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Cover Page Footnote

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COLLECTIVE RESPONSIBILITIES, PRIVATE ARMS, AND STATE REGULATION: TOWARD THE ORIGINAL UNDERSTANDING

*James A. Henretta**

The article by Saul Cornell and Nathan DeDino is an ambitious one, and expounds three major propositions.[1] First, it argues that Second Amendment scholarship is "at an important crossroad[]" because of recent work by historians that challenges both "collective rights" and "individual rights" interpretations.[2] According to the authors, this scholarship suggests that "the right protected by the Second Amendment is neither a private right of individuals nor a collective right of the states" against the federal government.[3] Rather, this new work sees the Amendment as reflecting the ideology of civic republicanism. From this perspective, the keeping and bearing of arms was both a collective right and an individual duty. Civic republicanism enjoined citizens to "act together in a collective manner, for a distinctly public purpose, participation in a well regulated militia."[4]

Second, Cornell and DeDino provide a survey of the legislative acts that regulated firearms in the colonial period, the Revolutionary Era, and the early nineteenth century. On the basis of these statutes, they maintain that gun control legislation, both with respect to the arms borne by the militia and those kept by private individuals, had a long and relatively uncontested history in early America. Founding Era governments assumed they had the authority—indeed, the responsibility—to regulate the use of guns and gunpowder, and Americans, both as British subjects and United States citizens, generally accepted and abided by these restraints and regulations.

Finally, Cornell and DeDino contest the argument advanced by Akhil Amar that legal developments during the antebellum period and the ratification of the Fourteenth Amendment in 1868 transformed the keeping and bearing of arms from a federal issue

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1. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004).
2. *Id.* at 490.
3. *Id.* at 491.
4. *Id.*

and/or a collective responsibility into an individual constitutional right.[5]

This Essay will focus on the first proposition, relating to civic republicanism, because that is the most important part of the article and the part most in need of elaboration. However, because my remarks will suggest that the Second Amendment provided some sort of constitutional protection for privately owned arms, they will also bear upon the Cornell and Dedino's discussion of the Fourteenth Amendment.

I accept as essentially accurate (if at times a bit polemical) the authors' exegesis of gun control legislation. The legislation they describe is completely consistent with other regulatory activity taken by early American governments, such as restricting activities on the Sabbath and controlling and licensing the sale of alcoholic beverages. It also accords with the widespread belief during the Revolutionary Era that regulation by the collectivity was a complement to individual liberty and not its antithesis. Thus, Cornell and Dedino instructively quote the statement of minister John Zubly to the Provincial Congress of Georgia that the "well regulated liberty of individuals is the natural offspring of laws, which prudentially regulated the rights of whole communities."[6] Lastly, the character of this regulatory legislation is compatible with my understanding of the qualified, but nonetheless significant, constitutional protection afforded by the Bill of Rights to the individual ownership of arms.

To demonstrate the importance of a civic republican understanding of the Second Amendment, the authors reexamine a much debated passage in "A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania," the initial Chapter of the Pennsylvania Constitution of 1776.[7] Article XIII of the declaration states "[t]hat the people have a right to bear arms for the defence of themselves and the state,"[8] a phrasing that is often interpreted as a constitutional right to own and use arms for personal self-defense.[9] Cornell and DeDino contest this individualist reading of Article XIII by juxtaposing it to Article VIII of the declaration, which places upon "'every member of society'" an obligation to pay taxes and, if necessary, to "'yield his personal service'" to secure the protection of "'life, liberty, and property.'"[10] The collective obligation of Article VIII, they suggest,

5. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); *see also* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998).

6. Cornell & DeDino, *supra* note 1, at 493 (quoting John J. Zubly, The Law of Liberty (Philadelphia 1775) (internal quotation marks omitted)).

7. Pa. Const. of 1776, art. XIII, *available at* http://www.yale.edu/lawweb/avalon/states/pa08.htm (last visited Oct. 6, 2004).

8. *Id.*

9. Cornell & DeDino, *supra* note 1, at 498.

10. *Id.* at 495 (citations omitted).

trumps (or at least qualifies) an individualist interpretation of Article XIII. They point out further that the term "right of the people" was used in the late eighteenth century, and in the Pennsylvania Constitution, to describe rights of "the people" not only as individuals but also as a collective body. Their review of the evidence leads Cornell and DeDino to conclude that in Pennsylvania, bearing arms "'was a perfect example of a civic right,' ... a right that citizens exercised when they acted together for a distinctly public purpose."[11]

Their argument is strong but not conclusive. There remains sufficient ambiguity in the wording of Article XIII and in the historical context to allow an individualist reading. We need only remind ourselves that from its inception the Pennsylvania Constitution of 1776 was a bitterly contested document. Its framework of government, which had been suggested by Thomas Paine, was assailed by John Adams as "so democratical, without any restraint or even an Attempt at any Equilibrium or Counterpoise, that it must produce confusion and every Evil Work."[12] Indeed, the Pennsylvania Constitution of 1776 was so controversial that it spawned an opposition party, which took the name "Republican" and was dedicated to its overthrow.[13] By 1790, the Pennsylvania Republicans had won the ratification of a new constitution that was less infused by the ideology of civic republicanism and more influenced by the doctrines of "mixed government" and Lockean liberalism.[14] The new document eliminated Article VIII of the Constitution of 1776, which enjoined virtuous citizens to sacrifice money and blood for the common good. It also changed the wording of Article XIII (now Section XXI of Article IX) so that it gave "the citizens" the right to bear arms.[15] This term is arguably more individualistic in connotation than "the people" used in the Constitution of 1776.[16] Still, the evidence is ambiguous and will likely remain so. Pennsylvania was a battleground among rival political ideologies and there was little agreement among the various factions on many constitutional principles.

11. *Id.* at 497.

12. John Adams, Autobiography 3 (1776), *available at* http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=A1_23 (last visited Sept. 3, 2004).

13. The Pennsylvania Republican Party should not be confused with the Republican Party formed in the 1790s by Thomas Jefferson and James Madison.

14. Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 233-35, 245-51, 333-39, 438-46 (W.W. Norton & Co. 1972) (1969).

15. Pa. Const. of 1790, art. IX, § XXI ("That the right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned."), *available at* http://www.paconstitution.duq.edu/con90.html (last visited Sept. 3, 2004). This exact wording, with the exception of the commas, is replicated in the Pennsylvania Constitutions of 1838, 1874, and 1968.

16. *Id.*

Yet Pennsylvania does yield one insight into more general "American" attitudes toward the right of an individual to possess and use arms. As Cornell and DeDino emphasize, Pennsylvania was one of several states to confiscate the weapons of those who refused to swear an oath of allegiance to the state during the American Revolution or who, in its aftermath, took up arms against the duly elected government.[17] Their evidence confirms the conclusion of a number of commentators that during the 1780s and 1790s the right to possess arms was not sacrosanct. Erstwhile radical Samuel Adams maintained that only "peaceable citizens" should be protected in their right of "keeping their own arms"[18] while the New Hampshire ratifying convention suggested that the U.S. Constitution be amended to prohibit Congress from disarming "any citizen, unless such as are or have been in actual rebellion."[19] Reviewing the literature on this subject, historian Robert Shalhope concludes that the right to bear arms

> included only the [sic] those deemed "honest and Lawful Subjects" by their separate state governments. And these governments had not only the power but the responsibility to restrict the rights and privileges of citizenship—including the right to possess private arms-in order to promote the public good—the preeminent goal of republican government.[20]

To bolster their civic republican interpretation of the Second Amendment, Cornell and DeDino draw upon David Konig's deeply researched and carefully argued article on the eighteenth-century controversy over the Scottish militia.[21] In that article, Konig explains that in 1708, following the Union between England and Scotland, and again in 1757, when the English militia was overhauled, the English government deprived the Scots of the right to organize their own militia.[22] Scottish political leaders deeply resented this English policy,

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17. For other examples of such confiscations, see Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic,* 16 Const. Comment. 269, 274 (1999).

18. Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22, 34 (1984).

19. *Id.*

20. Shalhope, *supra* note 17, at 281.

21. David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right to Keep and Bear Arms,"* 22 Law & Hist. Rev. 119 (2004). Cornell & DeDino also draw upon H. Richard Uviller and William G. Merkel, who argue that "the language of the Amendment can not support a right to personal weaponry independent of the social value of a regulated organization of armed citizens." H. Richard Uviller & William G. Merkel, The Militia and the Right to Arms, or, How the Second Amendment Fell Silent 24 (2002). In a review, Sanford Levinson appears to accept Uviller and Merkel's historical interpretation, only to deny its relevance because of "its commitment to a desiccated version of originalism." Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel,* The Militia and the Right to Arms, 12 Wm. & Mary Bill Rts. J. 315, 325 (2004).

22. Konig, *supra* note 21, at 123, 131-32.

both because it reduced Scotland to a second-class member of the British Empire and because it had rendered Lowland Scots unable to defend their counties, and the capital of Edinburgh, against the Jacobite Highland rebellion of 1745. Consequently, Konig explains, the acquisition of a militia act for Scotland "remained a patriotic cause from the 1750s through the 1790s"[23] and, thanks to the popularity of James Burgh's *Political Disquisitions*, published in 1774, this controversy reverberated throughout Britain's North American settlements.[24] In his treatise, Burgh argued that "a militia is the only natural defence of a free country both from invasion and tyranny," a sentiment shared by John Adams, one of his American admirers.[25] In December 1774, as General Gage threatened to march from Boston into the countryside to capture Patriot arms, Adams wrote to Burgh that "America will never submit to the claims of parliament and administration," and explained why: "New England alone has two hundred thousand fighting men, and all in a militia, established by law; not exact soldiers, but all used to arms."[26]

Nor was Adams the only American statesman who was aware of Burgh's advocacy for a Scottish militia and his condemnation of English policy. During the debate over the ratification of the Philadelphia Constitution at the Virginia Convention, William Grayson asked rhetorically about "[w]hat attention had been paid to the militia of Scotland and Ireland, since the Union." Then, Grayson, a staunch Anti-Federalist, told the delegates what many of them already knew: "They have 30,000 select militia in England. But the militia of Scotland and Ireland are neglected."[27] Grayson's support for a strong militia in Virginia and the other states was widely shared. Although the military performance of militia units during the American Revolution had been decidedly mixed, state and local leaders had no doubt that they contributed to the Patriot victory and were determined to keep them as a first line of defense against foreign invasion or domestic tyranny. "Fear of being 'disarmed' along the lines of the [Highland] Scots after 1745 was never far from the minds of the founding generation," Konig points out.[28] As William Lenoir told the North Carolina Convention (which ultimately refused to ratify the Constitution): "When we consider the great powers of Congress . . . there is great cause of alarm. They can disarm the militia."[29]

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23. *Id.* at 134.
24. 1-3 James Burgh, Political Disquisitions: An Enquiry into Public Errors, Defects, and Abuses (Da Capo Press 1971) (1774, 1775).
25. Konig, *supra* note 21, at 139.
26. *Id.* at 140.
27. *Id.* at 147.
28. *Id.* at 149.
29. *Id.* at 150.

Read from this perspective, Konig's article offers support for the traditional "federalist" interpretation of the Second Amendment as a right held by the states against the federal government. By delineating the dimensions of the Scottish situation and demonstrating its influence in America, Konig shows that the fears about the powers of a "consolidated" federal government had a basis in recent historical experience and help to explain the militia clauses in the Constitution and the Bill of Rights—a well-taken point that deserves stronger emphasis in the article by Cornell and DeDino. Even Federalist supporters of the new Constitution had concerns. As Oliver Ellsworth of Connecticut put it during the Philadelphia Convention: "The whole authority over the Militia ought by no means to be taken away from the States whose consequences would pine away to nothing after such a sacrifice of power."[30] Although the Constitution reserved to the states the authority to name the officers and supervise the training of their militias, it gave the federal government the power to organize, arm, and discipline them.[31] For Grayson and other Anti-Federalists, the allocation of such powers to the federal government made it imperative to demand an amendment that protected the state-based militia.

However, seen from another perspective, Konig's analysis suggests a set of arguments that allow an individualist reading of the Second Amendment. The road to such an interpretation is not straightforward to present-day Americans because we think differently from our eighteenth-century forebearers about rights and responsibilities. Cornell and DeDino put it well: "[Today we] think about constitutionalism in terms of individual rights and collective responsibilities." However, in the civic republican world of the Founding Era, people placed emphasis on "collective rights and individual responsibilities."[32] Konig deftly captures this eighteenth-century intermixture of individualism and collectivism: "The right to bear arms in the militia was, like that of serving on juries or voting, an individual right exercised collectively."[33]

"An individual right exercised collectively." This phrase demands examination, both because it sounds paradoxical to our ears and because even in the eighteenth century, it was replete with meaning. Like the franchise and jury service, the right to bear arms was not universal; either by custom or law, it was invariably restricted to free, white, property-owning, adult male British subjects or American

30. *Id.* at 145.

31. Article I, Section 8 of the U.S. Constitution gives Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8.

32. Cornell & DeDino, *supra* note 1, at 494.

33. Konig, *supra* note 21, at 153.

citizens.[34] Yet there was one significant difference between the individual's service in the militia and his acceptance of other civic responsibilities. While all of them demanded some of a person's time—to attend the poll, sit on a jury, or turn out for a militia muster—the militia service also required the use of some of his private property. He had to acquire and maintain a firearm.

What, then, was the constitutional status of this privately owned, but collectively used weapon? If we accept Konig's argument that the American founders were deeply influenced by the English government's disarming of the Scottish militia, then it follows that they gave a high value not only to the institution of the militia, but also to the private arms of its members. The "security of a free State"[35] (in the words of the Second Amendment) would require that the arms owned by individual citizens be safeguarded from seizure. As the Federal Farmer, an Anti-Federalist critic of the Constitution, put it, "to preserve liberty, it is essential that the whole body of the people always possess arms."[36]

Konig acknowledges the potential complications posed by the private ownership of the militias' arms, but brushes them aside as questions of property rights and state regulatory activity.[37] Cornell and DeDino explore these issues at greater length. In their view, "Americans drafted their constitutional protections for the right to bear arms in response to their fear that government might disarm the militia."[38] Beginning from that premise, they proceed to argue that the ownership of arms was constitutionally protected only when the arms were used, or kept for use, in a well regulated militia. Arms owned or used for other purposes—such as hunting, self-defense, or anti-state activities—fell outside these constitutional limits and could be (and actually were) regulated by ordinary state laws.

There are two problems with the distinction between arms used for militia service and those used for other purposes. First, it is not

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34. Indeed, the English Declaration of Rights of 1689 imposed an additional limitation by explicitly reserving the right to keep arms to "the Subjects, which are Protestants." Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 118 (1994).

35. U.S. Const. amend. II.

36. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 649 (1989) (quoting Letters From the Federal Farmer to the Republican 124 (W. Bennett ed., 1978)).

37. *See* Konig, *supra* note 21, at 143.

> With the establishment of a national government, few gave any thought to whether the actual individual ownership of arms was a federal matter. Property rights in eighteenth-century America were such that an individual might even own another human being; gun ownership would not be considered any less a matter of law left to the states to regulate as they saw fit.

Id.

38. Cornell & DeDino, *supra* note 1, at 499.

descriptive of life in the real world of the eighteenth century. In 1772, the Virginia legislature banned the hunting of deer in order to protect its declining herd, a regulation that was probably ignored by the "disorderly persons" at whom it was directed.[39] But suppose the legislature had anticipated this unhappy result and instead had banned the private ownership of muskets and rifled guns, an action that would have saved the deer, but also would have disarmed the militia (or at least eliminated the private ownership of arms by militia members). Would any such measure have been given a hearing by the legislature? The answer must be in the negative, and not only because of the role of the militia in deterring slave revolts.[40] Ordinary yeomen farmers would have opposed it as an arbitrary infringement on their independence, and it would have been strongly resisted as well by many Virginian political leaders, including George Mason. At the ratifying convention in Richmond, Mason condemned Governor William Keith of Pennsylvania for attempting in the late 1740s "to disarm the people" and thereby "to enslave them."[41] The line between regulating firearms and disarming the militia was necessarily fuzzy and much more problematic than Cornell and DeDino admit.

Second, this fuzziness was apparent to people of the time and some of them sought to define their constitutional right to keep arms in broad terms. In 1780, the citizenry of Northampton, Massachusetts, argued that Article XVII of the state's proposed Declaration of Rights was too narrowly conceived. It simply declared a right "to keep and to bear arms for the common defence";[42] instead, they proposed "that it should run in this or some such like manner, to wit, The people have a right to keep and bear arms as well for their own as the common defence."[43] The town of Williamsburgh, Massachusetts, likewise voted to add "for their Own . . . defence" because "we esteem it an essential priviledge to keep Arms in Our houses for Our Own Defence and while we Continue honest and Lawful Subjects of Government we Ought Never to be deprived of them."[44] To these sentiments from New England, where the traditions of local self-

39. Konig, *supra* note 21, at 143 (quoting 8 The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the year 1619, at 592-93 (William Waller Hening ed., Univ. Press of Virginia 1969) (1821)).

40. *See* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998); *see also* Carl T. Bogus, *Race, Riots, and Guns*, 66 S. Cal. L. Rev. 1365 (1993).

41. Konig, *supra* note 21, at 151.

42. Mass. Const. of 1780, pt. I, art. XVII, *reprinted in* 5 Sources and Documents of the U.S. Constitutions 92, 95 (William F. Swindler ed., 1975).

43. Shalhope, *supra* note 17, at 277 (quoting The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, at 574 (Oscar & Mary Handlin eds., 1966)).

44. *Id.* at 278 (quoting The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, *supra* note 43, at 624).

government had long reflected the principles of civic republicanism, we may add a similar statement from Virginia, Patrick Henry's oft-quoted remark that "[t]he great object [of the Second Amendment] is, that every man be armed."[45]

Such sentiments complicate a narrow civic republican interpretation of the Second Amendment by raising the possibility that many Americans simply assumed that the wording of the Second Amendment incorporated a private right to keep arms and to use them for lawful purposes. To use a conceptualization made famous (or infamous) by more recent judicial decisions, the wording of the Second Amendment and the protections for personal privacy and private property in the Third, Fourth, and Fifth Amendments, may have cast a "penumbra" that bestowed some sort of constitutional status on the private possession and use of firearms.[46] I say "some sort" of constitutional protection because it is abundantly clear that this individual right was neither universal in scope nor unlimited in application. As Cornell and DeDino demonstrate, race-based laws disarmed slaves and free blacks, while state legislatures confiscated arms from those loyal to the Crown during the War of Independence and from groups, such as the Shaysites, who threatened the sovereign authority of the state during the first decades of the republic.[47] If various constitutions—state and federal—afforded some protection for the private ownership of arms, they offered no legal refuge for those who would use those arms for revolutionary purposes or to contest the sovereign authority of republican governments.

It is probably too soon to tell if the scholarship on the Second Amendment is at a crossroads. Even if historians were to agree on the predominant view of the Second Amendment among the founding generation of citizens, that understanding would probably not determine the disposition of specific cases or general constitutional issues. Moreover, as my remarks have suggested, the historical issues are sufficiently complex that scholars may reasonably differ over their meaning. I find convincing Cornell and DeDino's arguments that eighteenth-century Americans viewed the issues of the militia and the bearing of arms in civic republican terms, and that they accepted the legitimacy and the necessity of gun control legislation. However, unlike Cornell and Dedino, I believe there is sufficient historical evidence to suggest that Americans viewed the Second Amendment (and the similar state declarations) as offering some sort of constitutional protection to law-abiding citizens to own and use arms.

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45. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment,* 101 Yale L.J. 551, 579 (1991) (emphasis omitted) (quoting Stephen Hallbrook, That Every Man Be Armed 74 (1984)).

46. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

47. Cornell & DeDino, *supra* note 1, at 506-10; *see also supra* notes 13-17 and accompanying text.

Notes & Observations