

## A Gun May Be a Gun May Be a Gun

Defining 'arms' for modern man is the Second Amendment's real conundrum.

BY RICHARD A. ALLEN

**D**oes the Second Amendment guarantee an individual right to keep and bear shoulder-mounted Stinger missile launchers? If not, how can we distinguish between protected and nonprotected weapons?

Those are questions the Supreme Court will eventually have to address if it decides that the Second Amendment gives individuals a right to bear arms unrelated to service in a militia. Attempting to apply the amendment to weapons technologies that did not exist when the Constitution was written may send the Court down a surprising path.

The Second Amendment provides that 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." The Supreme Court last week granted certiorari to review the decision of the U.S. Court of Appeals for the D.C. Circuit in *Parker v. District of Columbia*, the case that struck down the District's ban on handguns as violating that amendment.

The Court will consider the issue of whether the amendment provides only a collective right to states to maintain a militia, as most federal circuit courts have held, or whether it establishes an individual right to keep and bear arms unrelated to militia service, as the D.C. Circuit in *Parker* and the 5th Circuit in *United States v. Emerson* (2001) have ruled.

For the sake of argument, let's assume that the Court agrees that the Second Amendment creates an individual right to keep and bear arms unrelated to service in a well-regulated militia. Then the justices will be faced in this case, or the next, with the further question of what weapons are encompassed by the term "arms." Assault rifles? Rocket-propelled grenades? Stinger missiles?

That question of constitutional interpretation has received much less attention in the scholarly literature and the courts, but it is as important and as difficult as the debate over collective versus individual rights.

### A REASONABLE FRAMER

We don't know, of course, whether the Framers wanted the term "arms" to encompass all forms of modern weaponry capable of being wielded by individuals. Since they didn't know about such weapons, they obviously had no specific intent on that question.

When such a situation arises—when there is no way of knowing how the Framers intended a constitutional provision to apply to a particular set of circumstances—even proponents of the "original intent" school, such as Justice Antonin Scalia, recognize that constitutional interpreters have to engage in a speculation about what the Framers probably would have intended. This speculation requires interpreters not only to consider the general purposes of the provision but also to conjecture about what reasonable people would have intended. This sort of inquiry underlies Justice Oliver Wendell Holmes Jr.'s famous dictum that the First Amendment's guarantee of free speech does not give people a right to falsely shout "fire" in a crowded theater. There's no evidence of what the Framers thought about that First Amendment application—it's highly unlikely any of them considered the question at all—but modern interpreters have no difficulty in concluding that no reasonable person would have intended such a right.

With most constitutional provisions, we have little difficulty in concluding that the Framers would have intended them to apply to technologies developed after 1789, when the Constitution was ratified. The Supreme Court has very sensibly concluded that the First Amendment's guarantee

of freedom of speech and the press applies to television and the Internet and that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to wiretapping and thermal imaging. In those cases, application of the provision to modern technologies clearly carries out the provision's original purpose without being unreasonable.

In the case of the Second Amendment, however, we cannot conclude that reasonable Framers would have intended to give individual citizens a right to possess Stinger missiles, which can bring down large planes from miles away, or rocket-propelled grenades, which can also kill scores of people from long distances. Those weapons are so vastly different from and so much more powerful than the "arms" with which the Framers were familiar as to be different in kind. Most Americans would find such an application as unreasonable as constitutional protection for those crying fire in that crowded theater.

### NOT LIKE THE OTHER

In fact, in the *Parker* opinion, the D.C. Circuit indicated its view that the term "arms" did not encompass "weapons capable of mass destruction." It gave "cannons" as an example of such weapons. Presumably, the court would also include Stinger missiles and RPGs in that category.

The court concluded that modern handguns were included in the term "arms" because they are the "modern-day equivalent of colonial era weapons." (In this respect, the court neglected to note a 7th Circuit decision, *Quilici v. Village of Morton Grove* (1982), that reached the opposite conclusion.)

If one accepts the premise that the term "arms" includes some but not all types of modern weaponry, however, one will soon confront some serious difficulties in trying to decide which modern weapons are covered and which aren't. How do you establish a basis for differentiation that is reasonably related to the purposes of the Second Amendment and that is objective and not arbitrary?

The weapons' utility for militia (i.e., military) purposes might be one objective basis for differentiation. Indeed, this seems to have been the basis for the Supreme Court's most recent decision dealing with the Second Amendment, *United States v. Miller* (1939), which held that the amendment does not give people a right to possess sawed-off shotguns because they are not useful weapons for well-regulated militias.

The most obvious problem with military utility as a basis for differentiation is that it would lead to a right to possess the *most destructive* of modern weapons. Stinger missiles, RPGs, and machine guns, for example, are very useful for military purposes.

Another possible basis for differentiation would be the relative power and dangerousness of the modern weapon as compared to that of 18th-century weapons. This is suggested by the *Parker* court's conclusion that the term "arms" does not include "weapons capable of mass destruction" but does include the "lineal descendant[s]" and "modern day equivalents of the colonial pistol."

But whether a particular modern weapon is "comparable" or "analogous" or "equivalent" to 18th-century guns is an essentially subjective, not objective, basis for differentiation. Two reasonable judges might well reach opposite conclusions on whether modern assault rifles, or even modern hunting rifles, are comparable to the relatively primitive, single-shot, muzzle-loading firearms with which the Framers were familiar. Since there is no objective way to determine which judge is correct, this result would be entirely arbitrary.

A more fundamental problem with power as the basis for distinguishing weaponry is that it would not further but is completely unrelated to the principal purpose of the Second Amendment, which was to ensure citizens an effective means of resisting an oppressive government. Limiting the term "arms" to modern weapons that are somehow comparable in lethality to weapons from the Framers' time would exclude the very weapons that would be *most effective* today for military purposes. Modern hunting rifles, for example, while significantly more deadly than 18th-century muskets, would still be singularly ineffective in opposing a military force armed with machine guns, RPGs, and shoulder-launched missiles, not to mention artillery, tanks, and warplanes.

### DISAGREEING AT THE CORE

This interpretative dilemma cannot be readily solved by saying, as some courts and scholars have suggested, that courts can allow "reasonable restrictions" on the right of individuals to bear arms, much as governments are permitted to impose reasonable time, place, and manner limits on free speech. In the case of the First Amendment, most Americans agree on what reasonable speech regulations can be imposed without impairing the core constitutional right—communication on issues of public importance. The Supreme Court has developed some fairly noncontroversial guidelines on the subject—for example, that regulations must be content-neutral and must constitute the least restrictive alternative to accommodate the government's interests.

With regard to the Second Amendment, however, reasonable people are sharply divided on the very reasonableness of the core conduct—individual ownership of guns—and the degree to which it threatens public safety. Accordingly, decisions as to whether any particular restriction on the possession of weapons is "reasonable"—for example, banning handguns or limiting firearms to law enforcement officers—would be as subjective and arbitrary as decisions as to whether modern weapons are "comparable" to 18th century weapons.

Thus, the Second Amendment presents a unique conundrum in its application to modern technologies. If one accepts the premise that the term "arms" cannot reasonably be construed to include all forms of modern weaponry, the only basis for determining what weapons are included that is both objective and consistent with at least the Framers' specific intent and original understanding of

the term “arms” is that it encompasses only those types of weapons that actually existed in 1789, such as single-shot, muzzle-loading firearms.

A decision that the Second Amendment only protects private ownership of muskets and the like would certainly represent a rigorous application of the original-intent school of constitutional interpretation. Admittedly, that decision may seem anomalous in view of the general purpose of the amendment. But it seems the only one possible if the Supreme Court agrees that the amendment grants an individual right to possess “arms” unrelated to

service in a well-regulated militia. In short, muskets and the like are the only “arms” consistent with a nonarbitrary interpretation of the Framers’ original understanding of that term.

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