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COMMENTARY

Second-Amendment Showdown

By MIKE COX
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The Supreme Court has agreed to take up a case that will affect millions of Americans and could also have an impact on the 2008 elections. That case, *Parker v. D.C.*, should settle the decades-old argument whether the right "to keep and bear arms" of the Constitution's Second Amendment is an individual right -- that all Americans enjoy -- or only a collective right that states may regulate freely. Legal, historical and even empirical reasons all command a decision that recognizes the Second Amendment guarantee as an individual right.


The amendment reads: "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." If "the right of the people" to keep and bear arms was merely an incident of, or subordinate to, a governmental (i.e., a collective) purpose -- that of ensuring an efficient or "well regulated" militia -- it would be logical to conclude, as does the District of Columbia -- that government can outlaw the individual ownership of guns. But this collective interpretation is incorrect.

To analyze what "the right of the people" means, look elsewhere within the Bill of Rights for guidance. The First Amendment speaks of "the right of the people peaceably to assemble . . ." No one seriously argues that the right to assemble or associate with your fellow citizens is predicated on the number of citizens or the assent of a government. It is an individual right.

The Fourth Amendment says, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." The "people" here does not refer to a collectivity, either.

The rights guaranteed in the Bill of Right are individual. The Third and Fifth Amendments protect individual property owners; the Fourth, Fifth, Sixth and Eighth Amendments protect potential

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individual criminal defendants from unreasonable searches, involuntary incrimination, appearing in court without an attorney, excessive bail, and cruel and unusual punishments.

The Ninth Amendment protects individual rights not otherwise enumerated in the Bill of Rights. The 10th Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Here, "the people" are separate from "the states"; thus, the Second Amendment must be about more than simply a "state" militia when it uses the term "the people."

Consider the grammar. The Second Amendment is about the right to "keep and bear arms." Before the conjunction "and" there is a right to "keep," meaning to possess. This word would be superfluous if the Second Amendment were only about bearing arms as part of the state militia. Reading these words to restrict the right to possess arms strains common rules of composition.

Colonial history and politics are also instructive. James Madison wrote the Bill of Rights to provide a political compromise between the Federalists, who favored a strong central government, and the Anti-Federalists, who feared a strong central government as an inherent danger to individual rights. In June 1789, then Rep. Madison introduced 12 amendments, a "bill of rights," to the Constitution to convince the remaining two of the original 13 colonies to ratify the document.

Madison's draft borrowed liberally from the English Bill of Rights of 1689 and Virginia's Declaration of Rights. Both granted individual rights, not collective rights. As a result, Madison proposed a bill of rights that reflected, as Stanford University historian Jack Rakove notes, his belief that the "greatest dangers to liberty would continue to arise within the states, rather than from a reconstituted national government." Accordingly, Mr. Rakove writes that "Madison justified all of these proposals (Bill of Rights) in terms of the protection they would extend to *individual* and minority rights."

One of the earliest scholars of the Constitution and the Bill of Rights, Supreme Court Justice Joseph Story, confirmed this focus on individuals in his famous "Commentaries on the Constitution of the United States" in 1833. "The right of the citizens to keep and bear arms," Story wrote, "has justly been considered, as the palladium of the liberties of republics, since it offers a strong moral check against the usurpation and arbitrary power of rulers . . ."

It is also important to consider the social context at the time of the drafting and adoption of the Bill of Rights. Our Founding Fathers lived in an era where there were arms in virtually every household. Most of America was rural or, even more accurately, frontier. The idea that in the 1780s the common man, living in the remote woods of the Allegheny Mountains of western Pennsylvania and Virginia, would depend on the indulgence of his individual state or colony -- not to mention the new federal government -- to possess and use arms in order to defend himself is ludicrous. From the Minutemen of Concord and Lexington to the irregulars at Yorktown, members of the militias marched into battle with privately-owned weapons.

Lastly, consider the empirical arguments. The three D.C. ordinances at issue are of the broadest possible nature. According to the statute, a person is not legally able to own a handgun in D.C. at all

and may have a long-gun -- even in one's home -- only if it is kept unloaded and disassembled (or bound with a trigger lock). The statute was passed in 1976. What have been the results?

Illegal guns continue to be widely available in the district; criminals have easy access to guns while law-abiding citizens do not. Cathy L. Lanier, Acting Chief of Police, Metropolitan Police Department, was quoted as follows: "Last year [2006], more than 2,600 illegal firearms were recovered in D.C., a 13% increase over 2005." Crime rose significantly after the gun ban went into effect. In the five years before the 1976 ban, the murder rate fell to 27 from 37 per 100,000. In the five years after it went into effect, the murder rate rose to 35. In fact, while murder rates have varied over time, during the 30 years since the ban, the murder rate has only once fallen below what it was in 1976.

This comports with my own personal experience. In almost 14 years as prosecutor and as head of the Homicide Unit of the Wayne County (Detroit) Prosecutor's Office, I never saw anyone charged with murder who had a license to legally carry a concealed weapon. Most people who want to possess guns are law-abiding and present no threat to others. Rather than the availability of weapons, my experience is that gun violence is driven by culture, police presence (or lack of same), and failures in the supervision of parolees and probationers.

Not only does history demonstrate that the Second Amendment is an individual right, but experience demonstrates that the broad ban on gun ownership in the District of Columbia has led to precisely the opposite effect from what was intended. For legal and historical reasons, and for the safety of the residents of our nation's capital, the Supreme Court should affirm an individual right to keep and bear arms.

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