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## Point of View *The Best Security of a Free State*

by **TIMOTHY WHEELER**

The U.S. Court of Appeals for the Fifth District handed down a decision this week that will alter the course of firearms jurisprudence. At issue in *U.S. v. Emerson* was the running controversy over whether the Second Amendment "right to keep and bear arms" belongs to the states or to individuals. The court ruled the right belongs to individuals and not states. Now the real fight begins.

Specifically, the court wrote that the amendment "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . . that are suitable as personal, individual weapons" and are not made for criminal purposes, such as sawed-off shotguns.

Thus the court disposed of the states' rights interpretation of the amendment, so dear to gun controllers. The ruling also draws a bead on the so-called sophisticated states' right model, which grudgingly concedes an individual right only if the person with the gun is serving in the militia (National Guard). This interpretation was also favored by those who can't abide the idea of an armed populace.

The court's opinion did admit government's power to limit gun rights, such as in cases where the gun owner is likely to wrongfully harm another person. Indeed, the Fifth Circuit ruled that the appellant Timothy Emerson had given up his right to possess firearms by posing a threat to his wife.

In writing the majority opinion Judge William L. Garwood rightly cited precedent prohibiting gun possession by dangerous or mentally unsound people.

But the deep and inescapable meaning of Emerson is this: the U.S. Constitution affirms the right to own firearms, and that right belongs to you and me. Judge Garwood acknowledged that other circuits have rejected the individual rights or standard model of the Second Amendment, but believes they did so "without sufficient articulated examination of the history and text of the Second Amendment."

And what a history it is. Judge Sam Cummings's original district court opinion in the Emerson case was a scholarly introduction to the founders' voluminous writings on the subject. Judge Garwood's appellate court decision is an advanced course. After reading it one wonders how anyone could credibly argue that the founders wrote the Second Amendment to empower government instead of men and women.

From the Founders themselves: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals..." - proposed amendment of the Anti-Federalist faction at the Pennsylvania state constitutional convention, 1787.

"And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms..." - amendment proposed by Samuel Adams at the Massachusetts constitutional convention, 1788.

From 19th century constitutional scholars:

"This may be considered as the true palladium of liberty...the right of self defence is the first law of nature. Wherever...the right of the people to keep and bear arms is, under any colour or pretext whatso-

ever, prohibited, liberty, if not already annihilated, is on the brink of destruction." - St. George Tucker, *Blackstone's Commentaries*, 1803.

"The prohibition [on the infringement of the right to keep and bear arms] is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." - William Rawle, "A View of the Constitution of the United States of America," 2nd ed., 1829.

This week's ruling also expertly parses the phraseology of the Second Amendment, showing the contemporary usage of the words "the people," and "bear arms." It leaves no doubt that the framers meant to delegate some powers to the federal government and to reserve others to the states, but to save for citizen defenders the right to own firearms.

The Fifth Circuit's decision squarely opposes the states' right leanings of the other circuits. This conflict should be resolved by the U.S. Supreme Court, which has successfully avoided ruling on the Second Amendment for 60 years. The need for a final and binding ruling grows as states such as California and Massachusetts incrementally revoke the right of gun ownership.

Coming only a month after the first hostile foreign attack on U.S. soil since the War of 1812, the Emerson decision should give Americans hope. In times of peril, we have always found comfort and guidance in the first principles of our nation. The peculiarly American right of gun ownership is the premier safeguard of our liberty.

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