



Do Citizens Have the Right to Keep and Bear Arms? Original Intent Says Yes

by John R. Hendrickson

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”
— Second Amendment, United States Constitution

The Supreme Court may have another chance to rule on whether or not individuals have the right to keep and bear arms as clearly stated in the Second Amendment of the United States Constitution. In *Shelly Parker et al v. District of Columbia*, the U.S. Court of Appeals for the District of Columbia heard arguments in regard to Washington, D.C.’s law which bans handguns.¹ Regardless of the merits of gun control laws on states and localities, this decision will require the Court to rule on the much debated question of whether or not individuals have the right to keep and bear arms.

In 1939 in *United States v. Miller*, the Supreme Court upheld the National Firearms Act of 1934, which regulated the taxation and registration of automatic weapons and sawed-off shotguns in response to the growing violence of prohibition.² Justice James C. McReynolds in a unanimous opinion explained that the Second Amendment protected the citizen’s right to own ordinary militia weapons.³ *Miller* was the last major case the Court took up in dealing with the Second Amendment, but a number of lower court decisions have been rendered. In *United States v. Emerson* the U.S. District Court for the Northern District of Texas ruled that the Second Amendment granted individuals the right to keep and bear arms. The case, decided in 1999, was upheld by the Fifth Circuit Court of Appeals in 2001.

Both the District Court and Fifth Circuit opinions provided a strong intellectual basis that the original-intent view of the Amendment supported the right to keep and bear arms. In the District Court opinion, Judge Sam R. Cummings wrote: “A historical examination of the right to bear arms, from English antecedents to the drafting of the Second Amendment, bears proof that the right to bear arms has consistently been, and should be, construed as an individual right.”⁴

The Fifth Circuit opinion, authored by Judge William L. Garwood, expanded on Judge Cummings’ opinion that the historical proof for the original intent of the Second Amendment supports an individual’s right to keep and bear arms. “We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training,” wrote Judge Garwood.⁵

In the *Parker* case, lawyers for the District of Columbia argued that the Second Amendment applies to militias and not individuals.⁶ Gun control advocates view the Amendment as outdated and applying only to states in regard to their militias. They believe the right is a collective right. *Miller* is considered an unclear opinion because it advocates both state regulation and at the same time the individual right to bear arms, which is why both sides of this argument often cite the Court opinion.

A federalist interpretation of the Second Amendment could argue that individual states have the right to restrict gun rights. “Of course, the individual-rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for compelling state interests, such as prohibiting firearms ownership by convicted felons, just as the First Amendment does prohibit shouting ‘fire’ in a crowded movie theater,” noted Attorney General John Ashcroft.⁷

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Although states do have the right to regulate firearms in the strictest of scrutiny, the Amendment does state “the right of the People.” As Judge Garwood noted in his opinion:

In fact, the text of the Constitution, as a whole, strongly suggests that the words, “the people” have precisely the same meaning within the Second Amendment as without. And, as used throughout the Constitution, “the people” have “rights” and “powers,” but federal and state governments only have “powers” or “authority,” never “rights.”⁸

Under the 14th Amendment, the Bill of Rights is incorporated onto the states. Robert A. Levy, who is a constitutional scholar with the CATO Institute, wrote: “But the Second Amendment, like the First and Fourth Amendments, refers explicitly to “the right of the people.”⁹ To quote Judge Garwood: “All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans.”¹⁰

The vast historical evidence in support of the original-intent view of the Second Amendment cannot be fully explained in this short policy BRIEF, but Judge Garwood’s opinion provides a comprehensive and decisive overview. In addition, the *Federalist Papers* and other writings from the American Founding show that the intent of the Amendment was quite clear.

The decision in the *Parker* case will be a fundamental chapter in the history of the Second Amendment and the right of Americans to keep and bear arms and to defend themselves, but it will also be important in the realm of judicial activism. Will the DC Court of Appeals uphold the original intent or use judicial tyranny to uphold an obviously unconstitutional law?

The Washington D.C. gun ban also raises additional policy questions. Do guns foster or prevent more crime? Do concealed-carry laws do more good than harm? Not enough space is allowed to give proper attention to these fundamental questions in this BRIEF, but reading *The Bias Against Guns: Why Almost Everything You’ve Heard about Gun Control is Wrong* and *More Guns, Less Crime: Understanding Crime and Gun Control Laws* should be mandatory reading for all citizens concerned with freedom and security. Both are written by John R. Lott, a policy scholar, who has written significantly on gun control issues.

Charlton Heston, former President of the National Rifle Association, always said that the Second Amendment was our first freedom, and true security relies in this Amendment. The Founders understood the importance of this sacred and enduring right, a right reserved to all law-abiding citizens.

(Endnotes)

¹ Matt Apuzzo, “Scope of 2nd Amendment Questioned,” The Associated Press, December 7, 2006, <<http://www.washingtonpost.com/wp-dyn/content/article/2006/12/07/AR2006120701001>> (December 11, 2006).

² Kermit L. Hall (ed.), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992, pg. 763.

³ Ibid.

⁴ Judge Sam R. Cummings, “Written Opinion in *US v. Emerson*,” <http://www.txnd.uscourts.gov/pdf/NotAblecases/emerson_2.pdf> (September 1, 2006).

⁵ Judge William L. Garwood, “Written Opinion in *United States v. Emerson*,” <<http://www.ca5.uscourts.gov/opinions/pub/99/99-10331.cro.wpd.pdf>> (December 12, 2006).

⁶ Apuzzo.

⁷ John Ashcroft, letter to James Jay Baker, May 17, 2001 <<http://www.nrila.org/media/misc/pryorlet.pdf>> (December 12, 2006).

⁸ Garwood.

⁹ Robert A. Levy, “Oversight hearing on the District of Columbia’s gun control laws,” CATO Institute, <<http://www.cato.org/testimony/ct-r1062805.html>> (December 12, 2006).

¹⁰ Garwood.

John R. Hendrickson is a Research Analyst with Public Interest Institute.

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