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St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings

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ST. GEORGE TUCKER AND THE SECOND AMENDMENT: ORIGINAL UNDERSTANDINGS AND MODERN MISUNDERSTANDINGS

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In his *View of the Constitution of the United States*, St. George Tucker described the Second Amendment as "the true palladium of liberty."[1] Supporters of gun rights have argued that Tucker's comments provide irrefutable proof that the right to bear arms was originally understood to protect an individual right to keep and use firearms for personal self-defense, hunting, and any other lawful activity.[2] This claim rests on a serious misreading of Tucker's constitutional writings. Tucker was a product of an

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1. St. George Tucker, *View of the Constitution of the United States*, *in* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA ed. app. at 300 (St. George Tucker ed., Lawbook Exch. 1996) (1803) [hereinafter Tucker, *View of the Constitution*].

2. As gun rights advocate David Kopel notes, "St. George Tucker appears regularly in Standard Model articles discussing the Second Amendment. It is perhaps significant that *none* of the anti-individual writers even admit Tucker's existence, let alone attempt to address the meaning of the most important law book of the Early Republic." David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1378 (footnote omitted). *See also* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004) (book review) (claiming that an excerpt from Tucker's published work supports an individual-rights interpretation). For invocations of Tucker in popular gun rights culture, see Robert Dowlut, Commentary, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 83-84 (1983), David Hardy, *St. George Tucker on the Second Amendment* (1997), http://www.womenshooters.com/wfn/tucker.html, and *Our 2nd Amendment: The Original Perspective*, AM. GUARDIAN, July 1998, *available at* http://www.nraila.org/Issues/Articles/Read.aspx?ID=21.

eighteenth-century world quite alien to our own, and his view of the Second Amendment was a product of the struggles of his own day, not the modern debate between gun rights and gun control. The individual rights misreading of Tucker is merely the latest example of how constitutional scholarship has been hijacked for ideological purposes in this bitter debate.[3] To understand what Tucker meant by the phrase "the true palladium of liberty," one must pay careful attention to the political context in which he wrote and the role that the right to bear arms played in his constitutional theory. While partisans of the individual rights theory have misinterpreted Tucker's understanding of the Second Amendment, they are certainly correct to insist that Tucker's views of the Second Amendment are important and merit close attention.[4] Tucker was one of the leading legal thinkers of the Founding Era, and his magisterial study of Blackstone's *Commentaries* was an influential work of constitutional theory that helped shape the terms of constitutional discourse in the early republic.[5] For originalists, Tucker's *Blackstone*

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3. The use and abuse of history in recent Second Amendment jurisprudence and scholarship has been well documented by a number of scholars. *See* Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657 (2002) (exposing "some of the historical errors that have ... come to be regarded as historical truth"); Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000). Even among historians sympathetic to the individual-rights view, there has been criticism of much recent legal scholarship adopting this point of view. *See* Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269, 270 (1999) ("In their urgency to propound a particular view of the Amendment that fits their current ideological demands, jurists have either ignored the political culture of the early republic or framed it in such a way as to suit their needs."). As the case of historian Michael Bellesiles demonstrates, violations of accepted standards of scholarly practice are not unique to legal scholarship or the individual rights model, but have also plagued the collective rights interpretation. *See* James Lindgren, *Fall from Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (book review) (claiming that the Bellesiles Scandal "is changing the way that some historians think about their own profession and how some scholars allied to history regard historical research and publishing"); Danny Postel, *Did the Shootouts over 'Arming America' Divert Attention from the Real Issues?*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 1, 2002, at A12. For a balanced assessment of the current state of the debate, see Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 903-05 (2004) (reviewing DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003)).

4. *See* Kopel, *supra* note 2, at 1378.

5. *See* BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 161 (1993).

is particularly important because it drew heavily on the learned jurist's own William and Mary law lectures, which were composed almost contemporaneously with the framing and adoption of the Second Amendment.[6] While originalists are correct to note that Tucker's law lectures provide the first systematic effort to describe the meaning of the Second Amendment and its role in American constitutionalism, Tucker's earliest commentary on the Second Amendment does not support the individual rights view. Indeed, in his unpublished law lectures Tucker not only explicitly described the Second Amendment as a right of the states, but he noted that its inclusion in the Constitution was designed to assuage Anti-Federalists' fears about the Constitution's power over the militia discussed in Article I, Section 8.[7] To underscore the Second Amendment's role as a guardian of states' rights within the federal system, Tucker also linked its function with the Tenth Amendment, the provision of the Bill of Rights most closely associated with federalism.[8] Tucker's earliest writings about the Second Amendment challenge the often-repeated claim that the states' rights theory of the Second Amendment is a modern invention quite alien to the Founding Era.[9]

Tucker's analysis of the Second Amendment in the unpublished law lectures also sheds new light on his discussion of "the true palladium of liberty" more than a decade later.[10] When Tucker's early thoughts about the Second Amendment are set against his later published writing on the same topic, it is possible to see how this issue fits into the structure of his more mature constitutional theory. Tucker's understanding of the role of the right to bear arms in American constitutionalism evolved over the course of the 1790s,

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6. *See* Rakove, *supra* note 3, at 106-07 (discussing the particular importance of the Framers' intent in Second Amendment interpretation).

7. St. George Tucker, Ten Notebooks of William and Mary Law Lectures 126-29 [hereinafter Tucker, Law Lectures] (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

8. *See id.*

9. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 244 & n.171 (1983); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 493-94 (1995); Joyce Lee Malcolm, *Infringement*, COMMON-PLACE, July 2002, *available at* http://www.common-place.org/vol-02/no-04/roundtable/malcolm.shtml (implying that the states' rights interpretation developed in response to political concerns in the early twentieth century).

10. *See* Tucker, Law Lectures, *supra* note 7, at 127-28.

and these changes reflected his attempt to adapt his theory to the rapidly changing circumstances of American politics in the Federalist Era.[11] Tucker greatly expanded his discussion of the meaning of the Second Amendment in his published treatise.[12] He did not abandon his earlier commitment to states' rights, but he did refine and enlarge his analysis of the structural role of the Second Amendment in supporting federalism, giving additional attention to the role of the Second Amendment as a civic right.[13] According to that notion, the right to bear arms in a well-regulated militia was a judicially enforceable privilege and immunity of federal citizenship.[14] Ironically, Tucker, a staunch defender of states' rights, articulated a view of the Second Amendment that would be adopted by the nationalist-minded Republicans in the Department of Justice during Reconstruction.[15]

Tucker's analysis of the right to bear arms was far more sophisticated than modern Second Amendment theorists have recognized. His writings fit neither the modern collective nor individual rights models.[16] In his more mature writings, Tucker thus approached the right to bear arms as both a right of the states and as a civic right.[17] Tucker also dealt with the issue of individual self-defense, but he did not treat this right in the context of his discussion of the Second Amendment.[18] Tucker located this right in common law, not

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11. *Compare* Tucker, Law Lectures, *supra* note 7, at 126-29, *with* Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 272-75.

12. Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 272-75.

13. *See id.* ed. app. at 272-75, 356-57.

14. *See id.* ed. app. at 356-57. On the notion of incorporating the Second Amendment as a civic right, see Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 491-94 (2004). The article suggests that the "civic rights model comes the closest to faithfully translating the dominant understanding of the right to bear arms in the Founding Era." *Id.*

15. For a different view of the Second Amendment and incorporation, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257-66 (1998). Amar claims that "Reconstruction gun-toting was individualistic" rather than "collective." *Id.*; *see also* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at viii (1998) (basing discussion of right of former slaves to bear arms on conclusion that "the purpose of the Second Amendment was to protect individual rights").

16. *See* WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? 17-21 (Saul Cornell ed., 2000) (discussing the modern debate among Second Amendment scholars).

17. *See* Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 300, 356-57.

18. *See* discussion *infra* Part IV.

constitutional law.[19] One cannot hope to understand Tucker's legal theory without appreciating the different legal foundations for the two rights. Modern discussions of gun rights and gun control have generally ignored the common law, focusing instead on issues of constitutional law.[20] The obsession with constitutional law and the absence of attention to common law would have been puzzling to Tucker and others of the founding generation. The common law was absolutely essential to understanding the right of self-defense and a host of other issues in American law.[21] Indeed, the bulk of Tucker's study of Blackstone was not devoted to the Federal Constitution but to the common law.[22] Disentangling these two concepts is not only essential to understanding Tucker's legal theory, it provides important insights into the origins of our current impasse on the right to bear arms.

I. TUCKER'S ORIGINAL UNDERSTANDING OF THE SECOND AMENDMENT

Tucker himself noted that, had *The Federalist* treated the defects of the Constitution with equal candor as its strengths, it would have provided the best commentary on America's new frame of government.[23] Since *The Federalist* had not dealt honestly with those defects and had been written before the amendments were adopted subsequent to ratification, Tucker believed it was vital to provide his students with a detailed guide to the new law of the land.[24] Tucker's lectures were the first systematic effort by any figure in American law to describe the contours of the new system created by the amended Constitution.[25]

Tucker was a moderate Anti-Federalist who had initially opposed ratification, but as Federalists scored one victory after another in the individual state ratification conventions, he was forced to

19. *See infra* notes 133-36 and accompanying text.

20. *See, e.g.*, Malcolm, *supra* note 9.

21. For a discussion of Tucker's treatment of common law, see SCHWARTZ, *supra* note 5, at 168-70.

22. Tucker, *View of the Constitution*, *supra* note 1.

23. *See id.* ed. app. at 376-77.

24. *See id.*

25. *See* SCHWARTZ, *supra* note 5, at 161.

rethink his stance.[26] He came to believe that, with proper amendments, the Constitution could effectively protect both the rights of the states and the liberty of individuals.[27] Admittedly, Tucker was not entirely pleased with the final shape of the Bill of Rights that emerged from Congress, which had not sufficiently scaled back the powers of the federal government.[28] Still, in his law lectures he expressed guarded optimism that America's new constitutional system could weather any future storms on the horizon.[29]

Tucker's William and Mary law lectures defined the core around which he built his monumental study of Blackstone's *Commentaries* published in 1803.[30] Although his unpublished discussion of the Second Amendment in these lectures has not been discussed by modern scholars, it provides a remarkable source for understanding his earliest thinking about the Constitution and the Bill of Rights.[31]

Tucker was well informed about congressional debates on the Bill of Rights. His brother, Thomas Tudor Tucker, was a member of Congress, and St. George corresponded with other leading politicians of his day about political matters.[32] While evidence of the crucial Senate debates over the wording of the Second Amendment have not survived, one tantalizing suggestion about the character of this discussion is provided in a letter Virginian John Randolph wrote to Tucker, declaring that "[a] majority of the Senate were for not allowing the militia arms."[33] Randolph happily reported that

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26. *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 263-73 (1999).

27. *See id.*

28. *See id.* at 271-72.

29. *See* Tucker, Law Lectures, *supra* note 7. For an analysis of Tucker's place in the legal culture of revolutionary Virginia, see CHARLES T. CULLEN, ST. GEORGE TUCKER AND THE LAW IN VIRGINIA, 1772-1804 (1987) (published version of 1971 Ph.D. dissertation). On Tucker's place in American legal thought, see CRAIG EVAN KLAFTER, REASON OVER PRECEDENT: ORIGINS OF AMERICAN LEGAL THOUGHT 31-47 (1993); SCHWARTZ, *supra* note 5, at 159-71; G. EDWARD WHITE, 3-4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 81-86 (1988).

30. *See* SCHWARTZ, *supra* note 5, at 161.

31. CORNELL, *supra* note 26, at 263.

32. *See, e.g.*, Letter from Theodorick Bland Randolph to St. George Tucker (Sept. 9, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 293 (Helen E. Veit et al. eds., 1991).

33. Letter from John Randolph to St. George Tucker (Sept. 11, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 32, at 293.

this proposal failed to garner a two-thirds majority and was defeated.[34] Randolph explained the significance of this decision as a victory for those who opposed the designs of the Federalists.[35] "They are," Randolph commented, "afraid that the Citizens will stop their full Career to Tyranny & Oppression."[36] Randolph's letter sheds light on the decision of the Senate to reject language that would have linked the right to bear arms to the common defense. While individual rights scholars have suggested that the Senate's rejection of this language clearly establishes that they intended to protect an individual right,[37] Randolph's letter casts the choice to excise this language in a radically different light.[38] The issue was not individual versus collective rights, as gun rights scholars have claimed, but clearly was federal versus state control. If the right to bear arms was restricted to common defense, that construction would have been viewed by proponents of states' rights as a threat to the militia. As Randolph's letter to Tucker suggests, the issue before the Senate was control of the militia, not an individual right to use guns for personal defense or hunting.[39]

The connection between the Second Amendment and federalism emerges unambiguously in Tucker's law lectures. Tucker described the meaning of the Second Amendment in the following terms:

> If a State chooses to incur the expence of putting arms into the Hands of its own Citizens for their defense, it would require no small ingenuity to prove that they have no right to do it, or that it could by any means contravene the Authority of the federal Govt. It may be alledged indeed that this might be done for the purpose of resisting the Laws of the federal Government, or of shaking off the Union: to which the plainest Answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above-mentioned would be subversive of every principle of Freedom in our

34. *See id.*
35. *Id.*
36. *Id.*
37. *See, e.g.*, Rakove, *supra* note 3, at 121-22.
38. *See* Letter from John Randolph to St. George Tucker, *supra* note 33, at 293.
39. *See id.*

> Government; of which the first Congress appears to have been sensible by proposing an Amendment to the Constitution, which has since been ratified and has become a part of it, viz. "That a well regulated militia being necessary to the Security of a free State, the right of the people to keep & bear arms shall not be infringed." To this we may add that this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth Article of the ratified Aments.[40]

In his earliest formulation of the meaning of the Second Amendment, drafted shortly after its adoption, Tucker interpreted the Amendment within the context of federalism. In his view, the inclusion of a provision protecting the right to bear arms was a necessary concession to moderate Anti-Federalists who feared that the power of the federal government might threaten the states.[41] Tucker even went so far as to argue that this right might include the awesome power of either "resisting the Laws of the Federal Government, or of shaking off the Union."[42] To underscore the fact that the Second Amendment had to be interpreted in terms of the larger struggle over power relations in the federal system, Tucker explicitly linked the Second Amendment to the Tenth Amendment, another provision that dealt with federalism.[43] Rather than frame the meaning of the Second Amendment in terms of a right of personal self-defense, as many modern gun rights advocates have argued, Tucker's discussion casts the right to bear arms as a right of the states.[44]

Tucker was hardly the only early constitutional commentator to describe the Second Amendment as the "palladium of liberty," nor was he the only one to locate the origins of the Amendment in the struggle over the structure of federalism between Federalists and Anti-Federalists. The archnationalist Joseph Story adopted a similar point of view in his *Commentaries on the Constitution*,

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40. Tucker, Law Lectures, *supra* note 7, at 127-28. The Tenth Amendment was originally the Twelfth Amendment proposed to the states. *See* AMAR, *supra* note 15, at 8-19 (discussing the importance of the first two amendments that were not ratified).

41. Tucker, Law Lectures, *supra* note 7, at 126-29.

42. *Id.* at 127.

43. *See id.* at 127-28.

44. *See id.*

another influential constitutional text written several decades later.[45] While individual rights scholars have often cited Story in modern Second Amendment scholarship, they have studiously avoided examining his own analysis of the original understanding of the Second Amendment.[46] Given that Story shared Tucker's view that the Second Amendment had been adopted to assuage Anti-Federalists' fears about the potential disarmament of the state militias, this omission is not surprising.[47] In contrast to Tucker, who sympathized with much of the Anti-Federalist critique of the Constitution, Story viewed these fears as entirely unfounded.[48] Indeed, he confessed his own bewilderment over Anti-Federalists' apprehensions about the potential threats to the state militias.[49]

> It is difficult fully to comprehend the influence of such objections, urged with much apparent sincerity and earnestness at such an eventful period. The answers then given seem to have been, in their structure and reasoning, satisfactory and conclusive. But the amendments proposed to the constitution (some of which have been since adopted) show, that the objections were extensively felt, and sedulously cherished. The power of Congress over the militia (it was urged) was limited, and concurrent with that of the states.[50]

While Story and Tucker did not agree about the potential threat posed by federal control of the militia, both scholars recognized that originally the Second Amendment had been part of a compromise between Federalists and Anti-Federalists designed to reaffirm state control of the militia and neutralize the fear that the militia might be disarmed.[51]

Tucker and Story each interpreted the original understanding of the Second Amendment as a response to the argument between

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45. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890 (1833).

46. For efforts to enlist Story in the modern gun rights cause, see Kopel, *supra* note 2, at 1388-97, and Reynolds, *supra* note 9, at 470.

47. *See* 3 STORY, *supra* note 45, §§ 1200-1202.

48. *See id.* §§ 1202-1203.

49. *See id.*

50. *Id.* § 1202 (footnote omitted).

51. *Compare* 3 STORY, *supra* note 45, §§ 1199-1210, 1890-1891, *with* Tucker, Law Lectures, *supra* note 7, at 126-29.

Federalists and Anti-Federalists over federalism.[52] Protection of states' rights, not individual rights, was the issue that had prompted the inclusion of the Second Amendment.[53] Anti-Federalists had repeatedly harped on these two dangers during ratification.[54] Federalists were forced to respond to this argument and concede far more power to the states than they might have been comfortable with at the start of ratification.[55] Indeed, Anti-Federalist criticism led James Madison to argue in *Federalist No. 46* that even if the federal government chose to create a powerful standing army, it would be no match for "a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence."[56] While it is hard to imagine Madison articulating such a strong states' rights view in Philadelphia during the framing of the Constitution, the persistent attacks by Anti-Federalists during ratification had forced him to concede that in extreme circumstances the state militias might act as the final bulwark against federal tyranny.[57]

Ratification was a dynamic process in which the participants were often forced to recast their positions as they encountered criticism and challenges.[58] Rather than seek a single static meaning for the right to bear arms and the militia, it is important to recognize that the meaning of the Constitution was evolving in the brief time between the conclusion of the Philadelphia Convention and its final

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52. *See* CORNELL, *supra* note 26, at 263-73; 3 STORY, *supra* note 45, §§ 1200-1202.

53. Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39 (1998), *reprinted in* WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT?, *supra* note 16, at 97-122.

54. *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 220 (1995).

55. *See generally id.* at 265-90 (discussing Madison's views through the ratification process).

56. THE FEDERALIST NO. 46, at 334 (James Madison) (Benjamin Fletcher Wright ed., 1961).

57. *See id.* There is some debate over how nationalistic Madison was during the struggle over the Constitution. *See* BANNING, *supra* note 54, at 265-90. Banning argues that the common identification of Madison as "a leader of a nationalistic push ... comes quite close to ... standing [him] on his head." *Id.* at 20. For a more pragmatic view of Madison, see Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473 (1988).

58. *See* Rakove, *supra* note 3, at 113-26 (discussing the politics surrounding ratification and the evolution of the language of the Second Amendment during this process).

adoption. In response to Anti-Federalist attacks, Federalists had been forced to shift ground and offer some public assurances that the state militias would never be disarmed.[59] This was part of the implicit bargain struck to ratify the Constitution. Anti-Federalists failed to obtain their primary goal of securing structural amendments to the Constitution that would have shifted power back to the states.[60] The opponents of the Constitution did, however, win some concessions from Federalists. Although an amendment restricting federal control over the militia was rejected, the adoption of the Second Amendment was understood, at least by some, to provide some protection for the state militias.[61]

Tucker's discussion of the radical potential of the militia must be situated in the context of the debate between Federalists and Anti-Federalists that led to the publication of Madison's analysis in *Federalist No. 46*.[62] The inclusion of an explicit provision on the right to bear arms was designed to prevent the disarmament of the state militias.[63] Tucker realized that this might include a right to take up arms against the government, a right that might be exercised as the final check on tyranny.[64]

Rather than seeking a single monolithic meaning for the right to bear arms in the Founding Era, it would be more historically accurate to acknowledge that a number of different interpretations of the Second Amendment coexisted at the time that it was proposed and adopted.[65] There was a spectrum of sentiment on each side of

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59. *See generally* Finkelman, *supra* note 3.

60. *Id.* at 196-97.

61. *See id.* at 214; Rakove, *supra* note 3, at 145-46.

62. *See generally* THE FEDERALIST NO. 46 (James Madison).

63. *See* THE FEDERALIST NO. 46 (James Madison), *supra* note 56, at 332-36 (discussing the ability of state governments to prevent "encroachment" by the federal government, particularly with reference to the military).

64. THE FEDERALIST NO. 46 (James Madison).

65. This theory may be called "original meaning" originalism. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620-21, 635 (1999) ("[T]here are simply too many parties [to the Constitution] ever to find unanimous agreement to an idiosyncratic meaning."); *see also* Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403, 410 (1996); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996). For a more complex and intellectually rigorous version of originalism, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999). For critiques of Second Amendment originalism, see Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167 (2000), and

the ratification struggle. Many leading Anti-Federalists dismissed the Bill of Rights as little more than "a tub to the whale," a distraction offering little of substance.[66] For these Anti-Federalists, the right to bear arms was a hollow promise. Other more moderate Anti-Federalists viewed the inclusion of an explicit provision on the right to bear arms as a modest victory for the cause of states' rights. For these Anti-Federalists, the inclusion of the Second Amendment reduced, but did not eliminate, the danger of federal disarmament of the state militias.[67] Leading Federalists were at least as cynical as elite Anti-Federalists, viewing the Bill of Rights as something that was at best "a parchment barrier," and at worst a legal error that would actually weaken liberty, not strengthen it.[68] Federalist Fisher Ames captured this latter view when he mocked the demand for an explicit provision affirming the right to bear arms, viewing such requests as the height of folly.[69] Other Federalists, including Madison, were less dismissive and accepted that a statement of basic rights, including the right to bear arms, might assuage moderate Anti-Federalists and help bring the nation together.[70]

II. THE SECOND AMENDMENT IN TUCKER'S VIEW OF THE CONSTITUTION

To understand the differences between his earliest discussion of the Second Amendment in his unpublished law lectures and the analysis that appeared in print a decade later, one must acknowledge the impact of the tumultuous events of the 1790s on Tucker's thinking. The Federalist Era, the contentious period between the adoption of the Constitution and Jefferson's election to

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Rakove, *supra* note 3.

66. Finkelman, *supra* note 3, at 215 & n.95.

67. Saul Cornell, *Beyond the Myth of Consensus*, *in* BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY REPUBLIC 256, 257-58 (Jeffrey L. Pasley et al. eds., 2004).

68. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301.

69. Rakove, *supra* note 3.

70. On the ideological diversity of the Founding Era, see generally Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3 (1988) (contrasting Federalist and Anti-Federalist viewpoints).

the presidency in 1800, was a period of bitter conflict between Republicans and Federalists.[71] Tucker became a vocal spokesman for Jeffersonianism and an outspoken critic of Federalist constitutional theory.[72] His discussion of the Second Amendment was one small part of his effort to formulate an alternative theory of the Constitution to counter the nationalist vision of the Federalists. When properly understood within the historical context of the acrimonious debates over the Constitution in the first decade after its ratification, Tucker's fascinating discussions of the right to bear arms not only underscore how important this issue was to Americans in this era, but also show how closely connected this problem was to other contentious questions in early American law, such as federalism and judicial review. A serious historical examination of Tucker's views on the meaning of the Second Amendment serves as a useful reminder that constitutional ideas were in flux in this formative period. Moreover, Tucker's attack on Federalist theories of the Second Amendment provides further evidence that conflict, not consensus, defined constitutional debate at this pivotal moment in American history.

Tucker's *Commentaries* are best understood as providing one important gloss on the meaning of American constitutionalism at the end of the Federalist Era. Tucker's writings reflected a distinctly Jeffersonian point of view, one grounded in the theory of states' rights.[73] One cannot understand Tucker's *Commentaries* without appreciating that his multivolume treatise was the culmination of more than a decade of lecturing, writing, and protesting against the Federalist agenda.[74]

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71. On the 1790s, see generally STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993), and JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT (1999).

72. *See* Robert Morton Scott, St. George Tucker and the Development of American Culture in Early Federal Virginia, 1790-1824, at 103-04, 124-26 (Feb. 17, 1991) (unpublished Ph.D. dissertation, George Washington University) (on file with Rockefeller Library, Colonial Williamsburg) (discussing the publishing history of Tucker's edition of Blackstone's *Commentaries*).

73. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 397 n.317 (2004).

74. The footnotes to this essay were littered with citations to the texts that had defined opposition constitutional thought during that tempestuous era. Tucker not only cited Madison's *Report of 1800*, he quoted approvingly from more than a dozen Democratic-Republican pamphlets, essays, and speeches published in the late 1790s. On the development

Tucker set out to do more than merely refute Federalist constitutional heresies; he sought to extirpate the outmoded English legal doctrines that lay at the root of those theories. One of the chief sources for these ideas was the English legal treatises Americans used as the basis for their legal education. Among these works, no treatise was more influential than Blackstone's. Purging American law of its antirepublican English remnants was a monumental project. The American Revolution, Tucker believed, had "given birth" to a new era in human history and inaugurated a "new epoch" in the annals of law.[75] In formulating his constitutional theory, Tucker drew heavily on Madison's *Report of 1800*, the final summation of Virginia's response to the Alien and Sedition Crisis.[76] The learned Virginian judge shared Madison's belief that the states were the indispensable guardians of American liberty.[77] On this point, the Republican opposition was in complete accord. Tucker shared with Madison and Jefferson a firm belief that the rights of the states and the rights of individuals were inescapably bound together in American constitutional theory. By safeguarding the latter, one protected the former.[78]

The subject of bearing arms afforded Tucker an excellent focal point to consider the profound gulf separating the way supporters of Jefferson and their Federalist opponents viewed the Constitution. Tucker used his discussion of the Second Amendment as a means of exposing the flaws in Federalist constitutional theory and affirming the superiority of his own brand of Jeffersonian constitutionalism.[79]

Constitutional interpretation was at the core of this disagreement. Republicans favored a philosophy of strict construction, believing that the preservation of liberty and a republican form of government required that one approach the language of the

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of this dissenting tradition, see generally CORNELL, *supra* note 26, which provides a detailed account of Anti-Federalist politics, history, and thought.

75. Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 104, 122.

76. H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 713-14 (1994).

77. Lash, *supra* note 73, at 398.

78. For an elaboration of this insight, see *id.* at 394-95.

79. For a general discussion of the lack of political consensus in this era, see generally Kramnick, *supra* note 70. On the conflict between Federalists and Jeffersonians on the meaning of the First Amendment, see NORMAN ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 82-99 (1986).

Constitution in an almost literal fashion.[80] Federalists supported Hamilton's theory of loose construction, which gave Congress considerable latitude to accomplish its designated legislative functions.[81] Tucker shared with other Jeffersonians a deep-seated antipathy toward this theory of the Constitution. Given the chasm separating Federalists from their Jeffersonian opponents on virtually every major constitutional question of the day, it is hardly surprising that they would interpret the Second Amendment in radically different terms.[82]

Tucker's first discussion of the Second Amendment does not occur in the often-quoted passage describing it as the "palladium of liberty,"[83] but rather in the midst of an attack on Federalist efforts to use volunteer militias during the "Quasi-War" with France (1797–1800).[84] Tucker and other Republicans viewed this policy as a perfect example of how Federalists were willing to stretch the meaning of the Constitution to accomplish their goals.[85] Although the Constitution did not explicitly prohibit a volunteer militia, Federalists had assured their opponents in 1788 that a citizens' militia officered by the states would provide a bulwark against potential federal tyranny.[86] Ten years later in 1798, it appeared that Federalists were attempting to subvert this ideal by an "unconstitutional act of congress."[87] In place of a militia drawn from the ranks of all citizens, Federalists sought a select militia drawn from a small elite. For Tucker and other Jeffersonians, a select militia would

80. J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 917 n.35 (1988) (book review).

81. *Id.* at 917 n.35, 923.

82. On the differences between the two approaches to constitutional interpretation, see generally LYNCH, *supra* note 71.

83. Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 300.

84. ELKINS & MCKITRICK, *supra* note 71.

85. *See* CORNELL, *supra* note 26, at 272 (referring to the Alien and Sedition Acts as examples of shaping the Constitution beyond its intended meaning).

86. To support this assertion, Tucker cited Madison's *Report of 1800*, which provides further evidence that his thinking about the meaning of the right to bear arms in his published study was formulated at the end of the 1790s. Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 297 n.*.

87. *Id.* ed. app. at 275. On Tucker's connection to dissenting constitutional theory, see CORNELL, *supra* note 26, at 272.

easily become a tool of a party or faction and would pose a threat to liberty.[88]

This discussion of the Second Amendment clearly frames the issue in terms of the militia. He reiterated his earlier view that the adoption of the Second Amendment was a response to Anti-Federalist concerns about the future of the state militias. Tucker went so far as to argue that adoption of the Second Amendment had dispelled "all room for doubt, or uneasiness upon the subject."[89]

Later, in his *View of the Constitution,* Tucker included an entirely new discussion of the Second Amendment that used the right to bear arms as a means to discuss the scope of judicial review under the Constitution.[90] This new analysis was framed in response to the Alien and Sedition crisis.[91] The hypothetical scenario Tucker conjured up was federal disarmament of the militia.[92] The issue that concerned Tucker was how to respond when "the legislature should pass a law dangerous to the liberties of the people."[93] In Tucker's view, "[t]he judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority."[94] Congressional disarmament provided an excellent illustration of this point: "If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means."[95] The underlying constitutional theory that made such developments possible was the Federalist theory of loose construction of the Constitution. "[I]f congress may use any means, which [it] choose[s] to adopt" to achieve its goal of preventing insurrections, Tucker complained, it could easily

88. Tucker, *View of the Constitution, supra* note 1, ed. app. at 274-75.
89. *Id.* ed. app. at 273.
90. Barnett, *supra* note 2, at 246; Kopel, *supra* note 2, at 1378.
91. Tucker, *View of the Constitution, supra* note 1, ed. app. at 357.
92. *Id.* ed. app. at 289.
93. *Id.* ed. app. at 357.
94. *Id.*
95. *Id.* ed. app. at 289.

transform "the provision in the constitution which secures to the people the right of bearing arms" into "a mere nullity."[96]

The modern individual rights misreading of Tucker stems in part from the failure to note the influence of the Alien and Sedition crisis in shaping his mature constitutional theory. Tucker's response to this crisis led him to extend and refine his analysis of the role that the Second Amendment might play in American constitutionalism. The danger that Tucker apprehended was federal disarmament of the state militias. Tucker appended a civic conception of arms bearing to his earlier states' rights conception of the Second Amendment.[97]

Jeffersonian outrage was not directed at the prospect that Federalists would pass laws that hindered individuals from defending themselves against intruders and housebreakers. The target of disarmament was muskets and rifles, not sword canes or pistols, or other weapons with limited military value intended primarily for self-protection. There was little reason to fear Federalists targeting such weapons and considerable cause for alarm about the right to keep and bear arms in the militia. Federalists in Virginia had hinted at the prospect of disarmament as a means of preventing insurrection during the crisis provoked by the Alien and Sedition Acts.[98] Disarming the state militias by preventing citizens from keeping and bearing arms was exactly the kind of policy that Tucker and other Jeffersonians would have feared most.[99] Thwarting Federalist tyranny required a well-regulated militia controlled by the individual states. If Federalists

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96. *Id.*

97. Tucker's interpretation of the Second Amendment as a right of citizens to bear arms as part of a well-regulated militia fits with the new paradigm for the Second Amendment that has emerged in the scholarly literature. For efforts to reformulate Second Amendment theory along these lines, see Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 165-66 (2004), and 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, 153, 158 (2004). *But see* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 166 (2002). *See generally id.* at 147-211 (discussing how one should analyze and interpret the Constitution); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 613-21 (2000) (discussing ideas of individual rights revisionists and their weaknesses).

98. *See* The Address of the Minority in the Virginia Legislature 11 (1798).

99. Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 300.

tried to restrict the right to bear arms in the militia, Tucker believed that federal courts should strike down such laws as unconstitutional.[100] Protection of this civic right was essential for the Second Amendment to function as a guardian of the rights of the states. In his mature writings, the civic and states' rights function of the Amendment were closely connected.

III. TUCKER AND THE LOST LANGUAGE OF EIGHTEENTH-CENTURY CONSTITUTIONAL DISCOURSE

Tucker's discussion of judicial review focused on potential federal threats to the right to bear arms.[101] The term "bear arms" has itself become a hotly contested issue in modern Second Amendment debate. For many modern gun rights advocates the term "bear arms" is interchangeable with the phrase "bear a gun."[102] There is little historical evidence to support such a claim.[103] Although a few isolated texts use such idiosyncratic language, the dominant understanding of this phrase, and the accepted legal usage, described the use of weapons in a military context.[104] One of the most serious problems with individual rights theory is that it makes it impossible to understand why some states embraced a new formulation of the right to bear arms in the nineteenth century. Rather than assert a right to "bear arms for the defense of themselves and the state," the new Jacksonian constitutional formulation

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100. *See id.* ed. app. at 289.

101. *Id.*

102. Barnett, *supra* note 2, at 244-45; Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms, Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 162-63 (1999) (positing that a federal law criminalizing gun possession by individuals under a domestic violence restraining order violates the Second Amendment).

103. For an illustration of the problems with Barnett's method, which is both impressionistic and anachronistic, compare his discussion of the meaning of the term "bear arms," *supra* note 2, at 243-64 (arguing that the right to bear arms did apply to nonmilitary contexts), with Michael Dorf's discussion, Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 293-94 (2000) (favoring a collective right to bear arms over an individual right). Dorf provides dozens of examples of the term "bear arms" being used in a military sense, Dorf, *supra*, at 306-14, while Barnett relies primarily on an idiosyncratic text such as the *Dissent of the Pennsylvania Minority*, Barnett, *supra* note 2, at 246-60. While one can find isolated examples of this usage, the legal meaning of the term was well understood to be military.

104. *See* Yassky, *supra* note 97, at 617; *see also* Barnett, *supra* note 2, at 260 (admitting that Congress used the phrase "bear arms" only for military contexts between 1774 and 1821).

of this right asserted that "each person has a right to bear arms in defense of himself and the State."[105] Indeed, the shift in language between the Founding Era and the Jacksonian period itself provides one of the best arguments against reading the earlier language as advancing an individual right. There would have been little need to adopt the new formulation if the old one were widely understood to protect an individual right.[106]

The only time that bearing a gun might be equated with bearing arms was when a weapon was carried in the context of militia service. Perhaps the best illustration of this distinction is a draft law written by Thomas Jefferson and proposed by James Madison to punish those who had violated Virginia's game laws.[107] The statute penalized any individual who "bear[s] a gun out of his inclosed ground, unless whilst performing military duty."[108] The purpose of the statute was to distinguish between the different levels of regulation appropriate to nonmilitary use of firearms and use of firearms within the context of militia duty.[109] When read in context, this text undermines the claims of individual rights theorists. Indeed, the individual-rights interpretation of this passage is almost exactly opposite of the meaning intended by Madison.[110]

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105. Cornell, *supra* note 3, at 676-77.

106. On the emergence of a new formulation of the right to bear arms in the Jacksonian era, see Cornell, *supra* note 3, at 678-79, and Robert Weisberg, *The Utilitarian and Deontological Entanglement of Debating Guns, Crime, and Punishment in America*, 71 U. CHI. L. REV. 333, 341-43 (2004) (book review).

107. *See* Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. DET. MERCY L. REV. 1, 26 (1999).

108. A Bill for Preservation of Deer (1785), *in* 2 THE PAPERS OF THOMAS JEFFERSON 444 (Julian P. Boyd ed., 1950).

109. Madison presented the bill to the House but no action was taken. *Id.* at 444. Virginia had enacted two earlier game laws in 1738 and 1772. *Id.* (citing 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 60-63 (William Waller Hening ed., photo. reprint 1969) (1819); 8 *id.* at 591-94).

110. For misreadings of this text by modern gun rights advocates, see *supra* note 3. For a more elaborate discussion of the robust character of early American gun regulation, including disarmament of segments of the population deemed dangerous, see Cornell & DeDino, *supra* note 14, at 505-06. *See also* Letter from John Ashcroft, Attorney Gen., to James Jay Baker, Executive Dir., Nat'l Rifle Ass'n (May 17, 2001), *available at* http://www.nraila.org/images/Ashcroft.pdf (finding disarming equivalent to enslaving). On the Ashcroft letter, see generally Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705 (2002). On the Department of Justice's memo supporting the Ashcroft letter, see Jess Bravin, *Bush Lawyers Target Gun Control's Legal Rationale*, WALL ST. J., Jan. 7, 2005,

Tucker's use of the term "bear arms" reflected the dominant understanding of his day, which clearly distinguished between bearing arms and bearing a gun. This difference emerged clearly in Tucker's treatment of the rights of African Americans. Tucker discussed the legal status of "free negroes and mulattoes,"[111] who had been legally prohibited from "serving in the militia, except as drummers or pioneers." This prohibition had been lifted and Tucker noted that free blacks were later "enrolled in the lists of those that bear arms."[112] Tucker's discussion of the ambiguous status of free blacks provides additional evidence that the term "bear arms" was a legal term of art that clearly implied the use of arms in a public capacity, not a private one. Indeed, he noted that under state law "[a]ll but house-keepers, and persons residing upon the frontiers are prohibited from keeping or carrying any gun, powder, shot, club, or other weapon offensive or defensive."[113] Once again, Tucker's usage merits closer scrutiny. Tucker did not describe the nonmilitary use of weapons by blacks on the frontier as bearing arms, he described such an activity as carrying a gun.[114] There was an important legal difference between bearing a gun and bearing arms. In his own proposal for emancipation, Tucker recommended prohibiting any "negroe or mulattoe" from "keeping, or bearing arms."[115] According to Tucker's analysis, blacks would be prohibited from keeping arms in their home, or from appearing at muster and being issued arms they might bear as part of the militia. Modern individual rights theorists have asserted that the phrase "keep and bear arms" was not a single unified principle, but two separate ideas. The only example of these two ideas being severable is the anomalous situation of free blacks described by Tucker. Indeed, no constitutional text from the Founding Era, including the Second Amendment, used the "keep or bear" formulation that Tucker employed to describe the unique situation faced by free blacks in Virginia. The

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111. St. George Tucker, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia* (1796), *in* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS 409 (Clyde N. Wilson ed., 1999) [hereinafter Tucker, *Dissertation on Slavery*].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 441.

Second Amendment affirmed a right to keep and bear arms, not a right to keep and carry firearms, or a right to keep and/or bear arms.[116]

Much of the modern confusion over the Second Amendment stems from the simple individual/collective rights dichotomy that has shaped modern discussions of the right to bear arms.[117] Rather than fit Tucker's thought into the modern dichotomous debate over the right to bear arms, it would make more historical sense to look at how Tucker conceptualized the nature of rights. Tucker's theory of rights included a typology with four distinct legal categories: natural, social, civil, and political. In this elaborate scheme, the right of individual self-defense, the right of greatest concern to modern gun rights advocates, was cast as a natural right, one that had been substantially narrowed when one left the state of nature and entered civil society. The Second Amendment, by contrast, fit into Tucker's third and fourth categories, civil rights and political rights. Tucker's term "civil right" might best be rendered in modern parlance as a civic right, a right that "appertain[s] to a man as a citizen or subject."[118] Tucker understood these rights to provide a means of safeguarding other rights, and hence Tucker appropriately described the right to bear arms as "the true palladium of liberty."[119] Not every individual was entitled to the full rights of citizenship. Among those excluded from such rights were "aliens, women, children under the age of discretion, idiots, and lunatics, during their state of insanity, and negroes and mulattoes, though natives of the state, and born free."[120] These excluded categories were also groups that did not bear arms.[121] Finally, the role of the Second Amendment as a check on federal power fit Tucker's notion of a political right, a right enjoyed by groups acting in a political

116. U.S. CONST. amend. II.

117. *Compare* Jesse Matthew Ruhl et al., *Gun Control: Targeting Rationality in a Loaded Debate*, 13 KAN. J.L. & PUB. POL'Y 413, 426 (2004) (asserting that Tucker believed that the Second Amendment provided an individual right), *with* Koren Wai Wong-Ervin, Note, *The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence*, 50 HASTINGS L.J. 177, 188 (1998) (asserting that Tucker believed that the Second Amendment provided both an individual and a collective right).

118. Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 300.

119. *Id.*

120. *Id.*

121. *Id.*

capacity, including the states. Efforts to prevent individual citizens from bearing arms in the militia would have been a violation of a civil right in Tucker's scheme, and efforts to block the states from using their militias would have been a violation of a political right. Thus, Tucker's understanding of the right to bear arms included aspects that would fit both the modern collective and civic rights models. The right at the core of modern gun rights ideology, the right of personal self-defense, had little to do with the Second Amendment, but it was part of the common law tradition, a subject of considerable interest to Tucker and one that has been much neglected in modern discussions of guns and the law.

IV. THE COMMON LAW RIGHT OF SELF-DEFENSE

Although the modern debate over guns has focused largely on questions of constitutional law, in Tucker's day the use of firearms outside of the context of militia service was primarily an issue of statutory and common law. The fact that personal self-defense was a subject best understood in terms of common law rather than constitutional law did not mean that Tucker viewed it as somehow less important. The bulk of Tucker's five-volume treatise, it is worth recalling, was not a study of constitutional law, but common law.[122]

Although the constitutional right to bear arms and the common law right to bear a gun in self-defense have become blurred together in many modern discussions about the right to bear arms, the two concepts were legally distinct in the Founding Era. A few efforts had been made to incorporate this common law principle into state bills of rights during the Founding Era, but those efforts inevitably failed. Thus, Jefferson's proposal for the Virginia Declaration of Rights that "no freeman be debarred the use of arms" was ultimately not included in that text.[123] Most Americans simply did not see the need to single out the common law right of self-defense for inclusion in any constitutional document. This decision did not mean that Americans did not value this right, nor did it mean that they believed they had forfeited it. The protection of this right, a

122. *Id. passim*.

123. *See* Thomas Jefferson, The Virginia Constitution, First Draft (1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 108, at 329, 344.

protection well established under common law, was left to courts and juries, the traditional guardians of such rights.[124]

The common law not only sanctioned the right of self-defense but also established a host of restraints on the use of firearms, including crimes such as affray.[125] The right to keep or carry firearms outside of the context of the militia had evolved under common law, the body of cases that English courts had adjudicated over the course of several centuries and that contained the bulk of English legal doctrine. In Tucker's view, the common law had evolved uniquely in each of the states, and this would have meant that the scope of this right and the nature of the legal restraints on firearms use would have varied from one state to another.[126]

Tucker's analysis of the distinction between collective self-defense and individual self-defense emerges clearly in the annotations he compiled to Blackstone's *Commentaries*. The right to bear arms corresponded to what Blackstone described as the fifth auxiliary right,[127] a principle embodied in the English Bill of Rights assertion: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[128]

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124. The common law protected many rights. *See generally* JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 197-201 (4th ed. 2002) (supplying information on the development of the common law system in England); DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 122-25 (1989) (providing readings on common law principle and precedent in the eighteenth century); JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 12-76 (2004) (providing an exhaustive discussion on the common law Court of King's Bench in the time of Lord Mansfield); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 14 (abr. ed. 1995) (noting that most eighteenth-century jurists believed that natural rights were embodied in the common law).

125. *See* WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 18-20 (Richmond Aug: Davis 1799) (providing an in-depth discussion of the crime of affray).

126. On the importance of statutory regulation and common law constraints on firearms in the Founding Era, see Cornell & DeDino, *supra* note 14, and St. George Tucker, *Of the Cognizance of Crimes and Misdemeanours*, *in* 5 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, *supra* note 1, ed. app. at 8-9 [hereinafter Tucker, *Crimes and Misdemeanours*]

127. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, *supra* note 1, at 143-44 [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES].

128. The Bill of Rights, 1689, 1 W. & M., 2d sess., c.2 (Eng.), *reprinted in* W.C. COSTIN & J. STEVEN WATSON, THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660-1914, at 69 (2d ed. 1964).

Auxiliary rights such as this one were a set of "barriers" within the British constitutional system that functioned as safeguards against tyranny.[129] In his explanation of the nature and function of these auxiliary rights, Blackstone made clear that these checks served a public political function; they were not a means for citizens to settle private grievances.[130] The fifth auxiliary right, "the right to have arms," was aimed at preventing the violence of oppression, not defending oneself against thieves.[131] To underscore this fact, Blackstone treated the fifth auxiliary right alongside other political rights such as the right to petition the government.[132]

In his gloss on Blackstone's discussion of the fifth auxiliary right, the right of subjects to have arms for their defense suitable to their condition as allowed by law, Tucker included a brief footnote in which he compared the limited nature of this English right with the more robust right explicitly protected by the Second Amendment, which contained no restrictions based on social class.[133] The notes for this section do not address the question of individual self-defense. A discussion of that issue was reserved for another section of his treatise that dealt with justifiable homicide.[134] In that discussion, Tucker makes no mention of the Second Amendment or the fifth auxiliary right, but instead directed his readers to some of the better-known English treatises on the common law of crime. Blackstone's separate discussion of these two rights clearly demonstrates that the two were legally distinct. Tucker's own discussion echoed the distinctions between these two rights evidenced in Blackstone's *Commentaries*.[135]

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129. 2 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 127, at 140-41.

130. *Id.* at 143-44.

131. *Id.* at 143.

132. *Id.* at 142-45.

133. *Id.* at 143 ed. n.40.

134. 5 *id.* at 177-81.

135. 5 *id.* at 183-84. For problematic modern readings of Blackstone, see generally JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 130 (1994), and Robert Cottrol & Raymond Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (reviewing MALCOLM, *supra*). For a more plausible historical reading of Blackstone's views on this matter, see generally Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 252-60 (2000). Some of the common law treatises Blackstone cited were MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW

The difference between the common law right to keep or carry firearms and the constitutional right to bear arms also emerged in Tucker's analysis of the law of treason.[136] This subject presented Tucker with an excellent opportunity to chastise Federalist judges who had participated in the trials of the Whiskey and Fries rebels, two of the most important examples of political unrest in the 1790s.[137] Federalists in Congress tried to extend federal powers beyond those designated by the Constitution; so too, Federalist judges sought to expand the definition of treason beyond the limits set by the Constitution.[138] This loose and expansive construction of treason employed by Federalists was drawn from English law and was, therefore, a poor guide for judging Americans who lived under an entirely different legal and constitutional system.[139] The Federalist approach to treason illustrated the larger problem with American uses of Blackstone and other English commentators. Thus, Tucker's critique of the way Federalist judges had handled this issue allowed him to reiterate the fundamental point of his treatise: the evolution of American law beyond the limits of English common law.[140]

One of the most notable differences between England and America, in Tucker's view, lay in the radically different views of guns that had evolved under common law in each society. Tucker contrasted the American attitude toward gun ownership with the extremely limited views embedded in English law.[141] Tucker noted that under English common law "the bare circumstance of having arms, therefore, of itself, creates a presumption of warlike force in England."[142] Such an assumption was entirely unwarranted in many parts of America. Tucker acknowledged that there was no single

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(1762), and WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (1716).

136. *See* St. George Tucker, *Concerning Treason*, *in* 5 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 127, ed. app. at 19-21 [hereinafter Tucker, *Concerning Treason*].

137. *See id.* ed. app. at 24-26.

138. *See id.* ed. app. at 20-21.

139. For some of Tucker's thoughts on Federalist rulings in treason cases and on the development of treason in general, see Tucker, *Concerning Treason*, *supra* note 136, ed. app. at 21-40, which states clearly his misgivings about the reasoning of the Whiskey and Fries cases, especially Justice Samuel Chase's opinion on the constitutional meaning of treason.

140. *See* Tucker, *Crimes and Misdemeanours*, *supra* note 126, ed. app. at 4-10.

141. *See* Tucker, *View of the Constitution*, *supra* note 1, ed. app. at 300.

142. Tucker, *Concerning Treason*, *supra* note 136, ed. app. at 19.

common law understanding of the right to keep or carry arms in America.[143] The common law in America had evolved differently in each state. The common law had to adjust to the fact that citizens were expected to outfit themselves with weapons suitable for militia service and train with them.[144] Although still subject to reasonable regulation by statute, the practice of bearing military arms openly did not by itself create an assumption of either warlike force or constitute an affray.[145] Americans traveled to muster and practiced with firearms as part of their obligations to serve in a citizen-militia. In Tucker's view, the realities of American life had changed the legal threshold necessary to demonstrate that traveling armed might constitute an affray, riot, or even treason.[146] The law recognized a difference between those weapons suitable for militia service and others that were only useful for individual self-defense.[147] The only weapons that enjoyed full constitutional protection were militia weapons.[148] Yet even the right to travel armed with muskets or rifles was not unlimited. The fate of the participants in the Whiskey and Fries rebellions demonstrated this point.[149] The defense and prosecution in the resulting cases conceded that traveling armed with militia weapons did not enjoy constitutional protection when those weapons were used outside of the context of militia-related activity.[150] The defense accepted that an armed assembly might legitimately be prosecuted for riot, while noting that their client's actions fell short of the constitutional threshold needed to sustain a charge of treason.[151] In Tucker's view, the defense's concession that the rebels were engaged in riotous behavior might have been reasonable in Pennsylvania, but he doubted that such a concession would have been warranted had the cases been tried in Virginia, where the mere fact of traveling armed with a musket did not by

143. *See* Tucker, *Crimes and Misdemeanours*, *supra* note 126, ed. app. at 8-9.

144. *See, e.g.*, 1778 N.Y. Laws 62.

145. *See* Tucker, *Concerning Treason*, *supra* note 136, ed. app. at 19.

146. *See id.* ed. app. at 19-21.

147. *See* Aymette v. State, 21 Tenn. (2 Hum.) 154, 158-59 (1840).

148. *See* Cornell & DeDino, *supra* note 14, at 500-01.

149. *See* United States v. Fries, 3 U.S. (3 Dall.) 515 (1799); United States v. Mitchell, 2 U.S. (2 Dall.) 348 (1795); United States v. Vigol, 2 U.S. (2 Dall.) 346 (1795).

150. *Fries*, 3 U.S. (3 Dall.) 515; *Mitchell*, 2 U.S. (2 Dall.) 348; *Vigol*, 2 U.S. (2 Dall.) 346.

151. *Fries*, 3 U.S. (3 Dall.) 515; *Mitchell*, 2 U.S. (2 Dall.) 348; *Vigol*, 2 U.S. (2 Dall.) 346.

itself create any presumption of illegality.[152] To sustain a charge of either riot or affray in his home state of Virginia, he believed, would require a much higher standard of proof that a group of armed citizens were engaged in criminal behavior.[153] The key to deciding if arming oneself constituted an affray was determined by context. The law prohibited traveling armed "in terror of the country," but there were clearly many circumstances in which one might travel armed without causing an affray.[154]

Given his negative comments on the proceedings in all the Whiskey and Fries Rebellion cases,[155] one might reasonably ask if Tucker believed that there was some kind of constitutional penumbra that surrounded the right to bear arms that protected nonmilitary use of certain classes of firearms. Applying a modern concept such as a constitutional penumbra does pose the risk of introducing an anachronism into discussions of an eighteenth-century constitutional idea. It might be more accurate to consider if the exercise of this right carried with it any ancillary protection for firearms use. The scope of any constitutional protection would have been shaped by the purpose of the right, the maintenance of a well-regulated militia. Weapons intended primarily for self-defense with little utility for military engagement would not have enjoyed constitutional protection but would have enjoyed some limited protection under common law, subject to state regulation. Secondly, traveling armed, even with militia weapons, would have still been subject to reasonable regulations and some types of common law constraints. Attending muster with arms would have enjoyed robust constitutional protection. Carrying a rifle or musket in the streets of Philadelphia might not have enjoyed the same level of protection. Rather than think in terms of constitutional penumbras, it would be more accurate to acknowledge that the exercise of the right to keep and bear arms necessarily created a subsidiary right to train with one's weapon.[156]

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152. *See generally* Tucker, *Concerning Treason*, *supra* note 136, ed. app. at 19-21.

153. *See generally id.* at 22.

154. 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 127, at 146; *see also* HENING, *supra* note 125, at 18-20 (discussing the crime of affray).

155. *See* Tucker, *Concerning Treason*, *supra* note 136, ed. app. at 19-21.

156. *See, e.g.*, 1778 N.Y. Laws 62 (an early New York law requiring militiamen to train regularly). For modern discussions on the right to train with a weapon, see James A.

A clear statement of how the right to bear arms created such a subsidiary right was articulated by one of Tucker's contemporaries, Samuel Latham Mitchill, in an oration delivered before the Society of Black Friars in 1793. "The Establishment of a Militia, in which most able bodied and middle aged men are enrolled and furnished with arms, proceeds upon the principle, *that they who are able to govern, are also capable of defending themselves.*"[157] It followed logically from this principle that "the keeping of arms, is, therefore, not only not prohibited, but is positively provided for by law."[158] Bearing arms, Mitchill noted, was as much a claim by government on the property and lives of its citizens as it was a claim by them against their government.[159] To achieve the goal of having a well-regulated militia meant that government would encourage citizens to acquire certain types of firearms and attain a basic competency with them.[160] Government might even compel citizens to outfit themselves and train with such weapons. In America, Mitchill opined, arms "shall not rust for want of employ, but shall be brought into use from time to time, that the owner may grow expert in the handling of them."[161] Mitchill did not equate the right to bear arms with a right of individual self-defense, but he did state a point that would have seemed obvious to Americans of his day. The fact that Americans were well armed did yield a security dividend to society. Arms kept for the purpose of participating in the militia might also "serve for the defence of the life and property of the individual against the violent or burglarious attacks of thieves."[162] Another benefit of a well-regulated militia properly armed and trained was its efficacy as a means to "suppress any mob or insurrection."[163]

Henretta, *Collective Responsibilities, Private Arms, and State Regulation: Toward the Original Understanding*, 73 FORDHAM L. REV. 529, 534-36 (2004) and Shalhope, *supra* note 3, at 278-79.

157. SAMUEL LATHAM MITCHILL, AN ORATION, PRONOUNCED BEFORE THE SOCIETY OF BLACK FRIARS, AT THEIR ANNIVERSARY FESTIVAL, IN THE CITY OF NEW YORK, ON MONDAY, THE 11TH OF NOVEMBER, 1793, at 27 (New York, Friar McLean 1793).

158. *Id.*

159. *Id.* at 27-28.

160. *Id.* at 28.

161. *Id.* at 27.

162. *Id.* at 28.

163. *Id.*

Mitchill's elaboration of the benefits of a well-regulated militia and the right to keep and bear arms provides an important context for Tucker's own musings on the scope of this right. In contrast to English law, which had disarmed the population, American law encouraged gun ownership so that citizens might meet their obligation to participate in the militia. Citizens were expected to participate in a well-regulated militia, which meant not only that the government would encourage private ownership of firearms, but the common law, at least in parts of America, had to evolve to deal with this reality.

Arms owned for militia service were heavily regulated, but these arms also enjoyed a privileged legal status and were constitutionally protected.[164] Civilian firearms did not enjoy this type of protection and were subject to even more robust legislative control.[165] The legal difference between constitutionally protected arms and ordinary guns was captured by an anonymous author in a Maine newspaper as he pondered the meaning of the arms bearing provision of the Massachusetts Constitution of 1780.[166] In his view, "the legislature have [sic] a power to controul [arms] in all cases, except the one mentioned in the bill of rights, whenever they shall think the good of the whole require it."[167] Personal arms such as pistols were not treated in the same way as militia weapons such as muskets. In the absence of any law prohibiting the ownership or use of personal firearms, "the people still enjoy, and must continue so to do till *the legislature shall think fit to interdict*."[168] When the legislature acted, however, the right to keep or carry these types of weapons could be severely constrained. The scope of legislative authority over such firearms was broad, but not unlimited. Laws enacted to regulate

164. *See* Cornell & DeDino, *supra* note 14, at 500-01.

165. *See* Act of Dec. 25, 1837, 1837 Ga. Laws 90 (prohibiting the sale and possession of dangerous weapons, including Bowie knives and pistols); *see also* Act of Feb. 24, 1797, 1797 N.J. Laws 179 (punishing armed rioters); 1785 N.Y. Laws 152 (restricting the discharge of firearms on certain days of the year).

166. *See* Scribble-Scrabble, Letter to the Editor, CUMBERLAND GAZETTE (Portland, Me.), Jan. 26, 1787, at 1 [hereinafter Scribble-Scrabble, January 1787 Letter to the Editor]; *see also* Scribble-Scrabble, Letter to the Editor, CUMBERLAND GAZETTE (Portland, Me.), Dec. 8, 1786, at 1 [hereinafter Scribble-Scrabble, December 1786 Letter to the Editor].

167. Scribble-Scrabble, December 1786 Letter to the Editor, *supra* note 166.

168. Scribble-Scrabble, January 1787 Letter to the Editor, *supra* note 166 (emphasis added).

firearms would still need to be directed at a legitimate public purpose and had to be reasonable. Within these constraints, the legislature had considerable latitude to regulate the possession and the use of guns.

This understanding of the right to bear arms seems entirely consistent with the evolution of firearms law and jurisprudence at the state level in the decades following the adoption of the Second Amendment. In the eighteenth century, states enacted laws designed to encourage citizens to arm themselves with weapons suitable for participation in the militia.[169] In the decades after the adoption of the Second Amendment, the individual states adopted a variety of laws aimed at discouraging, and in some cases prohibiting, citizens from arming themselves with weapons that had little connection to the goal of creating a well-regulated militia, such as pistols.[170] When faced with legal challenges to these new gun control laws, state courts employed a logic similar to the one used by Tucker, Mitchill, and the pseudonymous writer from Maine who drew a clear distinction between militia weapons and civilian arms.[171] While militia weapons enjoyed considerable protection, weapons designed for personal protection, such as Bowie knives and handguns, were subject to more extensive regulation and might even be prohibited in some cases.[172] The only types of firearms that enjoyed full constitutional protection were those weapons that citizens were obligated to own so that they could meet their duty to participate in the militia.[173]

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169. *See* 1778 N.Y. Laws 62 (requiring militiamen to provide various items of equipment at their own expense, including musket, bayonet, and cartridges). For a general discussion of various states and their regulation of militia, see Cornell & DeDino, *supra* note 14, at 508-10.

170. *See* Act of Dec. 25, 1837, 1837 Ga. Laws 90 (prohibiting the sale and possession of dangerous weapons including Bowie knives and pistols); *see also* Act of Feb. 2, 1838, 1838 Va. Acts (criminalizing the carrying of concealed weapons). *See generally* Cornell & DeDino, *supra* note 14, at 502-15.

171. *See* Aymette v. State, 21 Tenn. (2 Hum.) 154, 158-59 (1840) (concerning the distinction between militia weapons and civilian arms); *see also* State v. Buzzard, 4 Ark. 18, 18 (1842) (concerning the violation of an Arkansas statute that made the carrying of a pistol a misdemeanor).

172. *See Aymette*, 21 Tenn. (2 Hum.) at 154, 158-59; *see also* Act of Dec. 25, 1837, 1837 Ga. Laws 90 (prohibiting the sale of Bowie knives and pistols).

173. *See* Cornell & DeDino, *supra* note 14, at 508-10.

CONCLUSION

Tucker's interpretation of the right to bear arms provided the learned jurist with an opportunity to explore the meaning of federalism and states' rights, the proper method for interpreting the constitution, the continuing relevance of the right of armed resistance under constitutional government, judicial review, the nature of citizenship, the complex nature of different types of rights claims under American constitutional law, and the divergent evolution of the common law in different parts of America. In his earliest commentaries on the Second Amendment, Tucker interpreted the meaning of this provision of the Bill of Rights within the context of federalism as a right of the states. He saw the Second Amendment as a concession to Anti-Federalists designed to limit the potential disarmament of the militia and check the grant of authority over the militia in Article I, Section 8. Tucker even conceded that the states might use this awesome power as the ultimate check on federal tyranny. By the time Tucker published his more mature thoughts on the Second Amendment in his *Blackstone*, much had changed. Fears that might have seemed slightly farfetched in 1788 were no longer "visionary supposition" or "the incoherent dreams of a delirious jealousy."[174] In response to these changed circumstances, Tucker refined and expanded his discussion of the right to bear arms, exploring the civic character of the right and examining how the federal courts might protect citizens from federal laws intended to prevent them from exercising their right to bear arms in a well-regulated militia.

Tucker shared with others in the Founding generation the belief that bearing arms in the militia was legally distinct from bearing or carrying a gun in self-defense. The latter right was well established in common law, while the former had been explicitly protected by the Second Amendment. The different legal foundations for these two rights did not diminish his appreciation of the importance of either. Modern gun rights ideology has conflated these two rights. Given the trajectory of modern constitutional law, this confusion is understandable. Tucker lived in a different era, a time when the protections of common law were a vital part of American law.

174. THE FEDERALIST NO. 46 (James Madison), *supra* note 56, at 334.

Far too much scholarly energy has been wasted in the great American gun debate trying to twist history to produce a usable past. While both sides in this debate have played the law office history game on occasion, partisans of the individual-rights view have been far more aggressive in pushing their ideological agenda. Ironically, this revisionist historical project has been carried out under the banner of constitutional originalism. Reinterpreting the Second Amendment as an individual right does more than simply distort history for ideological purposes, it also does great violence to the text of the Constitution, turning the Bill of Rights into a constitutional "Etch-a-Sketch" in which the Second Amendment's preamble, tying the purpose of the Amendment to the preservation of a well-regulated militia, can be erased by judicial fiat. Such bold rewriting of the text of the Constitution goes well beyond what the most ardent proponents of a living constitution would advocate, and seems wildly inconsistent with the professed commitment to originalism of most gun rights advocates.

There is no need to distort history to achieve progress in America's great gun debate. The time has come to abandon the simplistic dichotomy that dominated discussion of gun control for most of the last century. Rather than argue endlessly over the individual or collective rights character of the Second Amendment, scholars could spend their time more profitably hammering out a workable firearms jurisprudence. The real issue in the contemporary debate over guns in America has little to do with the fear of standing armies and the danger of militia disarmament that inspired the framing of the Second Amendment. The modern debate over guns in America is about the scope of the right of self-defense. Framing a jurisprudence that can reconcile the need for public safety with the rights of gun owners need not involve the Second Amendment at all. Rather than try to fit the great American gun debate into the existing framework that has produced our current impasse, the time has arrived to create a new paradigm to deal with this contentious issue. Here Tucker's writings about the common law foundations of the right of self-defense might provide some useful insights for constitutional theorists trying to find a way to balance these opposing values. The power of the common law resided in its ability to evolve organically in response to changing

circumstances. While Tucker's writings were the product of a different world, there may still be much we can learn from the erudite jurist.