for generations, but Richard Stockton's father had converted to Presbyterianism in order to marry someone from that sect (Abigail); so Richard Stockton (Elias Boudinot's mentor and brother-in-law) had been raised a Presbyterian, but his extended family would have been old-stock Quakers. At the end of his life (around the time Boudinot was debating the Second Amendment in Congress), Stockton asked to be buried in the Quaker cemetery, next to his grandfather's grave, which the local Quakers allowed, making an exception from their usual practice. Stockton's daughter, Julia Stockton (Boudinot's niece) married Benjamin Rush.

Boudinot probably understood Quakers and the peace testimony better than most of his colleagues in Congress. Earlier, while Boudinot was President of the Continental Congress, an entourage of Quaker elders appeared at Nassau Hall in Princeton, where Congress was meeting temporarily.[331] The Quaker delegation insisted on addressing the Congress to request the abolition of slavery; over many objections from others present, Boudinot had allowed it.[332] Just as the Quakers petitioned the Continental Congress, they would later petition the First Congress (in early 1790) to end the institution of slavery.

Just as the Quakers had appeared in New York to lobby in person on the issue of slavery, when Congress eventually considered the first Militia Act, the Quakers returned in full force to plead for an exemption from the militia service.[333] James Jackson delivered a tirade about those who refuse to fight, but "Elias Boudinot posed a concept of moral conscience it was

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[327] *See id.* at 257–60 (founding), 288–91 (presiding over).

[328] *See id.* at 173.

[329] *See* ALFRED HOYT BILL, THE HOUSE CALLED MORVEN. 37–51 (1954).

[330] *See* BOYD, *supra* note 320, at 13–16.

[331] *See* Gary Nash, *A Moment in Nassau Hall*, PRINCETON ALUMNI WEEKLY 3, 4–8 (Oct. 3, 2018). Anthony Benezet, John Pemberton, Warner Mifflin, and one or two others were present. *See id.*

[332] *See id.* at 7.

[333] *See* BORDEWICH, *supra* note 9, at 291.

both rooted deep in Protestant tradition and looked forward to a modern understanding of individual rights."[334] Boudinot added that it was pointless to try to force people to fight who were refusing to do so—pacifists make terrible soldiers in battle, he explained.[335] There was also the issue of national reputation: "We are said to be the people who understand the civil rights of men . . . . Do not let us then, at the outset, violate the great and important ones, the rights of conscience, enforcement to that which their religious tenets teach them to abhor."[336]

An additional point for giving context to Boudinot's Second Amendment statements is that his view of the Constitution overall was not what moderns would describe as strict constructionist or originalist. Early in the first session of Congress, as they debated about presidential appointment and removal powers for executive officials, Boudinot asked, "Can the Constitution be executed if its principles are not modified by the legislature?"[337] He believed the Constitution was continually evolving.[338] He believed Congress had the power to fill in the gaps left in the Constitution via legislation, and that constitutional silence on a subject was a license, not a limitation: "The Constitution itself called for the work necessary to complete its design and function. Misunderstanding what the constitution required, others foolishly sought to 'narrow the operation of the constitution,' placing it in a straitjacket, 'rendering it impossible to be executed,' complained Boudinot."[339]

Boudinot would probably have bristled at suggestions that the Constitution was "sacred" or somehow divinely inspired. Like many Federalists of his day, he thought no constitution was perfect, but must have some inherent defects, the product of fallible humans; he cautioned his colleagues to "be careful not to be misled by looking for perfections when nothing higher than human prudence and foresight ought to be expected."[340]

C. The Silence of James Madison (VA)

James Madison did not speak during the debates about the Second Amendment, but he helped draft it and was at least partly responsible for the inclusion of the "religiously scrupulous" clause. Madison's personal approach to the conscientious objector clause was complex. On the one hand, during the subsequent debates about the first federal Militia Act,

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[334] *Id.*
[335] *See id.*
[336] *Id.*
[337] GIENAPP, *supra* note 9, at 140.
[338] *See id.*
[339] GIENAPP, *supra* note 9, at 137.
[340] *Id.* at 214.

Madison argued that those "religiously scrupulous of bearing arms" should not have to serve in person, but he also agreed with those who thought the Quakers should have to pay a fine in lieu of service, which he must have known they would simply refuse to pay. In 1816, then-President James Madison issued a blank presidential pardon form for Quakers who refused militia service, and refused to pay the statutory fines, in Maryland.[341]

Even though the "religiously scrupulous" clause dropped from the final Senate version of the Amendment, it is significant that the comments of Representatives Benson, Scott, and Smith refer to the legislatures creating a statutory protection for religious pacifists so that the clause in the Second Amendment might be unnecessary—Benson and Scott were confident that legislatures would do so, and Smith noted that some of the state proposals for an amendment protecting the militia or right to bear arms included the exemption with various wording. Arguably, this presumption that the legislatures would recognize the same legal protections means that the "religiously scrupulous" exemption was part of the public meaning of the right as it was understood before the codification of the specific text that became the Second Amendment.

V. REFLECTING ON THE DEBATES: WHAT CAN WE INFER?

The House debates about the Second Amendment focused mostly on whether to include an exemption for conscientious objectors (especially Quakers), and if so, how to phrase it. There were clearly differing views about whether to grant such an exemption, and if so, whether it was more appropriate to do this through the Constitution or through state legislative enactments. The vote reveals that a majority of the House favored exempting conscientious objectors one way or another, though it is less clear what the split was on the question of forcing conscientious objectors to pay something in lieu of service (a disagreement to which they returned when debating the Militia Act).

Two outspoken anti-federalist members of the House, Gerry and Burke, interrupted the discussion about conscientious objectors to propose more sweeping language that would prohibit, or at least severely restrict, the maintenance of a federal standing army. Both were disappointed by the proposed Amendments overall, as they had wanted much larger structural changes to the Constitution itself. Neither of their proposals gained much traction and seemed like an attempt to replace the proposed

[341] Gilder Lehrman Institute of American History, *Conscientious Objectors: Madison Pardons Quakers, 1816*, available at https://www.gilderlehrman.org/history-resources/spotlight-primary-source/conscientious-objectors-madison-pardons-quakers-1816 [https://perma.cc/NY78-JHVH].

Amendment—about militias and the right to keep and bear arms—with a major change to the Constitutional itself regarding the federal military.

The discussions in Congress about the Second Amendment occurred at a time when Congress was dealing with closely related issues—the state debts to their militia members for service in the War and whether the federal government should assume such debts, the prospect of westward expansion and frontier conflicts with indigenous tribes, fears by the southern states that the federal government would abolish or restrict the institution of slavery (and their threats/plans to secede in that case), and the disputes over state boundaries that occasionally boiled over into armed clashes. There was zero discussion of an individual right to own or carry weapons for self-defense, but inferring a reason for this requires speculation—silence could indicate they thought the point was so obvious as to be trivially true, or it could mean that the idea never occurred to them. Either view, however, is an argument from silence.

A. Protecting Individual Rights or Protecting the Militias?

In *Heller*, Justice Stevens' dissent overall adopts the view that Congress and the ratifiers thought the Second Amendment was about protecting, implying that without the Amendment the federal government might disband the state militias.[342] At the time, however, Congress was focused on, and divided over, the assumption debate, which itself demonstrated that many of the states could not *afford* to activate their militias for any extended period, and it was not clear how the federal government could afford to support the states in this. Both the militia system and a potential federal standing army posed serious problems for public finance. For fans of the militia system, it would have been more rational to worry that the militias would die off on their own if they did not receive ongoing federal subsidies, or at least recurring federal bailouts.

Bruen followed the *Heller* majority in treating the Second Amendment as primarily protecting individual rights,[343] presumably because Congress thought a constitutional amendment was necessary to prevent the government from disarming the populace. The *Heller* majority noted that several state constitutions at the time already protected a right to bear arms, so there was no imminent risk of widespread disarmament by those states; such a fear would have had to be directed at the federal government.[344] The problem is that it would have been completely infeasible for the tiny federal government of the time to conduct a door-to-door confiscation of all arms throughout the sparsely-settled, vast

[342] D.C. v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).

[343] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2142 (2022).

[344] *Heller*, 554 U.S. at 598.

frontiers of even the original thirteen states. Such a fear also seems irrational from the standpoint of realpolitik: if state legislatures were protecting the right to bear arms, it seems unlikely that the same state would elect representatives to Congress who would support a ban on all arms. Moreover, there were no historical examples of a state or colony attempting to do this—isolated examples from brief periods of political tumult in English history were already at least a hundred years in the past at that point. A few isolated examples from the colonies at the outbreak of open hostilities with Britain were merely wartime (or verge-of-war) seizures of the enemy's arms, not a policy of universal weapons confiscation during peacetime. Universal weapons confiscation in peacetime would have been an irrational fear, something no one among the ratifiers would have experienced.

It seems plausible, based on the House debates, that there was no shared understanding of what the Second Amendment meant or represented—in other words, no true "public meaning." Instead, it is possible that different constituent groups in different regions of the country understood it very differently, and that at least some in the ratification era viewed the Second Amendment as being related to the Quaker Factor. There was no agreement, even within a single state, between federalists and anti-federalists about what the right to keep and bear arms entailed.[345] As one historian put it, "Exploring the multiple original meanings of the right to bear arms in Pennsylvania suggests that there is good reason to believe that the federalists objected to the anti-federalists' understanding of the right to bear arms, particularly when it came to armed rebellion."[346] There were diverse views among the anti-federalists themselves, sometimes even within the same state.[347] So, with no clearly discernable public meaning, the task of courts post-*Heller* and *Bruen* to dutifully apply the original public meaning of the Second Amendment to modern day litigation is made extremely difficult, if not outright impossible.

B. The Second Amendment and Assumptions About Public Versus Private Ownership of Firearms

Despite the Framers' overall obsession with private property rights, militia records from the time indicate there was some confusion about whether guns were truly private property in the usual sense, or were public property, or some type of hybrid property (like private property held in

[345] GIENAPP, *supra* note 9, at 410.

[346] *Id.*

[347] *See id.* at 405.

public trust).[348] As historian Robert Churchill concluded in his survey of militia returns from the period, "It is time to ponder what these guns meant to their owners and how that meaning changed overtime."[349] Militia returns from the period usually did not differentiate between guns owned by militiamen and guns owned by states or local governments.[350]

Officers complained during the war that men would report for duty without bringing their guns from home—even many who in fact owned guns—expecting to be issued new weapons from the military supply.[351] "More often than not, however, the men arrived at camp without arms."[352] Military commanders' indignation at men not bringing their own guns suggests that the officers thought that they had no right to leave their guns at home. There were also complaints that men would return home with an army issued gun and never bring it back, and it is unclear if those men thought they were appropriating property belonging to the military (theft),[353] or that they already thought of all their guns at home as partly belonging to the public and assumed they could store military issued rifles at their homes indefinitely.[354] There were guns issued that were specifically designated as public property.[355] It is not completely clear that those who drafted, debated about, and voted for the Second Amendment thought the guns were private property, as opposed to private property held in trust for public use, or even public property of which the militia member was a custodian. After 1775, George Washington began a policy of keeping muskets that men brought with them even after the men returned home.[356] "He ordered that no soldier upon the expiration of his term of enlistment was to take with him any serviceable gun. If the musket was his private property, it should be appraised, and he would be given full value for it."[357] As an enforcement measure Washington withheld the last

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[348] *See* Robert H. Churchill, *Gun Ownership in Early America: A Survey of Manuscript Militia Returns.* 60 WILLIAM & MARY Q. 615, 642 (2003) ("When Virginia and the other southern states stopped counting the private guns of their militiaman, they undermined a public claim on the private arms of the individual citizen the militiamen had contested for half a century.").

[349] *Id.*

[350] *See id.* at 623.

[351] *See* ERNA RISCH, SUPPLYING WASHINGTON'S ARMY 348–49 (1981).

[352] *Id.*

[353] George Washington, in order to reduce the number of army-issued guns his soldiers would take home and attempt to keep, after 1776 had them stamped with an insignia to mark them as public property, though apparently this did not solve the problem. *See* E. WAYNE CARP, TO STARVE THE ARMY AT PLEASURE: CONTINENTAL ARMY ADMINISTRATION AND AMERICAN POLITICAL CULTURE, 1775–1783 66–67 (1984).

[354] *See id.*

[355] *See* Churchill, *supra* note 348, at 624.

[356] *See* RISCH, *supra* note 351, at 349.

[357] *Id.*

two months pay from any soldier who returned home with a gun he had brought with him from home when he first reported for duty.[358] Many regimental troops ignored these rules and took their guns home with them anyway.[359] Washington advised the Continental Congress in 1776 that there were 2,000 men in his camp without muskets.[360]

> As late as the spring of 1780, Washington was still warning his officers to give strict tension to prevent soldiers from carrying away their arms when their times of service expired. He had used every means in his power to prevent this practice, but he was persuaded they do it in a variety of instances nevertheless.[361]

An illustration of the disjunction between modern ideas of gun ownership and the mindset in the Founding generation was the problem of gun maintenance and care in Washington's army. One contributing factor to the chronic shortage of firearms for the army was the soldiers' failure to keep their weapons in good (operating) condition.[362] Washington concluded that the men would not take care of their "own" guns they brought from home (guns they were obligated to leave with the army when they left), but they would take better care of guns issued to them by the army after their enlistment; as a result, he tried to shift away from the bring-your-own-gun-to-war policy to procuring or producing the army's own guns that could be issued to the men for safekeeping.[363]

Quaker communities would have further complicated this situation as there would be fewer guns available, not due to a legal prohibition on guns, but merely due to low interest in the community in arming themselves for self-defense. To the extent that the Second Amendment was part of a program to ensure an ample supply of firearms for future conflicts that might arise, the Quakers created a gun gap.[364] Compared to

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[358] *See id.*

[359] *See id.*

[360] *See id*. at 350.

[361] *Id.* at 356.

[362] *See id.* at 351–52.

[363] *See id.* at 352. The question of how the colonists before the war viewed private property rights in guns, versus some kind of public trust idea, deserves more attention and development from historical researchers.

[364] "In 1755, North Carolina began to have armed conflicts with Indian tribes there, and the governing Council of the colony ordered that all those eligible for the militia were to furnish their weapons. Then the Council made the interesting suggestion that the Quakers should produce instead the tools of the pioneer settler – axe, spade, and hoe." MARGARET HIRST, QUAKERS IN PEACE AND WAR 352 (1923). This request by the Council seems to acknowledge that the Quakers did not own guns, and no one expected them to fight with farm tools – they were hoping the Quakers would turn these over for the militia to use as equipment. The Quakers refused even

other states, Pennsylvania had significantly lower rates of gun ownership, according to probate records.[365] "Arms were less prevalent in Pennsylvania than in the other states. . . ."[366] The dearth of firearms became an acute problem on the frontier during the French & Indian War.[367] During that conflict, Benjamin Franklin had to obtain guns from neighboring states to help ameliorate the shortage.[368] The situation did not change much even in the years leading up to the War of Independence, despite the Pennsylvania legislature gradually approving the creation of a state militia starting after 1756. When Pennsylvania recruits turned out in 1776, a disproportionate number were unarmed. Even after Independence, the pattern continued—more than one-fourth of the men in the 1806 militia census would have lacked a firearm, based on the same census count of available muskets and rifles.[369] Even though guns were legal in Pennsylvania, and the Quakers were out of government at that point, they either exerted enough social and cultural influence to suppress gun ownership overall or comprised enough of the population to create a local market failure for distribution or retail sales of firearms. As Thomas Verenna explains:

> What does all this mean? The myth that guns were everywhere, and that everyone (or even every household) in Pennsylvania had a gun, has to be put to rest. While such a claim is probably true in certain parts of the country during the Revolutionary War, Pennsylvania holds a unique place in the history of gun culture. It remained a center of conflict for over two decades, and produced large numbers of troops—both Continental and militia—in support of the War for Independence. But proper acquisition, maintenance, and training with firearms just did not catch on. Some claim that the state did not acquire firearms because of the Quaker government, but there were no laws on the books restricting the purchase of guns. And while the Quaker government might not have acquired many firearms for public stores initially, their attitudes changed during the French and Indian War.

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to do this and continued to petition to be excused from all participation whatsoever in the violence. *See id.*

[365] *See* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WILLIAM & MARY L REV. 1777, 1803–05 (2002).

[366] Nathan R. Kozuskanich, *Rethinking Originalism: Bearing Arms and Armed Resistance in Pennsylvania*, 56 AM. J. LEGAL HIST. 398, 400 (2016).

[367] *See* Thomas Verenna, *A Want of Arms in Pennsylvania*, J. AM. REVOLUTION (Apr. 24, 2014) available at https://allthingsliberty.com/2014/04/a-want-of-arms-in-pennsylvania/ [https://perma.cc/9W6B-UZXK] (quoting numerous contemporary sources regarding the dearth of firearms in Pennsylvania, both before and after Independence).

[368] *See id*.

[369] *See id. (*citing William G. Merkel, *Mandatory Gun Ownership, the Militia Census of 1806, and Background Assumptions Concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, 25 L. & HIST. REV. 160 (2007)).

> Nonetheless, their lack of initiative to purchase firearms did not, in any way, infringe upon citizens acquiring them personally. And plenty of gunsmiths and one powder mill existed in Pennsylvania—on the frontier and in towns—so that if one wanted a firearm they could acquire them. Yet for reasons unknown, I cannot say why, Pennsylvanians just did not seem all that interested in acquiring firearms.[370]

Remember that during the House debates about the Second Amendment, Thomas Scott (representing the non-Quaker frontier area of southwest Pennsylvania) had referred specifically to the right to "keep arms," without mentioning a right to "bear" arms. It seems plausible that the choice of the verb "keep" in the Amendment, rather than the more common "own," was intentional. Arms were "kept" by citizens, but they were kept for the community, even if the keeper had the right to use a weapon in the meantime for hunting or self-defense. "Ownership" of arms was subject to impressment or requisition by the government at any time and did not have the same legal status as other private property rights.

The Second Amendment had implications for public finance. Arming the federal military—or even state militias—was expensive, and from a financial standpoint, the Second Amendment was a way for the federal government to externalize most of the costs onto the states and then push those costs onto private citizens. The better armed and organized the militias were, the less Congress would have to spend when it needed to raise and equip an army. During the war, the Continental Army had faced a desperate shortage of guns, gunpowder, and ammunition.[371] The Second Amendment provided a foundation for the first federal Militia Act, which required men to acquire their own firearms, even in peacetime. Some of the states were still swimming in their own unpaid war debts to their militiamen; if the Second Amendment encouraged the citizenry to arm themselves, the states would have to spend less on an armory or stockpiling an arsenal for its militia.

The dependence militias had on the supply of privately held firearms, rather than relying exclusively on state-owned armories, highlights a complicated free-rider problem with regard to the economics of the gun supply. Guns were expensive, apparently too expensive a commodity to buy and keep stockpiled and idle in a state armory waiting for the next armed conflict to erupt. At the same time, the value of guns as a public good, from the standpoint of the militia, probably far outweighed any

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[370] Verenna, *supra* note 367.

[371] *See* E. WAYNE CARP, TO STARVE THE ARMY AT PLEASURE: CONTINENTAL ARMY ADMINISTRATION AND AMERICAN POLITICAL CULTURE, 1775–1783 66–67 (1984); RISCH, *supra* note 351, at 348–49.

private value or utility they had for individual citizens. Indeed, protecting the existence of state militias without prohibiting a federal standing army would inevitably, and foreseeably, lead to freeloading by cash-strapped state. States could simply slash their state militia budgets and rely on protection from the federal government. A fear that the federal government would try to disband state militias was less rational than a fear that a state would decide to forego having its own militia, or at least significantly defund its own militia, pushing the costs of state security onto the federal government (and, indirectly, onto other states). In the colonial era, there were occasions when colonies had to supply funds or militia support for British military actions, and the colonies that contributed (like Massachusetts and New York) protested over Pennsylvania's non-participation. There was a financial incentive for states to defund their militias that could create an opening for the most well-organized and active political lobby of the era—the Quakers—to push for a state to curtail its militia activities. A similar but smaller risk applied on the federal side. Given that the affirmation clauses indicate the Framers contemplated Quakers holding federal office in any of the three branches, they would have contemplated that Quaker officeholders would disfavor both military spending and military actions.

The question of whether private property rights in guns were identical to or different from other chattel property rights merits more research; the main point here is that the economics of firearms at the time would have provided an opening for a pacifist political faction to orchestrate the defunding of their state militia, justified to the voting public as a matter of simple fiscal responsibility, especially if they could fall back on the federal government. This, in turn, brings us back to the Second Amendment and what it was designed to prevent. There was a genuine risk in the Founding Era that the combination of a pacifist political bloc with the free-rider problem of state military defense would create a perverse incentive for a state to defund its militia and force the federal government to bear the burden instead, even if the benefit went disproportionately to one imperiled state that had defunded its militia. I contend that this was a much more realistic fear for the Founders than the federal government banning guns or going door to door to confiscate firearms and disarm the populace. The forced disarmament scenario, however, underlies the individual right theory. Why did the Founding generation think the Second Amendment was necessary? What was the bad outcome it was supposed to prevent? The individual rights advocates would say its purpose was to prevent disarming the citizenry, but I think it is more likely that the Founders were concerned some states would neglect, defund, or abandon their own militias, and that Quakers were the ones most likely to attempt this. The result would have been more of the burden shifting to the federal government. In other words, rather than worrying that an overbearing federal government would mandate the dissolution of the state militias to

institute a tyrannical national system, the more pressing concerns of the time should have made them concerned about the anti-militia movement being a bottom-up phenomenon. In addition, there was probably some concern, though it was less likely, that Quakers or some similar pacifist group could gain control of a chamber of Congress or the Presidency and derail the national security and foreign policy agenda of the majority.

C. The Colony With No Militia

Quakers had controlled the Pennsylvania government for most of its history—and at times had exerted significant influence in the colonial governments of New Jersey, North Carolina, and Rhode Island. Their strict anti-military policy was the central issue that brought about the end of their control in Pennsylvania, "as a growing Associator movement latched on to the unseat the Quakers and establish a new government."[372] From the standpoint of the radicals that seized control of Pennsylvania in 1776, the Quakers had for decades thwarted their efforts to organize or arm themselves for self-defense against threats on the frontier (mostly Native Americans, but also occasionally against the French). "Indeed, by 1776, bearing arms was the paramount obligation in the new state and became a defining attribute of male citizenship for Pennsylvanians."[373]

The Pennsylvania frontiers were mostly non-Quakers, however, and the right to bear arms meant more than being *permitted* to own firearms—they expected to be *provided* with weapons by the state, either in-kind or via some system of reimbursements or vouchers. This was true as early as the 1750s:

> For example, a 1755 petition from Bucks County asked the assembly for 'a Supply of Arms and Ammunition, and that some Method may be fallen upon to enable the Inhabitants to distinguish our friendly Indians from others.' When Robert Hunter Morris replaced James Hamilton as governor in October 1755, he struggled with the assembly to supply people in the West with the arms they desired.[374]

Frontier leaders in Pennsylvania complained "that three-quarters of them had no guns or ammunition and lacked any cohesive military leadership.[375] The "right to bear arms" certainly included self-defense—mostly against Native American raids—but it also meant a "well-regulated militia," and that meant an adequately *supplied* militia.[376] Similarly, "Petitioners from

[372] *See* Kozuskanich, *Pennsylvania, the Militia, and the Second Amendment*, *supra* note 58, at 132.

[373] *Id.* at 133.

[374] *Id.* at 127.

[375] *Id* at 127–28.

[376] *See id.*

Lancaster complained that while they were 'being invaded by a cruel and formidable Enemy,' the people were 'neither provided with Arms or Ammunition, nor under any Kind of Discipline.'"[377]

One particularly illuminating anecdote about the attitudes toward guns, militia service, and self-defense is in a 1776 letter from William Irvine to John Hancock, in which Irvine wrote that men were upset with being charged for their militia-issued muskets: "They complain farther . . . that they will in all probability not only be naked at the end of the year but in debt too—[and] *that as soon as the War is at an end the Arms will be useless to them*."[378]

This letter reveals or confirms several important points. First, many non-pacifist men on the frontier, who were willing to serve in the militia, did not own firearms themselves, but needed guns provided by the militia commanders. Second, muskets were unaffordable to many rustic settlers, a point that is relevant to modern Second Amendment questions related to gun taxes, defining the parameters of "common use" weapons, and so forth. Third—and most striking—is that the men were not delighted that they finally owned a weapon that they could keep and bear for personal self-defense after the War ended. Instead, they thought the muskets were "useless" except for warfare.

The Quaker ethos of anti-militarism seems to be the only explanation for the perennially low gun ownership rates even among non-Quaker communities on the Pennsylvania frontier. Not funding a militia affected the prevailing social norms of gun ownership; guns were not banned, but they were also not popular.

From the perspective of the members of Congress,[379] Quakers could undermine plans for westward expansion and the addition of new states, because they could prevent the state militias from conquering Native Americans. Compounding this concern was the fact that Quakers were well-represented in the westward migrations that were already happening, with settlers moving into Kentucky, Ohio, Indiana, and other western territories; many came from southern states where slavery was more prevalent and the state authorities more hostile to abolitionists.[380]

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[377] *Id* at 129.

[378] *Id.* at 136 (emphasis added).

[379] Thomas Scott, the non-Quaker Federalist Congressman from western Pennsylvania, expressed to his colleagues in Congress that he expected "millions" of people to move westward in the coming years, and said Congress would have to choose between a well-regulated militia and settlement by "unprincipled banditti." BORDEWICH, *supra* note 9, at 92.

[380] *See, e.g.*, ROGERS, *supra* note 75, at 373 (describing the exodus of Quakers from post-war South Carolina to the Northwest Territory. "Also among those leaving were Quakers, who disapproved of slavery. Between 1805 and 1819, twelve hundred Quakers left for the Northwest."). *Id.*

An alternative explanation of the Second Amendment's purpose is that it was supposed to prevent what happened in Pennsylvania—an official state policy of anti-militarism—from happening again, there or anywhere else. As John Adams wrote in 1813, "I have witnessed a Quaker Despotism in Pennsylvania. The Sovereignty was in the Quakers. The Revolution destroyed it."[381] In the Founding era, the Quakers were unique in their organized and relentless political lobbying over issues that were religiously adjacent, like abolition and pacifism, but not directly related to the spread of their faith. Even though the Quakers had removed themselves from holding public office after 1776, the Framers clearly anticipated Quakers holding federal offices at some point, as indicated by the inclusion of "oath or affirmation" in various places in the Constitution. The House members from southern states clearly feared that the Quakers had enough clout or influence to push their agenda on the slavery issue, and the concentration of Quakers in Philadelphia was a reason some feared having the nation's capital there.

Historian Nathan Kozuskanich places the end of Quaker rule in 1776, when the original Penn charter was abandoned and a new state constitution was adopted, and a fiercely anti-Quaker legislature took control. Kozuskanich explains:

> One of the important social realities Pennsylvanians faced was the problem posed by Indians along the frontier. While Pennsylvania was hardly unique in this problem, it was peculiar in having a pacifist Quaker government in power. The Pennsylvania constitution emerged out of a struggle between two opposing visions of civil society—a martial back county vision that prized equal representation in the Assembly, trial by jury, and participation in the common defense, and a Quaker vision defined by liberty of conscience, pacifism, and negotiation.[382]

At the time the Second Amendment was debated and ratified, it was conceivable that the Quakers could exert enough influence in one or more states to defund its militia (especially given that there were other financial incentives for states to do so), and it would have been rational to fear that one of the new states that would form in the western territories would come under the sway of anti-militarism. A constitutional provision may have seemed necessary to preempt a pacifist political movement from gaining traction, and it is unsurprising that this would come packaged with a concession to the pacifists that they could have personal exemptions. The inclusion of the "religiously scrupulous" clause in the original Second Amendment could have been to complement the preceding clauses in the

[381] MEKEEL, *supra* note 19, at 386.

[382] KOZUSKANICH, *For the Security and Protection of the Community*, *supra* note 55, at 6.

Amendment, which provided the flip side of that exemption—that no state, nor the federal government, could adopt an official policy of anti-militarism. Rather than protecting the states from interference by the federal government on the militia question, the Second Amendment, under this theory, protected the majority of the citizenry from those receiving the exemption forcing their pacifism on everyone else.

Even in areas where Quakers did not control the government, they could exert social influence. Consider the example of the Quaker gunsmith in North Carolina named Matthew Osbourne, who repurchased his guns from all his customers at the outbreak of war in order to prevent them from being used in the fighting:

> The most striking example of Quaker resistance to the demands of the state government occurred near the Piedmont monthly meeting of Centre. Soon after learning that the fighting had begun, Matthew Osborne, an expert gunsmith, directly disobeyed the government's demand for supplies. Osborne had made many hunting rifles for his neighbors in the surrounding countryside and was asked to produce guns for the Continental Army. He not only refused to do so, but went around to his neighbors and bought back the guns previously sold them. These were taken back to his shop where the barrels were heated and bent back to make them useless. In this way, Osborne could make sure that no rifle he had made would ever be used in taking human life. Thus, in his small way he prevented his shop from becoming a munitions plant for the "powers of darkness."[383]

The point of recounting this story is that it was reasonable for the Framers to expect the Quakers would not only refuse to participate in the military, and that they would not only be without guns that others could take in use, but they might actively destroy firearms that came into their possession, thereby depriving the public of their use. Even though the stories are merely anecdotal, incidents like these are part of the history of the Second Amendment and inform the text-and-history approach that *Bruen* adopted.

Bruen mandates that courts apply public meaning originalism when analyzing Second Amendment challenges to gun safety statutes or

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[383] Steven Jay White, *North Carolina Quakers in the Era of the American Revolution*, 71–72 (1981) (Master's Thesis, University of Tennessee), available at https://trace.tennessee.edu/utk_gradthes/1227 [https://perma.cc/R56E-LQNA]. An alternate version of this story is in circulation that involves a different method of destruction: "According to local legend, Osborne made a number of long rifles for his Quaker neighbors. When he learned some of those rifles had been used at the Battle of Guilford Courthouse, he repurchased the rifles and broke them against a tree." C. Michael Briggs, *The Longrifle Makers if Guilford County*, 103 AM. SOC. ARMS COLLECTORS BULLETIN 33–39 (2011), available at https://americansocietyofarms collectors.org/wp-content/uploads/2019/06/2011-B103-The-Longrifle-Makers-of-Guilford-County.pdf [https://perma.cc/4M3S-CLMG].

regulations, which includes looking at historical sources to determine the meanings of the right to keep and bear arms in the Founding era. Such an inquiry is incomplete, however, if it attempts to ascertain the scope of the right to bear arms in isolation from other related issues that public leaders in the Founding era closely associated with that right. Freedom to own firearms was not merely an abstract idea or philosophical ideal, but a feature of life in the young Republic that existed within the context of economics, market prices, taxes, government, slave patrols, Native American raids, and expectations of future large-scale armed conflicts. If we try to conceptualize a Founding-era right to bear arms without seeing it in its larger social context, we are likely to arrive at incorrect conclusions or misinterpret the history in light of our modern context and modern assumptions.

VI. CONCLUSION

The House debates about the Second Amendment are an important piece of the Amendment's history. This Article has attempted to provide, for the first time, a step-by-step survey of the debates, situating each comment in the original Second Amendment debates within the context of the overlapping issues of the day, such as funding for those bearing arms and the public debts that would result, the implications of arms-bearing for westward expansion and internal state security, and the complicated political situation with the groups like the Quakers, who opposed militias and bearing arms as a matter of conscience. Although the First Congress ultimately sent a version of the Second Amendment for ratification that omitted the exceptions for the religiously scrupulous, the debates provide strong historical clarification of the perceived need for militias. The debates also reveal the significance, for those in Congress, of the existence of groups that refused to participate in militias, the expediency of reassuring those groups that they would not be subject to conscription, and the problems of funding the militias and sourcing firearms.

This Article has also set forth a possible alternative explanation of the Second Amendment's purpose: to preempt any state or the federal government from adopting a policy of pacifist anti-militarism, whether through direct governance by officials who might be religious pacifists or through lobbying and social influence of Quakers and similar religious groups. In the original version of the Second Amendment, this preemptive move came with the proviso that the pacifists themselves would receive legal protection for following their conscientious scruples. A forthcoming companion article to this one will explore more deeply the complex problems the Quakers posed and how these related to the right to keep and bear arms, with more focus on the Pennsylvania backstory to the Second Amendment rather than the House debates, which were the primary focus of this Article. The public finance issues related to the Second

Amendment, including the legal status of guns as private property versus property held in trust for public purposes, were touched upon in this Article, but deserve more investigation by academic researchers.

Of course, the current Supreme Court insists that the core principle of the Second Amendment is the right of law-abiding citizens to arm themselves for self-defense; in the short term, the Court is not looking for alternate explanations of the Second Amendment. Even so, this Article has shown that considering the right to bear arms in isolation from other related issues is problematic if we are to be faithful to the original public meaning of the Amendment and its text. The original debates in Congress about the Second Amendment reveal that it overlapped with several other thorny policy issues, just as Second Amendment issues today overlap with complex questions of federalism versus local governance, tort liability for manufacturers, licensing and permitting regimes, taxation, policing, the carceral state, and even public schooling. The First Congress wanted to provide special solicitude for the rights of those *not* bearing arms due to their convictions. Even those in Congress who did not want to include the conscientious objector clause in the Constitution itself mostly wanted state legislatures to provide such protection instead. They did not treat an individual's right to keep and bear arms in isolation—whatever that right may have entailed—but considered it alongside the need to provide legal protection for the unarmed as well. This is a lesson that courts should apply today.