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PARKER: AN INTERPRETIVE SHIFT FOR THE SUPREME COURT TO ADOPT

I. INTRODUCTION

Composed of twenty-seven words, the text of the Second Amendment provides: “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.”¹ Overall, courts have interpreted this text very narrowly² as some have found “the common law did not recognize an absolute right to keep and bear arms.”³ However, the meaning and scope of the Second Amendment is in dispute, and the debate has recently grown stronger.⁴ The United States Supreme Court has never decided whether the Second Amendment protects an individual or collective right to keep and bear arms,⁵ and the last time it furnished any direct guidance as to what the amendment means was almost seventy years ago in *U.S. v. Miller*.⁶ Although the *Miller*⁷ test has been heavily quoted and cited, there is confusion among courts and commentators about what it really means.⁸ One thing that seems certain is the Second Amendment currently only applies to the federal government and not the states.⁹

On March 9, 2007, in what has been labeled by one journalist as “the most

1. U.S. Const. amend. II.

2. See e.g. Daniel E. Feld, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696, 701 (1978).

3. *Id.* at 700 (citing *Burton v. Sills (Burton I)*, 248 A.2d 521 (N.J. 1968)).

4. In *Silveira v. Lockyer (Silveira I)* the court noted:

A robust constitutional debate is currently taking place in this nation regarding the scope of the Second Amendment, a debate that has gained intensity over the last several years. Until recently, this relatively obscure constitutional provision attracted little judicial or scholarly attention. As a result, however, of increasing popular concern over gun violence, the passage of legislation restricting the sale and use of firearms, the cultural significance of firearms in American society, and the political activities of pro-gun enthusiasts under the leadership of the National Rifle Association . . . the disagreement over the meaning of the Second Amendment has grown particularly heated.

312 F.3d 1052, 1060 (9th Cir. 2003); accord e.g. David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and the Origin of Gun Control in America*, 15 Wm. & Mary Bill Rights J. 1237, 1238–40 (2007); David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said about the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99, 104–05 (1999).

5. *Parker v. Dist. of Columbia (Parker II)*, 478 F.3d 370, 391 (D.C. Cir. 2007), cert. granted sub nom. *Dist. of Columbia v. Heller*, 128 S. Ct. 645 (2007).

6. See Erwin Chemerinsky, *Constitutional Law* 13 (2d ed., Aspen 2005) (citing *U.S. v. Miller*, 307 U.S. 174 (1939)). Justice Douglas took no part in the consideration of this case. *Miller*, 307 U.S. at 183.

7. 307 U.S. at 178.

8. Feld, *supra* n. 2, at 708–09.

9. Chemerinsky, *supra* n. 6, at 466 (citing *Presser v. Ill.*, 116 U.S. 252 (1886)).

important ruling on gun control in 70 years,"¹⁰ the U.S. Court of Appeals for the District of Columbia Circuit in *Parker v. District of Columbia*¹¹ (*Parker II*) held the Second Amendment protects an individual right to bear arms.¹² *Parker II* was the first federal appellate court to strike down a gun law as an unconstitutional violation of the Second Amendment,¹³ thus encouraging the Supreme Court to grant certiorari on the case to intervene and revisit *Miller*.¹⁴ The *Parker II* court reached the correct result, but not entirely for the reasoning explicitly stated in its opinion; Supreme Court precedent, along with support for the text of the Second Amendment beyond that accounted for by the *Parker II* court, exists to support the court's holding. Public policy supports a straightforward individual rights interpretation of the Second Amendment, and even if it did not, the constitutional way to reduce the Second Amendment to a "dead letter" is not by simply applying its text against intent and meaning. Therefore, if any or all of the plaintiffs in *Parker II* are determined to have standing and if *Parker II* is not rendered moot with the passage of the District of Columbia Personal Protection Act,¹⁵ *Parker II* should be affirmed and the Second Amendment interpreted to protect an individual right to bear arms.

Because *Parker II* provides a thorough historical and jurisprudential analysis of the Second Amendment, Part I of this note will provide a brief background of Second Amendment law, focusing on settled Supreme Court precedent. Part II will state the case of *Parker II* including: The relevant facts and parties involved in the case, the procedural history of the case, as well as the holding and reasoning of both the U.S. District Court for the District of Columbia (*Parker I*) and *Parker II* courts. Part III of this note will defend the thesis and expand upon selected points of the *Parker II* court's reasoning. Part IV will analyze the current state of *Parker II* and its possible future effects.

II. BRIEF BACKGROUND OF SECOND AMENDMENT LAW

As noted above, there is little Supreme Court precedent on the Second Amendment. One commentator observed that as of September 1998, the Supreme Court had mentioned the Second Amendment in twenty-seven opinions, while most of these references merely incidentally refer to it¹⁶ and in twenty-two of them only "the right of the people to keep and bear Arms" was quoted or paraphrased without mentioning the

10. Pete Williams, *Major Ruling against D.C. Handgun Ban*, <http://www.msnbc.msn.com/id/17538139> (Mar. 9, 2007).

11. 478 F.3d at 391.

12. *Id.* at 395.

13. William W. Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas*, 10 Green Bag 469 (2007); Williams, *supra* n. 10.

14. 307 U.S. 174; see Lyle Denniston, SCOTUSblog, *Court Agrees to Rule on Gun Case*, <http://www.scotusblog.com/wp/uncategorized/court-agrees-to-rule-on-gun-case/> (Nov. 20, 2007).

15. See Robert A. Levy, Testimony, *Oversight Hearing on the District of Columbia's Gun Control Laws* (U.S. H.R. Comm. Govt. Reform, June 28, 2005) (available at <http://www.cato.org/testimony/ct-ri062805.html>).

16. Christopher J. Schmidt, *An International Human Right to Keep and Bear Arms*, 15 Wm. & Mary Bill Rights J. 983, 988 (2007) (citing Eugene Volokh, Testimony, *Testimony of Eugene Volokh on the Second Amendment* (U.S. Sen. Subcomm. Const., Sept. 23, 1998) (internal citations omitted) (available at <http://www.law.ucla.edu/volokh/beararms/testimon.htm>)).

word "Militia."¹⁷ Some view this as no surprise since the fact that the Second Amendment's protections do not protect ordinary citizen's rights is "'perhaps the most well-settled point in American law.'"¹⁸

The Supreme Court's most recent and direct decision addressing the scope of the Second Amendment came in *Miller*.¹⁹ Put in the words of one commentator, "*Miller* grew out of a 1938 prosecution of two bootleggers . . . for . . . possessing a sawed-off shotgun without having paid the required federal tax."²⁰ Jack Miller and Frank Layton were indicted for violating the National Firearms Act by unlawfully transporting an unregistered twelve-gauge double barrel shotgun with a barrel less than eighteen inches long from Claremore, Oklahoma, to Siloam Springs, Arkansas, "against the peace and dignity of the United States."²¹ To be in compliance, the shotgun would have had to have been registered and accompanied with a stamp-affixed written order.²²

Miller and Layton argued the National Firearms Act both usurped the police power traditionally reserved to the states and violated their Second Amendment rights.²³ This argument proved successful in the U.S. District Court for the Western District of Arkansas, where the court sustained Miller and Layton's demurrer and quashed their indictment.²⁴ However, the government appealed arguing the Second Amendment merely protected a collective right to "bear arms" for the common defense, as supported by the common law.²⁵ Miller and Layton could not afford counsel so there was neither a brief filed nor an appearance for them at the Supreme Court, and the government argued unopposed.²⁶ Writing for the Court in *Miller*, Justice McReynolds, viewed by some as "one of the worst Supreme Court Justices of the twentieth century,"²⁷ set out the *Miller* test:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.²⁸

The *Miller* Court reversed and remanded the case to the lower court for further

17. Volokh, *supra* n. 16 (internal citations omitted).

18. Kopel, *supra* n. 4, at 100 (quoting Dennis Henigan, *The Right to Be Armed: A Constitutional Illusion*, S.F. Barrister 19 (Dec. 1989) (available at <http://www.gunlawsuits.org/defend/second/articles/illusion.php>)).

19. Chemerinsky, *supra* n. 6, at 13.

20. Kopel, *supra* n. 4, at 105.

21. *Miller*, 307 U.S. at 175 (citing National Firearms Act, 48 Stat. 1236-40 (1934)).

22. *Id.*

23. *Id.* at 176.

24. *Id.* at 177.

25. Br. for the U.S. at 4, *Miller*, 307 U.S. 174.

26. *Miller*, 307 U.S. at 175; *accord e.g.* Kopel, *supra* n. 4, at 105-06 (also noting that the law at the time of *Miller*, the federal government was allowed to take a case directly to the Supreme Court if a federal statute was found unconstitutional); *id.* at 106 n. 17; Gura & Possessky, P.L.L.C., DCGunCase.com, *Frequently Asked Questions*, <http://dcguncase.com/blog/faqs/> (last accessed Mar. 18, 2008).

27. Kopel, *supra* n. 4, at 106 (citing L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311, 1331 (1997)).

28. *Miller*, 307 U.S. at 178 (citing *Aymette v. Tenn.*, 21 Tenn. 154, 158 (1840)).

proceedings because the shotgun in question did not fall within the category of weapons protected by the Second Amendment when applied to the Court's test.²⁹

Interpretations of the Second Amendment have been shaped around two basic models.³⁰ The first is the individual rights model, stating the Second Amendment guarantees private citizens a right to keep and use firearms for any purpose, subject to only limited governmental regulations, analogous to other Bill of Rights provisions such as the First Amendment's right to free speech.³¹ The second is the collective rights model, stating the Second Amendment protects only the right of state governments to preserve, maintain, and arm their militias, such as today's National Guard.³²

Stemming from these two basic models, courts³³ and commentators³⁴ add sub-classifications. Under the individual rights model, there is the "standard" model which stands for the basic individual rights model,³⁵ and the "limited" individual rights model³⁶ stating the Second Amendment protects an individual right to keep and use firearms, but only those *firearms* which have a "reasonable relationship"³⁷ to militia use.³⁸ Under the collective rights model, there is the "traditional" model standing for the basic collective rights model,³⁹ and the "sophisticated" collective rights model stating the Second Amendment only protects the rights of *citizens* that have a direct relationship with their state's militia.⁴⁰

Across the legal landscape with these models deployed, there is a split among the states and federal circuits, while a debate still rages among the academic community. In the federal appellate courts, the Fifth and D.C. Circuits are the only two courts which have held the Second Amendment protects an individual right to keep and bear arms, while all other courts have upheld the collective rights view.⁴¹ Among the states, at least seven states have held that the Second Amendment protects an individual right to bear

29. *Miller*, 307 U.S. at 183. The result of *Miller* on remand against Frank Layton is not reported, while "Jack Miller was found murdered near Chelsea, Oklahoma on April 6, 1939." Br. of Amicus Curiae NRA Civ. Rights Def. Fund in Support of Appellants at 14 n. 5, *Parker II*, 478 F.3d 370.

30. *Parker II*, 478 F.3d at 379.

31. *Id.*; *Silveira I*, 312 F.3d at 1060.

32. *Parker II*, 478 F.3d at 379; *Silveira I*, 312 F.3d at 1060; *U.S. v. Emerson*, 270 F.3d 203, 218 (5th Cir. 2001) (internal citations omitted). David Kopel also recognizes two other views of the Second Amendment, though unsupported by Supreme Court precedent. The first is advocated by Gary Wills which argues the Second Amendment was "merely a clever trick that James Madison played on the Anti-Federalists." Kopel, *supra* n. 4, at 104 (citing Gary Wills, *To Keep and Bear Arms*, 42 N.Y. Rev. Bks. 62, 72 (Sept. 21, 1995)). The second is advocated by David Williams and argues that although the Second Amendment once protected an individual right, Americans are no longer "the people" as referred to in the Second Amendment because they are not "virtuous and united." Kopel, *supra* n. 4, at 104 (citing David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991) [hereinafter Williams, *Civic Republicanism*]; David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 Cornell L. Rev. 879 (1996) [hereinafter Williams, *Militia Movement*]; David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. Rev. 822 (1998) [hereinafter Williams, *Unitary*]).

33. See e.g. *Emerson*, 270 F.3d at 219–20 n. 11 (internal citations omitted).

34. See e.g. Hardy, *supra* n. 4, at 1239–41.

35. *Id.* at 1237.

36. *Silveira I*, 312 F.3d at 1060.

37. *Miller*, 307 U.S. at 178 (citing *Aymette*, 21 Tenn. at 158).

38. Hardy, *supra* n. 4, at 1238 n. 12.

39. *Id.* at 1237.

40. *Emerson*, 270 F.3d at 219.

41. See e.g. *Parker II*, 478 F.3d at 380; Feld, *supra* n. 2, at 61 (Supp. 2007).

arms while at least ten have endorsed the collective rights position.⁴² One commentator noted that “eighty-eight law review articles published since 1912 concluded the Second Amendment secures an individual right, while seventy-six articles published in the same time frame conclude the amendment secures a collective right.”⁴³

III. STATEMENT OF THE CASE

A. Relevant Facts

On February 10, 2003, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon (Plaintiffs), filed a complaint in the *Parker I* court against the District of Columbia and Mayor Anthony Williams (Defendants).⁴⁴ One commentator observed, “the main purpose of the . . . litigation was to bring a test case to the Supreme Court” since “[t]he D.C. gun laws are far more extreme than those of almost every other U.S. jurisdiction.”⁴⁵ Plaintiffs were represented by the private counsel of Alan Gura, Bob Levy, and Clark Neily who took this case on a pro bono basis, did not accept funds from any outside sources for their services, and produced an entirely in-house work product.⁴⁶

Plaintiffs sought declaratory and injunctive relief under 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. § 1983.⁴⁷ They claimed Defendants’ gun control laws were an unconstitutional infringement on their Second Amendment rights.⁴⁸ Specifically, Plaintiffs challenged D.C. Code § 7-2502.02(a)(4) which generally bars the registration of handguns while having an exception for retired D.C. police officers; § 22-4504, which forbids the carrying of a pistol without a license to the extent of preventing a registrant from transporting a gun within his own home; and § 7-2507.02, which requires lawfully owned guns to be stored unloaded and disassembled, or bound by a secure device such as a trigger lock.⁴⁹ The *Parker II* court concluded that “[e]ssentially, the [Plaintiffs] claim a right to possess . . . ‘functional firearms,’ by which they mean ones that could be ‘readily accessible to be used effectively when necessary’ for self-defense in the home.”⁵⁰ Plaintiffs’ assertion did not extend to outside the home nor did it challenge the power of D.C. to regulate firearms.⁵¹

42. *Parker II*, 478 F.3d at 380–82 (internal citations omitted).

43. Schmidt, *supra* n. 16, at 1019 (citing Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi.-Kent. L. Rev. 349, 383 (2000) (article counts valid as of 2000)).

44. Pls.’ Compl. at 1–2, *Parker v. Dist. of Columbia (Parker I)*, 311 F. Supp. 2d 103 (D.D.C. 2004).

45. Dave Kopel, *D.C.’s Gun Ban: Round 2*, *America’s 1st Freedom* 30, 31 (July 2007). One commentator has further commented on the severity of Defendants’ gun laws referring to them as “draconian.” Glen Harlan Reynolds, *Looking Ahead: October Term 2007*, *Cato S. Ct. Rev.* 335, 347 (2007).

46. Gurra & Possessky, *supra* n. 26.

47. *Parker II*, 478 F.3d at 374.

48. *Id.* at 373; Pls.’ Compl. at 8, *Parker I*, 311 F. Supp. 2d 103.

49. *Parker II*, 478 F.3d at 373. For the relevant language of these statutes challenged by Plaintiffs, see *infra* nn. 239, 242, 246.

50. *Parker II*, 478 F.3d at 374.

51. *Id.*

B. *The Parties Involved*

Shelly Parker was a D.C. resident and resided in a high crime area.⁵² After becoming involved in her community and trying to make her neighborhood a better place to live, her life was threatened by a drug dealer while he beat and pried on the front door to her home.⁵³ In addition, in 2002, the back window to her car was broken, a large rock was thrown through the front window of her car, the security camera was stolen from her home, and a drug user's car was driven into the back fence of her home.⁵⁴ As a result, Shelly wished to possess a firearm in her home for self-defense, but under Defendants' laws could not lawfully do so.⁵⁵

Dick Anthony Heller was a D.C. resident who resided in a high crime neighborhood and was employed as a special police officer by D.C.⁵⁶ Pursuant to these duties, Dick was licensed to carry a handgun while providing security for the federal judiciary at the Thurgood Marshall Judicial Center in Washington, D.C.⁵⁷ Since Dick also lawfully owned various other weapons, he applied for permission to possess such weapons in his home for purposes of self-defense⁵⁸ on July 17, 2002,⁵⁹ but was denied specifically under D.C. Code § 7-2502.02(a)(4).⁶⁰

Tom G. Palmer was a homosexual D.C. resident.⁶¹ Because of his sexual orientation, Tom had previously been assaulted and his life threatened while walking to dinner with a co-worker in another city, but successfully warded off his assailants by brandishing a handgun.⁶² He could not have lawfully displayed his handgun in D.C., and thus sought to possess a firearm in his home for purposes of self-defense, but under Defendants' laws could not lawfully do so.⁶³

Of the three remaining plaintiffs, Gillian St. Lawrence, Tracey Ambeau, and George Lyon were also D.C. residents.⁶⁴ These plaintiffs also lawfully owned various handguns and sought to possess them in their homes for self-defense purposes.⁶⁵ Anthony Williams was named as a defendant because of his official capacity as Mayor, who was responsible for executing and administering the D.C. laws that were alleged unconstitutional by Plaintiffs.⁶⁶

52. Pls.' Compl. at 2, *Parker I*, 311 F. Supp. 2d 103; Gurra & Possessky, *supra* n. 26.

53. Levy, *supra* n. 15; Gurra & Possessky, *supra* n. 26.

54. Levy, *supra* n. 15.

55. Pl.'s Compl. at 2, *Parker I*, 311 F. Supp. 2d 103; Levy, *supra* n. 15; Gurra & Possessky, *supra* n. 26.

56. Pl.'s Compl. at 2-3, *Parker I*, 311 F. Supp. 2d 103.

57. *Id.*

58. *Id.*

59. Pet. for Cert. at app. J, *Parker II*, 478 F.3d 370.

60. *Parker II*, 478 F.3d at 374.

61. Pls.' Compl. at 3, *Parker I*, 311 F. Supp. 2d 103.

62. *Id.*

63. *Id.*; Levy, *supra* n. 15.

64. Pls.' Compl. at 3-4, *Parker I*, 311 F. Supp. 2d 103.

65. *Id.*

66. *Id.* at 5.

C. Parker I

On March 31, 2004, District Judge Sullivan,⁶⁷ writing for the *Parker I* court, issued a memorandum opinion in response to Plaintiffs' motion for summary judgment and Defendants' motion to dismiss.⁶⁸ Plaintiffs' counsel at this stage had not changed, and representing Defendants were Daniel Rezneck and Johnathan Potter from the Office of Corporation Counsel in Washington, D.C.⁶⁹

After setting out the relevant standard of review, the court began its Second Amendment analysis by quoting the amendment and *Miller* test.⁷⁰ Subsequently, the court drew from the language of *Miller* immediately following the *Miller* test, which included a discussion by the *Miller* court about the nature and purpose of the word "Militia" as used in the Second Amendment at the time of its drafting.⁷¹ The court noted that due to the Supreme Court's silence on the issue since *Miller*, a debate had grown over whether the Second Amendment guarantees a collective right of the states to arm the militia, a limited individual right to bear arms but only as a member of the state militia, or an individual right to bear arms for non-militia use.⁷²

Following its analysis of *Miller*, the court announced it read *Miller* in concert with the majority of federal appellate courts as rejecting an individual right to bear arms for non-militia use.⁷³ To strengthen this position, the court focused on the fact that the Supreme Court had two opportunities to re-examine *Miller* and twice refused to do so.⁷⁴ In support of this proposition, the court referenced *Lewis v. U.S.*,⁷⁵ which involved a

67. A biography of Judge Sullivan can be found at <http://www.fjc.gov/servlet/tGetInfo?jid=2312> (accessed Mar. 18, 2008).

68. 311 F. Supp. 2d at 104.

69. *Id.* at 103.

70. *Id.* at 104–05.

71. *Id.* at 105. The relevant language from *Miller* the court drew from reads:

The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia-civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Miller, 307 U.S. at 178–79.

72. *Parker I*, 311 F. Supp. 2d at 105.

73. *Id.*

74. *Id.*

75. 445 U.S. 55, 65 (1980).

felon in possession of a firearm being prosecuted for the violation of a criminal statute,⁷⁶ and *Burton v. Sills*,⁷⁷ which was the dismissal of an appeal to the Supreme Court where the state court held that the Second Amendment did not protect an individual right to bear arms.⁷⁸ The court concluded that if the Supreme Court interpreted the Second Amendment as an individual right, it could not have reached the conclusions it did in these cases.⁷⁹

Defendants argued that Plaintiffs had not made any showing that their possession or use of firearms had some "reasonable relationship"⁸⁰ "to the preservation or efficiency of a well-regulated militia."⁸¹ On the other hand, Plaintiffs advanced three arguments before the court. First, they argued that *Miller* proposed a test to distinguish which weapons were protected from those not protected under the Second Amendment.⁸² Acknowledging that Plaintiffs' arguments were plausible, the court responded that if the Supreme Court thought *Miller* was being misinterpreted, it would have taken an opportunity to correct the misunderstanding at some point during the past sixty-five years.⁸³

Second, Plaintiffs argued the Second Amendment established a fundamental right to bear arms notwithstanding any militia connection.⁸⁴ In support of this contention, they relied heavily on the Fifth Circuit precedent of *U.S. v. Emerson*.⁸⁵ The court paraphrased *Emerson* as holding that the Second Amendment, though subject to reasonable restrictions, guarantees an individual right to keep and bear arms as long as the weapons could have a "conceivable application in the context of a state Militia."⁸⁶ The court recognized that *Emerson* reasoned the Second Amendment to be necessary for one's self-defense, defense of property, game hunting, and preparation in the event the state needed assistance to resist the threat of a tyrannical federal government.⁸⁷ The court did not find Plaintiffs' argument or their reliance on *Emerson* persuasive and even questioned the validity of *Emerson's* holding, finding it in conflict with prior Fifth Circuit precedent.⁸⁸ The court pointed out that almost thirty years before *Emerson*, the Fifth Circuit twice rejected a criminal defendants' Second Amendment right argument and upheld their convictions for possessing unregistered sawed off shotguns.⁸⁹ The

76. *Parker I*, 311 F. Supp. 2d at 105.

77. *Burton v. Sills (Burton II)*, 394 U.S. 812 (1969).

78. *Parker I*, 311 F. Supp. 2d at 105.

79. *Id.*

80. *Miller*, 307 U.S. at 178 (citing *Aymette*, 21 Tenn. at 158).

81. *Parker I*, 311 F. Supp. 2d at 104.

82. *Id.* at 105-06.

83. *Id.* at 106.

84. *Id.*

85. *Id.* (citing *Emerson*, 270 F.3d 203).

86. *Parker I*, 311 F. Supp. 2d at 106.

87. *Id.* (citing *Emerson*, 270 F.3d at 260).

88. *Id.* at 106 (noting that "[t]his change in position by the Fifth Circuit is troubling in light of the Fifth Circuit's rule that a subsequent panel is precluded from disregarding the holding of an earlier panel unless it is changed by an en banc decision or by a decision of the United States Supreme Court"). *Id.* (citing *U.S. v. McFarland*, 264 F.3d 557, 559 (5th Cir. 2001); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir. 1987)).

89. *Id.* (citing *U.S. v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *U.S. v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971)).

court therefore rejected Plaintiffs' reliance on *Emerson* since it found *Emerson* to be unstable precedent in light of this change in position.⁹⁰ To strengthen this finding, the court found it persuasive that since *Emerson* was the only federal appellate precedent to hold the Second Amendment protected an individual right to bear arms, *Emerson* was therefore isolated and unsteady authority.⁹¹

Third, Plaintiffs argued that although the Supreme Court used the correct interpretation of the term "Militia" in *Miller*,⁹² the definition used by present courts is too narrow.⁹³ Plaintiffs urged the court that rather than a small, state organized group to resist a tyrannical federal government, the term as used in *Miller* suggested all able-bodied men capable of acting for the common defense.⁹⁴ Acknowledging a recent Eleventh Circuit opinion which found that *Miller* suggested the "Militia" as used in the Second Amendment only referred to actively maintained and well-trained groups,⁹⁵ Plaintiffs further contended the Framers could not have intended this interpretation because if the term "Militia" was meant to only give states the right to arm a militia, it would be in conflict with Article 1, § 8, clause 16 of the Federal Constitution ("Congress has the power '[t]o provide for . . . arming . . . the Militia'").⁹⁶ Disposing of these arguments, the court responded that Plaintiffs' interpretation of the Second Amendment would result in a "free-for-all" and was negated by the plain meaning of the Second Amendment's language of "a well regulated Militia" which must imply an organized state group formed as a "fighting force."⁹⁷

Covering its bases, the court proceeded to predict that the D.C. Circuit Court of Appeals would give little merit to Plaintiffs' arguments.⁹⁸ The court referenced *Fraternal Order of Police v. U.S.*⁹⁹ as precedent where the D.C. Circuit Court of Appeals, relying on *Miller*, rejected a Second Amendment argument because there was no evidence before the D.C. Circuit Court suggesting a relationship of any party to a militia.¹⁰⁰ The court used this decision to support its prediction that the facts of the case at hand would likely yield the same result on appeal before the D.C. Circuit Court of

90. *Parker I*, 311 F. Supp. 2d at 106–07.

91. *Id.* at 107 (internal citations omitted).

92. For a discussion of the term "Militia" as defined by the *Miller* Court, see 307 U.S. at 178–79.

93. *Parker I*, 311 F. Supp. 2d at 107.

94. *Id.* (citing Pls.' Opposition to Defs.' Mot. to Dismiss at 8, *Parker I*, 311 F. Supp. 2d 103).

95. *Id.* (citing *U.S. v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997)).

96. *Id.* at 107–08 (citing Pls.' Mot. for S.J. at 32, *Parker I*, 311 F. Supp. 2d 103).

97. *Id.* at 108.

"[E]very word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."

Parker I, 311 F. Supp. 2d at 108 (quoting *Wright v. U.S.*, 302 U.S. 583, 588 (1938) (quoting *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840)).

98. *Id.*

99. 173 F.3d 898 (D.C. Cir. 1999).

100. *Parker I*, 311 F. Supp. 2d at 108 (citing *Fraternal Or. of Police*, 173 F.3d at 906).

Appeals.¹⁰¹

Wrapping up its findings, the court turned to D.C. Court of Appeals precedent, although not binding, for persuasive guidance.¹⁰² The court referenced *Sandidge v. U.S.*¹⁰³ for its holding that the Second Amendment merely protects a collective rather than individual right to bear arms.¹⁰⁴ Although the court acknowledged Plaintiffs' arguments to be "thought-provoking and historically interesting," it found Plaintiffs had no plausible claim under the Second Amendment since they submitted no evidence indicating membership in the militia.¹⁰⁵ In conclusion, the *Parker I* court was strongly persuaded by the lack of Supreme Court action with respect to the Second Amendment over the past sixty-five years.¹⁰⁶

The court ultimately held the Second Amendment "protects an individual's right to 'bear arms for service in the Militia,'" but "did not refer to the word 'keep' in the Second Amendment."¹⁰⁷ The court interpreted "Militia" to mean an organized military body such as today's National Guard.¹⁰⁸ Because of this interpretation, the court granted Defendants' motion to dismiss.¹⁰⁹

D. Parker II

Picking up their things and seeking review, Plaintiffs filed a notice of appeal to the D.C. Circuit Court of Appeals on April 6, 2004, of which they asserted the court had jurisdiction over their case pursuant to 28 U.S.C. § 1291.¹¹⁰ *Parker II* was argued December 7, 2006,¹¹¹ and decided March 9, 2007, by Senior Circuit Judge Silberman,¹¹² who delivered the opinion of the court joined by Circuit Judge Griffith,¹¹³ while Circuit Judge Henderson dissented.¹¹⁴

Plaintiffs' counsel remained unchanged, however they now had significant amicus support.¹¹⁵ This support included an amici curiae brief filed from the Attorney General for the State of Texas, also signed by Attorney Generals from the States of Alabama, Arkansas, Colorado, Florida, Georgia, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Utah, and Wyoming.¹¹⁶ Additional amicus support included the Second

101. *Id.*

102. *Id.* at 109.

103. 520 A.2d 1057 (D.C. App. 1987).

104. *Parker I*, 311 F. Supp. 2d at 109 (quoting *Sandidge*, 520 A.2d at 1058).

105. *Id.* at 109–10.

106. *Id.* at 110.

107. *Parker II*, 478 F.3d at 374.

108. *Id.*

109. *Id.*

110. Appellants' Br. at 1, *Parker II*, 478 F.3d 370.

111. *Parker II*, 478 F.3d at 370.

112. A biography of Chief Judge Silberman can be found at <http://www.fjc.gov/servlet/tGetInfo?jid=2189> (accessed Mar. 18, 2008).

113. A biography of Judge Griffith can be found at <http://www.fjc.gov/servlet/tGetInfo?jid=1023> (accessed Mar. 18, 2008).

114. A biography of Judge Henderson can be found at <http://www.fjc.gov/servlet/tGetInfo?jid=3090> (accessed Mar. 18, 2008).

115. *Parker II*, 478 F.3d at 372–73.

116. *Id.* at 372.

Amendment Foundation, which was also signed by twelve professors,¹¹⁷ Congress of Racial Equality, American Civil Rights Union, and the National Rifle Association Defense Fund.¹¹⁸

Todd S. Kim, Solicitor General from the Attorney General's Office for the District of Columbia, argued the case before the court for Defendants.¹¹⁹ With him on the briefs were Robert Spagnoletti, Edward Schwab, and Lutz Alexander Prager, who were additional members from the Attorney General's office.¹²⁰ Defendants also had significant amicus briefs filed on their behalf including Ernest McGill and The Brady Center for Gun Violence.¹²¹ In addition, Attorney Generals from Massachusetts, Maryland, and New Jersey, along with counsel from the cities of New York, Chicago, and San Francisco were on the record as amicus in support of Defendants.¹²²

After a standing analysis, the court held that the only named plaintiff who had standing to challenge Defendants' gun laws in question was Dick Heller, since he actually applied for and was denied a registration certificate to own a handgun.¹²³ Commencing its Second Amendment discussion, the court began by quoting the amendment and noting that the amendment's second comma divides its two clauses: The first being the prefatory, and the second being the operative.¹²⁴ Plaintiffs conceded the prefatory clause expresses a civic purpose but argued this purpose does not qualify the individual right guaranteed by the operative clause.¹²⁵ Defendants argued "the prefatory clause declares the Amendment's only purpose—to shield the state militias from federal encroachment" as a check on federal power, while the operative clause speaks solely to military affairs and even when read in isolation, only guarantees a civic right.¹²⁶

Noting the two basic models of Second Amendment interpretation, the court summarized Defendants' interpretation of the amendment as deriving from the "sophisticated collective right[s] model."¹²⁷ After setting out the split among states, federal circuits, and noting academic commentary and treatises,¹²⁸ the court also observed that the U.S. Department of Justice had recently adopted the individual rights interpretation of the Second Amendment.¹²⁹ However, because the court concluded that there was no direct precedent with a square holding for it to follow from the D.C. Circuit Court of Appeals or Supreme Court, it centered its analysis from the text of the Second

117. Brandeis Br. Filed on Behalf of Amici Profs., *Parker II*, 478 F.3d 370. The professors who also signed the brief include Lloyd R. Cohen, Nicholas J. Johnson, Michael I. Krauss, Joseph E. Olson, David N. Mayer, Daniel D. Polsby, Andrew P. Morriss, Glenn H. Reynolds, Dale A. Nance, William A. Schroeder, Robert F. Turner, and Leonard J. Nelson. *Id.*

118. *Parker II*, 478 F.3d at 372–73.

119. *Id.* at 373.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Parker II*, 478 F.3d at 376–78.

124. *Id.* at 378.

125. *Id.*

126. *Id.*

127. *Id.* at 379.

128. *Parker II*, 478 F.3d at 380 (internal citations omitted).

129. *Id.* (citing Memo. Op. for the Atty. Gen., *Whether the Second Amendment Secures an Individual Right* (Aug. 24, 2004) (available at <http://www.usdoj.gov/olc/secondamendment2.pdf>)).

Amendment.¹³⁰

Preliminarily, the court responded to the Second Circuit decision *U.S. v. Toner*¹³¹ as referenced by Defendants to defend their collective rights interpretation of the Second Amendment.¹³² Defendants referenced *Toner* for the proposition that the Second Amendment protects only a civic right, but the court read *Toner* as merely holding that the "right" protected by the amendment was not fundamental.¹³³

1. The Operative Clause

The court began its analysis by interpreting the meaning of the operative clause.¹³⁴ The court noted that when interpreting a disputed constitutional provision, the record of proceedings that authored the particular provision usually provides helpful guidance.¹³⁵ Unfortunately, the Second Amendment's drafting history is slim and indecisive, but in the recorded debates available, the First Congress did not reference the operative clause.¹³⁶ From this historical fact, the court inferred that the Second Amendment's drafters did not dispute the operative clause's individual guarantee.¹³⁷

Building on their argument, Defendants contended hardly any law would violate the Second Amendment since it was merely a "dead letter,"¹³⁸ because the "Militia" is no longer in existence; today's National Guard is fully equipped by the federal government, creating no need for individual firearm ownership.¹³⁹ The court, unpersuaded, found it strange that if the Second Amendment's sole purpose was as Defendants contended, the able members of the First Congress would have used different language such as "Congress shall make no law disarming the state militias" or "States have a right to a well-regulated militia."¹⁴⁰

Stemming from the assertion that the operative clause secures only a civic right even when read in isolation, Defendants further argued that the singular nature of the Second Amendment's preamble supports the implication that the operative clause is conditioned on the prefatory clause.¹⁴¹ The court responded that when read in context with other similar state constitutional provisions, the Second Amendment's structure is not uncommon; it was widespread at the time for prefatory language to declare a positive governmental theme which was narrower than the operative language used to achieve it.¹⁴² The court read the Second Amendment in concert with this practice; the prefatory clause declares the Framers' desire of "a well-regulated Militia," which is narrower than

130. *Id.* at 380–81.

131. 728 F.2d 115 (2d Cir. 1984).

132. *Parker II*, 478 F.3d at 380 n. 4.

133. *Id.*

134. *Id.* at 381.

135. *Id.* at 390.

136. *Id.* at 390–91.

137. *Parker II*, 478 F.3d at 391.

138. *Id.* at 378.

139. *Id.* at 379.

140. *Id.*

141. *Id.* at 389.

142. *Parker II*, 478 F.3d at 389.

the operative clause's individual guarantee.¹⁴³

Expanding on this observation, the court found the Second Amendment "does not protect 'the right of the militiamen to keep and bear arms' but rather 'the right of the people.'"¹⁴⁴ As a result, the court read the operative clause as protecting the private ownership of weapons rather than only ownership connected with the preservation of state militias, and re-iterated that if the Framers intended otherwise, they would have chosen different language.¹⁴⁵ The court continued to state that placement of the Second Amendment's civic purpose in the preamble was a perfect way to safeguard the Framers' view of "a natural right to keep and bear Arms [while] the preservation of the militia was the right's most salient political benefit—and thus the most appropriate to express in a political document."¹⁴⁶ In sum, the court concluded the Second Amendment was a perfect compromise between the Federalists and Anti-Federalists of the First Congress; the Federalists offered the preamble to "palliate" Anti-Federalist fears of a fading militia, but neither party thought the government had the power to remove weapons from citizens.¹⁴⁷

Regarding "the right of the people," Plaintiffs argued this clause clearly establishes an individual right while "keep and bear Arms" implies private ownership and use.¹⁴⁸ On the other hand, Defendants asserted that "keep and bear Arms" should be read in a military context rendering the entire meaning of the operative clause as merely a collective right, while their interpretation of "the right of the people" as to whether this speaks of a private or civic right was unclear.¹⁴⁹ In response, the court focused on the word "people" and, for guidance, looked to how the term was used in the First, Fourth, Ninth, and Tenth Amendments.¹⁵⁰ The court found these amendments were clearly intended as individual rights to be free from government interference, and the Tenth Amendment provides a perfect example of the Framers' ability to distinguish between "the people" and "the states."¹⁵¹ Thus, the court inferred an individual right from a natural reading of the Second Amendment in context with other Bill of Rights provisions.¹⁵²

Defendants argued "the people" referred to a narrower class "of individuals such as 'the organized militia' or 'the people who are engaged in militia service,' or . . . [just] 'the states.'"¹⁵³ The court responded that such a strained interpretation of "the people" is completely out of context when read with other amendments in the Bill of Rights that protect individual rights.¹⁵⁴ Looking to Supreme Court precedent to bolster its position,

143. *Id.* at 390.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Parker II*, 478 F.3d at 390.

148. *Id.* at 381.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Parker II*, 478 F.3d at 381.

153. *Id.*

154. *Id.*

the court found *U.S. v. Verdugo-Urquidez*¹⁵⁵ to be a helpful and persuasive guide to interpreting "the people" as used in the Fourth Amendment and other the Bill of Rights:

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.¹⁵⁶

The court found this passage not only helpful when interpreting "the people," but as an implication to the Supreme Court's view of the Second Amendment, since it was listed among other provisions in the Bill of Rights that protect individual rights.¹⁵⁷ The court used this passage to dispose of Defendants' argument as well.¹⁵⁸

In sum, the court reasoned that "the people," when read in context with other provisions of the Federal Constitution using the term and in light of Supreme Court precedent, led to the conclusion that the Second Amendment protects an individual right.¹⁵⁹ The court found this to be true despite that fact that "the people" was not as all-encompassing as used today,¹⁶⁰ since the term as used in the Equal Protection Clause of the Fourteenth Amendment was meant to make up for this initial shortcoming.¹⁶¹

With this in mind, the court reasoned that the operative clause's language indicates the right to keep and bear arms is preserved, rather than created, by the government.¹⁶² The "right" protected by the Second Amendment pre-existed the Constitution like other rights in the Bill of Rights, since the Second Amendment has roots in the common law and English Bill of Rights.¹⁶³ Expanding on this point, the court found that this pre-existing right served to protect the interests of hunting, lawful self-defense, and if necessary, resistance of a tyrannical government.¹⁶⁴ The Second Amendment was premised on the idea that private individuals would exercise this right in addition to their state militia obligations.¹⁶⁵

The court acknowledged the collective right argument that the First Congress

155. 494 U.S. 259 (1990).

156. *Parker II*, 478 F.3d at 381 (quoting *Verdugo-Urquidez*, 494 U.S. at 265) (internal citations omitted)).

157. *Id.* at 381-82.

158. *Id.* at 382.

159. *Id.*

160. *Id.* at 382 (citing Robert E. Shalloppe, *To Keep and Bear Arms in the Early Republic*, 16 Const. Commentary 269, 280-81 (1999)).

161. *Parker II*, 478 F.3d at 382.

162. *Id.* (citing Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?* 75 N.C. L. Rev. 781, 890 (1997)).

163. *Id.* (citing *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 270-72 (Fred B. Rothman & Co. 1981)).

164. *Id.* at 383 (internal citations omitted).

165. *Id.*

included the Second Amendment among other individual liberty protections in the Bill of Rights without comment.¹⁶⁶ The court countered that if this were true, the Second Amendment would be watered down to an “inexplicable aberration” if this out of context interpretation were adopted to read the amendment as not protecting an individual right.¹⁶⁷

Regarding Defendants’ argument that “keep and bear Arms” should be read as “purely military language” which merely protects a civic right,¹⁶⁸ the court conceded that “bear Arms” is vulnerable to a military interpretation, but found such an interpretation to be incorrect.¹⁶⁹ Referencing four dictionaries,¹⁷⁰ one heavily relied on by the Supreme Court,¹⁷¹ the court noted that “bear” is a synonym for carry, support, or convey.¹⁷² Thus, the court reasoned that it would be unusual for a writer, either now or at the time of the Second Amendment’s drafting, to use the word “bear” not intending one of these three definitions.¹⁷³

Defendants continued to claim that “bearing arms” signifies military service while relying on an unadopted portion of the Second Amendment.¹⁷⁴ The court admitted that this could be a plausible argument when placed in the appropriate context, but there were too many instances in which “bear Arms” indicates private use, overriding a pure military interpretation.¹⁷⁵ To support its position, the court pointed out that at least Supreme Court Justices Ginsburg, Scalia, and Souter also read “bear Arms” beyond merely “soldiering:”

Surely a most familiar meaning [of “carries a firearm”] is, as the Constitution’s Second Amendment (“keep and bear Arms”) and Black’s Law Dictionary . . . indicate: “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”¹⁷⁶

Based on this authority, the court interpreted the operative clause’s “bear Arms” in a private rather than civic sense.¹⁷⁷

As a final argument relating to the operative clause, Defendants asserted “keep and

166. *Parker II*, 478 F.3d at 383.

167. *Id.*

168. *Id.* at 384.

169. *Id.*

170. *Id.* (citing *Silveira v. Lockyer* (*Silveira II*), 328 F.3d 567, 573 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (referencing Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1770); *Johnson & Walker’s English Dictionaries Combined* 126 (J.E. Worcester ed., 1830); *Oxford English Dictionary* 20 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., Oxford U. Press 1989); *Webster’s 1828 Dictionary* (available at <http://1828.mshaffer.com/d/search/word,bear>)).

171. *Parker II*, 478 F.3d at 384 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (referencing Johnson, *supra* n. 170)).

172. *Id.* (internal citations omitted).

173. *See id.*

174. *Id.*

175. *Id.*

176. *Parker II*, 478 F.3d at 385 (quoting *Muscarello v. U.S.*, 524 U.S. 125, 143 (1998) (Ginsburg, J., Rehnquist, C.J., Scalia, & Souter, JJ., dissenting) (emphasis in original)).

177. *Id.*

bear” is a unitary term while “keep” should not have an independent implication.¹⁷⁸ Defendants further contended that even if “keep” and “bear” are not read as a unitary term, “keep” cannot be broader than “bear” since the Second Amendment protects arms used throughout the course of militia service exclusively.¹⁷⁹ The court noted that Defendants referenced support for this contention,¹⁸⁰ which attempted to equate “keep” to “keep up” as in “keep up a standing army” or as used in the Articles of Confederation.¹⁸¹ However, the court countered that “[s]uch outlandish views are likely advanced because the plain meaning of ‘keep’ strikes a mortal blow to the collective right theory,”¹⁸² as “keep” is a straightforward term “that implies ownership or possession of a functioning weapon by an individual for private use.”¹⁸³ As a result, the court concluded that “bear Arms,” when viewed in context with “the people” and “keep,” has a clear individual meaning.¹⁸⁴

2. The Prefatory Clause

Turning to the prefatory clause, the court noted that both sides generally agreed on the meaning of this clause as declaring a civic purpose.¹⁸⁵ The primary dispute was over the meaning of “a well regulated Militia” and whether the phrase declares the entire prefatory clause’s only purpose as civic.¹⁸⁶ Plaintiffs argued that “Militia” as used in “a well regulated Militia” is “practically synonymous” with “the people” as used in the operative clause.¹⁸⁷ To counter, Defendants argued “Militia” referred to “a body of adult men regulated and organized by state law as a civilian fighting force,” but this is non-existent today as “the Framers’ militia has faded into insignificance.”¹⁸⁸

Both sides drew from *Miller* and its interpretation of “Militia.”¹⁸⁹ Defendants declared that a historical account of the meaning of “Militia” and the definition used in *Miller* supported their contention,¹⁹⁰ while “well regulated” implied a select body of individuals.¹⁹¹ The court began its analysis of this issue by looking to The Second Militia Act.¹⁹² The court reasoned that since the Act was a product of the Second Congress, which consisted of many members of the First Congress who drafted the Bill

178. *Id.* (citing Appellees’ Br. at 23 (July 21, 2006) (noting that “[e]very word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added” (quoting *Holmes*, 39 U.S. at 570–71))).

179. *Id.* at 385.

180. *Id.* (citing *Wills*, *supra* n. 32, at 66).

181. *Parker II*, 478 F.3d at 385.

182. *Id.* at 386 (quoting Dr. Johnson’s dictionary definition of “keep” as meaning “to retain; not to lose; to have in custody; to preserve; and not to let go”). *Johnson*, *supra* n. 170, at 540.

183. *Parker II*, 478 F.3d at 386 (citing *Silveira II*, 328 F.3d at 573–74 (Kozinski, J., dissenting from denial of rehearing en banc); *Emerson*, 270 F.3d at 231 n. 31).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Parker II*, 478 F.3d at 386.

189. *Id.*; see *Miller*, 307 U.S. at 178–79.

190. *Parker II*, 478 F.3d at 386.

191. *Id.* at 389.

192. *Id.* at 387.

of Rights, it would likely provide persuasive guidance to what the term “Militia” meant as used in the Second Amendment.¹⁹³ The court read this in accord with *Miller*’s definition, the current congressional definition in 10 U.S.C. § 311, and Defendants’ own definition of “Militia” contained in the D.C. Code.¹⁹⁴

With this in mind, the court found that Defendants’ interpretation of “Militia” is too narrow since these sources confirm that the term refers to “all free, . . . able-bodied men of a certain age who had given their names to the local militia officers as eligible for militia service,” such as today’s National Guard as codified in 10 U.S.C. § 311.¹⁹⁵ When reading “well regulated Militia,” the court noted that today’s National Guard is unlike the “Militia” of 1791 when the Second Amendment was drafted¹⁹⁶ since, unlike today, participation was mandatory then.¹⁹⁷ The court found that The Second Militia Act further supported that militia members had a duty to arm themselves apart from of actual service, while the state had a duty to organize the militia apart from whether citizens actually armed themselves properly according to the statute.¹⁹⁸ Accordingly, the court concluded the “well regulated Militia” clause was not referring to a select body of individuals since militia participation in 1791 was required; the most efficient way to preserve a militia was to protect an individual right to arms to ensure that citizens would be ready for service in the militia when called.¹⁹⁹

3. Precedent

Because the court previously had acknowledged that neither the D.C. Circuit Court of Appeals nor the Supreme Court had decided whether the Second Amendment protected an individual or collective right, the court looked to persuasive precedent on the issue.²⁰⁰ First, the court looked to *Fraternal Order of Police*²⁰¹ where the court had previously assumed the correctness of the collective right position urged by the government because the appellants had not properly raised the issue.²⁰² Since this did not provide guidance, the court turned to Supreme Court precedent, starting with *Scott v. Sanford*²⁰³ where the Supreme Court, in a discussion about Bill of Rights, noted:

[N]o one . . . will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances . . . [n]or can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding. . . . These powers . . . in relation to

193. *Id.*

194. *Id.* at 387–89 (citing D.C. Code § 49-401 (West 2001)).

195. *Parker II*, 478 F.3d at 387–89.

196. U.S. Const. amend. II.

197. *Parker II*, 478 F.3d at 389.

198. *Id.*

199. *Id.*

200. *Id.* at 391.

201. 173 F.3d 898.

202. *Parker II*, 478 F.3d at 391.

203. 60 U.S. 393.

rights of person . . . are, in express and positive terms, denied to the General Government.²⁰⁴

Although the quoted language is dicta, the court was persuaded by the Supreme Court's categorization of the Second Amendment among other well-known individual rights.²⁰⁵ To bolster this contention, the court referenced *Robertson v. Baldwin*.²⁰⁶ The court found this precedent to be the only mid-nineteenth to early-twentieth century cases to address whether the Second Amendment protects an individual or collective right.²⁰⁷ Since the District of Columbia is a federal district controlled by Congress, the court noted that the Bill of Rights applies directly to it without need of incorporation through the Fourteenth Amendment.²⁰⁸

With these historical cases in mind, the court turned to *Miller* for the Supreme Court's most comprehensive analysis of the Second Amendment to date.²⁰⁹ The court preliminarily indicated it read *Miller* as an individual rights interpretation of the Second Amendment, though the *Miller* Court did not explicitly hold this.²¹⁰ The court acknowledged that both the collective and individual right theorists rely on *Miller* to support their contention.²¹¹ After setting out the facts, arguments, and quoting the *Miller* test, the court recognized that Defendants argued this language refers to the connection an individual must have to the militia before falling under the Second Amendment's protections.²¹² However, in response, the court read this language as focusing on the types of arms protected by the Second Amendment, and not as conclusive evidence of whether the Second Amendment protects an individual or collective right.²¹³ The court reasoned that if *Miller* endorsed the collective rights interpretation, the *Miller* Court surely would have pointed out that Jack Miller and Frank

204. *Parker II*, 478 F.3d at 391 (quoting *Scott*, 60 U.S. at 450) (emphasis removed)).

205. *Id.*

206. The court quoted:

The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. . . . Thus the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; *the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons*; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment.

Id. at 392 (quoting *Robertson*, 165 U.S. at 281-82 (emphasis in *Parker II*, not in *Robertson*)). The *Parker II* court reasoned that if the Second Amendment was not an individual right, it is unlikely the Supreme Court would have chosen a concealed weapon as an exception to the Second Amendment. *Id.*

207. *Id.* at 391 (citing *Twining v. N.J.*, 211 U.S. 78, 98 (1908); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900); *Presser v. Ill.*, 116 U.S. 252, 264-66 (1886); *U.S. v. Cruikshank*, 92 U.S. 542, 551 (1876)).

208. *Parker II*, 478 F.3d at 391-92 n. 13.

209. *Id.* at 392.

210. *Id.*

211. *Id.*

212. *Id.* at 394.

213. *Parker II*, 478 F.3d at 393, 394.

Layton were not affiliated with any militia body.²¹⁴ In sum, the court summarized the *Miller* test as two pronged: In order for a weapon to fall within the protections of the Second Amendment, it must have “a reasonable relationship^[215] to the preservation or efficiency of a well regulated militia” and be “of the kind in common use^[216] at the time.”²¹⁷

In dicta, the court emphasized that, in its opinion, the Ninth Circuit incorrectly interpreted the term “Militia” as used in the Second Amendment in *Silveira* ²¹⁸ by failing to take into account the Second Militia Act.²¹⁹ Conversely, the court found that *Miller*’s definition of “Militia” provided additional support of an individual rights interpretation of the Second Amendment.²²⁰ In the court’s view, *Miller* recognized it would seem foolish for the Second Amendment’s drafters to draw a distinction between the ownership and use of arms for private versus militia purposes, since the ban of arms for private purposes would have crippled the militia’s readiness if it became necessary to call citizens for service.²²¹

To summarize the *Parker II* court’s Second Amendment analysis:

[T]he Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment’s civic purpose, however, the activities it protects are not limited to militia service, nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.²²²

4. Application

Applying this rule to the facts of *Parker II*, Defendants argued that modern handguns are not the type of weapon that falls within the court’s two-prong interpretation of the *Miller* test, since automatic handguns were not in existence in the 1700s.²²³ The court responded there could be no question that most handguns satisfied both prongs of the test then and especially today, because pistols clearly bear “some reasonable

214. *Id.*

215. *See Miller*, 307 U.S. at 178 (citing *Aymette*, 21 Tenn. at 158).

216. *Id.* at 178–79.

217. *Parker II*, 478 F.3d at 398 (drawing from the language of *Miller*, 307 U.S. at 178–79).

218. 312 F.3d at 1069.

219. *Parker II*, 478 F.3d at 394.

220. *Id.*

221. *Id.*

222. *Id.* at 395.

223. *Id.* at 397–98.

relationship to the preservation or efficiency of a well regulated militia”²²⁴ and are “of the kind in common use”²²⁵ today.²²⁶ In addition, the court added that just as modern communication is protected under the First and Fourth Amendments, the Second Amendment was not limited to protecting only colonial pistols.²²⁷

Clarifying its position, the court conceded this does not mean the government cannot impose any regulations on the use of weapons.²²⁸ Since the Second Amendment has roots in the common law, the court looked to the restrictions recognized in that body of authority.²²⁹ These consisted of restricting one from exercising the right to carry arms when under the influence of alcohol while on the premises of a church, polling facility, or public assembly;²³⁰ in a terrorist-like manner;²³¹ or if a convicted felon.²³² Therefore, the mere concealment of a weapon does not offend the Second Amendment.²³³ The court reasoned these “reasonable restrictions” are a balance between promoting the government’s police interests of health, safety, and welfare of its citizens, while not sacrificing the core principles that the Second Amendment is founded on.²³⁴ The court continued that characteristics such as insanity or felonious conduct would deprive one of the Second Amendment’s protections, but someone who merely is unsuited for militia service is not deprived of a “right to keep and bear Arms.”²³⁵

Recognizing Defendants’ assertion that their gun laws were a public safety measure, the court pointed out this ban on handguns was not limited to only citizens who do not have a relationship to militia service.²³⁶ Plaintiffs argued Defendants’ gun laws were unconstitutionally void since they irrationally restrict the lawful ownership of handguns leaving the law-abiding citizen incapable of owning a handgun.²³⁷ The court refused to go down this path and only took judicial notice of the black market of handguns in D.C., since it found Defendants’ gun laws in question are facially void because they infringe on Plaintiffs’ Second Amendment rights.²³⁸

Regarding the specific provisions of the D.C. Code alleged to be in violation of the Second Amendment by Plaintiffs, the court first analyzed D.C. Code § 7-2502.02.²³⁹

224. See *Miller*, 307 U.S. at 178 (citing *Aymette*, 21 Tenn. at 158).

225. *Id.* at 178–79.

226. See *Parker II*, 478 F.3d at 397.

227. *Id.* at 398.

228. *Id.* at 399.

229. *Id.*

230. *Id.*

231. *Parker II*, 478 F.3d at 399 (citing *N.C. v. Kerner*, 107 S.E. 222, 225 (N.C. 1921)).

232. *Id.* (citing *Lewis v. U.S.*, 445 U.S. 55, 65 n. 8 (1980)).

233. *Id.* (citing *Robertson*, 165 U.S. at 281–82).

234. *Id.*

235. *Id.*

236. *Parker II*, 478 F.3d at 399 n. 17.

237. *Id.*

238. *Id.*

239. The *Parker II* court quoted the relevant portions of this statute:

(a) A registration certificate shall not be issued for a . . .

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the

Defendants argued that since this statute merely bans handguns, a citizen is left free to choose any other type of weapon.²⁴⁰ The court found this argument “frivolous” and countered that once it is determined a weapon falls within the meaning of “Arms” as used in the Second Amendment, the weapon is protected from governmental regulation unless an exception applies.²⁴¹

Moving to D.C. Code § 22-4504,²⁴² the court re-iterated that Plaintiffs do not assert a right to carry handguns outside the home, only a right to carry handguns within the home which is restricted by this provision of Defendants’ gun laws.²⁴³ The court declined to analyze the Second Amendment’s protections with respect to carrying handguns in public or cars, and only found that § 22-4504 unconstitutionally prevents Plaintiffs from moving handguns throughout their home.²⁴⁴ In support of this contention, the court concluded such a restriction would undermine one of the rights the Second Amendment is premised upon, self-defense.²⁴⁵

Finally, D.C. Code § 7-2507.02 requires that a firearm be kept “unloaded and disassembled or bound by trigger lock or similar device, unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia.”²⁴⁶ Plaintiffs argued they are entitled to a “functional” firearm within the protection of the Second Amendment, while Defendants asserted that if faced with a self-defense justification, a judge would likely give the statute a narrow meaning.²⁴⁷ The court reasoned that this requirement waters down the existence of a firearm to a “useless hunk of ‘metal and springs’” and judicial discretion cannot be the escape hatch to an unconstitutional statute.²⁴⁸ This would completely deprive a citizen of exercising lawful self-defense rights.²⁴⁹

In conclusion, *Parker I* was reversed, and since the court found there were no material facts in dispute, the lower court was ordered to grant summary judgment for

employee with a firearm during the employee’s duty hours or to a police officer who has retired from the Metropolitan Police Department.

Id. at 399–400 n. 18 (quoting D.C. Code § 7-2502.02(a)(4)).

240. *Id.* at 400.

241. *Parker II*, 478 F.3d at 400.

242. The *Parker II* court quoted the relevant portions of this statute:

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person’s dwelling place, place of business, or on other land possessed by the person, shall be fined not more than \$5,000 or imprisoned for not more than 5 years, or both

Id. at 400 n. 20 (quoting D.C. Code § 22-4504).

243. *Id.* at 400.

244. *Id.*

245. *Id.*

246. *Parker II*, 478 F.3d at 400–01 (quoting D.C. Code § 7-2507.02).

247. *Id.* at 401.

248. *Id.*

249. *Id.*

Dick Heller consistent with Plaintiffs' relief requested.²⁵⁰ Judge Henderson dissented,²⁵¹ and argued, among other things, the majority opinion added forty-five useless pages of dicta to the Second Amendment debate when the case could have been decided on the simple fact that D.C. is not a state within the meaning of the amendment.²⁵² Judge Henderson continued, the Second Amendment "relates to the Militia of the [s]tates only."²⁵³

IV. DEFENSE OF THESIS

A. *Text of the Second Amendment and Supreme Court Precedent*

The Second Amendment's plain language secures an individual right.²⁵⁴ The government has "'powers'" or "authorities," not rights; the "right" as used in the Bill of Rights are for "the people,"²⁵⁵ and as *Parker II* pointed out, the Supreme Court has made it clear that "the people" has the same meaning throughout the Bill of Rights.²⁵⁶ A similar interpretation of "people" can be found in *Scott* where Chief Justice Taney noted that "'people' . . . and 'citizens' are synonymous terms, and mean the same thing."²⁵⁷ Thus, one commentator observed that "[i]f individuals can 'bear arms,' then the right to 'bear arms' must belong to individuals."²⁵⁸

As a result, the Second Amendment does not logically secure a "right" to be a soldier,²⁵⁹ what it does for the "Militia" is protect that "the people" are armed during inactive times, making organizations like today's National Guard not within the scope of the Second Amendment's "well regulated Militia" clause.²⁶⁰ If the Second Amendment protected the state's right to arm a militia, it would have repealed Article 1, § 8 (which grants Congress the power of "organizing, arming, and disciplining the Militia . . ."), Article 1 § 10 ("No state shall, without the consent of Congress, . . . keep troops . . . in a time of peace . . ."), and Article 2, § 2 (which declares the "President shall be Commander in Chief . . . of the Militia of the several States . . .") of the Federal Constitution; surely the Framers of the Second Amendment did not intend such a

250. *Id.*

251. *Parker II*, 478 F.3d at 401. (Henderson, J., dissenting).

252. *Id.* at 401–02 (Henderson, J., dissenting).

253. *Id.* at 409. A forthcoming law review article by professor Eugene Volokh dissects Judge Henderson's dissent. Kopel, *supra* n. 45, at 30 (citing Eugene Volokh, *Necessary to the Security of a Free State*, ___, Notre Dame L. Rev. ___, (forthcoming) (available at <http://www.law.ucla.edu/volokh/freestate.pdf>)).

254. Br. of Am. Civ. Rights Union in Support of Appellants at 2, *Parker II*, 478 F.3d at 381 (noting that the Second Amendment is "stated in plain English, is consistently supported by volumes of historical authorities, and no other alternative interpretation of the Amendment is logically coherent"); Schmidt, *supra* n. 16, at 988 (citing William J. Michael, *Questioning the Necessity of Concealed Carry Laws*, 38 Akron L. Rev. 53, 57 (2005)).

255. Schmidt, *supra* n. 16, at 984 (internal citations omitted).

256. See *Parker II*, 478 F.3d at 381; Br. of Amicus Curiae Sts. in Support of Appellants at 4–5, *Parker II*, 478 F.3d 370.

257. 60 U.S. at 404 (emphasis added).

258. Kopel, *supra* n. 4, at 119.

259. Br. of Amicus Curiae Sts. in Support of Appellants at 4, *Parker II*, 478 F.3d 370.

260. *Id.* at 9.

result.²⁶¹ In addition, a right to keep and bear arms while performing militia service would seem meaningless, since it is likely those serving in the militia would be provided with the necessary equipment, including weapons, to carry out their duties.²⁶²

Looking to persuasive Supreme Court precedent not accounted for in *Parker II*, in *Miller*, Justice McReynolds noted “[i]n the margin some of the more important opinions and comments by writers are cited.”²⁶³ Of the authority cited after this statement,²⁶⁴ two cases are Supreme Court opinions and six are state court opinions which interpret the Second Amendment or its parallel state constitutional provision as an individual right, while treatises by Justice Joseph Story and Thomas Cooley also support the individual rights position.²⁶⁵ In addition, the case cited after the *Miller* test²⁶⁶ supports the “standard” individual rights model²⁶⁷ as it holds the only weapons protected under Tennessee’s Constitution are those “part of the ordinary military equipment,”²⁶⁸ while also mentioning in dicta the Second Amendment to the Federal Constitution has the same construction and meaning.²⁶⁹

Looking to post-*Miller* precedent, *Konigsberg v. State Bar of California*²⁷⁰ included dicta about the Second Amendment’s scope. Though *Konigsberg* upheld the denial of an application for a license to practice law because the applicant refused to answer questions about communism, thus failing to show he possessed good moral character,²⁷¹ Justice Harlan argued the First and Second Amendments protected individual rights, but these protections are not absolute:²⁷²

[A]s Mr. Justice Holmes once said: “[The] provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.” . . . In this connection also compare the equally *unqualified command of the Second Amendment*: “the right of the people to keep and bear arms shall not be infringed.” And see [*Miller*].²⁷³

Regarding the history of the American Bill of Rights, one commentator has further observed that even today, a Briton without a criminal record can easily obtain even a shotgun for his leisure,²⁷⁴ while another identified the common law of England as far

261. See Robert A. Levy, *Thanks to the Second Amendment*, Leg. Times (Apr. 16, 2007) (available at <http://dcguncase.com/blog/links/>).

262. Br. of Amicus Curiae Am. Civ. Rights Union in Support of Appellants at 16, *Parker II*, 478 F.3d 370.

263. 307 U.S. at 182.

264. *Id.* at 182 n. 3 (internal citations omitted).

265. Kopel, *supra* n. 4, at 107.

266. See *Miller*, 307 U.S. at 178 (citing *Aymette*, 21 Tenn. at 158).

267. Kopel, *supra* n. 4, at 106–07.

268. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 500 (1995) (quoting *Aymette*, 21 Tenn. at 156).

269. Kopel, *supra* n. 4, at 108.

270. 366 U.S. 36 (1961).

271. *Id.* at 37–38.

272. Kopel, *supra* n. 4, at 147.

273. *Konigsberg*, 366 U.S. at 51 n. 10 (internal citations omitted) (emphasis added).

274. David B. Kopel, *It Isn't about Duck Hunting: The British Origins of the Right to Arms*, 93 Mich. L. Rev. 1333, 1335 (1995).

back as 1400 to support the root of the Second Amendment, codified in the English Bill of Rights of 1689.²⁷⁵ As well, every known judicial opinion and scholarly commentary from the nineteenth century, except one,²⁷⁶ treats the Second Amendment as an individual right.²⁷⁷

The next notable Supreme Court precedent came in *Moore v. City of East Cleveland*.²⁷⁸ Although *Moore* held citizens have a fundamental right to keep their nuclear and extended family together,²⁷⁹ in a discussion about the Fourteenth Amendment's scope, Justice Powell noted:

"[The] full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on."²⁸⁰

Another case from the Warren Court hinting at the Second Amendment's scope came in *Duncan v. Louisiana*.²⁸¹ Although *Duncan* involved the Sixth Amendment's trial by jury incorporated to the state through the Fourteenth Amendment,²⁸² in a discussion about the Bill of Rights as a whole, Justice Black provided:

[T]he personal rights guarantied [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms . . .²⁸³

One commentator noted that a similar inference to Justice Black's views on the Second Amendment can be drawn from his statement, "I prefer to think our Bill of Rights as including all provisions of the original Constitution and Amendments that protect *individual* liberty by barring government from acting in a particular area or from acting except under certain prescribed procedures."²⁸⁴

The most recent and significant discussion by the Supreme Court came in Justice Thomas's concurring opinion in *Printz v. U.S.*²⁸⁵ where the Court held the Brady Act unconstitutional.²⁸⁶ Arguing that even if the Brady Act was within Congress's

275. Schmidt, *supra* n. 16, at 993-94 (citing *Or. v. Kessler*, 614 P.2d 94, 98 (Or. 1980)).

276. Kopel, *supra* n. 4, at 137 (citing *Buzzard v. Ark.*, 20 Ark. 106 (1842)).

277. *Id.* (citing David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359 (1998)); see also Br. of Amicus Curiae Sts. in Support of Appellants at 25, *Parker II*, 478 F.3d 370 (noting "[t]he historical necessities and events of the English constitutional experience . . . were familiar to" the Framers and should "inform our understanding of the purpose and meaning of constitutional provisions" (quoting *Loving v. U.S.*, 517 U.S. 748, 766 (1996)).

278. 431 U.S. 494 (1977).

279. *Id.* at 498-500 (plurality).

280. *Id.* at 502 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (emphasis added)). This same passage was also quoted in *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (plurality).

281. 391 U.S. 145 (1968).

282. *Id.* at 149.

283. *Id.* at 166-67 (Black & Douglas, JJ., concurring).

284. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960) (emphasis added); Kopel, *supra* n. 4, at 148.

285. 521 U.S. at 936 (1997) (Thomas, J., concurring).

286. Kopel, *supra* n. 4, at 121.

Commerce Clause Power, it might still be an unconstitutional violation of the Second Amendment, Justice Thomas provided.²⁸⁷

The Constitution . . . places whole areas outside the reach of Congress' regulatory authority. . . . *The Second Amendment . . . appears to contain an express limitation on the Government's authority.* . . . This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. . . . Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic."²⁸⁸

Expanding on Justice Story's philosophy, one commentator found him a consistent supporter of the federal government's power,²⁸⁹ since he only once dissented from a constitutional decision when Chief Justice Marshall was in the majority.²⁹⁰ Beyond Justice Thomas' reference, Justice Story, while discussing the Second Amendment, argued out of Court "[i]t is against sound policy . . . [to] trample upon the rights of the people" and further warned that denying people the Second Amendment's protections as a strong check on federal power would "gradually undermine all the protections intended by . . . our national bill of rights."²⁹¹

Though not expressed in Court, it is worth noting the views from other current Supreme Court Justices regarding the Second Amendment's scope. Justice Scalia hinted in his book that he supports an individual rights interpretation.²⁹² At his Senate Confirmation Hearings when asked about the Second Amendment, Chief Justice Roberts acknowledged it was an "open issue" but declined to express an opinion due to the current split of courts and possibility the Court would resolve the issue during his

287. *Id.* at 122.

288. *Printz*, 521 U.S. at 937–38 (Thomas, J., concurring) (internal citations omitted) (first emphasis added, second emphasis in original).

289. Kopel, *supra* n. 4, at 183 (citing James McClellan, *Joseph Story and the American Constitution* 311 n. 161 (2d. ed., U. Oklahoma Press 1990)).

290. *Id.* at 183 n. 351.

291. *Id.* at 184 (quoting Joseph Story, *A Familiar Exposition of the Constitution of the United States* 264–65 (1842)); see also Br. of Amicus Curiae Am. Civ. Rights Union in Support of Appellants at 21, *Parker II*, 478 F.3d 370 (quoting Justice Story who provided that "one of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence [sic] to keep arms . . .").

292. Justice Scalia provided:

So also, we value the right to bear arms less than did the Founders (who thought the right to self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may . . . like elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.

Kopel, *supra* n. 4, at 118 n. 48 (quoting Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 43 (Amy Gutmann ed., Princeton U. Press 1998)); see Br. of Amicus Curiae NRA Civ. Rights Def. Fund in Support of Appellants at 3, *Parker II*, 478 F.3d 370.

tenure.²⁹³ Justice Alito, during his term on the U.S. Court of Appeals for the Third Circuit, dissented in *U.S. v. Rybar*²⁹⁴ and argued a law criminalizing machine gun possession was unconstitutional, though he cited the Commerce Clause rather than the Second Amendment for support.²⁹⁵

Even though the Supreme Court has virtually said nothing about the Second Amendment²⁹⁶ outside of mere dicta, it seems these cases invite similar inferences to those drawn from *Scott* and *Robertson* by the *Parker II* court.²⁹⁷ In light of all Second Amendment Supreme Court precedent, there seems to be an established line of authority supporting an individual rights interpretation of the Second Amendment,²⁹⁸ while the “great weight” of scholarly commentary also adopts this position.²⁹⁹

B. Public Policy and Application of the Second Amendment

Although the *Parker II* court eluded at least one policy argument advanced by Plaintiffs,³⁰⁰ public policy is in favor of the court’s holding. The right to defend your life, property, and family is “one of the most basic rules of nature.”³⁰¹ Currently in ten of twelve federal judicial circuits, if someone intrudes into a private home, the only remedy is to call 911 and hope the police arrive in a timely manner.³⁰² As well, in D.C., courts have held that the city’s police department is “not generally liable to victims of criminal acts for failure to provide adequate police protection.”³⁰³ Nationwide, in 69.2% of violent crimes it takes more than five minutes for police to respond, and in 40.3% it takes more than eleven minutes.³⁰⁴

Firearms are the most reliable, durable, and efficient means for effective self-defense available, especially for vulnerable groups such as women and the elderly.³⁰⁵ In addition, firearms are annually used 3–6 times more to deter criminals than by criminals using them to carry out crimes,³⁰⁶ and in more than eight out of ten cases where an assault victim brandishes a firearm in defense against an assailant, the criminal flees, even when armed.³⁰⁷

293. Erin Sheley, *Gunfight at D.C. Corral*, 12 Wkly. Stand. 11 (Mar. 26, 2007).

294. 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting).

295. Sheley, *supra* n. 293.

296. Volokh, *supra* n. 16 (internal citations omitted).

297. See *supra* nn. 204, 206.

298. Kopel, *supra* n. 4, at 186–87.

299. Br. of Amicus Curiae Sts. in Support of Appellants at 5, *Parker II*, 478 F.3d 370.

300. See 478 F.3d at 399 n. 17.

301. Br. of Amicus Curiae Cong. of Racial Equal. in Support of Appellants at 25, *Parker II*, 478 F.3d 370.

302. Leonard W. Levy, *Origins of the Bill of Rights* 13–14 (Yale U. Press 1999).

303. Natl. Rifle Assn. of Am. Inst. for Legis. Action, *The Case for Reforming the District of Columbia’s Gun Laws*, <http://www.nraaila.org/Issues/FactSheets/Read.aspx?ID=72> (Mar. 28, 2007) (quoting *Warren v. Dist. of Columbia*, 444 A.2d 1, 4 (D.C. App. 1981)).

304. Br. of Amicus Curiae Cong. of Racial Equal. in Support of Appellants at 24, *Parker II*, 478 F.3d 370 (citing Bureau of J. Statistics, *Percent Distribution of Incidents Where Police Came to the Victim*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvvs/current/cv05107.pdf> (accessed Mar. 18, 2008)).

305. Brandeis Br. Filed on Behalf of Amici Profs. at 1–2, *Parker II*, 478 F.3d 370 (quoting Linda Gorman & David B. Kopel, *Self-defense: The Equalizer*, 15 Forum Applied Research & Pub. Policy 92 (2000)).

306. *Id.* at 2.

307. Robert A. Levy, Am. Spectator, *They Never Learn*, http://www.spectator.org/dsp_article.asp?art_id=11342 (Apr. 25, 2007).

An examination of firearms' criminology reveals from 1946 in the U.S., when the earliest reliable firearm data compilation began, to 2000, the murder rate rose only one tenth of a percent while the rate of civilian firearm ownership quintupled.³⁰⁸ Specifically in the 1990s, while U.S. gun ownership increased by almost fifty million guns, murder rates decreased by a third.³⁰⁹ Comparing these numbers to other countries, such as Russia, France, Poland, Norway, Austria, Germany, Greece, England, Canada, and Switzerland, nations with more firearms per capita do not have higher murder rates than those nations with fewer.³¹⁰

The destructive role of firearms in our society is determined by socio-cultural and economic factors, not their availability.³¹¹ While 15% of Americans have criminal records,³¹² approximately 90% of adult murderers have records consisting of an average of four felonies from six years of recorded criminal behavior.³¹³ Additionally, one commentator found that the abuse rate for firearms has been calculated at 0.0000625% for murder and 0.0009188% for aggravated assault,³¹⁴ thus demonstrating:

[T]he majority of gun owners are responsible, law-abiding citizens who use guns mainly for sports and in self-defense.

The only people who have ever obeyed gun control laws are law-abiding, gun-owning citizens. The criminals have not and will not magically begin to obey strict gun laws. It is time that the United States government and the states enforce the criminal laws they currently have and stop their efforts to control a symptom of the problem and not the disease. The perceived gun problem is peripheral to the problem of crime. As criminals generally do not like to target armed individuals for their prey, widespread ownership of guns, coupled with responsible use and training, would most likely reduce crime.³¹⁵

308. Brandeis Br. Filed on Behalf of Amici Profs. at 3, *Parker II*, 478 F.3d 370 (citing Gary Kleck, *Targeting Guns: Firearms and Their Control* 96 (Aldine Transaction 1997)).

309. *Id.* at 4 (citing Daniel D. Polsby & Don B. Kates, Jr., *American Homicide Exceptionalism*, 69 U. Colo. L. Rev. 969, 984–88 (1998)). An expanded examination of Switzerland, for example, reveals their right to bear arms is as precious as our right to vote because it represents a cultural heritage that symbolizes a wholesome, community activity, and is a part of proud tradition that assembles the critical makeup of a national defense system. Stephen P. Halbrook, *Target Switzerland* 241 (Sarpedon 1998); David Kopel, *International Perspectives on Gun Control*, 15 N.Y. L. Sch. J. Intl. & Comp. L. 247, 247–48 (1995). This approach seems to produce fruitful societal benefits beyond a very low crime rate such as enjoying the weakest centralized government of any world democracy, belonging to no traditional alliances, and no involvement in both world wars. David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* 290, 407 tbl. 1 (Prometheus Bks. 1992); Stephen P. Halbrook, *Citizens in Arms: The Swiss Experience*, 8 Tex. Rev. L. & Pol. 141, 152 (2003).

310. Brandeis Br. Filed on Behalf of Amici Profs. at 12, *Parker II*, 478 F.3d 370 (citing Graduate Inst. of Intl. Stud., *Small Arms Survey 2003* (Oxford U. Press 2003); Joyce Lee Malcolm, *Guns and Violence: The English Experience* (Harvard U. Press 2002)).

311. *Id.* at 28.

312. *Id.* at 14 (citing Mark Cooney, *The Decline of Elite Homicide*, 35 *Criminology* 381, 386 (1997)).

313. *Id.* at 15 (citing Gary Kleck & Don B. Kates, *Armed: New Perspectives on Gun Control* 20–21 (Prometheus Bks. 2001)).

314. Ronald H. Benson, Student Author, *Printz Puns on the Palladium of Rights: It Is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 Ala. L. Rev. 561, 583 (1999) (citing Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment*, 24 *Rutgers L.J.* 1, 78–79 (1992) and noting these calculations were done by dividing the number of incidents involving firearms by the number of total firearms in the United States).

315. *Id.*; accord *Williams*, *supra* n. 10 (quoting Washington resident Tom Palmer who is a previous assault victim seeking a firearm for self-defense); see also Br. of Amicus Curiae Sts. in Support of Appellants at 30–

In sum, while the media ultimately affects our views towards firearms, data strongly suggests that allowing firearms to be in the hands of responsible adults actually reduces crime, while having no impact on accidental deaths.³¹⁶

Further support is found in two studies on gun control legislation conducted in the last five years by neutral, non-partisan, respected federal agencies that could not find a single gun control measure that reduced violent crime, suicide, or gun accidents.³¹⁷ The first of these studies was conducted by the National Academy of Sciences in 2004, which reviewed 253 journal articles, ninety-nine books, forty-three government publications, and empirical research of its own.³¹⁸ The second was compiled by the Centers for Disease Control in 2003, which considered firearm and ammunition bans, along with waiting period, acquisition, registration, and licensing restrictions for the purchase of firearms, as well as child-access and zero-tolerance laws.³¹⁹

Three additional objective studies confirm the effect of gun laws.³²⁰ The first examined all 3,054 counties in the U.S. and found, after accounting for other factors, that concealed handgun laws reduce murder by 8.5%, rape by 5%, and assault by 7%.³²¹ The second study, analyzing the same geographic region from 1977–2000, found that murder rates decreased 1.5–2.3% for every year concealed handgun laws are in effect, saving society billions of dollars in costs annually.³²² Lastly, a 1998 Library of Congress study found “‘it is difficult to find a correlation between the existence of strict firearms regulations and a lower incidence of gun-related crimes.’”³²³ In light of this empirical evidence, the argument that strict gun control laws produce societal benefits such as reduced crime and deaths seems obscure.³²⁴ The more accurate observation appears that, “[t]he evidence is clear: more guns in the hands of responsible owners yield lower rates of violent crimes. Gun control does not work. It just prevents weaker people from defending themselves against stronger predators.”³²⁵

31. *Parker II*, 478 F.3d 370 (citing Florenz Plassman & John Whitley, *Confirming “More Guns, Less Crime”*, 55 Stan. L. Rev. 1313, 1315 (2003)).

316. Brandeis Br. Filed on Behalf of Amici Profs. at 23, *Parker II*, 478 F.3d 370 (citing David B. Mustard, *Culture Effects Our Beliefs about Firearms, but Data Are Important*, 151 U. Pa. L. Rev. 1387, 1391 (2003)).

317. *Id.* at 28–29 (citing Comm. on Law & Just. & Natl. Research Council, *Firearms and Violence: A Critical Review* (Charles F. Wellford et al., eds., Natl. Academies Press 2004); Robert A. Hahn et al., *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearm Laws*, <http://www.cdc.gov/mmwr/Preview/mmwrhtml/rr5214a2.htm> (Oct. 3, 2003)).

318. *Id.* at 14 (citing Comm. on Law & Just. & Natl. Research Council, *supra* n. 317); see Robert A. Levy, *Loaded for the High Court*, 30 Legal Times (Sept. 24, 2007) (available at http://dcguncase.com/blog/wp-content/uploads/2007/09/levy_legal-times_9-24-071.pdf).

319. Levy, *supra* n. 318; Hahn et al., *supra* n. 317.

320. Br. of Amicus Curiae Sts. in Support of Appellants at 31, *Parker II*, 478 F.3d 370.

321. *Id.* (citing John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* fig. II (U. Chicago Press 1998)).

322. *Id.* (citing William Alan Bartley & Mark A. Cohen, *The Effect of Concealed Weapons Laws: An Extreme Bound Analysis*, 36 Econ. Inquiry 258, 258–65 (1998); Stephen G. Bronars & John R. Lott, Jr., *Criminal Deterrence, Geographic Spillovers, and the Right to Carry Concealed Handguns*, Am. Econ. Rev. 475–79 (May 1998)). As of 2005, there were thirty-seven states with concealed handgun legislation. See Michael, *supra* n. 254, at 53.

323. Br. of Amicus Curiae Cong. of Racial Equal. in Support of Appellants at 24, *Parker II*, 478 F.3d 370 (quoting Lib. of Cong., *Report for Congress: Firearms Regulations in Various Foreign Countries I* (May 1998)).

324. But see Morison Buck, *Letters: Guns Galore*, 34 Fla. Bar News 6 (Aug. 15, 2007).

325. Levy, *supra* n. 307. Levy further argued that “[a]nti-gun advocates, however noble their motives, help

Looking specifically at the District of Columbia, in the five years prior to 1976, when the statutes challenged by Plaintiffs were enacted, the murder rate dropped from thirty-seven to twenty-seven per 100,000 people, but during the five years after the statutes were enacted, these numbers rose back to thirty-five per 100,000.³²⁶ Consistently since 1976, D.C.'s murder rate has the highest in the U.S., except for a few instances where it ranked second or third.³²⁷ With that being said, during a twenty-five year life of the D.C. Gun Laws, from enactment in 1976 to 1991, the D.C. homicide rate rose 200% while the national homicide rate in that same period rose only 12%.³²⁸ Specifically, from 1999–2004, the D.C. violent crime rate was higher than every other state in the U.S., and even double that of some states.³²⁹

From the above data, it seems public policy favors granting the right to self-defense protected by the Second Amendment by possessing appropriate firearms, but even if the data were the opposite, the issue is about the meaning of the Second Amendment.³³⁰ As one commentator has observed, “the Constitution has spoken and that is enough” therefore “[s]uch . . . concerns may be relevant to, say, the question of whether to *repeal* the [Second Amendment], but . . . should certainly have no role in [its interpretation].”³³¹ Faithfulness to the federal Constitution requires that the Second Amendment’s enumerated right be granted the same vigorous protection as any other constitutional right,³³² rather than merely misreading *Miller* without conducting an exhaustive study,³³³ or treating the Second Amendment as a “politically incorrect, disfavored stepchild of the Bill of Rights.”³³⁴

If public policy should be the deciding factor when interpreting constitutional provisions, does that mean we do away with juries too, since sometimes citizens fail to effectively meet their jury duties?³³⁵ Of course not, and as a response to the collective rights interpretation of the Second Amendment, one commentator argued that this is likely the result of academics not taking their views public and instead only talking to each other.³³⁶ Harvard Law School Professor Alan Dershowitz admits to hating guns and wishing the Second Amendment was repealed, but condemns

create the environment in which horrors like Virginia Tech occur.” *Id.*

326. Brandeis Br. Filed on Behalf of Amici Profs. at 19, *Parker II*, 478 F.3d 370.

327. *Id.*

328. Br. of Amicus Curiae Cong. of Racial Equal. in Support of Appellants at 23, *Parker II*, 478 F.3d 370 (citing *Repeal D.C. Gun Ban*, Wash. Times A12 (May. 21, 2005)).

329. Br. of Amicus Curiae Sts. in Support of Appellants at 30, *Parker II*, 478 F.3d 370 (citing FBI and U.S. DOJ Unif. Crime Rpts., *Crime in the U.S.* (internal citations omitted)).

330. Levy, *supra* n. 318.

331. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 484 (1995) (emphasis in original).

332. Br. of Amicus Curiae Am. Civ. Rights Union in Support of Appellants at 2, *Parker II*, 478 F.3d 370; see *Silveira II*, 328 F.3d at 569.

333. Br. of Amicus Curiae Am. Civ. Rights Union in Support of Appellants at 3, *Parker II*, 478 F.3d 370 (noting that “[a]mong the inferior Federal courts, no precedent has reviewed the overwhelming body of authorities . . . and rebutted [them] to conclude that the Second Amendment does not provide for an individual right to bear arms. They generally just misread [*Miller*] . . . contrary to what the Supreme Court has itself has said about *Miller*, and increasingly just cite each other”) (referring to *Printz*, 521 U.S. at 938 n. 1)).

334. *Id.* at 2.

335. Reynolds, *supra* n. 331, at 486–87.

336. *Id.* at 508.

[f]oolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a public safety hazard [because they do not] see the danger in the big picture. They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like.³³⁷

Unfortunately, however, as long as Americans remain uninformed on the issue, they will continue to be manipulated by the current majority of courts' collective rights interpretation of the Second Amendment, which, as one commentator observed, is similar to the empty promises offered by the diet and fitness industries.³³⁸

V. CURRENT STATE OF *PARKER II* AND ITS POSSIBLE FUTURE EFFECTS

On May 8, 2007, a request by Defendants to rehear *Parker II* en banc was denied by a vote of 6–4.³³⁹ Subsequently, Defendants filed a petition for certiorari to the Supreme Court on September 4, 2007, and framed the issue as “[w]hether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns.”³⁴⁰ On the other hand, Plaintiffs urged a broader issue in “[w]hether the Second Amendment guarantees law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes.”³⁴¹ On November 20, 2007, the Supreme Court granted certiorari to *Parker II* and framed the issue as “[w]hether the following provisions—D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.”³⁴²

Oral argument for *Parker II* is scheduled for March 18, 2008,³⁴³ and one commentator expects an opinion in June 2008.³⁴⁴ *Parker II* has been termed as a “wild-card” by one commentator,³⁴⁵ and whatever the Supreme Court holds, there is sure to be serious presidential election campaign effects with the 2008 election year approaching.³⁴⁶ *Parker II* presents a professional and scholarly setting for the Supreme

337. Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 Tenn. L. Rev. 759, 789 (1995); see Levy, *supra* n. 15.

338. Reynolds, *supra* n. 331, at 508.

339. Or. Denial of En Banc Rehearing, *Parker II*, 478 F.3d 370.

340. Pet. for a Writ of Cert., *Parker II*, 478 F.3d 370.

341. Br. in Response to Pet. for Cert., *Parker II*, 478 F.3d 370.

342. *Heller*, 128 S. Ct. 645.

343. S. Ct. of the U.S., *Argument Calendars*, http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMarch2008.pdf (last updated Mar. 3, 2008).

344. Alan Gura, *Supreme Court Agrees to Hear Second Amendment Challenge to D.C. Gun Ban*, <http://dgcuncase.com/blog/2007/11/20/supreme-court-agrees-to-hear-second-amendment-challenge-to-dc-gun-ban/> (Nov. 20, 2007).

345. Reynolds, *supra* n. 45, at 347.

346. Robert Barnes & David Nakamura, *D.C. Case Could Shape Gun Laws*, Wash. Post A01 (Sept. 5, 2007); Tom Goldstein, SCOTUSblog, *A True Rightward Turn? The Upcoming Term and the 2008 Elections*, <http://www.scotusblog.com/wp/uncategorized/a-true-rightward-turn-the-upcoming-term-and-the-2008-elections/#more-5897> (Sept. 18, 2007); Robert A. Levy, *Mukasey Should Declare Where He Stands on the Second Amendment*, <http://dgcuncase.com/blog/wp-content/uploads/2007/10/th-levyl.pdf> (Oct. 2, 2007) (noting “[t]here are few issues that galvanize conservative voters, and attract moderates, as much as the right to bear arms”).

Court to rule on the Second Amendment,³⁴⁷ and Judge Silberman has framed the issue so that “no honest [C]ourt can avoid dealing with it head-on.”³⁴⁸ In addition, “win or lose, the Supreme Court case on [*Parker II*] will not be the final battle” for Second Amendment issues.³⁴⁹

If *Parker II* is affirmed, which will likely turn on Justice Kennedy,³⁵⁰ depending on how the Supreme Court decides the issue, the Court’s holding could invalidate gun laws across the country and have an extraordinary effect on future gun control legislation, or have virtually no immediate effect on state gun control legislation without incorporation through the Fourteenth Amendment.³⁵¹ If *Parker II* is reversed, little disruption would seem expected at least in the federal courts, since as noted above, currently only the D.C. Circuit and Fifth Circuit have held the Second Amendment protects an individual right to bear arms. However, there could potentially be “far-reaching” effects on the Court’s holding,³⁵² and the Second Amendment would be “eviscerat[ed] . . . for all practical purposes.”³⁵³ As well, “whenever . . . the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.”³⁵⁴ “Without our Second Amendment rights, all other rights [secured by the Constitution are merely] ‘on loan’ from the government”³⁵⁵ and we face potential future disaster.³⁵⁶ Hence,

347. Gura & Possessky, *supra* n. 26.

348. Tony Mauro, *D.C. Circuit Strikes Down Gun-Control Law, Priming Issue for High Court*, Leg. Times (Mar. 12, 2007) (available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1173434606378>) (quoting Roger Pilon of the Cato Institute).

349. Kopel, *supra* n. 45, at 60 (noting that, for example, if *Parker II* is affirmed, the next likely case will be one raising the question of whether the Second Amendment will be binding on the states through incorporation through the Fourteenth Amendment since *Parker II* involved the jurisdiction of D.C. rather than a state. In addition, Kopel notes “even if the Supreme Court affirms [*Parker II*], the most important bulwark of the right to arms and the right of self-defense will not be the courts, but will still be the legislative process, and the influence on that process of the world’s oldest and largest civil rights organization—the National Rifle Association.”); see also Lyle Denniston, SCOTUSblog, *Circuit Denies New Review of Second Amendment*, <http://www.scotusblog.com/wp/uncategorized/circuit-denies-new-review-of-second-amendment/> (May 8, 2007).

350. Reynolds, *supra* n. 45, at 335 (noting that Justice Kennedy found himself in the majority in every single 5–4 decision during the Court’s October 2006 term) (citing Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. Times A1 (July 1, 2007) (available at <http://www.nytimes.com/2007/07/01/washington/01scotus.html>)).

351. Anthony Gallia, “Your Weapons, You Will Not Need Them.” *Comment on the Supreme Court’s Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 Akron L. Rev. 131, 140 (1999) (citing Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876* 192 (Praeger Publishers 1998)); Kopel, *supra* n. 45, at 60; James Oliphant, *D.C. Gun Case May Hit Chicago: City’s Law is Next Target If Foe Wins in Supreme Court*, Chi. Tribune sec. News, 3 (Sept. 5, 2007); David Stras, *Academic Round-up*, <http://www.scotusblog.com/wp/uncategorized/academic-round-up-21/> (Dec. 31, 2007) (quoting Nelson Lund that the Court is “more likely than not” to affirm *Parker II*).

352. Reynolds, *supra* n. 45, at 349–50 (noting that if *Parker II* is reversed many Americans will likely be inflamed at the Court’s demonstrated willingness to protect non-enumerated rights such as abortion—referencing *Roe v. Wade*, 410 U.S. 113 (1973)—and homosexuality—referencing *Lawrence v. Texas*, 539 U.S. 558 (2003)—while not protecting the Second Amendment’s enumerated “right to bear Arms”).

353. Br. of Amicus Curiae Sts. in Support of Appellants at 4, *Parker II*, 478 F.3d 370.

354. *Id.* at 23 (quoting *Blackstone’s Commentaries* 300 (S. Tucker, ed., Philadelphia 1803) (emphasis added)).

355. Mike Huckabee, *Issues: Second Amendment Rights*, http://www.mikehuckabee.com/index.cfm?FuseAction=Issues.View&Issue_id=18 (accessed Mar. 18, 2008).

356. Levy, *supra* n. 15 (quoting *Silveira II*, 328 F.3d at 569 (Kozinski, J., dissenting from denial of rehearing en banc)); see also Story, *supra* n. 291.

regardless of how unfavorable one looks upon the Second Amendment, Judge Kozinski reminds us that denying the protections it asserts “is a mistake a free people get to make only once,” no matter how improbable such a “doomsday” may seem today.³⁵⁷

VI. CONCLUSION

The Supreme Court should affirm *Parker II* for the reasons advanced by Judge Silberman and above.³⁵⁸ A steady stream of Supreme Court precedent and notable academic commentary exist, beyond that accounted for by the *Parker II* court, to support an individual rights interpretation of the Second Amendment. As well, public policy supports an individual rights interpretation of the Second Amendment, and even if it did not, the constitutional way to reduce the Second Amendment to a “dead letter” is not by simply applying its text against intent and meaning. Therefore, as long as any of the Plaintiffs are determined to have standing and if *Parker II* is not rendered moot with the passage of the District of Columbia Personal Protection Act, *Parker II* should be affirmed and the Second Amendment interpreted to protect an individual right to bear arms consistent with the opinion of the *Parker II* court.

Drew A. Lagow*

357. *Silveira II*, 328 F.3d at 570 (Kozinski, J., dissenting from denial of rehearing en banc).

358. U.S. Solicitor General Paul D. Clement recently advanced a “balancing” approach in his brief to the Supreme Court regarding *Parker II*. See Br. for the U.S. as Amici Curiae at 8, *Parker II*, 478 F.3d 370. However, one critic argues this will “invite the Supreme Court to uphold an individual right to bear arms in principle but then allow politicians and judges to gut it in practice.” Wall Street J., *Misfire at Justice*, http://online.wsj.com/article/SB120096108857304967.html?mod=opinion_journal_main (Jan. 22, 2008).

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