

Thanks to the Second Amendment

by Robert A. Levy

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Predictably, the anti-gun crowd is apoplectic over *Parker v. District of Columbia*. The March 9 decision is nothing more than "constitutional fantasy," fumes Dennis Henigan, director of the Legal Action Project at the Brady Center. Perhaps the cold, bracing slap of constitutional truth has dulled his judgment.

The U.S. Court of Appeals for the D.C. Circuit made a historic proclamation in *Parker*. Senior Judge Laurence Silberman, joined by Judge Thomas Griffith, held that "the Second Amendment protects an individual right to keep and bear arms." That right is "not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia." And thus the D.C. Circuit became the first federal appellate court to overturn a gun regulation on Second Amendment grounds.

In a March 26 *Legal Times* commentary ("The Mythic Second," Page 60), Henigan makes a heroic effort to refute the D.C. Circuit's ruling by reading the Second Amendment out of the Constitution. Here's his bottom line: Nothing in the Second Amendment prohibits Washington, D.C., from banning the possession of garden-variety handguns by law-abiding citizens in their own homes for self-defense.

What right is protected by the Second Amendment? According to Henigan, it's only the right to bear arms in conjunction with actual militia service. Never mind that pistols, with an obvious military use, cannot be privately owned in the nation's capital for any purpose whatsoever. Where, then, would a D.C. resident obtain a weapon for militia service? Not to worry, argues Henigan. After all, "[n]o modern militia depends for its viability on privately owned arms," and the Second Amendment was not written to protect some "fantasy militia of which ordinary gun owners can be members without ever having to report for militia duty." There's so much wrong with this argument that it's hard to know where to start.

Able-Bodied and Armed

It's not individuals but the state itself, Henigan suggests, that will supply arms when needed for militia use. Interesting notion, but completely ahistoric.

First, three constitutional provisions limit the states' power over the militia. Article I, Section 8, charges Congress with "organizing, arming, and disciplining, the Militia." Article I, Section 10, says that "No state shall, without the consent of Congress, . . . keep troops in time of peace." Article II, Section 2, declares the "President shall be Commander in Chief . . . of the Militia of the several States." Hence, if the Second Amendment secures a state's right to arm the militia, it thereby repealed all three earlier provisions. That would certainly be a well-kept constitutional secret.

Second, consider the Supreme Court's pronouncement in *United States v. Miller* (1939): "When called for service these men were expected to appear bearing arms supplied by themselves." If militia members were expected to arm themselves, the Second Amendment cannot pertain to states arming militias. Indeed, if the latter were the essence of the Second Amendment, the Miller Court would never have

reached the question on which that case ultimately hinged: whether a sawed-off shotgun had military utility.

Third, Henigan's attempt to distinguish the founding-era militia from today's "modern militia" is plainly incorrect. The Modern Militia Act, 10 U.S.C. §311(b), provides that the militia comprises "all able-bodied males" at least 17 years old and less than 45 years old who are (or have declared their intent to become) citizens and all female citizens who are members of the National Guard. The act goes on to define two classes of militia: "the organized militia," which consists of the National Guard and the Naval Militia, and "the unorganized militia," which consists of everybody else.

In *Silveira v. Lockyer* (2003), 9th Circuit Judge Andrew Kleinfeld put it this way: The militia "is like the jury pool, consisting of 'the people,' limited, like the jury pool, to those capable of performing the service." Silberman agreed: Enrollment in the founding-era militia involved no more than "providing one's name and whereabouts to a local militia officer — somewhat analogous to our nation's current practice of requiring young men to register under the Selective Service Act."

Not a Standing Army

Henigan rejects the notion of an "unorganized" militia because it supposedly "runs head-on into the Second Amendment's reference to a 'well-regulated' militia." Instead, Henigan insists (quoting Noah Webster) that the militia means "able-bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises." While that's certainly an accurate description of an organized militia — the National Guard, for example — it bears no resemblance to the unorganized militia mentioned in the Modern Militia Act or the original 1792 Militia Act.

As for the term "well-regulated," Judge Silberman explained in *Parker* that it means "properly supplied with arms and subject to organization by the states." In its 18th-century context, "well-regulated" didn't mean heavily regulated, but rather properly regulated — in other words, trained and equipped with citizen-furnished weapons so that the organized component of the militia would not become too powerful.

The Framers feared and distrusted standing armies. In granting Congress near-plenary power over the militia, they realized that a select, armed subset of organized militia — such as today's National Guard — might be equivalent to a standing army. So they wisely crafted the Second Amendment to forbid Congress from disarming other citizens, thereby ensuring the existence of a "well-regulated" militia, neither government-organized nor government-armed.

These arguments are supported by an overwhelming majority of modern legal scholars, from Yale's Akhil Amar to Harvard's Alan Dershowitz and Laurence Tribe. They acknowledge that the Second Amendment secures an individual right not limited to militia service.

One Obvious Purpose

But Henigan and his Brady Center colleagues reject those constitutional authorities. Like others who have relied on *Miller*, Henigan misinterprets the Supreme Court's broad justification of the Second Amendment. "With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces," wrote Justice James Clark McReynolds, "the declaration and guarantee of the Second Amendment were made."

While recent scholarship has cast considerable doubt on that narrow conception of the Second Amendment, Judge Silberman knew he was bound by *Miller*. Not a problem. Silberman lucidly explained: "Preserving an individual right was the best way to ensure that the militia could serve when called." Banning private ownership of weapons would have "a deleterious, if not catastrophic, effect" on the militia's readiness.

Henigan doesn't buy it. He asks, "If the Framers meant to guarantee a right to be armed for purposes other than militia service [such as hunting and self-defense], why did they include the militia language at all?" And "why didn't the *Miller* Court address the suitability of a short-barreled shotgun for [nonmilitia] purposes?" Silberman's answer was straightforward: The right to keep and bear arms pre-existed the Constitution and "was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they [might] perform for the state."

Thus, the prefatory clause of the Second Amendment is merely explanatory; it offers one rationale for the right to keep and bear arms, but it does not foreclose others. Under *Miller*, a weapon qualifies for Second Amendment protection only if it has potential militia use. But once qualified, the weapon may also be used privately, for hunting and self-defense.

Compare the free-press clause of the 1842 Rhode Island Constitution: "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments of any subject." That syntax — not unlike the Second Amendment's — surely does not mean that the right to publish one's sentiments protects only the press. It protects "any person," and one reason among others that it does so is that a free press is essential to a free society.

No Personal ICBM

Finally, Henigan raises this concern: If the Second Amendment's protection rested on the military utility of the weapons, there would be "no principled basis" to deny protection to private ownership of hand grenades, bazookas, and surface-to-air missiles.

That complaint should be directed at Justice McReynolds, not Judge Silberman. It is *Miller* that establishes military use — mistakenly in my view — as a pre-condition for Second Amendment protection.

Better understood, the Second Amendment establishes a presumption that individuals have a right to possess a firearm. Like free speech under the First Amendment, the rights secured by the Second Amendment are not absolute. Regulations — subject to strict constitutional scrutiny — can clearly be imposed on some weapons (e.g., surface-to-air missiles), some persons (e.g., pre-teens), and some uses (e.g., murder).

Miller has done little to illuminate and much to mystify the meaning of the Second Amendment. But Henigan is dead wrong when he contends that *Parker* and *Miller* cannot be reconciled. The core holding of *Miller*, stripped of confusing clutter, goes like this: "In the absence of any evidence tending to show that possession or use of a [sawed-off] shotgun . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

Parker is entirely compatible with that holding. Pistols self-evidently bear "some reasonable relationship to the preservation or efficiency of a well-regulated militia" — they have been carried into battle by American troops in every conflict since the Revolutionary War.

To be fair, Dennis Henigan gets one thing right: "[V]iolent gun crime is on the rise again" in the wake of the Brady Act's passage. That should tell us something about the efficacy of gun-control laws. From a policy perspective, those laws don't work. The nation's murder capital, Washington, D.C., is a perfect example.

But more important, an outright ban on all handguns is blatantly unconstitutional. It's time for the Supreme Court to set the matter straight.

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