

## *Pennsylvania, the Militia, and the Second Amendment*

THERE IS PERHAPS NO ICON more mythic in the lore of the American Revolution than the Minuteman, the republican defender of liberty and symbol of American independence. Of course, veneration of the armed militia man is not just the product of modern scholars bent on laying claim to the original meaning of the Second Amendment. As the only colony without an established militia tradition, many Pennsylvanians before the Revolution believed that a state-sanctioned militia was the solution to several of the province's problems. The frontier violence of the French and Indian War and Pontiac's Rebellion galvanized a coalition of men who sought to establish a militia law that would demand military participation from every male citizen. This vision of civil society, which placed a premium on contributing to the common defense, pushed Pennsylvania into the Revolution and shaped its 1776 constitution and Declaration of Rights.<sup>1</sup> By the Revolution, pacifism had become untenable, and the Quaker Party and its followers saw their power wane as the province joined in open rebellion against the British Crown. In 1777, the new assembly passed Pennsylvania's first militia law, mandating that all men contribute to the common defense either through actual service or fines. This story, familiar to anyone who has studied Pennsylvania history, has more than just local significance. In fact, it recently captured the interest of the United States Supreme Court.<sup>2</sup>

<sup>1</sup> John Paul Selsam's aptly named study, *The Pennsylvania Constitution of 1776* (Philadelphia, 1936), is the only monograph to deal exclusively with the 1776 Frame of Government. See also Charles Lincoln, *The Revolutionary Moment in Pennsylvania, 1760–1776* (Philadelphia, 1901). Lincoln is not particularly interested in analyzing the 1776 constitution, but his study was the first to offer the idea of a dual revolution in western Pennsylvania against both Quaker and British authority that galvanized the movement to revolution in Pennsylvania.

<sup>2</sup> Pennsylvania has recently enjoyed some popularity in several noteworthy studies seeking to link its history with larger national themes. For example, see: Terry Bouton, *Taming Democracy: "The People," the Founders, and the Troubled Ending of the American Revolution* (New York, 2007); Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York,

Since the Philadelphia press regularly and exhaustively discussed arms and the militia, Pennsylvania provides an excellent case study of eighteenth-century attitudes about these subjects—a fact not lost on Second Amendment scholars.<sup>3</sup> Competing interpretations of the militia and the right to bear arms recently came to a head before the Supreme Court in *District of Columbia v. Heller*, with Pennsylvania’s history playing a key role in the Court’s interpretation of the case, which questioned the constitutionality of Washington, DC’s ban on handguns.<sup>4</sup> Numerous petitioners filed briefs invoking the original meaning of the Second Amendment.<sup>5</sup> Joseph Scarnati, president pro tempore of the Pennsylvania senate, filed an amicus brief arguing that “Pennsylvania’s history informs any inquiry into the meaning of the Second Amendment of the United States Constitution.” Moreover, he asserted that “Pennsylvania’s history supports a conclusion that the Second Amendment protects an individual right to keep and bear arms for private purposes.”<sup>6</sup> Scarnati’s basic line of reasoning was that since the Quaker government refused to pass a viable militia law before its dissolution, Pennsylvanians enshrined an individual right to self-defense in the 1776 constitution “after seeing firsthand the fatal consequence of relying solely on government to protect public safety.”<sup>7</sup> Unfortunately, Scarnati’s conclusion is utterly unsubstantiated by historical evidence and shaped more by modern misconceptions and mythologies than actual historical research.

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2007); and Matthew C. Ward, *Breaking the Backcountry: The Seven Years’ War in Virginia and Pennsylvania, 1754–1765* (Pittsburgh, 2004).

<sup>3</sup> The Pennsylvania Declaration of Rights has long been a favorite of Second Amendment legal scholars. It has been cited in more law review articles pertaining to the right to bear arms than any other eighteenth-century state constitution written before the Bill of Rights.

<sup>4</sup> *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290), is an appeal of the decision in *Parker v. District of Columbia*, 478 F.3d 370, 373 (D.C. Cir. 2007), in which the court ruled that Washington, DC’s ban on handguns violates the Second Amendment. Oral arguments were heard on March 18, 2008, and the Court made its ruling on June 26, 2008.

<sup>5</sup> Second Amendment scholarship remains deeply originalist, even though legal scholars have questioned originalism’s usefulness as a method of jurisprudence. For an overview of the legal debate on originalism, see Daniel A. Farber, “The Originalism Debate: A Guide for the Perplexed,” *Ohio State Law Journal* 49 (1989): 1085–106. One of the best historical approaches to originalism is Jack Rakove’s, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996).

<sup>6</sup> Brief for Joseph B. Scarnati, III, the President Pro Tempore of the Senate of Pennsylvania, as *Amicus Curiae* Supporting Respondent at 2 *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (No. 07-290), [http://www.scotusblog.com/wp/wp-content/uploads/2008/02/07-290\\_amicus\\_scarinati.pdf](http://www.scotusblog.com/wp/wp-content/uploads/2008/02/07-290_amicus_scarinati.pdf).

<sup>7</sup> *Ibid.*, 1.

Scholars have contested the meaning of the Second Amendment, and an argument over the collective or individual character of the right to bear arms continues to dominate the literature. Was the Second Amendment meant to protect a state right to preserve the militia (the Collective Rights Model), or did it refer to an individual right to possess and carry guns for self-defense (the so-called Standard Model)?<sup>8</sup> To substantiate their claims about the federal Bill of Rights, scholars on both sides of the debate have looked to the precedents established in the militia clauses of state constitutions. Since Pennsylvanians were the first to codify a right to bear arms, their recognition of the “right of the people to bear arms in defense of themselves and the state” has garnered particular attention.<sup>9</sup> Indeed, Heller’s own brief cites the Pennsylvania constitution to argue that “eighteenth-century constitutional drafters used ‘bearing arms’ in the individual sense.”<sup>10</sup> For Heller, “defense of themselves” means self-defense, and so the right to bear arms protected in clause 13 must be individual.

Heller’s interpretation relies on a selective reading of the 1776 constitution, ignoring the fact that the eighth clause provided protection for those “conscientiously scrupulous of bearing arms”—clearly a militia exemption.<sup>11</sup> To read “bearing arms” in an “individual sense” in this case

<sup>8</sup> The parameters of the modern debate are ably charted in Stuart Banner, “The Second Amendment, So Far,” *Harvard Law Review* 117 (2004): 898–917. For differing interpretations of the republican origins of the Second Amendment, see Robert E. Shalhope, “The Armed Citizen in the Early Republic” and Lawrence Delbert Cress, “A Well-Regulated Militia: The Origins and Meaning of the Second Amendment,” in *Whose Right to Bear Arms Did the Second Amendment Protect?* ed. Saul Cornell (Boston, 2000), 27–62. For a summary of the modern individual rights model see Glenn Harlan Reynolds, “A Critical Guide to the Second Amendment,” *Tennessee Law Review* 62 (1995): 461–512.

<sup>9</sup> Individual rights scholars have taken their cue from Stephen A. Halbrook, “The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts,” *Vermont Law Review* 10 (1985): 255–320. Halbrook’s interpretation that “defense of themselves” is synonymous with “self-defense” has gone unchallenged until now. Saul Cornell argues that “the Pennsylvania Declaration of Rights . . . had little to do with public concern over an individual right to keep arms for self-protection.” See Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York, 2006), 22. Cornell’s assertion is based on my dissertation, “For the Security and Protection of the Community” (PhD diss., Ohio State, 2005).

<sup>10</sup> Brief for Respondent at 12, *District of Columbia v. Heller* 128 S.Ct. 2783 (2008) (No. 07-290), <http://www.gurapossessky.com/news/parker/documents/07-0290bs.pdf>.

<sup>11</sup> The eighth clause of the Declaration of Rights adopted in 1776 reads: “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 expense of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man’s property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will

would mean that the clause protected those who did not want to be forced to purchase, own, or physically carry firearms. It also renders nonsensical the demand that objectors “pay [an] equivalent” for the personal service. The first mistake *Heller* makes is to assume that “defense of themselves” is synonymous with personal self-defense. The second is to remove the concept of self-defense from the community context established by the preamble and various clauses of the Declaration of Rights. The third is not to review Pennsylvania’s own history. What emerged in Pennsylvania between the start of the French and Indian War and the Revolution was a perception of personal and community self-defense that was tied to military mobilization. This is not to say that someone would be expected to call out the militia if his house were being robbed, but rather that true individual and collective security lay in a militia. If Pennsylvanians were going to defend themselves, then the government needed to bring coherence to the state’s volunteer defense associations and compel service from every man.

One of the problems plaguing Second Amendment scholarship is a failure to contextualize sources, and perhaps nowhere is this truer than in the appropriation of Pennsylvania’s history in the modern gun debate. In the *Heller* case, both the majority and minority opinions used Pennsylvania to make their point, and both sides had their history wrong. Justice Antonin Scalia, author of the majority opinion, looked to Pennsylvania’s 1776 and 1790 constitutions as precedents to the Second Amendment. Both of these constitutions allowed men to “bear arms for the defense of themselves and the state,” which Scalia interpreted to be an “individual [right] unconnected to militia service.”<sup>12</sup> Justice Stevens did not disagree in his minority opinion, but rather used the Pennsylvania constitution as a contrast to the wording of the Second Amendment. “Had the Framers wished to expand the meaning of the phrase ‘bear arms’ to encompass civilian possession as use,” he wrote, “they could have done so by the addition of phrases such as ‘for the defense of themselves.’”<sup>13</sup> Such interpretations, however, require the Court to divorce individual gun ownership from the very reason the constitution guaranteed the right to bear arms in the first place. Stevens clearly did not understand that, in Pennsylvania, self-defense was tied to military action. As for Scalia, his

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pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.”

<sup>12</sup> Majority Opinion, *Heller*, 128 S.Ct. at 2802.

<sup>13</sup> Minority Opinion (Stevens), *Heller*, 128 S.Ct. at 2828.

quest to prove that the right to bear arms was not restricted to collective military action caused him to disregard the collective responsibilities that came with that right. Indeed, one cannot separate the eighteenth-century conception of rights from its collective implications.

What Scarnati, Scalia, and many others who adhere to the so-called Standard Model have failed to realize is that by 1776 Pennsylvania sought *more* state regulation, not less. In fact, the one thing many Pennsylvanians desired was for the government to bring coherence to militia organization throughout the province and coerce all men to contribute to the common defense. What Pennsylvania's example also makes clear is that both the Standard and Collective Models are inadequate in explaining the eighteenth-century conception of rights and responsibilities. While those who adhere to an individual right to bear arms downplay the militia in favor of evidence of individual gun ownership and a natural right to self-defense, collective rightists focus on the states' right to regulate their militias and talk little of guns outside of a militia muster. Pennsylvania's history shows that we need not be so dichotomous in our thinking about guns during the Revolution. The right to bear arms was not exercised solely by the state or by individuals, but rather by citizens in an attempt to ensure public safety. Early attempts to regulate the militia clearly show that individual rights and collective responsibilities were enmeshed. Indeed, the individual right to bear arms was essential if men were to perform their duty of militia service.<sup>14</sup>

The language of safety and defense that pervaded the 1776 constitution was in part the result of an ideology shaped during the French and Indian War as the province's disparate members battled over the passage of a militia law.<sup>15</sup> A comprehensive survey of surviving newspa-

<sup>14</sup> Saul Cornell has called this the Civic Rights Model. See *Well-Regulated Militia*.

<sup>15</sup> Historians have debated the cause of Pennsylvania's inadequate defense, namely, whether it was Quaker pacifism or Proprietary obstinacy. See Robert L. Davidson, *War Comes to Quaker Pennsylvania, 1682–1756* (New York, 1957) and Ralph L. Ketcham, "Conscience, War, and Politics in Pennsylvania, 1755–1757," *William and Mary Quarterly*, 3rd ser., 20 (1963): 416–39. I do not wish to discount the impact of religion, ethnicity, class, and race on Pennsylvania's colonial history, but rather wish to shift the focus to constitutional concerns. Westerners did not oppose the Quakers because of doctrinal differences per se, but because those differences compromised their constitutional guarantee of safety. See Owen S. Ireland, *Religion, Ethnicity, and Politics: Ratifying the Constitution in Pennsylvania* (University Park, PA, 1995) for an ethno-religious interpretation of the ratification of the federal Constitution in Pennsylvania. Steven Rosswurm argues that the evidence for ethno-religious studies consist "almost entirely of an analysis of the assembly's membership roll-call divisions and random quotes from the 1750s to the 1790s, [and] is so weak that one hesitates to call the ethnic-religious argument an interpretation." See Rosswurm, *Arms, Country, and Class: The*

pers, pamphlets, and legislative debates reveals that Pennsylvanians were less concerned with an individual right to bear arms than they were with the responsibility of the provincial government to enable them to protect themselves on the frontier.<sup>16</sup> Moreover, they were not simply interested in protecting the state. The impulse driving Pennsylvanians was strongly tied to a community-based understanding of self-defense that was galvanized by the lack of a state militia and forged in the frontier violence of the 1750s and 1760s. If we are to understand arms-bearing and the militia in revolutionary Pennsylvania, we must first understand the years prior to 1776.

Two interrelated concerns dominated colonial Pennsylvania politics: how to negotiate successfully with local native tribes and how best to secure the frontier when negotiations broke down. Central to these debates was a call for a militia law, particularly from those in the West but also from sympathetic easterners who saw a coherent militia as essential to the peoples' security. As British subjects, frontiersmen insisted that the assembly meet its basic constitutional obligation to provide for their safety.<sup>17</sup> The assembly's failure to prevent Indian incursions on the frontier between 1754 and 1758 led many to question the legitimacy of Quaker rule.<sup>18</sup> Of course, the debate over a militia had begun long before the 1750s, but the escalating violence of the French and Indian War fostered a reactive constitutional ideology that valued physical protection and community safety.<sup>19</sup> To provide that safety, many earlier governors had struggled with the Quaker-dominated assembly to provide a militia, particularly when relations with France soured. For example, in response to the growing

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*Philadelphia Militia and "Lower Sort" during the American Revolution, 1775–1783* (New Brunswick, NJ, 1987), 4.

<sup>16</sup> Pennsylvania's legislative records are now available online at <http://www.footnote.org>. Pennsylvania's newspapers are also available in hard copy at the Library Company of Philadelphia and the Historical Society of Pennsylvania and online through Readex's Archive of Americana database, <http://www.readex.com>, subscription required.

<sup>17</sup> For more on Scotch Irish appeals to the right to life and property as British subjects, see Patrick Griffin, *The People with No Name: Ireland's Ulster Scots, America's Scots Irish, and the Creation of a British Atlantic World, 1689–1764* (Princeton, NJ, 2001), 157–73.

<sup>18</sup> According to John Phillip Reid, colonists believed that they were protected under the second original contract, which guaranteed that if they remained loyal to the king, they would receive protection and enjoy all the rights and privileges of freeborn Englishmen. See John Phillip Reid, *Constitutional History of the American Revolution*, abridged ed. (Madison, WI, 1995), 18. Reid also offers a persuasive argument that the Revolution was primarily a crisis in constitutionalism.

<sup>19</sup> By "reactive" I don't mean to imply that it was new, but rather that it was a reaction to Quaker policies. The constitutional guarantee of safety and protection was well established in English law by the time of the Revolution.

hostilities between natives and white settlers, Governor Patrick Gordon (1726–36) issued a proclamation in 1728 requiring all British subjects in Pennsylvania to “be at all times duly furnish’d with suitable Arms & Ammunition for their Defence, to be used in case of real Necessity by the order & Direction of proper Officers, who shall be duly appointed for that Purpose.” For Gordon, self-defense was associated with regulated communal defense, and he further instructed Pennsylvanians to “fail not to appear with [arms] in proper Time & Place, if there should be Occasion to use them, in Defense of themselves, their Families & Country.”<sup>20</sup>

With the start of King George’s War in 1744, Governor George Thomas (1738–47) considered it “absolutely necessary, that a Militia should be formed . . . for the Defense of this Province.” Asserting his executive authority, he offered Justice of the Peace William Moore a commission as colonel of the Chester militia and asked him to recommend other qualified men to act as militia officers. Together, Thomas expected these men to make a list of “all the Inhabitants capable to bear Arms,” organize them into companies, and then “Exercise both Officers and Soldiers” no more than six times a year.<sup>21</sup> Moore thanked the governor for his consideration, but warned him that his plan for a coherent militia would be greatly frustrated since “the Inhabitants very well know we have no Militia Law and that they are in no manner obliged to obey the Command of the Officers.”<sup>22</sup> Moore believed that all men should contribute to the common defense, a position he maintained even more vigorously a decade later with the outbreak of the French and Indian War. In a 1755 petition to the assembly, he argued that if certain men would not defend their fellow citizens because of religious conscience, then they should relinquish their seats to men who would do their duty as elected officials. Conscious of the rift between the governor and assembly, Moore asked that the house “not keep up unnecessary Disputes with the Governor, nor, by Reason of their religious Scruples, longer neglect the Defence of the Province.”<sup>23</sup>

Moore was not alone in his quest for an effective militia law, nor were

<sup>20</sup> “A Proclamation,” May 16, 1728, in *Colonial Records of Pennsylvania*, ed. Samuel Hazard, 16 vols. (Philadelphia, 1838–53), 3:308.

<sup>21</sup> George Thomas to William Moore, Oct. 5, 1744, Cadwalader Collection, Phineas Bond Papers, ser. V, box 24, Historical Society of Pennsylvania.

<sup>22</sup> William Moore to George Thomas, Oct. 25, 1744, Cadwalader Collection, Phineas Bond Papers, ser. V, box 24.

<sup>23</sup> “A Petition of William Moore, and Thirty-five others,” Nov. 5, 1755, in *Pennsylvania Archives*, 9 ser., 120 vols. (Philadelphia and Harrisburg, 1852–1935), 8th ser., 5:4099.

those who petitioned the assembly strictly from the western reaches of the province. The issue of safety forged East-West alliances between those who supported a militia bill and those who did not. Often, these alliances were not conscious or part of an organized plan to push the assembly to action, but rather were ad hoc reactions to Quaker policies. And so, on the heels of Moore's petition came a message from William Plumsted, mayor of Philadelphia, and 133 men from the city asking the assembly for "Compassion for our bleeding and suffering Fellow-Subjects" and offering to "publicly join our Names to the Number of those who are requesting you to pass a [militia] Law." Plumsted's petition underscored the government's responsibility to help organize a militia for the common defense. "It is highly unjust to think that the Burden of Defence should fall upon individuals," the petitioners argued, "when the Design of Government is, to obtain general Security by a general Union of the Force of individuals."<sup>24</sup> Individuals needed arms and a coherent militia structure, but they should not be expected to undertake their own defense without any help from the government. Indeed, Plumsted considered it a "Subversion of the very End of Government to deny that *legal* Protection to the Governed." In a second petition, Plumsted asserted that "a well-regulated Militia has always been found the Surest & least expensive Method of defence," and he again begged the assembly to give "that legal protection to your Bleeding Country."<sup>25</sup>

For many Pennsylvanians, the "defense of themselves" lay in a coherent militia. As Governor James Hamilton (1748–54) told the assembly, a great number of men in Lancaster County had "in the most earnest manner petitioned [him] to provide for their Protection," assuring him that "a great Number would be warm and Active in Defence of themselves and their Country were they enabled so to be by being supplied with Arms and Ammunition, which many of them are unable to purchase at their own private Expence." Hamilton pressed the house to "provide such Means for the Security of the Whole" province.<sup>26</sup> With the lack of an

<sup>24</sup> "A Representation to the General Assembly of the Province of Pennsylvania, by several of the principal Inhabitants of the City of Philadelphia," Nov. 12, 1755, in *Pennsylvania Archives*, 8th ser., 5:4116.

<sup>25</sup> "A Remonstrance by the Mayor, Aldermen and Common-Council of the City of Philadelphia," Nov. 24, 1755, in *Pennsylvania Archives*, 8th ser., 5:4152.

<sup>26</sup> "Speech to the Assembly Concerning the Affairs of the Province," in *Pennsylvania Archives*, 4th ser., 2:290. Sensible to the dangers of being on the frontier, the petitioners asked the government to "put Us in a Condition that We may be able to defend Ourselves," guaranteeing in return that they would do their part to "join with all that We can do for the Safety of the Province." See "Petition of

organized militia, Pennsylvania residents banded together for their own protection. As the *New York Mercury* reported, “the people on the west side of the Susquehanna . . . are gathering together to defend themselves.”<sup>27</sup> Citizens in Carlisle entered into an association on July 12, 1755, for their “mutual Defense,” promising to keep “Night Watch or Guard, within the limits of Carlisle” and to “Continue so long as it seemeth necessary to the majority of Us.”<sup>28</sup> A precedent for such voluntary military associations had been set as early as 1747 during King George’s War, when Benjamin Franklin drafted a charter for a militia association so that Pennsylvanians could “undertake their own defense”; many counties followed Lancaster’s example.<sup>29</sup> Yet, many considered such voluntary associations unsatisfactory because they placed the burden of defense on the few for the benefit of the many, and scattered local response was often no match for the invading French and Indians.

Although the people on the frontier formed local militia units and defense associations in response to Indian incursions, they looked to the provincial government for supplies and leadership. 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.”<sup>30</sup> 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. In his first address to the house, Morris pleaded with the members to help the inhabitants of the back counties. While the assembly and governor argued, a petition from York County arrived claiming that there were many in that county willing to enlist in a militia and “bear Arms for the Defence of the Frontiers . . . if they had any Assurance of Arms, Ammunition, and reasonable Pay.”<sup>31</sup> The petitioners

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the Inhabitants of Donegal, in Lancaster County, to the Governor,” in *Colonial Records of Pennsylvania*, 6:131.

<sup>27</sup> *New York Mercury*, Aug. 4, 1755.

<sup>28</sup> “For Our Mutual Defense,” in *Two Hundred Years in Cumberland County: A Collection of Documents and Pictures Illustrating Two Centuries of Life in Pennsylvania*, ed. D. W. Thompson et al. (Carlisle, PA, 1951), 24–25.

<sup>29</sup> As quoted in Gordon S. Wood, *The Americanization of Benjamin Franklin* (New York, 2004), 55.

<sup>30</sup> “A Petition from divers Inhabitants of the Townships of Tinnecom, Nocamixon, and Springfield in the County of Bucks,” Nov. 6, 1755, in *Pennsylvania Archives*, 8th ser., 5:4101.

<sup>31</sup> “A Petition from sundry Inhabitants of the Town and County of York,” Nov. 3, 1755, in *Pennsylvania Archives*, 8th ser., 5:4096.

explained that three-quarters of them had no guns or ammunition and lacked any cohesive military leadership. In other words, the people wanted a well-supplied and well-regulated militia.

The violence of the French and Indian War was unlike anything many Pennsylvanians had ever seen, and it strengthened the impulse for a government-regulated militia that would provide for the common defense. Reports from the Moravians in Bethlehem told of “six hundred men, women, and children” seeking “relief in their wants and nakedness; many of them having had their houses, barns, cattle, and all burnt and destroyed by the savages and just having saved their life.”<sup>32</sup> Likewise, nearby Nazareth saw an influx of over three hundred refugees by late 1755. The town’s chroniclers wrote that “Columns of rising smoke at different points along the horizon, mark the course of the savages who roamed within four miles of our settlements. We got news that the savages had devastated not only on the other side, but also on this side of the mountains,—burning and murdering.”<sup>33</sup>

The question of how to provide adequate defense dominated public debate throughout the 1750s. “Our Accounts, in general, from the Frontiers, are most dismal,” lamented the *Pennsylvania Gazette*, “all agreeing that some of the Inhabitants . . . are [not] able to defend themselves.”<sup>34</sup> One anonymous writer railed against the assembly for not protecting the frontier settlers, observing that the French were “daily plundering our back inhabitants, and spoiling and laying waste to our borders.” Indeed, the author argued, it was “high Time to look ‘round us, and unite as with one Voice to elect such Men as are able and willing to defend themselves and Country from so violent an Enemy.”<sup>35</sup> A like-minded essayist joined the critique of the assembly’s inadequacy to arm the frontier: “I may venture to say, without the Gift of Prophecy,” he argued, “that those among us, who are desirous to choose such Members, as would be willing to pay a proper Regard to the Orders of His Majesty in this critical Conjunction, would be willing to vote Money to supply the

<sup>32</sup> “Joseph Powell’s Account of the Benefactions Received and His Distribution Thereof amongst the Poor Distressed Back Inhabitants,” June 10, 1757, Historical Society of Pennsylvania.

<sup>33</sup> “Six Months on the Frontier of Northampton County, Penna., during the Indian War, October 1755–June 1756,” *Pennsylvania Magazine of History and Biography* 39 (1915): 351.

<sup>34</sup> *Pennsylvania Gazette*, Sept. 8, 1757.

<sup>35</sup> *Pennsylvania Gazette*, Sept. 19, 1754. This is one of the first formulations of collective self-defense in terms similar to those eventually incorporated into the Pennsylvania Declaration of Rights.

Back inhabitants with Arms.”<sup>36</sup>

It becomes clear in these exchanges between petitioners, the governor, and the assembly that many Pennsylvanians felt they could best defend themselves with arms and leadership provided by the government. The demand for the assembly to supply arms for those who had none pervades these frontier petitions, complicating the image of a well-armed America and utterly undermining the notion that Pennsylvanians shunned government regulation of arms.<sup>37</sup> Petitioners from 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.” In a sentiment that would later pervade the provisions of the 1776 constitution, the petitioners asked that the government put those “who are willing to defend themselves and Country into a proper Condition for Defence, and oblige such who are principled against appearing in Arms to contribute towards enabling those to do it who are not so principled.”<sup>38</sup> As Timothy Horsfield wrote to Governor Morris from Bethlehem, “Men are enough to be had, who appear willing to go in Defence of themselves & country, but being under no Command, & not having Persons of Skill & Judgment to Order & Dispose them, I Expect little or no Service to be done by them.”<sup>39</sup> Governor Morris in turn lamented that “I have no arms or I should willingly supply those that want, and are willing to use ’em in defence of themselves and their country.”<sup>40</sup> Eventually, Morris was able to secure fifty barrels of gun powder from General William Shirley, who gave him permission to distribute it as necessary to those “employ’d in Defence of the King’s lands.”<sup>41</sup>

With a pacifist assembly and a proprietor unwilling to tax his own estate to raise money for a militia, governors were left with very little room to maneuver. Often, they granted commissions to voluntary defense associations, a gesture that gave such associations legitimacy, but one that

<sup>36</sup> *Pennsylvania Gazette*, Sept. 26, 1754.

<sup>37</sup> This is not to say that Pennsylvanians had few guns in general, but that they lacked the firearms prescribed for militia duty.

<sup>38</sup> “A Petition from the Inhabitants of Donnegall, in Lancaster County,” in *Pennsylvania Archives*, 8th ser., 5:3724.

<sup>39</sup> Timothy Horsfield to Gov. Morris, Nov. 26, 1755, in *Pennsylvania Archives*, 1st ser., 2:523.

<sup>40</sup> Gov. Morris to Mr. Samuel Robinson, Nov. 11, 1755, in *Pennsylvania Archives*, 1st ser., 2:480.

<sup>41</sup> Gen. Shirley to Gov. Morris, Nov. 19, 1755, in *Pennsylvania Archives*, 1st ser., 2:502. Morris had written to Shirley claiming that men on the frontier were “in want of Ammunition requisite for defending themselves,” but that he did not expect the assembly to “provide the necessary supplies for them in time.”

did not commit any public funds to their cause. Under a governor's commission, men in Bethlehem established a five-person night watch in 1757 "for the Defence of themselves and neighbours," but they raised all arms at private cost.<sup>42</sup> Indeed, pressure from the frontier and from officials in London to establish and regulate a militia caused no small amount of bad blood between Pennsylvania's governors and assembly in the years preceding the Revolution. "I am clear of opinion," wrote Governor Morris, "that this Province cannot be properly defended till measures are taken to exclude from the Legislature a set of men who Either are, or pretend to be, principled against defending themselves and their Country."<sup>43</sup> Indeed, it was this very sentiment, that pacifism was antithetical to the ends of government, that shaped one of Pennsylvania's most explosive events—the Paxton Riots.

Frontier discontent in Pennsylvania reached its boiling point late in 1763 when the so-called Paxton Boys massacred the Indians at Conestoga Manor and then marched fully armed to Philadelphia in early 1764 to air their grievances before the governor. More than just an attack of the West on the East, or the Presbyterians on the Quakers, the actions of the Paxton Boys brought the province's legal and civil structure into question. Indeed, the primary root of the Paxton Boys' discontent was constitutional—namely that the government had failed to protect the natural rights of its citizens and had instead given protection to "enemy" Indians. The riots, which ended without bloodshed, produced two important documents, a "Declaration" and "Remonstrance," that reveal the frontier perception of legitimate political authority in civil society. The Paxtonians were frustrated with the inherent unfairness of the system of determining representation in the assembly because it favored the eastern counties and Philadelphia over the West. Those sympathetic to the Paxtonian cause and concerned about adequate defense felt that, if the West could elect more representatives, the Quaker party would be outnumbered and a militia law would succeed. Since men in political society deferred their natural right to protect themselves and their property to their representatives, it was imperative that those representatives have an equal voice.<sup>44</sup> As the Paxton Boys remonstrated, they had "an indisputable

<sup>42</sup> "Alteration in the Returns of the United Brethren residing in Bethlehem," July 26, 1757, in *Pennsylvania Archives*, 1st ser., 3:243.

<sup>43</sup> Gov. Morris to Earl of Halifax, Nov. 28, 1755, in *Pennsylvania Archives*, 1st ser., 2:528.

<sup>44</sup> This is not to say that men had no natural right to self-defense, but that lethal responses to threats were regulated. The accepted standard came from Blackstone, i.e., that one's back had to be

Title to the same Privileges and Immunities with his Majesty's other subjects."<sup>45</sup> Seeking to assert their status as full citizens, the Paxtonians defined themselves against the savagery of the Indians. Surely, they reasoned, their own government would protect their liberties, not those of the Indians. If not, the very foundation of civil society was unstable. For the Quakers, who accepted a more pluralistic and permeable view of civil society based on negotiation and alliance, the Paxton Riots were a clear assault on the peace and order they had helped create in Pennsylvania since its inception. Such violence, however, was indicative of the white, militaristic, and increasingly exclusive vision of civil society growing in the backcountry.<sup>46</sup>

The barrage of pamphlets that circulated in Philadelphia following the riots prompted the Paxton Boys to issue an "Apology" that explained the constitutional reasons for their expedition. In language that would be echoed in the 1776 Declaration of Rights, the "Apology" noted that "the far greater part of our Assembly were Quakers, some of whom made light of our Sufferings & plead Conscience, so that they could neither take Arms in *Defense of themselves or their Country*."<sup>47</sup> Such actions stood in stark contrast to the few Quakers who actually bore arms during the Paxton Riots by joining the militia that had quickly mustered to protect the city. It seemed a fundamental hypocrisy that Quakers would deny the means of defense to the frontier but rush to arms when their own lives were in danger.

Although the assembly dismissed the Paxton Boys' *Remonstrance*, the battle to demand militia service from all male citizens was far from over. On March 23, 1764, a petition signed by over twelve hundred inhabitants of Cumberland County arrived at the State House. Complaining that a

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against the wall before lethal force could be used. One of the complaints against the Paxton Boys was that they took the law into their own hands and killed the Indians in Conestoga Manor without due process of law. If the Indians were indeed guilty of murder on the frontier, as the Paxton Boys claimed, then punishment would be meted out by the court.

<sup>45</sup> Matthew Smith and James Gibson, *A Declaration and Remonstrance of the Distressed and Bleeding Frontier Inhabitants of the Province of Pennsylvania Presented by Them to the Honourable Governor and Assembly of the Province, Shewing the Causes of their Late Discontent and Uneasiness and the Grievances Under Which they have Laboured, and Which They Humbly Pray to have Redress'd*, in *The Paxton Papers*, ed. John Raine Dunbar (The Hague, 1957), 105–6.

<sup>46</sup> As John J. Smolenski argues, the vision of public order and citizenship that emerged in the backcountry by 1764 was "martial, white, masculine, [and] virulently anti-Quaker." See Smolenski, "Friends and Strangers: Religion, Diversity, and the Ordering of Public Life in Colonial Pennsylvania, 1681–1764" (PhD diss., University of Pennsylvania, 2001).

<sup>47</sup> "The Apology of the Paxton Volunteers," in *Paxton Papers*, 187. Emphasis added.

“barbarous and savage Enemy” had driven many frontier inhabitants from their homes, the petitioners asked the assembly to pass a militia law that would oblige “all his Majesty’s Subjects, who have Life and Property at Stake, to appear in Defence thereof.” For these petitioners, any suggestion that Quakers could be exempt from militia duty was repulsive, especially since the Quakers had “the greatest Share in Government.” They claimed that what lay at “the Bottom of all their Grievances” and was “the Source of all their Sufferings” was the lack of fair representation for western counties in the assembly. In conclusion, they asked that the assembly “restore to the Frontier Counties their Rights, of which they have been so long deprived.”<sup>48</sup> The very next day the assembly passed twenty-six resolves criticizing the proprietary government and asking that a royal governor be installed in its stead. The assembly placed the blame for poor defense on the proprietors who would not permit Pennsylvanians to “raise Money for their Defence, unless the Proprietary arbitrary Will and Pleasure [was] complied with.” Indeed, if the “natural Course of human Affairs” was a reliable guide, proprietary power would soon become absolute and thus a danger “to the Liberties of the People.”<sup>49</sup>

The attempt to unseat the proprietor ultimately failed, as did all petitions for a militia.<sup>50</sup> The Quaker Party’s inability to resolve the militia issue would be its final undoing, as a growing and increasingly politicized Associator movement latched on to the independence movement to unseat the Quakers and establish a new government. Indeed, Pennsylvania Whigs justified their revolution with a natural rights ideology similar to one espoused on the frontier that demanded equal participation in civil society. Since the Quaker Party denied western counties equal power in the assembly, and because it did not enforce participation in the common defense through a militia law, Whigs challenged its legitimacy to rule. Likewise, radicals denounced Britain’s revocation of the colonies’ right to internal police, which Pennsylvanians felt essentially made them second-class and inherently unequal British citizens. The revolution against Britain was effected through the adoption of the Declaration of Independence, while the internal revolution was made possible through

<sup>48</sup> “A Petition from the County of Cumberland,” Mar. 23, 1764, in *Pennsylvania Archives*, 8th ser., 7:5582–83.

<sup>49</sup> Resolves of the Assembly, Mar. 24, 1764, in *Pennsylvania Archives*, 8th ser., 7:5593–95.

<sup>50</sup> The assembly did pass a militia bill in 1755, only to have it vetoed by the Crown. The assembly passed another militia bill in 1757, but a protracted debate with the governor over amending that bill ensured that it was never signed into law.

extralegal committees and the drafting of a new state constitution. It was with this document that Pennsylvania radicals changed the configuration of authority within civil society, rejecting the Quaker paradigm of pacifism and elite rule and placing a premium on safety and equal civic obligation to the community.

Pennsylvanians understood civil society to consist of men bound together “according to the law of nature, for the safety of the whole; having a common established law and judicature to appeal to; with authority to settle controversies between them, and to punish offenders.”<sup>51</sup> While legal code helped define the boundaries of civil society, there were also certain community obligations as stipulated by natural law. Presbyterian minister John Goodlet argued that every man was required “by the law of nature to preserve his own life, liberty, and property; but also that of others.”<sup>52</sup> As Princeton president Samuel Davies cautioned, to fail in one’s duty as a member of civil society was to place the entire system, with its “remote, as well as intimate Connections, References and mutual Dependencies,” in jeopardy.<sup>53</sup> Indeed, the safety of the whole depended on the contributions and diligence of every individual, and participation in civil society came with certain responsibilities.<sup>54</sup> Such a definition of civil society, with its martial emphasis, posed a serious challenge to a traditional Quaker ideal that eschewed state sanctioned violence. Indeed, by 1776, bearing arms was the paramount obligation in the new state and became a defining attribute of male citizenship for Pennsylvanians.

By the Revolution, Pennsylvanians sympathetic to the patriot cause had committed themselves to establishing a government that would look after the common defense. The lesson they had learned from the previous decades was that individuals and voluntary associations could only do so much and that every man needed to contribute his share to protecting life, liberty, and property. If some people did not want to volunteer, then the government needed to coerce them. In a petition to the assembly, the

<sup>51</sup> John Goodlet, *A Vindication of the Associate Synod* (Philadelphia, 1767), 8.

<sup>52</sup> *Ibid.*, 9.

<sup>53</sup> Samuel Davies, *A Sermon Delivered at Nassau Hall* (Philadelphia, 1761), 18.

<sup>54</sup> For a more detailed analysis of civil society in the early republic, see John L. Brooke, “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic,” in *Beyond the Founders: New Approaches to the Political History of the Early American Republic*, ed. Jeffery L. Pasley et al. (Chapel Hill, NC, 2004), 207–50. James H. Kettner argues in *The Development of American Citizenship, 1608–1870* (Chapel Hill, NC, 1978) that as the Revolution approached, Americans sought to define principles of membership in civil society that included concepts of individual liberty and community security. See p. 10.

Committee of Philadelphia argued that since “Self-preservation is the first Principle of Nature,” all men in a state of political society “are obliged to unite in defending themselves and those of the Same Community.” Indeed, the committee continued, “the Safety of the People is the supreme Law,” and it declared that “the Doctrine of Passive Obedience and Non-resistance is Incompatible with our Freedom and Happiness.”<sup>55</sup> It is important to note that the mechanism of self-defense lay in the uniting of men to defend the community, not in an individual right to bear arms.

Conservatives and moderates in the assembly were ultimately unable to stem the tide of public opinion and on November 8, 1775, adopted a set of resolutions that effectively turned the Associators into a regular militia. They asked all men aged sixteen to fifty to associate if they had not already done so, or to “contribute an Equivalent to the Time spent by the Associators in acquiring military Discipline.”<sup>56</sup> These resolutions were the result of considerable debate and compromise between the assembly’s radical and conservative elements and, as such, did not impose fines or sanctions for those who refused to comply. Still, the assembly had helped codify Pennsylvania’s first state-sanctioned militia. It brought further form to the militia by passing “Rules and Regulations for the better Government of the Military Association in Pennsylvania” on November 25; the assembly encouraged all Associators to adopt a set of regulations “for establishing Rank or Precedence.”<sup>57</sup> In November 1775, in its final act of acquiescence to the radicals before adjourning for the year, the assembly passed a tax on non-Associators,<sup>58</sup> its enforcement, however, was lax.

When the members of the assembly reconvened in February 1776, Philadelphia privates complained of the ease with which men could shirk their military duties.<sup>59</sup> Likewise, the Bucks County Committee asked that an additional tax, one that was proportionate to the Associators’ expenses, be levied on non-Associators because Associators had to pay for

<sup>55</sup> “The Petition and Remonstrance of the Committee of the City and Liberties of Philadelphia,” Oct. 30, 1775, in *Pennsylvania Archives*, 8th ser., 8:7336.

<sup>56</sup> Resolves of the Committee of the Whole House, Nov. 8, 1775, in *Pennsylvania Archives*, 8th ser., 8:7351.

<sup>57</sup> “Rules and Regulations for the better Government of the Military Association in Pennsylvania,” Nov. 25, 1775, in *Pennsylvania Archives*, 8th ser., 8:7369.

<sup>58</sup> “Resolutions directing the Mode of Levying Taxes on Non-Associators in Pennsylvania,” Nov. 25, 1775, in *Pennsylvania Archives*, 8th ser., 8:4380–84.

<sup>59</sup> “The Petition of the Privates of the Military Association of the City and Liberties of Philadelphia,” in *Pennsylvania Archives*, 8th ser., 8:7402–7.

their own arms and were risking their lives.<sup>60</sup> March saw the assembly trying to calm Associator disaffection throughout the province. First, acting upon the recommendation of the Congress, the assembly ordered that all non-Associators' arms be collected and distributed to those who would bear them.<sup>61</sup> Secondly, to compensate poor Associators for their time away from their farms and families, many of whom had left their families to begin drilling for service and demanded that the public purse help them in their time of need, the assembly resolved that the Overseers of the Poor and a county justice of the peace aid any families in need and bill the province for all expenses incurred.<sup>62</sup>

Political legitimacy in Pennsylvania began to hinge on who could best provide for the common defense, and, as such, the assembly began to lose ground to the extralegal bodies established to push the Whig agenda forward. One such body, the Conference of Committees, began to assume the powers of a legitimate legislature when the assembly went into recess from June until August of 1776. Despite the steps the assembly had taken to regulate the militia, it had failed to raise the six thousand men the Continental Congress requested to aid George Washington. Claiming to be the "only representative body of this colony that can . . . accomplish the desires of the congress," the conference resolved unanimously to raise forty-five hundred Associators to join the fifteen hundred men already mustered.<sup>63</sup> On June 25, the final day of its session, the conference issued a final declaration, this time to the Associators of Pennsylvania: "You are about to contend for *permanent* freedom, to be supported by a government which will be derived from yourselves, and which will have for its object not the emolument of one man, or class of men only, but the safety, liberty, and happiness of every individual in the community."<sup>64</sup> This was not a guarantee of safety for every individual, but for every individual in the community. And it became increasingly clear that membership hinged on the willingness to take arms and defend that community.

The desire to create a viable militia was confounded by Pennsylvanians' lack of proper military accoutrements. In Philadelphia,

<sup>60</sup> *Pennsylvania Gazette*, Mar. 6, 1776.

<sup>61</sup> Resolutions, Mar. 14, 1776, in *Pennsylvania Archives*, 8th ser., 8:7447–48.

<sup>62</sup> "Rules and Regulations for the better Government of the Military Associations in Pennsylvania," Apr. 5, 1776, in *Pennsylvania Archives*, 8th ser., 8:7479.

<sup>63</sup> Proceedings of the Provincial Conference of Committees, June 23, 1776, in *Journals of the House of Representatives of the Commonwealth of Pennsylvania* (Philadelphia, 1782), 42.

<sup>64</sup> *Ibid.*, 45.

one broadside asked that the Associators adopt “the cheapest uniform, such as that of a HUNTING SHIRT,” lest poorer men be unable to furnish the requisite clothes for duty.<sup>65</sup> Demands by the Continental Congress and the Philadelphia Committees strained relations between affluent officers and the poorer men who filled the ranks of the soldiery. In a letter to John Hancock, William Irvine wrote from Carlisle that his men were upset with being charged for their militia muskets. “[W]hen the Men are equipped (if Arms are included),” he wrote, “they will be on an average from ten to twelve pounds in debt.” The men were particularly disgruntled because of rumors that men serving in Boston and Canada were paid more and could return their muskets when their service was finished. The obligations of militia duty were too much to bear, and the debt incurred by the musket was far too onerous. “They Complain farther,” Irvine wrote, “that they will in all probability not only be naked at the end of the year but in debt too—& that as soon as the War is at an end the Arms will be useless to them.”<sup>66</sup> Irvine reported to James Wilson that militia companies in York came close to mutiny over the price of arms and military clothing and warned him that discontent would spread “unless something is done or provision made about Arms.”<sup>67</sup>

On May 9, 1776, John Adams introduced a resolution to the Continental Congress recommending that the colonies adopt governments “as shall . . . best conduce to the happiness and safety” of the people.<sup>68</sup> To counteract moderates like John Dickinson, who firmly believed that Pennsylvania’s existing institutions were sufficient for Congress’s demands, John Adams, Edward Biddle, and Richard Henry Lee drafted a resolution that called for an end to all oaths of allegiance to the Crown and for governments to operate only under the authority of the people. Tories and moderates knew such constitutional thinking would bring an end to Pennsylvania’s established government. “A Convention chosen by the people, will consist of the most fiery Independents,” lamented James Allen. “They will have the whole Executive & legislative authority in

<sup>65</sup> “To the Associators of the City of Philadelphia,” Philadelphia, May 18, 1775.

<sup>66</sup> William Irvine to John Hancock, Mar. 23, 1776, Gratz Collection, Generals of the Revolution, case 4, box 12, Historical Society of Pennsylvania.

<sup>67</sup> William Irvine to James Wilson, Mar. 23, 1776, in Gratz Collection, Generals of the Revolution, case 4, box 12.

<sup>68</sup> See John Adams, *The Works of John Adams*, ed. Charles Francis Adams (Boston, 1850), 2:489.

their hands.”<sup>69</sup> Now, radical Whigs had Congress’s blessing to continue their extralegal committees and push for a new provincial government.

Elections for the Constitutional Convention were held on July 8, 1776, the same day the Declaration of Independence was read at the State House. Non-Associators bore the brunt of the convention’s hostility to the now-defunct assembly’s policies. Associators, they argued, “have freely and bravely gone into the field for the defense of the common liberties of America” while non-Associators remained “at home in peace and security.” The committee, therefore, resolved to “render the burthen and expense” equally among all the citizens of Pennsylvania, arguing that “the safety and security of the state should at all times call the attention of its members for its preservation.”<sup>70</sup> After much debate and consideration, the convention passed an Associator ordinance. According to the convention, Associators had given their time, money, and bodies to the defense of the country while non-Associators had “pursued their [personal] business to advantage.” Thus, it was ordained that every non-Associator from age sixteen to fifty pay twenty shillings for each month he was not in physical military service. Even those above fifty years of age were not exempt. Although they were unable to “bear the fatigue of military duty,” the convention considered it “just and reasonable that they should contribute towards the security of their property.”<sup>71</sup>

The Revolution gave military men access to the political and public spheres to an extent they had never before experienced.<sup>72</sup> Associators became essential Whig allies, and the Whigs catered to their concerns about a militia and the common defense. In September 1776, Pennsylvania finally established a new constitution “for the security and protection of the community . . . and to enable the individuals who compose it, to enjoy their natural rights.”<sup>73</sup> To that end, the first clause of the Declaration of Rights established that all men had inalienable natural rights, which included “enjoying and defending life and liberty, acquiring,

<sup>69</sup> James Allen, “Diary of James Allen,” May 15, 1776, reprinted in *Pennsylvania Magazine of History and Biography* 9 (1885): 187.

<sup>70</sup> Minutes of the Proceedings of the Convention of the State of Pennsylvania, July 23, 1776, *Journals of the House*, 54.

<sup>71</sup> “An Ordinance for Rendering the Burden of Associators and Non-Associators in the Defence of this State as Nearly Equal as May Be,” Sept. 14, 1776, in *Journals of the House*, 82, 84.

<sup>72</sup> See Gregory T. Knouff, *The Soldiers’ Revolution: Pennsylvanians in Arms and the Forging of Early American Identity* (University Park, PA, 2004).

<sup>73</sup> 1776 Pennsylvania Constitution, preamble, in *Pennsylvania Archives*, 4th ser., 3:627.

possessing and protecting property, and pursuing and obtaining happiness and safety.”<sup>74</sup> Government was not antithetical to the people; the government was the people. Thus, the people of Pennsylvania had the “sole, exclusive and inherent right of governing and regulating the internal police” of the state. Since government was instituted “for the common benefit, protection and security of the people” and not “any single man,” the community had the right to abolish any government that did not look after the “public weal.”<sup>75</sup> The right to vote was also bound up in communal obligation, and the Declaration stated that all voters and men elected to office were to have “sufficient evident common interest with and attachment to the community.”<sup>76</sup>

It is no surprise, then, that the individual and communal were bound together when it came to bearing arms and defense. Since “every member of society [had] a right to be protected in the enjoyment of life, liberty and property,” every person was thereby “bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto.”<sup>77</sup> As the Declaration explicitly guaranteed “the right of conscience in the free exercise of religious worship,” it could not compel “any man who is conscientiously scrupulous of bearing arms” as long as such men “pay such equivalent.” In this formulation, the mechanism for protecting life and property lay in the obligation of men in the community to contribute to its defense. Thus, the Declaration guaranteed “that the people have a right to bear arms for the defence of themselves and the state.”<sup>78</sup>

The new constitution was hotly debated in the press because it vested “supreme legislative power” in a unicameral House of Representatives open to all free men who paid taxes.<sup>79</sup> Benjamin Rush, writing as “Ludlow,” complained that the Declaration of Rights “confounded *natural* and *civil* rights in such a manner as to produce endless confusion in society.”<sup>80</sup> Bryan, writing as “Whitlocke,” fired back that “some of the

<sup>74</sup> 1776 Pennsylvania Constitution, Declaration of Rights, clause 1, in *Pennsylvania Archives*, 4th ser., 3:629.

<sup>75</sup> *Ibid.*, clause 3 and 5, in *Pennsylvania Archives*, 4th ser., 3:629–30.

<sup>76</sup> *Ibid.*, clause 7, in *Pennsylvania Archives*, 4th ser., 3:630.

<sup>77</sup> *Ibid.*, clause 8, in *Pennsylvania Archives*, 4th ser., 3:630.

<sup>78</sup> *Ibid.*, clause 2 and 8, in *Pennsylvania Archives*, 4th ser., 3:629–30.

<sup>79</sup> 1776 Pennsylvania Constitution, sec. 2, in *Pennsylvania Archives*, 4th ser., 3:632.

<sup>80</sup> “Letter I,” *Pennsylvania Journal*, May 21, 1777. Rush’s Ludlow letters were quickly published as *Observations upon the Present State of the Government of Pennsylvania* (Philadelphia, 1777).

first men in opposition have publicly acknowledged [the Declaration of Rights] to be the best on the continent” and asked for “[p]roof of the dangerous confusion.”<sup>81</sup> Rush’s main critique lay in the republican concern that the new legislature was unchecked and could “trample the sacred bulwarks” of the constitution and infringe on the people’s liberty. Rush turned to John Adams in support of his opposition to the unicameral legislature. “I think a people cannot be *long free*, not *ever happy*,” Adams wrote, “whose government is in one Assembly.”<sup>82</sup> Bryan and the pro-constitutionalists were suspicious of executive checks and balances, lest popular sovereignty be impeded and the unequal representation of the colonial legislature be duplicated. Every county was now “admitted to a proper share in the legislature,” Bryan explained, and the president was denied the ability to veto laws passed by the assembly. “The power of forbidding any thing to be law, but what [the president] pleases,” Bryan wrote, undoubtedly recalling the proprietary veto that had stymied many militia laws, “. . . is a power which an angel might be tempted to abuse.”<sup>83</sup>

Another cause for concern was the establishment of a test oath for office that demanded that each member swear his belief in “one God, the creator and governor of the universe.”<sup>84</sup> Although one essayist, writing as “Demophilus,” agreed that a ruler should “declare his belief in the retributive justice of the Supreme Governor of the universe,” he argued that the oath should not be included in the new Frame of Government. “[W]e have no evidence,” he wrote, “that the time is yet come when the Saints alone . . . shall rule the world.”<sup>85</sup> Others disagreed, arguing that “from the nature of civil society in a Christian country, it would be well for the community if every member was . . . encouraged to make some profession of religion in general.”<sup>86</sup> Still others decried the oath as being more liberal than William Penn’s demand that assemblymen profess belief in Jesus Christ, thus opening the doors of government to “Deists, Jews, Mahomedans, and other enemies of Christ.”<sup>87</sup> Opponents of the new Frame of Government met in the State House yard on October 23 and drew up a list of thirty-one resolutions against the constitution, among

<sup>81</sup> “Letter I. To Ludlow,” *Pennsylvania Evening Post*, May 24, 1777.

<sup>82</sup> “Letter II,” *Pennsylvania Journal*, May 28, 1777.

<sup>83</sup> “Letter I. To Ludlow,” *Pennsylvania Evening Post*, May 24, 1777.

<sup>84</sup> 1776 Pennsylvania Constitution, sec. 10, in *Pennsylvania Archives*, 4th ser., 3:634.

<sup>85</sup> “To the Printers of the Pennsylvania Packet,” *Pennsylvania Packet*, Sept. 17, 1776.

<sup>86</sup> “Mr. Towne,” *Pennsylvania Evening Post*, Sept. 24, 1776.

<sup>87</sup> “Mr. Towne,” *Pennsylvania Evening Post*, Sept. 26, 1776.

which was the complaint that “in the Constitution . . . the CHRISTIAN religion is not treated with proper respect.”<sup>88</sup> While the different elements in this debate disagreed over why the oath was flawed, all recognized that the individual was linked to the larger community. Those who supported the oath did so for the safety of that community, as did those who wanted a more explicitly Christian oath to keep “enemies” out of office.

Turnout for the 1776 election was poor, as many boycotted it in protest or were kept away from the polls by the Associators who dominated the election proceedings. The pro-constitutionalists swept most of the western counties, dominating seats in the assembly except those from Philadelphia city and county. For the first time in Pennsylvania history, the representatives from the East were a minority in the assembly. The eastern moderates were, however, a powerful minority led by John Dickinson and could theoretically prevent a quorum and stymie the radical agenda. When the assembly refused to call a new constitutional convention, Dickinson, George Gray, and John Potts vacated their seats. The men elected to the first government under the new constitution took their seats on November 28, 1776. The house quickly passed a resolution to “take immediate measures . . . respecting the collection of fines imposed . . . on all *non-associators*.” It then unanimously resolved to “enact a *militia-law*, and take such further measures as will put the defence of this State on a just and equitable footing, so as to encourage those worthy *associators*.”<sup>89</sup> Perhaps most telling of how the Associator movement had pushed the Revolution forward in Pennsylvania, and had helped establish the new constitution, was the fact that the house essentially shut down from December 14, 1776, to January 13, 1777; a quorum could not be reached due to many members “being officers in the militia” who had returned home to “bring out the militia of their respective counties.”<sup>90</sup>

With Washington’s victories at Trenton and Princeton, the assembly reconvened in the new year, though Dickinson and his friends still refused to take their seats. By February, an election was held to fill their seats.<sup>91</sup> When the assembly received a draft of the militia bill on the morning of February 14, 1777, the members debated it “for some time,” with objec-

<sup>88</sup> “Philadelphia, October 22,” *Pennsylvania Evening Post*, Oct. 22, 1776.

<sup>89</sup> *Journals of the House*, Nov. 29, 1776, 98.

<sup>90</sup> *Journals of the House*, Dec. 14, 1776, 102.

<sup>91</sup> *Journals of the House*, Feb. 8, 1776, 10.

tions being raised “concerning the persons excepted therein from personal service.”<sup>92</sup> Over the next month, the members debated several of the bill’s clauses concerning terms of office and oaths of allegiance for officers and exemption from duty for assemblymen. Not surprisingly, elected members of the legislature were not exempted from duty. The militia bill, titled “An Act to Regulate the Militia of the Commonwealth of Pennsylvania,” was enacted into law on March 17. “A militia law upon just and equitable principles hath ever been regarded as the best security of liberty,” the preamble stated, and thus it was the “indispensable duty of the freemen of this commonwealth to be at all time prepared to resist the hostile attempts of its enemies.” Under the law’s provision, no one could shirk his militia duty, and given the exclusive nature of civil society espoused by the Paxton Boys, it is no surprise that the militia law restricted its demands to the state’s “white male inhabitants.” Those unwilling to serve personally had to find a substitute to serve in their stead or pay a fine.<sup>93</sup> The law levied a system of penalties against deserters, non-Associators, and those who sold state-owned arms without the proper permission. It provided a pension for those who lost a limb in battle and money to the families of those killed on the field. The main purpose of the militia law was to ensure that every man contributed to the common defense, but the end result was an inefficient bureaucracy. The government kept a master list of all men eligible to serve, which it further subdivided into local battalions and eight classes chosen by lottery. An active-duty roster was also kept to ensure that every man served equitably. As Stephen Rosswurm argues, it was a complicated and unruly system, “but it was a well-intentioned effort to regularize active duty and therefore equalize burdens.”<sup>94</sup>

Critiques of the militia law focused not on compulsory service, but on its egalitarian election of officers. Bryan celebrated the fact that “the assembly have not even exempted themselves from military duty” as the Quakers of the past had done.<sup>95</sup> But Rush objected to the constitution’s provision that all officers under the rank of brigadier general be chosen by the people since “most of the irregularities committed by the militia . . . were occasioned by that laxity of discipline” allowed by officers elected by

<sup>92</sup> *Journals of the House*, Feb. 14, 1777, 111.

<sup>93</sup> “An Act to Regulate the Militia of the Commonwealth of Pennsylvania,” in *The Statutes at Large of Pennsylvania*, ed. James T. Mitchell and Henry Flanders, 18 vols. (Harrisburg, 1896), 9:75–77, 82.

<sup>94</sup> Rosswurm, *Arms, Country, and Class*, 136.

<sup>95</sup> “Letter II. To Ludlow,” *Pennsylvania Gazette*, June 4, 1777.

the people. Secondly, more executive discipline was needed since “above one half of the state have refused or neglected to choose officers, agreeably to the recommendation of the Assembly.”<sup>96</sup> Indeed, a poorly disciplined militia and a flawed system of government would spell certain doom for Pennsylvania. “A *good government* is an engine not less necessary to ensure us success . . . than ammunition and *fire-arms*,” Rush argued.<sup>97</sup> Aware of the militia’s widespread support for the constitution, a critic of the new constitution submitted an essay signed “An Associator,” warning his countrymen of “the dangers that now threaten them, from the attempt to establish the government formed by the late Convention.”<sup>98</sup> The essay caused “a good deal of noise” in Philadelphia, and the author called on all “True Whigs” to meet at Philosophical Hall to debate amending the militia law.<sup>99</sup> Bryan chastised his opponents for trying to prevent the execution of the militia law when Washington was “ordering our Militia to hold themselves in readiness” and was saddened to see “some respectable characters countenance such proceedings.”<sup>100</sup>

The rhetoric of bearing arms did not end with the passage of the 1777 militia law, and Pennsylvania’s place in the scholarship on the Second Amendment has been further secured by Pennsylvania’s debates over the federal Constitution. Much has been made of the 1787 “Dissent of the Minority,” drafted by Robert Whitehill and the Anti-Federalists in Pennsylvania’s ratification convention. Echoing in part the words of the state constitution, the “Dissent” declared that “the people have a right to bear arms for the defence of themselves and their own state . . . or for the purposes of killing game” and demanded that the “power of organizing, arming, and disciplining the militia . . . remain with the individual states.”<sup>101</sup> To be sure, the phrasing of the “Dissent” is odd, linking the right to bear arms with the particularly nonmilitary action of killing game. More importantly, Whitehill’s language was at odds with Pennsylvania’s own game laws, which explicitly regulated “persons [presuming] . . . to carry any gun or hunt on the improved or inclosed lands

<sup>96</sup> “Letter III,” *Pennsylvania Journal*, June 4, 1777.

<sup>97</sup> “Letter IV,” in *Observations upon the Present State of the Government of Pennsylvania*, by Benjamin Rush (Philadelphia, 1777), 21.

<sup>98</sup> *Pennsylvania Journal*, May 21, 1777.

<sup>99</sup> “For the Pennsylvania Evening Post,” *Pennsylvania Evening Post*, May 24, 1777.

<sup>100</sup> “Letter III. To Ludlow,” *Pennsylvania Packet*, June 10, 1777.

<sup>101</sup> “The Address and Reasons of the Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents,” *Pennsylvania Packet*, Dec. 18, 1787.

of any plantation.”<sup>102</sup> It is curious that individual rights scholars base their interpretation on the rhetoric of the losing faction of the debates, as if the minority dissent from one state solely dictated the wording the Federalists used in the Second Amendment. This is not to say that Anti-Federalist ideas in general did not shape the Bill of Rights, but rather one must note that Whitehill and his supporters were so politically weak that the ratifying convention refused to send their “Dissent” on to Congress. And, in the final analysis, the Second Amendment addressed only concerns about the militia (a concern from many states), not the right to hunt, suggesting that Whitehill’s “Dissent” had very limited currency.

Nevertheless, the employment in the “Dissent” of “defense of themselves” continues to hold a sacred place in individual rights scholarship, perhaps because James Wilson, Pennsylvania Supreme Court justice and influential Federalist, wrote that the 1790 Pennsylvania Constitution and its provision of a right to bear arms supported “the great natural law of self preservation.”<sup>103</sup> As a Federalist, Wilson opposed the Bill of Rights, considering it to be “superfluous and absurd,” and advocated a strong army that could effectively protect the United States. “[N]o man, who regards the dignity and safety of his country,” Wilson declared to a crowd in Philadelphia in 1787, “can deny the necessity of a military force, under the controul, and with the restrictions which the new Constitution provides.”<sup>104</sup>

In late 1789, Wilson chaired a convention to rewrite the 1776 Pennsylvania Constitution, which many considered to have formed an unruly, ineffective, and expensive government. In its initial redrafting of the Declaration of Rights, the convention placed the right to bear arms with other militia-related clauses. The right of citizens to “bear arms in defence of themselves and the state” was linked together with the rights of assembly and petition (both collective actions); the following clause granted an exemption from military service for those who “scruple to bear arms.”<sup>105</sup> The next two clauses prohibited a standing army and forbade

<sup>102</sup> “An Act to Prevent the Killing of Deer Out of Season, and Against Carrying of Guns or Hunting by Persons Not Qualified,” *Statutes at Large of Pennsylvania* (1721), 3:255.

<sup>103</sup> Bird Wilson, ed., *The Works of the Honourable James Wilson*, L.L.D. (Philadelphia, 1804), 3:84.

<sup>104</sup> *Daily Advertiser*, Oct. 13, 1787.

<sup>105</sup> See article 9, sec. 19, *The Proceedings Relative to Calling the Convention of 1776 and 1790* (Harrisburg, 1825), 163. It reads: “That the right of the citizens to bear arms in defence of themselves and the state, and to assemble peaceably together, and apply in a decent manner, to those invested with the powers of government, for redress of grievances or other proper purposes, shall not be questioned.”

the quartering of soldiers in times of peace, making it clear that these men considered the right to bear arms as similar to other collective or military actions.<sup>106</sup>

This version of the constitution did not last, however, and a new one was proposed to the committee in February 1790. Again, the right to bear arms was paired with other matters relating to the militia. This time, the rights of assembly and petition were parsed into a separate clause, while the right to bear arms and the exemption from service for conscientious objectors were unified in section 20.<sup>107</sup> The prohibitions against standing armies and the quartering of soldiers followed. Upon consideration of the revised clause, the convention entertained a motion to strike out the conscientious objector clause, but it was defeated forty-two to nine with Wilson's support.<sup>108</sup> On February 26, 1790, the convention agreed to print copies of the constitution "for the consideration of the good people of Pennsylvania"; the convention then adjourned until August. Upon reconvening, the convention discussed the bearing of arms clause again, agreeing to add a colon between the right to bear and the objector exemption.<sup>109</sup> By September, the constitution had changed once more. The convention moved the conscientious objector clause to article 6, section 2, which mandated that "[t]he freemen of this commonwealth . . . be armed and disciplined for its defence."<sup>110</sup> The right to bear arms was now its own clause, followed as before by the prohibitions on standing armies and the quartering of soldiers. There is nothing to suggest that the convention's perception of the right to bear arms resembles the individual right to self-defense that modern Standard Model scholars purport.

This context casts light on Wilson's link between bearing arms and self-preservation. Although Wilson had restructured Pennsylvania's government by abolishing the unicameral legislature, the 1790 constitution by no means rejected the commitment to the common defense established by its precedent. The new frame of government still demanded that all freemen be armed for the province's defense and considered the government's central responsibility to be the provision of "peace, safety and

<sup>106</sup> See article 9, secs. 21 and 22, in *ibid.*

<sup>107</sup> See article 7, secs. 19 and 20, in *ibid.*, 175.

<sup>108</sup> *Ibid.*, 225.

<sup>109</sup> *Ibid.*, 263–64. The clause now read: "That the right of the citizens to bear arms in defence of themselves and the state shall not be questioned: But those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service."

<sup>110</sup> *Ibid.*, 302.

happiness.”<sup>111</sup> While Wilson unquestionably believed in a natural right to self-defense, he also saw the necessity of regulating arms for the “personal safety of the citizens.” Indeed, Wilson considered it to be a crime for a man to arm himself “with dangerous and unusual weapons” that would “diffuse a terrour among the people.”<sup>112</sup> Homicide was not a crime in the protection of one’s life or home since self-defense was part of natural law. This law, he argued, was recognized in the Pennsylvania Constitution’s acceptance of the right to bear arms. Wilson, however, saw the necessity of community mobilization to promote personal safety. With regard to defending one’s house, he quoted Lord Coke: “Every man’s house is his castle . . . and he ought to keep and defend it at his peril; and if any one be robbed in it, it shall be esteemed his own default and negligence.” Therefore, Wilson argued, “one may assemble people together in order to protect and defend his house.”<sup>113</sup>

Even if Wilson did subscribe to a wholly individual rights understanding of “bear arms,” such an interpretation did not seem to have any currency in the Pennsylvania courts. In 1799, Dr. James Reynolds stood trial for assault with intent to murder after he had tried to fend off a Federalist mob, angry about his opposition to the Alien and Sedition Acts, by brandishing a pistol. What is illustrative about this case is that neither the prosecution nor the defense considered Reynolds’s possession or use of his gun to be a matter of constitutional law. If the individual right to bear arms was protected under the 1790 Pennsylvania Constitution, then why didn’t his lawyer justify his client’s actions under article 6 or section 21? It is also important to note that Reynolds was never considered to have borne arms, since that term never appears in the trial transcripts. His lawyer argued that “there did exist a conspiracy to assassinate Dr. Reynolds” and that since there was “no law in Pennsylvania to prevent it; every man has a right to carry arms who apprehends himself to be in danger.”<sup>114</sup> That right came not from the state constitution but from “the law of nature and the law of reason,” which allowed deadly force “if necessary to [one’s] own safety.”<sup>115</sup> The prosecution disagreed, taking its cue from Blackstone and arguing, “The law says, if a man attack

<sup>111</sup> Article 9, sec. 2, in *ibid.*, 303.

<sup>112</sup> Wilson, *Works of the Honourable James Wilson*, 3:79.

<sup>113</sup> *Ibid.*, 85.

<sup>114</sup> William Duane, *A Report of the Extraordinary Transactions which Took Place at Philadelphia, in February 1799* (Philadelphia, 1799), 33.

<sup>115</sup> *Ibid.*, 32.

you by a sword, you have no right to kill him, till you have made every attempt to escape.”<sup>116</sup> In the end, the jury sided with the defense and acquitted Reynolds. The case clearly demonstrates that using a gun in self-defense was legally different from bearing arms in “defense of themselves and the state.”

Other Pennsylvanians clearly saw their state’s constitutional right to bear arms as being tied to collective duty. In 1798, with tensions heightening between the United States, France, and Britain, Congress attended to the issue of raising a provisional army to protect the United States and quell seditious activity. The proposed bill gave President Adams the power over a volunteer military corps that was neither militia nor regular army. The constitutional grey area was a cause of much concern and debate. Why was a special force needed, some members wondered, since state militias had effectively quelled the Whiskey Rebellion? Others were wary, in light of the alien and sedition bills, of the Federalists’ attempt to create “military associations of one part of the people, in order suppress a supposed disaffection of the rest of the community.” Pennsylvanian Albert Gallatin opposed the bill, in part because wealthy Federalists would join the ranks of the volunteer corps and undermine the constitutional rights of poorer Republicans to participate in the militia. “Whether a man be rich or poor,” Gallatin argued, “provided he has a common interest in the welfare of the community, he had an equal reliance upon him. And this is a Constitutional idea; for the Constitution says, ‘the rights of the people to bear arms shall not be questioned.’”<sup>117</sup> In other words, the proposed corps would subvert citizens’ constitutional right to bear arms in a militia.

Gallatin and many other Pennsylvanians would be mystified by our modern propensity to separate the right to bear arms into either an individual or a collective right. No doubt this is because we have lost sight of our “common interest in the welfare of the community,” a concept that very much motivated Pennsylvanians of the founding era. To be sure, we live in a much different world than the peoples we study. Pennsylvania’s history reveals an abiding concern for a well-regulated militia, and the men who drafted the 1776 constitution were products of that very concern. With the coming of the Revolution, Pennsylvanians began to regulate firearms more than ever before and demanded that all men fulfill

<sup>116</sup> *Ibid.*, 45.

<sup>117</sup> *Claypoole’s American Daily Advertiser*, June 4, 1798.

their obligation to the common defense. To ensure that men could meet their obligations, the constitution protected a right to bear arms so that the people could defend themselves and fulfill the very purpose of government as stated in the preamble: “the security and protection of the community.”

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