

## ST. GEORGE TUCKER'S SECOND AMENDMENT: DECONSTRUCTING "THE TRUE PALLADIUM OF LIBERTY"

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A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding, may learn his own rights, and know when they are violated . . . .

– St. George Tucker<sup>2</sup>  
*Introduction*

The Bill of Rights, according to the above view, is designed to inform ordinary citizens of their rights. Its meaning is not a monopoly of the governmental entities whose powers the Bill of Rights was intended to limit. By

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<sup>2</sup> ST. GEORGE TUCKER, *View of the Constitution of the United States*, in 1 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 app. D at 308 (William Young Birch & Abraham Small 1803).

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knowing when their rights are violated, the citizens may signify their displeasure through mechanisms, such as the ballot box and the jury box, and may resort to speech, the press, assembly, and petition to denounce the evil. The Second Amendment “right of the people to keep and bear Arms”<sup>3</sup> was intended to serve as the ultimate check, which the Founders hoped would dissuade people at the helm of state from seeking to establish tyranny.<sup>4</sup>

Although humble people generally think that they are among “the people,” a segment of the not-so-humble appear to disagree when it comes to the right of “the people” to keep and bear arms.<sup>5</sup> Did the Founders mean what they seem to have said, or were their words too complex for the common people to understand? The following article seeks to provide some insights into that question through an examination of the writings of St. George Tuck-

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<sup>3</sup> “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

<sup>4</sup> This view was expressed just ten days after Madison proposed the Bill of Rights in Congress:

As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.

“A Pennsylvanian,” Tench Coxe, *Remarks on the First Part of the Amendments to the Federal Constitution*, FED. GAZETTE, June 18, 1789, at 2; see Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347, 367 (1999).

<sup>5</sup> “Half (50%) of the American population *wrongly believe* the Constitution gives every citizen the right to own a handgun.” HEARST REPORT, THE AMERICAN PUBLIC’S KNOWLEDGE OF THE U.S. CONSTITUTION 27 (The Hearst Corp. 1987) (emphasis added).

er and a recent reevaluation of those writings.

When Thomas Jefferson was elected as President of the United States in 1801, students from the College of William and Mary celebrated with a glass of wine at the house of their acclaimed professor, Judge St. George Tucker.<sup>6</sup> Tucker was already at work writing what would be the first and foremost treatise on the Constitution and Bill of Rights. Published in 1803 and known as Tucker's *Blackstone*, the work included the English jurist's *Commentaries* along with Tucker's reflections on the American system.<sup>7</sup>

During the American Revolution, Tucker had smuggled in arms from the West Indies at the behest of Governor Patrick Henry,<sup>8</sup> and as a militia colonel, Tucker fought against British forces.<sup>9</sup> After the Revolution, Tucker practiced law. Tucker, along with James Madison and Edmund Randolph, was appointed to the Annapolis Convention of 1786.<sup>10</sup> The Annapolis Convention served as a

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<sup>6</sup> MARY HALDANE COLEMAN, *ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY* 127 (The Dietz Press 1938).

<sup>7</sup> Tucker's Appendix, "the first disquisition upon the character and interpretation of the Federal Constitution, as well as upon its origin and true nature," was for years used as a textbook in Virginia and other states in the early republic. J. Randolph Tucker, *The Judges Tucker of the Court of Appeals of Virginia*, 1 VA. L. REG. 789, 793-94 (1896); see Stephen P. Halbrook, *St. George Tucker: The American Blackstone*, 32 VA. B. NEWS, Feb. 1984, at 45-46.

<sup>8</sup> Halbrook, *supra* note 7, at 47. In 1775, Tucker heard Patrick Henry's famous "Liberty or Death" speech, and left one of only three detailed accounts of that debate. TYLER COIT MOSES, *PATRICK HENRY* 145 (reprinted New York 1980) (1887).

<sup>9</sup> COLEMAN, *supra* note 6, at 35, 48-58. Tucker was appointed major of the Chesterfield militia, which he led to join General Greene in North Carolina. With sword and pistol, he dashed about on his horse Hob at the Battle of Guilford Court House, rallying the wavering militiamen and taking a bayonet wound in the leg. Halbrook, *supra* note 7, at 47. Tucker eventually received a promotion to lieutenant colonel of a troop of horsemen in the Virginia militia, and was actively involved in the siege of Yorktown when Cornwallis surrendered. *Id.*

<sup>10</sup> Halbrook, *supra* note 7, at 47.

warm-up for the Philadelphia Convention of 1787, which framed the federal Constitution.<sup>11</sup> However, Tucker was known to have joined with George Mason and Patrick Henry in opposing its adoption without a bill of rights.<sup>12</sup> In 1788, as the States debated the proposed federal Constitution, Tucker was appointed judge of the General Court of Virginia.<sup>13</sup> After serving on the Court of Appeals of Virginia,<sup>14</sup> President James Madison appointed Tucker United States District Judge for the Eastern District of Virginia in 1813.<sup>15</sup>

In 2006, the Institute of Bill of Rights Law at the William and Mary College of Law held a symposium on the influence of St. George Tucker on American law.<sup>16</sup> Professor Saul Cornell of Ohio State University presented a paper on Tucker's views on the right to bear arms.<sup>17</sup> As Cornell notes, "St. George Tucker described the Second Amendment as 'the true palladium of liberty.'"<sup>18</sup>

As the first major commentator on the Constitution, Tucker's views should be accorded close scrutiny,<sup>19</sup> particularly on an issue like the Second Amendment, which has received little attention from the Supreme Court.<sup>20</sup> Profes-

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see Letter from James Madison to Thomas Jefferson, (Oct. 24, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, 279-81 (Boyd ed., 1955).

<sup>13</sup> Halbrook, *supra* note 7, at 47.

<sup>14</sup> See, e.g., Halbrook, *supra* note 7, at 49.

<sup>15</sup> "Biographical Sketch of the Judges of the Court of Appeals," 8 Va. (4 Call.) 627 (1827).

<sup>16</sup> *Institute of Bill of Rights Law Symposium: St. George Tucker and His Influence on American Law*, 47 WM. & MARY L. REV. 111 (2006).

<sup>17</sup> Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1123 n.\* (2006).

<sup>18</sup> *Id.* at 1123; see TUCKER, *supra* note 2, at 300.

<sup>19</sup> "[T]he Supreme Court has cited Tucker in over forty cases." David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYUL. REV., 1359, 1376.

<sup>20</sup> "Our most recent treatment of the Second Amendment occurred in

sor Cornell has emerged as perhaps the leading exponent of the view that the Second Amendment recognizes no individual right to possess arms, and instead protects a civic duty to bear arms in the militia.<sup>21</sup> Accordingly, an analysis of Tucker's views on the issue reveals much of importance on the Second Amendment, and an analysis of Cornell's views on Tucker may reveal more about the position that the Amendment eschews any individual right.

In his article, Cornell seeks to refute "supporters of gun rights" who misinterpret Tucker as espousing 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."<sup>22</sup> Referring to the controversy over "gun rights and gun control," Cornell avers, "The individual rights misreading of Tucker

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*United States v. Miller*, 307 U.S. 174 (1939) . . . The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." *Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring). Only in recent years has the Second Amendment been accorded detailed scrutiny by the federal courts of appeals. *Compare* *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (Second Amendment "protects the rights of individuals, including those not then actually a member of any militia . . . to privately possess and bear their own firearms . . ."), *cert. denied*, 536 U.S. 907 (2002), *with* *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002) (adopting "the 'collective rights' model, [which] asserts that the Second Amendment right to 'bear arms' guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons."), *petition for reh. denied*, 328 F.3d 567, 568 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).

<sup>21</sup> Cornell is the Director of the Second Amendment Research Center at the John Glenn Institute, Ohio State University. Cornell, *supra* note 17, at 1123 n.\*. According to the Freedom States Alliance, a firearm prohibition lobby, Cornell's new book "blows away the NRA myths about the Second Amendment." (E-mail solicitation from info@freedomstatesalliance.com, Sept. 19, 2006); *see* SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (Oxford University Press 2006).

<sup>22</sup> Cornell, *supra* note 17, at 1123.

is merely the latest example of how constitutional scholarship has been hijacked for ideological purposes in this bitter debate.”<sup>23</sup>

**I. “THE PALLADIUM OF LIBERTY”:  
TUCKER’S BLACKSTONE *VERSUS* CORNELL’S TUCKER**

Debunking the individual-rights “hijackers” of the Second Amendment, Professor Cornell refers to “the often-quoted passage describing it [the Second Amendment] as the ‘palladium of liberty’” at least five times,<sup>24</sup> but he strangely fails to provide the actual quotation or to acknowledge its contents. Providing Tucker’s actual quotation or acknowledging its contents would be worthwhile in order to determine the extent of the constitutional hijacking by scholars who read the Second Amendment as protecting individual rights.

After quoting the text of the Amendment, Tucker began as follows:

This may be considered as the true palladium of liberty. . . . The right of self defence is the first law of nature: in most governments, it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.<sup>25</sup>

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<sup>23</sup> *Id.* at 1124.

<sup>24</sup> *Id.* at 1123-25, 1137, 1143.

<sup>25</sup> TUCKER, *supra* note 2, at 300. The above is similar to Tucker’s style in explaining, a few pages earlier, the freedom of the press protected by the First Amendment as follows:

Cornell's thesis is that Tucker, along with the Founders in general, saw the Second Amendment as guaranteeing a "state right" to maintain a militia, excluding an individual right to have and carry arms for self defense, which the legislature is free to curtail or prohibit. Tucker's comment, however, clearly espouses the view that the Second Amendment protects the individual right to bear arms and to use them for self defense – "the first law of nature."<sup>26</sup>

The above quotation did not mention the militia although Tucker certainly saw the militia as the republican alternative to a standing army. After all, the right to arms for defense extended to protection from both individual criminals and public tyranny.

Moreover, as noted, Tucker saw any prohibition on the right "under any colour or pretext whatsoever" as dangerous to liberty.<sup>27</sup> He explained further,

In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calcu-

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[A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

*Id.* at 297. The above was quoted in the seminal case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring). Justice Black found in Tucker's work "the general view held when the First Amendment was adopted and ever since." *Id.* at 296.

<sup>26</sup> TUCKER, *supra* note 2, at 300.

<sup>27</sup> *Id.*

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lated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.<sup>28</sup>

Thus, when explaining how the right to keep and bear arms was violated in England, Tucker pointed in part to English game laws that prohibited individuals from keeping guns, even at home.<sup>29</sup> He said nothing about any laws that disarmed militias. This silence is inconsistent with Cornell's thesis that the right to bear arms protects only militias from being disarmed.

Tucker also referred to the English Declaration of Rights of 1689, which stated, "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law."<sup>30</sup> This was a right of Protestant "Subjects" – not militiamen – to "have Arms for their Defence," and Tucker referred to this right as the English variety of "the right of bearing arms" with-

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<sup>28</sup> *Id.*

<sup>29</sup> Although English game laws were in some cases enforced in a manner to prevent subjects from keeping guns, English judicial precedents actually held that the people at large could keep arms at home, and that guns could be seized only when actually being used contrary to the hunting prohibitions. *See Rex v. Gardner*, 87 Eng. Rep. 1240 (K.B. 1739); STEPHEN HALBROOK, THAT EVERY MAN BE ARMED 51-53 (1984) (analyzing other cases).

<sup>30</sup> An Act Declaring the Rights and Liberties of the Subject, 1 W. & M. 2, c. 2 (1689) (Eng.).



out imposing any militia context.

Blackstone had written that “a reason oftener meant, than avowed, by the makers of forest or game laws” was “for prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . .”<sup>31</sup> Historically, conquerors, who founded the European kingdoms, endeavored “to keep the *rustici* or natives of the country . . . in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting . . . .”<sup>32</sup> Feudal laws thus “prohibit[ed] the *rustici* in general from carrying arms” and severely proscribed hunting.<sup>33</sup>

Commenting on Blackstone’s text, Tucker again juxtaposed the limited right to have arms under the English Declaration with the game laws. “In the construction of these game laws it seems to be held, that no person who is not qualified according to law to kill game, hath any right to keep a gun in his house.”<sup>34</sup> Because only persons with an income of 100 pounds per annum were qualified to hunt, “it follows that no others can keep a gun for their defence; so that the whole nation are completely disarmed, and left at the mercy of the government, under the pretext of preserving the breed of hares and partridges, for the exclusive use of the independent country gentlemen.”<sup>35</sup> Tucker concluded that “[i]n America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty.”<sup>36</sup>

Again, Tucker discussed the right to keep and bear arms as protecting the liberty to keep a gun for defense in the home and to carry arms, including for hunting. No mention was made of state militia powers or bearing arms

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<sup>31</sup> WILLIAM BLACKSTONE, 2 COMMENTARIES \*412 (Tucker ed., 1803).

<sup>32</sup> *Id.* at \*413.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*414 n.3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

in a militia. Cornell disregards the above passages altogether.

Although declining to quote the words of Tucker's "palladium of liberty" text, Cornell notes that Justice Joseph Story used the same allegory in his *Commentaries on the Constitution*. Cornell states, "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."<sup>37</sup> Cornell proceeds to quote a comment by Justice Story regarding Congress' militia power being "concurrent with that of the states."<sup>38</sup>

As with Tucker, Cornell studiously avoids mention of the content of Story's analysis of the Second Amendment, much less does he quote any of Story's "palladium of liberty" statement. Story's interpretation is unmistakable:

The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them.<sup>39</sup>

Story cited Tucker for that proposition as well as for the following proposition about the right of subjects "to

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<sup>37</sup> Cornell, *supra* note 17, at 1131.

<sup>38</sup> *Id.*

<sup>39</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1001, at 708 (1833), citing, *inter alia*, Tucker, *supra* note 2, at 300. "Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'" *Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) (citation omitted).

have arms for their defense” under the English Declaration of Rights: “But under various pretenses the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.”<sup>40</sup> Story was referring to possession of arms by individuals, not by militias. Although Story also stressed the importance of a well-regulated militia, this view was hardly inconsistent with the individual right to have arms.<sup>41</sup>

Having left the reader in the dark about what Tucker and Story actually said on “the palladium of liberty,” Cornell asserts that for both, “Protection of states’ rights, not individual rights, was the issue that had prompted the inclusion of the Second Amendment.”<sup>42</sup> Aside from the constitutional vocabulary that governments (federal and state) have only “powers” and not “rights,” and that only individuals have “rights,”<sup>43</sup> the Second Amendment was prompted by the perceived need to protect the right of individuals to keep and bear arms, which would encourage a well-regulated militia.

## II. A CONSTITUTIONAL RIGHT TO ARMS FOR SELF DEFENSE?

Blackstone’s *Commentaries* analyzed the right to have arms in the first chapter, entitled “Of the Absolute Rights of Individuals,” of the first book, entitled “Of the

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<sup>40</sup> STORY, *supra* note 39, § 1891 at 747.

<sup>41</sup> Elsewhere, Story fused the individual right with the need for a militia quite neatly as follows: “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.” STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* § 450, at 319 (Regnery Gateway, Inc. 1986) (Harper 1859).

<sup>42</sup> Cornell, *supra* note 17, at 1132.

<sup>43</sup> Compare U.S. CONST. art. I, § 8 and U.S. CONST. amend. X (federal and state “powers”) with U.S. CONST. amends. I, II, IV, and IX (“rights” of the people).

Rights of Persons.” Therein he referred to “auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.”<sup>44</sup> Besides the right to petition, Blackstone included among these auxiliary rights the following:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2 [the Declaration of Rights], and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.<sup>45</sup>

To the above, Tucker counterpoised the following: “The right of the people to keep and bear arms shall not be infringed. Amendments to C. U. S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government.”<sup>46</sup> Although Cornell refers to this statement of Tucker, he fails to quote it and asserts that it does “not address the question of individual self-defense.”<sup>47</sup> Yet the discussion concerns a “right of the

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<sup>44</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES, \*93, \*141 (Tucker ed., 1803).

<sup>45</sup> *Id.* at \*144.

<sup>46</sup> *Id.* at \*144 n.40. Tucker referred to the Second Amendment as Article Four of the Amendments because that was the original numbering Congress used when submitting the amendments to the States for ratification.

<sup>47</sup> Cornell, *supra* note 17, at 1146.

subjects” to use arms for “self-preservation” when the law is inadequate, and no mention is made of the militia. Indeed, to Blackstone’s above words, Tucker added the following further note:

Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself informs us, Vol. II, p. 412, “that the prevention of popular ‘insurrections and resistance to government by disarming the bulk’ of the people, is a reason oftener meant than avowed by the makers of the forest and game laws.”<sup>48</sup>

Again, the forest and game laws repressed the right of individuals to keep arms, in order to enable the ruling monarchy to control the commoners. Such laws had no applicability to “State’s rights” to maintain a militia – indeed, England had no States – or to bearing arms in a militia. Tucker clearly saw the Second Amendment as prohibiting infringements on the individual right to have arms.

Contending that the right to have arms in the English Declaration had no self-defense component, Cornell argues that this auxiliary right, “the right to have arms,” was aimed at preventing the violence of oppression, not defending oneself against thieves.”<sup>49</sup> But Blackstone made no distinction between defense against robbers or tyrants, nor did he limit defense to organized groups and exclude individual defense. Indeed, the right of having arms vindicated the rights to “personal security” and “personal liber-

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<sup>48</sup> BLACKSTONE, *supra* note 44, at \*144 n.41.

<sup>49</sup> Cornell, *supra* note 17, at 1146.

ty.” As Blackstone further explained,

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen . . . . And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence.<sup>50</sup>

The use of arms “for self-preservation and defense” could be applied to an individual or a collective group. An aggressor could be a single murderer or a renegade military force that stages a coup d’ état and overthrows the constitution. Contrary to Cornell, Blackstone did not limit self-preservation to some kind of elusive collective right and eschew individual defense.

Tucker made further references to infringement of the individual right to bear arms, which Cornell fails to mention. Tucker explained how the British Parliament would violate basic rights in the guise of some necessary objective, but that Congress had no such power. He reiterated that in England the game laws “have been converted into the means of disarming the body of the people,” and that “the acts directing the mode of petitioning parliament, [sic] and those for prohibiting riots: and for suppressing assemblies of free-masons, [sic] are so many ways for preventing public meetings of the people to deliberate upon their public, or national concerns.”<sup>51</sup> By contrast, Congress

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<sup>50</sup> BLACKSTONE, *supra* note 44, at \*143-44.

<sup>51</sup> TUCKER, *supra* note 2, at 315.

had “no power to regulate, or interfere with the domestic concerns, or police of any state . . . nor will the constitution permit any prohibition of arms to the people; or of peaceable assemblies by them, for the purposes whatsoever, and in any number, whenever they may see occasion.”<sup>52</sup>

In short, the Bill of Rights precluded “any” ban on arms “to the people” or of their peaceable assemblies. Tucker wrote “the people,” not “the militia,” and he obviously had in mind the rights protected by the First and Second Amendments.

This pattern is pervasive. Cornell argues that Tucker, in his discussion of the law of treason, sharply contrasted “the common law right to keep or carry firearms and the constitutional right to bear arms” in a militia.<sup>53</sup> Regarding the law of treason in England, Sir Matthew Hale observed in *Pleas of the Crown* that “the very use of weapons by such an assembly, without the king’s licence, unless in some lawful and special cases, carries a terror with it, and a *presumption* of warlike force, &c.”<sup>54</sup> Tucker commented that “[t]he bare circumstance of having arms, therefore, of itself, creates a *presumption* of warlike force in England, and may be given in evidence there, to prove *quo animo* the people are assembled.”<sup>55</sup> Cornell acknowledges that statement but then avoids any reference to what Tucker proceeded to ask:

But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In

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<sup>52</sup> *Id.* at 315-16.

<sup>53</sup> Cornell, *supra* note 17, at 1147.

<sup>54</sup> ST. GEORGE TUCKER, *Concerning Treason, 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*, app. B at 19 (1803).

<sup>55</sup> *Id.*

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many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.<sup>56</sup>

As usual, Cornell avoids the embarrassing quotations. As an example of exercising “the right to bear arms” as “secured in the constitution,” Tucker referred to a man “going out of his house *on any occasion*” – not just for a militia muster – with “his rifle or musket in his hand.” Cornell’s veiled reference to the above two sentences revises them to say that, in Tucker’s view, “the mere fact of traveling armed with a musket did not by itself create any presumption of illegality.”<sup>57</sup>

Cornell intersperses with the above a discussion of the prosecutions arising out of the Whisky and Fries rebellions. Cornell states, “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.”<sup>58</sup> He cites a trio of reported cases for that proposition, but these cases do not support this proposition. In *State v. Mitchell*,<sup>59</sup> the Attorney General argued the unremarkable proposition that “to assemble in a body, armed and arrayed, for some treasonable purpose, is an act of levying war[.]”<sup>60</sup> No one, however, mentioned the constitutional status of traveling with militia arms, whether when on or off duty.

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<sup>56</sup> *Id.*

<sup>57</sup> Cornell, *supra* note 17, at 1148-49 n.152.

<sup>58</sup> *Id.* at 1148 (citing *United States v. Fries*, 3 U.S. (3 Dall.) 515 (Pa. D. 1799); *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 26 F. Cas. 1277 (Pa. D. 1795) (No. 15,788); *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (Pa. D. 1795)).

<sup>59</sup> 2 U.S. at 348.

<sup>60</sup> *Id.* at 354.



### III. JUDICIAL REVIEW: INVALIDATING INFRINGEMENTS ON LIBERTY OR DICTATING TO THE MILITARY COMMAND?

Cornell's rendition of Tucker is long on Cornell's characterizations and citations to recent law review articles supporting the "collective rights" view of the Second Amendment but woefully short on Tucker's actual words. This pattern also arises when Cornell discusses Tucker's views on judicial review. Cornell claims that Tucker conjured up a scenario of "federal disarmament of the militia" in a discussion about whether courts could declare laws unconstitutional.<sup>61</sup>

Tucker made no such mention about the militia. In the reference cited by Cornell, Tucker contended that judicial review is particularly applicable to laws purportedly passed not under an enumerated power, but under the "necessary and proper" clause, which violated the Bill of Rights guarantees. A court may declare a federal criminal law unconstitutional in the following circumstance:

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. But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and any man imprisoned for bearing arms under such an act, might be without relief; because

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<sup>61</sup> Cornell, *supra* note 17, at 1138 (citing TUCKER, *supra* note 2, at 289).

in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.<sup>62</sup>

In the above quotation, Tucker referred to a law prohibiting “any person” – not a militia – from bearing arms. Judicial review would be initiated by “any man” imprisoned for bearing arms, rather than a State claiming federal usurpation of its militia power or an individual claiming rejection by a militia force. In short, the Second Amendment protected individuals from federal laws which would prohibit possession of arms and impose imprisonment for having arms.

Tucker expanded on this analysis of judicial protection for the right to keep and bear arms in a further passage. Cornell refers to a passage’s page number but neither quotes the passage nor summarizes its content.<sup>63</sup> Tucker wrote,

If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man’s own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or

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<sup>62</sup> TUCKER, *supra* note 2, at 289. Tucker adhered to the then-incipient view that the courts are duty bound to declare statutes contrary to the constitution as void. In a General Court case decided in 1793, Judge Tucker opined that the Virginia Constitution of 1776, being the sovereign act of the people and hence the supreme law, “is a rule to all departments of the government, to the judiciary as well as to the legislature . . . .” *Kamper v. Hawkins*, 1 Va. Cas. 20, 23 (Va. Gen. Ct. 1793). Chief Justice John Marshall would espouse that view in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>63</sup> Cornell, *supra* note 17, at 1138 (citing TUCKER, *supra* note 2, at 357).

to keep and bear arms; it would, in any of these cases be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act. . . . The 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 it's shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence.<sup>64</sup>

The right to have arms, under the above view, was on par with freedom of religion, speech, and assembly, and abridgment of any of these rights should be declared unconstitutional. The judiciary had a special responsibility to protect these “rights of the individual.”

Cornell, who refuses to quote the relevant passages, refers to “The modern individual rights misreading of Tucker,” and asserts, “[t]he danger that Tucker apprehended was federal disarmament of the state militias.”<sup>65</sup> He adds, “If Federalists tried to restrict the right to bear arms in the militia, Tucker believed that federal courts should strike down such laws as unconstitutional.”<sup>66</sup> Tucker, however, never mentioned the militia in the above passages, not even once.

As for the alleged “right to bear arms in the militia,” those conscripted into the militia apparently have a “right” to do that which they are ordered to do on pain of fines or imprisonment. It is a rather curious “right” to do some-

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<sup>64</sup> Tucker, *supra* note 2, at 357.

<sup>65</sup> Cornell, *supra* note 17, at 1139.

<sup>66</sup> *Id.* at 1139-40.

thing one is forced to do. As for those who are not conscripted into the militia, they have an even more radical “right” to be so conscripted.

Specifically, based on the same passage from Tucker quoted above, Cornell asserts that to Tucker “the right to bear arms in a well-regulated militia was a judicially enforceable privilege and immunity of federal citizenship.”<sup>67</sup> Aside from the fact that Tucker did not say or even imply that, the implications of this statement are astonishing. It suggests that a person who is not a member of a militia could file a federal lawsuit and obtain a judicial decree ordering those in authority to accept such person as a militia member and further ordering that such person be able to bear arms. Could such person also choose which arm he or she would like to bear, as well as decide where and when to do so? Such a doctrine is inconsistent with the fundamental concept of compelled enrollment into a military force and its system of command.

Tucker himself noted that the 1792 Militia Act “establishing an uniform militia throughout the United States, seems to have excluded all but free white men from bearing arms in the militia.”<sup>68</sup> Indeed, the Act provided in

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<sup>67</sup> *Id.* at 1126 (citing Tucker, *supra* note 2, at 356-57). Cornell claims that this view was adopted by Republicans in the Department of Justice during Reconstruction, but only cites two works supportive of the view that Reconstruction Republicans held the Second Amendment to be a right of individuals, including freed slaves, which was incorporated against the States by the Fourteenth Amendment. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 257-66 (1998); STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* viii (1998). The Department pursued criminal indictments in federal courts alleging that the individual rights of freedmen to assemble and to have arms under the First and Second Amendments were violated by private conspirators. See HALBROOK, *FREEDMEN*, chapters 6-7.

<sup>68</sup> ST. GEORGE TUCKER, *On the State of Slavery in Virginia, in 2 BLACKSTONE’S COMMENTARIES*, app. H at 37 n. Elsewhere, Tucker summarized the militia law in part as follows:

part that “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizen shall reside . . . .”<sup>69</sup> Even within that limited class, various occupations, from government officials to persons involved in crucial transportation services, were exempt from the militia.<sup>70</sup>

According to the Cornell thesis, the people not qualified by law to be in the militia because of age, sex, race, occupation, not being able-bodied, or simply not being needed had a judicially enforceable right under the Second Amendment to enlist in the militia so that they could “bear arms.” The above statutory limitations presumably should have been declared unconstitutional by the courts.

Moreover, the Act also required every person enrolled in the militia to “provide himself with a good musket or firelock,” as well as other equipment, and required him to “appear, so armed, accoutered and provided, when called out to exercise, or into service . . . .”<sup>71</sup> Under

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Every able bodied white male citizen of the respective states, of the age of eighteen, and under forty-five years of age (except certain persons particularly excepted, and all persons who now are, or may be excepted by the laws of the respective states) shall be enrolled in the militia: and every person so enrolled shall, within six months, provide himself with arms, &c. as directed by the act, and shall appear so armed, &c. when called out to exercise, or into service. *Id.* at 409 n.

<sup>69</sup> Act of May 8, 1792, ch.33, §1, 1 Stat. 271, 271 (1792).

<sup>70</sup> *Id.* § 2.

<sup>71</sup> *Id.* § 1.

the Cornelian constitutional right to bear arms in the militia, however, one not called out to exercise or into service would have a judicially enforceable right to be called out to the militia. Such person would also presumably have the right to decide what kind of arms to bear, even if contrary to what the law and the militia command prescribed.

In short, Cornell is so intent on deconstructing the ordinary reading of the Second Amendment – that the people have a right to keep and bear arms – that he conjures up the unprecedented fantasy that a federal court could dictate to military authorities, including the personnel of a militia force together with their functions and arms. Reality was and remains otherwise. A militiaman’s refusal to peel potatoes when so commanded because he felt entitled to “bear arms” would be insubordination – not the exercise of a constitutional right – and could lead to a court-martial.

Tucker’s views, as expressed in his edition of Blackstone, were originally formulated in his law lectures presented at the William and Mary College of Law. These lectures, according to Cornell, do “not support the individual rights view,” and Tucker “explicitly described the Second Amendment as a right of the states . . . .”<sup>72</sup> For once, Cornell presents an actual quotation from Tucker, instead of the usual snippet or failure to quote anything. In this quotation, Tucker states that a State may choose “to incur the expence of putting arms into the Hands of its own Citizens for their defense,” and that would not “contravene” federal authority.<sup>73</sup> “[T]o contend that such a power would be dangerous” – on the basis that federal law might be resisted or withdrawal from the Union might occur – “would be subversive of every principle of Freedom in our Government.”<sup>74</sup> Tucker added that this quotation was the view of the first federal Congress because it proposed what

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<sup>72</sup> Cornell, *supra* note 17, at 1125.

<sup>73</sup> *Id.* at 1129.

<sup>74</sup> *Id.* at 1129-30.

became the Second Amendment, which Tucker quotes. “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 [Tenth Amendment].”<sup>75</sup>

This statement is consistent with both the power of the state to arm its citizens, which is implied in both the Militia Clause of the Second Amendment and in the reserved powers guarantee of the Tenth Amendment, and the right of the citizens to keep and bear such arms, which is explicit in the Second Amendment’s operative clause. In short, the states had a reserved power to arm the militia, and this reservation did not violate any power delegated to the federal government. Contrary to Cornell, Tucker did not assert that the Second Amendment secures nothing more than a state militia power.

Tucker’s above views from his law lectures reappeared in his *View of the Constitution*, which was published as an appendix to his edition of Blackstone. The subject was the Militia Power in Article I, Section 8 of the Constitution, which delegates power to Congress “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .”<sup>76</sup>

The objective of this provision, according to Tucker, could be traced to the Virginia Bill of Rights, which declared “that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural,

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<sup>75</sup> *Id.* at 1130. Indeed, the Constitution was clear when it prohibited military powers to the States. *E.g.*, U.S. CONST. art. I, § 10, cl. 3 (“No State shall . . . keep Troops . . . in time of Peace”).

<sup>76</sup> U.S. CONST., art. I, § 8, cl. 16.

and safe defence of a free state . . . .”<sup>77</sup> Tucker recalled the proposed amendment by the Virginia Convention that ratified the Constitution in 1788: “that each state respectively should have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress should omit or neglect to provide for the same.”<sup>78</sup> (As discussed below, that provision was rejected by Congress when it considered amendments in 1789.) Any “uneasiness upon the subject, seems to be completely removed,” Tucker continued, by the Second Amendment.<sup>79</sup> “To which we may add, that the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government.”<sup>80</sup>

The above was consistent with Tucker’s other comments in the *View* on the Second Amendment. Recognition of the right of the people to have arms promoted a well-regulated militia. Contrary to Cornell, the two concepts are hardly irreconcilable.

As noted above, the Virginia Convention proposed a state power to provide for the militia should Congress neglect to do so. This was among the structural amendments concerning federal and state powers that the convention proposed. Virginia also proposed an entirely separate list of “unalienable rights,” including “[t]hat the people have a right to freedom of speech,” and “[t]hat the people

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<sup>77</sup> Tucker, *supra* note 2, at 273 (quoting Virginia Declaration of Rights, Art. XIII (1776)).

<sup>78</sup> *Id.*; see 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 660 (Jonathan Elliot ed., 1836) [hereinafter 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

<sup>79</sup> Tucker, *supra* note 2, at 273.

<sup>80</sup> *Id.* The focus of Tucker’s discussion was the Militia Power, not the Second Amendment, which was mentioned only once. *Id.* at 273. Cornell cites these same pages and claims: “This discussion of the Second Amendment clearly frames the issue in terms of the militia.” Cornell, *supra* note 17, at 1138.



have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state . . .<sup>81</sup>

When the first federal Congress considered amendments to the Constitution, the proposed bill of rights was considered separately from the structural amendments. The Senate passed provisions, which would become the First and Second Amendments, rejecting inclusion of an anti-standing army provision in the latter.<sup>82</sup> St. George Tucker was informed of these Senate proceedings.<sup>83</sup>

The Senate considered separately, and rejected, all structural amendments to the Constitution, including the Virginia proposal: “That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . .”<sup>84</sup> The linguistic differences are unmistakable: this posited the “power” of the “state” to organize, arm, and discipline its militia, in contrast with the “right” of “the people” to keep and bear arms.

John Randolph wrote to St. George Tucker about the Senate action as follows: “A majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution. They are afraid that the Citizens will stop their full

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<sup>81</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 78, at 659.

<sup>82</sup> JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 70-71 (Gales & Seaton 1820) [hereinafter JOURNAL OF THE FIRST SESSION OF THE SENATE].

<sup>83</sup> 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, at 293 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

<sup>84</sup> JOURNAL OF THE FIRST SESSION OF THE SENATE, *supra* note 82, at 75.

career to Tyranny & Oppression.”<sup>85</sup>

Cornell, without any reference to the Senate’s consideration of the amendment regarding the State militia power, mistakes Randolph’s letter as concerning the Second Amendment, and asserts: “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.”<sup>86</sup> Yet the Senate passed the individual right to have arms and rejected the state power to maintain militias. It cannot be the case that, by declaring the right of the people to keep and bear arms, Congress actually intended to declare the power of States to maintain militias – the very proposal Congress rejected.

The Senate then returned to the bill of rights, passing a form of the First Amendment similar to the final version, and rejecting a proposal to add “for the common defence” after “bear arms” in the Second Amendment.<sup>87</sup> Had it succeeded, recognition of “the right of the people to keep and bear arms for the common defense” would have still guaranteed an individual right to keep arms, but could have been interpreted as allowing arms to be borne only for the common defense.

Cornell denies that the Senate’s rejection of the words “bear arms *for the common defense*” “establishes that they intended to protect an individual right,” claiming that “Randolph’s letter casts the choice to excise this language in a radically different light.”<sup>88</sup> To the contrary, Senate action on the Second Amendment was entirely separate from its action on the State militia power, which was the subject of Randolph’s letter.<sup>89</sup>

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<sup>85</sup> Letter from John Randolph to St. George Tucker (Sept. 11, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 83, at 293.

<sup>86</sup> Cornell, *supra* note 17, at 1129. Strangely, Cornell describes the Senate action as a defeat, rather than a victory, for the Federalists. *Id.*

<sup>87</sup> *JOURNAL OF THE FIRST SESSION OF THE SENATE*, *supra* note 82, at 77.

<sup>88</sup> Cornell, *supra* note 17, at 1129 (citations omitted).

<sup>89</sup> Cornell makes a single oblique reference to the failed State-militia-

#### IV. THE LINGUISTICS OF “BEARING ARMS”: “BEAR” DOES NOT MEAN CARRY, AND “ARMS” DOES NOT MEAN HANDGUNS

Under Tucker’s above linguistic usage, the term “bear arms” simply means to carry a weapon, whether for defense, hunting, militia purposes, or other reasons. However, Cornell argues that “bear arms” had an almost exclusively military usage.<sup>90</sup> The evidence for this argument is underwhelming.

The first state bill of rights to use the term “bear arms” was that of Pennsylvania in 1776, which stated, “That the people have a right to bear arms for the defence of themselves and the state . . . .”<sup>91</sup> Cornell denies that such language denotes an individual right, since it did not refer to the singular “right to bear arms in defense of himself and the State,” as did one or more state bills of rights in the nineteenth century.<sup>92</sup> Yet “defense of themselves”

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power amendment, yet endeavors to attribute its meaning to the Second Amendment: “Anti-Federalists failed to obtain their primary goal of securing structural amendments to the Constitution that would have shifted power back to the [S]tates. . . . 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.” *Id.* at 1133 (citations omitted).

<sup>90</sup> *Id.* at 1140-44.

<sup>91</sup> Pennsylvania Declaration of Rights art. XIII (1776). Ignoring this guarantee, Cornell asserts, “A few efforts had been made to incorporate this common law principle [to bear a gun in self-defense] into state bills of rights during the Founding Era, but those efforts inevitably failed.” Cornell, *supra* note 17, at 1144. His only example is that the Virginia Declaration of Rights did not include Jefferson’s proposal that “[N]o freeman shall ever be debarred the use of arms . . . .” *Id.* (citing THOMAS JEFFERSON, *The Virginia Constitution, First Draft (1776)*, in 2 THE PAPERS OF THOMAS JEFFERSON 329, 344 (Julian P. Boyd ed., Princeton University Press 1950)). Actually, none of Jefferson’s draft bill of rights was included.

<sup>92</sup> Cornell, *supra* note 17, at 1141. The first constitution to use the phrase “defense of himself and the State” was the Mississippi Constitu-

meant self defense, otherwise, it would redundantly mean “defense of the state.”

Moreover, Pennsylvania kept that same clause in a 1790 revision as follows: “That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned.”<sup>93</sup> James Wilson, president of the convention that adopted the provision, a leading Federalist, and later Supreme Court Justice, explained the guarantee in a discussion of homicide “when it is necessary for the defence of one’s person or house.”<sup>94</sup> He continued,

[I]t 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.”<sup>95</sup>

Cornell argues that only “isolated examples” exist of the phrase “bear arms” used in an individual, non-military sense, “an idiosyncratic text such as the *Dissent of*

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tion. See MISS. CONST. art. I, § 23 (1817).

<sup>93</sup> PA. CONST. art. IX, § XXI (1790).

<sup>94</sup> 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 84 (Lorenzo Press 1804).

<sup>95</sup> *Id.* (citations omitted); see Nathaniel Bacon, An Historical and Political Discourse of the Laws and Government of England, in 1 COLLECTED FROM SOME MANUSCRIPT NOTES OF JOHN SELDEN, ESQ. 40 (D. Browne & A. Millar 1760) (“Freemen . . . were bound to keep Arms for the preservation of the Kingdom, their Lords, and their own persons”).

*the Pennsylvania Minority*” being one example.<sup>96</sup> The *Dissent of the Pennsylvania Minority* was a proposal by Anti-Federalists in the Pennsylvania convention that ratified the Constitution in 1787 for a bill of rights, including the following:

That the people have a right to bear arms for the defense 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 . . . .<sup>97</sup>

When the Bill of Rights was being debated in the House of Representatives in 1789, Representative Frederick A. Muhlenberg, who was then the Speaker of the House and had also been president of the Pennsylvania Ratification Convention, wrote, “[I]t takes in the principal Amendments which our Minority had so much at Heart . . . .”<sup>98</sup> The Second Amendment was merely a more concise version of the above, sans its laundry list of purposes and exceptions.

Cornell cites no proposed or adopted constitutional guarantee that limited the terms “bear arms” as a “right” for purely military use. He refers to a game bill that Jefferson drafted and that Madison proposed to the Virginia legislature in 1785.<sup>99</sup> The bill provided for deer hunting seasons outside one’s enclosed land, punishing a violator with a fine, and being bound to his good behavior. If within a

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<sup>96</sup> Cornell, *supra* note 17, at 1140 n.103.

<sup>97</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merrill Jensen ed., State Historical Society of Wisconsin 1976).

<sup>98</sup> Letter from Frederick A. Muhlenberg to Benjamin Rush (Aug. 18, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 83, at 280.

<sup>99</sup> Cornell, *supra* note 17, at 1141.

year “he shall bear a gun out of his inclosed ground, unless whilst performing military duty,” the defendant would be in violation of his recognizance.<sup>100</sup> Because this bill refers to “bear[ing]” an arm when deer hunting or otherwise *not* on military duty, Cornell’s claim that “this text undermines the claims of individual rights theorists” is difficult to understand.<sup>101</sup>

While ignoring Tucker’s repeated use of “bear arms” above to refer to individual use, Cornell points to Tucker’s work on slavery to show 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.”<sup>102</sup> Writing in 1796, Tucker noted that free Negroes “were formerly incapable of serving in the militia, except as drummers or pioneers, but now I presume they are enrolled in the lists of those that bear arms, though formerly punishable for presuming to appear at a muster-field.”<sup>103</sup> Tucker republished his essay on slavery in the *Commentaries* with new notations, including the following in regard to the comment that free blacks were enrolled in the militia: “This was the case under the laws of the state; but the act of 2 Cong. c. 33, for establishing an uniform militia throughout the United States, seems to have excluded all but free white men from bearing arms in the militia.”<sup>104</sup>

Despite the military assistance of free blacks and even slaves in the Revolution, they were deprived of civil rights, such as, “All but housekeepers, and persons residing upon the frontiers are prohibited from keeping, or carrying any gun, powder, shot, club, or other weapon offensive or

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<sup>100</sup> THOMAS JEFFERSON, *A Bill for Preservation of Deer*, in 2 THE PAPERS OF THOMAS JEFFERSON 443-44 (Julian P. Boyd ed., 1950).

<sup>101</sup> Cornell, *supra* note 17, at 1141.

<sup>102</sup> *Id.* at 1142.

<sup>103</sup> ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA 20 (Philadelphia 1796).

<sup>104</sup> TUCKER, *supra* note 68, at 37 n.

defensive.”<sup>105</sup>

Tucker referred above to free blacks, who were enrolled on the militia lists to “bear arms,” as well as the later exclusion of all but whites “from bearing arms in the militia.” In neither instance did he limit the term “bear arms” to militia service, and in the latter, he specified that the bearing of arms was “in the militia.” Tucker used the terms in the broadest manner in his plan for the emancipation of slaves, in which he proposed civil restrictions such as, “Let no Negroe or mulattoe be capable . . . of keeping, or bearing arms, unless authorised so to do by some act of the general assembly . . . .”<sup>106</sup> He explained that “by disarming them, we may calm our apprehensions of their resentments arising from past sufferings . . . .”<sup>107</sup>

Referring to the above prohibition on blacks “keeping, or bearing arms,” Cornell claims: “According to Tucker’s analysis, blacks would be prohibited from keeping arms in their home, or from appearing at muster and being

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<sup>105</sup> TUCKER, *supra* note 103, at 20. Tucker also referred to the Virginia act of 1680, renewed in 1705 and 1792, which “prohibited slaves from carrying any club, staff, gun, sword, or other weapon, offensive or defensive. This act was afterwards extended to all Negroes, mulattoes and Indians whatsoever, with a few exceptions in favor of housekeepers, residents on a frontier plantation, and such as were enlisted in the militia.” *Id.* at 55. He noted about such laws the following: “From this melancholy review it will appear that . . . even the right of personal security, has been, at times, either wholly annihilated, or reduced to a shadow.” *Id.* at 57.

<sup>106</sup> TUCKER, *supra* note 103, at 93. Tucker added in a footnote to the above: “See Spirit of Laws, 12, 15, 1. Blackst. Com. 417.” *Id.* In that passage, Blackstone relied on Montesquieu for the proposition that slaves, excluded from liberty, envy and hate the rest of the community, and thus warned “not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen.” BLACKSTONE, *supra* note 31, at \*417-18. Montesquieu warned of “the danger of arming slaves is not so great in monarchies as in republics.” 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 243 (Thomas Nugent transl., 1899).

<sup>107</sup> TUCKER, *supra* note 103, at 95.

issued arms they might bear as part of the militia.”<sup>108</sup> Yet Tucker said nothing about any militia muster or being issued arms – the prohibition was on “bearing arms” in any form, which meant carrying arms in any manner, just as under the slave codes.

In explaining the term “bear arms,” Cornell not only constricts the word “bear” to one narrow meaning, but also does the same with the word “arms.” Militia weapons such as muskets were constitutionally protected (albeit limited to militia use), while “civilian firearms,” “ordinary guns,” and “personal arms such as pistols” were not.<sup>109</sup>

However, pistols were indeed militia arms. Officers in troops with horses were required by the 1792 Militia Act to “be armed with a sword and pair of pistols.”<sup>110</sup> Tucker himself fought in battles in the Revolution as a militia officer armed with sword and pistol.<sup>111</sup> Not surprisingly, Cornell finds nothing to cite from Tucker to substantiate his claim.

Instead, Cornell quotes from an anonymous letter to the editor writing on the Massachusetts Constitution of 1780 to the effect that “the legislature have [sic] a power to controul [arms] in all cases, except the one mentioned in the bill of rights . . . .”<sup>112</sup> Cornell adds, implying that he is summarizing the author, “Personal arms such as pistols were not treated in the same way as militia weapons such as muskets.”<sup>113</sup> Yet the author said absolutely nothing about that subject. “In the absence of any law prohibiting the ownership or use of personal firearms” – Cornell’s words, not the author’s – “the people still enjoy, and must continue so to do till *the legislature shall think fit to inter-*

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<sup>108</sup> Cornell, *supra* note 17, at 1142.

<sup>109</sup> *Id.* at 1151.

<sup>110</sup> Act of May 8, 1792, ch. 33, 1 stat. 272 § 4.

<sup>111</sup> Halbrook, *supra* note 7, at 47.

<sup>112</sup> Cornell, *supra* note 17, at 1151 (quoting *Scribble Scrabble*, CUMBERLAND GAZETTE (Portland, Maine), Dec. 8, 1786).

<sup>113</sup> *Id.*



*dict.*”<sup>114</sup>

Moreover, the context of the above was the Massachusetts Constitution, which provided, “The people have a right to keep and bear arms for the common defence.”<sup>115</sup> The above author commented elsewhere, “All men . . . have . . . a right to keep and bear arms for their common defense, to kill game, fowl . . . . The [Massachusetts] Bill of Rights secures to the people the use of arms in common defence; so that, if it be an alienable right, one use of arms is secured to the people against any law of the legislature.”<sup>116</sup> The federal Second Amendment includes no limitation on the use of arms to the common defense, a clause which – as discussed above – was explicitly rejected.

Running far a field of Tucker, Cornell also references an 1837 Georgia law that prohibited the sale and possession of pistols.<sup>117</sup> He neglects to mention that the Georgia Supreme Court declared that law unconstitutional under the Second Amendment, explaining that

The right of the whole people, old and

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<sup>114</sup> *Id.* (quoting *Scribble Scabble*, CUMBERLAND GAZETTE (Portland, Maine), Jan. 26, 1786). Another author writing in the same newspaper noted, “The idea that Great Britain meant to take away their arms, was fresh in the minds of the people; therefore in forming a new government, they wisely guarded against it.” *Senex*, CUMBERLAND GAZETTE (Portland, Maine), Jan. 12, 1787. This contradicts Cornell’s thesis that pistols were not constitutionally protected, since British General Thomas Gage confiscated pistols as well as other firearms from the inhabitants of Boston. RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (Little Brown & Co. 1903) (“[T]he people delivered to the selectmen 1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses”). In the Declaration of Causes of Taking Up Arms of July 6, 1775, the Continental Congress decried Gage’s seizure of the arms of the people of Boston. 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, 151 (Worthington Chauncey Ford ed. 1905).

<sup>115</sup> Massachusetts Declaration of Rights, art. XVII (1780).

<sup>116</sup> *Scribble-Scabble*, CUMBERLAND GAZETTE (Portland, Maine), Jan. 26, 1787.

<sup>117</sup> Cornell, *supra* note 17, at 1151 n.165.

young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*. . . .<sup>118</sup>

That interpretation is consistent with Tucker's remark that liberty is endangered where "the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited . . . ." <sup>119</sup> Aside from the fact that pistols were militia arms, Tucker's statements against the English game laws demonstrate that firearms in general, including hunting arms, were constitutionally protected. Tucker contrasted the rights of Americans under the Second Amendment with England, where "the people have been disarmed, generally," so that "not one man in five hundred can keep a gun in his house . . . ." <sup>120</sup>

## CONCLUSION

Cornell asserts that Tucker's "writings fit neither the modern collective nor individual rights models. 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." <sup>121</sup> Aside from that not being Tucker's approach,

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<sup>118</sup> Nunn v. State, 1 Ga. 243, 251 (1846).

<sup>119</sup> TUCKER, *supra* note 2, at 300.

<sup>120</sup> *Id.*

<sup>121</sup> Cornell, *supra* note 17, at 1126.

that *is* the “collective rights” model. Denial that a “right” is individual necessarily implies that it is “collective.” The ideas of a state “right” to bear arms and of a person’s “civic right” to bear arms in the militia are two basic variants of the collective rights model.

Having turned Tucker completely on his head, Cornell expresses indignation about scholars who read Tucker’s words in their literal and ordinary way,

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. . . . 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 . . .

<sup>122</sup>

Although Cornell is certainly correct in adding that one cannot erase the Militia Clause from the text, one also may not erase the substantive right. Those who deny that the Second Amendment protects individual rights have failed to articulate any inconsistency between recognition of the right of the populace to have arms and the resultant encouragement of a militia.

The irony cannot be lost that Tucker, in his lectures at William and Mary College of Law, explained the ramifications of the Second Amendment as an individual right in detail, and that two centuries later, at the same College of Law, in a symposium dedicated to Tucker’s legacy, his

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<sup>122</sup> *Id.* at 1154.

views on the Second Amendment were obliterated. This obliteration is accomplished by repeated veiled references to “the often-quoted passage describing it [the Second Amendment] as ‘the true palladium of liberty,’”<sup>123</sup> without ever quoting that passage or any of the other rich passages in which Tucker analyzed the broad character of the right to keep and bear arms.

That brings us back to Tucker’s insight that a bill of rights is intended not only to instruct government on its limits, but also to “giv[e] information to the people.”<sup>124</sup> Every person, even the most humble, therefore “may learn his own rights, and know when they are violated . . . .”<sup>125</sup> Tucker synthesized the Founders’ aspirations in favor of a declaration of rights that was more than a scrap of paper. This was the vision of the Founders with respect to every provision of the Bill of Rights, not excluding the Second Amendment.

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<sup>123</sup> *Id.* at 1123-25, 1137, 1143.

<sup>124</sup> TUCKER, *supra* note 2, at 308.

<sup>125</sup> *Id.*