No. 08-1521

In The
Supreme Court of the United States

OTIS MCDONALD, et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF HISTORIANS ON EARLY AMERICAN LEGAL, CONSTITUTIONAL AND PENNSYLVANIA HISTORY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT CITY OF CHICAGO

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INTEREST OF *AMICI CURIAE*

Amici are professional historians who have published scholarship on the Second Amendment, Pennsylvania history, Quaker history, Anglo-American legal and constitutional history, and related issues.[1] Based on our study as historians, we set forth below how the right to keep and bear arms and the right to individual self-defense were understood by early Americans, particularly as affected by early Pennsylvania history and constitutions, Whig and Quaker self-defense theories, and Quaker and other conscientious objectors.

Amici's names and institutional affiliations (listed for identification purposes) are set forth in Appendix A.

SUMMARY OF ARGUMENT

The conceptions of individual and collective self-defense evolved in the seventeenth and eighteenth centuries. Under the contract theory of government,

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief as the requisite notice of our intent to file was timely provided, pursuant to the parties' blanket consents on file with the Clerk.

these two modes of self-defense were natural rights to be exercised should the government fail in its responsibility to protect the people. This theory became reality in the American Revolution. The people rose up as a collective force against the tyranny of the British government. The militias mustered by the people themselves were the vehicle for their deliverance.

The Revolution unleashed radical forces, most notably in Pennsylvania. There, the Presbyterians, in revolt against the pacifist Quaker regime as much as the British, codified the right to collective self-defense in their constitution. The Framers wished to contain these radical elements. When the Anti-Federalists pushed for a constitutional amendment with the express aim of reserving the right of rebellion, the Federalists began to rethink the role of the militia in the American polity.

Their solution was to endorse both the British idea that the government should muster and control the militias and, at the same time, adopt the Quaker perspective that, to be permanent, a constitution must be malleable. The debates over the Second Amendment indicate that the Founders codified the right of the people to bear arms collectively, understanding that individuals would necessarily possess those arms. The militia, and thus those individuals, would serve the government and the government would regulate them. The right of individual self-defense was left unchanged by the Second Amendment. As before, it was a natural right recognized by

common law and subject to appropriate regulation under the governmental contract with the people. Protecting the right to keep and bear arms for militia purposes was the dominant reason behind the Second Amendment.

ARGUMENT

I. AN HISTORICAL EXAMINATION OF THE UNDERPINNINGS OF THE SECOND AMENDMENT WILL ASSIST THE COURT IN DECIDING THE QUESTION PRESENTED

This brief provides the Court with our scholarship on Founding-era historical facts to facilitate its review of American history and tradition with respect to the right of *individuals* to possess and carry weapons in case of confrontation, as recognized by the Court in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). As the Court now considers whether that right may be incorporated under the Fourteenth Amendment to limit the police power of the states, it must consider whether the right is "implicit in the concept of ordered liberty." *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937) *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969). In making this determination in other cases, the Court has been informed by a review of historical context.

In *Duncan v. Louisiana*, 391 U.S. 145, 149–50, 154 (1968), the Court held that the general grant of a

jury trial for serious offenses is a fundamental right necessary to the Anglo-American regime of ordered liberty.[2] The Court reached this conclusion by retracing the history of the right, beginning with its English roots and terminating with the present day significance of the right in various states. *Id*. at 151–54. The Court's discussion focused on the adoption of the right by the American colonists and the significance of that guarantee to the Founders. *Id.* For example, the Court cited Blackstone, the Declaration of Independence, and objections to the Constitution which led to the submission of a Bill of Rights protecting the right to a jury trial. *Id*. at 151–52.

In *Moore v. City of East Cleveland, Ohio*, the Court similarly recognized that the appropriate limits of constitutional rights and governmental power "come not from drawing arbitrary lines, but rather from careful 'respect for the teachings of history (and), solid recognition of the basic values that underlie our society.'" 431 U.S. 494, 503 (1977); *id*. at 503 n.10 (also stating "[a] similar restraint marks our

[2] In *Duncan*, the Court held that the proper standard in determining if a specific procedural safeguard should be incorporated is "whether given this kind of system a particular procedure is fundamental – whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." 391 U.S. at 150 n.14. The Court did not state whether this test should also apply with respect to incorporation of enumerated substantive liberties. But whether the Court analyzes the Second Amendment under *Palko* or *Duncan*, the historical events giving rise to the Amendment's codification remain instructive.

approach to the questions . . . whether or to what extent a guarantee in the Bill of Rights should be 'incorporated' in the Due Process Clause because it is 'necessary to an Anglo-American regime of ordered liberty[ ]'"). In *Moore*, the Court said rights are sometimes protected by the Due Process Clause of the Fourteenth Amendment "precisely because" they are "deeply rooted in this Nation's history and tradition." *Id*. at 503. In the same vein is *Washington v. Glucksberg*, in which the Court noted that the "Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" 521 U.S. 702, 720–21 (1997) (citations omitted). The nation's "history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decision-making'" in the area of substantive due process. *Id*. at 721.

In determining whether the Second Amendment individual right defined in *Heller* is implicit in and fundamental to our scheme of ordered liberty, the Court will be aided by an examination of the historical underpinnings of the right. In particular, *amici* review the competing Whig and Quaker theories of self-defense, their clashing implementation and resulting conflict in the first states (particularly Pennsylvania), the Founders' understanding of them during the ratification debates, and negotiation over the scope of the self-defense right leading to the Second Amendment.

II. EARLY MODERN THEORIES OF INDIVIDUAL AND COLLECTIVE SELF-DEFENSE

A. Whigs And Self-Defense

The Anglo-American Whig theories of the rights of individual and collective self-defense are closely related. They must be understood in the context of the contract theory of government, which determined what rights could be exercised and when. As exemplified in the writings of Locke, Blackstone, and the American Founders, seventeenth- and eighteenth-century Englishmen and Americans acknowledged the individual's natural right to life, liberty, and property. These rights existed first in the "state of nature," that is, in the absence of a legitimate government. Here, to preserve his life in the face of an attack, which put him in a "state of war" with the attacker, the individual had unlimited liberty to use lethal force in self-defense. But when a government was established and man was removed from the state of nature through a social contract, he relinquished certain rights to the civil government. "[E]very man," wrote Blackstone, "when he enters into society, gives up a part of his natural liberty." 1 William Blackstone, *Commentaries on the Laws of England* ch. 1 at 125 (George Sharswood ed., Philadelphia, J.B. Lippincott Co. 1893) (1753) *available at* http://oll.libertyfund.org/title/2140 (last accessed Jan. 1, 2010). Likewise, an American Anti-Federalist said, "A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the

existence of that society." John De Witt, *To the Free Citizens of the Commonwealth of Massachusetts*, Am. Herald, Oct. 22, 1787. Instead of the individual needing to protect himself, an effective government would prevent and punish transgressions of the positive law, making "protection . . . the duty of the magistrate." Blackstone, *supra*, 123. The only exception that would allow the individual to exercise his natural right of self-defense would be if the government failed to provide protection "upon a sudden affray," such as in the case of a highway robbery, when no governmental force was immediately present. 4 Blackstone, *supra*, ch. 14 at 183 (although sometimes Blackstone found such acts only "excusable" as opposed to justified).

Early Americans likewise thought that homicide in unavoidable situations of self-defense was a natural-law right limited by the positive law. New York Judge James De Lancey wrote:

> *Homicide Excusable* . . . is founded on a Primary Law of Nature . . . But herein the Law is very careful not to give way to the shedding of Blood, for no one is excusable in this case, if he could by any means avoid it . . . he is obliged by our Law to retire back to the Wall, before he make use of this Law of *Self-Preservation.*

James De Lancey, *The Charge of the Honourable James De Lancey, Esq.* 5 (New York, William Bradford 1734). Because there was a legitimately established government with protective forces, self-defense

could not be legally exercised except in limited and extreme circumstances. Such ideas were based on Locke's assertion that the invocation of certain natural rights under a legitimate government to be not the exercise of liberty, but of "license." John Locke, *Second Treatise of Government* ch. 2, sec. 6 (David Wooton ed., Mentor 1993) (1689). If attacks and individual defense were undertaken as matter of course and the government were rendered powerless, the ensuing chaos would necessitate a much stronger government, along the lines of Thomas Hobbes' Leviathan, which would restrict individuals' freedom under an authoritarian regime in order to prevent a perpetual state of war. Thomas Hobbes, *Leviathan, The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (J.C. A. Gaskin ed., Oxford Univ. Press 2009) (1651). In order to have a greater degree of liberty for all, individuals had to be restricted so they did not harm one another, and, conversely, had to be encouraged not to take the law into their own hands.

Collective self-defense in Anglo-American thought was understood as the right of revolution. Revolution was the right of the people collectively to defend themselves against an oppressive government by overthrowing it through use of violence (or threat of violence) and to establish a new and just government in its place. This was the theory behind the overthrow of Charles I in the English Civil War (1641–1649) and of James II in the Glorious Revolution (1688). The best articulation of this theory can be found in

Locke's *Second Treatise of Government* and the writings of the American revolutionaries, the latter drawing extensively on the history and legal theory of seventeenth-century Britain. According to Locke, if the government breaks the contract with the people by threatening their natural rights to life, liberty, and property, it puts the people in a state of war with the government and they have the natural right to defend themselves. He explained, "[T]here remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them." Locke, *supra*, ch. 13, sec. 149, at 337.

Collective self-defense was significantly different from individual self-defense. Most Englishmen, including Americans, did not believe that the individual acting alone had the right to resist the government in any way. Rather, revolution had to be undertaken by "'the whole people who are the Publick'" for it to be legitimate. Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776* at 36 (1991) (quoting Revolutionary War source). The most radical of seventeenth-century theorists and an inspiration for the Americans, Algernon Sidney, wrote that individual resistance of government was "a sort of sedition, tumult, and war." *Id.* It was the people as a whole who had contracted with government, and therefore it was the people as a whole who must feel the oppression and agree as a body to change the government.

B. Quakers, Self-Defense, And The Possession Of Arms

Whig theories of self-defense were dominant in early modern Britain and America. A significant opposing theory in colonial and Revolutionary America came from Quakerism. *See generally* Jane E. Calvert, *Quaker Constitutionalism and the Political Thought of John Dickinson* (2009). This theologico-political theory for the establishment of and participation in government was based largely on a doctrine called the Peace Testimony which held that man must not destroy creations of God, namely other men and the constitution. The Quaker position on self-defense, individual or collective, was straightforward—man must not defend himself against potential attackers but should present himself as non-threatening and convince his would-be oppressor that they should reconcile. As a Quaker theologian wrote, "sufferers using no resistance, nor bringing any weapons to defend themselves, nor seeking any ways revenge upon such occasions, did secretly smite the hearts of the persecutors." Robert Barclay, *Apology for the True Christian Divinity*, Prop. 14, sec. 6 at 427 (Quaker Heritage Press 2002) (1678). Quakers found this method to be effective. For example, Thomas Story said they "*were peaceful people and hurt nobody, therefore* [the Indians in the colonies] *would not hurt them*." Margaret Hirst, *The Quakers in Peace and War: An Account of Their Peace Principles and Practice* 338 (1972) (italics in original).

Remaining unarmed was the advice of Quaker meetings in the seventeenth and eighteenth centuries, and members were often admonished for transgressions from non-resistance. But Pennsylvania's history shows that Quakers did not oppose owning or carrying guns as a rule, but instead eschewed violence in general. It was not arms *per se* that Quakers had a problem with; it was what those arms could represent and how they were used. When one Quaker merchant obtained "a number of muskets" as partial payment for a debt, he then sold them as hunting guns. William Rotch, *Memorandum, Written by William Rotch in the Eightieth Year of His Age* 2 (1916) (describing 1764 incident). He refused, however, to sell the accompanying bayonets since they were "purposely made and used for the destruction of mankind." *Id*. at 2, 4. While bayonets had a singular purpose (and thus selling them would violate the Peace Testimony), a gun could have many, and so Rotch had no problem with selling guns to be used against "wild fowl." *Id*. at 3. William Penn likewise acknowledged Pennsylvanians' "liberty to fowl and hunt upon the lands they hold," actions that required the use of guns. William Penn, *The Frame of the Government of the Province of Pennsylvania in America, 1683*, *in William Penn and the Founding of Pennsylvania: A Documentary History* 271 (Jean R. Soderlund ed., 1983).

Although Quakers were principled against using arms for violence against men or the government, they did not oppose all gun use. Guns could be used

for many things, some against their testimony, some not. The distinction is reflected in two words that indicate the context of arms usage. To "carry" arms was used in a personal or civic context; to "bear" arms was for a martial context.[3] For example, they said that while "some of our seafaring friends . . . carry guns on board their ships'" Hirst, *supra*, 229, they "could not join with [the magistrates] in carrying arms" to police the city, W.C. Braithwaite, *The Second Period of Quakerism* 620 (1919). When Quakers

[3] Our scholarship regarding the sources of the Second Amendment reveals an historical context for the meaning of the phrase "to keep and bear arms" that is more complex than is set forth in the *Heller* majority opinion. *Heller*'s statement that, in the context of "arms," "[a]t the time of the founding, as now, to 'bear' meant to 'carry'" for the purpose of confrontation, *Heller,* 128 S. Ct. at 2793, is not historically accurate. The Founders used "bear arms" to have specific meaning limited to the context of military service. *Infra*, 19–21, 29–30. We therefore urge the Court to reconsider its historical interpretation, as it has done where necessary in other decisions, and to focus on the strong contrary authority presented here. *See Lawrence v. Texas,* 539 U.S. 558, 571 (2003) ("In summary, the historical grounds relied upon in *Bowers* [*v. Hardwick,* 478 U.S. 186 (1986)] are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated."). As *Lawrence* explained in reviewing Justice Burger's *Bowers* opinion, "scholarship casts some doubt on the sweeping nature of the statement," which failed to take "account of other [historical] authorities pointing in an opposite direction[.]" *Lawrence,* 539 U.S. at 572. Here, too, the sweeping statement in *Heller* that "bearing arms" meant "carrying for a particular purpose—confrontation," 128 S. Ct. at 2793, fails to take into account the other more compelling historical authority that places "bear arms" in a more complete historical context.

discussed bearing arms there was more at stake than the mere possessing or carrying of guns for personal self-defense. They asked, "Are Friends faithful in our testimony against bearing arms, and being in any manner concerned in the militia?" Hirst, *supra*, 321. Bearing arms, then, referred to serving in the military. *See Heller*, 128 S. Ct. at 2794. Quakers did not fear carrying of weapons; they feared being forced to become soldiers. The Quakers' difficulty with self-defense came when they controlled the Pennsylvania government and were thus responsible for protecting its inhabitants.

III. CONFLICT BETWEEN THE GOVERNMENT'S DUTY TO PROTECT THE PEOPLE AND QUAKER PACIFISM GIVES RISE TO VOLUNTEER MILITIAS

The Quakers' pacifist government became increasingly unpopular as the French and Indian War brought violence to the Pennsylvania frontier. Pennsylvania was the only colony without an established militia, relying instead on ad-hoc voluntary military associations for protection. Western residents petitioned the Quaker Assembly for a militia, claiming there were men willing to enlist and "bear arms for the defense of the frontiers . . . if they had any assurance of arms, ammunition, and reasonable pay." *A Petition from Sundry Inhabitants of the Town and County of York*, *reprinted in* 5 *Pennsylvania Archives*, 8th ser. at 4096 (Gertrude MacKinney ed., 1931) (1755). Conscious of the Quakers' objections to

violence, the petitioners asserted that "the immediate preservation of the lives of the inhabitants" should trump other concerns since the Assemblymen were elected as "the guardians of their lives as well as their fortunes." *A Petition from Divers Inhabitants of the County of Chester*, *reprinted in Pennsylvania Archives*, 8th ser. at 4097 (Gertrude MacKinney ed., 1931) (1755).

As the eighteenth century progressed, Quakers became a minority in the colony, which meant there were more challenges to their political domination. *See* Alan Tully, *Forming American Politics: Ideals, Interests, and Constitutions in Colonial New York and Pennsylvania* 296–303 (1994).[4] These challenges largely came from immigrants who were reformed Calvinists, militant Scotch-Irish Presbyterians. As these militant Protestants expanded settlements onto the frontier, they clashed with the Indians, with whom Quakers had always had peaceful relations.

Many Quakers began to feel the conflict between the Peace Testimony and their duty as governors to protect the inhabitants of the province. Some believed that they should uphold their responsibility to their

[4] Tully argues that Quakers were able to maintain power in the Assembly by forging alliances through "civil Quakerism." Tully, *supra*, 296–303. Non-Quakers appreciated the Quakers' commitment to "Pennsylvania's unique constitution, liberty of conscience, provincial prosperity, loosely defined pacifism, rejection of a militia, and resistance to the arbitrary powers of proprietors," and joined with them to protect this ideology. *Id.*

constituents by continuing to pay money to the king. Others believed that having the Crown protect the inhabitants would weaken Quaker power and they should raise a militia themselves. Still others believed they should preserve their good relations with the Indians by abdicating their seats in the Assembly and having nothing whatsoever to do with war. Ultimately, the Quakers abdicated their responsibility as Assemblymen, but not their seats, and chose to leave the frontiersmen on their own. *See* Jack D. Marietta, *The Reformation of Quakerism, 1748–1783* 150–68 (1984) (Six did in fact abandon their seats, but the majority remained. *Id.* at 158.).

The Presbyterians' reaction was predictable. Considering themselves thrown into a state of nature by a corrupt and negligent government, in 1764 a group called the Paxton Boys took up arms and marched on Philadelphia in an attempt to overthrow the Quaker government. "The far greater part of our Assembly were Quakers," the Paxtonians complained, "some of whom made light of our sufferings & plead conscience, so that they could neither take arms in defense of themselves or their country." *The Apology of the Paxton Volunteers Addressed to the Candid and Impartial World*, *in The Paxton Papers* 185 (John Dunbar ed., M. Nijhoff 1957). Although an armed rebellion was averted, this incident and the animosities it solidified between the Scotch-Irish and the Quakers would have a significant effect on events

during the Revolution and creation of the Constitution.

As the colonies drew closer to revolution, the conflict between the Quakers' Peace Testimony and the Presbyterians' call for a militia became irreconcilable. The Quakers still had tight control of the Pennsylvania Assembly and had now completely renounced not just military activity but even peaceful protest against the British government. *See* Calvert, *supra*, ch. 7. By contrast, non-Quaker Pennsylvanians had little compunction about mustering themselves without state sanction in the wake of Lexington and Concord. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 Rutgers L.J. 1041, 1054–61 (2007). Since the government would not provide arms, advertisements in the local papers asked anyone with firearms to "give public notice thereof, and dispose of them at a moderate price to those who want them." Advertisement, The Evening Post 177, May 4, 1775. Quakers could not deny the martial spirit sweeping the province, and were acutely aware of the balance of power shifting out of their favor. Nathan Kozuskanich, *"For The Security and Protection of the Community": The Frontier and the Makings of Pennsylvanian Constitutionalism* 299–310 (2005) (Ph. D. dissertation, Ohio State Univ.), *available at* http://etd.ohiolink.edu/view.cgiacc_num=osu1133196585 (last viewed Jan. 1, 2010). Nevertheless, the Quakers refused to support an armed revolution against the Crown. *Id.*

IV. THE PENNSYLVANIA CONSTITUTION AND ITS INFLUENCE ON THE SECOND AMENDMENT

In the spring of 1776, Congress decided to separate from England. The main obstacle was Pennsylvania, which, according to Quaker beliefs, refused to vote for independence. In May 1776, Congress authorized the takeover of the Pennsylvania Assembly by the Presbyterian revolutionaries who then codified their non-Quaker views in a new constitution. They continued to dominate the Pennsylvania government until the mid-1780s. By late July 1776, a draft of the Pennsylvania Declaration of Rights had been submitted to the larger convention for consideration, and the constitution was finished by September that year. *See* Calvert, *supra,* chs. 6, 7.

The preamble to the 1776 constitution reflects how the predominating concern with common safety shaped the proceedings of the convention. "Government ought to be instituted for the security and protection of the community, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man," they wrote, "and whenever the great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness." Pa. Const. pmbl. (1776). Not only had previous Assemblies denied the right to protection, King George had now "withdrawn his protection," and perpetrated "a

most cruel and unjust war" against his own people. *Id*. This preamble announced that, with independence from Britain declared and a new constitution in place, Pennsylvanians could enjoy a government that protected their natural right to safety.

As the *Heller* majority and both dissents recognized, the 1776 Pennsylvania Constitution provides insight into the then-prevalent conception of the right to bear arms. *E.g.*, *Heller*, 128 S. Ct. at 2793, n.8, 2825–26, 2828, 2850. Three clauses of its Declaration of Rights in particular warrant attention, the first, eighth, and thirteenth, all of which deal with individual or collective self-defense:

> I. THAT all men are born equally free and independent, and have certain natural, inherent and unalienable Rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.
>
> VIII. THAT every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service, when necessary, or an equivalent thereto . . . Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent.

> XIII. THAT the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power.

Pa. Const. Decl. of Rights, cls. I, VIII, XIII (1776).

This language reflects the Presbyterian complaints against the Quaker government's perceived failure to provide for the common defense over the previous twenty years. Their predominant concern—as reflected in the text—was establishing a coherent system of community defense so that the government could protect the people's natural rights.

Article One reiterates the preamble's assertion of man's natural rights, among them the right to defend life and property. *Id.*, cl. I. To ensure that defense, Articles Eight and Thirteen then provide that the government will fulfill its duty to protect its citizens—"every member of society hath a right *to be protected*." *Id.*, cls. VIII, XIII (emphasis added). The construction indicates that no longer will those citizens on the frontier be left on their own to defend themselves. Moreover, each individual had a duty to "contribute his proportion towards the expence of that protection, and yield his personal service" to that collective endeavor. *Id.*, cl. VIII.

For all of the drafters' animosity towards the Quakers, they nonetheless included a conscientious

objector clause stating that those "scrupulous of bearing arms" could contribute to the common defense in other ways in clause Eight. Article Thirteen supports and elaborates on Article Eight by ensuring the individual right of the people to bear arms. Again, this is a collective, military self-defense, as indicated by the words "bear arms," "themselves," "State," and the more obvious language of armies and the military.[5] *Id.*, cls. VIII, XIII. All of this, including bearing arms, would be controlled and limited by "the civil power" to prevent a military state.[6] *Id.*, cl. XIII.

In the wake of the Declaration of Independence, county-level committees of safety throughout Pennsylvania raised men into volunteer militia units and gathered supplies. Those joining militias were asked to supply their own firearms, and men who did not

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[5] In *Heller*, both the majority, 128 S. Ct. at 2793 & n.8, and Justice Stevens's dissent, *id.* at 2825–26, assume that the reference to "defense of themselves" in the 1776 Pennsylvania constitution is to a right of personal self-defense. This is not the case. As the preceding discussion shows, the non-Quakers newly in power had in mind the collective ability to defend their communities through an organized militia that the Quakers had denied them.

[6] Although the Pennsylvania convention borrowed language from the recently passed Virginia Declaration of Rights, it was the first state to guarantee a right to bear arms. The constitution's authors were innovators and no other state "matched Pennsylvania in translating . . . [Revolutionary] words into reality." *See* John K. Alexander, *Pennsylvania: Pioneer in Safeguarding Personal Rights in The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* 321 (Patrick T. Conley & John P. Kaminski eds., 1992).

join associations were required to submit their guns to the committee. Those who appeared to be "possessed of good firearms, and [did] not deliver them" to the collector of arms were given a citation and required to answer for their conduct before the Committee of Safety. *In Committee, Bucks County,* The Pa. Gazette, July 17, 1776. Personal firearms (and with them the ability to defend oneself) became subject to communal safety and defense.

Despite Article Eight's provisions, there was no longer room for the pacifist Quaker paradigm of conscientious objection to military service, nor could individuals escape relinquishing their property (be it through gun confiscation or fines) to the needs of the community. Pennsylvania's first legislature under the new constitution passed the state's first law to "regulate the militia." An Act to Regulate the Militia of the Commonwealth of Pennsylvania, ch. DCCL, Stat. at Large 75 (1777). This law was the "best security of liberty and the most effectual means of drawing forth and exerting the natural strength of a state." *Id*. The law stated that it was the "indispensable duty of the freemen of the commonwealth to be at all times prepared to resist the hostile attempts of its enemies," and thus required that a list be compiled of "every white male person . . . between the ages of eighteen and fifty-three years capable of bearing arms." *Id*. As implemented, the Pennsylvania Constitution reflected an overwhelming concern for the people's collective right of self-defense. To the extent individual rights entered the debate, it was

in the context of the discussion of the individual's right of conscientious objection, not self-defense.

Pennsylvania's Constitution—in both the debates surrounding its adoption and the issues confronted in its implementation—thereby influenced the Second Amendment. Pennsylvania's Quaker history revealed problems inherent in a pacifist government. It therefore fell to the body of citizens as a collective group to keep and bear arms in defense of the state. This concern translated into the Second Amendment's constitutional protection of the collective defense of the people. Similarly, the right of conscientious objection (but not individual self-defense) was the most prominent individual right in debates surrounding the Second Amendment. *See* V, *infra*. The right of individual self-defense remained a matter of natural law separate and distinct from the Pennsylvania Constitution itself.

V. NEGOTIATING THE SECOND AMENDMENT: THE RIGHT OF REVOLUTION TOPS THE AGENDA, AND INDIVIDUAL-ORIENTED GUN RIGHTS ARE HARDLY MENTIONED

The Second Amendment arose out of the demands of Anti-Federalists for codification of liberties. The Federalists generally did not support the provisions and agreed to them largely to appease Anti-Federalists and thus, as James Madison said, to "prepare the way for a favorable reception of

[Congress's] future measures." 1 Annals of Cong., 448 (Joseph Gales ed., 1792). Although Madison drafted the Bill of Rights, he believed that both state and federal bills of rights could be "rather unimportant." *Id.* 454. He nevertheless supported them because they would not be harmful and would have a "salutary tendency." *Id.*

The Second Amendment came out of a debate about the purpose and control of militias. Was their purpose to defend the people against the government by enabling revolution, as it had been for Americans revolting against the British and for Presbyterians opposing the Quaker government of Pennsylvania? Or were militias a tool of the state, to suppress domestic insurrections and repel outside threats? The latter was the militia's historic purpose in Britain and how the colonies had understood their militias until 1775, when they exercised their right of revolution. But as Americans evolved from revolutionary subjects of the Crown to citizens of a republic, ideas about the militias' future conflicted.

The Federalists, who had been as enthusiastic revolutionaries as anyone, took a conservative turn and moved away from the right of revolution. Their standard response to opponents of the Constitution was that it left all rights to the people that were not reserved to the federal government, meaning that the people would control the militias unless the federal government needed them. Federalists also argued that the ability to amend the Constitution negated any necessity for armed revolt and made obsolete any

right of revolution. The militia should therefore be controlled by the states and the federal government, rather than the people directly, and should "suppress insurrections and domestic violence" rather than foment such. 3 *The Debates in the Several State Conventions on The Adoption of The Federal Constitution* 424 (Jonathan Elliot ed., 2d ed., Washington, Taylor & Maury 1836), *available at* http://memory.loc.gov/ammem/amlaw/lwed.htm (last accessed Jan. 1, 2010). Americans had already witnessed this practice in Massachusetts' use of its militia (as well as a privately hired militia) to suppress Shays' Rebellion in 1787. Although Federalists envisioned that states normally would control their militias, they argued that the federal government was the militias' ultimate authority "because a whole state may be in insurrection against the Union." *Id.*[7]

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[7] Thomas Jefferson was a prominent holdout for the right of revolution, saying that "a little rebellion now and then is a good thing." Letter from Thomas Jefferson to James Madison (Jan. 30, 1787) *in* 5 *The Works of Thomas Jefferson* (P. L. Ford ed., Federal ed. G.P. Putnam's Sons 1904–05) *available at* http://oll.libertyfund.org/title/802/86654. But views, which he expressed well before The Constitution Convention, seemed to have little currency even in his native Virginia. The state's 1776 constitution rejected his proposal to codify a right that "[no] freeman shall ever be debarred the use of arms." *Jefferson: Political Writings* 108 (Joyce Appleby & Terrence Ball eds., 1999). Instead, the Virginia Declaration of Rights only acknowledged "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases

(Continued on following page)

Looking backward to the Revolution, the Anti-Federalists saw the major threat to America coming from an overly powerful general government similar to that of Great Britain. They were especially worried that the Constitution allowed a standing army. George Mason warned of central governments' penchant for disarming the people:

> An instance within the memory of some of this house will show us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British government was advised by an artful man [Sir George Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia.

The solution Mason saw was that "divine Providence has given every individual – the means of self-defense" by joining a militia to combat a standing army. *Id.* 380–81. Patrick Henry argued that "You have a bill of rights [in Virginia] to defend you against the state government, which is bereaved of all power, and yet you have none against Congress, though in full and exclusive possession of all power!" *Id.* 146. He sought to replicate at the federal level the

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the military should be under strict subordination to, and governed by, the civil power." *Id.* 353.

state constitutional provisions allowing the people to protect themselves against government. The right of revolution was still foremost in his mind. Pennsylvanian Tench Coxe, a delegate to the Continental Congress in 1789, tried to persuade those Anti-Federalists who saw the Bill of Rights as too weak to support the measures by telling them that "As civil rulers . . . may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to injury of their fellow-citizens, the people are confirmed in the next article in their right to keep and bear their private arms" for collective defense. *Remarks on the First Part of the Amendment to the Federal Constitution*, The Fed. Gazette, June 18, 1789.

Anti-Federalists were also not persuaded that the Constitution's amendment clause—still a foreign concept to most—would allow such easy alterations as to make the right of revolution obsolete. They feared that they would be "without prospect of change, unless by again reverting to, a state of Nature." De Witt, *supra*. They therefore insisted on codifying the right of the people of the United States as a whole to resist their government. De Witt (a *nom de plume*) stated his concern thus: "That a Constitution for the United States does not require a Bill of Rights, when it is considered, that a Constitution for an individual State would, I cannot conceive. – . . . [T]hey are both a compact between the

Governors and Governed." *Id.* And compacts can be broken.

While the Second Amendment debates focused on the militia, they virtually ignored any right of individuals to defend themselves personally with firearms.[8] Congressional debate over the Second Amendment centered almost entirely on a clause in the initial proposal that provided an exception from militia service for the "religiously scrupulous." Paul Finkelman, *"A Well Regulated Militia": The Second Amendment In Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 226–27 (2000); *see infra*, V (on conscientious objector provision). The rest of the debate was led by Anti-Federalists, who also made attacks on a standing army. Finkelman, *supra*, 226–27; *see also* Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. Early Republic 223, 241 (1988). In general, the Anti-Federalists showed their deep fear of the national government. Meanwhile, the majority Federalists said little. The debate was a discussion concerning the militia, nowhere in it is there the slightest hint about a private or individual right to own a weapon. This should not surprise us, for "[i]n all the discussion and debates" over the Second Amendment, "from the Revolution to the eve of the

[8] The Bill of Rights also did not replicate any of the provisions of the 1776 Pennsylvania constitution or its natural rights language, with the exception of the right to collective self-defense.

Civil War, there is precious little evidence that advocates of local control of the militia showed an equal or even a secondary concern for gun ownership as a personal right." Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 The Wm. & Mary Q. 39, 40 (1998).

The lack of discussion of gun ownership for individual purposes was no accident. Congress had proposals from the Pennsylvania Anti-Federalists, made in their "Reasons of Dissent," that covered such individual-oriented rights. *See The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, Pa. Packet, Dec. 18, 1787, *reprinted in* 2 *The Documentary History of the Ratification of the Constitution* 618 (Merrill Jensen ed., St. Hist. Soc'y of Wis. 1976) ("Dissent").[9] But these proposals were ignored by James Madison and others in Congress even as they accepted other proposals made in the same publication. Finkelman, *supra*, 206–09. This suggests that Madison and Congress knew about the "Reasons of Dissent," read them, and treated them like a menu, selecting some options and rejecting others, including the individual-oriented gun-right provisions.

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[9] The Dissent was well known to the Founders, having been published in numerous Pennsylvania papers and as a broadside. 3 *The Complete Anti-Federalist* 145 (Herbert J. Storing ed., Univ. of Chi. Press 1981).

The proposals of the Pennsylvania dissenters that were incorporated, sometimes almost word-for-word, into the Bill of Rights include the rights in the Free Exercise, Free Press, and Free Speech Clauses of the First Amendment, and those in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. Elements of the Tenth Amendment are also found in the proposals.[10] But Congress decided not to recognize the individual-oriented gun rights in the Dissent, including the right not to be disarmed except in exceptional circumstances and the right to hunt. *See* Dissent, *supra*, 623–24. Thus, in drafting the Bill of Rights, James Madison and his Congressional colleagues rejected the provisions of the Pennsylvania minority relating to individual firearms use and instead focused on the preservation of the organized state militias. Finkelman, *supra*, 212.

VI. THE CONGRESSIONAL DEBATES OVER CONSCIENTIOUS OBJECTORS AND THE SECOND AMENDMENT CONFIRM ITS PREDOMINANT MILITIA FOCUS

The centrality of the militia to the Second Amendment is made even clearer in the debate in Congress over the Bill of Rights and the problem of conscientious objectors. In his first gloss of what would eventually become the Second Amendment,

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[10] See Dissent, *supra*, for the corresponding text in, respectively, the *Dissent*'s reasons numbers 1, 6, 5, 3, 3, 2, 4, and 11.

Madison proposed the following: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 Annals of Cong. 451 (Joseph Gales ed., 1792). The ensuing discussion in Congress over conscientious objectors further supports the understanding that "bear arms" was limited to military service, not just carrying arms for confrontation. Elbridge Gerry opposed Madison's concession to pacifists, arguing that the government could "declare who are religiously scrupulous and prevent them from bearing arms." *Id.* 778. Gerry's concern was not the inability of individuals to defend themselves, but the potential of the government to "destroy the militia" and raise a standing army. *Id.* Thus, he suggested that Madison's general provision be restricted to persons who belonged to a specific religious sect that forbade the bearing of arms. Representative James Jackson of Georgia sought to further define what bearing arms meant by adding the stipulation that those religiously scrupulous of bearing arms would be "compelled to render military service, in person, upon paying an equivalent." *Id.* 779. This was rejected since the Quakers also objected to paying someone else to serve in their stead. Pennsylvania's Thomas Scott observed that granting exemptions for pacifists would make the militia unreliable and would violate "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." *Id.* 796.

Madison also proposed a specific exemption for those who refused to bear arms when Congress drafted a militia bill in December 1790. "The pride of the federal constitution [was that] the rights of man had been attended to," he argued, and although "it was possible to oppress their sect," no one had ever been able "to make [the Quakers] bear arms." James Madison, *Sketch of the Debates on Part of the Militia Bill*, The Gen. Advertiser, Dec. 27, 1790. As such, Congress would be wise to "make a virtue of necessity and grant them the privilege." *Id.* Since no state had ever tried to force pacifists to carry guns outside of militia service, it is certain that Madison was using "bear arms" to connote military action, otherwise he would have qualified the nature of the "bearing."

A number of representatives opposed these exemptions. Jackson argued that men would be tempted to evade militia duty "by a pretended attachment to religious principles." XIV *Documentary History of the First Federal Congress of the United States of America*, *Debates in the House of Representatives, Third Session: December 1790–March 1791* 138 (William Charles diGiacomantonio et al. eds., 1995). In particular, they feared that some would "wear the mask of Quakerism" to avoid service. *Id.* This attitude reflected resentment of the Quakers' neutrality during the Revolution. "If Quakers pretend to claim protection of the Laws of the Land," wrote South Carolinian Henry Laurens in 1777, "it should

be remembered that they refuse to obey those Laws & deny allegiance to the State[.]" Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777) *in* 7 *Letters of Delegates to Congress, 1774–1789* 613 (Paul Hubert Smith ed., Library of Congress 1976–2000) (referring to laws requiring an oath to the state and military service). Roger Sherman questioned if Congress had the power to give an exemption to pacifists since the "states governments had [not] given out of their hands the command of the militia, or the right of declaring who should bear arms." *House of Representatives of the United States, Fri. Dec. 17*, Pa. Packet 2, Dec. 21, 1790. He went on to argue that it was the

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

Id. Sherman's comments, made while discussing the militia, indicate that his assertion of the privilege to bear arms was directly tied to communal service.

The hesitance to grant military exemptions highlights the civic element and duty of bearing arms in the militia. Aedanus Burke from South Carolina feared that such exemptions would "oblige the middling and poorer classes of citizens to the toils and dangers of military service" while the "wealthy, the potent, and influential" could escape service, leading to the "disgrace of the militia." *Congress of the United States, House of Representatives, Debates of Wednesday, Militia Bill, Under Consideration*, The Fed. Gazette 2, Dec. 28, 1790. The real issue at hand was which governing body should grant the exemptions, and most members believed that state governments, not Congress, should be entitled to give exemptions. As such, Madison's proposal was eventually defeated; but "it was not, however, the sense of the House that [conscientious objectors] should be forced to bear arms," Providence Gazette & Country J., Jan. 15, 1791.

VII. THE COLLECTIVE RIGHT OF SELF-DEFENSE MOTIVATED ADOPTION OF THE SECOND AMENDMENT

The evolving concepts of individual and collective self-defense at the time of the American Founding reflected seventeenth- and eighteenth-century British political and legal traditions. Under the contract

theory of government, these were held to be natural rights of self-defense that could be exercised if the government failed to protect either individuals or the people as a body. But each right had strict limitations and could be exercised only in extreme circumstances. Individuals could only defend themselves with lethal force as a last resort against a sudden attack when a policing force was not present. A revolution could only be undertaken as collective self-defense after the people as a body had felt oppression and agreed to act; the individual had no right to resist the government on his own. In both situations, the power of the government was supreme until it was ineffective or malevolent.

These ideas were actualized during the American Revolution. The people rose up as a collective force against the tyranny of the British government via militias mustered by the people themselves. In many cases, and especially in Pennsylvania, the Revolution released radical forces. The Presbyterians, in revolt against the pacifist Quaker regime as much as the British, privileged the imperative to collective self-defense over individual self-defense by confiscating weapons from pacifists and others not in the militia.

The drafters of the U.S. Constitution wished to contain these radical elements. Although the Continental Congress had authorized the Presbyterian take-over of the legitimate Quaker government in 1776, the federal authorities knew such a precedent was dangerous. Thus, when the Anti-Federalists pushed for the Second Amendment with the express

aim of reserving the right of rebellion, the Federalists began to rethink the role of the militia in the American polity. Their solution was both conservative and forward-looking. They reverted to the British idea that the government alone could muster and control the militias, and they came to accept the Quaker view that, to be permanent, a constitution should be amendable. At the time of the 1794 Whiskey Rebellion, an anonymous author wrote "[W]here the interest and authority of government are distinct and independent from the interests and will of the people, insurrection may have been ranked among the most sacred of duties; in ours who can hesitate to regard it as the most pernicious of crimes." Anonymous, undated newspaper article, in John Dickinson Papers, Ser. I. b. Political, 1774–1807, R. R. Logan Collection, Historical Society of Pennsylvania.

In the Second Amendment, the Founders codified the right of the people to bear arms collectively, with the understanding that some individuals could possess those arms, but the militia, and thus the individuals, would be in the service of the government, which would ensure that the militia was "well regulated." The right of individual self-defense provided no motivation for the adoption of the Second Amendment. It remained as it had been, a natural right, recognized at common law and subject to limitation by the existence of the contract between the government and the people.

VIII. CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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(Winter 2009), *Pennsylvania, the Militia, and the Second Amendment*, 133 Pa. Mag. of Hist. & Biography 119 (Apr. 2009), *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. Pa. J. Const. L. 413 (2008), and *Defending Themselves: The Original Understanding Of the Right to Bear Arms*, 38 Rutgers L.J. 1041 (2007).