The Federalist Society Online Debate Series

Parker v. District of Columbia: DC Gun Ban Case

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Earlier this year, the U.S. Court of Appeals for the District of Columbia Circuit ruled in *Parker v. District of Columbia* that the Firearms Control Regulations Act of 1975 (a local law that effectively bars District residents from owning handguns) violates the Second Amendment of the U.S. Constitution. In doing so, the Court became the first federal appeals court in the United States to strike down a gun control law for reasons based on the Second Amendment, and the second to interpret the Second Amendment as protecting an individual right to bear arms (the first was the 5th Circuit 2001 decision, *United States v. Emerson*). The District has announced sought Supreme Court review on the 4th of September, and the plaintiffs who brought the challenge have announced that they will support Supreme Court review as well, which it is widely believed the Supreme Court will grant. A panel of experts including Ohio State professor **Saul Cornell**, University of Tennessee Law professor **Glenn Reynolds**, Legal Director of the Brady Center to Prevent Gun Violence, **Dennis Henigan**, Executive Director of the Educational Fund to Stop Gun Violence, **Joshua Horwitz**, and lawyers for the plantiffs in *Parker*, **Alan Gura** (Gura & Possessky, PLLC.), **Bob Levy** (Cato), and **Clark Neily** (the Institute for Justice) predict the outcome of the case, and debate about the Second Amendment's relation to the right to bear arms.

The debate is formatted as an unedited email exchange amongst the participants and is not intended to reflect the views of the Federalist Society.

Saul Cornell

Although one can not predict with any degree of certainty if the Supreme Court will grant cert. in Parker, the odds do seem pretty good. Of course, one wonders if the Supreme Court really wants to get mixed up in yet another contentious issue in American political life. If the Court takes the case the question of how it is likely to rule raises a host of other issues. Although it would be nice to think that the Court will make use of the kinds of arguments that academics love to debate, I suspect that these will not be central to the actual outcome. My own view is that the Court will take the case and it will produce multiple opinions. I expect that the court will be divided in predictable ways and that the majority decision will stake out some pragmatic middle ground. I would guess that most, if not all of the District's existing law, will pass constitutional muster.

Alan Gura [Picture Unavailable]

Parker is a compelling case precisely because it is so narrow, presenting no "middle ground." The laws at issue are not complicated – the city bans guns. It bans all guns to all law abiding adult citizens, under virtually all circumstances, all the time. If, as I expect the Supreme Court will confirm, the Second Amendment guarantees an individual right to arms, then the D.C. Circuit will be affirmed. The Court isn't in the business of re-writing the city's laws to create something that it believes might be "pragmatic." And the Court avoids answering questions not actually before it, especially unasked constitutional questions, so it is doubtful the Court will seek to answer all possible Second Amendment questions that might arise in cases challenging nuanced regulations rather than, as we have here, an outright prohibition. *Parker* should take prohibition off the table. Whether it helps set a standard for measuring regulations is unclear.

Saul Cornell

In Mr. Gura's own brief in *Parker* he states very clearly that the District does not ban all guns, but rather that the District effectively bans hand guns. Thus, Gura's claim that this is a clear case of gun prohibition is false. What we are talking about is something close to ban on a particular class of weapons. Even if one accepted the individual rights view of the Second Amendment, a controversial claim at best, why would hand guns enjoy Second Amendment protection? During the Founding era the only mention of hand guns in militia laws relates to horsemen's pistols. I have looked at Mr. Gura's brief and I don't see any members of the DC cavalry among his clients. Perhaps he might explain why hand guns ought to enjoy any Second Amendment protection under any theory of the Second Amendment: individual, collective, or civic?

Alan Gura [Picture Unavailable]

You should read our brief more carefully, in particular, pp. 58-60, explaining how D.C. Code 7-2507.02, banning all functioning guns, violates the Second Amendment. The D.C. Circuit understood our argument quite well: "As appellants accurately point out, § 7-2507.02 would reduce a pistol to a useless hunk of 'metal and springs.'" *Parker v. Dist. of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007). One of the plaintiffs, Gillian St. Lawrence, is suing for her right to have a functional shotgun. Handguns are protected by the Second Amendment because they are weapons that people might "suppl[y] by themselves and [are] of the kind in common use." *United States v. Miller*, 307 U.S. 174, 179 (1939). The fact that handguns were, in fact, used by citizens showing up for militia duty tends to prove that they are covered by the *Miller* test. Handguns plainly have legitimate use in the hands of law abiding individuals as well as military use. Even collectivist judges have agreed handguns pass the *Miller* test. See *Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1942). Why do you claim the

individual rights interpretation is "controversial, at best?" Isn't it known as the "standard" model of interpreting the Second Amendment? Or are Laurence Tribe, Alan Dershowitz, Akil Amar, Eugene Volokh, Sanford Levinson, William Van Alstyne, et al., not given to "use...the kinds of arguments that academics love to debate?"


Glenn Reynolds

I'm going to go out on a limb here and predict that the Supreme Court will deny certiorari on this case. I think that's likely because of the difficult position the Court would be placed in if it failed to find an individual right to arms under the Second Amendment. As Prof. Mike O'Shea wrote Concurring Opinions: How many Americans would view *District of Columbia v. Parker* as the most important court case of the last thirty years? The answer must run into seven figures. The decision would have far-reaching effects, particularly in the event of a reversal. Here is one way to think about the message the Supreme Court would be sending if it reversed the D.C. Circuit on the merits in *Parker* . . . That's a comparison between the Court's handling of the enumerated rights claim at issue in *Parker*, and its demonstrated willingness to embrace even non-enumerated individual rights that are congenial to the political left, in cases like *Roe* and *Lawrence*. "So the Constitution says *Roe*, but it doesn't say I have the right to keep a gun to defend my home, huh?" The Court's jurisprudence of unenumerated rights (with which I'm largely in agreement, by the way) would make it politically very difficult for the Court to eviscerate a clearly enumerated right to which many Americans attach great importance. At the same time, I don't think the Court is willing to affirm in *Parker*. If I'm right, a denial of certioriari is the only way for the Court to avoid a very difficult situation.

Dennis Henigan

The Second Amendment issue is whether the individual asserting the protection of the Amendment is engaged in the keeping and bearing of arms in connection with a well regulated militia, not whether a particular kind of weapon is constitutionally protected *per se*. It is interesting that Mr. Gura argues that handguns are constitutionally protected because they "were, in fact, used by citizens showing up for militia duty." Of course, none of his clients in the *Parker* case use handguns, or seek to use handguns, in connection with militia duty because there exists no duty that requires them to do so.

It is true that in *U.S. v. Miller*, the Supreme Court decided that the defendants' interstate transport of a sawed-off shotgun was not protected by the Second Amendment, based on the absence of evidence that such a gun can serve militia purposes. This was due to the procedural posture of the case. The case was presented on demurrer to the indictment, which contained facts about the nature of the gun possessed by the defendants (such facts being essential to an indictment under the National Firearms Act), but contained no facts about whether the defendants had any connection to a well regulated militia. This does not mean that the Supreme Court in *Miller* was adopting the absurd position that private possession of military arms is constitutionally protected, even by someone with no connection whatever to a well regulated militia. The Court's reliance on the nature of the gun to decide the specific case before it in *Miller* was a specific application of the Court's more general interpretation of the meaning of the Amendment as clearly laid out in the *Miller* opinion. The Supreme Court expressly held in *Miller* that the "declaration and guarantee" of the Second Amendment "must be interpreted and applied" according to the purpose of assuring the effectiveness of the militia forces referenced in Article I, Section 8 of the Constitution. Thus, according to *Miller*, the entire Amendment, not simply the word "Arms", must be read in light of the purpose to ensure the viability of the well regulated militia.

For more on this, see the Brady Center's "rolling critique" of the DC Circuit's *Parker* opinion (particularly the first installment

entitled "Mangling Miller"), at www.bradycenter.org. One additional thought. The use of the term "standard model" to describe the "private purpose" view of the Second Amendment is the great conceit of the Second Amendment debate. Mr. Gura seems to suggest that the support given that view by Professors Tribe, Dershowitz, Amar, Volokh, Levinson, Van Alstyne, etc. entitles it to be considered the "standard model" of Second Amendment interpretation. Proponents of the "militia purpose" view, of course, can cite for support the writings of Professors Wills, Rakove, Bogus, Cornell, Schwoerer, Higginbotham, Farber, Dorf, Uviller, Merkel, etc. Are these scholars simply to be discounted? Are any of the "private purpose" proponents willing to renounce the term "standard model" to describe their views? The use of the term "standard model" has never been anything but an effort by the "private purpose" supporters to win the debate by simply declaring themselves the winners. Eleven circuits have ruled on the meaning of the Second Amendment and only two have adopted the "private purpose" view. Yet proponents of the minority judicial view continue to arrogate for themselves the term "standard model".

Alan Gura [Picture Unavailable]

Had *Miller* determined that individuals lack Second Amendment rights, the Court would not have bothered to ask whether the gun at issue was of the type that Mr. Miller could possess. To answer that question, the Supreme Court looked to the Second Amendment's (non-exclusive) militia-securing rationale. Holding that the people have a right to keep and bear those arms that are of the kind that would be in common use, and that they might find useful if called for militia duty, the Supreme Court remanded for a determination of whether sawed off shotguns would qualify. Had Mr. Miller lived to submit sufficient evidence on that question at trial, he would have kept his gun. The Second Amendment fulfills its militia-securing purpose by guaranteeing that the people have the right to keep and bear arms. But the government cannot abolish a constitutional right simply by promising never to invoke one of the rationales underlying the protection of the right. The individual rights interpretation of the

Second Amendment is the "standard model" because it is the only conclusion that can be drawn from reading the Second Amendment's plain text using the commonly accepted tenets of English grammar. The individual rights interpretation reflects not only the views of most modern scholars, but also the views of the Founders and all commentators for whom they were in living memory, as well as the various courts that had occasion to review the Second Amendment through the early part of the 20th century. Taking state supreme courts into account, the score from 1791 through today is not as lopsided in the collectivists' favor as Hennigan claims. But even if one refuses to acknowledge the individual rights model as the standard, it is quite a stretch to dismiss this view as "controversial, at best."

Saul Cornell

When considering the text of the Second Amendment one must begin with the role of preambles in 18th century constitutional texts. The preamble states the purpose of the text, and is not simply a justification clause as some modern scholars have suggested. Here is what Blackstone says about preambles or proemes:

"If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the fame nature and use is the comparison of a law with other laws, that are made by the fame legislator, that have some affinity with the subject, or that expressly relate to the fame point."

We next come to the meaning of the phrase “bear arms.” Apart from the odd usage of this term by Pennsylvania Anti-Federalists, there is little historical evidence to support the claim that this

term was typically associated with the private use of arms. In fact, in virtually every use of the term tracked by scholars, which includes over a hundred examples, the phrase has a clear military meaning. Can Gura produce a hundred counter-examples? Gun rights advocates have been writing about this topic for forty years and have never been able to produce a comparable body of evidence to support their claims. I think it is time to settle this once and for all. If Gura can not produce such evidence I think we can consider the matter closed and the argument settled in favor of the militia based reading of this phrase. If you look at early constitutional commentators such as Joseph Story it is hard to see how you could claim that they support Gura's view of the Second Amendment. Here is what Story said:

"The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. 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."

The entire focus of this passage is on the right to bear arms in a well regulated militia. Story says nothing about private purposes. Indeed, Story clearly talks about regulation in the sense of legal control and bemoans that regulation has gotten lax. The claim that all early commentators on the Second Amendment supported the individual rights view is both anachronistic and just silly.

Glenn Reynolds

Brannon Denning and I wrote an article on *Miller* a while back for the Law and Contemporary Problems symposium. (The article is available for free download here from SSRN.) I think it's quite difficult to argue that the *Miller* case stands for something other than an individual right to arms. It's a fair criticism to say that the case isn't terribly clear, but it's also true that it's not as unclear as is sometimes supposed. Despite the fact that only the Federal government was represented in the case, the Supreme Court rejected a claim that the Second Amendment didn't protect an individual right, and instead decided the case on the much narrower ground that a sawed-off shotgun wasn't part of the "ordinary military equipment," and hence couldn't be presumed to be the kind of weapon protected by the Second Amendment. *Miller* is thus notable more for what it did not say than for what it did.

Alan Gura [Picture Unavailable]

So we should ignore those parts of the Constitution that do not "establish justice" or "ensure domestic tranquility?" And if a court determines Cornell's latest book doesn't "promote progress," will he lose his copyright? Blackstone's quoted statement about the utility of preambles contains its own preamble: "If words happen to still be dubious. . ." What if words are not dubious? What if they are crystal clear, e.g., "the right of the people to keep and bear arms shall not be infringed?" "Bear arms" was frequently used in a non-military context. Just because soldiers can "bear arms" doesn't mean that all usage of "bear arms" is exclusively military, any more than "wear boots" would be exclusively military because one might find references to soldiers who "wear boots." Rebutting this logical fallacy doesn't require a hundred examples. One suffices plenty. James

Madison, the Second Amendment's author, introduced a bill in Virginia's legislature, drafted by Jefferson, that would have punished a game violator if he were to "bear a gun out of his inclosed ground, unless whilst performing military duty." See A Bill for Preservation of Deer (1785), in 2 *The Papers of Thomas Jefferson* 443 (J. Boyd ed.1950-1982). Of course our case has little to do with bearing arms, our clients are interested in keeping them. Is "keep" also an exclusively military term? Prof. Cornell's reading of Story is strained. Story is plainly stating that individuals should keep private arms to dissuade the government from acting on tyrannical impulses, and resist the government if it does indeed become tyrannical. Story decries a perceived lack of interest in the people keeping guns and practicing with them on a regular basis. He'd be rightly proud of our clients' efforts. It is spurious to suggest that Story bemoans the lack of government regulation over firearms.

Saul Cornell

Mr. Gura clearly can not produce any hard evidence to support his claim that the phrase bear arms was typically used in a non-military context in the 18th century. Instead, he cites a law in which the phrase "bear a gun" is used. Bearing a gun and bearing arms are obviously not the same type of activity. A Quaker might bear a gun, but Quakers did not bear arms. (The *Parker* Court simply misrepresented the facts about Quaker views on this matter. Quakers opposed hunting for sport, but not hunting for food.) Mr. Gura then suggests that there is a distinct right to keep arms apart from bearing them. Can he produce any constitutional text from the Founding era which defines a distinct right to keep arms apart from bearing them? I suppose when Mr. Gura orders bread and butter he does not care if only the butter or the bread arrives. The rest of us expect that bread and butter is not the same as bread or butter.

Alan Gura [Picture Unavailable]

Madison's statute plainly described bearing a "gun" both in a civilian context, and "whilst performing military duty." So under Professor Cornell's theory, "bearing guns" can refer to either civilian or military use, but "bearing arms" can only refer to the military. Why? If the word "arm" is the exclusive military hook, what about "armed robbery?" Is that something that only occurs while soldiering?

Pennsylvania's 1776 Constitution, and Vermont's Constitution of the following year, both decreed "That the people have a right to bear arms for the defence of themselves and the State." We don't need ninety-seven more examples to debunk the nonsense that "bearing arms" admits of no interpretation other than military usage.

The Professor also moves the goal posts in discussing "keep." First we're told that "bearing arms" is a military term. Pointing out that the Second Amendment also secures the right to "keep" arms, we're now told that the military term is "keeping and bearing arms." But since when is "keep" a primarily military term? If "bearing arms" is exclusive to the military, and the Amendment references only military activity, then "keep" must be surplusage. It isn't. Sam Adams urged "that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . ."

It is, in fact, possible to order bread, but not butter. I've done it many times. It's also possible to order coffee with either cream or sugar, but not both. If the question is framed as seeking a package deal, then a partial delivery is disappointing. But the Constitution is *a la carte*. Our clients are only seeking to keep guns in their homes. Likewise, the First Amendment guarantees "the right of the people [there's that phrase again] peaceably to assemble, and to petition the Government for a redress of grievances," but it's possible to exercise one right without the other. The Eighth Amendment prohibits "cruel and unusual punishment." Under Prof. Cornell's "bread and butter" theory, the

government could order that all inmates be cruelly tortured, because torture would not then be "unusual." Somehow I doubt that argument would get very far.

Saul Cornell

Citing Pennsylvania's radical constitution of 1776 as proof of what the Second Amendment might have meant presents a number of problems. That document was written by the men who would become radical Anti-Federalists in 1788 and who were defeated when they ran for office in the First Congress. When he was working on the Bill of Rights Madison did not even consider the text written by these men, the Dissent of the Minority. Yet, even if one were to take this radical tradition as the true guide to the meaning of the Second Amendment, Gura has simply got the Pennsylvania tradition wrong. The Pennsylvania provision on arms bearing does not protect a right of each citizen to bear arms in defense of himself and the state. This new formulation of the right to bear arms only emerged in the Jacksonian era and never became the dominant model. The 1776 Constitution protects a right of the people to bear arms in defense of themselves and the state. The same document also says: "That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.' Both of these clauses use the phrase right of the people in an 18th century sense which was distinctly civic/ collective in spirit. Gura and others have also ignored the first mention of the term bearing arms in the Pennsylvania Constitution.

"That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of

his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good."

Again, if we follow Blackstone, not Gura, then we need to read the phrase bear arms in both clauses in the same way. Since one can not be forced to bear arms in individual self defense, this provision has to be read in the orthodox military sense. Moreover, the Pennsylvania Constitution provided a separate provision protecting the right to hunt. If the arms bearing provision protected hunting there would have been no need to include this other provision. Once again, the history clearly contradicts Gura's claims. As far as Professor Reynolds' claims about *Miller* go there is a small historical problem with his argument. Every contemporary report of the *Miller* case described it as protecting a collective or militia-based view of the Amendment. Which is a better guide to *Miller*: contemporary reactions or Glenn's modern view which only emerged 70 years later?

Bob Levy

Regarding Dennis Henigan's assertion that the key Second Amendment question is whether an individual is keeping and bearing arms "in connection with a well regulated militia":

1. The *Miller* Court noted that the "Militia comprised all males physically capable of acting in concert for the common defense." As Judge Kleinfeld put it in Silveira: The "militia is like the jury pool, consisting of 'the people,' limited, like the jury pool, to those capable of performing the service." In other words, "militia" means the people,

generally possessed of arms, which they knew how to use – not a formal military group separate from the people at large.

2. The Modern Militia Act provides that the "militia" comprises "all able-bodied males at least 17 years of age and … under 45 years of age [and] female citizens … who are members of the National Guard." The Act goes on to state that "the classes of the militia are (1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of [all other members]." Plainly, in referring to the "Militia," the Second Amendment means an informal, citizen-armed force, not the National Guard, which the Framers would have considered equivalent to a standing army.

3. The Second Amendment says that "the right of the people to keep and bear Arms, shall not be infringed." It does not create or grant the right; instead, it prevents a right that already existed from being infringed. Where did the right originate? The right to keep and bear arms originated from our common law heritage and our natural rights. The right pre-dated the Constitution and pre-dated government-sponsored militias. Thus, the right could not have been limited to service in the militia. It entailed, among other things, self-defense and hunting – common, lawful, private uses of weapons before the formation of federal and state governments. Once those governments were formed, the use of weapons was expanded to include militia service.

Regarding Dennis Henigan's characterization as "absurd" the notion that "private possession of military arms is constitutionally protected":

1. According to the Militia Act of 1792, "every citizen so enrolled [in the militia] and notified shall, within six months thereafter, provide himself with a good musket or firelock [or rifle]."

2. *Miller* made the same point: "When called for service these men were expected to appear bearing arms supplied by themselves." If militia members were to arm themselves, the Second Amendment could not mean they would be armed by the

states.

3. If the Second Amendment did not apply to privately owned weapons, the *Miller* Court would never have reached the question on which that case ultimately hinged: whether the sawed-off shotgun, privately owned by *Miller*, had military utility.

Regarding Saul Cornell's insistence that preambles are binding laws.

1. Prefatory explanations, while interesting, have never been held to limit or eviscerate the plain operative meaning of the constitutional text.

2. As a matter of simple grammar, one reason offered to support an action does not foreclose other reasons. If the First Amendment were worded, "A well-educated electorate being necessary to the security of a free state, Congress shall make no law abridging the freedom of speech," it would be grammatically illogical to claim that free speech rights are limited to registered voters or election-campaign material.

3. 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 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 protects any person is that a free press is essential to a free society.

4. The prefatory clause of the Second Amendment is no different. It is merely explanatory; it offers one rationale among others for the right to keep and bear arms. Membership in a well-regulated militia is a sufficient but not necessary condition to the exercise of our right to keep and bear arms. Under *Miller*, a weapon qualifies for Second Amendment protection only if it has potential militia use. But once qualified, the weapon can also be used privately, for self-defense and hunting.

Saul Cornell

If we want to make originalist arguments, then you need to read the texts in light of 18th century rules of constitutional interpretation. If we are not making originalist arguments, which is fine with me, then we ought to be talking about this debate in different terms. Which is it? Or do we use originalist arguments when they produce the end result we desire and then abandon them when they don't? Levy and Gura seem to want to have it both ways.

Alan Gura [Picture Unavailable]

Moving the goal posts again. It doesn't matter whether Madison agreed with all of the political views espoused in the Pennsylvania Constitution. We were discussing whether the phrase "bearing arms" was used in a non-military context. Clearly, it was. It doesn't matter whether the Pennsylvania (and Vermont) framers were Quakers, radicals, anarchists, or vegetarians. They spoke English.

In English, then and now, "the people have a right to bear arms in defence of themselves and the State" suggests that individual human beings have a right to possess guns so they can defend themselves with firearms, and this is in addition to the rationale, separately espoused, that people have a right to possess guns so they would be in a position to defend the state.

Harping on the anti-federalist bona fides of the Pennsylvania Constitution authors is self-defeating. Is Prof. Cornell seriously suggesting that the anti-federalists were MORE prone to use collectivist language than were the federalists?

If there is any radicalism here, it is the suggestion that "right of the people" was a collectivist phrase, not just within the Second Amendment, but generally. I take it, then, that Prof. Cornell believes we have no individual rights under the First and Fourth

Amendments, either? What's really interesting in this claim is that suddenly the militia clause has lost its collectivist influence. How else to get around the sticky problem that contemporary constitutions declared "That the people have a right to bear arms in defence of themselves," sans militia clauses.

But let's keep it simple and stick with the Pennsylvania Constitution, where Prof. Cornell thinks that "the people have a right" has only a collectivist meaning. Article XII: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments;" Collective? Article X: "That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure," Collective? Article XVI: "That the people have a right to assemble together." Collective?

Don't make excuses that the authors of this text lost an election, or weren't really influential, or were nuts. This is an American, English-language constitution from one of the leading states, purportedly written by the faction most suspicious of governmental authority.

Bob Levy

For varied reasons, Saul Cornell dismisses the Pennsylvania constitution as proof that “bear” has a non-military connotation. He cites, among other things, a separate Pennsylvania provision protecting the right to hunt. That, of course, is silly logic. The right to hunt could well entail protections that are far broader -- e.g., immunity from unreasonable restrictions on time, place, and manner -- than the right to keep and bear arms for the purpose of hunting.

More important, if Prof. Cornell doesn't like Pennsylvania, perhaps he could favor us with an explanation of the following 27

state provisions that use bear in a non-military context:

Alabama: That every citizen has a right to bear arms in defense of himself and the state.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question

Connecticut: Every citizen has a right to bear arms in defense of himself and the state.

Delaware: A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.

Florida: (a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ...Seventh: The right to bear arms in defense of themselves and of the State

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question

Missouri: That the right of every citizen to keep and bear arms

in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question

Nebraska: … the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes

North Dakota: All individuals … have certain inalienable rights [including the right] to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited

Oregon: The people shall have the right to bear arms for the defence of themselves

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed

Vermont: That the people have a right to bear arms for the defence of themselves and the State

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired

West Virginia: A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.

Wisconsin: The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose. 06).]

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied.

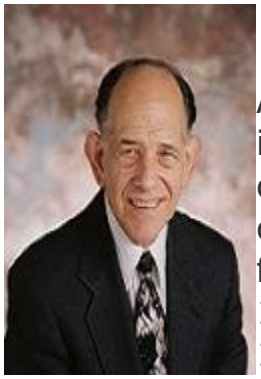
Alan Gura [Picture Unavailable]

Too bad there is not a single 18th century text explaining a "collective rights" theory of interpreting "the right of the people," "the people have a right," and the like.

The only rules of collectivist interpretation, hatched in the 20th century by gun prohibitionists, require the suspension of English grammar, followed by outlandish *ipse dixit* assertions about the meaning of ordinary English words. When faced with definitive contrary evidence, a new meaning is hatched for a different word.

Saul Cornell

Perhaps Bob Levy can explain how Alabama's 19th century constitution influenced America's 18th century constitutional tradition. Who is being silly and illogical here? In my prior post I pointed out that a new formulation for the right to bear arms emerged in the 19th century and that it clearly asserted an individual right. Perhaps Levy can also explain why a new formulation emerged if the old formulation meant the same thing? The emergence of a new language about the right to bear arms in the 19th century is one of the strongest arguments against the view that this was the original understanding. Nobody to my knowledge has ever denied that some state constitutions very clearly adopted the new 19th century model instead of the older 18th century one. The problem with *Parker* is that it got all of this wrong. Even if you support the outcome in *Parker* you can't seriously condone such mistakes without adopting an Orwellian view of history. Originalism just can't support the individual rights view without cooking the evidence.



Bob Levy

A formulation qualifies as a "new" formulation only if it alters an earlier formulation. Here are 10 state constitutions that used "bear" in a non-military context prior to 1850. What earlier military formulations of "bear" were being amended? (AL 1819, CT 1818, IN 1812, KY 1792, MI 1835, MS 1817, MO 1820, OH 1802, TX 1836, VT 1777.)

Dennis Henigan cites the following statement from *Miller* as dispositive: "[T]o assure … the effectiveness of [militia] forces, the declaration and guarantee of the Second Amendment were made. It must be interpreted … with that end in view." As Judge Silberman explained, that statement from *Miller* can easily be reconciled with the DC Circuit's view of *Parker*: "Preserving an

individual right was the best way to ensure that the militia could serve when called..... A ban on the use and ownership of weapons for private purposes, if allowed, would undoubtedly have had a deleterious, if not catastrophic, effect on the readiness of the militia."

And let's not forget the Federalist Papers on the right of individuals to be armed -- not as part of the military, but as a counterweight to the military: Alexander Hamilton wrote in Federalist No. 29: "[I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens." James Madison agreed. In Federalist No. 46, he declared that a standing army "would be opposed [by] a militia amounting to near half a million citizens with arms in their hands." Alluding to "the advantage of being armed, which the Americans possess over the people of almost every other nation," Madison continued: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."

Alan Gura [Picture Unavailable]

Prof. Cornell , please provide a single explanation, dating from the 18th century, of how a right is "collective." A single letter, speech, any kind of article or statement at all, that explains how a right, ANY right, is a "collective" right in the sense that it does not guarantee any individual freedom.

Surely, if everyone in the revolutionary era dismissed individual rights in favor of collectivism, we'd see at least one such example. After all, everyone knows the colonists rebelled against the king because he was too permissive with the individual liberties, right?

As we've discussed, Vermont and Pennsylvania explicitly declared a personal right to bear arms in their 18th century constitutions. Ignoring these sources does not create a single 18th century example of collectivist thinking.

It is audacious to not only dismiss all evidence of the individual rights view, but, in the absence of any collectivist evidence, declare that collectivism was the operative mindset in revolutionary America. Collectivism, in the sense that the people express their group rights as an organized political body, is a distinctly Marxist (b. 1818) concept. There are constitutions based on such principles. Ours is not among them.

Saul Cornell

Well, we could start with Albert Gallatin's gloss on the1790 Pennsylvania Declaration of Rights in which he says:

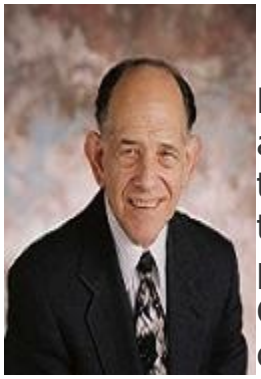
"The whole of the Bill [of Rights] is a declaration of the right of the people at large or considered as individuals." Gallatin clearly distinguishes between rights of the people at large or as individuals. Although Mr. Gura is fond of invoking Amar's authority, he seems to have not noticed that Prof. Amar's thesis is that the Second Amendment began as a collective right and only morphed into an individual right in the 19th century. Or is Amar only good authority when he supports Mr. Gura's own ideological preferences?

I note that Mr. Levy has truncated the Madison quote. (I fear this is very common in Second Amendment debate.) Here is the whole quote:

"Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable

than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone, they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia, by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it."

The Founding fathers knew the difference between an armed mob and a well regulated militia. It is citizens organized as a militia under the control of their states that is the proper check on tyranny.



Bob Levy

Prof. Cornell repeats that "It is citizens organized as a militia under the control of their states that is the proper check on tyranny." Yet, no fewer than 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." And Article II, section 2, declares the "President shall be Commander in Chief … of the Militia of the several States." Thus, if the Second Amendment secures states' rights to control their militias, it repealed all three earlier provisions. If that were the true intent of the Framers, it's certainly a well-kept constitutional secret.

Alan Gura [Picture Unavailable]

Prof. Cornell, please stay focused. We were discussing the Pennsylvania Constitution of 1776, not the Declaration of Rights contained in the 1790 version. It's easy to see why Prof. Cornell would like to forget about the first constitution -- that troublesome phrase, "the people have a right," is not present in the reworked version. Alas, the concepts are the same.

Which rights in the 1790 Pennsylvania Constitution would Gallatin have seen as "individual?" How about, "That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned." art. IX, sec. 21. Sure looks like an individual right. Especially considering the individual rights of "enjoying and defending life and liberty," art. IX, sec. 1, of worship, art. IX, sec. 3, of the press and speech, art. IX, sec. 7, of security against unreasonable search and seizure, art. IX, sec. 8, and the like.

As for the rights Gallatin would have seen as being "at large?" How about, "[the people] have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper." art. IX, sec. 2. "At large" is frequently used in the electoral context, and the Pennsylvania Declaration secured free and equal elections. Of course, that the people form their government "at large" does not mean that each individual does not enjoy a right to vote. And it certainly doesn't support the view that individual rights are incompatible with "the people's" rights, in the Soviet sense.

The most useful aspect of Prof. Cornell's argument is that he breathes life into the claims that if sophistry is used to imagine away the people's Second Amendment rights, then none of the people's other rights will remain secure for long. The "logic" used to define away the Second Amendment would be employed against the First, the Fourth, and so on. Here we see the collectivist shadow throw doubt upon the entire Pennsylvania Constitution, a document rich with individual rights which plainly influenced the federal Bill of Rights. And this is done without a

militia clause, and even with the text literally spelling out an individual right to bear arms. All on the flimsy pretext that an anti-federalist believed that government should be formed by the people.

As for Prof. Amar, I'd let him speak for himself. His ability to communicate with us today might be related to the fact that he's not of the 18th century. Still waiting for a single 18th century voice explaining how the Second Amendment right is to be read collectively.

Dennis Henigan

In response to Bob Levy and Alan Gura:

1. Levy cites the *Miller* Court's statement that the "Militia comprised all males physically capable of acting in concert for the common defense." He omits the next sentence, referring to the militia as "A body of citizens enrolled for military discipline." Enrolled by what? Military discipline imposed by what? The *Miller* Court clearly recognized the militia as inherently "organized". Of course, the Second Amendment refers not to the "militia", but to the "well regulated Militia." Levy's view cannot account for the inclusion of the modifier "well regulated". The Parker opinion is utterly incoherent on the nature of the militia. On the one hand, it says "there was no organizational condition precedent to the existence of the "militia" and that the term refers to "the raw material from which an organized fighting force was to be created" (similar to Levy's view); on the other, it says the militia was "all free, white, able-bodied men of a certain age who had given their names to the local militia officers as eligible for militia service." If individuals had to give their names to local militia officers to be eligible for the militia, then obviously the militia is inherently organized. By the way, which of Mr. Gura's clients have given their names to local militia officers as eligible for militia service? These folks are in a "well regulated Militia" that exists only in their own minds.

2. Levy notes the modern Militia Act, which distinguishes between the "organized militia" and the "unorganized militia". He then makes the facially implausible argument that the "unorganized militia" is far more similar to the "well regulated Militia" in the Second Amendment than the "organized militia". One can make this argument only by turning a blind eye to the term "well regulated". As developed in my 1989 Dayton article ("The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?") and as explicated with great care in Uviller and Merkel's book, *The Militia and the Right to Arms or How the Second Amendment Fell Silent*, the well regulated militia of 1792, in which privately owned guns were important in arming the militia, simply no longer exists. No longer is there a circumstance in which the people possess guns in connection with service in a real, as opposed to a fantasy, militia.

3. Levy cities the Militia Act of 1792 in support of his position. A government requirement that individuals possess certain guns as part of their duty to the government is the ultimate government regulation of guns. It deprives individuals of their own choice about ownership of firearms just as completely as a government ban on such ownership. Thus, the requirement in the Militia Act of 1792 that militia members acquire certain guns cannot support an argument that the Second Amendment guarantees a right to own guns for private purposes free from government interference. The Second Amendment guarantees the people the right to keep and bear arms in service to a well regulated militia. If instead of passing the Militia Act, Congress had decided not only against exercising its Article I power to arm the militia, but also had banned the possession and use of guns in the militia (thus precluding armed militias under the control of the states), it would have denied the people the right guaranteed by the Second Amendment. The Second Amendment ensures that the right to be armed in service to a militia is a "right of the people," protected against federal hostility, or distinterest, toward the militia. For various reasons explained by Uviller and Merkel, history has not been kind to this core idea of the Second Amendment, thus rendering it of no modern importance, except insofar as its meaning has been distorted and manipulated to

serve pro-gun interests.

4. The issue is not whether the Second Amendment applies to "privately-owned weapons" or state-supplied weapons. The Amendment applies to the possession and use of guns in connection with service in a well regulated militia, regardless of whether those weapons are privately-owned or not. In contrast to 1792, in 2007 no weapons are owned by private citizens in connection with militia service. And gun control laws typically exempt the modern military institution with the closest resemblance to the "well regulated Militia" of the Second Amendment, i.e. the National Guard. Therefore, if the true meaning of the Second Amendment is respected, modern gun control laws raise no Second Amendment issue.

5. Levy misrepresents what I wrote in my previous posting. I did not write that it was "absurd" that "private possession of military arms is constitutionally protected." I wrote that it was "absurd" to argue that "private possession of military arms is constitutionally protected, even by someone with no connection whatever to a well regulated militia." It is further absurd to suggest, as do Mr. Gura and the *Parker* court, that the Framers sought to ensure that the militia would be armed by guaranteeing the people the right to be armed for private purposes like hunting or self-defense. Guaranteeing a right to possess guns for private purposes would make the effective arming of the militia dependent on the uncertain choices of private citizens about whether to arm themselves and what arms to possess. If the First Congress thought, as claimed by the *Parker* court, that guaranteeing such a right was the "best way to ensure that the militia could serve when called," then why did it enact the Militia Act of 1792 forcing individuals to possess guns at government command?

6. Finally, it is unfortunate that much energy in the Second Amendment debate is consumed deciding whether the right guaranteed is properly labeled "individual" or "collective". To my mind, the issue is far more simple. The right clearly is guaranteed to "the people" * that, after all, is what it says. The issue is: What right is guaranteed to the people? The only

reading that gives meaning to all the words of the Amendment is that it gives the people the right to be armed in a well regulated militia. If the Framers had intended a broader right, they would have either omitted the language about the militia entirely, or adopted a wording more similar to that of the dissenting delegates at the Pennsylvania ratification convention, which referenced multiple purposes for the right to be armed, including "defense of...their own state, or the United States, or for the purpose of killing game...."

Bob Levy

Dennis Henigan has mangled the meaning of "well-regulated" to support his bizarre view that the only militia is an organized militia, despite explicit reference in the Militia Act to both an organized and unorganized component -- the latter consisting, in effect, of all persons physically able to serve in that capacity. As the D.C. Circuit explained in *Parker*, "well-regulated" means "properly supplied with arms and subject to organization by the states."

In its eighteenth-century American context, "well-regulated" signified that the militia would be equipped with citizen-furnished weapons so that it could serve as a counterweight to a standing army. The framers feared and distrusted standing armies, and realized, in granting Congress near-plenary power over the militia, 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, in part to forbid Congress from disarming ordinary citizens, thereby ensuring the existence of a "well-regulated" militia, one component of which would be manned by Americans bearing their own arms.

The act of giving "names to the local militia officers as eligible for

militia service" does not mean service in an organized militia -- any more than today's requirement for young men to register under the Selective Service Act means that all such registered men are serving in the U.S. military.

Hennigan notes that the Militia Act of 1792 required that individuals "possess certain guns as part of their duty to the government," which he characterizes as the ultimate government regulation of guns. Wrong. The requirement to possess certain guns is triggered only when an individual is "notified" to report for organized militia service, after which he has 6 months to obtain an appropriate weapon. Until then, no individual is required, but every individual is entitled, to possess a private firearm as part of his membership in the unorganized militia.

Josh Horwitz

I anticipate that the Supreme Court will grant certiorari because the *Parker* court struck down the challenged ordinance based on an interpretation of the Second Amendment that cannot be squared in any way with the Supreme Court's earlier rulings on the scope of the Amendment. While acknowledging that the Second Amendment protects a right that is necessary for preservation of the well-regulated militia, the Parker court also concluded that it protects a purely individual right to possess a firearm for the purposes of self-defense, hunting, and protection against the "depredations of a tyrannical government." The National Rifle Association urged this interpretation in their brief arguing that "[a] civilian population that is protected from the threat of disarmament contributes to the 'security of a free state' ... the very existence of an armed citizenry will tend to discourage would-be tyrants from attempting to use paid troops to 'pacify' the populace." In an email earlier today, Mr. Levy sides with the *Parker* court, trying to rework the Supreme Court's decision in *Miller* to make it fit this notion that the amendment was intended to protect a right to possess firearms for a variety of individual purposes: "[t]he prefatory clause of the Second Amendment is no different. It is merely explanatory; it offers one rationale among others for the right to keep and bear arms.

Membership in a well-regulated militia is a sufficient but not necessary condition to the exercise of our right to keep and bear arms. Under *Miller* a weapon qualifies for Second Amendment protection only if it has potential militia use. But once qualified, the weapon can also be used privately, for self-defense and hunting." The problem here is that the *Miller* case, and the historical record, do not support this notion, and with respect to the supposed individual right to have a firearm to be prepared for armed insurrection against a "tyrannical" government, the Supreme Court has specifically rejected it in *Presser v. Illinois*: Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. ...The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject." The right posited by the *Parker* court, the NRA and Levy, is a right that defies any regulation. How does government legislate for public safety without trampling on the Second Amendment if, once a weapon has been found to have a potential militia use (and that would include hand grenades, hand held bombs, machine gun, to name a few) its possession by an individual for militia, or self defense, or hunting, or armed revolt, must be respected? I can't predict what the Supreme Court will do with the D.C. ordinance, and hope it is upheld, but I do predict the Supreme Court will make clear that the militia purpose of the Amendment is determinative of the scope of the right it protects.

Bob Levy

Joshua Horowitz is wrong on two counts. First, he cites *Presser v. Illinois* for the proposition that the Second Amendment does not secure a right to keep and bear arms absent legislation to the contrary. But *Presser* simply involved a gun control ordinance by Illinois -- a ban on parading down public streets by a private, armed group.

The Court held that "The exercise of this power by the States is necessary to the public peace, safety and good order." But the key to the Court's holding was that the Second Amendment "is a limitation only upon the power of Congress and the National Government, and not upon that of the States." In other words, the doctrine of incorporation had not yet been recognized, and would not be for another 11 years. Thus, in 1886, when *Presser* was decided, the Bill of Rights could not be invoked against the states, only against the federal government. Although Presser has not been formally overruled, there is considerable doubt as to its current validity. In any event, incorporation is not an issue in Washington, DC, where *Parker* is now being litigated.

Second, Horowitz accuses me (and the D.C. Circuit) of advocating "a right that defies any regulation." The result, he says, would be constitutional protection for keeping and bearing "hand grenades, hand held bombs, machine gun, to name a few." Perhaps a more careful reading of Judge Silberman's opinion will allay Horowitz's concern. If Ms. Parker prevails, the D.C. government will not be foreclosed from regulating all uses and ownership of firearms. Judge Silberman noted that "the protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." Perhaps, he said, D.C. could justify concealed-carry restrictions, the registration of firearms, proficiency testing, and no gun possession by felons or minors. But an across-the-board ban on all handguns, in all places, for all residents, isn't "reasonable." In fact, it's not a regulation at all; it's an out-and-out prohibition. When America dealt with prohibition of a different sort in 1919, we implemented that ill-advised goal by amending the Constitution. And in that case, the Bill of Rights contained no express provision guaranteeing the right to consume alcoholic beverages.

Dennis Henigan

Bob Levy misreads the Second Militia Act of 1792. The requirement that each citizen "provide himself with a good

musket or firelock" is triggered not by notification to "report for organized militia service" (in Levy's words), but by the act of the "captain or commanding officer of a company" in enrolling the citizen, and notifying the citizen of his enrollment. In the words of the statute: "That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock...." The statute goes on to also require the citizen to "appear so armed, accoutred and provided, when called out to exercise, or into service...." The deadline for arming oneself for militia service is six months after notification of enrollment, not six months after being "called out for service," as Levy seems to think. Regardless of what triggers the duty to arm oneself, the critical point is that a right to be armed for non-militia purposes against government interference cannot be supported by the Militia Act of 1792, under which the government commanded citizens to be armed to serve the government's purposes. The Militia Act does, however, make it clear that the militia cannot be said to exist prior to some organization by the government, because "enrolling" citizens in the militia is an act performed by the "captain or commanding officer of a company." Levy uses the analogy to the Selective Service System, which simply raises the question: Which of the Parker plaintiffs have "registered" for the militia and with whom did they register? Even under Levy's concept, in no sense can the *Parker* plaintiffs be considered part of a "well regulated Militia". Finally, Levy and the Parker court simply stipulate, without support, that the term "well regulated" means "properly supplied with arms and subject to organization by the states." But the term used in the Second Amendment is "well regulated," not "subject to regulation". Under Levy's reading, a militia could be "well regulated" without actually being "regulated" at all. I doubt that's what the Framers had in mind.

Saul Cornell

Mr. Gura confuses civic republicanism with Marxist collectivism. Anyone familiar with modern scholarship on the Founding era would understand the difference between these two sets of ideas. The arms bearing provision of the Pennsylvania Constitution does not frame the right as an individual right. If it did it would not

pair it with the typical 18th century attack on standing armies and an affirmation of civilian control of the military. The entire provision is clearly about a militia based right. Nor can Mr. Gura's account deal with the other use of the phrase bearing arms in that text. "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto." This provision only makes sense if we are talking about a militia based right. The *Parker* Court's bizarre version of originalism, like the views of Mr. Gura, ought to make serious originalists cringe. If we can use any 18th century text written by a competent user of English at the time to reconstruct original meaning than this method is meaningless. For a text to have any probative weight in a serious originalist analysis it must represent the views of the typical rational man on the street or the generally accepted public meaning a term had in the Founding era. There is no way anyone who knows anything about the 18th century would claim that the Pennsylvania texts Gura cites fit these requirements. These were the views of one of the most radical minority voices in the 18th century. I think the time has come to give up the bad originalism and the even worse history that has clouded this debate and focus on the real issues in the case. Just for arguments sake let's adopt a living constitution argument that the Second Amendment has some how morphed into an individual right. The question is this: can you ban a single class of weapons and require that citizens store guns in a safe manner? Why would such a law fail to pass muster under virtually any theory of judicial scrutiny?

Bob Levy

Let's get this straight. There are two components of the militia:organized and unorganized. The currently effective Militia Act recognizes an "unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia."

There is no duty - none - for members of the unorganized militia to be armed. Indeed, if there were such a duty - which Dennis

Henigan calls the "ultimate government regulation of guns" -- each member who now finds himself disarmed by state and local gun laws would be violating federal law. That, in itself, would render the state and local laws invalid by terms of the Supremacy Clause. To my knowledge, Henigan's "ultimate government regulation of guns" has never been invoked to overturn a local gun control ordinance. The Militia Act of 1792, insofar as it imposed a duty to "appear armed, accoutred and provided, when called out to exercise, or into service," related to the organized, not the unorganized, component of the militia. The key question, of course, is not whether members of the unorganized militia have an obligation to be armed - they obviously do not - but whether they have a right to be armed.

Clark Neily

Though perhaps unintentionally, at the end of his post Prof. Cornell poses an interesting question regarding scope of power. The Constitution says nothing about automobiles, or indeed conveyances of any kind. Does this mean the government may ban all cars, trucks, motorcycles, bicycles, airplanes, etc. on a whim? Plainly not. Same thing with clothing, cooking utensils, and farm equipment. In every case, the government must have a valid reason for prohibiting or regulating the ownership of any given item. Sometimes that reason must be compelling; sometimes "substantial" is enough; and other times any non-insane reason at all will do. Unless Prof. Cornell is prepared to argue (and perhaps he is) that the text of the Second Amendment would have been understood by a "typical rational man on the street" to lessen -- indeed, eliminate altogether -- the constitutional protection accorded to "arms" as a class of personal property, then the entire debate reduces to a standard-of-review question: How strong a case must the government make when it forbids people from owning guns. Can we agree on that much? In other words, would Prof. Cornell and the other participants in this debate concede that Americans' constitutional right to own guns is at least as strong as their right to own cars, clothes, screwdrivers, and hot tubs?

Josh Horwitz

I wanted to refute a few assertions made by Mr. Levy in responding to my comments. First, he states "Although Presser has not been formally overruled, there is considerable doubt as to its current validity." Mr. Levy fails to cite any authority for his position and perhaps has missed the fact that the *Parker* court itself relies on *Presser* in footnote 13. That footnote references the Supreme Court's holding in *Cruikshank* and *Presser* that the Second Amendment constrains only federal action, citing to a number of subsequent cases to the same effect, and noting that it remains one of the provisions of the Bill of Rights not incorporated through the Fourteenth Amendment. Second, I find no comfort in Mr. Levy's reference to the Parker court's hypothetical examples of firearms restrictions that would potentially withstand scrutiny under its interpretation of the Second Amendment. The Parker court was not addressing a challenge to any such restriction and its comments in that regard are pure dicta. Nor does Mr. Levy explain how a registration requirement, for example, would be sustainable against a right to possess arms to rise up against a tyrannical government as posited by the *Parker* court. The NRA has historically opposed even mild firearms restrictions on the slippery slope theory - that is they are just a prelude to government taking away firearms. Perhaps Mr. Levy would like to analyze how the Parker court, given its reasoning, would actually reconcile a right to possess firearms to revolt against government tyranny, and a government mandated firearms registry, identifying who owns what firearms at what address. Finally, Mr. Levy simply evades my point about other types of "militia" arms. The Second Amendment protects a "right to keep and bear arms." The amendment does not distinguish between firearms and other arms. Mr. Levy posits that an individual right to possess weapons that have a "militia" use or lineage are protected by the Second Amendment. The *Parker* court holds that a ban on a class of firearms such as handguns offends this supposed right. On what principled basis would a court find that a ban on hand grenades or, for that matter, a ban on improvised explosive devices, does not infringe this "right"?

Alan Gura [Picture Unavailable]

We don't dispute that "bearing arms" has a military connotation when used in a conscientous objector clause. Disputing such military usage of "bearing arms" would be as silly as disputing that "bearing arms" has a purely individual connotation in constitutional provisions declaring "That the people have a right to bear arms in defence of themselves." Can government ban a single class of books? Perhaps if they're obscene or libelous, but not if they have common, legitimate value. Can government require that no books be opened at home, that no pens ever be uncapped? No. *Parker* presents identical questions in the context of articles explicitly protected by the Bill of Rights. Considering that Americans' plenary right to own items of personal property has never been questioned, the fact that guns are explicitly protected by the constitutional text makes the prohibitionist case here harder than, say, if the government were to ban automobiles or toaster ovens. With regard to incorporation, even Judge Reinhardt's collectivist opinion in *Silveira* noted that *Cruiskshank* and *Presser's* rejection of incorporation is "thoroughly discredited." And recognizing a right to ordinary guns no more sanctions hand grenades than does the First Amendent's free exercise clause protect ritual human sacrifice. Courts know how to draw these lines. *Miller's* protection of arms of the type that would be in common use is a good start. Giving life to constitutional rights can be a sticky business, but that's why we have judges. We don't throw out constitutional rights because judges claim their job is too hard. Note the fellow who claimed the 9th Amendment is "an inkblot" didn't get confirmed. Proponents of the collectivist theory ignore the mountain of statements by the Founders extolling the virtues of an individual right to bear arms, and then, without citing to a single example of a collectivist interpretation, claim that such a view would be the only one that could be held in the 18th century. The collectivist theory redefines the plain meaning of words, struggling to explain away all contrary usage. It is no accident that collectivists cannot find any contemporaneous sources to support their views or that their interpretation of the Second Amendment remains a perpetually moving target, subject to constant revision and refinement as fatally inconsistent facts

and reasoning come to light. Nor is it a coincidence that the collective-rights camp suffers constant defections by high-level scholars who credibly disclaim any personal interest in promoting guns or gun ownership. The simple fact is that the Second Amendment means what it says: Americans have a right to own guns.

Saul Cornell

Contrary to Mr. Gura's claims the scholarship on this topic has produced many examples to support the militia based view of the right to bear arms. Rather than trust Gura and Levy's modern gun rights readings of the 18th century constitutional tradition it would make more sense to give greater weight to what people in the 18th century said. Here is a good illustration of how Americans in the Founding era viewed this right:

"The Bill of Rights secures to the people the use of arms in common defense; so that, if it be an alienable right, one use of arms is secured to the people against any law of the legislature. The other purposes for which they might have been used in a state nature, being a natural right, and not surrendered by the constitution, the people still enjoy, and may continue to do so till the legislature shall think fit to interdict."

The fact that Americans in the Founding era made a decision to elevate one particular class of arms used for one particular purpose to the highest level of constitutional protection, does not mean that guns enjoy no protection. Rather it means that in the Founding era civilian guns were simply treated like any other type of property.

Mr. Gura's distorted view of the state of scholarly debate is just wrong. A number of the most prominent supporters of the individual rights view have in fact changed their views in light of recent scholarship. This is precisely why the idea of standard model is something of a joke among serious scholars. This debate no longer fits the simple individual/collective dichotomy. Gura cannot accept that the debate has moved on. The fact that

many who oppose Mr. Gura's effort to equate guns with words have revised and recast their views in light of new evidence is not a sign of weakness, but a sign of intellectual honesty. We should be wary of ideologues like Gura and others whose view of the Second Amendment will never change no matter how much evidence or argument is presented. As I noted in my book, anyone who tells you that all of the evidence supports them and that American thinking about the Second Amendment has not changed since the Founding era is simply not someone you should take seriously. If that were true then the Second Amendment would be like no other part of our constitutional history. Quite the contrary is the case and I would urge anyone interested in genuinely scholarly account of this history to look at my book.

Alan Gura, Bob Levy, & Clark Neily [Picture Unavailable]

This debate has mostly been conducted on a high level. Regrettably, Saul Cornell's final post has stooped to *ad hominem* attacks, barefaced attempts to promote Cornell's book, and reliance on a quote for which Cornell inexplicably provides no source. Let's focus on the strange quote – the only part of Cornell's post that isn't personally offensive or transparently self-serving. After we repeatedly pressed Cornell to identify a single contemporaneous source for the militia view of the Second Amendment, he produced what he trumpets as "a good illustration of how Americans in the Founding era viewed the right." Essentially, the quote states that only "the use of arms in common defense" was constitutionally protected; other purposes, such as self-defense, were subject to interdiction by the state legislature. Was this the declaration of Madison, Hamilton, or another luminary among the Framers? Cornell didn't say. Well, we checked. The quote is from the estimable [hold your hat] Scribble Scrabble, a newspaper essayist. Was this profound thinker published in a scholarly journal? Not quite: It was the *Cumberland Gazette*, a newspaper in Portland, Maine. Was Scribble Scrabble opining on the U.S. Constitution? No, he was writing about a provision in the Massachusetts state constitution. Moreover, the article appeared five years before the Second

Amendment was ratified. Why has Cornell quoted this bizarre source, without citation, including its deceptive reference to "The Bill of Rights," but no mention that the provision in question was from the Massachusetts Bill of Rights? Because he could not respond any better to our challenge: Name "a single 18th century voice explaining how the Second Amendment right is to be read collectively." Suppose, however, we accept Scribble Scrabble's analysis, as if it applied to the federal Constitution. The notion that the legislature may freely "interdict" citizens' ability to own guns cannot be reconciled with any clear-headed conception of "the right of the people." Indeed, one might also assert that "the people" enjoy a right to own pens and pencils "till the legislature shall think fit to interdict." After all, the right to own writing instruments is implicit, but not explicitly recognized, in the First Amendment. Of course, every serious-minded person rejects interdiction of pens and pencils, even those that are ultimately used for something other than free speech or a free press. Those of us on the pro-freedom side reject interdiction of guns as well. The burden of persuasion for treating guns differently than writing instruments clearly lies with those who would make that distinction. Our opponents in this debate offered precious little beyond Scribble Scrabble.