

**ORIGINALISM AND ITS TOOLS:
A FEW CAVEATS**

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*District of Columbia v. Heller*¹ has fairly been said to mark “the triumph of originalism.”² The *Heller* majority expressly employed an original public meaning approach to constitutional interpretation,³ while the four dissenting Justices implicitly relied upon original Congressional intent.⁴ We may hope from this that serious works on constitutional

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1. 128 S. Ct. 2783 (2008).

2. Linda Greenhouse, *Three Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4. Others deny this. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008). Some originalists regard the opinion as rather half-hearted. See Nelson Lund, *Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

3. 128 S. Ct. at 2788.

4. Justice Stevens’ dissent consistently refers to the intent of the Framers of the Amendment and analogizes citation of post-1791 commentators to use of post-enactment legislative history. *Id.* at 2822, 2826, 2828, 2837 n. 28, 2838. Original Congressional intent assesses meaning via the intent of the legislative draftsmen of an amendment; conversely, original public meaning does so via the understanding of the American public. The latter seems more appropriate in the case of a

history, in the past too often neglected by the courts,⁵ will gain the recognition they have earned. At the same time, it is appropriate to note a few *caveats* relative to the field. The first two involve problems with verification at the intersection of law and history; the last concerns problems that arise at the intersection of history and computer technology.

I. THE COUNTERINTUITIVE MAY ALSO BE COUNTERFACTUAL. IT MAY EVEN BE COUNTERFEIT.

In 2000, Emory University history professor Michael Bellesiles released “Arming America: The Origins of a National Gun Culture.” The book’s key claims were that private firearm ownership was rare and not particularly valued in early America; the “national gun culture” only began after the Civil War. The claims were said to be based upon years of research into probate property inventories, periodic state audits of gun ownership, and accounts by travelers.

The work was praised by other historians. Garry Wills’ review praised it for having “dispelled the darkness that covered the gun’s early history in America.”⁶ It won Columbia University’s prestigious Bancroft Prize for history.⁷ Legal academics predicted that his work

constitutional provision or amendment, where Congress only proposes the measure, and the people—acting through elected conventions or their State legislatures—choose whether to adopt or reject it.

5. By way of example, none of the following works have ever been cited by the Court, though all are definitive and the first won a Pulitzer Prize: LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE:” STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000). In fact, Leonard Levy, perhaps our greatest constitutional historian, has *never* been cited by the Supreme Court.

6. Garry Wills, *Spiking the Gun Myth*, *N.Y. TIMES*, Sept. 10, 2000, §7 at 5.

7. For additional information about the Bancroft Prize, see Columbia University Libraries: The Bancroft Prizes, <http://www.columbia.edu/cu/lweb/eguides/amerihist/bancroft.html> (last visited Jan. 4, 2010).

David T. Hardy, *Originalism and Its Tools: A Few Caveats*, 1 *AKRON STRICT SCRUTINY* 40 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/originalism-and-its-tools-a-few-caveats.pdf>.

might influence judicial thinking.⁸ In fact, some of Bellesiles' earlier work secured a citation in a Ninth Circuit ruling on rights to arms.⁹

Then came the downfall. A graduate student, Clayton Cramer, was convinced many of Bellesiles' conclusions could not be true and began to cite-check him. He quickly found that many of the sources cited by the book were being misquoted, while others seemed to be fabricated outright. He scanned the authorities Bellesiles had cited and put them online.¹⁰ Bellesiles responded by claiming that he was being made the target of a hate campaign orchestrated by the gun lobby. The professional historians rallied to his side. The American Historical Association condemned the "personal attacks" and "harassment" allegedly directed at him.¹¹

Fortunately, some professional historians did examine the matter and found *major* problems.¹² Bellesiles' compilation of probate inventories reported results that were mathematically impossible.¹³ Worse, he claimed to have consulted San Francisco probate records—but they had been destroyed in the 1906 earthquake and fire.¹⁴ Other records he claimed to have relied upon either did not exist or did not contain the data that he claimed.¹⁵ In still other cases, he had "switched" numbers (substituting 57 percent unarmed for 57 percent armed), or invented incidents.¹⁶ As Professor James Lindgren concluded:

8. Robert F. Worth, *Historian's Prizewinning Book on Guns is Embroiled in a Scandal*, N.Y. TIMES, Dec. 8, 2001, at A13.

9. *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) *cert. denied*, 540 U.S. 1046 (2003). The citation was in the slip opinion, and was deleted prior to publication by West. See *infra* note 21.

10. Primary Historical Sources, <http://www.claytoncramer.com/primary/primary.html#GunScarcityDocuments> (last visited Jan. 4, 2010).

11. For a copy of the resolution, see Michael A. Bellesiles, *Disarming the Critics*, <http://www.oah.org/pubs/nl/2001nov/bellesiles.html>.

12. See James Lindgren, *Fall from Grace: Arming America the Bellesiles Scandal*, 111 YALE L. J. 2195 (2002); Joyce Lee Malcolm, *Arming America*, 79 TEX. L. REV. 1657 (2001); Robert H. Churchill, *Guns and the Politics of History*, 29 REV. AMER. HIST. 329, 331 (2001).

13. Lindgren, *supra* note 12, at 2198.

14. *Id.* at 2210-11.

15. Joyce Lee Malcolm, *Disarming History*, Reason Online (March 2003), <http://www.reason.com/news/show/28713.html>.

16. Lindgren, *supra* note 12, at 2206.

[S]ome errors are big and some are small, but the overall effect is shocking, indeed unprecedented for a Bancroft-Prize-winning book. Nearly every sentence that Bellesiles wrote about probate records in the original hardback edition of *Arming America* is false. Nearly everything that Bellesiles says about homicide is either false or misinterpreted . . . When the sources do not support the main premise of *Arming America*, Bellesiles sometimes misreports their content in a way that fits his thesis, as he does in over 200 instances mentioned in this Review.¹⁷

Garry Wills praised the book at its release; now, he proclaimed, "I was took. The book is a fraud."¹⁸ Bellesiles resigned his professorship,¹⁹ the publisher of his book withdrew it from distribution, and his Bancroft prize was revoked.²⁰ The Ninth Circuit managed to remove the reference to his work from its opinion before West issued its bound volumes.²¹

Lessons to be learned from this: (1) Don't assume that a historian does not have an agenda. (2) The fact that a source was peer-reviewed doesn't mean the peers checked the footnotes.

17. *Id.* at 2229.

18. *How the Bellesiles Story Developed*, History News Network, <http://hnn.us/articles/691.html>.

19. Press Release, Michael Bellesiles Resigns from Emory Faculty, <http://www.emory.edu/news/Releases/bellesiles1035563546.html>.

20. Press Release, Columbia's Board of Trustees Votes to Rescind the 2001 Bancroft Prize, online at http://www.columbia.edu/cu/news/02/12/bancroft_prize.html.

21. See Philip A. Homan, *A Record Enriched*, Idaho Librarian <http://www.idaholibraries.org/newidaholibrarian/200305/RecordEnrichedII.htm>. ("San Francisco's Ninth Circuit Court of Appeals cited Bellesiles' research in its decision *Silveira v. Lockyer*, Dec. 5, 2002, which ruled that the Second Amendment established a collective, not an individual, right to 'keep and bear arms.' It later deleted the citations from its decision, in a move legal experts called very unusual.") For a criticism of the Bellesiles passage which the Ninth Circuit cited, see http://www.claytoncramer.com/weblog/2002_12_01_archive.html#85599885.

II. “CITE CHECKED” DOESN’T MEAN AN EDITOR VERIFIED THE CONTEXT.

St. George Tucker taught law at William and Mary from 1788 to 1804, and in 1803 he published his American edition of Blackstone,²² which incorporated an extended discussion of the U.S. Constitution. It stands among the best evidence of original understanding of the Constitution, since it was the first significant commentary on that document, written by a lawyer who personally knew and communicated with many of the Framers.²³

Remarkably, Tucker was quoted both by the majority and by the dissent in *District of Columbia v. Heller*,²⁴ as support for *both* of their positions. The majority cited to Tucker’s Blackstone, which repeatedly places the Second Amendment in the context of an individual right, linked to self-defense. The key passages are:

First, after reciting the Amendment, Tucker explains: “The right of self defense 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.” The reference to rulers restricting the right makes it clear he refers to defense of the individual, not of the state.

Tucker adds: “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.”

Finally, Tucker criticizes British law. The Game Act of 1671²⁵ had forbidden gun ownership by any but the most wealthy, and Tucker writes, “In England, the people have been disarmed, generally under the specious pretext of preserving the game . . .”²⁶ The 1688 Declaration of

22. ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS (1803).

23. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1370-71; MARY COLEMAN, ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY 35, 61, 113-14 (1938).

24. 128 S.Ct. 2783, 2805, 2839, n.32 (2008).

25. 22 & 23 Car. 2, ch. 25 (1671).

26. See David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527, 1533 (2009).

Rights²⁷ guarantee (“the subjects which are Protestants may have arms for their defence [sic] suitable to their conditions and as allowed by law”) was to Tucker an inadequate protection:

True it is, their bill of rights seems at first view to counteract this policy, but the right of bearing arms is limited to protestants, and the words suitable to their condition and degree have been interpreted ... so that not one man in five hundred can keep a gun in his house without a penalty.²⁸

While the majority relied upon Tucker’s Blackstone, the dissent cited Tucker’s unpublished law lecture notes. Using these, the dissent claimed that “St. George Tucker, on whom the Court relies heavily, did not consistently adhere to his position that the Amendment was designed to protect the ‘Blackstonian’ self defense right . . .”²⁹ It then cited a portion of Tucker’s notes arguing that, if Congress failed to provide for arming of the militia, the States could do so—citing the Second and Tenth Amendments to show this would be constitutional. The dissent then argued that the notes “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.”³⁰

There is a major problem with this conclusion. What the dissent quoted was not the portion of Tucker’s lecture notes dealing with the Second Amendment; it was the portion dealing with Congress’s Article I power over the militia, in which it would be predictable that the Second Amendment would be put in a State militia context.³¹ It quoted from pages 127 and 128 of Tucker’s notes, although Tucker’s discussion of the Bill of Rights began at page 140. When Tucker’s notes get to the Second Amendment, they use terminology that closely tracks his later Blackstone, usually down to the word:

27. 1 Wm. & Mary c. 2 (1688/89).

28. TUCKER, *supra* note 22, at 300.

29. 128 S. Ct. at 2839 n. 32. (Stevens, J., dissenting).

30. *Id.*

31. See Hardy, *supra* note 26, at 1534.

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 whatsoever 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.

[Marginal 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. [The Declaration of Rights]³²

How could the dissent have overlooked the portion of Tucker's notes that actually did focus on the Second Amendment? How could the dissent instead argue that Tucker did not always adhere to the view that the Amendment protected a "'Blackstonian' self defense right" when the notes the dissent cites begin a discussion of the Second Amendment with a reference to the right of self defense being the first law of nature?³³

The dissent appears to have relied uncritically upon a 2006 law review article by Professor Saul Cornell.³⁴ The article relates the quotation that the dissent used, taken from Tucker's discussion of the Article I militia clauses, not from his discussion of the Bill of Rights.

32. Tucker lecture notes, Swem Library, College of William and Mary, at 143-44. See Hardy, *supra* note 26, at 1534.

33. *Heller*, 128 S.Ct. at 2805, 2839, n. 32.

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

The article inaccurately claims that this is Tucker's "formulation of the meaning of the Second Amendment."³⁵ From this it argues that "Tucker's earliest commentary on the Second Amendment does not support the individual rights view,"³⁶ and that "Tucker also dealt with the issue of individual self-defense, but he did not treat this right in the context of his discussion of the Second Amendment."³⁷ The Stevens' dissent borrows this attribution.

The 2006 article fails to acknowledge that the segment of the notes that it quotes does not mention the Second Amendment; it is from the notes' description of the militia clauses. It nowhere acknowledges that Tucker's notes *do* have a section devoted to detailing the Amendment, which *does* describe it from an individual rights view, *does* track his 1803 Blackstone almost to the word, and *does* treat the right to self defense as the first purpose of the Amendment.

The article faced a problem: how to reconcile Tucker's supposed 1790s view of the Amendment with what he wrote in his 1803 Blackstone. It claimed that the difference (which as noted above, did not exist at all) was due to changes in Tucker's views over the years, elaborating: "To understand the differences between his earliest discussion of the Second Amendment in his unpublished law lectures and the analysis that appeared in print a decade later, one must acknowledge the impact of the tumultuous events of the 1790s on Tucker's thinking."³⁸ The idea that the 1790s changed his thought is simply an invented cause to explain an invented effect.

The article on which the dissent relied was, in short, seriously misleading. Since I disclosed this,³⁹ its author has published two replies,⁴⁰ which accept that Tucker's notes indeed read as I contended.⁴¹

35. *Id.* at 1130.

36. *Id.* at 1125.

37. *Id.* at 1126.

38. *Id.* at 1134. *See also id.* at 1153 ("By the time Tucker published his more mature thoughts on the Second Amendment in his *Blackstone*, much had changed.").

39. *See Hardy, supra* note 26.

40. Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. 1541 (2009) [hereinafter Cornell, *Lecture Notes*]; Saul Cornell, *Heller, New Originalism, and Law Office History*, 56 UCLA L. REV. 1095 (2009) [hereinafter Cornell, *Heller*].

The replies also implicitly admit that the author had the undisclosed portion in his possession when he wrote.⁴² Both replies are remarkable for their inability to explain why the original article: (1) entirely omitted any reference to the lecture notes' sections on the Second Amendment; (2) described that passage it cited, from the notes' discussion of the militia clauses, as if that was the discussion of the Second Amendment, and all of the notes' discussion of it; and (3) claimed that Tucker's notes' position differed from that of his 1803 Blackstone, when they were virtually identical, and attributed the supposed change to Tucker's experiences during the 1790s.

Professor Cornell argues that I “mistakenly assert that the passage quoted by Stevens on the left is about the militia clauses and not about the Second Amendment,” and that “it is hard to fathom how anyone, including Hardy and Gura, could make such a claim.”⁴³ He notes that my article did not quote *in haec verba* the segment of the notes that his article had cited,⁴⁴ and claims “[t]his omission ought to raise a red flag for anyone interested in understanding the true historical meaning of these texts.”⁴⁵

A person should be cautious about what they ask for, because every now and then they get it. Here is the passage that Professor Cornell quoted, and Justice Stevens borrowed. *Preceding it, in italics, is the part of that passage that was omitted from both.* The reader may judge whether Tucker is examining the militia clauses:

The Congress have moreover power to provide for calling forth the militia to execute the laws of the union, suppress insurrections; and repel invasions, and further to provide for organizing arming & disciplining the militia; and for governing them when in the actual service of the United States; but the power of officering them according to the _____ prescribed by Congress, is _____ [secured?] to the States.

41. The replies refer to the undisclosed portion of Tucker's notes as “the unpublished version of the ‘Palladium of Liberty’ passage.” Cornell, *Heller*, at 1122.

42. One reply refers to having “re-read these passages.” *Id.* at 1122.

43. *Id.* at 1120.

44. *Id.* at 1119.

45. *Id.*

The object of this clause in the Constitution, is founded upon the principles of our own State Bill of rights, which declares “that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural & safe defense of a free State,” were by some persons apprehended to be dangerous to the State Governments, who it was supposed were thereby prohibited from arming their own militia should Congress neglect to do so; -- upon this ground, one of the amendments proposed by the Convention of this State provided “That each State respectively should have the power to provide for organizing, arming and disciplining its own militia whensoever Congress should neglect to provide for the same.” It was moreover proposed that the militia should [not?] be subject to martial law, except when in actual service, in time of war, Rebellion, or invasion, a provision which appears to be comprehended in the words of the Constitution: As to the power of arming the militia [two lines crossed out] there seems no good reason to alledge against it in case Congress should neglect to do it: -- If a State chooses to incur the expence of putting arms into the Hands of its own Citizens for their defence, 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 with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above-mentioned, would be subversive of every principle of Freedom in our Government; of which the first Congress appear 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 Amendments.⁴⁶

46. St. George Tucker lecture notes at 126-28 (emphasis added).

Indeed, “[t]his omission ought to raise a red flag for anyone interested in understanding the true historical meaning of these texts.”

Many of the reply articles’ remaining points simply involve assertions, with no citation of authority at all. For example:

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 the text, it becomes clear that the passage is not about a private right to 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.⁴⁷

No authority is cited. Let us consult Tucker’s notes:

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.⁴⁸

This is “not about a private right to self-defense?”⁴⁹ “First law of nature,” which so many rulers strive narrowly to limit, refers to Congressional powers under Article I, Section 8. Tucker continues: “Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour whatsoever prohibited, liberty, if not already annihilated is in danger of being so.”

Here Tucker at least mentions standing armies—the only time he will do so—but places that next to disarmament as a peril to liberty: “In

47. Cornell, *Lecture Notes*, *supra* note 40, at 1546.

48. Citations to Tucker’s notes are taken from Hardy, *supra* note 31.

49. Cornell, *Lecture Notes*, *supra* note 40, at 1546.

England the people have been disarmed under the specious pretext of preserving the game.”

Tucker was a little off here—the portion of the Game Act of 1671 that had prohibited arms ownership by all but the wealthy had in fact been repealed in 1692.⁵⁰ However, he plainly is discussing private, not militia, arms. The Game Act was clearly not directed at the militia; by the time of the 1671 Act, the idea of a general militia had faded out, and been replaced by a loyalist voluntary force firmly controlled by king and gentry, and used to suppress their opponents.⁵¹ It is hardly likely that the Stuart monarchs envisioned the Game Act as meant to disarm their hand-picked militias.

This was even clearer a century later. In Blackstone’s and Tucker’s time, less than one-half of one percent of the British population was enrolled in the voluntary militia.⁵² Their arms were provided by the government and stored by their officers under lock and key.⁵³ As historian Robert Churchill has noted:

The problem for Cornell's argument is that England's game laws prohibited citizens, the vast majority not enrolled in the militia, from possessing firearms for private purposes. That Tucker saw the game laws as a contravention of the right protected by the Second Amendment is clear evidence that he understood that right to apply in America to all citizens and to weapons owned for both public and private purposes.⁵⁴

50. JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 126-127 (1994).

51. *Id.* at 38-39.

52. The Militia Act of 1761 authorized a militia of 28,240 men. 2 Geo. III, ch. 20 §41.c. The British population then would have been about six million. Julie Jeffreys, *The UK Population: Past, Present, and Future* 3 (2005), http://www.statistics.gov.uk/downloads/theme_compendia/fom2005/01_FOPM_Population.pdf.

53. Militia Act of 1761, 2 Geo. III, ch. 20 §104. Each commander was required to “keep the said arms in some dry part of his house or dwelling, under lock and key,” and to do the same with uniforms. Sergeants were required “to take care that, after exercise, every militia-man cleans and returns his arms, clothes, and accoutrements to his captain” or his delegate.

54. Robert H. Churchill, *Three Steps Forward, One Step Back*, Humanities and Social Sciences Online (Sept. 2007), <http://www.h-net.org/reviews/showrev.php?id=13574>.

Tucker continues on to a discussion of the politics of the Game Acts: “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.”

Tucker is essentially arguing that the Crown used the game laws to persuade the gentry to disarm the people, thereby making the Crown secure against popular unrest.⁵⁵ Cornell argues that this *must* refer to the militia,⁵⁶ although no such reference is made and Tucker’s point is equally consistent with the view that a disarmed populace impedes resistance to oppression.

Tucker then wrote a note on the blank, facing page, with a citation to the English Declaration of Rights: “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.”⁵⁷

Again, this is consistent with an individual rights view: The English Declaration had nothing to do with the militia system and everything to do with James II’s confiscations of private arms.⁵⁸ Professor Cornell argues that Tucker was not “worried that America would follow England down this path.”⁵⁹ No one has argued that he so worried. The point is that he discusses the individual British guarantee in the context of our Second Amendment.⁶⁰

55. The Game Acts were, in fact, written to favor the gentry in a number of ways. Qualification to hunt was determined by value of land, and not of personalty. Under the 1671 Act, persons qualified to hunt, and their agents, were allowed to search the homes of others for the contraband items. P.B. Munsche, *Gentlemen and Poachers: The English Game Laws 1671-1831* at 16-17, 21 (1985).

56. Churchill, *supra* note 54.

57. Hardy, *supra* note 31, at 1533 (emphasis added).

58. Malcolm, *supra* note 12, at 118-19.

59. Cornell, *Lecture Notes*, *supra* note 40, at 1547 n.40.

60. Professor Cornell also submits that Tucker’s point about the narrowness of the British right undermines reliance upon it as a predecessor of the Second Amendment. *Id.* at 1549. Tucker’s Blackstone makes the point that the Second Amendment lacks the British restrictions. “The right of the people to keep and bear arms shall not be infringed.” U.S. CONST. amend. II. “. . . and this without qualification as to their condition or degree, as is the case in the British government.” Tucker, *supra* note 45, at 143. Moreover, Joyce Malcolm has demonstrated that the restrictions played no role in the development of English law. Malcolm, *supra* note 12, at 126-29.

In short, Tucker's notes once reference standing armies: liberty is in danger "[w]here ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour whatsoever prohibited" Even though this reference comes in conjunction with the right to arms, Professor Cornell's reply argues that it (1) means that Tucker is *only* concerned about standing armies and (2) the seven relevant words overcome every other, clearly individual, reference in Tucker's notes.⁶¹

The articles written in reply present new problems as well as old. They advocate a form of pragmatism, described as Blackstonian, involving the search for the intent and spirit of the law. They do not note the legal background that left Blackstone with no other choice because when he wrote in the 1760s, it was illegal for anyone to publish the debates in Parliament.⁶²

A much more serious problem takes the form of bold assertions unaccompanied by evidence, or contradicted by it. The reader is told that Benjamin Oliver was "one of the most influential legal writers of the early nineteenth century,"⁶³ with no documentation given. To my knowledge, no other person has ever claimed that Oliver or his 1832 book⁶⁴ had any influence at all. If Oliver's work has any claim to a title, it may have been that of most obscure commentary, cited neither by courts nor by other commentators, and not reprinted for nearly 140 years.⁶⁵

61. Cornell, *Lecture Notes*, *supra* note 40 at 1546-52.

62. Parliament had declared such reporting to be a punishable breach of its privileges, and newspaper editors were arrested on that charge as late as 1771. "Official" reports were not available until 1803. "Breach of Privilege," <http://www.parliament.uk/about/livingheritage/evolutionofparliament/communicating/overview/breachofprivilege.cfm>; <http://www.publications.parliament.uk/pa/cm/chron.htm>; <http://www.1911encyclopedia.org/Reporting>.

63. Cornell, *Heller*, at 1117.

64. BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN: WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES* (1832, reprinted 1970).

65. A search of the major commentaries of the period (William Rawle, Joseph Story, Thomas Cooley) turns up no citation of Oliver. Westlaw search in the All State and Federal Cases library da(before 1901) & ((oliver w/5 (rights w/8 citizen)) "b. oliver" "benjamin oliver") % "r. b. oliver") turns up no reference to this Oliver or his book. Westlaw reports that its databases go back to 1804 in Massachusetts, and 1790 for Federal cases. A search for cases reported between 1832 and 1849

We are told that “it is clear that what Oliver is actually saying is that the original militia-based view had recently been challenged by a new, expansive, and individualist conception of the right to bear arms.”⁶⁶ Actually, all that Oliver says is that the Second Amendment was “probably” meant to protect militia uses, but that “a different construction” has been given it:

The provision of the constitution, declaring the right of the people to keep and bear arms, was probably intended to apply to the right of the people to bear arms for such purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from going to arms. A different construction however has been given to it.⁶⁷

Oliver gives no clue as to which view came first. In fact, his words are consistent with “well, this is what *I* think, but the courts have all disagreed with me.”

The reply articles claim that in *Heller*, Justice Scalia “ignored the large body of scholarship on the Second Amendment critical of the individual rights interpretation.”⁶⁸ The supporting footnote has two citations, neither of which refers to any large body of scholarship.⁶⁹ An assertion that *Heller*’s holding runs against “the overwhelming weight of countervailing historical scholarship”⁷⁰ likewise cites to articles that, when read, give little support.⁷¹ Actually, the individual rights view is

show 3184 hits for the former and 3478 for the latter. Email from Westlaw reference attorneys David Madden and Corey G. to David T. Hardy (Sept. 11 & 12, 2009). The first reprint of Oliver’s work came in 1970.

66. Cornell, *Heller*, at 1117.

67. OLIVER, *supra* note 64, at 177.

68. Cornell, *Heller*, at 1110.

69. The closest approach is Judge Wilkinson’s agreement that the scholarship on the issue is in “reasonably close balance.” J. Harvey Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 271 (2009). The cited portion of Cass Sunstein’s article only states that Saul Cornell and Jack Rakove are critics of the individual rights view. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 255-57 (2009).

70. Cornell, *Heller* at 1111.

71. Judge Posner simply states: “Among other things, professional historians were on Stevens’s side.” Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*,

so dominant that Professor Glenn Harlan Reynolds entitled it the “Standard Model” of Second Amendment interpretation.⁷²

A discussion of rights of slaves in the state of nature (a bit of an oxymoron) digresses into a statement that slaves had no self-defense rights.⁷³ The support for this is an earlier article by Professor Cornell, referencing Tucker’s statement that slaves were deprived of rights of property and liberty, and “even the right of personal security, has been, at times, either wholly annihilated or reduced to a shadow” for them.⁷⁴ The problem is that Tucker cites examples of this “right of personal security,” and those include both self defense *and* the right to arms:

By the act of 1680, a Negroe, a mulattoe, or Indian, bond or free, presuming to lift his hand in opposition to any Christian, should receive thirty lashes on his bare back for every offence.

The same act prohibited slaves from carrying any club, staff, gun, sword, or other weapon, offensive or defensive.⁷⁵

Taken in full context, the citation illustrates that Tucker indeed viewed arms-bearing for personal defense as a right, and one linked to rights to “personal security.”

Lesson to be learned: Trust but verify. The *Heller* dissent quoted Tucker’s notes on the militia clauses, not his notes on the Second Amendment, because it relied on a claim in a single law review article, an article which does not stand up to examination.

The Tucker papers are in the Swem Library, a pleasant three hour drive from Washington, D.C. A day of travel, or a phone call to request interlibrary loan of the microfilm, would have saved the dissenting justices from an embarrassing mistake.

NEW REPUBLIC, Aug. 27, 2008, at 35. Cass Sunstein’s article, at the portion cited by Oliver, only mentions that Saul Cornell and Jack Rakove criticize the individual rights view. Sunstein, *supra* note 69. Neither makes claims of “overwhelming weight.”

72. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

73. Cornell, *Heller*, *supra* note 40 at 1121-22.

74. Cornell, *Lecture Notes*, *supra* note 40 at 1550.

75. ST. GEORGE TUCKER, *A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT IN THE STATE OF VIRGINIA* 54-55 (1796). *See generally* Stephen P. Halbrook, *St. George Tucker’s Second Amendment: Deconstructing the “True Palladium of Liberty,”* 3 TENN. J. OF L. & POL’Y 120, 150 & n. 105 (2007).

David T. Hardy, *Originalism and Its Tools: A Few Caveats*, 1 AKRON STRICT SCRUTINY 40 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/originalism-and-its-tools-a-few-caveats.pdf>.

III. BE AWARE OF LIMITATIONS OF METHOD

I have found www.newspaperarchive.com a convenient research tool in relation to popular understanding of the Fourteenth Amendment. The website allows users to perform keyword searches (which can be narrowed by date and location) in a large library of nineteenth century newspapers.

Professor George C. Thomas has published several articles based on keyword searches of that newspaper database for privileges and/or immunities, and variations thereof.⁷⁶ Based upon the relatively low number of hits (and specifically for ones reporting Senator Howard's crucial speech of May 23, 1864, where he states that the Amendment will make the Bill of Rights applicable to the States), he concludes that there is little evidence of a public understanding that the proposed Amendment would incorporate the Bill of Rights.

Two sets of considerations make that conclusion quite problematic. The first is a problem with the database. To begin with, the [newspaperarchive.com](http://www.newspaperarchive.com) database represents only a tiny fraction of American newspapers of the relevant period. Professor Richard Aynes, Chairman of Constitutional Law and the Director of the Constitutional Law Center at the University of Akron School of Law, estimates that the database covers only 1.3 to 5.4 percent of those periodicals.⁷⁷

Additionally, some experimentation uncovered massive flaws in [newspaperarchive.com](http://www.newspaperarchive.com)'s search engine. Professor Thomas noted some anomalies in www.newspaperarchive.com's search results, in the way of

76. George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES ____ (2009) (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392961#; George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Reply to Professor Wildenthal*, 68 OHIO ST. L. J. 1627 (2007).

77. Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES n.15 (2009) (forthcoming). The variance in percentages is due to the rapid increase in the number of newspapers over this timeframe and variations in estimates of their numbers. One example, as will be noted below, at one point in the nineteenth century the small town of Olney, Ill., had six newspapers simultaneously operating; one of them, the *Olney Times*, was published from 1856 to 1952. See *infra* note 91. [Newspaperarchive.com](http://www.newspaperarchive.com) has, for Olney newspapers, only the *Times*, and only for 1857-1859.

underinclusion, but was unable to find the reason for them.⁷⁸ My own research uncovered the reason, and it is a barrier to using the web archive to prove a negative.

The website has an interesting interface. A keyword search initially presents links to each newspaper page where the keywords were found. Clicking on the link brings up an image of the page, on which the researcher can use the browser's "find" command to highlight the keywords.

An image is not keyword searchable, nor can you "find" a word in it; the computer knows it as a picture, not as searchable text. I deduced that the archive must involve text files with links between each word and its location on the page image. After I found a way to extract the text files,⁷⁹ I could determine exactly why keyword searches were unreliable. The text files were unreliable and, in many places, sheer gibberish. Some characteristic errors⁸⁰ suggested text files had been created, not by human readers, but by an optical character recognition program. The program faced major obstacles—nineteenth century newspaper fonts, 140 years of fading and staining of the result, with longitudinal scratches indicative of well-used microfilm. The software was unable to overcome these barriers.

Perhaps the most important evidence of an intent to incorporate is Senator Jacob Howard's floor speech of May 23, 1866, reported in the *New York Times* the following day. In the course of his speech he reads Section One of the future Fourteenth Amendment, which was duly reported in the *Times*. Newspaperarchive.com's text file for that reading of section one is as follows:

ABTICLX.

78. Thomas, *Newspapers and the Fourteenth Amendment*, *supra* note 76, at 6 (online version). Professor Thomas noted that he would sometimes get different numbers of "hits" when running an identical search, and once the *New York Times* archives showed a hit that did not occur on www.newspapers.com.

79. The clue came when I discovered one could highlight parts of the page image by holding down the mouse button and dragging the cursor around. While this is normal for text, it is not normal for an image. I then used a copy command and found that I had copied, not part of the image, but the matching text file.

80. Frequently confounding "b" and "h," or "I" and "t," or "e" and "s," for instance.

Stx-noK L Ro Stats shaU maks or eaforce *inr* law which snail abridn th* privilege* or immuntlw of oitissns of ih* United BtaU*; aor shall any Htato deprive any penon of Ills, llb»rtj or property without doe proees* of law, nor deny to any person within its iorUdlotton th* Moal proteetten of ths law*.

The text of the Amendment itself would not show up on a search for “privileges or immunities,” nor one for “due process,” nor one for “equal protection!”

The newspaper’s report of Senator Howard’s speech began with:

The Reconstruction Resolutions

Mr. Howard moved that the Senate proceed to the consideration of the Reconstruction resolutions recently passed by the House.⁸¹

Newspaperarchive.com’s text file for it read:

Mr. BOWAKD moved that the Benate proceed to the consideration of the Beconstruotlon reaolnUona recently paaaed by the Houae, •? Ur. Bu>e»r»—The quertJon, a« I take tt, Ia of proceeding to th* consideration of that resolution. Of conne thit doe* not Involve the merits of tha question, and I shall not speak of them. I know not that I shall be abla to take any part in this debate, bnt I cannot allow the resolution to be taken up without expressing my individual opinion that it would be better ii IU conaidoraUou were postponed

The end of the day’s session is reported thus in the text file:

Ho person (ball b* » Snnr.toro'- U -i r ^r—f.-t T- 1 , Cin vnlntlAni; Aided in acr iBMurecUoa or rr!>fh, n *ifmul* UM IjDlud BtsUa, er a-insa aid or comfort Ui-n>i« Mr. HOWAJUI (TIKKefted Ih* «triku^f out of the word " voluntary" in the abow, which was *«ro<i to. Mr. CUAJH proposed the Xotlowlug a* a subsiltulo for ths fourth seeUon of ths House resolution D«bU iturarrWI tn aid *f rebeUion or war c_»«Jnit th« United StaUi* us ijU«»J add void, aod cannot boenforesd tn anr Comrt, and shall not

81. *Thirty-Ninth Congress, First Session*, N.Y. TIMES, May 24, 1866.

b« paid or th» J/'ot!"! ?*»*•• or any Btats, nor shall anr compensation l>« m»'if opson a a>7 l v e s . The Benat*. at I c^eliipk. went into Executive 8<<- aloD. and soon after adjourned.

With text files in this condition, one cannot base a conclusion on a lack of “hits” when keyword searching; it is a matter of hit and miss, and miss seems to be the rule.

Professor Thomas also employed a Google Archive search for newspaper coverage in the relevant period. An examination of the service suggested that it simply linked to newspaper archives’ search engines—that is, the documents reported did not reside on a Google server at all. The probability of misspelling appeared much lower than was the case on newspaperarchive.com. That left a significant question as to the breadth of its coverage. If it was relying on the newspaper’s own search engines, then its value would be limited to newspapers which (1) were in print during Reconstruction and (2) in 2009 have a keyword-searchable database for that period.

I could find no Google statement as to how many newspapers were in its database, so I devised a rough indicator. I simply searched for the words “United States” over the span 1860-1879, on the assumption that so common a phrase, and so long a period, would turn up a sample of Google’s database.

The result: the first hundred “hits” broke down as follows:

<i>New York Times</i> :	95
<i>Chicago Tribune</i> :	3
Supreme Court reports	1
All others	1

A second search for a common term—“law”—turned up much the same results. The database for this period consists overwhelmingly of the *New York Times*, with a bit of the *Chicago Tribune*. It does not give us a cross section of the press of the period, and certainly not of the small local newspapers.

Moreover, the *New York Times*’ search engine appears to have its own problems. In this period, the *Times*’ general practice had been to

reprint a transcript of each day's Congressional debates.⁸² I conducted a search for "privileges or immunities" over the entire period of 1866-68 and the results turned up only eleven hits.

A further test: As noted above, a key piece of evidence is Senator Howard's floor speech of May 23, 1866. The speech was covered by the *New York Times* on the following day.⁸³ An examination of the hard copy of the *Times*' report of his speech shows it uses "privileges and immunities" eight times and "privileges or immunities" twice.⁸⁴ Yet a search of the *Times* database for either phrase, over May 23 to May 25, 1866, did not turn up Howard's speech.⁸⁵ Nor, for that matter, did the single word "privileges" do so.⁸⁶

It would appear, in short, that keyword searches of newspaperarchive.com, Google archives, or the *New York Times* database, are of no reliability at all when it comes to proving a negative. The first clearly, and the other two probably, rely upon optical character recognition without human proofreading, and the system often fails under these circumstances.

But let us for a moment assume, *arguendo*, that it may become possible to demonstrate that during and before its ratification, local papers gave little coverage to the Fourteenth Amendment and the Congressional intent behind it—that, while those purposes were covered by the major Eastern newspapers, they received little coverage elsewhere. This might be taken to deny that the Congressional intent was known "to the country – the entire country, not just the East Coast."⁸⁷ But to conclude from this that there was little original public understanding of those purposes would involve an anachronistic assumption—*viz.*, that in 1866-68, people interested in national politics and legislation (and in particular, members of the State legislatures that

82. See David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 709 (2009).

83. N.Y. TIMES, May 24, 1866, at 1.

84. *Thirty-Ninth Congress, First Session*, N.Y. TIMES, May 24, 1866.

85. New York Times Database Search, <http://query.nytimes.com/search/> (last visited Jan. 10, 2009).

86. *Id.*

87. Thomas, *A Reply to Professor Wildenthal*, *supra* note 76, at 1634.

would be asked to ratify) turned to their local newspapers for national news and reports on the doings of Congress.

That assumption is a natural one. Today every moderate-sized town has newspapers of fifty or so pages, with a section for local and a section for national news. In the nineteenth century, though, there were a multitude of local newspapers—tiny Olney, Ill., which currently has a population of 8,631,⁸⁸ had six going simultaneously⁸⁹—usually very small, four or eight pages per issue. These covered mostly local news, often compiled by a single person who served as publisher, reporter, and editor. News from outside the community was based on letters from his friends elsewhere, or borrowed, with delay, from the large national newspapers, and then distilled down to a paragraph or two. There were some exceptions: Professor Aynes points out that Congressmen had many copies made of their more important speeches, and circulated to friendly local press, so it is not surprising that John Bingham's hometown *Cadiz Republican* heavily covered his positions.⁹⁰ But most of the thousands of local papers focused on local events.

Contrasted with these were the great New York City newspapers—the *Herald*, *Times*, and *Tribune*. They had pooled their resources to create the new Associated Press, which could provide reporters to cover Congress. The reporters' main function was to transcribe the House and Senate debates, and wire the transcript to the member newspapers, which would run it the next day.⁹¹

In this setting, a person who wished to stay abreast of national events could not turn to the national news section (or should we say paragraph) of his local paper. He had to subscribe to one of the large

88. U.S. Census Bureau, http://factfinder.census.gov/servlet/SAFFacts?_event=Search&geo_id=&_geoContext=&_street=&_county=olney&_cityTown=olney&_state=04000US17&_zip=&_lang=en&_sse=on&pctxt=fph&pgsl=010&show_2003_tab=&redirect=Y.

89. "Olney Factbook 2008-2009" at 10, *available at* <http://splash.gatehousemedia.com/olney/08factbook.pdf>. I only discovered this in the course of researching an ancestor, Benjamin Bogart, who played a role in founding the town.

90. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 69 n. 66 (1993).

91. HAZEL DICKEN-GARCIA, *JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA* 56 (1989); *AP History*, *available at* http://www.ap.org/pages/about/history/history_first.html.

newspapers for that purpose. Thus, the *New York Herald* (which could boast a circulation around 80,000, in a nation which then had about a tenth of our present population) had about half its circulation outside New York City and its environs.⁹² A third of the *New York Tribune's* circulation was outside New York State, including 5000 subscribers in California.⁹³ The latter numbers are even more impressive when we compare them to population. California's 5000 copies went to a population of under 400,000, and Iowa's 11,000 went to a population of under 700,000.⁹⁴ We may expect that members of the State's political elite, including the legislators who would be asked to ratify the proposed amendment, were disproportionately subscribers.

Lessons to be Learned: R2D2 is a loyal droid, but a lousy researcher. Make sure a new keyword-searchable database really is keyword-searchable.

IV. CONCLUSION

Originalism, and particularly original public understanding, has great virtues, but it requires a few *caveats*. Legal professionals know that they instinctively have agendas—but one cannot lightly assume that historians and others do not. Neither peer review nor cite-checking is uniformly reliable. There often is no substitute for examining the original material.

92. EDGAR W. MARTIN, THE STANDARD OF LIVING IN 1860 at 315-316 (2008); Current New York City Population, available at <http://money.cnn.com/magazines/moneymag/bplive/2008/snapshots/PL3651000.html>.

93. *Id.* at 316 n.85.

94. *Id.* Population figures are from the census of 1860, available at <http://www.civilwarhome.com/population1860.htm>. Assuming five persons to a household, around 6 percent of California households, and nearly 8 percent of Iowa ones, received the *Tribune*. How many others received the *Herald* or *Times* is unknown.