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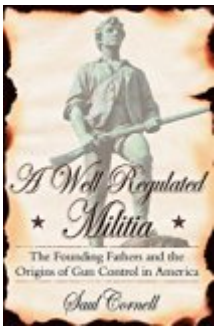
Saul Cornell. *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America.* New York: Oxford University Press, 2006. xvi + 270 pp. $30.00, cloth, ISBN 978-0-19-514786-5.



Reviewed by Robert H. Churchill

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Saul Cornell has written a very good book. The book will not bring an end to the debate over the meaning of the Second Amendment (no book could), but from now on scholars of the Second Amendment will begin by grappling with Cornell's argument. By theorizing the civic-rights interpretation of the Second Amendment, and historicizing the origins of the individual- and collective-rights interpretations, Cornell has significantly advanced the state of a very contentious field. Unfortunately, Cornell's presentation of the underlying evidence sometimes lacks balance, and does not live up to the quality of his interpretive contribution.

In the book Cornell builds upon work that he has published in law review articles over the last five years. He argues that the "original understanding" of the Second Amendment was that it articulated a "civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia" (p. 2). In Cornell's pluralist understanding of eighteenth-century political theory, this civic conception of the right to keep and bear arms sat alongside other, less resonant conceptions, including early versions of the modern individual- and collective-rights interpretations. Cornell argues that the individual-rights interpretation, though articulated in the eighteenth century, blossomed into a coherent constitutional doctrine during the Jacksonian era. As state legislatures, in response to deadly public brawling, tightened regulations on the possession and concealed carrying of deadly weapons, defendants framed constitutional challenges by reinterpreting the right to bear arms as a fully individual right to keep and carry arms for private purposes. Nonetheless, Cornell argues, the civic-rights interpretation remained the dominant understanding of the right to keep and bear arms as expressed in antebellum state court decisions and legal commentaries.

As for the modern collective-rights interpretation that has, until recently, dominated federal court decisions, Cornell finds a more curious genealogy. He argues that the modern conception is rooted in the Anti-Federalist desire to preserve state control over the militia as a bulwark against

"federal power if such power ran amok" (p. 5). Though Anti-Federalists largely failed in their attempts to alter the amendment's language, Cornell argues that they "clung tenaciously to their states' rights view of the Second Amendment as providing the foundation for state resistance to the Federal Government" (p. 65). Cornell highlights the irony posed by such radical origins for the modern collective-rights interpretation. The interpretation was drained of that radicalism, he argues, after the Civil War. Confronted with Republican assertions that the Second Amendment had been incorporated within the privileges and immunities clause of the Fourteenth Amendment and was thus binding on the states, white southern conservatives responded by arguing that the amendment protected only the state's right to arm its militia. It thus did not protect the attempts by African Americans to arm themselves and to organize militias to defend themselves against the Ku Klux Klan. Finally, in the twentieth century, progressive lawyers and legislators articulated a collective-rights interpretation that asserted that the right to keep and bear arms was held only by enrolled members of the state-sanctioned militia. With the reform of the militia system under the Dick Act of 1903 and the National Defense Act of 1916, this formulation stripped the right to keep and bear arms of much of its enforceable meaning and opened the way to the vigorous expansion of the police power to regulate the possession and use of guns (p. 6).

Cornell's contributions to the field in this volume are significant. First, he has set a standard of research against which further contributions will be measured. Utilizing the new tools for keyword searching in the digital edition of the Evans and Shaw-Shoemaker Collections and in Early American Newspapers, Cornell has brought to light many new texts bearing on early American understandings of the Second Amendment. He has also extensively mined legislative debates at the state and federal level and the writings of lesser-known constitutional theorists. Cornell has incorporated plebeian perspectives, discussing the understandings of the right to keep and bear arms and the right of resistance held, for example, by Shaysites, Whiskey Rebels, and Baltimore rioters. In his introduction, Cornell calls for scholars to approach the topic of the Second Amendment in a rigorous manner. In terms of research, he has met that test.

A second contribution to the field lies in Cornell's discussion of the place of the right of revolution in early American political theory. It was not that long ago that scholars offering what has been dubbed the insurrectionary interpretation of the Second Amendment were publicly denounced as "academic insurrectionists" and fellow travelers of Timothy McVeigh. Cornell in this volume acknowledges that early American political theorists offered a multiplicity of theories of legitimate resistance to acts of domestic tyranny, and that political actors adopted ever-shifting stances on the legitimacy of resistance at specific moments. Cornell argues that the period between the framing of the Constitution and the War of 1812 was remarkable for the "fluidity of American constitutional thought" as Americans grappled with the militia's role as a check on the constitutional abuses of a republican government (p. 83). That formulation largely vindicates the work of Sanford Levinson and David Williams, two of the scholars derided by collective-rights interpreters in the mid-1990s.[1] I think perhaps Cornell might have cited these two scholars in the footnotes as the first on the ground.

I also wish Cornell had not attempted to divvy up this theoretical fluidity into mainstream and extremist pots. For example, he contrasts the "mainstream" Republican adherence to the "peaceful defense of states' rights" in the Virginia and Kentucky Resolutions with the "radical" fixation of "rough-hewn" Republicans on popular nullification (p. 94). Such a formulation does not capture the minute distinctions among the positions staked out by a variety of Democratic-Republicans

in 1798 as they grappled with the limits of legitimate resistance. Cornell also seems to want to find an early end to this period of fluidity, though it continued right through the Civil War.

On the whole, however, I think Cornell's basic chronological framework is correct. His account of the emergence of a fully individual right to keep and carry arms for private purposes in the Jacksonian period adds an important milestone to the story. His discussion of the post-Civil War debate over the incorporation of the Second Amendment is the most careful that I have read. Finally, his suggestion that the twentieth-century jurisprudence of the Second Amendment is based not on *U.S. v. Miller*, but on a misreading of the case that unduly privileges the collective-rights interpretation offered in Lucilius Emery's 1914 *Harvard Law Review* article, is positively fascinating (pp. 203-204).

My central criticism of the book rests on Cornell's conceptualization of the civic right to keep and bear arms. In Cornell's view, the dominant early American interpretation of that right was as a guarantee "that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia" (p. 2). He asserts that most early Americans believed the right was "inextricably linked" (p. 65) to a "specific legal obligation" and applied only to "militia weapons owned for this purpose" (p. 27). It did not include the right "to keep or use firearms outside the context of the militia," a common-law right that was subject to reasonable regulation (p. 59). If I am reading Cornell correctly, he is arguing that early Americans believed that the right to keep and bear arms was guaranteed only to enrolled militiamen, and that it applied only to a single weapon per militiaman. If I have misunderstood him, I hope he will use part of his response to clarify. But if I have understood him correctly, then I think he has mis-conceptualized the civic right at the heart of the Second Amendment.

Cornell makes several arguments supporting this conception of the civic right. First, he asserts that colonial and state governments exercised a police power to regulate the possession of guns. Here, I submit, he has exaggerated the reach of the police power. For example, Cornell notes that early American law empowered constables to "take away the arms" of those guilty of the common-law crime of affray (p. 30). But the disarmament in question was authorized only temporarily for the purpose of bringing the offenders before a justice of the peace.[2] When discussing regulation in the Jacksonian era, Cornell argues that several states expanded their use of the police power to prohibit "the sale or possession of certain weapons," and suggests that these weapons included both guns and knives. He specifically claims that Georgia and Tennessee passed "wide-ranging laws prohibiting the sale of pistols, dirks, and sword canes" (p. 142). There are two problems with Cornell's presentation of this material. The first is that Tennessee's statute applied only to Bowie knives, which clearly fell outside the scope of the right to keep and bear arms. The second problem is that Georgia's statute, which did apply to small pistols, was struck down as an unconstitutional infringement of the right to keep and bear arms in the 1846 case *Nunn v. Georgia*. Because Cornell never cites the case, it is difficult for a lay reader to discern the lack of balance in his presentation of the evidence. Cornell's assertions aside, there is little evidence that any colony or state exercised a police power to disarm citizens prior to the Civil War.

Cornell also asserts that pistols clearly fell outside of the constitutional protection afforded by the Second Amendment. He rests this assertion on the 1840 Tennessee Supreme Court Case *Aymette v. State* upholding the aforementioned statute banning Bowie knives. Cornell declares that "in the view of the *Aymette* court, the legislature enjoyed the widest possible latitude to regulate pistols" including the right to ban their possession (p. 146). But no such suggestion appears in

the court's opinion. The court in *Aymette* declared that "the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.... The citizens have the unqualified right to *keep* the weapon, it being of the character before described, as being intended by this provision."[3] The court found that Bowie knives were not of a military character, but made no mention or suggestion as to the status of pistols. Postbellum legal commentaries and judicial decisions applied *Aymette*'s logic in support of the argument that some small pocket pistols lacked military utility and thus fell outside the Second Amendment's protection, but Cornell has read this postbellum doctrinal development into an earlier text.

Cornell's most important supporting argument is that most early Americans rejected a right to keep arms for private purposes, and that they did not understand the right to keep and bear arms articulated in the Second Amendment to incorporate such a right. This argument rests on what I believe is a misreading of some key texts, combined with the omission of an extremely important early commentary on the Second Amendment, that of St. George Tucker.

Tucker's 1803 edition of *Blackstone's Commentaries* has long been discussed by scholars of the Second Amendment. That volume contained an appendix entitled "A View of the Constitution of the United States." Cornell discovered some years ago that a manuscript draft of this text existed among Tucker's law lectures in the Tucker-Coleman papers at the Swem Library. He is to my knowledge the first to use this text, which dates from the early 1790s and is the most informed commentary on the Second Amendment dating from the period immediately after ratification. As is true of the revised version published in 1803, the manuscript draft is organized as an article-by-article commentary on the Constitution of 1787, followed by the amendments. Cornell professes to offer an analysis of Tucker's "earliest gloss on the Second Amendment" and quotes passages from the manuscript draft suggesting that Tucker saw the amendment as guaranteeing the right of states to arm their militias (p. 74). But the passages of the manuscript draft that Cornell discusses are not Tucker's gloss on the Second Amendment. They are instead his gloss on the militia clauses of the original Constitution. On Tucker's gloss on the Second Amendment itself, both in the 1790s manuscript and in the 1803 published version, Cornell is silent. I hope Cornell will take the opportunity to explain his decision to pass over this material.

It is clear from the Tucker's gloss on the Second Amendment in the manuscript draft that he saw in the amendment a guarantee that extended well beyond the concern over federalism that Cornell discusses. Tucker noted that "in England the people have been disarmed under the specious precept of preserving the game." In a note on the facing page, Tucker commented that in England, "the right of the people to bear arms" was by the inclusion of limiting language "entirely done away." In this gloss, Tucker suggested that the passage of England's game laws had in England eliminated the constitutional protection that the Second Amendment was intended to guarantee. Tucker reiterated this view in 1803, noting that under the game laws in England, "the right of keeping arms is effectually taken away," while expressing his hope that in America, "the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty."[4]

The problem for Cornell's argument is that England's game laws prohibited citizens, the vast majority not enrolled in the militia, from possessing firearms for private purposes. That Tucker saw the game laws as a contravention of the right protected by the Second Amendment is clear evi-

dence that he understood that right to apply in America to all citizens and to weapons owned for both public and private purposes. Tucker's view mirrors that of Samuel Nasson and Saumel Latham Mitchel, cited by Cornell, and of a supporter of Samuel Adams in August 1789 who interpreted the House draft of the Second Amendment as a vindication of Adams's earlier proposed amendment that prohibited Congress from preventing "the people of the United States, who are peaceable citizens, from keeping their own arms."[5] All of these early interpreters of the language embedded in the Second Amendment understood it to guarantee a right to keep arms that transcended "the inextricable connection" to militia service that Cornell posits.

In the end, in juxtaposing the civic right to keep and bear arms with an individual right to keep arms for private purposes, Cornell risks collapsing the civic-rights paradigm back into what has been termed the sophisticated collective-rights interpretation. To support this position he must also offer a less balanced presentation of the evidence than the quality of his research merits. A more balanced read of the evidence suggests that the civic right manifested properties of both an individual and a collective right, that it guaranteed a citizen's right to keep arms (full stop), and to bear those arms when called upon to fulfill their civic obligation to serve in the militia. The use of such weapons was subject to regulation under the police power, but their possession was not. I think this formulation better captures the way Americans viewed the right to keep and bear arms from the Revolution through the end of the nineteenth century.

Were Cornell to accept this broader understanding of the civic right, there is little else in his argument that would need to be revised to accommodate it. That is a testament to the breadth of the contribution that he has made on this subject.

Notes

[1]. Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 637-59; and David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* (New Haven: Yale University Press, 2003).

[2]. Cornell quotes from the 1721 edition of the Henry Care's *English Liberties; or the free born subject's inheritance*. The full quote reads as follows: "Constables may take away the arms of them who ride or go armed in terror of the people, and may bring these persons before a justice of the peace to find sureties for their good behavior." Care, *English Liberties* (Boston, 1721), 248. See also *The Office and Authority of a Justice of the Peace* (Newbern: James Davis, 1774), 5.

[3]. *Aymette v. The State*, 21 Tenn. 154 (1840), 158-160.

[4]. St. George Tucker Notebooks, Box 63, Volume 4, Tucker-Coleman Papers, Swem Library, College of William and Mary, 143-44; and St. George Tucker, *Blackstone's Commentaries*, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), I: 272-74 and 300; II: 143; and III: 414.

[5]. Samuel Nasson to George Thatcher, July 9, 1789, in *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, ed. Neil H. Cogan (New York: Oxford University Press, 1997), 261; Samuel Latham Mitchell, *An Oration, Pronounced before the Society of Black Friars* (New York, 1793); and Boston *Independent Chronicle*, August 6, 1789.

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