# Articles

## THE KEYSTONE OF THE SECOND AMENDMENT: THE QUAKERS, THE PENNSYLVANIA CONSTITUTION, AND THE FLAWED SCHOLARSHIP OF NATHAN KOZUSKANICH

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Was *District of Columbia v. Heller*[1] correct in stating that the Second Amendment protects a right of people that do not belong to a state militia?[2] Presidential candidate Barack Obama said "yes,"[3] and a large majority of the American public seems to agree.[4] For most of the last century, the leading contrary theory was that the Second Amendment only protected a right of the states to organize militias,[5] yet scholarly research from the 1970s onward eventually made this theory so untenable that every Justice in *Heller* brusquely dismissed it.[6] Now, advocates who do not wish to read the Second Amendment as providing an ordinary individual right have adopted a new theory that is largely the creation of historian Nathan Kozuskanich and his thesis advisor, Saul Cornell.[7]

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[1] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[2] *Id.* at 2821-22 (discussing U.S. CONST. amend. II).

[3] Robert D. Novak, *Obama's Second-Amendment Dance*, WASH. POST, Apr. 7, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/04/06/AR2008040601652.html (discussing candidate Obama's praise for the *Heller* decision).

[4] Jeffrey M. Jones, *Americans in Agreement with Supreme Court on Gun Rights*, GALLUP POLL, June 26, 2008, http://www.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx (discussing U.S. CONST. amend. II) ("A clear majority of the U.S. public–73%–believes the Second Amendment to the Constitution guarantees the rights of Americans to own guns."). Harris Interactive found that seventy percent of Americans agreed that the Second Amendment protects an individual right to bear arms. Harris Interactive, *Second Amendment Supreme Court Ruling Matches with Public Opinion from the Harris Poll*, HARRIS POLL, June 26, 2008, http://www.harrisinteractive.com/harris_poll/index.asp?PID=922 (discussing U.S. CONST. amend. II) (finding that forty-one percent of Americans believe that there is an individual right only, and twenty-nine percent of Americans believe that there is both an individual right and "[a] state's right to form a militia").

[5] *See generally* City of Salina v. Blaksley, 83 P. 619 (Kan. 1905). *City of Salina v. Blaksley* is the foundational case for the theory that the Second Amendment is collective and not individual. *See generally id.*

[6] *See Heller*, 128 S. Ct. at 2799 (discussing U.S. CONST. amend. II) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."); *id.* at 2822 (Stevens, J., dissenting) (discussing U.S. CONST. amend. II) ("Surely [the Second Amendment] protects a right that can be enforced by individuals.").

[7] *See, e.g.*, Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"*, 56 UCLA L. REV. 1095 (2009) (arguing for the militia-only theory); Nathan Kozuskanich, *Defending*

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Kozuskanich claims that the Second Amendment, like the 'arms provision' in the Pennsylvania Constitution of 1776, is merely a guarantee of a right of individuals to participate in the militia in defense of the polity.[8] Kozuskanich's claim about the Second Amendment is based on two articles that he wrote about the original public meaning of the right to bear arms in Pennsylvania, including the right to bear arms guarantee in the Pennsylvania Constitution of 1776 and the Pennsylvania Constitution of 1790.[9]

Kozuskanich's research was cited in both of the briefs submitted by the District of Columbia itself – even though the two law review articles, appearing in the *Rutgers Law Journal* and the *University of Pennsylvania Journal of Constitutional Law*, had not yet been published and had not yet been made available to the public.[10] Two of the most important amicus briefs for the District

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*Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041, 1070 (2008) [hereinafter *Defending Themselves*].

[8] *Defending Themselves*, *supra* note 7, at 1070 (discussing U.S. CONST. amend. II; PA. CONST. of 1776).

[9] *See generally Defending Themselves*, *supra* note 7 (discussing PA. CONST. of 1790, art. IX, § 21; PA. CONST. of 1776, art. XIII); Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413 (2008) [hereinafter *Originalism*] (discussing PA. CONST. of 1790, art. IX, § 21; PA. CONST. of 1776, art. XIII).

[10] Brief of Petitioners at 31, *Heller*, 128 S. Ct. 2783 (No. 07-290) (citing *Defending Themselves*, *supra* note 7); Reply Brief of Petitioners at 7, *Heller*, 128 S. Ct. 2783 (No. 07-290) (citing *Originalism*, *supra* note 9). Although Kozuskanich's prepublication articles were obviously in the hands of the attorneys working in support of the District of Columbia's handgun and self-defense bans, the articles were oddly not made publicly available, even though it is common for law review authors to post prepublication articles on the SSRN website or on other websites. *See* Social Science Research Network (SSRN) Home Page, http://www.ssrn.com (last visited Mar. 15, 2010). For example, Clayton Cramer and Joseph Olson wrote an article for the *Georgetown Journal of Law & Public Policy* that was cited in *Heller* briefs. Brief of Respondent at 11, *Heller*, 128 S. Ct. 2783 (No. 07-290) (citing Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511, 514 n.15 (2008)); Brief for Second Amendment Foundation as Amicus Curiae Supporting Respondent at 14, *Heller*, 128 S. Ct. 2783 (No. 07-290) (citing Cramer & Olson, *supra*, at 519). That article was made publicly available via SSRN on January 31, 2008, less than a day after

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of Columbia, one by a collection of historians and the other by three linguists, also cited Kozuskanich.[11]

Part I of this article provides a straightforward legal history of the right to bear arms provisions in the Pennsylvania Constitution of 1776 and the Pennsylvania Constitution of 1790. In this part, we examine Kozuskanich's claims about the constitutions' language and history in his *Rutgers Law Journal* article.[12]

Part II turns to Kozuskanich's *University of Pennsylvania Journal of Constitutional Law* article.[13] According to Kozuskanich, Quakers who objected to serving in the militia said that they did not want to "bear arms."[14] Because Quakers did not object to arms in general, Kozuskanich argued that "bear arms" is exclusively a military term, and therefore, the right to keep and bear arms is only about owning and carrying militia weapons.[15]

But as it turns out, the Quakers were not as pro-gun as Kozuskanich acknowledges.[16] Some Quakers refused to use

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Georgetown had accepted it for publication. *See* Clayton E. Cramer & Joseph Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086176 (showing that this article was posted on January 31, 2008, well before its print date).

[11] Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioners at 12, *Heller*, 128 S. Ct. 2783 (No. 07-290) (citing *Defending Themselves*, *supra* note 7); Brief for Professors of Linguistics and English Dennis E. Baron et al. as Amici Curiae in Support of Petitioners at 26, *Heller*, 128 S. Ct. 2783 (No. 07-290) (citing *Defending Themselves*, *supra* note 7). Kozuskanich was also cited in an amicus brief for Mr. Heller, which cited some historical facts from Kozuskanich's 2005, Ph.D. thesis. Brief for the President *Pro Tempore* of the Senate of Pennsylvania, Joseph B. Scarnati, III, as Amicus Curiae in Support of Respondent at 7, 11, 17-19, *Heller*, 128 S. Ct. 2783 (No. 07-290) (citing Nathan Ross Kozuskanich, For the Security and Protection of the Community: The Frontier and the Makings of Pennsylvanian Constitutionalism 22-23, 29-30, 103-04, 106, 114-15, 117-18, 316 (2005) (unpublished Ph.D. dissertation, Ohio State University), *available at* http://etd.ohiolink.edu/send-pdf.cgi/Kozuskanich%20Nathan%20R.pdf?acc_num=osu1133196585).

[12] *See infra* pt. I.

[13] *See infra* pt. II.

[14] *See Originalism*, *supra* note 9, at 421 (citation omitted).

[15] *See Originalism*, *supra* note 9, at 421-22.

[16] *See infra* pt. II.B.

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firearms for personal defense or to carry arms ornamentally.[17] Moreover, a review of Kozuskanich's citations to writings by Quakers and other pacifists reveals that not one objected to bearing arms *only* in the militia and several of his citations have nothing to do with Quaker arms.[18]

Finally, part III looks at some astonishing assertions made by Kozuskanich that cast doubt on the accuracy of his characterization of the work of other scholars.

## I. PENNSYLVANIA'S RIGHT TO BEAR ARMS CLAUSES

Kozuskanich accurately writes, "The importance of the Pennsylvania Constitution of 1776 to the modern gun debate would be difficult to overstate."[19] In fact, both the majority opinion[20] and Justice Stevens' dissent in *Heller* quote the Pennsylvania Constitution of 1776.[21] The Pennsylvania Constitution of 1776 was also cited in *United States v. Emerson*, a 2001 case in which the United States Court of Appeals for the Fifth Circuit recognized that the Second Amendment protects an individual right, not limited to the militia, of Americans to keep and bear arms.[22]

Pennsylvania adopted two state constitutions during the revolutionary period and the Early Republic: one in 1776 and one in 1790.[23] Both constitutions contain guarantees of a right to keep

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[17] *See, e.g.*, JESSAMYN WEST, THE QUAKER READER 17 (2d prtg. 1962). *See infra* text accompanying notes 201-03.

[18] *See infra* pt. II.A.

[19] *Defending Themselves*, *supra* note 7, at 1042 (discussing PA. CONST. of 1776).

[20] District of Columbia v. Heller, 128 S. Ct. 2783, 2802 (2008) (quoting PA. CONST. of 1776, art. XIII).

[21] *Id.* at 2825-26 (Stevens, J., dissenting) (quoting PA. CONST. of 1776, art. XIII & § 43).

[22] United States v. Emerson, 270 F.3d 203, 230 n.29, 260 (5th Cir. 2001) (quoting PA. CONST. of 1776, art. XIII); *see also Defending Themselves*, *supra* note 7, at 1042-43 (discussing *Emerson*, 270 F.3d at 260; PA. CONST. of 1776) (criticizing the *Emerson* court's use of the Pennsylvania Constitution of 1776).

[23] *See* WAYLAND F. DUNAWAY, A HISTORY OF PENNSYLVANIA 191-92 (2d ed. 1948) (discussing PA. CONST. of 1790; PA. CONST. of 1776).

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and bear arms, with slightly different language.[24] The Pennsylvania Constitution of 1776 declares "[t]hat the people have a right to bear arms for the defence of themselves and the state."[25] The Pennsylvania Constitution of 1790 affirms "[t]hat the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned."[26]

There are two obvious differences, one significant and one stylistic. The first difference is that the Pennsylvania Constitution of 1790 limits the right to bear arms to *citizens*[27]–probably because of the experiences of the American Revolution, when Pennsylvania, like other colonies, severely limited the civil rights of people who refused to swear an oath of allegiance to the revolutionary government.[28] The second difference is the addition of the emphatic "shall not be questioned."[29]

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[24] PA. CONST. of 1790, art. IX, § 21; PA. CONST. of 1776, art. XIII.

[25] PA. CONST. of 1776, art. XIII.

[26] PA. CONST. of 1790, art. IX, § 21.

[27] *Id.*

[28] *See* HOWARD WIEGNER KRIEBEL, THE SCHWENKFELDERS IN PENNSYLVANIA: A HISTORICAL SKETCH 154-55 (1904) (discussing Test Act of 1777, ch. DCCLVI, 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 110, 112-13 (James T. Mitchell & Henry Flanders eds., 1903) [hereinafter Test Act]). Pursuant to the Test Act of 1777, people refusing to swear allegiance were "incapable of holding any office or place of trust in this state, serving on juries, suing for any debts, electing or being elected, buying, selling or transferring any lands, tenements or hereditaments, and shall be disarmed by the lieutenant or sub-lieutenants of the city or counties respectively." Test Act, *supra.*

One might think that the limitation of the right to bear arms to citizens featured in the Pennsylvania Constitution of 1790 was partly related to the fact that Pennsylvania had begun providing African Americans with limited rights, thereby creating a large, newly freed African American population that the white majority might not trust with arms. *See* PA. CONST. of 1790, art. III; *see also* CLAYTON E. CRAMER, BLACK DEMOGRAPHIC DATA, 1790-1860: A SOURCEBOOK 12-13, 108 (1997). However, it appears that the Pennsylvania Constitution of 1790 did not aim to make it possible to deprive ex-slaves of ordinary rights. For example, in spite of considerable opposition to citizenship for free African Americans, the constitution appears to have intentionally granted the vote to free African Americans. W.E. BURGHARDT DUBOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY 369-70 (Benjamin Blom, Inc. 1967) (1899) (quoting PA. CONST. of 1790, art. III, § 1; 3 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE

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The language in both constitutions, while not identical to the Second Amendment, is similar enough that a serious attempt to understand the Second Amendment should at least consider the original public meaning of the arms guarantee in the Pennsylvania constitutions.[30] This is especially so because the Antifederalist minority at the Pennsylvania Ratifying Convention for the United States Constitution urged Congress to add a Bill of Rights[31]–and one part of that request appears to be an ancestor of the Second Amendment:

> That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: and that the military shall be kept under strict subordination to and be governed by the civil powers.[32]

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AMENDMENTS TO THE CONSTITUTION 89 (Harrisburg, Pa., Packer, Barrett, & Parke 1838) [hereinafter PROCEEDINGS AND DEBATES]) (discussing the comments of Albert Gallatin, at the 1837 Constitutional Convention, who said the convention that framed the Pennsylvania Constitution of 1790 had intentionally struck out the word "white"). In spite of considerable opposition, including mob action in Philadelphia and legal challenges in 1836, African Americans did vote in Pennsylvania until the adoption of a new constitution in 1838. *Id.* at 368-72; *see also* 5 PROCEEDINGS AND DEBATES, *supra*, at 414 (containing Delegate Sterigere's description of how African Americans voting in Bucks County "had come within twelve votes . . . of electing their member of congress").

[29] PA. CONST. of 1790, art. IX, § 21.

[30] *See* U.S. CONST. amend. II; PA. CONST. of 1790, art. IX, § 21; PA. CONST. of 1776, art. XIII.

[31] 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 441 (Merrill Jensen ed., 1976). *See generally* Raymond Walters, Jr., *The Origins of the Jeffersonian Party in Pennsylvania*, 66 PA. MAG. HIST. & BIOGRAPHY 440, 442 (1942).

[32] *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, *in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE

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The use of "right to bear arms for the defence of themselves and state," so similar to the 1776 constitutional provision, indicates that the Antifederalist minority considered the existing state guarantee to be related to its request for a federal amendment.[33] Significantly, the request included not only the purpose phrase adapted from the state constitution, "for the defence of themselves and their state," but also "for the purpose of killing game," an obvious usage of "bear arms" to encompass the carrying of guns for individual, nonmilitia uses.[34]

### *A. Kozuskanich's Claim: The 1776 Provision Was a Collective Duty*

In his *Rutgers Law Journal* article, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, Kozuskanich argues that the "bear arms" provision in the Pennsylvania Constitution of 1776 did not protect a broad individual right:

> The language of the Pennsylvania Constitution fits neither the modern individual rights nor the collective rights models that have dominated modern Second Amendment scholarship. In every sense, the 1776 Pennsylvania Declaration of Rights affirmed the right to bear arms as part of civic duty to the community. Although the plain sense of the word "themselves" would seem to suggest a more collective understanding, modern scholarship has projected back onto this text the issues at the root of the modern debate over gun control and gun rights. . . . Thus, [the drafters of the Pennsylvania Constitution of 1776] demanded militia service from all citizens and recognized the right of local communities to defend themselves.[35]

Kozuskanich's article has one virtue and three serious flaws. The virtue is that he provides a detailed, well-written history of the

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CONSTITUTION, PUBLIC AND PRIVATE 13, 19 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter *Reasons of Dissent*].

[33] *See id.*; *see also* PA. CONST. of 1776, art. XIII.

[34] *Reasons of Dissent*, *supra* note 32, at 19.

[35] *Defending Themselves*, *supra* note 7, at 1069-70 (discussing PA. CONST. of 1776, art. XIII).

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political struggle involving the militia that took place in the decades leading up to the Revolution.[36] Since the founding of the colony, Quakers had control over Pennsylvania's government.[37] Alone among the thirteen colonies, Pennsylvania had no militia law,[38] and the government's relations with the Native Americans were generally peaceful.[39] By the 1740s, however, a large non-Quaker population in western Pennsylvania was engaged in frequent violent conflicts with the Native Americans, and they wanted Pennsylvania to have a militia.[40] In spite of having no formal state militia law until 1777, Pennsylvania did have militias

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[36] *See Defending Themselves*, *supra* note 7, at 1047-61 (describing these political struggles up until the American Revolution).

[37] DUNAWAY, *supra* note 23, at 105 ("[Quakers] completely . . . dominated the assembly up to the time of the French and Indian War."). "Quaker" was originally an epithet "used to describe Friends" by enemies of the sect's English founder, George Fox. MARGERY POST ABBOTT ET AL., HISTORICAL DICTIONARY OF THE FRIENDS (QUAKERS) 233 (2003). The term may have referred to the way Fox's followers "trembled at the power of God." *Id.* The formal name is the "Religious Society of Friends," but the Friends eventually turned the word "Quaker" into a positive description of themselves. *Id.* at 234.

[38] *See Defending Themselves*, *supra* note 7, at 1047-48. The Pennsylvania legislature did pass two militia statutes before the Revolution. Act of Nov. 25, 1755, ch. CCCCV, 5 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 197, 197-201 (James T. Mitchell & Henry Flanders eds., Harrisburg, Pa., Wm. Stanley Ray 1898) [hereinafter Act of Nov. 25, 1755]; Act for Forming and Regulating the Militia of the Province of Pennsylvania, app. XXI, 5 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 609, 609-35 (James T. Mitchell & Henry Flanders eds., Harrisburg, Pa., Wm. Stanley Ray 1898) [hereinafter Act for Forming and Regulating]. The first, in 1756, was vetoed by the British government, presumably because it was voluntary, lacked sufficient provision for discipline, and did not require conscientious objectors to pay for a substitute. *See* Act of Nov. 25, 1755, *supra*. In spite of appearing in *The Statutes at Large of Pennsylvania*, the second Act was never signed into law. *See* Act for Forming and Regulating, *supra*. Then, in 1777, an Act was passed to regulate the revolutionary militia of the commonwealth. Act of Mar. 17, 1777, ch. DCCL, 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 75, 75-94 (James T. Mitchell & Henry Flanders eds., 1903).

[39] *See* SYLVESTER K. STEVENS, PENNSYLVANIA: BIRTHPLACE OF A NATION 34-36 (1964) (describing William Penn's relationship with the Native Americans).

[40] *See Defending Themselves*, *supra* note 7, at 1047-48 (citations omitted); *see also* GORDON S. WOOD, THE AMERICANIZATION OF BENJAMIN FRANKLIN 55 (2004).

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organized by local governments and by influential figures, such as Benjamin Franklin.[41]

The prospect of a militia was not necessarily objectionable to all the members of nominally pacifist denominations.[42] For example, Benjamin Franklin related that when he organized a militia at the start of the French and Indian War he marched to Bethlehem, in the heart of the Moravian (United Brethren) community, after Gnadenhut, a Moravian village close to Bethlehem, had recently suffered a massacre.[43] Franklin wrote:

> I was surprized to find [Bethlehem] in so good a Posture of Defence. . . . In Conversation with Bishop Spangenberg, I mention'd this my Surprize; for knowing that they had obtain'd an Act of Parliament exempting them from military Duties in the Colonies, I had suppos'd they were conscienciously scrupulous of bearing Arms. He answer'd me, "That it was not one of their establish'd Princples; but that at the time of their

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[41] *See* BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 152-55 (New York, American Book Co. 1896) (1791) (describing how he organized the militia in spite of proprietary objections at the start of the French and Indian War); WOOD, *supra* note 40, at 55; *see also* 2 PENNSYLVANIA ARCHIVES: 5TH SERIES 482 (Thomas Lynch Montgomery ed., 1906) [hereinafter PENNSYLVANIA ARCHIVES] (listing Jack Andrew of Chester County, enlisted in the Continental Army from "Capt. Wallis' company of militia at Fort Lee, in 1776"); 5 PENNSYLVANIA ARCHIVES, *supra*, at 56-62 (listing various orders and payments for the "militia" of Bedford County); 6 PENNSYLVANIA ARCHIVES, *supra*, at 317 (listing "a muster roll of a detachment of part of Capt. Jas. McConnels [sic] company of Cumberland malitia [sic]," dated December 8, 1776 (emphasis omitted)); 7 PENNSYLVANIA ARCHIVES, *supra*, at 15 (listing accounts of payments to "the wives and children of such militia men" of Lancaster County in 1776 (emphasis omitted)); 10 PENNSYLVANIA ARCHIVES: 1ST SERIES 394 (Samuel Hazard ed., Philadelphia, Joseph Severns & Co. 1854) (reprinting a letter written by a militia man that stated, "Upon examining the Copies of muster Rolls in my possession, the earliest date I find is the 12th of August 1776, when I mustered some of the first Company's of ye Militia").

[42] *See* BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 230-31 (Leonard W. Labaree et al. eds., 2d ed., Yale Univ. Press 1964) (1791) [hereinafter FRANKLIN 2].

[Editors' Note: This version is very similar to, but nonetheless distinct from, the American Book Co. version of Benjamin Franklin's autobiography. *Compare* FRANKLIN, *supra* note 41, *with* FRANKLIN 2, *supra*.]

[43] *Id.*

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> obtaining that Act, it was thought to be a Principle with many of their People. On this Occasion, however, they to their Surprize found it adopted by but a few." It seems that they were either deceiv'd in themselves, or deceiv'd the Parliament. But Common Sense aided by present Danger, will sometimes be too strong for whimsicall Opinions.[44]

Eventually, the Quakers lost control of Pennsylvania's government and the new government organized the militia for defense against the Native Americans and then against the British.[45] As Kozuskanich explains, the nonpacifist majority of Pennsylvanians in 1776 certainly thought that bearing arms in the militia was a very important civic duty.[46]

From this useful historical exposition, Kozuskanich then announces that "[b]earing arms was a privilege, a right, *and* a duty."[47] As a general matter, the conclusion is accurate, but Kozuskanich's elaboration of the conclusion suffers from three key defects, which we detail in the remainder of this section. First, it assumes that rights and duties must be mutually exclusive.[48] Second, it reads the three clauses of article XIII disharmoniously, so that the latter two clauses negate the plain language of the first clause.[49] Third, other provisions in the Pennsylvania Constitution of 1776 flatly contradict it.[50]

Kozuskanich's theory is also contrary to subsequent legal history, which we will address in sections B and C of part I.[51] For the moment, we confine the discussion to 1776.

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[44] FRANKLIN 2, *supra* note 42, at 231-32.

[45] *See Originalism*, *supra* note 9, at 440-41 (citations omitted).

[46] *Id.* at 440 (citations omitted) ("The Paxtonians believed that every man who enjoyed the protections of government should contribute to the common defense, and it was this vision that became the reality in the 1776 Constitution.").

[47] *See id.* at 433 (emphasis added).

[48] *See infra* pt. I.A.1.

[49] *See infra* pt. I.A.2.

[50] *See infra* pt. I.A.3.

[51] *See infra* pt. I.B.-C.

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### 1. Rights and Duties

Rights and duties can overlap. For example, it would be consistent for a constitution to say that (1) individuals have the right to earn income from any honest trade, profession, or calling, and to spend that income as they see fit; and that (2) individuals have the duty to pay income taxes to the government so that the government may protect the community. These two provisions would be consistent because earning and spending money are broad rights and paying taxes, which is one aspect of spending money, is a duty. Regarding our hypothetical constitution, if we knew that for the three decades before the enactment of the constitution there had been a major political controversy over whether the state government should impose an income tax, we would have a better understanding of clause number two, which affirms the duty to pay income taxes. The fact that there was a controversy over the income tax does not negate the individual right to earn and spend income, which is guaranteed by clause one.

Now consider a similar constitutional structure for the rights and duties of arms: (1) individuals have the right to possess and carry arms for all legitimate purposes, including personal self-defense, hunting, and community defense, which the government must not violate; and (2) individuals have a duty to defend the community and the government itself, and to use their arms to do so. In this example, clause number two does not negate or limit clause number one. Most state constitutions follow the above model, which protects an individual right to arms *and* affirms the government's power to organize the militia and to compel service in the militia.[52]

Returning to the previous example, suppose that someone refuses to do his or her duty. There is a war going on and he or she does not pay the legally enacted income taxes. In this instance, the government would come and take his or her money. Does the government's taking of his or her money for wartime taxes prove that he or she has no individual right to earn and spend money? Of course not. The taking simply shows that if a person fails to

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[52] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-205 (2006) (citations omitted) (reviewing constitutional firearms provisions by state, both historical and present).

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perform his or her duty to pay taxes, he or she may lose some of the fruits of the exercise of his or her right to earn and spend income.

Similarly, in Pennsylvania in 1776, "county level committees of safety" organized the local militias.[53] In Bucks County, individuals that refused to serve in the militia "were required to submit their guns to the committee [of safety]" for distribution to militia volunteers who had no guns.[54]

The exigencies of the American Revolution meant that many actions were taken that, in the cool of peace, would not have been considered acceptable–such as Virginia's passage of a bill of attainder against Josiah Philips and his followers in 1778.[55] In the same vein, Pennsylvania's Test Act took away the rights to transfer property, to vote, or to sue for debts owed if a person refused to swear allegiance to the revolutionary government.[56] Yet the Test Act's deprivation of the rights of some people does not prove that loyal Pennsylvanians lacked the broad constitutional rights to own property, to vote, or to sue.[57] The Test Act explained that "allegiance and protection are reciprocal, and those who will not bear the former are not nor ought not to be entitled to the benefits of the latter."[58] The right to arms, like our hypothetical right to income or the very real rights abridged by the Test Act, was not absolute; if a person refused to perform civic duties, he or she might lose some of the benefit of his or her individual rights.[59]

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[53] *Defending Themselves*, *supra* note 7, at 1061.

[54] *Id.* (quoting *In Committee, Bucks County, July 10, 1776*, PA. GAZETTE, July 17, 1776, at 294).

[55] *See* H.J. ECKENRODE, THE REVOLUTION IN VIRGINIA 190-94 (1916). While at least one of Philips' followers was executed immediately upon capture, the passage of time allowed Virginians to reconsider the dangers of using bills of attainder, and by the time Philips was captured, he was granted a trial. *See id.* at 192-93. Nonetheless, the attainder was still such a shameful affair that members of Virginia's convention to ratify the United States Constitution traded barbs about it in 1788. *Id.* at 193-94.

[56] KRIEBEL, *supra* note 28, at 154-55 (discussing Test Act, *supra* note 28, at 110, 112-13).

[57] *See* Test Act, *supra* note 28, at 110, 111.

[58] Test Act, *supra* note 28, at 110, 111.

[59] *See id.* at 112-13.

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### 2. The Text of Article XIII

Article XIII of the Pennsylvania Constitution of 1776 states:

> 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.[60]

Article XIII thus contains three clauses: the right to bear arms, the prohibition on standing armies in peacetime, and civil control of the military.[61] Kozuskanich argues that the military control clauses of article XIII prove that the right to bear arms clause is not really a general right, but is a militia-only duty affirming a collective right.[62] His conclusion outruns his textual support. In his *Rutgers Law Journal* article, Kozuskanich's argument is based on an analysis of article VIII[63]–which is, without question, a military duty provision.[64] Kozuskanich provides much discussion of articles III, V, and VIII,[65] but he simply asserts, without evidence, that article XIII–the clause that actually contains a guarantee of a right to bear arms–merely "guaranteed the right to bear arms for community safety."[66] His *University of Pennsylvania Journal of*

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[60] PA. CONST. of 1776, art. XIII (emphasis added).

[61] *Id.*

[62] *Defending Themselves*, *supra* note 7, at 1064-66 (citing PA. CONST. of 1776, arts. VIII, XIII; 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); *An Essay of a Declaration of Rights, Brought in by the Committee Appointed for that Purpose, and Now Under the Consideration of the Convention of the State of Pennsylvania*, 22 BENJAMIN FRANKLIN PAPERS 529 (Philadelphia, Library Co. of Phila. 1776), *available at* http://franklinpapers.org/franklin/framedVolumes.jsp (click "Volume 22" hyperlink, then click "Revisions of the Pennsylvania Declaration of Rights")).

[63] *Id.* (discussing PA. CONST. of 1776, art. VIII).

[64] PA. CONST. of 1776, art. VIII.

[65] *Defending Themselves*, *supra* note 7, at 1063-64 (discussing PA. CONST. of 1776, arts. I, III, IV, V, VIII).

[66] *Id.* at 1064 (quoting PA. CONST. of 1776, art. XIII).

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*Constitutional Law* article reasserts the same claim.[67] But while making assertions about the definitive meaning of article XIII, he fails to seriously discuss article XIII's text or the text of closely analogous provisions in the Pennsylvania Constitution of 1776.[68] Article XIII addresses the distribution of the power of force in a free society.[69] Clause one ensures that the government will not have a monopoly of force and further ensures that the lawful government can be forcefully defended and protected by the people as a whole.[70] Clause two limits the *government's* ability to create a separate power of force.[71] Clause three ensures that, to the limited extent that government can have its own power of force, power will be controlled by the people, acting through their civil representatives.[72]

One can imagine a similar clause addressing the power of communication: "That the people have a right of freedom of speech and writing; and as government propaganda is dangerous to liberty, the government may not own any newspapers or television stations except during wartime; and in wartime, any government-owned newspaper or television station must be managed by civilians and not by the military."

For a nonhypothetical example, consider how the First Amendment addresses the power of religion: it protects the individual right of free exercise of religion *and* it prohibits the government from creating its own religious institutions.[73]

The Establishment Clause should not be construed as a limit on the Free Exercise Clause.[74] For example, a key purpose of the Establishment Clause is to prevent the federal government from making one religious denomination into the official national

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[67] *Originalism*, *supra* note 9, at 440 (citing PA. CONST. of 1776, art. XIII) ("Clause XIII guaranteed the right to bear arms for community safety.").

[68] *See id.* at 440-41; *Defending Themselves*, *supra* note 7, at 1064.

[69] PA. CONST. of 1776, art. XIII.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] U.S. CONST. amend. I.

[74] *See e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1946) (describing the Establishment Clause and the Free Exercise Clause as "complementary clauses").

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government church.[75] Yet the Free Exercise Clause is not limited to the ability to freely choose one's own denomination; for example, it includes the general right to practice religion in the home.[76]

As interpretation of the clause has developed, the Establishment Clause also forbids various forms of government-led religious activity or support for religion, such as school prayer or some forms of funding for religious schools.[77] Again, the Free Exercise Clause protects activities which are entirely unrelated to the Establishment Clause concerns of government institutions or funding.

Similarly, article XIII, clause one, protects the right of the people to bear arms, and the right is in no way limited by clauses two and three, which place controls on the government's armed institutions.[78]

### 3. The Rest of the Pennsylvania Constitutions

According to Kozuskanich, "to interpret 'defense of themselves' as a guarantee of an individual right to bear arms is bad history and lazy originalism."[79] Kozuskanich, however, has not followed proper scholarly protocol; namely, when one makes claims about the meaning of a phrase in a document, he or she should examine the use of that phrase, or very similar phrases, elsewhere in the same document.[80]

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[75] *See Everson*, 330 U.S. at 15.

[76] *See, e.g.*, Abbo v. Briskin, 660 So. 2d 1157, 1160-61 (Fla. Dist. Ct. App. 1995) (determining that, when a court makes child custody arrangements in a divorce, the court may not interfere with a parent's free exercise of his or her religion while the child is present in the home).

[77] *See* Lee v. Weisman, 505 U.S. 577, 599 (1991); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1972) (quoting Lemon v. Kurtzman, 403 U.S. 602, 617-19 (1970)).

[78] *See* PA. CONST. of 1776, art. XIII.

[79] *Defending Themselves*, *supra* note 7, at 1070.

[80] *See, e.g.*, 1 PA. CONS. STAT. § 1921 (1975) (detailing the steps of statutory interpretation, which require contextual analysis when the meaning of a phrase is in question).

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The Pennsylvania Constitution of 1776 repeatedly uses the phrase "[t]hat the people have a right" in order to affirm and protect individual rights.[81] Article XIII, for example, states:

> 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.[82]

The exact phrase "[t]hat the people have a right" is used three other times in this constitution, each time in an article that unquestionably guarantees individual, multipurpose rights:

> X. *That the people have a right* to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.
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> . . . .
>
> XII. *That the people have a right* to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.
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> . . . .
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> XVI. *That the people have a right* to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.[83]

It is implausible that the drafters of the Pennsylvania Constitution of 1776 used "[t]hat the people have a right" to refer

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[81] PA. CONST. of 1776, arts. X, XII, XIII, XVI.
[82] *Id.* art. XIII (emphasis added).
[83] *Id.* arts. X, XII, XVI (emphasis added).

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to general individual rights with respect to the right to freedom from unreasonable search and seizure, the right of free speech and press, and the right to peaceable assembly–and then, for no apparent reason, used the same phrase to refer only to a collective duty couched in the language of a right.[84] Notably, the "rights" provisions are all placed quite close to each other.[85]

What language did the Framers use when they wanted to affirm a personal duty? They used words such as "bound," "yield his personal service," and "compelled":

> 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: 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 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.[86]

Article VIII begins with a right ("to be protected" by government) and then affirms duties that are necessary for the government to be able to effectuate this right: the duty to pay taxes ("contribute his proportion towards the expence") and the duty to work directly for the government as needed ("yield his personal service when necessary").[87] The article obviously contemplates compulsory service in the militia, since it includes a clause for conscientious objectors.[88]

As Kozuskanich correctly argues, the Pennsylvanians of 1776 did believe that the duty to serve in the militia was so important

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[84] *See* PA. CONST. of 1776, arts. X, XII, XVI.

[85] *See id.*

[86] *Id.* art. VIII (emphasis added).

[87] *Id.*

[88] *Id.* ("Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent . . . .").

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that it needed to be constitutionalized.[89] They did so in article VIII, which expresses what members of society are "bound" to do.[90]

Kozuskanich's theory would require the reader to believe that, after affirming the duty of militia service in article VIII, the Framers of the Pennsylvania constitutions decided that they had to say it again in article XIII–and that the Framers inexplicably decided to use the words "[t]hat the people have a right"[91] when they really meant that the people had a *duty*. Kozuskanich's theory requires one to believe that these same Framers thrice used "[t]hat the people have a right"[92] when they meant that the people had *rights* and used the very same words to say that the people had *duties*.

### *B. State Courts and the Pennsylvania Phraseology*

There are no contemporary decisions of Pennsylvania courts concerning the meaning of article XIII or of the similar provision in the Pennsylvania Constitution of 1790. However, because constitutional conventions borrowed liberally from existing models, the Pennsylvania phrasing of a right to bear arms "for the defence of themselves and the state" (or slight variants) appears in ten other state constitutions ratified during the American Revolution and the Early Republic.[93] In some cases, the constitutions have even more explicitly individual language, such as the Mississippi Constitution of 1817, which declares that "[e]very citizen has a right to bear arms, in defence of himself and

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[89] *See Defending Themselves*, *supra* note 7, at 1044-45 (citing David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms"*, 22 LAW & HIST. REV. 119 (2004); PA. CONST. of 1776, pmbl.).

[90] PA. CONST. of 1776, art. VIII.

[91] *Id.* arts. VIII, XIII.

[92] *Id.* arts. X, XII, XIII, XVI.

[93] *See* IND. CONST. of 1816, art. I, § 20; KY. CONST. of 1799, art. X, § 23; KY. CONST. of 1792, art. XII, § 23; MISS. CONST. of 1832, art. I, § 23; MISS. CONST. of 1817, art. I, § 23; MO. CONST. of 1820, art. XIII, § 3; OHIO CONST. of 1802, art. VIII, § 20; VT. CONST. of 1793, ch. I, art. 16; VT. CONST. of 1786, ch. I, art. XVIII (displaying a comma after "arms"); VT. CONST. of 1777, ch. I, art. XV.

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the State."[94] Unlike using "the people," use of the phrase "[e]very citizen" leaves no question as to the individual nature of the right.[95]

State supreme courts provide evidence of how these phrases, copied from the Pennsylvania constitutions, were understood in other states.[96] There are three antebellum cases interpreting the meaning of these clauses.[97] In two of these decisions, from Kentucky and Missouri, the courts plainly recognized these clauses as protecting an individual right.[98] In Indiana, the decision upholding a ban on carrying *concealed* deadly weapons neither affirmed nor denied the individual nature of the right.[99] Were we to include another variant of the Pennsylvania phrasing, " 'in defence of *himself* and the State,' " the number of decisions would be larger–and none of the decisions considered the phrase to be about a "collective right" or a duty.[100]

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[94] MISS. CONST. of 1817, art. I, § 23.

[95] *See id.*

[96] *See* State v. Mitchell, 3 Blackf. 229 (Ind. 1833) (discussing IND. CONST. of 1816, art. I, § 20); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 90-93 (1822) (discussing KY. CONST. of 1799, art. X, § 23); State v. Shoultz, 23 Mo. 128, 155 (1857) (discussing MO. CONST. of 1820, art. XIII, § 3).

[97] *Mitchell*, 3 Blackf. 229 (discussing IND. CONST. of 1816, art. I, § 20); *Bliss*, 12 Ky. (2 Litt.) at 90-93 (discussing KY. CONST. of 1799, art. X, § 23); *Shoultz*, 23 Mo. at 155 (discussing MO. CONST. of 1820, art. XIII, § 3).

[98] *Bliss*, 12 Ky. (2 Litt.) at 90-93 (discussing KY. CONST. of 1799, art. X, § 23) (striking down a ban on carrying concealed weapons as contrary to the Kentucky Constitution's guarantee of "the right of the citizens to bear arms in defense of themselves and the state"); *Shoultz*, 23 Mo. at 155 (discussing MO. CONST. of 1820, art. XIII, § 3).

> As to the instruction in regard to the constitution of Missouri, that the people's right to bear arms in defence of themselves can not be questioned, and that no presumption ought to arise in the minds of the jury from the defendant's going armed with a pistol, it could not possibly aid the jury in their deliberations. This right is known to every juryman in our state, but nevertheless the right to bear [arms] does not sanction an unlawful use of arms.

*Shoultz*, 23 Mo. at 155 (discussing MO. CONST. of 1820, art. XIII, § 3).

[99] *See Mitchell*, 3 Blackf. 229 (discussing IND. CONST. of 1816, art. I, § 20) (holding that a person may constitutionally be prohibited from carrying a concealed weapon).

[100] *See* Cramer & Olson, *supra* note 10, at 511, 520-22 (citing ALA. CONST. of 1918, art I, § 23; CONN. CONST., art I, § 17; MICH. CONST. of 1850, art I, § 7; MICH. CONST. of 1835, art I, § 13; MISS. CONST. of 1817, art. I, § 23)

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It is conceivable that the courts of other states were just mistaken about what this phrase meant when it was copied from the Pennsylvania constitutions. It is also possible that a collective duty in Pennsylvania changed into a personal right as it was adopted by other American states. Still, if one wants to believe that Kozuskanich is correct, one must simultaneously believe three unlikely things: the legal meaning of the phrase changed between 1776 and 1822 (the date of the first of the above decisions); the Framers of the Pennsylvania Constitution of 1776 included two clauses with very different language but with the same meaning; *and* the Framers repeatedly used "that the people have a right" to say that individuals have rights, but only used this phrase to say that individuals have a militia obligation.

Whatever possibility there is that Kozuskanich might be correct is eliminated by contemporaneous evidence from Pennsylvania itself.

### *C. How Did Contemporaries Understand the 1790 Right to Keep and Bear Arms Provision?*

Other than the Pennsylvania Ratifying Convention of the United States Constitution,[101] there is little direct evidence of how contemporaries understood the "bear arms" phrase of the Pennsylvania Constitution of 1776 and of the Pennsylvania Constitution of 1790–but the evidence that we have is the gold standard. It comes from lectures by James Wilson.[102]

Who was James Wilson? He was the founder of the University of Pennsylvania Law School and was a law professor there.[103] He represented Pennsylvania at the Continental Congress during the

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(discussing antebellum case law and the constitutions of Alabama, Connecticut, Michigan, and Mississippi).

[101] *See supra* pt. I.

[102] 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D., at ii (Philadelphia, Lorenzo Press 1804); *see also* James Wilson (1742-1798), University of Pennsylvania Archives, http://www.archives.upenn.edu/people/1700s/wilson_jas.html (last visited Mar. 15, 2010) [hereinafter Univ. of Pa. Archives].

[103] 1 WILSON, *supra* note 102, at ii; Univ. of Pa. Archives, *supra* note 102.

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American Revolution[104] and signed the Declaration of Independence.[105] When George Washington wanted a law tutor for his nephew, Bushrod Washington (future Associate Justice of the Supreme Court of the United States), he hired James Wilson–in spite of the fact that Wilson was more expensive "than . . . any other lawyer."[106] Wilson was a member of the Philadelphia Convention that drafted the United States Constitution.[107] He was one of the original Associate Justices of the Supreme Court of the United States, appointed by George Washington (and seriously considered for Chief Justice),[108] where he served until his death in 1798.[109] He was also a drafter of the Pennsylvania Constitution of 1790.[110] Wilson's words deserve much weight on the subject of law in early America. Regarding self-defense, he explained:

> With regard to the first, it is the great natural law of self preservation, which, as we have seen, cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognised in the constitution of Pennsylvania. "The right of the citizens to bear arms in the defence of themselves shall not be questioned." This is one of our many renewals of the Saxon regulations. "They were bound," says Mr. Selden, "to keep arms for the preservation of the kingdom, and of their own persons."[111]

Wilson clearly recognized that the right to bear arms provision in the Pennsylvania Constitution of 1790 protected an individual

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[104] BURTON ALVA KONKLE, JAMES WILSON AND THE CONSTITUTION 18 (1907) (describing how Wilson was removed from the Pennsylvania delegation but restored after George Washington demanded that "members of the Assembly . . . return him").

[105] THE DECLARATION OF INDEPENDENCE (U.S. 1776); *see also* Hampton L. Carson, *James Wilson and James Iredell: A Parallel and a Contrast*, 45 PA. MAG. HIST. & BIOGRAPHY 1, 1-2 (1921).

[106] KONKLE, *supra* note 104, at 21; *see also* HORACE BINNEY, BUSHROD WASHINGTON 1 (Philadelphia, C. Sherman & Son 1858).

[107] *See* KONKLE, *supra* note 104, at 25-28.

[108] *Id.* at 31-32.

[109] Carson, *supra* note 105, at 2.

[110] KONKLE, *supra* note 104, at 32.

[111] 3 WILSON, *supra* note 102, at 84 (discussing PA. CONST. of 1790, art. IX, § 21).

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right for the purposes of collective defense and personal self-defense.[112] The decision of the Supreme Court of the United States in *Heller* quoted Wilson precisely on this point.[113]

However, Kozuskanich argues:

> While this might be interpreted as an endorsement of an individual right, it seems unlikely that the convention, under Wilson's leadership, would have employed two distinctly different definitions of the term "bear arms." Given the dominant usage of "bear arms" and "defense of themselves" in Pennsylvania, it is not unreasonable to conclude that Wilson considered community militia mobilization as an essential guarantor of personal safety.
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> Such a conclusion is even more plausible when we consider the way that Americans employed the phrase "self defense" during the Founding Era. While some pamphleteers acknowledged that murder was justified in cases of "necessary Self-Defence," others considered self defense to be part of community and militia mobilization against threats. In fact, in his support of a strong federal militia during the Constitutional Convention, Wilson himself argued that since "[t]he power of self-defence had been urged as necessary for the State Governments—It was equally necessary for the General Government."[114]

Kozuskanich's argument invents a false dichotomy. 'Self-defense' is a term used for personal defense *and* for community defense *and* for national defense. The view of the Founders, and of many of their predecessors in Western intellectual history, was that self-defense against tyrants was simply a broader application of self-defense against criminals.[115] Governments and individuals

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[112] *See* 3 WILSON, *supra* note 102, at 84 (discussing PA. CONST. of 1790, art. IX, § 21).

[113] District of Columbia v. Heller, 128 S. Ct. 2783, 2793 (2008) (quoting 2 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 1142 & n.x (Kermit L. Hall & Mark David Hall eds., 2007)).

[114] *Originalism*, *supra* note 9, at 443 (citations omitted).

[115] *See, e.g.*, Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 93 (1992) ("Moreover, arms were deemed to protect against every species of criminal usurpation, including

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could *both* engage in self-defense.[116] To acknowledge the former (collective, state government-led self-defense against a tyrannical invader) is not to negate the latter (personal self-defense against an individual community).

Wilson himself pointed out the harmony of personal and collective self-defense.[117] Connecting Pennsylvania's arms rights with the laws of Saxon England, Wilson quoted the great English legal historian, John Selden, as saying that the Saxon laws had required the English " 'to keep arms for the preservation of the kingdom, and of their own persons.' "[118] This was also quoted in *Heller*.[119]

As a fallback position, Kozuskanich asserts that other Pennsylvanians and constitutional delegates did not agree with Wilson.[120] For evidence, Kozuskanich describes an attempted murder trial:

> In 1799, Dr. James Reynolds stood trial for assault with intent to murder after he had tried to fend off a Federalist mob, angry about his opposition to the Alien and Sedition Acts, by brandishing a pistol. What is illustrative about this case is that neither the prosecution nor the defense considered Reynolds's possession or use of his gun to be a matter of constitutional law. If the individual right to bear arms was protected under the 1790 Pennsylvania Constitution, then why did Alexander Dallas, Reynolds's lawyer, fail to justify his client's actions under Article VI or Section XXI? It is also important to note that Reynolds was never considered to have borne arms, for the term never appears in the trial transcripts. Dallas argued that "there did exist a conspiracy to assassinate Dr. Reynolds," and that since there was "no law in Pennsylvania to prevent it; every man has a right to carry arms who apprehends himself to

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'political crime,' a phrase which the Founders would have understood in its most literal sense.").

[116] *See id.*

[117] 3 WILSON, *supra* note 102, at 84 (citation omitted).

[118] *Id.* (citation omitted).

[119] District of Columbia v. Heller, 128 S. Ct. 2783, 2792 n.7 (quoting 3 WILSON, *supra* note 102, at 84).

[120] *See Originalism*, *supra* note 9, at 445 ("But, even if Wilson did subscribe to an individual rights understanding of 'bear arms,' such an interpretation did not seem to have any currency in the Pennsylvania courts.").

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> be in danger." That right, however, came not from the state constitution but from "the law of nature and the law of reason," which allowed deadly force "if necassary [sic] to [one's] own safety." The prosecution disagreed, taking their cue from Blackstone and arguing, "The law says, if a man attack you by a sword, you have no right to kill him, till you have made every attempt to escape." 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."[121]

The obduracy here is apparent. The obvious reason that neither the prosecution nor the defense raised a constitutional issue was that Reynolds was not charged with any crime of owning or carrying the gun.[122] *American State Trials* reprinted transcripts of the case, which reports:

> There were two bills, presented to the Grand Jury, one of them against William Duane, James Reynolds, Robert Moore, and Samuel Cuming, for a riot and assault; there was a second count in the same indictment found on that bill, for riot only. The second indictment was against James Reynolds alone, for an assault upon James Gallagher, Jr., with an intent to kill.[123]

There was no Pennsylvania law against owning handguns or carrying them, so the legality of Reynolds's gun-carrying was not in dispute.[124] Instead, he was charged with riot and assault, and the case involved jury evaluation of Reynolds's use of the gun.[125] The

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[121] *Originalism*, *supra* note 9, at 445 (quoting WILLIAM DUANE, A REPORT OF THE EXTRAORDINARY TRANSACTIONS WHICH TOOK PLACE AT PHILADELPHIA, IN FEBRUARY 1799, at 32-33, 45 (Philadelphia, Office of the Aurora 1799); THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 305 (Harrisburg, Pa., John S. Weistling 1825) [hereinafter PROCEEDINGS]).

[122] *See* THE TRIAL OF WILLIAM DUANE, JAMES REYNOLDS, ROBERT MOORE, AND SAMUEL CUMING FOR RIOT, PHILADELPHIA, PENNSYLVANIA (1799), *reprinted in* 7 AMERICAN STATE TRIALS 676, 680 (John D. Lawson ed., 1917) [hereinafter TRIAL OF WILLIAM DUANE].

[123] *Id.*

[124] *See id.* at 680, 720.

[125] *Id.* at 680. TRIAL OF WILLIAM DUANE, *supra* note 122, at 680.

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jury seems to have sided with the defense on the riot charge because of inconsistencies in the testimony of eyewitnesses as to whether Dr. Reynolds's actions constituted violence, much less a riot.[126] That Dr. Reynolds was outnumbered by a mob when he drew his pistol may have caused the jury to find him innocent.[127]

The larger problem with Kozuskanich's carefully selected quotations from the trial is that Reynolds's defense attorney did not argue that " 'the law of nature and the law of reason' " were the basis for *carrying* a pistol.[128] The lawyer instead argued that natural law justified the use of the pistol in *self-defense*:

> I am here not to say he was right in producing a pistol, but I will say that he was not wrong. If a man is surrounded so that his strength is overpowered, he is justifiable in using this weapon, not to destroy life, but to hold it *in terrorem*, in aid of his physical strength. I will show that this is the positive language of the law, as well as of reason. I am willing to maintain that a man is justified in carrying arms to defend himself. Every assault is actionable, but there is no doubt that arms are to be used only when the blow cannot be avoided. If any man attempts to strike me, the law allows me to anticipate the blow. If I cannot prevent his making use of his strength, *the law of nature and the law of reason justify me*, not in applying to extremes, but if it becomes necessary to my safety, I am to make use of the weapon to prevent the blow, and even to take his life, if necessary to my own safety.[129]

Shortly thereafter, the defense attorney made it very clear that carrying deadly weapons was common, was recognized as legitimate, and was a right of the citizen.[130] In explaining the circumstances that caused Dr. Reynolds to be armed, the defense

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[126] TRIAL OF WILLIAM DUANE, *supra* note 122, at 705-06. Legally, a "riot" required at least three rioters, and eyewitnesses could not agree that three people were involved. *Id.* at 700.

[127] *Id.* at 717-20.

[128] *See id.* at 717; *see also Originalism*, *supra* note 9, at 445 (quoting DUANE, *supra* note 121, at 33).

[129] TRIAL OF WILLIAM DUANE, *supra* note 122, at 717 (emphasis added); *see also Originalism*, *supra* note 9, at 445 (quoting DUANE, *supra* note 121, at 33).

[130] *See* TRIAL OF WILLIAM DUANE, *supra* note 122, at 719-20.

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attorney argued that Dr. Reynolds had been warned of an assassination plot and had carried a pistol for that reason:

> What man would have hesitated to protect himself against a menace of that kind? I appeal to every man in court, I appeal to the Attorney General himself on this point. He carries a sword-cane, and so do I. There are many gentlemen in this country, who from the occasion of the times, and the combination of circumstances, also wear sword-canes. There were two periods when everyone wore weapons of defense from necessity. The first when the police was so defective that robberies were constant, and self-protection became necessary through the defects of the law. The second, when political fury rose to such a height, as in 1785-6, that it no longer became a question of defense against robbers, but against political opponents. The times are altered, or party violence has become less serious; we see, indeed, that the spirit of party yet preserves a disposition to assassination, in the threats against Dr. R.'s life, and that he at the present time has occasion to act on the defensive as everyone did at these periods. There is no danger to be apprehended from a man who carries a sword-cane or other weapon of defense. *There is no law in Pennsylvania to prevent it. Every man has a right to carry arms who apprehends himself to be in danger.* If every man has a right, was not this gentleman justifiable in putting arms in his pocket, when so special an occasion commanded him?[131]

Kozuskanich claims that the defense lawyer talked about the natural right of carrying a pistol as if it were distinct from the Pennsylvania constitutional right to bear arms.[132] However, the defense attorney at no point called carrying a pistol a 'natural right'; instead, he referred to the natural right of "*self-protection*."[133] Concerning *carrying* a pistol, Dr. Reynolds's attorney defended it in language entirely in accord with James Wilson's lectures: the

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[131] *See* TRIAL OF WILLIAM DUANE, *supra* note 122, at 719-20. (emphasis added).

[132] *Originalism*, *supra* note 9, at 445 (quoting DUANE, *supra* note 121, at 32-33, 45; PROCEEDINGS, *supra* note 121, at 305).

[133] TRIAL OF WILLIAM DUANE, *supra* note 122, at 719-20 (emphasis added).

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Pennsylvania constitutional right to arms is based on the natural right of self-defense.[134]

Kozuskanich's mixing of quotes misleads the reader into thinking that Reynolds's attorney had invoked the law of nature and the law of reason to justify carrying of a pistol when he did no such thing.[135] Kozuskanich's claim that "[t]he case clearly demonstrates that using a gun in self defense was legally different from bearing arms in 'defense of themselves and the state' "[136] is, therefore, incorrect.

## II. QUAKERS AND ARMS

According to Kozuskanich, "while pacifists had no issue with owning or carrying arms, they would not bear those arms in the militia."[137] There are two problems with Kozuskanich's claim. First, his cited evidence provides no support for it.[138] Second, members of pacifist denominations were much more diverse than Kozuskanich acknowledges.[139] Some pacifists refused even to wear arms ceremonially.[140]

### *A. Kozuskanich's Quaker Sources*

Kozuskanich cites page 16 of *A Catechism and Confession of Faith*,[141] which describes some Quakers who had refused to "bear

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[134] TRIAL OF WILLIAM DUANE, *supra* note 122, at 719-20; 3 WILSON, *supra* note 102, at 84 (discussing PA. CONST. of 1790, art. IX, § 21).

[135] *See Originalism*, *supra* note 9, at 445 (quoting DUANE, *supra* note 121, at 32-33, 45; PROCEEDINGS, *supra* note 121, at 305); TRIAL OF WILLIAM DUANE, *supra* note 122, at 719-20.

[136] *Originalism*, *supra* note 9, at 445 (quoting PROCEEDINGS, *supra* note 121, at 305).

[137] *Id.* at 421 (citations omitted).

[138] *See infra* pt. II.A.

[139] *See infra* pt. II.B.

[140] *See* SAMUEL M. JANNEY, THE LIFE OF WILLIAM PENN: WITH SELECTIONS FROM HIS CORRESPONDENCE AND AUTO-BIOGRAPHY 42-43 (Philadelphia, Hogan, Perkins & Co. 1852); WEST, *supra* note 17, at 17. *See infra* text accompanying notes 201-03.

[141] *Originalism*, *supra* note 9, at 421 n.39 (citing ROBERT BARCLAY, A CATECHISM AND CONFESSION OF FAITH 16 (10th ed., Philadelphia, Joseph Crukshank 1773)).

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Arms" in "Wars and Fightings."[142] It does not, however, indicate that the Quakers ever used guns in other circumstances.[143]

Another cite is to pages 9 and 10 of *Collection of Some Writings of the Most Noted of the People Called Quakers, in Their Times*.[144] It turns out that the cited Quaker was not someone who, in Kozuskanich's words, "had no issue with owning or carrying arms."[145] To the contrary, the Quaker considered himself forbidden to have anything to do with arms.[146] The Quaker told the Russian Tsar:

> I myself have worn a Sword, and other Arms, and knew how to use them: But when it pleased God to reveal in our Hearts the Life and Power of Jesus Christ, his Son, our Lord, who is the Prince of Righteousness and Peace, whose Commandment is Love, we were then reconciled unto God one unto another, unto our Enemies, and unto all Men; and he that Commandeth that we should love our Enemies, hath left us no right to fight and destroy, but to convert them.[147]

Kozuskanich seems to have missed the past tense of the Quaker's statement that he "*knew* how to use them" and in the following sentence, which established that Jesus "hath left [the Quaker] no right to fight and destroy."[148] Page 10 is even clearer:

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[142] BARCLAY, *supra* note 141, at 16.

[143] *Id.* The text states:

> And altho' these Testimonies of Christ and his Apostles are so clear against Wars and Fightings, yet our elder Brethren and some of us formerly, suffered much because we could not ourselves bear Arms, nor send others in our Places, nor pay for buying of Drums and other military Attire, as also for not observing those Days which were appointed to crave a blessing for Success to the Arms of the Nation where we lived, or to give Thanks for the Victories acquired by the Effusion of much Blood.

*Id.*

[144] *Originalism*, *supra* note 9, at 421 n.39 (citing COLLECTION OF SOME WRITINGS OF THE MOST NOTED OF THE PEOPLE CALLED QUAKERS, IN THEIR TIMES 9-10 (Philadelphia, W. & T. Bradford 1767) [hereinafter COLLECTION]).

[145] *See id.* (citing COLLECTION, *supra* note 144, at 9-10).

[146] *See* COLLECTION, *supra* note 144, at 9.

[147] *Id.*

[148] *Id.* (emphasis added); *see Originalism*, *supra* note 9, at 421.

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"And though we are prohibited Arms, and fighting in Person, as inconsistent (we think) with the Rules of the Gospel of Christ."[149]

Somehow, Kozuskanich also missed pages 11 through 13 of that same book, where Quaker founder George Fox is extensively quoted: "All Friends every where, who are dead to all carnal Weapons, and have beaten them to Pieces, stand in that which takes away the occasion of War."[150] Fox spoke of being freed of the obligation to be armed for militia duty in the British West Indies and responded to the question of whether Quakers would refuse to be armed against private criminals:

> Now those evil Doers, that may rob your Plantations or Houses, you complain to the Magistrates for the Punishment of them, tho' you cannot swear against them; or if the *Indians* come to rob your Plantations or Houses, you complain to the Magistrates for the Punishment of such evil Doers, to stop them, which Magistrates are for the Praise of them that do well; so this watching is for the preventing Thieves and Murderers, and stoping burning of Houses: So we do submit to every such Ordinance of Men for the Lord's Sake.[151]

Fox then discussed how the Magistrate's responsibility is to punish evildoers, so that the crime victim should simply contact the government:

> For if any should come to burn your House, or rob you, or come to ravish your Wives or Daughters, or a Company should come to fire a City or Town, or come to kill People, Don't you watch against all such Actions? . . . You cannot but discover such Things to the Magistrates, who are to punish such Things: And therefore the Watch is kept and set to discover such to the Magistrates, that they may be punished; and if he does it not, he bears his Sword in Vain.[152]

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[149] COLLECTION, *supra* note 144, at 10.
[150] *Id.* at 11.
[151] *Id.* at 12.
[152] *Id.* at 13.

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Fox was clear: a Quaker may not use force against robbers, rapists, arsonists, or murderers.[153] Instead, the Quaker should ask the government to punish the criminals.[154] There is not a word on the cited pages to suggest that Quakers had "no issue" with owning guns for nonmilitia purposes.[155]

Kozuskanich cites *The History of the Rise, Increase and Progress, of the Christian People Called Quakers: With Several Remarkable Occurrences Intermixed* at pages 423, 526, 677, and 706.[156] Starting on page 422 is an indictment of several Quakers for holding services outside the Church of England and for failure to take the oath of allegiance to the king.[157] The only arms-relevant language on page 423 is that part of the oath of allegiance requiring the oath-taker to deny recognition that the Pope or "any foreign prince" could "give license or leave to any of them to bear arms, raise tumults, or to offer any violence or hurt to his majesty's royal person, state or government, or to any of his majesty's subjects, within his majesty's dominions."[158] There is nothing concerning Quakers or other pacifists refusing military service or using or owning arms.[159] The oath had nothing to do with the oath-taker's use or possession of arms.[160] The oath simply denied that foreign officials could authorize an English uprising against the English king.[161]

The cite to page 526 is mystifying.[162] On that page, William Sewel relates that, in 1666, "the English landed in the island of Schelling in Holland, under the conduct of captain Holmes, and

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[153] *See* COLLECTION, *supra* note 144, at 13.

[154] *See id.*

[155] *Originalism*, *supra* note 9, at 421 n.39 (citing COLLECTION, *supra* note 144, at 9-10).

[156] *Id.* (citing WILLIAM SEWEL, THE HISTORY OF THE RISE, INCREASE AND PROGRESS, OF THE CHRISTIAN PEOPLE CALLED QUAKERS: WITH SEVERAL REMARKABLE OCCURRENCES INTERMIXED 423, 526, 677, 706 (3d ed. corrected, Burlington, N.J., Isaac Collins 1774)).

[157] SEWEL, *supra* note 156, at 421-23.

[158] *Id.* at 423.

[159] *See id.*

[160] *Id.*

[161] *Id.*

[162] *See Originalism*, *supra* note 9, at 421 n.39 (citing SEWEL, *supra* note 156, at 423, 526, 677, 706).

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setting the town on fire, there were about three hundred houses burnt down, belonging mostly to Baptists that did not bear arms."[163] There is nothing to support Kozuskanich's claim that "pacifists had no issue with owning or carrying arms."[164] Page 526 only says that the English perpetrated an atrocity against some pacifist Baptists who did not "bear arms" to defend their town against the marauders.[165]

Pages 677 and 706 both cover the decision of King James II to exempt Quakers from the obligation to serve in the militia of Barbados.[166] There is nothing that supports Kozuskanich's claim that Quakers or other pacifists had "no issue" with arms outside the militia.[167]

Kozuskanich also cites pages 355, 493, 537, and 649 of *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania*.[168] On page 355, Gouverneur Morris of Pennsylvania requests that the province create a militia "in such Manner as to be least burthensome to the Inhabitants, and particularly so as not to oblige any Persons to bear Arms who are or may be conscientiously scrupulous against it."[169] Nothing on the page supports the claim that Quakers or other pacifists did not mind nonmilitia gun use.[170]

Page 493 similarly requests an exemption for "such [individuals] as are conscientiously scrupulous of bearing Arms,"[171] but also says nothing of relevance about other arms use.[172]

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[163] SEWEL, *supra* note 156, at 526.

[164] *Originalism*, *supra* note 9, at 421 (citation omitted); SEWEL, *supra* note 156, at 526.

[165] SEWEL, *supra* note 156, at 526.

[166] *Id.* at 677, 706.

[167] *Id.*

[168] *Originalism*, *supra* note 9, at 421-22 n.39 (citing 4 VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF PENNSYLVANIA 355, 493, 537, 649 (Philadelphia, Henry Miller 1774) [hereinafter VOTES]).

[169] 4 VOTES, *supra* note 168, at 355.

[170] *Id.*

[171] *Id.* at 493.

[172] *See id.* More is said about the lack of arms supplies; however, nothing is said that would lend credence to Kozuskanich's claim. *See id*.

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On page 537, there is a discussion of a request by French immigrants to Pennsylvania for an exemption from militia duty, "as most of them having near Relations and Friends amongst the *French*, which they might have destroyed with their own Hands, had they consented to bear Arms against them[]."[173] But these French immigrants were not Quakers or any other type of pacifist.[174] Nor is there any evidence that they objected to militia service in general.[175] These French-American immigrants just did not want to fight against their former nation's army and to risk killing friends or relations.[176]

Finally, on page 649, government instructions for raising a militia again acknowledge that "forasmuch as many of the Inhabitants, within the said Province and Counties, scruple to bear Arms," they would be allowed to furnish substitutes.[177] Once again, there is nothing to support Kozuskanich's claim that Quakers and other pacifists objected *solely* to being armed in militia service, and there is nothing to support the further claim that Quakers and other pacifists were willing to use arms in other contexts.[178]

One of the most eminent early American Quakers was John Woolman, and Kozuskanich cites page 88 from Woolman's collected works.[179] Starting at page 86, Woolman discusses the response of Quakers drafted to relieve Fort William Henry in 1757 during the French and Indian War.[180] Their response was "[t]hat they could not bear arms for conscience-sake; nor could they hire any to go in their places, being resigned as to the event of it."[181] There is nothing on page 88, or the several pages around it, that

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[173] 4 VOTES, *supra* note 168, at 537.
[174] *See id.*
[175] *See id.*
[176] *Id.*
[177] *Id.* at 649.
[178] *See id.*
[179] *Originalism*, *supra* note 9, at 422 n.39 (citing JOHN WOOLMAN, *A Journal of the Life and Travels of John Woolman, in the Service of the Gospel*, *in* THE WORKS OF JOHN WOOLMAN. IN TWO PARTS 88 (Philadelphia, Joseph Crukshank 1774)).
[180] WOOLMAN, *supra* note 179, at 86-89.
[181] *Id.* at 88.

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makes any statement about the willingness of Quakers to own or use arms outside the militia.[182]

The sixth of Kozuskanich's cites is a reprint of a 1775 work addressed to Quakers.[183] Kozuskanich apparently used the Readex Early American Imprints version of that document,[184] which is the one that we used–although the publication information is slightly different.[185] He cites page 1.[186] There is no page 1, unless the cover might qualify as such, and the numbered pages are iii and then 4.[187] Nothing on the cover or on pages iii or 4 supports Kozuskanich's claim about the Quakers.[188] At most, on page 8 is the claim that "[a] righteous and just man may *defend* his property,"[189] but there is nothing that addresses the use of arms for that purpose.[190] More importantly, this pamphlet was not a statement of Quaker

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[182] *See* WOOLMAN, *supra* note 179, at 86-89.

[183] *Originalism*, *supra* note 9, at 421 n.39 (citing *An Earnest Address*, *in* AN EARNEST ADDRESS TO SUCH OF THE PEOPLE CALLED QUAKERS AS ARE SINCERELY DESIROUS OF SUPPORTING AND MAINTAINING THE CHRISTIAN TESTIMONY OF THEIR ANCESTORS 1 (Philadelphia, n. pub. 1775) [hereinafter *Earnest Address*]).

[184] Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 3 READEX, Nov. 2008, http://www.newsbank.com/readex/newsletter.cfm?newsletter=210 (citing *Originalism*, *supra* note 9) ("My research into the Second Amendment, published in the *University of Pennsylvania Journal of Constitutional Law*, uses keyword searching to access the considerable volume of material in the Readex digital archives.").

[185] *Compare Originalism*, *supra* note 9, at 421 n.39 (citing *Earnest Address*, *supra* note 183, at 1), *with* ANTHONY BENEZET, *The Testimony of the People Called Quakers*, *in* AN EARNEST ADDRESS TO SUCH OF THE PEOPLE CALLED QUAKERS AS ARE SINCERELY DESIROUS OF SUPPORTING AND MAINTAINING THE CHRISTIAN TESTIMONY OF THEIR ANCESTORS, at iii (Phila., John Douglas McDougal 1775) (citation omitted).

[186] *Originalism*, *supra* note 9, at 421 & n.39 (citing *Earnest Address*, *supra* note 183, at 1).

[187] BENEZET, *supra* note 185, at iii, 4.

[188] *See id.*

[189] *Id.* at 8.

[190] *Id.* at iii-20.

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doctrine.[191] It was an attempt to persuade Quakers to join the revolutionary cause or to at least stop supporting royal authority.[192]

Thus Kozuskanich cited several sources for his claim that "while pacifists had no issue with owning or carrying arms, they would not bear those arms in the militia."[193] Several cited works are just irrelevant[194]: a required English oath not to obey a Pope's order to overthrow the king;[195] French-American immigrants who asked to be excused from fighting the French army;[196] a tract urging American Quakers to resist the king;[197] and an account of an arson of an undefended, pacifist Baptist village in the Netherlands.[198] Among the sources in Kozuskanich's string cite, there are sources that do show some Quakers who "would not bear those arms in the militia."[199] But not one of those sources indicates that Quakers "had no issue with owning or carrying arms" outside the militia.[200]

### *B. The Diversity of Quaker Views About Arms*

Based on other evidence, we know that some Quakers *did* have 'issues' with carrying arms outside the militia.[201] One was

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[191] *See* NICOLE EUSTACE, PASSION IS THE GALE: EMOTION, POWER, AND THE COMING OF THE AMERICAN REVOLUTION 453-54 (2008) (discussing *Earnest Address*, *supra* note 183).

[192] *Id.* (discussing *Earnest Address*, *supra* note 183).

[193] *See Originalism*, *supra* note 9, at 421-22 & n.39 (citations omitted).

[194] *See id.* (citing SEWEL, *supra* note 156, at 423, 526, 677, 706; 4 VOTES, *supra* note 168, at 355, 493, 537, 649) (citing *Earnest Address*, *supra* note 183, at 1).

[195] SEWEL, *supra* note 156, at 423.

[196] 4 VOTES, *supra* note 168, at 537.

[197] *Earnest Address*, *supra* note 183, at iii-20; *see also* EUSTACE, *supra* note 191, at 453-54 (discussing *Earnest Address*, *supra* note 183).

[198] SEWEL, *supra* note 156, at 526, 677, 706.

[199] *Originalism*, *supra* note 9, at 421-22 & n.39 (citing WOOLMAN, *supra* note 179, at 88; COLLECTION, *supra* note 144, at 9-10; BARCLAY, *supra* note 141, at 16; 4 VOTES, *supra* note 168, at 355, 493, 537, 649).

[200] *See id.* (citing WOOLMAN, *supra* note 179, at 86-89; COLLECTION, *supra* note 144, at 9-13; BARCLAY, *supra* note 141, at 16; 4 VOTES, *supra* note 168, at 355, 493, 537, 649).

[201] *See, e.g.*, MEREDITH BALDWIN WEDDLE, WALKING IN THE WAY OF PEACE: QUAKER PACIFISM IN THE SEVENTEENTH CENTURY 247 app. 4 (2001) (citations omitted).

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Quaker founder, George Fox.[202] In a 1654 letter to Oliver Cromwell, the ruler of England at the time, "Fox . . . described himself as a 'witness against all violence,' unwilling to carry a sword against anyone."[203]

Another was William Penn:

> When William Penn asked Fox what to do about the sword which he was accustomed, as a well-dressed seventeenth-century gentlemen, to wear at his side, Fox reputedly replied, "Wear it as long as thee can." By which Fox meant: It is not the exterior trapping but the interior state which matters. Until you become a person who *cannot* contemplate the acts for which a sword was designed, and hence abhor the sword, swordlessness for you is an imitative and even lying state. It disguises the fact that you still have a sword in the heart.[204]

By the next time that Penn and Fox met, Penn had given up the sword.[205]

Kozuskanich states that "William Penn himself recognized Pennsylvanians' 'liberty to fowl and hunt upon the Lands they hold.' "[206] Some other Quakers did like to use hunting guns, as

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[202] *See* WEDDLE, *supra* note 201, at 247 app. 4 (citations omitted).

[203] *Id.* (citations omitted). Two years earlier, Fox had been attacked by a mob angered by his aggressive preaching. *Id.* at 41 (citations omitted). Despite being beat "into insensibility," he recovered "and invited them to '[s]trike again, here is my arms, and my head and my cheeks.' " *Id.* (citations omitted).

[204] WEST, *supra* note 17, at 17. The story about Penn and his sword is well known among Quakers, but there is some doubt about its authenticity. *See* JANNEY, *supra* note 140, at 42-43. Samuel M. Janney writes that the story is based on "reliable tradition" and was "[r]elated to [him] by I.P. of Montgomery County, Pa., who had it from James Simpson." *Id.* at 43. Janney also notes that prominent Quaker "T. Elwood [also] wore a sword when he first began to attend Friends' meetings." *Id.*

[205] JANNEY, *supra* note 140, at 42-43.

[206] *Originalism*, *supra* note 9, at 421 (quoting WILLIAM PENN, THE EXCELLENT PRIVILEDGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND 60 (Philadelphia, William Bradford 1687); A COLLECTION OF CHARTERS AND OTHER PUBLICK ACTS RELATING TO THE PROVINCE OF PENNSYLVANIA 33 (Philadelphia, Benjamin Franklin 1740) [hereinafter CHARTERS]).

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Kozuskanich points out.[207] For example, Elias Hicks[208] and Logan Pearsall Smith[209] were prominent Quaker intellectuals of the nineteenth and twentieth centuries who hunted.[210] There were also many Quaker hunters in the Ohio Valley in the first half of the nineteenth century.[211]

We are not saying that there were no Quakers of the type described by Kozuskanich–those who did not want to 'bear arms' in the militia but were willing to carry arms for hunting or self-defense. Rather, we are saying that Kozuskanich's cited sources do not support his claim that the cited speakers and writers themselves liked to hunt or to own nonmilitia guns. Accordingly, to the limited extent that Kozuskanich's cited Quakers actually said something about their unwillingness to 'bear arms' in the militia, their choice of words provides no evidence for Kozuskanich's thesis that 'bear arms' was a militia-only locution. Even worse, some of Kozuskanich's citations are irrelevant to his claim.

## III. INACCURATE DESCRIPTIONS OF OTHER HISTORIANS

In the *Rutgers Law Journal* article, Kozuskanich makes the astonishing claim:

> We may never know exactly how many guns there were in colonial America, and this essay makes no effort to substantiate or dismiss the claims of Michael Bellesiles's controversial book. Bellesiles argues that American gun culture began not with the frontier and the Revolution, but with industrialization which made firearms cheaper and readily available. He bases his thesis on an examination of probate records, which he claims shows that gun ownership was the exception to the rule before the 1820s. For more detailed studies of gun numbers

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[207] *Originalism*, *supra* note 9, at 420-21 (citations omitted).

[208] ELIAS HICKS, JOURNAL OF THE LIFE AND RELIGIOUS LABOURS OF ELIAS HICKS 12-13 (5th ed., New York, Isaac T. Hopper 1832).

[209] LOGAN PEARSALL SMITH, UNFORGOTTEN YEARS 75-76 (1939) (describing "delightful fishing and shooting trips" as a teenager).

[210] *Id.*; HICKS, *supra* note 208, at 12-13.

[211] Letter from Thomas D. Hamm, Archivist & Professor of History, Earlham Coll., to Dave Kopel (Jan. 3, 2005) (on file with author).

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> that contradict Bellesiles, [refer to the works of James Lindgren, Justin L. Heather, and Randolph Roth].[212]

If Kozuskanich had cited Michael Bellesiles's *Arming America*[213] as a source in 2000, 2001, or perhaps even as late as 2002, the citation could qualify as an understandable mistake. But why was it cited years after Bellesiles was publicly disgraced?[214]

Bellesiles resigned a tenured professorship from Emory University after an external review committee concluded that his research was, *at best*, shoddy.[215] In the committee's own words, "[T]he issue could again be one of extremely sloppy documentation rather than fraud. There are three aspects of this story, however, that raise doubts about his veracity."[216] The report acknowledged that "unfamiliarity with quantitative methods or plain incompetence could explain some of the known deficiencies" with the probate data that Bellesiles reported.[217] But

> [t]he most egregious misrepresentation has to do with his handling of the more than 900 cases reported by Alice Hanson Jones. When critics pointed out that Jones' data disagreed with his, Bellesiles responded by explaining that he did NOT include Jones's data in his computations because her inventories, taken during the build-up to the American revolution [sic], showed a disproportionately high number of guns! Here is a clear admission of misrepresentation . . . .
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> . . . .

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[212] *Defending Themselves*, *supra* note 7, at 1049 n.38 (citing, in relevant part, MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE (2000); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1819-35 (2002); Randolph Roth, *Guns, Gun Culture, and Homicide: The Relationship Between Firearms, the Uses of Firearms, and Interpersonal Violence*, 59 WM. & MARY Q. 223 (2002)).

[213] BELLESILES, *supra* note 212.

[214] *See* STANLEY N. KATZ ET AL., REPORT OF THE INVESTIGATIVE COMMITTEE IN THE MATTER OF PROFESSOR MICHAEL BELLESILES (2002), http://www.emory.edu/central/NEWS/Releases/Final_Report.pdf.

[215] *See id.* at 11-19.

[216] *Id.* at 11.

[217] *Id.* at 17.

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> . . . Yet the best that can be said of his work with the probate and militia records is that he is guilty of unprofessional and misleading work. Every aspect of his work in the probate records is deeply flawed.[218]

To say that the papers by Lindgren and Heather and by Roth contradicted Bellesiles's gun ownership data is a gross understatement.[219] The Lindgren and Heather abstract points to something beyond simple error:

> The authors replicated portions of Bellesiles's published study in which he both counted guns in probate inventories and cited sources containing inventories. They conclude that Bellesiles appears to have substantially misrecorded the seventeenth and eighteenth century probate data he presents. For the Providence probate data (1679-1726), Bellesiles has misclassified over 60% of the inventories he examined. He repeatedly counted women as men, counted about a hundred wills that never existed, and claimed that the inventories evaluated more than half of the guns as old or broken when fewer than 10% were so listed. Nationally, for the 1765-1790 period, the average percentage of estates listing guns that Bellesiles reports (14.7%) is not mathematically possible, given the regional averages he reports and known minimum sample sizes. Last, an archive of probate inventories from San Francisco in which Bellesiles claims to have counted guns apparently does not exist. By all accounts, the entire archive before 1860 was destroyed in the San Francisco earthquake and subsequent fire of 1906. Neither part of his study of seventeenth and eighteenth-century probate data is replicable, nor is his study of probate data from the 1840s and 1850s.[220]

Roth notes that "Bellesiles is the only researcher who has produced such low estimates of gun ownership."[221] After pointing

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[218] KATZ ET AL., *supra* note 214, at 18-19.

[219] *See, e.g.*, Lindgren & Heather, *supra* note 212, at 1778-79; Roth, *supra* note 212, at 227.

[220] Lindgren & Heather, *supra* note 212, at 1778-79 (discussing BELLESILES, *supra* note 212).

[221] Roth, *supra* note 212, at 227 (discussing BELLESILES, *supra* note 212, at 445 app. tbl.1).

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to the far higher figures from Alice Hansen Jones's work, which Bellesiles claimed to have incorporated into his data, Roth observed that "[t]he chance, statistically, that Jones's well-designed, properly weighted study is that far wrong . . . is nil."[222] Roth also describes how he compared Lindgren and Heather's checking of Bellesiles's work in Vermont and found that Lindgren and Heather were correct.[223] Roth charitably says that Bellesiles's work has "inaccurate counting."[224]

Roth's article appears in an issue of *The William & Mary Quarterly*, along with articles by Gloria L. Main and Ira D. Gruber that are even more scathing.[225] Main points out that it is hardly credible that Bellesiles could have done all the claimed probate research without an army of researchers.[226] She demonstrates that his citations to these records in *Arming America* are so incomplete as to be questionable and asks, "Did no one–editors or referees–ever ask that he supply this basic information?"[227]

Gruber is the most openly critical of Bellesiles's integrity as a scholar: "[T]o pursue such an argument Bellesiles must make very selective use of current scholarship . . . . Bellesiles's treatment of the militia is much like that of guns: he regularly uses evidence in a partial or imprecise way."[228] Gruber summarizes Bellesiles's

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[222] Roth, *supra* note 212, at 227 (discussing BELLESILES, *supra* note 212, at 445 app. tbl.1; 1 ALICE HANSON JONES, AMERICAN COLONIAL WEALTH, 55-65 (1978); Lindgren & Heather, *supra* note 212).

[223] *Id.* at 228 (citations omitted).

[224] *Id.* (discussing BELLESILES, *supra* note 212, at 445; Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST. 425 (1996) [hereinafter *Origins*]).

[225] *See id.* (discussing BELLESILES, *supra* note 212); Ira D. Gruber, *Of Arms and Men:* Arming America *and Military History*, 59 WM. & MARY Q. 217, 219 (2002) (discussing BELLESILES, *supra* note 212); Gloria L. Main, *Many Things Forgotten: The Use of Probate Records in* Arming America, 59 WM. & MARY Q. 211, 212-13 (2002) (discussing BELLESILES, *supra* note 212).

[226] Main, *supra* note 225, at 212-13 (discussing BELLESILES, *supra* note 212, at 445 app. tbl.1).

[227] *Id.* (discussing BELLESILES, *supra* note 212, at 109-10, 148, 266-67, 386, 445 app. tbl.1).

[228] Gruber, *supra* note 225, at 219 (citing BELLESILES, *supra* note 212, at 123-24, 179, 297, 487 n.15).

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scholarship as "a consistently biased reading of sources and [a] careless use[] of evidence and context."[229]

One of the authors of this article published a detailed examination of Bellesiles's intentional falsification of sources in *Arming America*,[230] as well as a book describing early American gun culture and showing many examples of intentional deception by Bellesiles.[231]

Bellesiles received the Bancroft Prize for *Arming America*–and, because of the scandal, he was the first author to ever have the Bancroft Prize revoked.[232] Soon thereafter, Alfred A. Knopf,

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[229] Gruber, *supra* note 225, at 221-22 (discussing BELLESILES, *supra* note 212).

[230] *See* Clayton E. Cramer, *Why Footnotes Matter: Checking* Arming America*'s Claims*, 1 PLAGIARY 149 (2006) (discussing BELLESILES, *supra* note 212). *Plagiary* is an interdisciplinary journal published by the University of Michigan Library, the focus of which is "the study of plagiarism and related fabrications/falsifications." University of Michigan Library, Plagiary, http://quod.lib.umich.edu/p/plag/ (last visited Mar. 15, 2010).

[231] *See* CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE (2006) (discussing BELLESILES, *supra* note 212; *Origins*, *supra* note 224). Bellesiles's work is reviewed in context throughout the book. For example, it is noted that Bellesiles altered the Militia Law of 1792, *id.* at xii (citing BELLESILES, *supra* note 212, at 230); changed the date and converted the contents of a shopping list for public arms into an inventory of private arms, *id.* at xiii (citing BELLESILES, *supra* note 212, at 63); and falsified his own sources on the Battle of Severn, *id.* at 80 (discussing BELLESILES, *supra* note 212). The book also demonstrates the falsity of Bellesiles's claim that " '[c]olonial legislatures therefore strictly regulated the storage of firearms, with weapons kept in some central place, to be produced only in emergencies or on muster day, or loaned to individuals in outlying areas' " using the sources he cited–when his sources were even on topic. *Id.* at xiv (quoting BELLESILES, *supra* note 212, at 73). Furthermore, the book highlights that Bellesiles's claim that " 'an examination of eighty travel accounts . . . indicate that the travelers did not notice that they were surrounded by guns and violence' " was intentionally fraudulent. *Id.* at 194-235 (quoting BELLESILES, *supra* note 212, at 306) (discussing BELLESILES, *supra* note 212, at 306, 322-25, 378).

[232] *See* Robert F. Worth, *Prize for Book Is Taken Back from Historian*, N.Y. TIMES, Dec. 14, 2002, at C4, *available at* http://www.nytimes.com/2002/12/14/business/prize-for-book-is-taken-back-from-historian.html?pagewanted=1.

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publisher of *Arming America*, pulped remaining copies rather than selling them as remainders.[233]

For Kozuskanich to cite *Arming America* concerning gun ownership data and then describe it as "controversial" is like citing Richard Heene's claim that his six-year-old son, Falcon, floated away in a mushroom-shaped balloon[234] and calling Mr. Heene's claim "controversial." There is no controversy. Richard Heene is a blatant 'hoaxster' and so is Michael Bellesiles. The latter kept his hoax going for a longer period, but the controversy over *Arming America* (except as an example of what happens to fraud) ended in 2002.

After delicately describing the fraudulent work of gun control advocate Michael Bellesiles, Kozuskanich turns fierce in regard to Stephen Halbrook.[235] Halbrook, formerly a philosophy professor at George Mason University, Howard University, and the Tuskegee Institute, is an attorney who has written many books and articles in support of Second Amendment rights and who frequently represents the National Rifle Association (NRA) in high-profile cases.[236] Kozuskanich writes:

> Halbrook's scholarship is a textbook example of the problems with so much originalist scholarship. His propensity to cherry-pick quotations and rip them from their contexts to fit his own ideology does a disservice to the historical actors about whom he is writing. For example, in his examination of John Adams's *A Defense of the Constitutions of Government of the United*

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[233] *Publisher Stops Publication of Controversial History Book*, USA TODAY, Jan. 8, 2003, http://www.usatoday.com/life/books/news/2003-01-08-guns-book_x.htm.

[234] *See* Brian Stelter, *Calling Story of Boy and Balloon a Hoax, Sheriff Seeks Felony Charges*, N.Y. TIMES, Oct. 19, 2009, at A12, *available at* http://www.nytimes.com/2009/10/19/us/19balloon.html.

[235] *Originalism*, *supra* note 9, at 414-15 n.6 (citing Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, LAW & CONTEMP. PROBS., Winter 1986, at 151, 153-55; 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778, at 475 (3d ed., Philadelphia, Budd & Bartram 1797)).

[236] *See* Stephen P. Halbrook, Ph.D. – Profile, http://www.stephenhalbrook.com/profile.html (last visited Mar. 15, 2010).

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> *States of America*, Halbrook tells us that Adams "upheld the right of 'arms in the hands of citizens, to be used at individual discretion, . . . in private self-defense." What Halbrook does not tell his readers is that the quotation comes from a discussion of the militia in which Adams actually supports the regulation of firearms (i.e., "The arms of the commonwealth should be lodged in the hands of that part of the people which are firm to its establishment."). While Adams does support using arms for private self defense, he argues that "arms in the hands of citizens, to be used at individual discretion . . . is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man."[237]

The quote-chopping and evasiveness here is unfortunate. What Adams actually wrote was that

> [i]t must be made a sacred maxim, that the militia obey the executive power, which represents the whole people, in the execution of laws. To suppose arms in the hands of citizens, to be used at individual discretion, *except in private self-defence*, or by partial orders of towns, counties, or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government. The fundamental law of the militia is, that it be created, directed, and commanded by the laws, and ever for the support of the laws. This truth is acknowledged by our author, when he says, "The arms of the commonwealth should be lodged in the hands of that part of the people which are firm to its establishment."[238]

While one might legitimately criticize Halbrook for failing to convey that Adams was worried about the danger of nongovernmental militias, Adams's argument for the regulation of firearms was to prevent armed bodies from overthrowing the government. Being armed for "private self-defence" is the conspicuous exception that Adams made to his desire for government control over guns, and Kozuskanich devoted two law

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[237] *Originalism*, *supra* note 9, at 414-15 n.6 (citing, in relevant part, Halbrook, *supra* note 235, at 153-55; 2 ADAMS, *supra* note 235, at 475).

[238] 2 ADAMS, *supra* note 235, at 475 (emphasis added).

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review articles to denying that the Founders intended to protect being armed for "private self-defence."[239]

## IV. CONCLUSION

The *Heller* decision affirmed the United States Court of Appeals for the District of Columbia's decision in *Parker v. District of Columbia*,[240] in which Judge Lawrence Silberman wrote, "[T]he public understanding of 'bear Arms' also encompassed the carrying of arms for private purposes such as self-defense."[241] Kozuskanich calls Judge Silberman's claim "demonstrably false."[242] Kozuskanich's strong assertion is not supported by his two articles.

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[239] *Compare* 2 ADAMS, *supra* note 235, at 475, *with Originalism*, *supra* note 9, *and Defending Themselves*, *supra* note 7.

[240] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[241] *Id.* at 384 (citing United States v. Emerson, 270 F.3d 203, 230 n.29 (5th Cir. 2001)).

[242] *Originalism*, *supra* note 9, at 415.

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