Written by **Bruce Walker** on December 14, 2010

Breyer Suggests Second Amendment Out of Date

Supreme Court Justice Stephen Breyer, speaking this past weekend on Fox News Sunday, declared that the Founding Fathers did not intend firearms to go unregulated. Breyer was one of four dissenting justices in the 2008 District of Columbia v. Heller case, which overturned a firearms ban in the District of Columbia. The decision in Heller was significant for many reasons, primarily for holding that the Second Amendment was connected with not only the right of individuals to bear arms, but also the power of state governments to maintain militia capable of resisting an oppressive federal government.

In his opinion in that case, Breyer stated that James Madison included the language of the Second Amendment so that the states would ratify the Constitution. The Bill of Rights, of course, could not be introduced until after the Constitution itself was confirmed by three-quarters of the states, but the substance of Breyer's argument — that there was significant opposition to the Constitution, unless a Bill of Rights was included to protect the rights of states — is essentially correct.

In light of that understanding, Breyer's legal reasoning on Fox seems curious. The Founding Fathers intended to provide state governments with protections against an overbearing federal government. How does that invalidate the force of the Second Amendment? The whole of the Bill of Rights is a statement of a concept assumed almost uniformly by the Founding Fathers: the protection of the rights of state governments and individuals against the federal government. Thus the famous opening words of the First Amendment: "…Congress shall make no law." The Bill of Rights, in fact, places no limits at all on what state governments may do.

The Ninth Amendment pointedly states that the Constitution cannot be "construed" — a limitation on the judicial power — to deny the people rights not specifically enumerated in the Constitution; and the Tenth Amendment provides that powers not specifically delegated to the federal government are reserved to the states and to the people. How, then, is Breyer able to interpret these amendments as granting the federal government more power than did the original Constitution? And how can he read in the Bill of Rights anything but a reservation to the states and to the people of the right to bear arms?

During the *Fox News Sunday* interview, Justice Breyer then began to play with the definition of "arms," asking, "…What is the scope of the right to keep and bear arms? Machine guns? Torpedoes? Handguns?" Actually, the definition is much simpler than Breyer suggests. Cannons were common in 1789, and no one has suggested a right to own field artillery. The rational definition of "arms," a right enshrined also in the constitutions of most of the first states, was clearly muskets and pistols (later rifles and revolvers) — weapons which a citizen could use for his own protection or on behalf of his state against a rogue federal government.

If technological changes alone can drain the protections granted by the Constitution and the Bill of

Rights, as Breyer and other activist jurists seem to suggest, then no rights have meaning, because the vector of technological change cannot be perfectly tamed. We have recently seen a hint of this with the TSA's "sexual battery" pat-downs and technological "strip searches." What exactly does "search and seizure" mean, when the rights of citizens and the state are involved? How does the right of "freedom of the press" apply to the broadcast airways? Can Congress impose its notion of "fairness" on those who use the airways, or operate in cyberspace?

Breyer and other activist judges doubtless will see openings for federal intrusion into areas of life once clearly protected by the Constitution and the Bill of Rights. But in order to determine whose interpretation of the historical meaning of our foundational documents is correct —Breyer's or that of citizens who believe in the primacy of private rights — perhaps the justice should read again the brief text in Article Nine: "The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

A simple interpretation of those words, which really require no special historical context, is: When in doubt, favor the rights of the people over the power of Washington.