

MOBS, MILITIAS, AND MAGISTRATES: POPULAR CONSTITUTIONALISM AND THE WHISKEY REBELLION

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INTRODUCTION

It is impossible to understand the constitutional dynamics of the early Republic without some appreciation for the manifold ways in which popular constitutionalism shaped these early debates. While historians for more than a generation have probed the contours of popular constitutionalism, legal theorists have only recently turned their attention to this issue. The publication of Larry Kramer's *The People Themselves* has become a focal point for lively debate over the place of popular constitutionalism in early American law and its continuing relevance to contemporary American jurisprudence.¹

The People Themselves has sparked considerable controversy, and one of the persistent themes in criticism of Kramer's work is that popular constitutionalism invariably leads to mob rule.² In reality, however, popular constitutionalism in the early republic encompassed an enormous spectrum of legal strategies. The peaceful efforts of the Democratic-Republican Societies to influence the course of Federalist policy stood at one pole, while mob action stood at the other. Even more important than either of these modalities of popular constitutionalism were the efforts of local communities and states to use militias as a check on federal power. The role of the militia as an agent of popular constitutionalism, a theme mentioned briefly

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1. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). For historical scholarship on popular constitutionalism, see Dirk Hoerder, "Mobs, a Sort of Them at Least, Are Constitutional": *The American Revolution, Popular Participation, and Social Change*, 21 *AMERIKASTUDIEN* 289 (1976), Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 *WM. & MARY Q.* 3 (1970), and Gordon S. Wood, *A Note on Mobs in the American Revolution*, 23 *WM. & MARY Q.* 635 (1966).

2. See, e.g., 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 review).

by Kramer, has been largely ignored in recent legal scholarship and has not figured in the critiques of *The People Themselves*. The failure to address this important issue can be blamed in part on the ideological distortions wrought by modern Second Amendment scholarship, which has obscured this important theme in early American constitutional discourse. Eager to discredit the dominant states' rights theory of the Second Amendment that has governed federal law since *United States v. Miller*,³ gun rights ideologues within the legal academy have attempted to portray states' rights theory as a modern invention. Thus, Glenn Reynolds declares confidently that "the states' rights theory did not appear until this century, when it seemed necessary to uphold gun control laws—primarily intended to disarm black people and immigrants—against Second Amendment challenge."⁴ In a short and somewhat fatuous review of *The People Themselves*, Reynolds faults Kramer for failing to deal with the Second Amendment.⁵ Had Reynolds read Kramer's book more carefully and taken the time to familiarize himself with the events of the 1790s, he would have realized that the connection between the Second Amendment and popular constitutionalism had little to do with a right to keep or carry firearms for individual self defense, but instead was closely connected to the militia.⁶ While Kramer notes this fact in passing, it is not an aspect of popular constitutionalism that is central to his story. If one shifts the narrative focus away from judicial review, Kramer's primary object of scrutiny, the Second Amendment and the militia move from the margins to the center of the story.

A truly historical account of the Second Amendment and its role in popular constitutionalism must move beyond the flawed originalist methods favored by so many Second Amendment scholars. Second Amendment originalism represents one of the weakest examples of this controversial methodology. Second Amendment originalists have worked backwards from the contemporary issue of gun control. Such a teleological approach to history is destined to produce distorted results. Rather than assume that

3. 307 U.S. 174 (1939).

4. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 494 (1995).

5. Glenn Harlan Reynolds, *Conjuring with—and for—the People*, 1 N.Y.U. J. L. & LIBERTY 656 (2005) (book review).

6. See Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) (assuming that the Second Amendment gave rights to states to organize military forces, rather than to individuals, and evaluating what those rights might entail). But see Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)) (rejecting the idea that the rights to arms are conditioned on militia service).

the debates of the Founding era must conform to the modern individual rights/collective rights dichotomy, it is essential to reconstruct the full range of eighteenth-century thought on this issue.⁷ Although the modern debate has been framed as a dichotomy, there is no reason to assume that Americans in the Founding era approached this issue in such stark terms. Similarly, while gun control has become a vexing issue to modern Americans, this issue was not at the heart of the original debate over the Second Amendment. To understand the Second Amendment historically, one must uncover the hopes and fears that animated Americans in the Founding era. The burning issue for Americans was not gun control, but federalism. No issue in early American constitutionalism was more important. Given the centrality of states' rights theory to so much Anti-Federalist and Jeffersonian constitutional thought, it would have been remarkable if the right to bear arms had not been swept up in the powerful vortex of the debate over federalism.⁸ While reasonable scholars may disagree over how to weigh various theories of the Second Amendment advanced in the Founding era, the claim that the states' rights theory was a modern invention can only be made by scholars whose ideological fervor for gun rights has obliterated their commitment to dispassionate scholarly inquiry.⁹

The states' rights theory of the Second Amendment was not a modern invention, but was absolutely central to the constitutional debates of the early republic. Evidence for this strain of constitutionalism is not hard to find in the surviving documentary record if one moves beyond the narrow range of sources typically found in modern Second Amendment scholarship. Complaints about the threat that the Constitution posed to the state militias were common in Anti-Federalist writings. These criticisms spawned a forceful response from Federalists. Indeed, faced with repeated attacks on the future viability of the militia under the Constitution, Federalists responded with some significant concessions to their opponents. The adoption of the Second Amendment was among the most important consequences of this ideological give and take.

7. On the fallacy of teleological history, see DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970).

8. See FORREST MCDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876* (2000); SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999). For a strong argument that the Second Amendment was drawn into the larger debate over federalism, see Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39 (1998).

9. See, e.g., Reynolds, *supra* note 4.

I. ANTI-FEDERALISTS, FEDERALISTS, AND THE STATES' RIGHTS THEORY OF THE SECOND AMENDMENT

Before considering the connection between the Second Amendment and popular constitutionalism in greater detail, it is important to take note of recent developments in Second Amendment scholarship.¹⁰ The debate on this divisive issue once fit neatly into a simple individual rights/collective rights dichotomy.¹¹ Two federal courts now acknowledge that the debate over the Second Amendment exists along a continuum of views.¹² Recent scholarship on this topic mirrors this judgment.¹³ The most interesting recent work on this controversial topic has explored the constitutional middle ground between these two opposing views. Supporters of this third model have described the right to bear arms as a limited individual right, an expansive collective right, and a civic right.¹⁴ All of the schol-

10. Two useful collections of writing on the Second Amendment are GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (Robert J. Cottrol ed., 1994) [hereinafter GUN CONTROL AND THE CONSTITUTION], and HISTORIANS AT WORK: WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? (Saul Cornell ed., 2000).

11. A classic statement of the individual rights view may be found in Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). For a good statement of the collective rights theory, see Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000), and Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 293-94 (2000).

12. See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *reh'g and reh'g en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); *Seegars v. Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004) (district court decision upholding the Washington, D.C., handgun ban); *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (same).

13. In *Emerson*, the Court described one view of the Second Amendment as the sophisticated collective rights view. Of course, the notion that there is a sophisticated collective rights view and an unsophisticated view is itself a creation of gun-rights scholarship. No scholar on the collective rights side has embraced this language. If one applied this terminology to the abortion debate one might describe the two sides as pro-life and anti-life, or pro-choice and anti-choice. The notion of a sophisticated collective-rights model appears to have been first suggested by Cottrol. GUN CONTROL AND THE CONSTITUTION, *supra* note 10. Ironically, the history upon which the sophisticated collective rights view rests is actually quite simplistic; for a more detailed discussion, see Saul Cornell, "Don't Know Much About History": *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657 (2002). For an excellent summary of the current state of the debate and a trenchant critique of the idea of a sophisticated and unsophisticated collective rights argument, see Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898 (2004) (reviewing DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003)).

14. Many excellent works discuss the civic model. See, e.g., H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002); Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161 (2004); 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 (2004); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 613-21 (2000). The individual rights model remained fairly weak in the Founding era, but emerged in a more robust form during the Jacksonian era. Although the civic model was the dominant model in the Founding era, the states' rights model also had vigorous champions in the early republic. See Saul

ars charting this constitutional middle ground agree that the right to bear arms was originally tied to participation in the militia, and that this right was retained and exercised by citizens, not states. Although the debate over the original meaning of the Second Amendment is far from over, it seems likely that some sort of pluralist model will emerge as the dominant paradigm. Evidence to support all three of the major theories of the Second Amendment can be found in the voluminous writings generated by Federalists and Anti-Federalists. The difficult question for future scholars will be how to weigh these different voices.

The very notion that one can speak of the Founders as a monolithic entity may obscure more than it illuminates constitutional thought in this era. The Founding generation was deeply divided over the most important issues of constitutional law: federalism, executive power, freedom of speech, and the right to bear arms. Conflict, not consensus, was the norm in constitutional debate in the Founding era. In short, a genuinely historical account will need to do a better job dealing with a multitude of discordant voices from the Founding debate.¹⁵ Legal scholars must also recognize that the public meaning of particular constitutional provisions might have shifted quite dramatically in a relatively short period. Ratification was a dynamic process. Deciding which moment in this constitutional ferment defines the original meaning of a constitutional provision presents serious challenges, which few originalists have acknowledged. Thus, if one wishes to make a rigorous originalist argument, one must not only deal with the problem of solving the difficult issue of how to weigh the various intents of the different actors, but one must also recognize that the public debate over various provisions of the Constitution changed as Federalists and Anti-Federalists debated the meaning of the Constitution.¹⁶

While originalists have confidently declared that there is no historical evidence for the states' rights view, such a claim is hard to reconcile with the sources. Confident pronouncements about the collective/states' rights theory's demise are not only premature, but they rest on a profound ignorance of the constitutional history of the early republic. While many Federalists rejected this theory, an important group of Anti-Federalists viewed the meaning of the right to bear arms within a states' rights framework. For

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

15. 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).

16. See discussion *infra* pp. 887–93.

these Anti-Federalists, the Second Amendment was far more collective than individual rights scholars realize, and far more radical than many modern collective rights supporters acknowledge.¹⁷

During ratification, the most ardent champion of the states' rights view of the militia and the right to bear arms was Luther Martin. In *The Genuine Information*, Martin discussed the various provisions on the right to bear arms found in the first state constitutions.¹⁸ He did not link these provisions with a private right of self defense, but clearly set them within the context of the structural checks on the danger posed by a standing army. Elsewhere in his influential pamphlet he singled out control of the militia as one of the most important issues before the American people. For Martin, state control of the militia was necessary to prevent encroachments by the national government on the rights of the states, which were the true guardians of the rights of citizens. Martin asserted that "the time may come when it shall be the *duty* of a *State*, in order to preserve itself from the oppression of the general government, to have recourse to the sword."¹⁹ One could hardly ask for a more lucid statement of the Anti-Federalists' states' rights theory.

The intensity of Anti-Federalist criticism forced Federalists to respond to these concerns. In the process of rebutting Anti-Federalist criticism, supporters of the Constitution conceded important ground to their opponents. The debate over the militia was an excellent illustration of the dynamic quality of ratification. Although many Federalists had expressed grave reservations about the militia in private, their public statements reassured Americans that this institution would continue to serve as a bulwark of liberty. Although it may not have been the most typical response, the most intellectually sophisticated reply to the Anti-Federalists' argument was framed by *The Federalist*.²⁰

17. For a premature post-mortem on collective rights theory, see Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQ. L. REV. 71 (2000). For a more sensible judgment, see Sanford Levinson, *The Historians' Counterattack: Some Reflections on the Historiography of the Second Amendment*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 91 (Bernard E. Harcourt ed., 2003). For the role of states' rights thought in this period, see CORNELL, *supra* note 8.

18. LUTHER MARTIN, *THE GENUINE INFORMATION* 74, 88 (Philadelphia, Eleazer Oswald 1788).

19. *Id.* at 74.

20. Studies of Federalist thought focus largely on Publius. The literature on *The Federalist* is massive. A good starting point is Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999). A useful collection of essays may be found in *SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING* (Charles R. Kesler ed., 1987). On the literary dimensions of *The Federalist*, see ALBERT FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* (1984). For a systematic effort to understand the philosophy of *The Federalist*, see DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984).

The authors of *The Federalist* accepted that the new government was a novel mixture of federal and national elements. This hybrid nature was evidenced in the way control of the militia was divided up between the states and the central government. Publius took up the Anti-Federalist challenge directly, addressing both the question of federal control of the militia and the role of the militia as a structural check within the new federal system. Publius reminded readers that it was unwise to put too great a reliance on this institution, a misplaced faith that nearly cost America her independence. The performance of the militia in the Revolution demonstrated that “the great body of yeomanry” was unwilling to submit to the level of regulation necessary “to acquire the degree of perfection which would entitle them to the character of a well regulated militia.”²¹ Experience had demonstrated that most Americans were reluctant to sacrifice their individual liberty to the collective good and take on the burdens necessary to create an effective militia. Given this reality, Publius concluded that it was best to leave the future composition of the militia up to Congress, though he hoped that Congress would recognize the need to create an elite group of select militia drawn from the ranks of those citizens with the greatest aptitude for military exercises.²² Having disarmed the Anti-Federalists’ argument that the militia was the best defense for a republic, Publius challenged their suggestion that the new government’s authority over the militia posed a threat to the states and its citizens. Any danger was effectively neutralized by the structure of checks and balances in the new frame of government. Publius acknowledged that if all of the many safeguards built into the new system failed, the final check on tyranny would be “that original right of self-defence, which is paramount to all positive forms of government.”²³ As was often true in eighteenth-century writing, the phrase “right of self defense” could signify an individual right or a right exercised by individuals collectively. Publius was clearly talking about the latter. He reassured Americans that they would not lose the natural right of revolution which always existed as the ultimate check on tyranny. Publius cleverly used this extreme situation, a dissolution of government and a return to a state of nature, to show just how unlikely such a turn of affairs would be under the new Constitution.²⁴

In the unlikely event that this radical option had to be exercised, the Constitution would pose no barrier to this ultimate check on despotism.

21. THE FEDERALIST NO. 29, at 156 (Alexander Hamilton) (E.H. Scott ed., 2002).

22. *Id.* at 154–59.

23. THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 21, at 151.

24. *See id.*

Yet, even in this unlikely scenario, Publius took great pains to point out that if this nightmare state of affairs presented itself, and the nation were plunged into a civil war, then the exercise of the right of revolution would have to proceed in an orderly manner to enjoy legitimacy and have any chance of achieving its goal of restoring liberty and order. Thus, while Publius conceded that in extreme situations the states might have recourse to use their militias against the national government in the defense of liberty, he denied that individuals or localities were ever justified in a resort to arms. Indeed, as a practical matter the notion of individual or local resistance was likely to lead to disaster. To illustrate this point, Publius contrasted the effectiveness of the orderly and coordinated actions of the militias under state authority with the futile efforts of individuals and localities that might “rush tumultuously to arms, without concert, without system, without resource.”²⁵ A well regulated militia was not an armed mob.²⁶

Although it is hard to imagine Publius or any other Federalist conceding a right of the states to take up arms against the federal government at the start of the ratification debate, the persistent criticism of the Anti-Federalists did force Federalists to adapt their arguments to deflect those of their opponents on this issue. Once again, the debate over the militia demonstrates the dangers of a static originalist methodology. Even if one assumes that there was a single public meaning ascribed to a particular provision of the Constitution, a questionable assumption for many provisions, it is not at all clear that the public meaning would have remained fixed over the course of ratification.

While Publius briefly considered the cataclysmic turn of events that could lead to the dissolution of government, he confidently asserted that such fears were the “incoherent dreams of a delirious jealousy” conjured up by the most paranoid opponents of the Constitution. Publius boasted that the very strength of the militia in America meant that a despotic federal government could never tyrannize the people. America, he reminded his readers, was unlike any other nation in the world because it boasted “a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by Governments possessing their affections and confidence.”²⁷ The existence of a well-armed population organized into state militias guaranteed that America would never succumb

25. *Id.* at 152.

26. *Id.*

27. THE FEDERALIST NO. 46 (James Madison), *supra* note 21, at 264.

to tyranny. To counter the states' rights theory of the militia championed by Anti-Federalists such as Luther Martin, Publius offered his own more limited and measured defense of the role of the state militias as a check on the power of the federal government.²⁸

The debate between Anti-Federalists and Federalists occurred months before the First Congress debated the language of what would become the Second Amendment. For those committed to an intellectually rigorous originalist view of Constitutional interpretation, one that approaches history in a sophisticated manner, a number of important questions must be answered before one considers the relevance of Martin's views and the Federalist response. Three evidentiary questions are particularly relevant to any potential originalist argument:

Did the Anti-Federalist states' rights critique of the militia survive ratification?

Did anyone of consequence take up this view after the Second Amendment was ratified?

Was this interpretation widely shared by any groups whose views ought to be weighted in an originalist account?²⁹

The answer to all three of these questions is "yes."

II. THE DEBATE OVER THE CONSTITUTIONAL RIGHT OF REVOLUTION: A LOST EPISODE IN EARLY AMERICAN CONSTITUTIONAL HISTORY

One of the most interesting figures in early American law to consider the function of the Second Amendment in American constitutionalism was St. George Tucker. While modern Second Amendment scholars are fond of quoting St. George Tucker's magisterial *Commentaries on Blackstone*, they have usually taken the Virginia judge's words out of context.³⁰ Rather than take the time to master Tucker's large body of writings, published and unpublished, Second Amendment originalists have cherry picked quotes, plucking ideas out of context. Rather than support the individual rights

28. *Id.*

29. I am not endorsing the rectitude or constitutional value of an originalist interpretation of the Second Amendment, but merely attempting to bring some measure of historical rigor to a debate that has been something of an intellectual embarrassment for originalism. For discussions of the embarrassing state of Second Amendment originalism, see Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167 (2000).

30. See BLACKSTONE'S COMMENTARIES (St. George Tucker ed., Philadelphia, Birch & Small 1803); see also David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1378 (1998) (devoting eight pages to Tucker); Barnett, *supra* note 6. While Tucker's thinking is significant, it is important to recall that his thought is not emblematic of American thinking, but rather it represents the voices of an important wing of the Jeffersonian movement.

view of the Second Amendment, Tucker's *Blackstone* articulates a view closer in spirit to the civic and states' rights conceptions of the right to bear arms. The modern misreading of Tucker stems from a failure to root the learned Virginia judge's analysis of the Second Amendment within the tumultuous political conflicts of the late 1790s. Tucker's discussion of the right to bear arms occurs in the context of a critique of Federalist policy regarding the militia, not as part of an exploration of the individual right of self defense. Tucker was concerned about the danger posed by Federalist volunteer militias and the prospect of Federal disarmament of the state militias. His interpretation reflected these important political concerns and had little to do with the individual right of self defense.³¹

Although fascinating, Tucker's mature thinking tells us nothing about his original understanding of the Second Amendment. Indeed, from the point of view of originalist theory, Tucker's *Blackstone* is really irrelevant. What scholars should be focusing on is what Tucker said in his William and Mary Law Lectures, which were delivered early in the 1790s. These lectures were the first systematic effort to explore the role of the Second Amendment in America's new amended constitutional system. Although individual rights scholars have proclaimed Tucker's views of the Second Amendment as oracular, they have never actually looked at the one text written almost contemporaneously with the adoption of the Second Amendment.³²

In his law lectures, Tucker described the Second Amendment as a necessary concession to Anti-Federalists who feared that the state militias might be disarmed by the federal government. In his account, the Second Amendment was cast as a right of the states, and he explicitly connected it with the discussion in Article I, Section 8 of the concurrent authority over the militia enjoyed by the states and the federal government. Tucker went even further, arguing that the Second Amendment gave the individual states the awesome power of "resisting the Laws of the federal Government, or of shaking off the Union."³³ Tucker anticipated the criticism of those who felt that such a stance would inevitably lead to anarchy and disunion.

[T]o 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

31. For a discussion of this problematic reading of Tucker, see Cornell, *St. George Tucker and the Second Amendment*, *supra* note 14.

32. *Id.*

33. *Id.* at 1129.

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."³⁴

To underscore the fact that the Second Amendment functioned as a check within the federal system, Tucker explicitly linked the Second Amendment to another provision that dealt with federalism, the Tenth Amendment. In his earliest analysis of the Second Amendment, drafted shortly after its adoption, Tucker interpreted the right to bear arms as a right of the states to arm their militia, and, if necessary, to use their militia against the federal government.³⁵

The nightmare scenarios that Federalists and Anti-Federalists had bandied back and forth during the debate over the Constitution did not disappear once the Constitution was ratified. Americans continued to grapple with the meaning of their revolutionary heritage: what, if any, role might armed resistance play in preserving America's new constitutional system? While few would have doubted the continuing legitimacy of a natural right of revolution, there was far less agreement over the possibility that there was a constitutional right of revolution built into the structure of American law. This issue was sufficiently controversial that it became a subject for serious academic disputation. New York's Tammany Society, a fraternal organization that met regularly to engage in forensic discussions on the most pressing issues of the day, took up this question. William Pitt Smith, a member of the medical faculty of Columbia College and one of the participants in that debate, concluded that the exercise of such a right was ultimately not compatible with constitutional government, and actually signaled the end of government, stating that "a Convention in arms, supposes a people disorganized, or just emerging from a state of nature lately assumed, and claiming the rights of freemen."³⁶ While the natural right of revolution could never be parted with, the notion that there could be a constitutional appeal to arms was antithetical to the idea of constitutionalism itself.³⁷

34. *Id.* at 1129–30 (citation omitted). There is nothing in this discussion that even vaguely suggests an individual right of private self defense. Tucker would have viewed such a right as something protected by common law, and hence there would have been little need to address this issue with a constitutional amendment, particularly given the absence of a general federal police power.

35. *Id.* The Twelfth Amendment eventually became the Tenth once the first two provisions recommended by Congress were rejected by the states.

36. WILLIAM PITT SMITH, OBSERVATIONS ON CONVENTIONS, MADE IN A TAMMANIAL DEBATE 12 (New York, J. Harrison 1793). On the Tammany Society, see ALFRED F. YOUNG, THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS, 1763–1797, at 202–03, 316 (1967).

37. See SMITH, *supra* note 36.

III. THE WHISKEY REBELLION: THE CHALLENGE OF POPULAR CONSTITUTIONALISM

The question that William Pitt Smith addressed in formal debate and St. George Tucker pondered in his law lectures soon proved to be a subject of more than mere academic interest. The right of revolution was tested in practice in western Pennsylvania where farmers took up arms against the federal government as part of a protest against the Whiskey excise tax.

The roots of the Whiskey Rebellion may be found in Federalist policy, which was committed to creating a powerful fiscal and military state based on the British model. This economic program included a plan for funding the national debt and chartering a national bank. To finance this ambitious program, Federalists followed the recommendations of Washington's brilliant Secretary of the Treasury, Alexander Hamilton, who pushed for higher taxes.³⁸ The new tax on whiskey fell particularly hard on backcountry farmers from Pennsylvania to Kentucky. Western farmers in these states distilled their grains into hard spirits. Whiskey not only fetched a higher price than unrefined grains, but it was cheaper to transport to eastern markets. Angered by the government's policy, distillers harassed excise collectors. The use of violence and intimidation to oppose the tax did not, however, coalesce into systematic opposition at first. Anger over the tax simmered for three years before organized resistance erupted. In the summer of 1794, a group of angry protestors marched to the home of tax collector General John Neville. When the assembled crowd refused to disperse, Neville fired on the crowd, injuring several and killing one of the protestors. About a month later, angry citizens assembled in arms at Braddock's Field near Pittsburgh, declaring their willingness to oppose the government policy by force of arms. What had begun as a tax protest had escalated into an armed rebellion.³⁹

President Washington received conflicting advice from his cabinet about how to handle the Whiskey Insurrection. Hamilton was an early advocate for using force to put down the rebellion, but others with the ear of

38. See Marshall Smelser, *The Federalist Period as an Age of Passion*, 10 AM. Q. 391 (1958); John R. Howe Jr., *Republican Thought and the Political Violence of the 1790s*, 19 AM. Q. 147 (1967) (discussing the heightened political tensions of the Federalist era); CORNELL, *supra* note 8; MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003) (analyzing Federalist theories of state building); SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC* (1997); JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* (1993) (exploring the political culture of the Federalist era).

39. For a general overview of the events leading up to the Whiskey Rebellion, see THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986).

the President were more cautious. Attorney General Edmund Randolph counseled moderation. Washington sided with Hamilton, believing that anything less than “firm measures” would mean an “end to our Constitution and laws.”⁴⁰ While Washington and Hamilton viewed the events in western Pennsylvania as a serious threat to federal authority, representatives of the government of Pennsylvania saw the situation less ominously. Washington met with leading Pennsylvanians—including the governor, the chief justice of the state Supreme Court, the attorney general, and the secretary of state—to discuss the growing unrest in western Pennsylvania. The chief justice of the Pennsylvania Supreme Court was confident that the state courts were more than competent to deal with the civil unrest occasioned by opposition to the whiskey excise. Indeed, he argued, “the employment of a military force, at this period, would be as bad as anything that the Rioters had done—equally unconstitutional and illegal.”⁴¹ There was widespread agreement among the state officials present at the meeting that federal action was unnecessary.⁴²

Washington went forward with a two-prong strategy, appointing a group of federal commissioners to meet with the rebels, and issuing an order to call out the militia. Using authority granted to the President under the Militia Act of 1792, Washington mobilized over 12,000 troops from Pennsylvania, Maryland, New Jersey, and Virginia. While Hamilton enthusiastically supported this strategy, others within Washington’s cabinet feared that the federal government might do more damage than good by resorting to force.⁴³

Few Federalists were more scathing in their denunciations of the rebels than Hamilton, who was emphatic that “there can therefore be no such thing as a ‘constitutional resistance’ to Laws constitutionally enacted.”⁴⁴ While citizens might pursue “the repeal of a law,” the actions of the rebels

40. RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 162 (1975).

41. *Id.* at 163.

42. *Id.* Governor Mifflin provided a more detailed explanation of his view that events in western Pennsylvania might be dealt with by the Pennsylvania Courts. See Letter from Governor Mifflin to President Washington (Aug. 5, 1794), in 4 PENNSYLVANIA ARCHIVES 104, 105–09 (John B. Linn & William H. Egle eds., 2d ser., Harrisburg, Pa., Lane S. Hart 1879). The meeting included Secretary of State Edmund Randolph, Secretary of War Henry Knox, U.S. Attorney General William Bradford, the governor of Pennsylvania, Thomas Mifflin, the chief justice of the state Supreme Court, Thomas McKean, state attorney general Jared Ingersoll, and Alexander J. Dallas, secretary of state of the commonwealth of Pennsylvania. For a report of the meeting, see Alexander Hamilton, *Conference Concerning the Insurrection in Western Pennsylvania*, in 17 THE PAPERS OF ALEXANDER HAMILTON 9, 9–14 (Harold C. Syrett ed., 1972) [hereinafter HAMILTON PAPERS].

43. KOHN, *supra* note 40, at 161–70.

44. Letter from Alexander Hamilton to George Washington (Sept. 2, 1794), in HAMILTON PAPERS, *supra* note 42, at 180, 187.

“to obstruct its operation presents a contradiction in terms.”⁴⁵ Similar attitudes were expressed in a grand jury charge delivered by a Federalist judge in Berks County, Pennsylvania, who reminded jurors that “one successful instance of *forcible opposition* to law, will naturally generate others.”⁴⁶ Taking the argument a step further, he argued that the structure of American constitutionalism had rendered the right of revolution effectively obsolete. He confidently asserted that “there can be no oppression in a government constituted as that of the United States.”⁴⁷

Hamilton’s economic policies helped solidify the Democratic-Republican opposition that had grown in the years after Ratification. Many who had supported the Constitution in 1788 joined with former Anti-Federalists to oppose Hamilton’s policies. While Democratic-Republicans sympathized with the grievances of the Rebels, they stopped well short of sanctioning their resort to extralegal measures. Rather than support the insurrectionary popular ideology of the rebels, Democratic-Republican and former Anti-Federalist William Findley found himself adopting a stance that ultimately placed him much closer to his Federalist opponent Hamilton than to the men who assembled in arms in Braddock’s Field. “[A]ll men of discretion,” Findley concluded, realized that “if they permitted government to be violently opposed, even in the execution of an obnoxious law, the same spirit would naturally lead to the destruction of all security and order,” a situation that would lead to “a state of anarchy.”⁴⁸ While opposing the tax with peaceful measures was entirely appropriate, he did not countenance “riots or any thing that might tend to promote any unconstitutional exertions.”⁴⁹ Those who took up arms against government were, in Findley’s view, little more than “armed banditti.”⁵⁰

The Whiskey Rebels, following in the tradition of Daniel Shays, believed that the people might spontaneously assemble in arms to defend liberty. For these plebeian populists, the militia was an agent of the local community. The Rebels regarded their own state government with no greater deference than they did the oppressive federal government responsible for the Whiskey excise. The adoption of the Federal Constitution and

45. Letter from Alexander Hamilton to George Washington, Report on Opposition to Internal Duties (Aug. 5, 1794), in 6 THE WORKS OF ALEXANDER HAMILTON (Henry Cabot Lodge ed., 1904), available at <http://oll.libertyfund.org/Home3/HTML.php?recordID=0249.06#LF-BK0249-6pt03ch01>.

46. Extract from a Charge Delivered by the Hon. Judge Ruth, to the Grand Jury of the County of Berks, GAZETTE OF THE U.S. & DAILY EVENING ADVERTISER, Aug. 25, 1794 (italics in original).

47. *Id.*

48. WILLIAM FINDLEY, HISTORY OF THE INSURRECTION IN THE FOUR WESTERN COUNTIES OF PENNSYLVANIA 177 (Philadelphia, Samuel Harrison Smith 1796).

49. *Id.* at 285.

50. *Id.* at 59.

Bill of Rights had done little to dampen the ardor of those who believed that the will of the community, expressed directly through the jury or the militia, might supersede the acts of legislatures or even written constitutions. From the Whiskey Rebels' point of view, their current situation under the Federal Constitution was little better than that of the colonists prior to the Revolution. The Whiskey Rebels' plebeian constitutionalism not only challenged the elite vision of Federalists, but it also challenged the state-centered popular constitutionalism of Democratic-Republicans.⁵¹

In plebeian constitutionalism, the militia functioned as an agent of the will of the local community. As had been true for the Shaysites before them, the Whiskey Rebels appropriated the rituals and rhetoric of the militia muster to organize themselves and give their actions legitimacy. Indeed, another Democratic-Republican critic of the rebellion, Hugh Henry Brackenridge, was struck by how the Rebels couched their actions in the language of the militia and consciously tried to make it seem as if they "were called out by authority, as in the case of the reviews of the militia."⁵² The Rebels went to great lengths to adopt the legal forms of a militia and to persuade the outside world that "we are no mob."⁵³ In a "Circular Letter" calling on Western Pennsylvanians to oppose the excise, the Whiskey Rebels reminded citizens of their moral obligation to muster.⁵⁴ "Delinquents" were admonished for failing to "come forth, on the next alarm" to defend "the virtuous principles of republican liberty."⁵⁵ The Rebels not only utilized the rituals, forms, and institutional framework of the militia, but also borrowed its potent language of political obligation. Thus, the Rebels did not speak in an idiom of individual rights, but instead used the language of civic obligations and republican liberty. They chose to assert their claims not as individuals "bearing arms," but as a community "assembling in arms," a phrasing that underscored the public and collective nature of their action.⁵⁶ Although the rebels did not invoke the language of the Second

51. See generally CORNELL, *supra* note 8.

52. The documents are produced in HUGH HENRY BRACKENRIDGE, INCIDENTS OF THE INSURRECTION 77 (Philadelphia, John M'Culloch 1795). During the trials of the Whiskey Rebels, the prosecution focused on this usurpation of the forms of the militia as proof that the insurgents were not merely engaged in riotous behavior, but had engaged in treason against the government of the United States. See STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 182-83 (Francis Wharton ed., Philadelphia, Carey & Hart 1849) [hereinafter STATE TRIALS] (reciting the charge of Judge Patterson to the jury in *United States v. Mitchell*, 26 F. Cas. 1277 (C.D.D. Pa. 1795) (No. 15,788)); see also Letter from H. H. Brackenridge to Tench Coxe (Aug. 8, 1794), in 4 PENNSYLVANIA ARCHIVES at 119, 120 (John B. Linn & William H. Egle eds., 2d ser., Harrisburg, Pa., Clarence M. Busch 1896).

53. BRACKENRIDGE, *supra* note 52, at 58.

54. *Id.* at 40.

55. *Id.* at 79.

56. *Id.* at 59.

Amendment to justify their actions, their behavior implicitly embodied the principles of the preamble whose language asserted the ideal of the militia as the guardian of popular liberty. Their conception of the militia was not tied to states' rights, but to a radical localist ideology. Nor was their ideology particularly individualistic in character, but was strongly communitarian in outlook.⁵⁷

While Democratic-Republicans sympathized with the grievances of the Whiskey Rebellion and opposed Hamilton's economic program, they rejected the idea that the people might assemble in arms spontaneously outside of their role as part of a well-regulated militia under state authority. While Democratic-Republicans were unwilling to mobilize their state militias to resist federal authority on this issue, this radical choice was only one of many options available to those committed to the idea of popular constitutionalism. For those not quite willing to sanction armed resistance by the state militias, there was always passive resistance. Implicit in the idea of the militia was the idea that citizen soldiers were not automatons who functioned as the tools of government. According to one version of republican theory, citizens retained a right to refuse to muster and thereby to exercise a form of veto on government policy. This theory enjoyed broader popular support than the radical ideology of the Whiskey Rebels. When Washington proposed using the militia to put down the rebellion, Pennsylvania's governor, Thomas Mifflin, believed that Pennsylvanians would act "as Freemen," which meant that "they would enquire into the cause and nature of the service proposed to them, and I believe that their alacrity in performing, as well as in accepting it, would essentially depend on their opinion of its justice and necessity."⁵⁸ This type of passive resistance was akin to the right of juries to refuse to convict a citizen under an unjust law, effectively nullifying the law at issue. Jury nullification reflected the strong tradition of popular constitutionalism in Anglo-American law. While these notions have atrophied in modern American law, they were a vital part of eighteenth-century law. In essence, local juries would act as a mini-legislature, or even a mini-constitutional convention, spontaneously evaluating the justice of a particular law or particular constitutional provision. The militia served a similar function. During Shays's Rebellion, local units of the militia in western Massachusetts had simply refused to muster and march against their fellow citizens. Militia nullification occupied a constitutional middle ground, somewhere between the categorical Federalist rejection of

57. CORNELL, *supra* note 8.

58. Letter from Governor Mifflin to President Washington, *supra* note 42, at 107.

the idea of constitutional resistance and the Whiskey Rebels' assertion of a continuing right of revolution.⁵⁹

Even among those who rejected the legitimacy of militia nullification there was some concern that this idea enjoyed enough popular support to present a serious obstacle to any effort by the federal government to call out the militia. Thus, Secretary of State Edmund Randolph was deeply worried that using force to crush the rebellion might trigger resistance to government action, either active or passive. After noting that "a radical and universal dissatisfaction with the excise pervades the four transmontane counties of Pennsylvania," Randolph remarked, "[s]everal counties in Virginia, having a strong militia, *participate in these feelings*."⁶⁰ Randolph echoed the concerns voiced by Mifflin, noting that not only was it possible that Pennsylvania's militia might refuse to respond to the Governor's request, but also "if the militia of other States are to be called forth, *it is not a decided thing that many of them may not refuse*."⁶¹ Furthermore, the Whiskey Rebels and Pennsylvania militia might have found common cause if confronted by an invading force of militia drawn from neighboring states. Either type of resistance to federal authority would precipitate a major constitutional crisis. Randolph was especially worried about the potential consequences of a civil war for the South. "*There is another enemy in the heart of the Southern States*," Randolph reminded Washington, "*who would not sleep with such an opportunity of advantage*."⁶² As had been true during the debate over ratification of the Constitution, the problem of slave rebellion was never far from the minds of leading southern politicians. Randolph's warnings demonstrate the tenuous nature of Federal control over the militia in the years immediately after the adoption of the Constitution and the unresolved nature of American thinking about the constitutional function of the militia as a possible check on federal tyranny.⁶³ Washington ultimately rejected Randolph's more cautious approach, siding with Hamilton's preference for a firm display of force. Randolph's dire

59. See *id.*; Letter from H. H. Brackenridge to Tench Coxe, *supra* note 52, at 121. I would like to thank Professor Frank Michelman for reminding me of the thought-provoking argument of Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991) (arguing that the Second Amendment provides a popular check on military policy).

60. Letter from Edmund Randolph to President Washington (Aug. 7, 1794), in STATE TRIALS, *supra* note 52, at 156, 157 (emphasis in original).

61. *Id.* (emphasis in original).

62. *Id.* (emphasis in original).

63. *Id.* at 156–59.

prognostications about the militia refusing to muster proved unfounded, and the nation thus averted a major constitutional crisis.⁶⁴

The musings and reservations expressed by Mifflin and Randolph demonstrate the fluidity of American constitutional thought in the years immediately following ratification. Questions about the limits of resistance within the new legal system created by the Constitution had not yet been worked out. In his initial response to Washington, Mifflin conceded that members of the militia enjoyed considerable independence and would deliberate on the legality and justice of a summons to arms.⁶⁵ When units of the militia failed to heed a call to muster and prepare to march against the insurgents, Mifflin was mortified. The governor soon retreated from this stance. Within six weeks of expressing some doubts to Washington in private, Mifflin stood before the militia of Lancaster, Pennsylvania, and delivered a rousing call to arms to support the President. The shift in tone and attitude toward the role of the militia was profound. Abandoning the idea of militia nullification, Mifflin now argued that militia men were legally and duty bound to follow orders, even if members harbored personal reservations about the government's policies. Mifflin's views now appeared almost indistinguishable from those of Hamilton. The only constitutionally legitimate response for unjust laws was for them to be "amended if they are imperfect, or . . . repealed if they are pernicious."⁶⁶ The notion of some type of popular nullification was no longer viable in Mifflin's view: "The oath or affirmation of every public officer, and the duty of every private Citizen," required that laws legally enacted "cannot be disobeyed, or obstructed, or resisted."⁶⁷

Government forces easily crushed the rebellion. The trial of the leaders of the rebellion provided the government with another opportunity to

64. The notion that the militia of one state might not respond to a call from the President and might even be used to resist federal authority were possibilities that Randolph took seriously when he provided counsel to Washington. For evidence that Randolph's fears were not entirely unfounded, see Letter from Alexander Hamilton to Thomas Sim Lee (Sept. 6, 1794), in HAMILTON PAPERS, *supra* note 42, at 201, and Letter from Thomas Sim Lee to Alexander Hamilton (Sept. 13, 1794), in HAMILTON PAPERS, *supra* note 42, at 231. Modern critiques of the so-called states' rights view of the Second Amendment argue that the notion of the militia being used by the state to resist federal authority leads to absurd results. See Reynolds & Kates, *supra* note 6. Actually, as Randolph's letter to Washington demonstrates, such a possibility was not only possible, but in the view of many was entirely plausible. Randolph's observations provide further confirmation of the connection between the Second Amendment and slavery. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

65. Letter from Thomas Mifflin to Joseph Hamar, GAZETTE OF THE U.S. & DAILY EVENING ADVERTISER, Sept. 9, 1794; Address of Governor Mifflin to the Militia of Lancaster (Sept. 26, 1794), in 4 PENNSYLVANIA ARCHIVES, *supra* note 52, at 310, 311–12 [hereinafter Mifflin Address to Militia].

66. Mifflin Address to Militia, *supra* note 65, at 312.

67. *Id.*

assert its authority and firmly squash the notion that the Constitution had somehow incorporated a right of revolution into American law. Two of the Whiskey Rebels were indicted for treason.⁶⁸ Neither of the defendants claimed a constitutional right of revolution, nor did they invoke their Second Amendment rights to keep and bear arms. Instead they readily conceded that their actions left them open to prosecution for rioting. Having conceded this fact, however, they strenuously denied that their actions met the Constitution's narrow definition of treason, which required proof of treasonous intent. Although the court did convict them, Washington was not eager to create any martyrs and quickly pardoned them.⁶⁹

The triumph of the forces of order over the Whiskey Rebels occasioned an outpouring of public sentiment in favor of the government's decision to use force to put down the rebellion. Federalists found a particularly sympathetic audience among many of the nation's clergy, who heeded Washington's call for a national day of Thanksgiving to commemorate the suppression of the rebellion. Ministers chose to "commemorate the blessings of our new government, now more firmly established by the suppression of a late unnatural, ill-advised insurrection."⁷⁰ The defeat of the Rebels was cast as a blow to anarchy and a triumph for "liberty with order."⁷¹ Samuel Kendal, a minister from Massachusetts, reminded his parishioners that

[t]here cannot exist any reason, or cause, which will justify the rising of a part of the people in arms against a government, like our federal government, which is supported by the will of the majority, and may at any time be altered by the same will; especially as there are constitutional means for the redress of any grievances, resulting from its administration.⁷²

Other sermons denounced events in western Pennsylvania as "commotions" and compared the Rebels to Shays and other fomenters of "anarchy and disorganization."⁷³ The actions of the Rebels were counter-posed to the

68. *United States v. Mitchell*, 26 F. Cas. 1277 (C.D.D. Pa. 1795) (No. 15,788); *United States v. Vigol*, 28 F. Cas. 376 (C.C.D. Pa. 1795) (No. 16,621).

69. See Thomas P. Slaughter, "The King of Crimes": *Early American Treason Law, 1787-1860*, in *LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 54* (Ronald Hoffman & Peter J. Albert eds., 1996); *STATE TRIALS*, *supra* note 52, at 180, 183 (discussing *United States v. Mitchell*, 26 F. Cas. 1277).

70. JOHN MELLEN, *THE GREAT AND HAPPY DOCTRINE OF LIBERTY* 10 (Boston, Samuel Hall 1795).

71. SAMUEL KENDAL, *A SERMON DELIVERED ON THE DAY OF NATIONAL THANKSGIVING, FEBRUARY 19, 1795*, at 28-29 (Boston, Samuel Hall 1795).

72. *Id.* at 28.

73. EBENEZER BRADFORD, *THE NATURE OF HUMILIATION; FASTING AND PRAYER EXPLAINED* 11 (Boston, Adams & Larkin 1795).

“patriotick militia” that crushed the rebellion.⁷⁴ Once again, supporters of ordered liberty attacked the notion that Americans were entitled to a constitutional right of revolution against their government. Similar sentiments were expressed in the popular press. As one writer noted, “the late insurrection in the western counties, and the alacrity of the militia, in rising for its suppression, demonstrate the propriety of a free people keeping arms in their own hands.”⁷⁵ The right to keep and bear arms, and participate in the militia, was intended to provide the people with the means to put down rebellions, not to foment them.⁷⁶

While the defeat of the Whiskey Rebels was certainly a setback for popular constitutionalism and plebeian radicalism, the states’ rights conception of the militia and the radical localist vision of the rebels had not been extirpated from American constitutionalism. The ideas that led citizens to assemble in arms in Braddock’s field and assert a right to challenge federal authority continued to exert a strong appeal to many opposed to the Federalists’ centralizing agenda, particularly in the volatile backcountry. The notion that the states might use their militia to interpose between the Federal government and their citizens also continued to attract adherents within the ranks of Democratic-Republicans. Whether framed as a direct challenge to federal power or conceptualized as a passive veto, the notion that the militia might serve as check on unjust federal policies remained a latent force to be reckoned with in early American constitutionalism.⁷⁷

CONCLUSION

The claim that the states’ rights theory of the Second Amendment was a modern invention of the gun control movement turns out to be yet another example of how recent scholarship on this contentious issue has been corrupted by the ideological imperatives of the modern gun control debate. Ironically, it is the claim by modern gun rights scholars, not the states’ rights theory of the Second Amendment, that is a recent invention. For Anti-Federalists and Jeffersonians, the Second Amendment was part of a theory of popular constitutionalism that viewed the militia as the ultimate

74. THOMAS THACHER, A DISCOURSE, DELIVERED AT THE THIRD PARISH IN DEDHAM, FEBRUARY 19, 1795, at 16 (Boston, Thomas Fleet 1795).

75. *The Late Insurrection in the Western Counties*, WASH. SPY, Dec. 26, 1794 [hereinafter *Late Insurrection*].

76. BRADFORD, *supra* note 73, at 11; KENDAL, *supra* note 71, at 28–29; SAMUEL STANHOPE SMITH, THE DIVINE GOODNESS OF THE UNITED STATES OF AMERICA 27 (Philadelphia, William Young 1795); THACHER, *supra* note 74, at 16–17; *Late Insurrection*, *supra* note 75.

77. See generally Robert H. Churchill, *Popular Nullification, Fries’ Rebellion, and the Waning of Radical Republicanism, 1798–1801*, 67 PA. HIST. 105 (2000).

check on the federal government. This theory was embedded in a larger theory of states' rights constitutionalism. This was hardly the only role that the militia played in popular constitutionalism. Others with the Jeffersonian elite continued to believe that the militia could nullify an unjust law or policy by simply refusing to muster. This constitutional function was analogous to the way the militia served as a check on the military functions defined in Article I, Section 9. It was a civic republican truism that a militia, unlike a standing army, could not be coerced into fighting for causes inimical to liberty. For those committed to the ideology of popular constitutionalism, the same checking function might be applied to any federal policy.⁷⁸

A much more radical theory of popular constitutionalism was asserted by the Whiskey Rebels. This plebeian face of popular constitutionalism showed no special faith in state governments to act as guardians of popular liberty. In this radical vision, it was local units of the militia and local juries that functioned as the guarantor of these rights. Following in the footsteps of Daniel Shays, the Whiskey Rebels carried forward the most radical legacy of the American Revolution.⁷⁹

The multiple roles accorded the militia by different figures within the Jeffersonian movement demonstrate the pervasive nature of popular constitutionalism in the first decade after the adoption of the Constitution. When one considers these roles closely, it appears that popular constitutionalism was central to the evolution of law in this era. The resolution of the electoral crisis of 1800 depended on the willingness of Jefferson to invoke the awesome power of popular constitutionalism.⁸⁰ It is hard to imagine how this awesome power might be revived in contemporary America. Moreover, it is wise to recall that popular constitutionalism has always been a two edged sword. The same notions of militia resistance asserted during the Whiskey Rebellion proved disastrous during the Baltimore Riots of 1812, when the militia refused a call to muster to protect a Federalist printer intent on exercising his First Amendment right to criticize Mr. Madison's War.⁸¹ Still, casting aside the normative implications of popular constitutionalism for contemporary America law, the centrality of popular constitutionalism to the debates of the early Republic seems indisputable. By forcing legal theorists and constitutional scholars to deal with the messiness of early American constitutional law, Larry Kramer has done us all an important service.

78. For an elaboration on this insight, see Scarry, *supra* note 59.

79. See Cornell, *supra* note 15.

80. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 90 (2005).

81. KRAMER, *supra* note 1, at 110.