

**SELF-INFLICTED WOUNDS:  
THE D.C. CIRCUIT ON THE SECOND AMENDMENT**

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On March 9, 2007, the U.S. Court of Appeals for the District of Columbia Circuit made history, becoming the first federal appeals court to strike down a gun law as a violation of the Second Amendment to the U.S. Constitution.<sup>1</sup> A panel of the D.C. Circuit, in *Parker v. District of Columbia*, voted 2-1 to strike down the District's strict handgun law, adopting an expansive view of the right to "keep and bear arms" at odds with the rulings of nine other federal circuits.

The *Parker* ruling is being celebrated by those who have long sought to transform the Second Amendment into a lethal weapon against gun laws. The celebration may be premature. The *Parker* majority opinion is so laced with internal inconsistencies, lapses in logic and, ultimately, incoherence, that it may well serve only to strengthen the case for the prevailing judicial view that the Second Amendment guarantees a right to be armed only in service to a well regulated militia, a view that has assured the constitutionality of a wide range of gun control laws. In this piece, my aim is to expose, in summary form, the most self-destructive flaws in the *Parker* analysis of the Second Amendment, including how the court distorted and defied Supreme Court precedent, "sliced and diced" the Constitution's text, deregulated the "well regulated Militia," and, ultimately obscured the real issue in the Constitutional debate over guns.

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<sup>1</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3083 (U.S. Sept. 04, 2007) (NO. 07-290).

## I. DISTORTING AND DEFYING SUPREME COURT PRECEDENT

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 most complete treatment of the Amendment, the Supreme Court in *United States v. Miller*, after quoting the provisions of Article I concerning the militia, 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.*”<sup>2</sup>

It is difficult to imagine a clearer statement that the “guarantee” of the Second Amendment – the right of the people to keep and bear arms – must be interpreted in light of its “declaration” of purpose: to assure the effectiveness of the militia, as referenced in Article I. Understanding it in this way, the federal courts routinely have upheld laws regulating the sale and possession of guns by private citizens because such laws have no adverse impact on the militia and bear no relation to militia service.<sup>3</sup> This conclusion follows because, unlike the militias of the 18<sup>th</sup> century, no modern militia depends for its viability on privately owned arms.<sup>4</sup> According to this virtually unanimous view, the Second Amendment was written to respond to Anti-Federalist concerns that the

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<sup>2</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis supplied).

<sup>3</sup> See e.g. *U.S. v. Parker*, 362 F.3d 1279 (10<sup>th</sup> Cir. 2004), *cert. denied*, 543 U.S. 874 (2004); *U.S. v. Lippman*, 369 F.3d 1039 (8<sup>th</sup> Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005); *U.S. v. Price*, 328 F.3d 958 (7<sup>th</sup> Cir. 2003); *Silveira v. Lockyer*, 312 F.3d 1052 (9<sup>th</sup> Cir. 2003), *rehearing en banc denied*, 328 F.3d 567, *cert. denied*, 540 U.S. 1046 (2003); *Olympic Arms v. Buckles*, 301 F.3d 384 (6<sup>th</sup> Cir. 2002); *Love v. Pepersack*, 47 F.3d 120 (4<sup>th</sup> Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *United States v. Wright*, 117 F.3d 1265 (11<sup>th</sup> Cir. 1997), *cert. denied*, 525 U.S. 894 (1998); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *U.S. v. Friel*, 1 F.3d 1231 (1<sup>st</sup> Cir. 1993). *But see United States v. Emerson*, 270 F.3d 203 (5<sup>th</sup> Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (adopting broader view of Second Amendment right, but upholding indictment brought under federal statute barring gun possession by persons under domestic violence restraining orders).

<sup>4</sup> See generally, Keith A. Ehrman and Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5, 34-40 (1989).

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.<sup>5</sup>

The *Parker* majority, however, found that the right guaranteed “is broader than its civic purpose,”<sup>6</sup> and instead was “premised on the private use of arms for activities such as hunting and self-defense.”<sup>7</sup> Indeed, the court concluded that a person’s Second Amendment right is not “contingent upon his or her continued or intermittent enrollment in the militia.”<sup>8</sup> Whatever ambiguities may lurk in the *Miller* opinion, there are at least two claims that *Miller* clearly forecloses: (1) that the right guaranteed by the Second Amendment can be interpreted and applied according to a purpose *other than* assuring the effectiveness of the militia, such as “hunting and self-defense;” and (2) that the right extends to persons who have not even an “intermittent” connection to a “well regulated Militia.” Yet, in plain defiance of *Miller*, these are precisely the claims made by the *Parker* majority.

After it briefly acknowledged the *Miller* Court’s unequivocal statement of the Second Amendment’s meaning, the *Parker* majority then impermissibly narrowed it. It found 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; in the words of the *Parker* opinion, the Supreme Court “was focused only on what arms are protected by the Second Amendment . . . .”<sup>9</sup> Since pistols have a militia use, according to *Parker*, they are

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<sup>5</sup> *Id.* at 18-34.

<sup>6</sup> *Parker v. District of Columbia*, 478 F.3d at 399.

<sup>7</sup> *Id.* at 395.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 393.

constitutionally protected, even in the hands of someone who has no connection to a militia.

It is true that the Supreme Court was able to decide the particular case before it in *Miller* by reference to the type of weapon possessed by the defendants. Jack Miller and Frank Layton had challenged their indictment for interstate transport of a short-barreled shotgun in violation of the National Firearms Act and its strict licensing and registration requirements on such guns and other “gangster-type” weapons. The Supreme Court ruled that the Second Amendment did not guarantee the right to possess such a gun because there was no evidence showing that it had “some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>10</sup> Nor was the Court willing to take judicial notice that this kind of gun was “any part of the ordinary military equipment.”<sup>11</sup>

At most, this analysis suggests that the potential militia suitability of a gun is *necessary* for constitutional protection. This does not mean, however, that military utility would be *sufficient* for constitutional protection, even in the hands of someone with no connection to a militia. Indeed, if constitutional protection followed from potential military utility alone, there would be no principled basis to deny such protection to private possession of machine guns, hand grenades, bazookas, surface-to-air missiles, or other military hardware.

The scope of the *Miller* opinion plainly is not limited to the issue of “what arms are protected by the Second Amendment.” *Miller* says that the right guaranteed by the Amendment, not simply the word “Arms,” must be “interpreted and applied” in

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<sup>10</sup> *United States v. Miller*, 307 U.S. at 178.

<sup>11</sup> *Id.*

accordance with its stated militia purpose. If the Supreme Court’s instruction is taken seriously, then it is difficult to discern how the possession of a militia-suitable gun by someone “for hunting and self-defense,” and not for any militia-related activity, can be constitutionally protected under *Miller*. Indeed, if the Second Amendment protects gun possession “for hunting and self-defense” by persons with no connection to a militia, as the *Parker* majority concludes, why didn’t the Supreme Court in *Miller* address the suitability of a short-barreled shotgun for those purposes?

This fictional reading of *Miller* was based largely on an extraordinary discussion in *Parker* about the Department of Justice brief to the Supreme Court in the *Miller* case. Rather than respecting and enforcing what the Supreme Court actually said in *Miller*, the *Parker* majority found the real meaning of *Miller* to be hidden in the Supreme Court’s opinion itself and discoverable only by analyzing the Government’s Brief. According to the *Parker* majority, “the Court’s opinion in *Miller* is most notable for what it omits.”<sup>12</sup>

According to the *Parker* majority, the Government made two alternative arguments to the Supreme Court in *Miller*. The first argument was that the right to keep and bear arms “exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.”<sup>13</sup>

According to the *Parker* court, the Supreme Court “did not decide the case on this, the government’s primary argument.”<sup>14</sup> Instead, the Supreme Court allegedly “followed the logic of the government’s secondary position, which was that a short-barreled shotgun was not within the scope of the term ‘Arms’ in the Second Amendment.”<sup>15</sup>

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<sup>12</sup> *Parker v. District of Columbia*, 478 F.3d at 393.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

The claim that the Government made two distinct arguments to the Supreme Court in *Miller*, and that only its “weapons based” argument was adopted by the High Court, simply misrepresents the Government’s *Miller* brief.<sup>16</sup> Here is what the Government actually argued, as presented in its “Summary of Argument”:

In both [England and America] the right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security. Indeed, the very language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law. The “arms” referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes, and the cases unanimously hold that weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment.<sup>17</sup>

It is clear from this passage that the Government was *not* arguing to the Supreme Court that the military utility of a weapon was itself sufficient to give the weapon constitutional protection, even by persons not members of the militia. Rather, the Government’s position was that to come within the protection afforded by the Second Amendment, one must 1) keep and bear arms as “members of the state militia or similar military organization . . .” and 2) keep and bear arms that are “ordinarily used for military or public defense purposes.”<sup>18</sup> The military utility of the weapon is an *additional* requirement for constitutional protection, not an *alternative* basis for protection.<sup>19</sup>

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<sup>16</sup> This analysis of the Department of Justice brief in *Miller* was developed by my colleague Jonathan Lowy of the Brady Center, and appears in the Brady Center’s on-line critique of the *Parker* opinion, *Mangling Miller: How the Parker Opinion Distorted and Defied Supreme Court Precedent*, in *Second Amendment Fantasy: The D.C. Circuit’s Opinion in the Parker Case*, at [www.bradycenter.org](http://www.bradycenter.org) and [www.gunlawsuits.org](http://www.gunlawsuits.org).

<sup>17</sup> Brief for Appellant (hereinafter “Government’s *Miller* Brief”) at 4-5, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696).

<sup>18</sup> According to the *Parker* majority, the Government in *Miller* had argued that even courts that had adopted an “individual rights” theory of the Second Amendment, had held that the term “‘Arms,’ as used in both the Federal and various state constitutions, referred ‘only to weapons ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals.’” *Parker* at 393 (quoting Government’s *Miller* brief at 18.) However, this portion of the Government’s *Miller* brief cites two state court cases that did not construe the Second Amendment at all, but rather interpreted state constitutional provisions in which the right to be armed is not accompanied by language referring to the

Why, then, did the *Miller* Court decide the case before it on the basis of the absence of evidence as to the militia utility of a short-barreled shotgun? The *Parker* majority argued that if the *Miller* Court intended to endorse the view that a person's connection to a militia is a separate requirement for constitutional protection, "it would have undoubtedly pointed out that the two defendants were not affiliated with a state militia or other local military organization."<sup>20</sup> This argument fails to grasp the procedural posture of the *Miller* case. The case was before the Supreme Court on a direct appeal of the District Court's grant of a demurrer to an indictment. Whereas the indictment would have contained facts about the gun possessed by the defendants (such facts being an element of the National Firearms Act violation), it would have included no facts about whether defendants were affiliated with a state militia. Thus, the *Parker* court was quite wrong in claiming that the Supreme Court could have pointed out that the defendants were not affiliated with a state militia. No such facts would have been alleged in the indictment.

The fact that the Supreme Court decided the *Miller* case on the basis of the absence of militia utility for a short-barreled shotgun, therefore, provides no basis to ignore, or narrow, the Court's crystal clear statement of the scope and meaning of the right guaranteed. The plain holding of *Miller* was that *because* the right to keep and bear

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militia at all. See *People v. Brown*, 235 N.W. 245 (Mich. 1931); *State v. Duke*, 42 Tex. 455 (Tex. 1874). Hence, this part of the Government's *Miller* brief is arguing that, even under state constitutions that, unlike the federal Constitution, protect a right to be armed for private purposes, strict regulation of short-barreled shotguns would be constitutional. At no point did the Government cite case law in its *Miller* brief supporting an individual Second Amendment right to own militia-suitable guns by persons unconnected to a militia.

<sup>19</sup> Thus, the Tenth Circuit, for example, has read *Miller* to create a four-part test to establish a Second Amendment claim. "As a threshold matter, [a party] must show that (1) he is part of a state militia; (2) the militia, and his participation therein, is 'well regulated' by the state; (3) [guns of the type at issue] are used by that militia; and (4) his possession of the [gun at issue] was reasonably connected to his militia service." *United States v. Haney*, 264 F.3d 1161, 1165 (10<sup>th</sup> Cir. 2001).

<sup>20</sup> *Parker v. District of Columbia*, 478 F.3d at 393.

arms must be “interpreted and applied” according to its militia purpose, in the absence of evidence that a short-barreled shotgun has a militia use, it cannot be constitutionally protected. The *Parker* majority, by failing to “interpret and apply” the right according to its militia purpose, ruled in defiance of Supreme Court precedent.

## II. “SLICING AND DICING” THE CONSTITUTIONAL TEXT

Throughout its opinion, the *Parker* majority took a “slice and dice” approach to the Second Amendment text. The court repeatedly divided the language into subparts, divining a meaning for each subpart taken in isolation. In this way, the court “lost the forest for the trees,” ending up with a thoroughly misleading interpretation of the whole.

### A. The Disappearing First Half

As indicated above, the *Parker* majority found that the right guaranteed by the Second Amendment is “broader” than its “civic purpose” to arm the militia and also extended to gun possession for “hunting and self-defense.” The necessary effect of this finding is to deprive the militia language of any functional meaning. If *Parker* is right, then every statute that would be constitutional under the actual text of the Amendment would be upheld even if the first thirteen words were omitted. Conversely, every statute that would be unconstitutional under the actual text would be struck down if those words were omitted. Under the *Parker* theory, *the first thirteen words of the Second Amendment literally make no difference.*

The instruction in *Miller* that the “guarantee” is to be “interpreted and applied” according to the express militia purpose is a specific application of the more general interpretive principle that no words of the Constitution should be read to be without meaning. This fundamental rule dates back to *Marbury v. Madison*: “It cannot be

presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible....”<sup>21</sup> The *Parker* interpretation cannot be reconciled with this command.

The *Parker* theory has no legally sufficient answer to the question: “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?”<sup>22</sup> The Framers could have adopted any number of contemporaneous formulations that expressly guaranteed a broad, private right to be armed. For example, the New Hampshire ratifying convention recommended a proposed amendment providing: “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.”<sup>23</sup> If the Framers intended an armed militia to be only one of several “salutary” purposes of the right to keep and bear arms, as suggested by *Parker*,<sup>24</sup> they also could have adopted language expressing those multiple purposes. For instance, the dissenting delegates at the Pennsylvania ratifying convention proposed: “That the people have a right to bear arms for the defense of themselves and their own State, or the United States, *or for the purpose of killing game*; and no law shall be passed for disarming the people or any of them, unless for crimes committed. . . .”<sup>25</sup> The

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<sup>21</sup> *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 174 (1803). Ironically, in arguing that the word “keep” in the Second Amendment must have “independent significance,” the *Parker* court endorsed this rule of constitutional construction, quoting the Supreme Court in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840): “[E]very word must have its due force, and appropriate meaning;...no word was unnecessarily used or needlessly added.” *Parker v. District of Columbia*, 478 F.3d at 385. The *Parker* majority then heedlessly violated this rule by giving no “due force” to the Amendment’s first thirteen words.

<sup>22</sup> The *Parker* court is reduced to arguing that the militia language was included in the Amendment as a “political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents.” *Parker* at 395. This may be true as a historical proposition, but it nevertheless leaves the militia language as legally without effect, in violation of the *Marbury* rule of constitutional interpretation.

<sup>23</sup> See H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS OR, HOW THE SECOND AMENDMENT FELL SILENT* 81-82 (2002).

<sup>24</sup> *Parker v. District of Columbia*, 478 F3d at 395.

<sup>25</sup> UVILLER & MERKEL, *supra* note 23, at 83 (emphasis supplied).

inclusion of the militia language, and omission of language referring to private purposes, must be presumed to be intentional and meaningful.<sup>26</sup>

### **B. Separating “Keep” from “Bear Arms”**

In addition to surgically removing the first thirteen words of the Second Amendment and casting them aside, the *Parker* majority carefully carved up the phrase “keep and bear Arms.”

First, the court isolated the phrase “bear Arms,” citing dictionary definitions and state constitutional provisions to make a historical argument that, although it “was sometimes used as an idiom signifying the use of weaponry in conjunction with military service . . . [this] idiomatic usage was not absolute.”<sup>27</sup> Finding definitions of “bear” to refer to “carry,” the court suggested that “to bear arms” could refer to “set[ting] out to find” thieves who had attacked a house.<sup>28</sup>

The court’s search for conceivable applications of the phrase “bear Arms” outside the military context, however, seems immaterial in light of the direct evidence that it was used solely in that context in James Madison’s drafting of the Second Amendment. As the *Parker* majority is forced to acknowledge<sup>29</sup>, Madison’s initial draft read as follows: “The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: *but no person religiously*

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<sup>26</sup> The *Parker* court thought it “passing strange” that the drafters would have “chosen the language they did” if they intended to limit the right guaranteed to “the protection of state militias.” Instead, according to the court, they could have chosen a “more direct locution.” *Parker* at 379. The court offered no support for the novel proposition that a proposed meaning to a constitutional text must be disallowed if modern readers could discern a “more direct locution” than the words actually used by the drafters. As argued above, in service to this invented rule of constitutional construction, the *Parker* court violated undoubtedly the oldest interpretive rule, requiring that every word used have meaning.

<sup>27</sup> *Parker v. District of Columbia*, 478 F.3d at 384.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

*scrupulous of bearing arms shall be compelled to render military service in person.*<sup>30</sup>

*Parker* concedes that, in the conscientious objector language (which was deleted in the First Congress),<sup>31</sup> Madison “appears to use ‘bearing arms’ in a strictly military sense....”<sup>32</sup> The court, nevertheless, adopted the improbable view that Madison and the First Congress understood the phrase “bear Arms” in the guarantee language to have a different meaning than the term “bearing arms” in the conscientious objector clause.<sup>33</sup> According to *Parker*, then, these virtually identical terms had different meanings when used in the same Amendment, even though the court also insisted that the term “the people” in the Second Amendment must be read to mean the same as “the people” when used in other provisions of the Bill of Rights.<sup>34</sup> Moreover, Madison’s inclusion of a conscientious objector clause at all is inexplicable in terms of the *Parker* theory. If the guarantee in the Second Amendment ensures individuals the choice to possess guns (or presumably not to possess them) for private purposes, why would it have even occurred to Madison to include language protecting conscientious objectors from a government-imposed requirement to “bear Arms”?

*Parker* then proceeded to sever the word “keep” from its context in the Amendment. The court wrote that “‘keep’ is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use.”<sup>35</sup> The word “keep” may well mean “possess for private use,” but it depends entirely on the

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<sup>30</sup> See UVILLER & MERKEL, *supra* note 23, at 97 (emphasis supplied).

<sup>31</sup> The debates in the First Congress indicate that the conscientious objector clause was deleted because of fears that it would enable the Government to vitiate the militia by declaring segments of the population to be “religiously scrupulous of bearing arms.” See UVILLER & MERKEL, *supra* note 23, at 98-100 (recounting House debates).

<sup>32</sup> *Parker v. District of Columbia*, 478 F.3d at 384.

<sup>33</sup> The *Parker* majority suggested that the term “bear Arms” in the guarantee clause may include “the carrying of arms for military purposes,” but is not limited to that meaning. *Parker* at 384.

<sup>34</sup> *Parker v. District of Columbia* 478 F.3d at 381.

<sup>35</sup> *Id.* at 386.

context. The *Parker* court studiously ignored contemporaneous uses of the phrase “keep and bear arms” to refer entirely to common, as opposed to private, defense. For example, Article XVII of the Massachusetts Bill of Rights provided that “[t]he people have a right to keep and bear arms for the common defense,’ [while] warning of the dangers of peacetime armies, and urging strict civilian control of the military.”<sup>36</sup> As discussed more fully below, it was common practice, codified in the Militia Act of 1792, for militiamen to be required to obtain their own militia arms and keep them at home for use when called out for militia service. The *Parker* court’s assumption that to “keep” arms necessarily implies possession for private use is completely unfounded, and rests entirely on the court’s having stripped the word from its context as part of the phrase “keep and bear Arms” in a constitutional provision specifically referencing the importance of a “well regulated Militia” to the “security of a free State.”

### III. DEREGULATING THE “WELL REGULATED MILITIA”

Having postulated that the right to be armed under the Second Amendment extends to the possession of guns for private purposes by persons with not even an “intermittent” connection to a militia, it is curious that the *Parker* opinion engaged in lengthy discussion of the nature of the militia during the founding era. Perhaps in an effort to obscure the fact that its theory effectively erases the Amendment’s militia language, the *Parker* majority went to great lengths to argue that the “well regulated Militia” was not an organized military force, but rather “was the raw material from which

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<sup>36</sup> UVILLER & MERKEL, *supra* note 23, at 82. Moreover, in one of the first judicial opinions addressing the meaning of the Second Amendment, the Tennessee Supreme Court found that the right to “keep and bear arms” under the Tennessee Constitution and the Second Amendment have identical historical origins in the English Declaration of Rights, under which “[t]he object, then, for which the right of keeping and bearing arms is secured is the defence of the public” and under which “[n]o private defence was contemplated, or would have availed anything.” *Aymette v. State*, 21 Tenn. 154 (Tenn. 1840).

an organized fighting force was to be created.”<sup>37</sup> According to *Parker*, “the existence of the militia preceded its organization by Congress, and it preceded the implementation of Congress’s organizing plan by the states.”<sup>38</sup>

In support of its account of the militia, the *Parker* majority cited *Miller*’s language that the militia included “all males physically capable of acting in concert for the common defence” who were “enrolled for military discipline.”<sup>39</sup> Though it observed that “[b]ecoming ‘enrolled’ in the militia appears to have involved providing one’s name and whereabouts to a local militia officer. . . .,”<sup>40</sup> the court nevertheless insisted that there was no “organizational condition precedent to the existence of the ‘Militia.’”<sup>41</sup> The inconsistency is striking. If someone can be in the militia only by “enrolling” with a “local militia officer,” then even according to *Parker*, the existence of the militia *presupposes* “an organizational conditional precedent.” The militia cannot simply be the “raw material” from which an organized militia will be formed. Moreover, it is not clear how this account could help any of the *Parker* plaintiffs make a Second Amendment claim, since they could make no assertion that they “enrolled” with any “local militia officer.” 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.

The *Parker* majority also invoked the “current congressional definition” of the “Militia” in 10 U.S.C. § 311, which distinguishes between the “organized militia” and the

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<sup>37</sup> *Parker v. District of Columbia*, 478 F.3d at 388.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 386 (quoting *U.S. v. Miller*, 307 U.S. at 178-79).

<sup>40</sup> *Id.* at 387.

<sup>41</sup> *Id.*

“unorganized militia.”<sup>42</sup> Under this statute, the “organized militia” is the National Guard and the “unorganized militia” is “all able-bodied males at least 17 years of age and . . . under 45 years of age . . .” who are not in the National Guard.<sup>43</sup> *Parker* suggested that this statutory “unorganized militia” is comparable to the militia of the founding era.<sup>44</sup> In fact, however, the distinction between the “organized” and the “unorganized” militia was a creation of the Dick Act of 1903, which gave birth to the modern National Guard system. It was a distinction unknown to the Framers; a “militia” in the founding era was understood to be an organized military force.<sup>45</sup>

Even if it were possible to envision a “militia” that could exist without an “organizational condition precedent,” the *Parker* analysis certainly cannot account for the Second Amendment’s reference to a “well regulated” militia. How can a “well regulated” militia also be an “unorganized” militia? The *Parker* majority makes the following argument:

We quite agree that the militia was a collective body designed to act in concert. But we disagree with the District that the use of “well regulated” in the constitutional text somehow turns the popular militia . . . into a “select” militia that consisted of semi-professional soldiers like our current National Guard.<sup>46</sup>

Here the court appears to have set up a “straw man” and knocked it down. The “militia purpose” interpretation of the Second Amendment need not, and does not, assert that the term “well regulated” means that the militia protected by the Second Amendment is

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<sup>42</sup> *Id.* at 388.

<sup>43</sup> 10 U.S.C. § 311.

<sup>44</sup> *Parker v. District of Columbia*, 478 F.3d at 388.

<sup>45</sup> Consider, for example, 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.” NOAH WEBSTER, NOAH WEBSTER'S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (American Christian history education series, The Foundation, 4th ed. 1985) (1828).

<sup>46</sup> *Parker v. District of Columbia*, 478 F.3d at 388.

necessarily a “select” militia like our current National Guard. Rather, this interpretation asserts only that the term “well regulated” means that the militia protected by the Second Amendment is necessarily organized, trained and disciplined by government, regardless of whether its membership includes a broad swath of the population, as it did during the founding era, or is the “select” group of citizen-soldiers that Congress formed into the National Guard when it passed the Dick Act in 1903 and first created the distinction between the “organized” and the “unorganized” militia. Whatever the scope of the militia’s membership, it would seem plain that a “well regulated” militia, by definition, cannot be simply a group of citizens “subject to organization,” as suggested by the *Parker* court,<sup>47</sup> but must, in fact, be “organized.”

The *Parker* majority offers an equally inconsistent and incoherent account of how the militia was armed. In its puzzling, but determined, effort to find some connection between a right to be armed for private purposes and an armed militia, the court finds that “[t]he important point, of course, is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called.”<sup>48</sup> The most powerful refutation of this professed connection between an “individual right” to be armed and the militia is the *Parker* court’s own discussion of the Militia Act of 1792. As the court accurately points out, the statute required those enrolled in the militia to arm themselves; indeed, “arming oneself became the first duty of all militiamen.”<sup>49</sup> Thus, under the *Parker* court’s own account, one year after the Second Amendment was ratified, the Congress enacted a law imposing a duty on militiamen to acquire militia arms. If the

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<sup>47</sup> *Id.* at 389.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 388.

Framers believed that preserving an “individual right” to possess guns (and presumably not to possess them) was the best way of arming the militia, why did Congress quickly proceed to impose a *duty* on militiamen to be armed?<sup>50</sup>

Thus, the *Parker* court’s effort to show some relationship between the Second Amendment’s declaration of militia purpose and its guarantee of the people’s “right to keep and bear arms” simply collapsed into self-contradiction. The majority argued that the militia, even apparently the “well regulated” militia, could exist prior to any organization, but then found that membership in the militia was dependent on pre-existing “local militia officers” with whom enrollment occurs. The majority argued that the militia was best armed by assuring a right to possess guns for non-militia purposes, but then made it clear that the militia *was* armed by imposition of a *duty* to be armed to serve the government’s militia purposes.

Of course, there is an interpretation of the Second Amendment under which these contradictions disappear: the Amendment guarantees the people the right to be armed in service to a militia organized by government to serve the security needs of the community.

#### **IV.    OBSCURING THE REAL ISSUE**

It is clear that the *Parker* majority considered its strongest argument to derive from the use of the term “the people” in the Second Amendment. The majority wrote that “[i]n determining whether the Second Amendment guarantee is an individual one, or

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<sup>50</sup> As is clear from the debates over the ratification of the Constitution, the central Anti-Federalist concern giving rise to the Second Amendment was the fear that, since the militia clauses of Article I appeared to give the Congress exclusive power to arm the militia, should Congress not do so, the states would be deprived of an armed militia. *See Ehrman & Henigan, supra* note 4, at 28-30. The Militia Act of 1792, by ensuring an armed militia, could be seen as alleviating the fear of federal neglect. If, instead of passing that statute, Congress had enacted a law banning possession of guns, with no exception for guns acquired for use in militia service, such a statute presumably would have violated the Second Amendment by precluding armed militias under the control of the states and denying the people the right to be armed in such militias.

some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right – ‘the people’.<sup>51</sup> Noting that the term “the people” is found in the First, Second, Fourth, Ninth and Tenth Amendments, the court asserted that it “has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation.”<sup>52</sup> The court concluded: “The natural reading of ‘the right of the people’ in the Second Amendment would accord with usage elsewhere in the Bill of Rights.” “The people,” according to the court, cannot mean “some subset of individuals such as ‘the organized militia,’” and also cannot mean “the states.” Thus, it concluded, “the right in question is individual.”<sup>53</sup>

This superficially appealing argument, however, simply obscures the real issue. There is no question that the Second Amendment guarantees a right to “the people” – that much is clear from the text. The issue is: *What* right does the Second Amendment grant to the people? Is it the right to possess and use guns for private purposes like hunting or self-defense, as asserted by the *Parker* majority? Or, rather, is it the right to be armed for purposes related only to service in a government-organized militia? As argued above, only the latter reading accounts for all the words of the Amendment in a consistent and coherent way.

It is no doubt true that the right of the people to keep and bear arms is different in important ways from the rights guaranteed by other provisions of the Bill of Rights. This becomes clear from the context in which the right is expressed in the Second Amendment. The right to keep and bear arms is the only right guaranteed in the Bill of Rights that has an expressed purpose to promote the security of a governmental entity;

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<sup>51</sup> *Parker v. District of Columbia*, 478 F.3d at 381.

<sup>52</sup> *Id.* (emphasis in original).

<sup>53</sup> *Id.*

i.e. “a free State.”<sup>54</sup> This is not equivalent to arguing that the Second Amendment grants a right to “the states,” rather than to “the people,” another straw man that the *Parker* court triumphantly knocks down.<sup>55</sup> The “militia purpose” argument, rather, is that the ultimate interest served by the people’s right to keep and bear arms in the Second Amendment is the security of a free State. This distinguishes it from the other rights guaranteed by the Bill of Rights, none of which are modified by an express, limiting purpose, and all of which are more clearly intended as a protection of the private interests of those asserting the right. This distinction, however, makes the Second Amendment no more or less a “right of the people” than any of the other guarantees in the Bill of Rights.

In point of fact, there is far less uniformity in the nature of the rights guaranteed “the people” in the Bill of Rights than the *Parker* majority suggests. The court asserts that all of the rights guaranteed in the first ten amendments are “individual” and not “collective” in nature. This is far from the truth. “The right of the people peaceably to

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<sup>54</sup> Consistent with its efforts to portray the “well regulated Militia” as an unregulated, almost abstract entity, the *Parker* majority also labors to interpret the phrase “a free State” to refer to an abstraction, instead of an actual political entity. The court asserted that the term was intended to mean “republican government” and not a state of the union. *Parker*, at 396. The court argued that “[e]lsewhere the Constitution refers to ‘the states’ or ‘each state’ when unambiguously denoting the domestic political entities such as Virginia, etc.,” as if to suggest that “a free State” was intended to mean something completely different. It is farfetched to believe that the modifier “each” or the use of the plural “States” somehow conveys an entirely different meaning than the phrase “a free State.” There is not a single instance of the word “State” or “States” in the Constitution (apart from “United States” and “State of the Union”) that does *not* refer to a domestic political entity, other than *Parker*’s imagined example in the Second Amendment. Examples of the singular “State” referring to such entities include Article I, § 2 (two uses), § 3 (two uses), § 9 (three uses) and §10 (five uses). Additional examples can be found throughout the Constitution. For this analysis, I am in debt to my colleague Brian Siebel of the Brady Center.

<sup>55</sup> The court addresses this argument by noting that the Framers were quite capable of distinguishing between “the people” and “the states,” and did so explicitly in the Tenth Amendment. *Parker*, at 397. Although a straw man argument, unfortunately the Ninth Circuit has adopted the position that the Second Amendment grants rights only to the states, at least in the sense that only a state has standing to bring a Second Amendment claim. *See Hickman v. Block*, 81 F.3d 98 (9<sup>th</sup> Cir. 1996). However, there is nothing in the text of the Second Amendment suggesting that only states, and not individuals, may bring Second Amendment claims. Second Amendment claims brought by individuals must be grounded in an asserted right to be armed in connection with service in an organized militia. *See generally*, David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 613-614 (2000).

assemble” in the First Amendment necessarily has a “collective” element; the word “assemble” presupposes the participation of others. In the Ninth Amendment, providing that the enumeration of certain rights in the Constitution “shall not be construed to deny or disparage others retained by the people,” it is unclear whether the “rights...retained by the people” are exclusively “individual” or rather have a collective element as well. The Tenth Amendment speaks not of “rights” at all, but of “powers.” It provides that the powers not given the Federal government by the Constitution, nor prohibited by the Constitution to the states, “are reserved to the states respectively, or to the people.” Although there may be some ambiguity here, it would seem that the “powers...reserved...to the people” would be reserved not to each person as an individual, but rather to “the people” collectively as the ultimate sovereign in our democracy.<sup>56</sup>

In the final analysis, though, deciding whether the “right of the people to keep and bear arms” is properly labeled “individual” or “collective” does not get us very far toward answering the central question of identifying the scope of the right guaranteed.<sup>57</sup> There is, however, nothing about the use of the term “the people” in the Second Amendment

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<sup>56</sup> Apart from the Bill of Rights, there are two other uses of the phrase “the people,” in the Constitution, both of which suggest a collective element. Article I, § 2 provides that the House of Representatives “shall be composed of Members chosen every second Year by the People of the several States...” Obviously, choosing the Members of the House of Representatives is done by “the People” understood collectively. Of course, the most famous constitutional use of the term “the People” is in the first words of the Preamble, declaring that “We the People of the United States...do ordain and establish this Constitution for the United States of America.” The collective sense of this usage is plain.

<sup>57</sup> It is unfortunate that participants in the debate over the meaning of the Second Amendment have consumed much energy on the question of whether it is properly labeled an “individual” or “collective” right. Some courts adopting the “militia purpose” view also have labeled it a “collective right.” See, e.g., *Love v. Pepersack*, 47 F.3d 120, 124 (4<sup>th</sup> Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6<sup>th</sup> Cir. 1976), and participants in the popular debate over the Amendment’s meaning frequently adopt the “individual” vs. “collective” rights framing of the issue (including, unfortunately, this writer, from time to time). As explained above, like the “right of the people peaceably to assemble,” the Second Amendment, properly understood, has an inherently collective element. Like the right to assemble, however, this collective element does not preclude individuals from bringing Second Amendment claims.

that itself defeats the “militia purpose” interpretation. Under the “militia purpose” view, individuals can assert the right guaranteed by the Amendment insofar as they are engaged, or seek to be engaged, in the constitutionally-protected conduct – possessing and using arms as part of a well regulated militia – and are being impeded in their efforts by Federal authority.

In support of its view that inclusion of the term “the people” itself defeats the “militia purpose” view of the Second Amendment, the *Parker* majority places surprising reliance on the Supreme Court’s ruling in *United States v. Verdugo-Urquidez*.<sup>58</sup> According to the *Parker* majority, in that case, the Supreme Court “endorsed a uniform reading of ‘the people’ across the Bill of Rights.”<sup>59</sup>

The *Verdugo-Urquidez* opinion, however, says nothing about whether the right of the people to keep and bear arms is limited to armed service in the militia; indeed, *Verdugo-Urquidez* is not a Second Amendment case at all. The case concerned whether the Fourth Amendment’s “right of the people to be secure... against unreasonable searches and seizures” applies to a search by federal DEA agents of the Mexican home of a suspected Mexican drug trafficker. In holding that the accused Mexican trafficker could not assert a Fourth Amendment claim, the Supreme Court noted the use of the phrase “the people” in various Amendments of the Bill of Rights, including the Fourth Amendment:

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

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<sup>58</sup> 494 U.S. 259 (1990).

<sup>59</sup> *Parker v. District of Columbia*, 478 F.3d at 381.

who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>60</sup>

The reference to the Second Amendment in *Verdugo-Urquidez* suggests, in dicta, the Supreme Court's view that "the people" given the right to keep and bear arms are part of "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." At most, this suggests that aliens living abroad have no Second Amendment rights.<sup>61</sup> The paragraph says nothing about whether the right given by the Second Amendment to "the class of persons who are part of a national community" is a right to be armed for militia purposes, or for private purposes. If anything, the dicta in *Verdugo-Urquidez* seems to contradict the statement in *Parker* that "the people" cannot mean "some subset of individuals...." Under the Supreme Court's formulation, "the people" means the "subset of individuals" who can be considered part of our national community. Nothing in *Verdugo-Urquidez* contradicts the view that the Second Amendment right applies to the "subset of individuals" who possess guns, or seek to possess guns, as part of an organized militia.

## V. LOOKING AHEAD

In the final analysis, the *Parker* majority opinion is a laboratory study of activist judges pursuing a tortured path to a predetermined result. Along the way, the court cavalierly disregarded the express guidance of a controlling Supreme Court decision, rewrote the text of the Second Amendment to suit its purposes, entangled itself in a web of inconsistency, and repeatedly erected "straw men" arguments to knock down while

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<sup>60</sup> *United States v. Verdugo-Urquidez*, 494 U.S. at 265.

<sup>61</sup> Although *Verdugo-Urquidez* suggests that connection to our national community is a unifying element in the multiple uses of "the people" in the Bill of Rights, this says nothing about whether the various rights guaranteed to "the people" differ in their nature and scope.

obscuring the real issue in the Second Amendment debate. The opinion eventually should fall of its own weight. But will it?

As of this writing, the District of Columbia has filed a petition for certiorari to the United States Supreme Court, but the Court has not yet acted. If the High Court takes the case, its ruling likely will replace *Miller* as the most important judicial ruling on the meaning of the Second Amendment. If the District's petition is denied, the *Parker* decision will remain a threat to federal and D.C. gun laws, as the D.C. Circuit likely will become the favored venue for future Second Amendment challenges.

Although it is difficult to predict what the future of the *Parker* opinion *will* be, there should be little doubt about what it *should* be. If its flaws are understood by future courts, the opinion should turn out to be the high water mark of the “private purpose” theory of the Second Amendment, discredited by history as reflecting unprincipled judicial activism at its worst.

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