

ST. GEORGE TUCKER'S LECTURE NOTES, THE SECOND AMENDMENT, AND ORIGINALIST METHODOLOGY: A CRITICAL COMMENT

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More than two hundred years after the publication of his influential edition of *Blackstone's Commentaries*, St. George Tucker, the distinguished Jeffersonian jurist, is at the center of controversy. Gun-rights advocates claim Tucker as their spiritual forebear, but opponents of this view argue that Tucker's interpretation of the Second Amendment¹ can not be pressed into service in the modern gun debate without doing great violence to his thinking. The stakes in this intellectual debate have been raised in the wake of the Supreme Court's historic decision in *District of Columbia v. Heller*.² In that decision, two very different interpretations of Tucker's views of the Second Amendment were set out. Justice Scalia adopted the gun-rights view of Tucker and Justice Stevens took the opposing view. One of the central points of contention in this modern debate over Tucker arises from the learned judge's earliest discussion of the Second Amendment in his unpublished law lectures.³

In his essay on Tucker's lectures, David Hardy claims that Tucker believed that the Second Amendment enshrined a private right of individual self-defense in the Constitution.⁴ This individual-rights view of the Second Amendment was recently affirmed in Justice Scalia's majority opinion in *Heller*.⁵ Although one might have expected gun-rights advocates to accept their victory graciously, Hardy and others have been quite critical of the

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¹ U.S. CONST. amend. II (link).

² *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (link).

³ See St. George Tucker, Ten Notebooks of William and Mary Law Lectures 126–29 (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary) (copies on file with the Northwestern University Law Review).

⁴ David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/48/> (link).

⁵ *Heller*, 128 S. Ct. at 2799. For earlier articulations of the same view, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (link), and Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461–62 (1995) (link).

Heller dissents.⁶ In particular, Hardy takes issue with Justice Stevens's use of a passage from Tucker's law lectures.⁷ Tucker argues in that text that the Second Amendment was adopted by the First Congress in response to fears about federal military power. In an article in a special issue of the *William and Mary Law Review* commemorating Tucker's *Blackstone*, I argued that this passage sheds new light on the meaning of his description of the Second Amendment as the "palladium of liberty."⁸ Hardy disagrees, but his argument is unconvincing. He correctly notes that this phrase appears in both the law lectures and Tucker's published *View of the Constitution*.⁹ The real questions, however, are what did Tucker mean when he described the Second Amendment as the "palladium of liberty," and how does this passage relate to the one quoted by Stevens?¹⁰ Curiously, Hardy does not include the passage cited by Stevens in his article. But if one compares the text quoted by Stevens with the one Hardy cites in his article and reads both passages in light of the Founding era's own rules for interpreting constitutional texts, it is clear that Tucker's views do not support either Hardy or the *Heller* majority, but instead support the interpretation of Justice Stevens. Here are the two discussions of the meaning of the Second Amendment that appear in Tucker's law lectures, placed side by side for comparison:

⁶ Cf. Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III* (George Mason Univ. Law & Econ. Research Paper, Working Paper No. 08-61, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309714 (attacking a critique of *Heller* by a prominent conservative judge) (link).

⁷ *Heller*, 128 S. Ct. at 2839 n.32 (Stevens, J., dissenting); Hardy, *supra* note 4, at 278. Hardy's article is a classic example of the historical fallacy of argument by tautology. He claims that because the phrase "palladium of liberty" appeared in the law lectures and later in Tucker's published work, his interpretation of the passage is correct. Such an argument is circular and tells us nothing about what this phrase meant; it merely tells us that the same phrase appears in two places. For a discussion of historical tautologies, see DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 31–34 (1970).

⁸ Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1125 (2006).

⁹ See ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS* 165 (1999) (link).

¹⁰ For a brief discussion of the various models interpreting the Second Amendment, see Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 161 (2004) (link).

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Table 1: Comparison of Lectures

Passage quoted by Justice Stevens in *Heller*

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 alleged 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 withheld 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 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.¹¹

Passage quoted by Hardy in the *Northwestern University Law Review Colloquy*

The right of the people to keep and bear arms shall not be infringed—this may be considered as the palladium of liberty. The right of self defense is the first law of nature. In most governments it has been the study of rulers to abridge this right with the narrowest limits. Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour what-soever prohibited, liberty, if not already annihilated is in danger of being so.—In England the people have been disarmed under the specious pretext of preserving the game. By the alluring idea, the landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people.—The Game laws are a [consolation?] for the government, a rattle for the gentry, and a rack for the nation.

[Tucker note: In England the right of the people to bear arms is confined to protestants—and by the terms suitable to their condition & degree, the effect of the Declaration is entirely done away. Vi: Stat. 1 W & M 1:2 c. 2.]¹²

¹¹ *Heller*, 128 S. Ct. at 2839 n.32.

¹² Hardy, *supra* note 4, at 278–79.

According to Justice Stevens, “Tucker suggested that the Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the Second and Tenth Amendments.”¹³ Hardy denies that the passage discussed by Stevens is really about the Second Amendment,¹⁴ a claim that is difficult to reconcile with the fact that the passage expressly states that the Second Amendment was adopted to protect the state militias.

I. NEW ORIGINALISM VS. BLACKSTONIANISM: ORIGINAL MEANING OR ORIGINAL INTENT

To understand Hardy's interpretive error one must look at his originalist method. Hardy clearly endorses Randy Barnett's and Justice Scalia's new originalism, a theory of constitutional interpretation that eschews the intent of the Framers and instead focuses on something called “original public meaning.”¹⁵ There are several problems with this method. First, it is inconsistent with the dominant modes of constitutional interpretation familiar to the Founders, which were largely focused on establishing intent.¹⁶ Second, the new method lacks any clear rules or methodology. The *Heller* majority employed an eclectic assortment of interpretive practices from different moments in American history. It is hard to see how one can claim to be an originalist if one rejects the Founders' interpretive techniques and substitutes in their place modes of analysis developed decades after the adoption of the Constitution.¹⁷

It is not surprising that new originalism has been attacked by legal scholars from across the contemporary political spectrum. Conservative judge Richard Posner has denounced the method as a form of “faux originalism.”¹⁸ Posner correctly insists that a genuine originalist method must adhere to the Founders' interpretive rules. Scholars on the left have also faulted the *Heller* decision for its bizarre methodology. For example, Reva Siegel notes the “temporal oddities” of the opinion, which invokes the public meaning at the time of the Founding, but relies heavily on evidence drawn from the nineteenth century for support.¹⁹ Scalia and other new ori-

¹³ *Heller*, 128 S. Ct. at 2839 n.32.

¹⁴ Hardy, *supra* note 4, at 278.

¹⁵ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Randy E. Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J., June 27, 2008, at A13 (link).

¹⁶ See Saul Cornell, *District of Columbia v. Heller, the New Originalism, and the Old Law Office History: Meet the New Boss, Same as the Old Boss*, UCLA L. REV. (forthcoming).

¹⁷ See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008) (link).

¹⁸ Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32-33 (link).

¹⁹ Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 196-98 (2008) (link).

ginalists seem unaware of, or unconcerned with, the profound changes that transformed American law in the period between the Founding era and the Jacksonian period.

Justice Stevens, by contrast, uses orthodox eighteenth century Blackstonian methods.²⁰ This approach may not meet all of the requirements of scholarly history, but it is a much better approximation of what originalism ought to look like, at least if one is interested in the constitutional ideas of Tucker, who clearly owed a great intellectual debt to Blackstone.²¹ One of the many problems with new originalism is that it ignores the interpretive pluralism of the Founding era. There was no single originalist method favored by the Founders. Federalists and Anti-Federalists were deeply divided over interpretive methodology.²² Indeed, rather than represent a neutral method of constitutional interpretation, the best that any version of originalism could ever hope to achieve would be to force us to choose sides among the different interpretive methods favored by the Founders themselves. Still, because the issue raised by Hardy's essay is how to interpret Tucker, we need to use Tucker's method, and that method was grounded in Blackstone.

What does orthodox Blackstonian method entail? Although Blackstonian method may share with new originalism an interest in establishing the original public meaning at the time of the Founding, this type of analysis is merely the first step in a multistage process of interpretation. Blackstone summarizes his method as follows:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.²³

The Blackstonian method supports an intentionalist model, not Barnett's and Scalia's new originalism. Blackstone underscores the intentionalist focus of this method in the last rule by noting that "the most universal and effectual way of discovering the true meaning of a law" is to inquire in-

²⁰ On Stevens's originalist method, see Cornell, *supra* note 17, at 637. On the debate over the Founders' views of originalism, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (link); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159 (1996) (link); Larry Kramer, *Two (More) Problems With Originalism*, 31 HARV. J.L. & PUB. POL'Y 907 (2008) (link).

²¹ For a discussion of the limits of both the old and the new originalism, see Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (link).

²² Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 570 (2003). Blackstonian method was one of several different methods embraced by the Founders. See *id.* at 560.

²³ 1 WILLIAM BLACKSTONE, COMMENTARIES *59 (link).

to “the reason and spirit of it; or the cause which moved the legislator to enact it.”²⁴ This rule was sometimes described by contemporaries of Tucker as a search for the evil to be remedied.²⁵

II. READING TUCKER’S LAW LECTURES FROM A BLACKSTONIAN PERSPECTIVE

Taking Blackstone’s rules about the “spirit and reason” of the law as a guide, consider the first passage discussing the Second Amendment in the table above. Hardy’s claim that this passage is about the militia clauses and not the Second Amendment is obviously inconsistent with Blackstone’s injunction that the meaning of a legal and constitutional text is to be gleaned from the intent of its authors. It is clear that Tucker believed that the intent of the First Congress in adopting the Second Amendment was to deal with the danger posed by Article I, Section 8, of the Constitution. This is precisely the claim made by Stevens that Hardy criticizes.²⁶

Turning to the other passage that Hardy believes holds the true secret to Tucker’s views on the Second Amendment, Blackstonian analysis also reveals a very different meaning. The passage does describe the Second Amendment as the “palladium of liberty.” Hardy clearly believes that it is self-evident that this passage shows that the Second Amendment protected the natural right of self-defense. Even a quick glance at the passage, however, ought to raise doubts about this reading. If one applies Blackstone’s rules of interpretation to this text, it becomes clear that the passage is not about a private right of self-defense. The evil Tucker identifies in the passage that needs to be remedied is exactly the same as the danger mentioned in the other passage from the law lectures: the threat posed by the powerful standing army created by the Constitution.

Hardy’s reading of this text ignores the Blackstonian rules of construction that Tucker esteemed. Consider Tucker’s discussion of the English

²⁴ *Id.* at *61.

²⁵ Saul Cornell, *The Original Meaning Of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 152 (2007). In a case dealing with the status of slaves in Pennsylvania after the states’ gradual emancipation law, for example, the state supreme court applied this rule of construction by interpreting the law in terms of the evil the legislature had intended to remedy. See *Respublica v. Richards*, 2 U.S. (2 Dall.) 224, 226, 1 Yeates 480, 483 (Pa. 1795) (link).

²⁶ See *supra* text accompanying note 7. Indeed, it seems hard to reconcile Hardy’s reading of this text with any plausible theory of constitutional interpretation. Moreover, this text clearly contradicts a central claim of gun-rights advocates that there is no contemporary evidence from the Founding era to support such a theory. Gun-rights advocates have also argued that such a theory leads to absurd results, including the right to take up arms against the federal government. E.g., Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787–1791*, 10 N. KY. L. REV. 13, 38 (1982) (link). Cf. Glenn Harlan Reynolds & Don B. Kates, Jr., *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) (describing a multitude of absurd consequences of a states’ rights view) (link). Of course, this was precisely what radical Jeffersonians came to believe in the 1790s. See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 75–85 (2006).

game laws. Although it is true that the game laws had been used to effectively disarm the English people, Tucker was well aware that America had no game laws. Nor was Tucker worried that America would follow England down this path. The threat to liberty in America was different.²⁷ Tucker shared with Brutus, one of the most theoretically sophisticated Anti-Federalist authors, the view that the scope of federal power was limited to the “protection and defence of the community against foreign force and invasion” and to the equally important role of suppressing “insurrections among ourselves.”²⁸ All matters related to individual self-defense, by contrast, fell within the scope of state authority “to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other. . . .”²⁹ Tucker’s discussion of the danger posed by Federalist policy in the 1790s confirms this view. Tucker did not believe that disarmament would be done by English-style game laws. Instead, he predicted that it would be accomplished by using the government’s power to repress insurrection under Article I, Section 8, and the treason clauses. Rather than focus on the evil Tucker intended to remedy, the danger of a standing army, Hardy substitutes his own modern gun-rights ideology and its fears about gun control and the private right of self-defense. Rather than treat Tucker as an eighteenth-century Jeffersonian Republican,³⁰ Hardy casts him as an early American Charlton Heston.³¹

The passage quoted by Hardy is not about private self-defense, but rather about the political danger posed by a standing army. Tucker made this absolutely clear when he wrote: “[T]he landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people.”³² The focus of the text is not on the private use of arms to fend off personal attack, but instead clearly on the political use of arms in a collective effort to defend political liberty—a function that the Founders believed was best served by the “well regulated militia” protected by the Second Amendment. Using Blackstonian methods to interpret this passage leads to the same conclusion as Justice Stevens’s dissent. The key to understanding the Second Amendment is the Founders’ concern about a

²⁷ For a discussion of Federalist and Anti-Federalist views of the limited scope of federal power and its relevance to firearms regulation at the state level, see Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHL-KENT L. REV. 103, 111–13 (2000) (link).

²⁸ Brutus, *Essays of Brutus* (VII), in 2 THE COMPLETE ANTI-FEDERALIST 400–01 (Herbert J. Storing ed., 1981).

²⁹ *Id.* at 401.

³⁰ See ST. GEORGE TUCKER, 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. note D at 289–300 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) [hereinafter TUCKER’S BLACKSTONE] (1803) (link).

³¹ On Heston and gun rights, see JOAN BURBICK, GUN SHOW NATION: GUN CULTURE AND AMERICAN DEMOCRACY (2006).

³² This quotation can be found *supra* in Table 1.

standing army. In short, when both of these passages are read using Tucker's own Blackstonian method, it is clear that they both point in the same direction: the evil the Second Amendment was intended to remedy was the threat of a standing army, not a potential threat to the common law right of self-defense.

Tucker does briefly mention that "[t]he right of self defense is the first law of nature."³³ Hardy has misinterpreted this claim as well. The quotation does not explain the meaning of the Second Amendment. Rather, it simply restates a truism of eighteenth-century political and constitutional theory: prior to entering civil society individuals had an absolute right of self-defense. Hardy fails to take note of Blackstone's discussion of the different meanings of the right of self-defense in the *Commentaries*. In essence, Hardy conflates the natural right of self-defense, the common law right of self-defense, and the constitutional right to keep and bear arms. Most Americans in the Founding era, including Tucker, recognized that leaving the state of nature required trading the almost limitless natural right of self-defense for the far more limited common law right of self-defense. Here is how one eighteenth-century American writer summarized the move from the state of nature to civil society:

1st. The power that every one has in a state of nature to do whatever he judgeth fit, for the preservation of his person and property and that of others also, within the permission of the law of nature, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself (his person and property) and the rest of that society shall require.

And 2nd. The power of punishing he wholly gives up, and engages his natural force (which he might before employ in the execution of the law of nature by his own single authority as he thought fit) to assist the executive power of the society as the law thereof shall require.³⁴

In his *Commentaries*, Blackstone discussed two concepts of self-defense: the 5th Auxiliary right and the common law right of self-defense.³⁵ The former, a political or civic right, was embodied in the English Bill of Rights.³⁶ The language of this provision protects the right of Protestants to

³³ *Id.*

³⁴ ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744), reprinted in 1 POLITICAL SERMONS OF THE FOUNDING ERA, 1730–1805, at 59 (Ellis Sandoz ed., 1998) (emphasis in original). For a similar view from the Founding era, see *Essays by The Impartial Examiner* No. 1 (Feb. 20, 1788), in 5 THE COMPLETE ANTI-FEDERALIST 173–179 (Herbert J. Storing ed., 1981).

³⁵ 1 BLACKSTONE, *supra* note 23, at *143–44; 4 BLACKSTONE, *supra* note 23, at *184.

³⁶ On Blackstone's view of the difference between these rights, see Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT. L. REV. 237, 252–260 (2000) (link).

have arms suitable to their condition as allowed by law. When the very same Parliament considered allowing individuals to have arms for self-defense within their homes, they rejected this proposal.³⁷ Given Blackstone's and Tucker's strong support for the rule of *in pari materia*,³⁸ and Tucker's own analysis of the anemic nature of the English right to have arms articulated in the very same text quoted by Hardy, it seems clear that Tucker did not believe that the English right was very robust.

Ironically, Hardy's essay may well end up providing critics of *Heller* with some of their best historical ammunition. Scalia's decision in *Heller* rests much of its authority on the claim that the Second Amendment protected a preexisting right that the English Bill of Rights had established.³⁹ Yet, if one looks closely at Tucker's discussion of the nature of that right, it is absolutely clear that Tucker did not see the robust right described by Scalia, but rather viewed this right as almost nonexistent. Tucker believed that "[i]n England the right of the people to bear arms is confined to protestants—and by the terms suitable to their condition & degree, the effect of the Declaration is entirely done away."⁴⁰ At a very minimum, the material Hardy cites in his article provides strong evidence that Tucker did not share Scalia's view of the English Bill of Rights.

Heller's conclusion that the Second Amendment was meant to provide federal protection for either the natural right of self-defense or the common law right of self-defense rests on another misunderstanding. The common law right of self-defense was distinct from and more limited than the natural right of self-defense. Individuals were allowed to use deadly force if, and only if, retreat was impossible. In the footnote annotations in his treatise on Blackstone, Tucker notes that the 5th Auxiliary right was essentially civic and public in character and was part of the genealogy of the Second Amendment.⁴¹ The annotations of the common law right of private self-defense, by contrast, do not mention the Second Amendment, but rather cite to the standard English treatises on common law and crime. Hardy's misreading of Tucker results from his erroneous tendency to conflate and collapse into a single right three very different conceptions of self-defense: the natural right of self-defense, the common law right of self-defense, and the constitutional right to keep and bear arms.

To illustrate the differences between these different legal conceptions of self-defense one need only consider the very different ways in which

³⁷ Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT. L. REV. 27, 51 (2000) (link). See generally *id.* at 30–58 (discussing the English view on the right to bear arms).

³⁸ 1 TUCKER'S BLACKSTONE, *supra* note 30, at 58 n.1 ("It is an established rule of construction that statutes *in pari materia*, or upon the same subject, must be construed with a reference to each other. . .").

³⁹ See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797–98 (2008).

⁴⁰ This quotation can be found *supra* in Table 1.

⁴¹ 2 TUCKER'S BLACKSTONE, *supra* note 30, at 143–45 nn.40–42; see Cornell, *supra* note 8, at 1126.

these rights were understood to legally impact men, women, and African-American slaves in Tucker's Virginia. In the state of nature all of these groups enjoyed an absolute right to use whatever force necessary to defend themselves. The common law in Virginia, as revised by statute, did not protect an untrammelled right of self-defense for any of these groups. Men and women each enjoyed a limited right of self-defense that required them to retreat to the wall before responding with deadly force. African-American slaves had an even more limited right. As Tucker himself noted regarding the situation of African Americans in his own state: "[I]t will appear that not only the right of property, and the right of personal liberty, but even the right of personal security, has been, at times, either wholly annihilated, or reduced to a shadow. . . ." ⁴² The right to bear arms in Virginia was also not universal: women were excluded and so were slaves. The situation of free blacks was especially complicated because they occupied a hazy legal netherworld between freedom and slavery. Tucker noted that "[f]ree negroes and mulattoes" were constitutionally prohibited from "serving in the militia, except as drummers or pioneers, but now I presume they are enrolled in the lists of those who bear arms, though formerly punishable for presuming to appear at muster-field." ⁴³

Tucker's use of the term "bear arms" in this context merits closer attention. In Tucker's writing, this term was not synonymous with bearing or carrying a gun. Indeed, Tucker noted the restrictions on free blacks in his analysis. 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. . . ." ⁴⁴ There was a clear difference in his mind between keeping and carrying a gun and keeping and bearing arms. Tucker's use of the term "bear arms" does not lend much support to the notion that this term was commonly used to signify the use of guns in a civilian context. Recall that according to Blackstone, "[w]ords are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use." ⁴⁵ Scalia's opinion in *Heller* relies uncritically on the findings of an article published in a Federalist Society-sponsored law review that purports to show that the term "bear arms" was frequently used in a nonmilitary sense in the Founding era. ⁴⁶ Yet, if one examines the footnotes to this essay it becomes clear that there are less than a half dozen examples

⁴² ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA 57 (1796) (link).

⁴³ *Id.* at 19–20.

⁴⁴ *Id.* at 20.

⁴⁵ 1 BLACKSTONE, *supra* note 23, at *59.

⁴⁶ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2795 (2008). See Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL'Y 511 (2008).

from the Founding era that support this claim, and one of those refers to the term “bear a gun,” not “bear arms.”⁴⁷

By contrast, historian Nathan Kozuskanich identified close to a hundred examples of popular uses of the term “bear arms” outside of Congress that support the military reading of this term.⁴⁸ If Scalia had applied his own theory neutrally he should have concluded that the most common use of the term was military-related.⁴⁹ Even if one accepts the flawed scholarship Scalia cited, including the dubious proposition that both uses of “bear arms” were common, then the Blackstonian method is clear on how to resolve the disputed meaning of the term in question: one must consult the preamble.⁵⁰ Yet, rather than follow the Founders’ Blackstonian rule, Scalia opportunistically turns to a different set of rules about preambles invented decades after the Second Amendment was framed.⁵¹

It is easy to see why a prominent conservative legal scholar such as Doug Kmiec would be critical of *Heller*.⁵² Rather than vindicate originalist

⁴⁷ See *id.*

⁴⁸ Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413 (2008). The use of this term in Congress uniformly supports the military reading. Once again an orthodox Blackstonian approach would recognize Blackstone’s injunction that: “Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.” 1 BLACKSTONE, *supra* note 23, at *60. Gun-rights supporters claim that this tells us nothing because Congress would have been focused on military issues. See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 246–48 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)). This is precisely the point: the same was true for the First Congress, which was focused on the threat of Article I, Section 8.

⁴⁹ To support this conclusion, Scalia cites to Cramer & Olson, *supra* note 46. If one tallies the sources cited in that article, however, the problem with the evidence becomes clear. The first twenty-eight citations deal mostly with English sources. A reference to the most important digital collection of early American printed sources understates the uses of “bear arms” within a military context, missing almost ninety-five such uses. The vast majority of the remaining sources are from the nineteenth century.

⁵⁰ 1 BLACKSTONE, *supra* note 23, at *60. On the importance of preambles to the Second Amendment’s framers, see 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, 120 (2004) (link). Scalia ignores Blackstone’s discussion of preambles, while focusing attention on his discussion of the 5th Auxiliary right, an irony noted by Justice Stevens in his dissent. *Heller*, 128 S. Ct. at 2838–39 (Stevens, J., dissenting). Scalia relies somewhat uncritically on Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998) (link). See *Heller*, 128 S. Ct. at 2789 (majority opinion). Yet this article’s thesis and evidence had been challenged by Konig’s research, which was readily available to the Court since it was cited by the Brady Center. See Brief for Brady Center et al. as Amici Curiae Supporting Petitioner at 9 n.3, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (link).

⁵¹ For more problems with Scalia’s use of preambles, see Cornell, *supra* note 17, at 631–39.

⁵² Doug Kmiec, *What the Heller? Is Only the Supreme Court’s Liberty Enhanced?*, SLATE, July 8, 2008, <http://www.slate.com/blogs/blogs/blogs/convictions/archive/2008/07/08/what-the-heller-is-only-the-supreme-court-s-liberty-enhanced.aspx#> (questioning Scalia’s “original understanding” interpretation of the Second Amendment) (link).

methodology, *Heller* shows that originalism has no ability to constrain judges. A similar critique was framed by Richard Posner, who notes that *Heller* proves that one can use originalist methods to justify almost any conclusion as long as one has enough law clerks to do the research.⁵³ Indeed, the search for original meaning may be even more prone to manipulation than the search for original intent.⁵⁴ Rather than elevate the doctrine of originalism to a new level, history may well show that it was Scalia's decision in *Heller* that finally demonstrated that the originalist emperor has no clothes.

CONCLUSION

David Hardy is to be commended for transcribing these sections of St. George Tucker's law lectures and making them more widely available. His interpretation of Tucker, however, is more problematic. Tucker's earliest writings on the Second Amendment support neither Hardy's individual-rights views of the Second Amendment nor the majority opinion in *Heller*. Tucker's vision of the Second Amendment is not consistent with either the modern gun control or gun-rights view of the Second Amendment. Tucker was a late eighteenth-century Jeffersonian and his views of the Second Amendment were crafted in response to the debates of his own day, not our own.

Rather than challenge Justice Stevens's reading of the Second Amendment, the passage cited by Hardy provides even more convincing evidence to support Stevens's dissent in *Heller*. Only by ignoring the Founding era's own rules of construction and employing a "faux originalist" method can one arrive at Hardy's view of the evidence. Indeed, the passage quoted by Hardy makes it absolutely clear that it was Justice Scalia, not Stevens, who relied uncritically on flawed, ideologically driven scholarship.

⁵³ Posner, *supra* note 18, at 35.

⁵⁴ This is the conclusion of Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. (forthcoming). *Heller* certainly bears out Kay's fears in this regard, since Scalia's method is an odd hodgepodge of techniques all of which seem designed to produce a preordained result.