

An Eighteenth Century Second Amendment in a Twenty-First Century World:
Moving Beyond Originalist Errors to Historical Insight

The emergence of a new variant of constitutional originalism has been heralded by its supporters as a major step forward in constitutional theory. The new originalism claims to have met the profound objections leveled at earlier versions of this theory by shifting attention away from a focus on the subjective belief of the framers and/or ratifiers of the Constitution. Rather than concentrate on original intent, this “new” method focuses on the plain meaning the text would have had to Americans at the time it was adopted. The authoritative meaning of any constitutional text according to this theory is the meaning the words would have been given at the time the document was crafted. Although in theory the new originalism ought to lead to a more sophisticated approach to history, in practice it has produced results that are almost the mirror image of the historical reality it purports to represent.¹

¹ The debate on originalism as a method for constitutional interpretation is immense, see the essays collected in Jack N. Rakove, Interpreting the Constitution: The Debate over Original Intent (Boston, 1990). A detailed philosophical discussion of originalism may be found in Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (Lawrence: University Press of Kansas, 1999). For the most recent attempt to defend this methodology, see Randy E. Barnett, “An Originalism for Nonoriginalists” Loyola Law Review 45 (1999): 611-54. On the notion of standards for originalists, see H. Jefferson Powell, “Rules for Originalists,” Virginia Law Review 73 (1987): 659. For trenchant critiques of this method and its lack of historical sophistication, see Mark Tushnet, “Inter-disciplinary Legal Scholarship: The Case of History-In-Law,” Chicago Kent Law Review 71 (1996), 914; Martin S. Flaherty,

The easiest way to illustrate the problems with this methodology is to look at its application in the contentious debate over the Second Amendment, a vibrant field of constitutional study in which originalism continues to play a large role. Rather than reconstruct the original world that gave rise to this provision of the Bill of Rights, Second Amendment originalists have tended to project the modern dynamics of the gun control debate backward in time. The result is a distorted account of the original meaning of this constitutional text. Ironically, the presentism that mars Second Amendment originalism has blinded scholars to the profound implications that a historically accurate understanding of the Second Amendment might have for thinking about American constitutionalism in the present.²

Originalist scholarship on the Second Amendment has been driven by two concerns that

“History Lite in Modern American Constitutionalism,” 95 Columbia Law Review (1995), 523-90; Larry D. Kramer, “When Lawyers Do History,” The George Washington Law Review 72 (2003): 387-423.

² For the most recent effort to chart the world of Second Amendment scholarship, see William Merkel, “A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment,” 17 Stan. L. & Pol’y Rev (2006): 671-698. For discussions of the problems with Second Amendment originalism, see Michael C. Dorf, “What does the Second Amendment Mean Today?” Chicago Kent Law Review 76 (2000): 291-347 and Daniel A. Farber, “Disarmed by Time: the Second Amendment and the Failure of Originalism,” Chicago Kent Law Review 76 (2000): 167-94. Historian Jack Rakove has likened much of the recent Second Amendment scholarship to a scholarly “Twilight Zone.” On this point, see Jack N. Rakove, “Confessions of an Ambivalent Originalist,” New York University Law Review 78 (2003): 1346-56.

have little to do with the original understanding of the right to bear arms. For some originalists, the Second Amendment is about the individual right of self defense. Others see the Second Amendment as creating an insurrectionary right of individuals to take up arms against the government if it should over-step its constitutional function. Neither of these views has much to do with the Whig-republican world of the Founders. The concept of self defense championed by originalists emerged decades after the Second Amendment was adopted and only gained a solid foothold in American law in the Jacksonian era. The insurrectionary view championed by other Second Amendment originalists is also quite alien to the Founding era. This view was a product of the anarchic individualism of the Abolitionists who developed it in the middle of the nineteenth century.³

Well-Regulated Liberty and the Founders Vision

It is impossible to understand the world of the Founders without some appreciation for the centrality of the concept of well-regulated liberty to their constitutional world view. The libertarian individualism that characterizes the constitutionalism of many modern gun rights scholars shares little with the Founding generation's faith in well-regulated liberty. The Founders defended the ideal of a well-regulated society and saw a well-regulated militia as an

³ For examples of individual rights originalists, see Nelson Lund, "The Past and Future of the Individual's Right to Arms," 31 Ga. L. Rev. 1 (1996); Glen H. Reynolds, "A Critical Guide to the Second Amendment," 62 Tenn. L. Rev. 461 (1995); Randy E. Barnett, "Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?" 83 Tex. L. Rev. 237 (2004) (book review).

indispensable check against the dual threats of anarchy and tyranny.⁴

Even the notion of self defense championed by the Founders was radically different than the concept that defines modern gun rights ideology. The aggressive notion of self defense that fuels modern gun rights ideology shared little with the understanding of self defense that informed the creation of the Second Amendment. The right of individual self defense was well established under English common law. Yet, this right was not identical to the right to bear arms that was embodied in the Second Amendment. Although the two might have derived from a common source, the natural right of self defense, once individuals entered civil society the two rights diverged in important ways. Under common law the right of individual self defense required citizens to retreat to the wall before responding with deadly force. The collective right of self defense, embodied in the right to bear arms in the militia, compelled one to stand one's ground until ordered to retreat. While the state could not force citizens to defend themselves, they could force them to bear arms in defense of the state or local community. Indeed, it was precisely because the state could compel citizens to bear arms that the first state constitution also invariably included protections for those religiously scrupulous about bearing arms. It would

⁴ For a discussion of this concept and its relevance to the constitutional thought of the Founding era, see Saul Cornell & Nathan DeDino, "A Well Regulated Right: The Early American Origins of Gun Control," 73 Fordham L. Rev. 487. For a general discussion of the idea of the well regulated society and the broad conception of the individual state's police powers, see William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996). On the concept of liberty in the era of the American Revolution, see John Phillip Reid, The Concept of Liberty in the Age of the American Revolution (1988).

have made little sense to include these provisions if the right to bear arms were simply identical to the common law right of self defense.⁵

The best evidence of how the concept of individual self defense was understood in the Founding era may be found in the landmark case that changed the meaning of self defense in American law, Commonwealth v. Selfridge. Among the most notorious cases in the early republic, the murder of Jeffersonian Charles Austin, by Federalist Thomas Selfridge, transformed the meaning of the idea of self defense. The prosecution in the case insisted that Selfridge was not entitled to arm himself with a hand gun for self protection. Selfridge's lawyer did not dispute this claim. Nor did he assert a constitutional right to bear arms in self defense. Indeed, he expressly affirmed that the right to bear arms only encompassed militia weapons. The defense in the Selfridge case adopted a common law approach. In the absence of any law prohibiting traveling armed, one could not impute criminal intent to sporting a pistol. The very same strategy had been used in another celebrated case less than five years before Selfridge. There is no evidence that any self respecting lawyer in the Founding era would have argued in

⁵ This fact was reflected by the radically different treatment the two received in both Blackstone Commentaries and in St. George Tucker's annotated Commentaries on Blackstone. 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia, at 143-4., n.40. For problematic modern readings of Blackstone, Robert Cottrol & Raymond Diamond, "The Fifth Auxiliary Right," 104 Yale L.J. 995 (1995) (book review). For a more plausible historical reading of Blackstone's views on this matter, see generally Steven J. Heyman, "Natural Rights and the Second Amendment," 76 Chi.-Kent L. Rev. 237, 252-60 (2000).

court that carrying a pistol or a sword cane for personal self defense was an example of bearing arms. It would take another two decades before these arguments would come before any court and achieve some measure of legal sanction. The modern notion that bearing arms included carrying weapons for personal use only gained respectability in the Jacksonian era.⁶

Another problem with originalist accounts of the Second Amendment stems from their claim that the notion of a well-regulated militia was somehow antithetical to government regulation. To support this odd claim, originalists have dutifully scanned eighteenth century dictionaries looking for interesting uses of this term. It is certainly true that in some contexts “well-regulated” could mean well-disciplined. Of course this interpretation of the language of the Second Amendment is hard to reconcile with the Articles of Confederation which asserted that “every State shall always keep up a well-regulated and disciplined militia.” The Founders, it is worth recalling, were well aware of Shays’s Rebellion. While the farmers who took up arms in western Massachusetts showed great discipline and even described themselves as a militia, they were hardly well-regulated in the sense that Washington and Madison would have understood the term.⁷

In contrast to modern gun rights ideology, the framers of the first state constitutions did not oppose gun regulation. To be sure, the Founders expected that most regulation would occur

⁶ For a discussion of this history, see Saul Cornell, A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America, (2006), 110-123.

⁷ For an analysis of the problems with originalist readings of the text of the Second Amendment, see Saul Cornell, “‘Don’t Know Much About History’: The Current Crisis in Second Amendment Scholarship,” 29 N. Ky. L. Rev. 657 (2002).

at the state level. The concept of firearms regulation, however, was uncontroversial at the time of the Second Amendment.

The Second Amendment's focus was clearly on the use of arms for military purposes—it was not, as modern gun rights advocates insist, a generic gun rights provision. The language of the Second Amendment makes this point quite clear. It is the right to bear arms, not the right to carry a gun, that is protected. Supporters of the individual rights theory argue that at the time of the Founding the term “bear arms” included non-military use of arms.⁸ Supporters of the military reading of the phrase have cited dozens of examples of the term being used in a military context during early congressional debate. In addition to this evidence one might point to the usage of the term in the contemporary press, pamphlets, and books of the day. If one looks at popular usage the evidence is equally strong. Out of the more than 150 occurrences of this term in the period between 1776 and 1791 less than a handful of uses fit the individual rights model.⁹

⁸ Don B. Kates, “Handgun Prohibition and the Original Meaning of the Second Amendment,” 82 Mich. L. Rev. 204 (1983); Don Kates & Randy Barnett, “Under Fire: The New Consensus in Second Amendment Scholarship,” 45 Emory L.J. 1139 (1999).

⁹ Supporters of this militia-based understanding disagree over the character of this right. Some view it as a right of the states, others see it as civic in nature, and some embrace a pluralist conception that includes elements of all three theories, for an overview of the most recent developments in this contentious debate, see Merkel, *infra* _____. For uses of the term in Congressional documents from the Founding era, see Dorf *infra* ____ and David Yassky, “The Second Amendment: Structure, History, and Constitutional Change” Michigan Law Review 99 (2000): 588-668.

The individual rights thesis does not rest on an exhaustive survey of the surviving historical materials, but on a handful of texts that have been endlessly recycled in one law review essay after another. Rather than cite dozens of texts, originalists cite the same text dozens of times.¹⁰

The Second Amendment, Federalism, and Popular Constitutionalism

In much the same way that Second Amendment originalists have projected a nineteenth century conception of self defense backward into the Founding era, so too they have projected a nineteenth century insurrectionary ideology into the era of the Second Amendment. The notion that the Second Amendment was intended to give individuals the means to acquire the military force necessary to resist government is a product of an Abolitionist reading of the Second Amendment, not a Federalist one. Second Amendment originalists are really the heirs of Lysander Spooner and John Brown, not James Madison. By confusing the anarchist and libertarian ideals of the nineteenth century with the Whig Republican ideas of the Founding era,

The figure was obtained by searching the Evans Early American imprints and newspaper collections which includes most of the major newspapers from the Founding era and all of the published books, broadsides, and pamphlets.

¹⁰ For a defense of the alternative originalist method focusing on the centrality of the Dissent of the Minority, see Barnett, *infra* _____. Originalists have tended to anchor their interpretation on idiosyncratic texts such as the Pennsylvania Anti-Federalist “Dissent of the Minority,” see Barnett, *infra* _____. For an effort to place this text in context and show how its language was not widely emulated, see Saul Cornell, “Beyond the Myth of Consensus: The Struggle to Define the Right to Bear Arms in the Early Republic,” in Beyond the Founders: New Approaches to the Political History of the Early American Republic 251, 251-73 (Jeffrey L. Pasley et al. eds., 2004).

originalists have constructed an insurrectionary theory of the Second Amendment.¹¹

Federalists and Anti-Federalists generally agreed that the right to keep and bear arms in a well-regulated militia provided an indispensable safe guard for liberty. What Federalists and Anti-Federalists did not agree upon was how this vital check would function in practice. Federalists, at least in the 1790s, believed that the Constitution precluded any right of revolution. Such a right could only exist in the absence of a functioning constitutional government. Jeffersonians, by contrast, found such a notion more plausible.¹²

One of the most interesting aspects of the history of the Second Amendment is the way it was interpreted in its first decade. The evolving Jeffersonian theory of the Second Amendment has not received the attention it deserves from modern scholars. Two constitutional ideas were central to this early debate over how the Second Amendment might serve as a check on federal power. The first concept, federalism, has been too often neglected in modern Second Amendment scholarship because of its association with the modern collective rights theory. In their zeal to discredit that theory, individual rights scholars have attempted to read the problem of states' rights out of early American constitutional debate. Yet, federalism was the most important issue in early American constitutional law. The other important issue for Jeffersonians was how the militia related to their vision of popular sovereignty and popular constitutionalism. The latter concept proved to be particularly divisive for Jeffersonians.¹³

¹¹ On this point, see Saul Cornell, "A New Paradigm for the Second Amendment," 22 Law. & Hist. Rev. 161 (2004).

¹² For further discussion, see Cornell, A Well Regulated Militia, *infra* ____.

¹³ Glenn Harlan Reynolds & Don B. Kates, "The Second Amendment and States' Rights: A Thought Experiment," 36 Wm. & Mary L. Rev. 1737 (1995).

Modern critics of popular constitutionalism have dismissed it as theoretically incoherent, and ultimately a proscription for mob rule. While Alexander Hamilton and leading Federalists in the 1790s would have concurred with this view, leading Jeffersonians would not. Although it is not clear how much weight one ought to accord Jeffersonian thought in modern constitutional interpretation, the constitutional history of the early republic was profoundly influenced by Jeffersonianism. Reconstructing the dynamics of early American constitutionalism necessarily requires exploring both dominant and dissenting voices. While many prominent Jeffersonians embraced the rhetoric of popular constitutionalism, there was considerable disagreement over how the voice of the people would be collected and asserted as a check on potential threats against liberty. Few leading Jeffersonians showed much sympathy for the radical vision of plebeian populists who viewed local institutions such as the jury and the militia as the agents of popular constitutionalism. The events of the Whiskey Rebellion tested this theory. Leading Jeffersonians viewed the actions of the Whiskey Rebels as a repudiation of American constitutional ideas, not their vindication. For members of the Jeffersonian elite, the only constitutional actors who could mobilize the militia to act as a check on potential federal tyranny were the states. In both the Alien and Sedition Crisis, and the electoral crisis of 1800, rumors of the states exercising this type of check proliferated. In the case of the latter situation, the evidence is clear that Pennsylvania and Virginia were both prepared to use their militias as a check on the federal government.¹⁴

¹⁴ Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004). For critiques of Kramer, see Larry Alexander & Lawrence B. Solum, “Popular? Constitutionalism?” 118 Harv. L. Rev. 1594 (2005) (book review); L. A. Powe, Jr., “Are ‘the People’ Missing in Action (and Should Anyone Care)?”, 83 Tex. L. Rev. 855 (2005) (book

St. George Tucker, Federalism, and Jeffersonian Popular Constitutionalism

One of the most interesting figures to grapple with the promise and limits of popular constitutionalism in the 1790s was St. George Tucker. Tucker was a professor, a jurist, and a leading Jeffersonian polemicist. The first mistake originalists make is treating Tucker's ideas as if his views represented some type of consensus from his day. No such consensus existed. His writings give us a clear view of how one influential Jeffersonian viewed early American constitutional law. Understanding the Jeffersonian context is vital to reading Tucker accurately.¹⁵

Tucker has become a favorite of Second Amendment originalists who are fond of quoting a single passage from Tucker's voluminous writings in which he described the Second Amendment as the "grand palladium of liberty."¹⁶ It is impossible to understand this passage without understanding the way Tucker's constitutional thought evolved in response to the crisis of the 1790s. In his earliest commentary on the Second Amendment, delivered as part his law lectures at William and Mary (a period almost contemporaneous with the framing of the Second Amendment), Tucker interpreted the Second Amendment as a structural check on federal power.

review). Saul Cornell, "Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion" 81 Chi.-Kent. L. Rev. 883. Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy 90 (2005).

¹⁵ Saul Cornell, "St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings," 47 Wm. & Mary L. Rev. 1123 (2006).

¹⁶ David B. Kopel, "The Second Amendment in the Nineteenth Century," 1998 BYU L. Rev.

He accepted that this included the awesome power of taking up arms against federal power.

Tucker also linked the Second Amendment with the Tenth's defense of federalism. In his earliest writings on the Second Amendment, Tucker discussed this provision of the Bill of Rights in terms of federalism and the militia.¹⁷

Much had happened in the intervening years between when Tucker first lectured his students on the Second Amendment at William and Mary and the publication of his magisterial edition of Blackstone. Tucker adapted his earlier commentary and added much new material inspired by the bitter conflicts of the 1790s. Tucker borrowed freely from his earliest discussion of the Second Amendment in his law lectures and used this material to reassert the inextricable link between the Second Amendment and Article I, Section 8. For Tucker, the issue continued to center on control of the militia. He reminded his readers that this provision of the Constitution prompted considerable alarm among Virginians at the time it was proposed. He lauded the proposed amendments suggested by the Virginia ratification convention, including the provision that Madison used as the basis for framing the Second Amendment. While the Second Amendment did not represent a complete victory for Anti-Federalists, Tucker clearly believed that it had been included to partially redress this concern.¹⁸

After discussing the connection between the Second Amendment and Article I, Section 8 Tucker devoted the bulk of his analysis of the Second Amendment to issues posed by developments in the period after the Bill of Rights was adopted. In particular, Tucker was worried about Federalist efforts to corrupt the militia and turn it into an engine of Federalist tyranny. What is most remarkable about his effort to rethink the role of the Second Amendment in American constitutionalism is that he used this issue to explore the scope of federal judicial

¹⁷ Ibid.

¹⁸ ibid.

review, going so far as to assert that if the Federalists sought to prevent citizens from bearing arms as a means of preventing insurrection, then it would be appropriate to appeal to the Federal courts for redress. Tucker would never have conceded a broad right of the federal government to exercise a general police power to regulate firearms, nor would he have embraced an expansive modern conception of judicial power to remedy this evil. His focus was on arms bearing, not on the right to own or use a gun. The nightmare scenario he conjured up did not involve efforts at federal gun regulation, but an assault on the right to bear arms in a well-regulated militia controlled by the states. Tucker worried that Federalists might try to disarm the state militias by preventing citizens from bearing arms. His discussion had nothing to do with civilian use of firearms.¹⁹

Tucker's mature ideas about the Second Amendment crystallized in a world shaped by the debates between Federalists and Jeffersonians, not the modern world of gun control. He was worried about the danger of Federalists disarming the state militias, not encroachments on an individual right of private self defense. When one takes note of the larger political context in which he wrote a radically different understanding of Tucker's most often quoted passage on the Second Amendment emerges. Here is what Tucker said in his much cited passage:

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. In England, the people have been disarmed, generally, under the specious pretext of preserving the

¹⁹ Ibid.

game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated 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.²⁰

Tucker denounced the English game laws and saw domestic disarmament as a prelude to tyranny. He accepted the common view that most citizens would own their own muskets, or other militia weapons. In the case of Cavalry officers, one might own a horseman's pistol, but the constitutional protection accorded these weapons was clearly connected to militia function. Guns without any connection to the militia were subject to the full scope of the individual states' police powers.²¹

Tucker began this passage by noting that the right of self defense is "the first law of nature." Modern gun rights advocates usually misinterpret this claim by failing to understand the connection between natural rights and rights protected under common law. Tucker shared the Blackstonian view that individuals ceded their natural rights when they entered civil society. The natural right of self defense had been modified and adapted by the English common law. If

²⁰ The Founders' Constitution, Volume 5, Amendment II, Document 7 <http://press-pubs.uchicago.edu/founders/documents/amendIIIs7.html> last visited ()

²¹ Cornell, "St. George Tucker," *infra* ____.

Tucker had meant this discussion to focus on the common law right of self defense, he would not have then gone on to discuss the dangers of a standing army. The fear of a standing army, a central Whig political concern, is at the core of his discussion. Tucker also discussed how the English game laws had been used to disarm the population. Tucker would have certainly opposed any policy that smacked of domestic disarmament. At the same time there is little in this passage to suggest that Tucker was concerned with guns outside of the context of public defense. The grand palladium of liberty clearly referred to the Whig notion of an armed citizenry organized as a well-regulated militia.

Federalists Rediscover Popular Constitutionalism: The War of 1812

One particularly fascinating effort to exercise popular constitutionalism in the early Republic occurred during the War of 1812. Ironically, it was not Jeffersonians, but their Federalist opponents who found this theory congenial to their political situation. Echoing ideas that Jeffersonians had articulated in the 1790s, Federalists invoked a theory of states' rights and justified it in terms of popular constitutionalism.

New Englanders opposed the Madison administration's use of the militia to fight an offensive war against British Canada during the War of 1812. While some areas of New England were in open rebellion against the Madison administration, leading Federalists opted to formulate a different approach to resisting federal authority. Once again, the issue of control of the state militia and its ability to act as a check on federal tyranny was at stake. In contrast to the aggressive check envisioned by Jeffersonians in 1800, Federalists opted to think about a form of passive resistance. In effect, Federalists toyed with a form of militia nullification. By refusing to muster their militias, Federalists hoped to impede the war effort and change American policy.²²

²² For further discussion, see Cornell, A Well Regulated Militia, infra ____

Federalist opponents of the War insisted that state militias could only be used defensively to repel an imminent threat of invasion or to put down domestic insurrection. If this reading of the Constitution were accurate, then the individual states could refuse to supply militia troops for the Jeffersonian war effort. The Governor of Massachusetts took the extraordinary step of requesting an advisory opinion from his own state Supreme Court on the appropriate constitutional uses of the militia in time of war. The judges of the Massachusetts court held that the authority to decide when to call out the militia rested with the governors of each state. While the President might request that the militia be called out, he could only do so with approval of the governor of the state from which the troops were requested. The Massachusetts' court emphasized the limited nature of the Constitution's grant of authority over control of the militia and implicitly endorsed the idea that the states were constitutionally empowered to engage in a form of passive resistance to federal power by refusing to muster their militias when the summons came from the President.²³

During the 1790s, when Federalists had been ascendant, Jeffersonian constitutional thought had embraced a strong states' rights agenda. Now that Jeffersonians were in control of the central government, Federalists found many of the same sorts of arguments congenial and used them to oppose Madison's policy. James Monroe, Madison's Secretary of War, did not savor this irony. He declared his own support for the "rights of the individual States" as indispensably necessary for the "existence of our Union, and of free government in these States." Acknowledging this point, however, did not mean that Monroe accepted the conclusions of the advisory opinion of

²³ "Governor Caleb Strong to Justices of the Supreme Court of the Commonwealth of Massachusetts, August 1, 1812," and the reply "To His Excellency the Governor," Kurland and Lerner, Founders Constitution, 3:183

the Massachusetts court. Although the Massachusetts Court had not sanctioned the most radical version of the states' rights theory of the militia employed during the electoral crisis of 1800, a view that would have authorized armed resistance to federal power, the Court did lend its own considerable moral authority to the notion that states might exert a form of passive resistance to federal policy. Still, the fact that this more moderate variant of states' rights theory had been endorsed by the highest judicial body in Massachusetts alarmed Monroe. The judges, in Monroe's view, had carried "the doctrine of State rights further than I have ever known it to be carried in any other instance." In some ways Monroe's assessment was correct. Although Jefferson had embraced a more radical view in 1800, he had not acted upon that theory. Moreover, Jefferson's views were not a formal legal pronouncement by a court, but were expressed in private letters. At another level, however, Monroe's analysis was incorrect. Jefferson had contemplated active resistance to federal power. Massachusetts by contrast was contemplating a form of passive resistance. Compared to what Jefferson had contemplated in 1800, the path charted by Massachusetts was far milder.²⁴

The Second Amendment and the Future of Popular Constitutionalism

Although much scholarly energy has been wasted on trying to twist the Second Amendment to fit our modern concerns, the Second Amendment has little to do with the current vitriolic debate over gun control. Nor is the radical abolitionist insurrectionary view of the Amendment likely to make a useful contribution to American law. The truly interesting and important questions that arise from the Second Amendment continue to be those that speak to

²⁴ "James Monroe to the Chairmen of the Senate Military Committee," February 1815, in *ibid*, 185-6.

issues of federalism and popular constitutionalism. Given the changes in the modern American military and the profound legal changes wrought by the Civil War, the New Deal, and the emergence of the modern National Security State, is it still possible to think of the Second Amendment as a potential check on federal power? Could one imagine a situation in which a state governor refused to deploy the National Guard for use outside of American territory, much as Federalists did in the War of 1812?

If originalism is to be taken seriously as a method of constitutional interpretation it will need to attain a much higher level of historical sophistication. The distortions of Second Amendment originalism should serve as a warning that this methodology more often masks contemporary agendas than it illuminates the thought of the Founders and their world. Rather than turn to originalism, constitutional scholars would do better to get their history right first and only then turn their attentions to how we might profitably learn something from our constitutional past.