

A New Paradigm for the Second Amendment

Saul Cornell*

Discussions about the meaning of the Second Amendment have become mired in an intellectual quagmire. Contemporary debate over this provision of the Bill of Rights have been cast in terms of a simple dichotomy: either the Second Amendment protects an expansive individual right similar in nature to freedom of the press or it protects a narrow right of the states to maintain their well-regulated militias.¹ Partisans of the individual rights view argue that the Second Amendment was designed to affirm a basic individual right to own firearms for hunting, recreation, and personal protection. The other view of the Amendment, often described as the collective rights view, argues that amendment is about the allocation of military power in the federal system. According to this view, the Second Amendment was a modest concession to moderate Anti-Federalists who feared the power of the new federal government. By affirming that the right of the people to bear arms as part of a well-regulated militia, Federalists were able to assuage lingering Anti-Federalist qualms about the future of the state militias. Framing the meaning of the Second Amendment in terms of such simple dichotomy fits well with the politics of the modern gun control debate. The individual rights view serves the interests of gun rights advocates, while the collective rights view fits well with supporters of gun control. While this neat dichotomy may have served the interests of those involved in modern political debates about gun policy, it is not particularly useful for understanding the eighteenth century world in which the Second Amendment was drafted and adopted.

To find dramatic evidence of the current paradigm crisis in Second Amendment scholarship and jurisprudence one need only look at the convoluted reasoning displayed

by two Federal Appeals court decisions trying to make sense of the vast scholarly literature on this once neglected topic.² In *United States v. Emerson*, the Fifth Circuit identified three schools of thought on the Second Amendment: the sophisticated collective rights view, the traditional collective rights view, and the individual rights view.³ In *Silveira v. Lockyer*, the Ninth Circuit adopted a different tripartite scheme, concluding that current scholarship could be divided into the following: the collective rights view, the individual rights view, and the limited individual rights view.⁴

In this important essay, David Konig joins his voice to a growing chorus of scholars who have concluded that it is time to move beyond the simplistic dichotomies that have obscured as much as they have clarified our understanding of the Second Amendment.⁵ In Konig's view the Amendment is neither an individual nor a collective right in the sense with which these terms are so often used in modern discussions of the right to bear arms. To support this conclusion he draws on an important but largely forgotten context of the Second Amendment. The key to understanding this lost context of the Second Amendment resides in the writings of thinkers such as James Burgh, who distilled the history of Scotland into a potent tonic for the Founders, reminding them of the dangers of allowing the militia to be disarmed by a distant and powerful government.

Burgh's thought has not figured prominently in recent writing on the Second Amendment by gun rights advocates who have been more enamored of the Italian Enlightenment theorist Cesare Beccaria who attacked laws which prohibited individuals from carrying firearms and argued that such laws worked to the benefit of criminals. In essence, Beccaria was the first modern theorist to argue that when firearms are outlawed,

only outlaws will have firearms. Thomas Jefferson was obviously impressed with this argument and copied it into his commonplace book. Jefferson did not, however, model his own proposal for the Virginia Declaration of Rights on this more expansive conception of the right to own firearms. Instead, Jefferson's proposal for the Virginia Constitution affirmed that, "No free man shall be debarred the use of arms within his own lands or tenements."⁶ Supporters of the individual rights view have attached great significance to Jefferson's words and to his fondness for Beccaria.⁷ Of course, the primary architect of the Virginia Declaration of Rights and Constitution was not Thomas Jefferson, but George Mason. The Virginia Declaration of Rights affirmed the ideal of a well-regulated militia in terms reminiscent of Burgh, not Beccaria.

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.⁸

Mason's language shares little with either Beccaria or Jefferson's formulation of this right. Indeed, none of the arms bearing provisions adopted by state constitutions in the Founding era followed Beccaria's or Jefferson's model. Both Beccaria and Jefferson's more individualistic conception of the right to have arms for self defense clearly stood outside of the constitutional mainstream in the 18th century.

Rather than focus on the Italian Beccaria, Konig astutely directs our attention to the Scott Burgh. Konig also persuasively argues for Burgh's influence on both The Federalist and the debates over the militia in the Virginia Ratification Debates. As several

recent critics of the individual rights model of the Second Amendment have noted, the subject of a private right to own firearms outside of the context of the militia was rarely discussed during the ratification debates, while the need to protect the militia from the threat posed by the Federal government received extensive commentary.⁹

The preference for Beccaria over Burgh in recent scholarship illustrates one of the most problematic features of this body of research and writing. In contrast to the contextualist method employed by Konig, recent individual rights scholarship on the right to bear arms has been an exercise in law office history of a particularly bizarre kind.¹⁰ Rather than trying to understand texts by placing them within their context, Second Amendment originalists have created something akin to an alternative history science fiction fantasy, stories about parallel historical universes in which the South won the Civil War or the American Revolution never happened. In this alternative Second Amendment universe, the Virginia Declaration of Rights was written by Beccaria or Jefferson, not Mason, the Second Amendment drafted by the Dissenting Anti-Federalist Minority of Pennsylvania, not the First Congress, and Joseph Story's constitutional treatises ghost-written by a radical abolitionist. While such efforts makes for excellent fiction, and might plausibly make for a fascinating exercise in creative constitutional theorizing, it makes for poor history.¹¹

Although Konig's essay raises serious questions about the individual rights interpretation of the Second Amendment, his analysis also presents a more modest challenge to the conventional understanding of the collective rights model. The right described by Konig is

less a right of the states, although clearly the issue of states rights was closely connected to the fate of the militia, but more accurately described as a civic right. Although Americans extended the right to bear arms to many who would not have enjoyed this right in Britain, the right was hardly universal. Women, free Africans, resident aliens, might claim a genuinely individual right such as the right of religious conscience, but they were not generally included among those who bore arms. In the Founding era, a Quaker might bear a gun against a bear, but in most cases they did not bear arms.¹² The civic right described by Konig, a right of citizens, not individuals, was inextricably linked to an obligation to participate in communal defense as part of a well regulated militia. Modern collective rights theorists have stumbled over the actual wording of the Second Amendment which refers to the right of the people, not a right of the states. Konig's formulation of the Amendment as an individual right exercised collectively comes closer to faithfully translating the dominant understanding of the Amendment in the Founding era than does either the modern collective or individual rights paradigms. In this sense the right to bear arms shares some features with the original conception of the right of assembly and the jury, rights that required that citizens act in a collective manner for a distinctly public purpose.¹³

Konig's model for the Second Amendment also helps illuminate the thinking of important 19th century commentators on the Second Amendment such as Joseph Story. Individual rights theorists such as David Kopel have argued that since Story does not fit perfectly into the modern collective rights theory he must be counted among supporters of the modern individual rights view of the Amendment. Kopel's framework is a textbook illustration of the historical "fallacy of false dichotomous question."¹⁴ Story wrote about arms bearing as a civic right, not an individual right.

One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.¹⁵

Story's entire discussion of the meaning of the Second Amendment occurs within the context of the militia and is much closer in spirit to Burgh, than to Beccaria. The right protected by the Second Amendment was one enjoyed by citizens who might use their privately owned weapons as part of their obligation to participate in a well regulated militia. Indeed, Story decried the actions of those who were sacrifice their public responsibility for the sake of mere private convenience, hardly a radical statement of an individual rights creed. Within the same decade that Story published his Familiar Exposition, abolitionist Joel Tiffany wrote his Treatise on the Unconstitutionality of Slavery.¹⁶ In Chapter Sixteen of his treatise, Tiffany discussed the meaning of the right

to bear arms. Tiffany read Blackstone's discussion of the right to have arms in an expansive manner. "It is called subordinate in reference to the great, absolute rights of man; and is accorded to every subject for the purpose of protecting and defending himself. Moreover, this guaranty is to all without any exception; for there is none, either expressed or implied." The expansive individual right defended by Tiffany and other abolitionists is about self defense: "The right to keep and bear arms, also implies the right to use them if necessary in self-defense." When compared with the assertive and unambiguously individualistic language used by Tiffany, Story's discussion of the Second Amendment seems distinctly civic in spirit. Story was both deeply conservative and strongly nationalist in his views. His conception of the Second Amendment as a civic right was consistent with both his nationalism and conservatism. Kopel and other individual rights theorists have distorted Story's thought, effectively casting him as a supporter of a radical abolitionist vision that he actually opposed.¹⁷

Story's conception of the militia did depart from his eighteenth century forebears in one important respect and this serves as a reminder of the need to pay attention to both the changing historical meaning of the right to bear arms and changing social and political realities of American history. The militia in Story's age had fallen into serious decline as a public institution and prompted him to observe that:

And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the

people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our National Bill of Rights.¹⁸

This discussion of the right to keep and bear arms was cast in the form of a jeremiad.¹⁹ There is nothing in this lament about the rise of individualism and the erosion of civic spirit that supports the modern individual rights view of Story.

Figuring out what such an odd and distinctively 18th century type of right might mean in the 21st century is a complex matter. Constitutional theorist Chris Eisgruber has likened the Second Amendment to a constitutional ghost town.²⁰ The notion of a constitutional ghost town calls attention to the fact that Americans might choose to restore the Second Amendment to its former vitality at any moment. Recreating the world of the eighteenth century militia is not impossible, but it would require a reawakening of civic mindedness and self sacrifice that seems difficult to imagine in modern America. Here Story's jeremiad is worth recalling. If Second Amendment rights have atrophied in modern America it is not because of too much government regulation, but ironically it is the absence of regulation that has produced the anemic version of the Second Amendment we now live under. If Americans were willing to undertake the burdens required by militia service and sacrifice some significant portion of their individual liberty to attain this collective ideal, then the Second Amendment would be restored to its former robust character.²¹ Given the deep suspicion of government that animates the gun rights movement, it would not welcome greater regulation and additional intrusions into the lives of citizens that would be necessary to recreate the Founder's militia. Proponents of gun regulation

would also view the militarization of American society necessary to recreate the militia as a negative development. Perhaps the new paradigm for the Second Amendment suggested by Konig and others can help us move beyond the current impasse. At the very least a more complex history of the right to keep and bear arms can help us understand how we have arrived at our current situation.

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Associate Professor of History, The Ohio State University, Director Second Amendment Research Center John Glenn Institute for Public Service and Public Policy. I would like to thank Don Higginbotham, Christopher Tomlins, Charlie Finlay, and Nathan DeDino for helpful suggestions.

¹ For introductions to this body of scholarship, see Robert J. Cottrol, ed. Gun control and the Constitution: Sources and Explorations on the Second Amendment (Westport, CT, 1994); Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment" Tennessee Law Review 62 (1995): 461-512; Saul Cornell, ed., Whose Right to Bear Arms Did the Second Amendment Protect (Boston, 2000); and Carl T. Bogus, "The history and Politics of Second Amendment Scholarship: a Primer" Chicago Kent Law Review 76 (2000): 3-25.

² Second Amendment scholarship is a classic example of Thomas Kuhn's theory of paradigm change, see Thomas S. Kuhn, The Structure of Scientific Revolutions (Chicago, 1962) and David Hollinger, "T.S. Kuhn's Theory of Science and its Implications for History" 78 (1973), 370-393. For a concise overview of the origins of the current

paradigm crisis in Second Amendment scholarship, see Saul Cornell, “Don’t Know Much About History: The Current Crisis in Second Amendment Scholarship” Northern Kentucky Law Review 29 (2002):657-81.

³ United States v. Emerson, 270 F.3d 203 (5th Cir.), *reh’g and reh’g en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

⁴ Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002).

⁵ Richard Primus, The American Idea of Rights (Cambridge: Cambridge University Press, 1999); David Yassky, “The Second Amendment: Structure, History, and Constitutional Change,” University of Michigan Law Review 99 (2000): 588-688; Cornell, “Don’t Know Much About History.”

⁶ Julian P. Boyd, ed., The Papers of Thomas Jefferson (Princeton, N.J. 1950---) 1: 333, 336.

⁷ Cesare Beccaria, Of Crimes and Punishments trans. Edward D. Ingraham 2nd ed. (Philadelphia, 1778); Gilbert Chinard, The Commonplace Book of Thomas Jefferson (Baltimore, 1926), 314. On the influence of Beccaria more generally, see David Lundberg and Henry May, “The Enlightened Reader In America” American Quarterly 28 (1976): 262-293 and Donald S. Lutz, “The Relative Influence of European Writers on late Eighteenth Century American Political Thought” American Political Science Review 78 (1984): 189-97. According to May only slightly more than a third of all libraries in the period 1777-1790 contained a copy of the essay by Beccaria favored by Jefferson. In his study of the patterns of citation to various thinkers in published writing in the Founding era Donald Lutz found that Beccaria accounted for about 1% of citations

in the 1770s, 3% in the 1780s and 0% in the 1790s. Stephen Halbrook, That Every Man be Armed (Albuquerque, NM 1984); Randy Barnett and Don Kates, “Under Fire: The New Consensus On The Second Amendment” Emory Law Journal 45 (1996): 1139-259. Both authors also make much of the decision of John Adams to quote another passage from Beccaria in the context of his defense of the Boston Massacre, L. Kinvin Wroth and Hille B. Zobel, eds., Legal Papers of John Adams (Cambridge, MA 1965) 3:242. For another individual rights scholar who falls into the Jeffersonian fallacy, see L. A. Powe, “Guns, Words, and Constitutional Interpretation” William and Mary Law Review 38 (1997): 1311-403.

⁸ “Virginia Declaration of Rights,” Philip Kurland and Ralph Lerner, eds., Founders Constitution (Chicago, 1987)I:6. Julian P. Boyd, ed., The Papers of Thomas Jefferson (Princeton, N.J. 1950---) 1: 333,336

⁹ Don Higginbotham, “The Second Amendment in Historical Context” Constitutional Constitution Commentary 16 (1999): 263-68; Jack N. Rakove, “The Second Amendment as the Highest State of Originalism,” Chicago-Kent Law Review 76 (2000): 129-32.

¹⁰ Saul Cornell, “Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory” Constitutional Commentary 16 (1999): 221-46.

¹¹ For examples of individual rights scholarship that might be characterized in these terms, see Kates and Barnett, “Under Fire” and Nelson Lund, “The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders” Texas Review of Law & Politics 4(1999): 157-91. For a sampling of

alternative history science fiction genre, see Harry Turtle Dove and Martin H.

Greenberg, eds., The Best Alternative History Stories of the 20th Century (New York, 2001) Gardner Dozois and Stanley Schmidt, eds. Roads Not Taken: Tales of Alternative History (New York, 1998) Karen Hellekson, "Toward a Taxonomy of the Alternate History Genre," 41 Extrapolation (2000): 248-56 and Gavriel Rosenfeld, "Why do we Ask 'What if' Reflection on the Function of Alternative History" History and Theory 41 (2002): 90-103.

¹² Rogers Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History (New Haven, CT 1997).

¹³ On the public and collective conception of the right of assembly, see Primus, American Language of Rights; on the jury as a collective and public right, see Akhil Amar, The Bill of Rights: Creation and Reconstruction (New Haven, CT, 1998).

¹⁴ David Hackett Fischer, Historians' Fallacies: Toward a Logic of Historical Thought (New York: Harper & Row, 1970), 9-12. David B. Kopel, "The Second Amendment in the Nineteenth Century" Brigham Young University Law Review 4 (1998):1393 which attacks Keith Ehrman & Dennis Henigan, "The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?" University of Dayton Law Review, 15 (1989):5-58.

¹⁵ Joseph Story, A Familiar Exposition of the Constitution of the United States (1842), 264-65

¹⁶ Joel Tiffany, A Treatise on the Unconstitutionality of American Slavery (Cleveland, 1849).

¹⁷ An excellent introduction to Story's thought and his arguments with contemporaries may be

found in, R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesmen of the Old Republic (Chapel Hill, 1985)

¹⁸ Story, Familiar Exposition, 264-65. On the decline of the militia as an institution in the early republic, see Mark Pitcavage, “An Equitable Burden: The Decline of The State Militias, 1783-1858,” Ph.D. Diss., Ohio State University, 1995.

¹⁹ On the jeremiad as an important American literary form, see Sacvan Bercovitch, The American Jeremiad (Madison, WI 1978)

²⁰ Christopher L. Eisgruber, Constitutional Self-Government (Cambridge, MA 2001), 120-26

²¹ Several gun rights advocates have suggested recreating the militia, but usually ignore the intrusive nature of the kinds of regulation necessary to create a well-regulated militia, see David Kopel and Christopher Little, “Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition,” Maryland Law Review 56 (1997): 438-554 and Brannon P. Denning, and Glenn Harlan Reynolds, “It Takes a Militia: A Communitarian Case for Compulsory Arms Bearing,” William and Mary Bill of Rights Journal 5 (1996): 185-214.