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Points of View

THE MYTHIC SECOND

**CONSTITUTIONAL FANTASY AT THE D.C. CIRCUIT SHOULD NOT DESTROY OUR NATION'S GUN  
POLICIES**

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On Friday, March 9, the earth moved on the gun-control issue. For the first time in our nation's history, a federal appeals court struck down a gun law as a violation of the Second Amendment. With a 2-1 ruling from the U.S. Court of Appeals for the D.C. Circuit in *Parker v. District of Columbia*, the city's restrictive handgun law was held unconstitutional. And as a threat to gun regulation, the Second Amendment moved from rhetoric to reality.

Before *Parker*, at least 75 federal and state court rulings had upheld all kinds of gun laws, including handgun bans. How did Senior Judge Laurence Silberman and Judge Thomas Griffith come to a different conclusion? By defying Supreme Court precedent, rewriting the amendment's plain language, and employing an 'all means necessary' path to their predetermined result, even relying on the infamous *Dred Scott* decision (which, it turns out, has nothing useful to say about the Second Amendment). Their opinion is a laboratory study in judicial activism.

The Second Amendment reads: '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.' In its only extended treatment of the amendment, the Supreme Court in *United States v. Miller* (1939) quoted the provisions of Article I addressing the militia and then gave the following guidance: '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 RIGHT OF THE PEOPLE'

It is difficult to imagine a clearer statement that the 'guarantee' of the Second Amendment -- the right to keep and bear arms -- must be interpreted in light of its 'declaration' of purpose -- to assure the effectiveness of the militia. Under-

standing it in this way, the federal courts have routinely found that laws regulating the sale and possession of guns by private citizens do not run afoul of the Second Amendment because such laws do not adversely affect the militia. The simple reason is that, unlike the militias of the 18th century, no modern militia depends for its viability on privately owned arms.

According to this virtually unanimous view, the Second Amendment was written to respond to Anti-Federalist concerns that the Constitution gave the federal government excessive power over the state militias, which, unlike the much-feared professional soldiers of a standing army, consisted of ordinary citizens who were soldiers only on occasion. The amendment affirmed that the keeping and bearing of arms in a 'well regulated Militia' of the states is a 'right of the people.'

But the Parker majority, finding that the right guaranteed 'is broader than its civic purpose,' stated that it was 'premised on the private use of arms for activities such as hunting and self-defense.' This conclusion flatly contradicts Miller. As the Parker dissenter, Judge Karen LeCraft Henderson (a George H.W. Bush appointee), aptly notes, regardless of the lively controversy over whether the Second Amendment right is properly labeled collective or individual or somewhere in between, ' Miller 's label is the only one that matters.'

The necessary effect of finding the right 'broader' than the expressed militia purpose is to deprive the militia language of any functional meaning. The Parker majority's account of the right to keep and bear arms would be exactly the same if the first 13 words of the amendment had been omitted. Of course, this reading violates the Supreme Court's long-standing insistence (since Marbury v. Madison) that '[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible.' If the Framers meant to guarantee a right to be armed for purposes other than militia service, why did they include the militia language at all?

'BEING NECESSARY'

After briefly acknowledging the Miller Court's unequivocal statement of the Second Amendment's meaning, the Parker majority then impermissibly narrows it. It finds that the Supreme Court really meant to say only that the weapon at issue in a particular case must have a militia use to be constitutionally protected. Since pistols have a militia use, according to the majority, they are constitutionally protected under Miller, even in the hands of someone who has no connection to a militia.

The Miller Court was able to decide the particular case before it by reference to the type of weapon possessed by the defendants. Jack Miller and Frank Layton had been indicted for interstate transport of a short-barreled shotgun in violation of the National Firearms Act. The Supreme Court ruled that the Second Amendment did not guarantee the right to possess such a gun because there was no evidence show-

ing that it had 'some reasonable relationship to the preservation or efficiency of a well regulated militia.' Nor was the Court willing to take judicial notice that this kind of gun was 'any part of the ordinary military equipment.'

At most, this analysis suggests that the potential militia suitability of a gun is necessary for its possession to receive constitutional protection. This does not mean, however, that military utility would be sufficient for constitutional protection. (If constitutional protection followed from military utility alone, there would be no principled basis to deny such protection to private ownership of hand grenades, bazookas, surface-to-air missiles, or other military hardware.)

Moreover, if the right guaranteed is meant also to enforce purposes such as self-defense and hunting, why didn't the Miller Court address the suitability of a short-barreled shotgun for those purposes? In any event, Miller says that the 'guarantee' in the Second Amendment, not simply the word 'Arms,' must be 'interpreted and applied' in accordance with the militia purpose.

#### 'A WELL REGULATED MILITIA'

The Parker court argues that the militia referenced in the Second Amendment was not an 'organized' military force, but rather 'preceded' organization into military units. It cites Miller in support of this position: '[A]ccording to Miller, the militia included 'all males capable of acting in concert for the common defence' who were 'enrolled for military discipline.' ' The Parker majority continues, 'Becoming 'enrolled' in the militia appears to have involved providing one's name and whereabouts to a local militia officer,' but there was no other 'organizational condition precedent to the existence of the 'Militia.' '

How does this account establish the right to be armed for private citizens, such as the plaintiffs in Parker, who do not appear to have 'enrolled' in anything, much less a militia? To what militia officer did the plaintiffs provide their 'name and whereabouts'? In the modern age, showing a connection between arms possession for private purposes and the 'militia' requires imagining a fantasy militia of which ordinary gun owners can be members without ever having to report for militia duty of any kind.

Of course, any attempt to establish the existence of a constitutionally relevant 'unorganized' militia also runs head-on into the Second Amendment's reference to a 'well regulated' militia. How can a 'well regulated' militia be, in the words of the Parker opinion, merely 'the raw material from which an organized fighting force was to be created'? This description bears no resemblance to the militia as described by Noah Webster in his legendary 1828 dictionary: 'The militia of a country are the able bodied men organized into companies, regiments and brigades... and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations.'

TO 'BEAR ARMS'

The legislative history of the Second Amendment features powerful supporting evidence that the 'well regulated Militia' was a system of compulsory military service. James Madison's original draft included this phrase: 'but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.' Although the phrase was later deleted out of concern that such religious exemptions would weaken the militia, the language shows that (1) Madison used the term 'bear arms' in reference to military activity ending immaterial the Parker court's desperate search for other uses of 'bear' to mean 'carry'), and (2) Madison viewed the right being granted as involving some kind of military service.

Despite the Parker majority's strenuous argument, the word 'keep' also does not imply gun possession for private use. Consistent with the militia purpose, the phrase 'keep and bear Arms' should be read to refer to the possession and use of weapons in accordance with the requirements of militia service.

The Parker opinion, therefore, cannot be reconciled with *United States v. Miller* or with the constitutional text. The 'well regulated Militia' that the Framers sought to protect no longer exists in a form that would be threatened by restrictions on the private possession of guns. For decades, this has meant that policy decisions about the control of deadly firearms have been made by our elected representatives, whether on the D.C. Council or in the U.S. Congress, without the interference of courts. This is as it should be.

Now, after 10 years of steady progress in the wake of the Brady Act's passage, violent gun crime is on the rise again. The streets of our cities are awash with illegal guns, most supplied by corrupt gun dealers who remain untouched by laws that are too weak and law enforcers who are handcuffed by irrational statutory restraints. Too much is at stake to allow the constitutional mythology of the Parker opinion to determine our nation's gun policy.

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