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Parker v. District of Columbia: Putting the "I's" in Milita

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CASENOTE

PARKER V. DISTRICT OF COLUMBIA: PUTTING THE "I'S" IN MILITIA

I. INTRODUCTION

The meaning of the Second Amendment is argued passionately among interest groups and often touted by the American public, but until recently, it has not caused much controversy in the courts.[1] Unlike the textual structure of other amendments in the Bill of Rights, the Second Amendment contains a statement of purpose ("[a] well regulated Militia, being necessary to the security of a free State") before its guarantee ("the right of the people to keep and bear Arms, shall not be infringed").[2] Prior to 2001, the federal circuits were well-settled that this construction indicated that the Framers' only intent was to ensure a state's ability to maintain an effective state militia without federal infringement, rather than to confer an individual right to bear arms.[3] But in the midst of a recent individual rights trend in Second Amendment scholarship, the difficulty in determining how these

1. *See* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 997–98 (1995) ("Oddly enough, this often-rancorous exchange has long been neglected by those to whom we normally turn for constitutional interpretation: the legal academy and the courts, particularly the U.S. Supreme Court.") (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS (1994)).

2. U.S. CONST. amend. II; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793 (1998) (internal citation omitted).

3. *See* Silveira v. Lockyer, 312 F.3d 1052, 1063 & n.11 (9th Cir. 2003) (listing the circuits that follow the states' right to a militia view, or collective rights view). In 2001, the Fifth Circuit overturned sixty-two years of precedent when it found that the Second Amendment *did* confer an individual right to bear arms. United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).

two clauses fit together has risen to the forefront of constitutional jurisprudence.[4]

Procedural ambiguities exist in addition to the substantive question of what rights the Second Amendment protects. Since the passage of the Fourteenth Amendment, the issue of whether the Second Amendment even applies to state action or if states can freely restrict firearms, while the federal government cannot, has yet to be resolved.[5] And even if states are bound by the Second Amendment, parties attempting to invoke individual rights often argue that they have been injured by gun control laws even before being prosecuted for violations.[6] Whether these plaintiffs can be heard depends largely on how courts define standing for pre-emptive harm.[7]

The United States Court of Appeals for the District of Columbia Circuit's recent decision in *Parker v. District of Columbia* attempted to resolve these questions by revisiting the amendment's text and enactment history, consulting scholarship trends, and taking note of the Fifth Circuit's decision in *United States v. Emerson*.[8] The *Parker* court held that the Second Amendment does protect an individual's right to bear arms.[9] Part II of this note explores the history of the Second Amendment, compares arguments supporting the collective rights theory to the recent scholarly trend reversing that long held viewpoint, and explains the judicial precedent in place prior to *Parker*. Part III presents the factual and procedural background of the *Parker* decision. Part IV examines the majority and dissenting opinions. Finally, Part V

4. *See* Adam Liptak, *A Liberal Case for the Individual Right to Own Guns Helps Sway the Federal Judiciary*, N.Y. TIMES, May 7, 2007, at A18 (noting previous "scholarly and judicial consensus that the Second Amendment protects only a collective right" and the dilution of that majority opinion over the last twenty years).

5. *See Silveira*, 312 F.3d at 1066 n.17; Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 296 (2000) (explaining that the Second Amendment has yet to be expressly applicable to the states).

6. *See* Parker v. District of Columbia, 478 F.3d 370, 374–75 (D.C. Cir. 2007) (explaining that plaintiffs were bringing pre-enforcement challenges to the District's gun laws and comparing plaintiffs to those in an "almost identical" position in *Seegars v. Gonzales* (citing Seegars v. Gonzales, 396 F.3d 1248, 1255–56 (D.C. Cir. 2005))).

7. *See id.* (suggesting that the D.C. Circuit Court could—and perhaps should—overrule its stance on pre-enforcement challenges in order to align more closely with the relaxed requirements found in Supreme Court decisions, *Babbitt v. United Farm Workers National Union* and *Virginia v. American Booksellers Association* (citing *Babbitt*, 442 U.S. 289, 298 (1979); *Am. Booksellers*, 484 U.S. 383, 393 (1988))).

8. *See id.* at 378–81 (citing *Emerson*, 270 F.3d at 264–65 (5th Cir. 2001)).

9. *Id.* at 395.

discusses the possible impacts of *Parker* and the likelihood that the Supreme Court will grant certiorari.

II. HISTORY

A. *Interpreting the Framers' Second Amendment*

In 1791, the First Congress adopted the Second Amendment to quell Anti-federalist concerns regarding the federal government's Article I powers.[10] As a stipulation to ratifying the Constitution, Anti-federalists demanded a safeguard that would protect a state's right to organize militias and defend itself if a tyrannical government abused the power to raise standing armies.[11] However, the wording of the amendment and the history surrounding its enactment make it unclear whether the Framers had intended to reserve an individual right to bear arms beyond this federalism issue.[12]

Modern interpretations resolving the individual rights ambiguity of the Second Amendment fall into three categories—the "collective rights" model, the "traditional individual rights" theory, and a variant of the two called the "limited individual rights" or "sophisticated collective rights" theory.[13] The collective rights

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10. *See* U.S. CONST. art. I, § 8, cl. 12, 15, 16 ("The Congress shall have Power . . . To raise and support Armies . . . To provide for calling forth the Militia to execute the Laws of the Union . . . To provide for organizing, arming, and disciplining, the Militia"); Dorf, *supra* note 5, at 310 ("To the extent that opponents of ratification worried about arms, their principal concern was that the federal government would establish a standing army. Ratification was obtained through a bargain."); *see also* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 667 (2000) (explaining that many Founders believed "state militias were preferable to a federal army").

11. *See Parker*, 478 F.3d at 390 ("Federalists relied on the existence of an armed populace to deflect Antifederalist criticism that a strong federal government would lead to oppression and tyranny. Antifederalists acknowledged the argument, but insisted that an armed populace was not enough and that the existence of a popular militia should also be guaranteed."); Dorf, *supra* note 5, at 311 ("[T]he Second Amendment was intended to protect the *states*' right of organized resistance to federal tyranny.").

12. *See* Dorf, *supra* note 5, at 311–12 (arguing that the Framers' concern about standing armies was more about federal control over the states, rather than ensuring an individual right). *But see* Volokh, *supra* note 2, at 810 (arguing that the First, Fourth, Ninth, and Tenth Amendments secure individual rights, which "suggests that 'the right of the people to bear arms' refers to a right of individuals" as well).

13. *Parker*, 478 F.3d at 379; Silveira v. Lockyer, 312 F.3d 1052, 1060 (9th Cir. 2003); Cottrol & Diamond, *supra* note 1, at 1000–03.

model does not recognize an individual right to bear arms and therefore permits both state and federal governments to strongly restrict firearm use.[14] The traditional theory asserts that "individual private citizens [have] a fundamental right to possess and use firearms for any purpose at all, subject only to limited government regulation."[15] The sophisticated collective rights model supports the idea that "individuals maintain a constitutional right to possess firearms insofar as such possession bears a reasonable relationship to militia service."[16] Application of the sophisticated collective rights model renders an almost identical result as the collective rights model because most proponents do not recognize a modern "militia" akin to the one contemplated by the Framers.[17] Currently, the majority of courts recognize the collective rights theory as the most salient.[18]

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14. *Silveira*, 312 F.3d at 1060. Collective rights theorists put significant weight on the purpose clause of the Second Amendment and assert that the goal of a "well-regulated militia" strongly indicates that the Framers' only intent was to "maintain state militias against federal encroachment." Cottrol & Diamond, *supra* note 1, at 1000. This theory is often considered to be a result-based argument aimed at supporting the contemporary desire to control gun violence. *See id.* at 1003.

15. *Silveira*, 312 F.3d at 1060. Traditional theorists purport that the ability to arm oneself was a preexisting right and that the Bill of Rights only secured its preservation. *See Parker*, 478 F.3d at 382 (citing Thomas B. McAffee & 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)); *see also* Robertson v. Baldwin, 165 U.S. 275, 281 (1897) ("[T]he 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 . . . ."). Also indicative of the Framers' intent to reserve an individual right is the ease with which the Framers could have expressed that their only intention was to protect ability of militias to organize. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644–45 (1989) ("[O]ne might ask why the Framers did not simply say something like 'Congress shall have no power to prohibit state-organized and directed militias.'").

16. *See Silveira*, 312 F.3d at 1060.

17. Cottrol & Diamond, *supra* note 1, at 1003 ("Because the militia of the whole has essentially disappeared, then the individual right has ceased to exist.").

18. *See Parker*, 478 F.3d at 380; *see also* Parker v. District of Columbia, 311 F. Supp. 2d 103, 107 (D.D.C. 2004) (citing federal circuit cases upholding the collective rights theory), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007); Sandidge v. United States, 520 A.2d 1057, 1058 (D.C. 1987) (explaining that the court's holding follows precedents of "numerous other courts" recognizing collective rights instead of an individual right).

B. *Legislative History Depicting the Second Amendment's Application*

1. The Supreme Court's Decision in *United States v. Miller* Supports a Collective Rights Theory

In 1939, the Supreme Court held that possession of a short-barreled shotgun had no relation to the "preservation or efficiency of a well regulated militia" and therefore "the Second Amendment [does not] guarantee[ ] the right to keep and bear such an instrument."[19] Although the Court did not take a firm stand on the broader question of individual rights, the majority of circuits have read this decision not as conferring an individual right, but instead supporting a collective rights theory.[20] An alternative reading of *Miller* proposes that the decision distinguishes certain weapons as unrelated to militias and therefore only these weapons are beyond the scope of the Second Amendment's protection.[21] Most courts have avoided this alternative interpretation and escape the "perverse result that the deadlier a firearm is, the more likely it is to receive constitutional protection—because the military, of course, prefers weapons that are as efficient and effective at killing as possible."[22] The Supreme Court has twice declined to reconsider its position, leaving lower courts with little guidance beyond *Miller*.[23]

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19. United States v. Miller, 307 U.S. 174, 178 (1939).

20. *See, e.g.*, *Silveira*, 312 F.3d at 1061 ("As a result of its phrasing of its holding in the negative, however, the *Miller* Court's opinion stands only for the proposition that the possession of certain weapons is not protected, and offers little guidance as to what rights the Second Amendment does protect. . . . What *Miller* does strongly imply, however, is that the Supreme Court rejects the traditional individual rights view."); *see also* Yassky, *supra* note 10, at 665–67 (explaining that the *Miller* case does not provide much clarity to the Second Amendment, but does rule out the Libertarian [traditional individual rights] approach).

21. *See* Yassky, *supra* note 10, at 666 (explaining that revisionists "read *Miller* as holding merely that certain weapons are beyond the reach of Second Amendment protection").

22. *Id.* at 666; *see Sandidge*, 520 A.2d at 1058–59 ("Given the destructive capabilities of modern weaponry, it is inconceivable . . . that Congress may only regulate weapons which have no possible relationship to the common defense today.").

23. *See Parker*, 311 F. Supp. 2d at 105.

2. The Fifth Circuit Interprets the Second Amendment as Conferring an Individual Right

Sixty-two years after *Miller*, the Fifth Circuit concluded in *United States v. Emerson* that *Miller* was being read too narrowly, and that the Framers *did* intend to protect the individual right to bear arms.[24] The Fifth Circuit disposed of the dominant interpretation of *Miller* by finding that the Supreme Court did not actually agree with the government's collective rights argument.[25] Instead, the Fifth Circuit believed the *Miller* Court ruled in the government's favor via their second theory—that the amendment only protects "those weapons which are ordinarily used for military or public defense purposes. . . ."[26] Because the *Miller* Court determined that "[s]awed-off shotguns . . . are clearly weapons which can have no legitimate use in the hands of private individuals," Miller's rights were not infringed by the law.[27]

Once the Fifth Circuit determined that *Miller* did not actually void the individual rights theory, the court held that plain interpretations of the text and historical material from the time of enactment actually proved that the individual rights model was correct.[28] The court believed that the "right of the people to bear arms" applied to individuals, not states, because everywhere else in the Constitution the word "people" is used to confer an individual right.[29] Likewise, the court determined that "bear arms" was

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24. 270 F.3d 203, 264 (5th Cir. 2001). *Emerson* involved an estranged husband who was issued a restraining order for threatening his wife. *Id.* at 211. After the order was issued, Mr. Emerson was found carrying a Beretta pistol in violation of 18 U.S.C. § 922(g)(8), which prohibits any person subject to a restraining order from shipping interstate or receiving an interstate shipped firearm. *Id.* at 211–13. Mr. Emerson claimed that § 922(g)(8) infringed on his Second Amendment rights. *Id.* at 212.

25. *See id.* at 224.

26. *Id.* at 222, 224.

27. *Id.* at 223–24 (quoting Brief for Appellant at 20–21, 307 U.S. 174 (No. 696), 1939 WL 48353).

28. *See id.* at 224–25, 260.

29. *Id.* at 227–28 (noting several instances in the constitutional articles and amendments where the Framers necessarily chose to use the word "state" instead of the confusing terminology, "the people," when describing the collective body of state citizens). In support of this reading, the Fifth Circuit cited the Supreme Court's decision in *United States v. Verdugo-Urquidez*, which held that the First, Second, Fourth, Ninth, and Tenth Amendments refer to a class of people to whom rights and powers are preserved. *Id.* at 228 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

not limited to military use,[30] and "keep arms" did not suggest this use at all.[31] The amendment's purpose statement for a "well-regulated militia" did not impede the court's interpretation because the textual guarantee was clear, and because the Framers understood militias to encompass nearly the entire population.[32] By conferring a right to arm the militias, the intent was to give each person a right to arm himself.[33] The historical perspective reinforced the court's textual determinations.[34] Despite determining that the federal statute did *not* violate Mr. Emerson's rights because it had a legitimate aim to protect public safety, the Fifth Circuit held that the Second Amendment confers an individual right.[35]

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30. *See id.* at 230–32 (explaining that at least ten early state constitutions "reflect[ ] that under common usage 'bear arms' was in no sense restricted to bearing arms in military service").

31. *Id.* at 232 (stating that it was undisputed by both appellants and appellees that "keep arms" has a non-military connotation).

32. *See id.* at 233–35 (holding that the preamble to the Second Amendment alone cannot confer a collective rights theory because "such an interpretation is contrary to the plain meaning of the text of the guarantee, its placement within the Bill of Rights and the wording of the other articles thereof and of the original Constitution as a whole"). The Court noted that "'Militia' . . . was understood to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large." *Id.* at 235.

33. *Id.* at 235 (explaining that "Madison saw an armed people as a foundation of the militia which would provide security for a 'free' state, one which . . . was not afraid to trust its people to have their own arms") (discussing THE FEDERALIST NO. 46 (James Madison)). Madison's view is instructive because he was instrumental in creating the Amendment. *Id.* at 240 n.53.

34. The *Emerson* court could not find any historical material contradicting its interpretation of the text which indicated it had formulated the appropriate viewpoint. *Id.* at 236. The court emphasized state ratifications of the Constitution and their demands to create a Bill of Rights containing a provision for the people's right to bear arms. *See id.* at 241–44 (listing eight state constitutional convention proposals for adding certain individual rights to the Constitution). The court also noted that "the Federalists' favorite 1787–88 talking point[ ]" responding to the state demands "was to remind the Anti-federalists that the American people were armed and hence could not possibly be placed in danger by a federal standing army or federal control over the militia." *Id.* at 259. Further, newspapers and letters written after the adoption of the Bill of Rights supported the *Emerson* court's view of individual rights. *Id.* at 260. Overall, the court was "struck by the absence of any indication that the result contemplated by the sophisticated collective rights view was desired, or even conceived of, by anyone" and therefore aligned its holding with the individual rights theory. *Id.* at 260 n.60.

35. *See id.* at 264–65 (stating that "the predicate order in question here is sufficient, albeit likely minimally so, to support the deprivation . . . of the defendant's Second Amendment rights").

3. Among the Federal Circuits, the Fifth Circuit Stands Alone in Conferring an Individual Right

Prior to the D.C. Circuit's decision in *Parker*, the Fifth Circuit was the only federal appellate court to protect a Second Amendment individual right to bear arms.[36] All other circuits have adopted some form of the collective rights theory and have never recognized that a federal or state law infringed on an individual right.[37] However, in 2001 the Department of Justice adopted the individual rights model.[38]

III. BACKGROUND OF THE *PARKER* CASE

In response to an increasing number of "gun-related deaths and crimes," Washington, D.C. passed the Firearms Control

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36. *See* Parker v. District of Columbia, 478 F.3d 370, 380 (D.C. Cir. 2007); *see also supra* note 18 and accompanying text. The *Parker* court also noted that "[s]tate appellate courts . . . offer a more balanced picture" with "at least seven [holding] that the Second Amendment protects an individual right," while "at least ten state appellate courts (including the District of Columbia) have endorsed the collective rights position." *Parker*, 478 F.3d at 380 & n.61 (citations omitted).

37. *See* United States v. Price, 328 F.3d 958, 961 (7th Cir. 2003) (agreeing with a previous collective rights holding despite defendant's petition for the court to review persuasive authority in *Emerson* and Attorney General John Ashcroft's letter to the National Rifle Association); *Silveira*, 312 F.3d at 1087 (asserting that "the collective rights view, rather than the individual rights models, reflects the proper interpretation of the Second Amendment"); Gillespie v. City of Indianapolis, 185 F.3d 693, 711 (7th Cir. 1999) (requiring the defendant to "demonstrate a 'reasonable relationship' between his own inability to carry a firearm and 'the preservation or efficiency of a well regulated militia'") (quoting United States v. Miller, 309 U.S. 174, 178 (1939)); United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) ("The Second Amendment was inserted into the Bill of Rights to protect the role of the states in maintaining and arming the militia"); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996) (requiring the defendant to "demonstrate[ ] that his possession of the machine guns had any connection with militia-related activity"); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) ("[T]he amendment does not confer an absolute individual right to bear any type of firearm."); United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) ("The purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia."); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) ("To apply the amendment so as to guarantee appellant's right to keep an unregistered firearm which had not been shown to have any connection to the militia . . . would be unjustifiable in terms of either logic or policy."); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) ("It is clear that the Second Amendment guarantees a collective rather than an individual right."); Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) ("The right to keep and bear arms is not a right conferred upon the people by the federal constitution.").

38. *See Parker*, 478 F.3d at 380 (citing Memorandum from Attorney Gen. John Ashcroft to All United States' Attorneys (November 9, 2001)).

Regulation Act of 1975.[39] The portions of the Act at issue in *Parker* were codified as two statutes. The first prohibited any new registrations of firearms after September 24, 1976,[40] and the second mandated that all legally registered firearms be kept unloaded and disassembled or locked.[41] The third statute at issue in *Parker* was passed by Congress in 1932 and required that an individual have a license to carry a concealed weapon.[42] The federal statute was later codified as section 22-4504 of the D.C. Code and amended in 1994 to include pistols.[43] Section 22-4504 had the breadth to punish an individual who carries a firearm within his or her home.[44] Together the three statutes prohibited registering, loading, assembling, and carrying handguns—essentially a total ban on handgun ownership.

Six plaintiffs disputed D.C. Code sections 7-2502, 7-2507.02, and 22-4504 as infringing on their Second Amendment right to possess firearms for self-defense.[45] They first brought their griev-

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39. Brief of Defendants-Appellees at 3, *Parker*, 478 F.3d 370 (No. 04-7041), 2006 WL 2187169 (explaining that "handguns had been used in 155 of 285 murders (54%) in 1974 . . . 88% of robberies and 91% of assaults . . . [and] [a]ll rapes involving firearms" in the District (citing Firearms Control Regulations Act of 1975: Hearing on H. Con. Res. 694 Before the Comm. on the District of Columbia, 94th Cong. 24, 26 (1976))).

40. D.C. CODE § 7-2502.02 (2001). This registration prohibition statute contains an exception allowing special police officers to register and possess firearms for use during their employment hours and for retired Metropolitan police officers to register and possess firearms at their homes. *Id.* § 7-2502.02(a)(4).

41. *Id.* § 7-2507.02. There is no exception outside active law enforcement for the D.C. CODE § 7-2507.02 requirement to keep firearms unloaded and disassembled. *See id.* § 7-2502.01(b)(1).

42. Brief of Defendants-Appellees, *supra* note 39, at 4 (citing Act of July 8, 1932, Pub. L. No. 72-275, 47 Stat. 650 (codified as amended at D.C. CODE § 22-4504 (2001))).

43. D.C. CODE § 22-4504 (2001 & Supp. 2007).

44. *See* Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007) ("§ 22-4504 . . . appear[s] to ban moving a handgun from room to room in one's own house, even if one has lawfully registered the firearm (an interpretation the District does not dispute)."). Exceptions to the concealed weapon license requirement are listed in § 22-4505 and include law enforcement personnel and other special agents. D.C. CODE § 22-4505 (Supp. 2007). Additionally, § 22-4506 allows the District of Columbia's Chief of Police to issue temporary permits if circumstances necessitate a concealed weapon. D.C. CODE § 22-4506 (2001 & Supp. 2007).

45. The six plaintiffs included District residents Shelly Parker, Tracey Ambeau, Tom G. Palmer, George Lyon, Gillian St. Lawrence, and Dick Heller. *Parker*, 478 F.3d at 373–74. Their respective complaints, as explained by the court, are as follows:

> Shelly Parker, Travey Ambeau, Tom G. Palmer, and George Lyon want to posses handguns in their respective homes for self-defense. Gillian St. Lawrence owns a registered shotgun, but wishes to keep it assembled and unhindered by a trigger lock or similar device. Finally, Dick Heller, who is a District of Columbia special police officer permitted to carry a handgun on duty

ances to the D.C. District Court, where the case was dismissed on the determination that the Second Amendment does not confer "an individual right to bear arms separate and apart from service in the Militia."[46] The district court's analysis adhered to the dominant interpretation of *United States v. Miller* that there is no individual right to bear arms and rejected the theory that *Miller* only intended to define the weapons covered by the amendment.[47] The court recognized the Fifth Circuit's decision in *United States v. Emerson* as an outlier that improperly expanded *Miller* and "brushed aside" contrary Fifth Circuit precedent.[48]

In a two-to-one panel decision, the D.C. Circuit Court reversed and remanded to the district court with instructions to grant summary judgment in favor of one plaintiff, Dick Heller.[49] Because the court was not convinced that any precedent could squarely dictate whether the Second Amendment provides for a collective or individual right, the majority went beyond case law to examine the amendment's text and other historical documentation.[50] The court held that the Second Amendment did provide for an individual right, and found the disputed D.C. gun laws unconstitutional.[51] The dissenting opinion argued that, under *Miller*, the district court's decision should have been easily affirmed because the Second Amendment was meant to safeguard a *state's* ability to raise a militia and therefore does not apply to districts, which are non-states.[52]

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as a guard at the Federal Judicial Center, wishes to possess one at his home. Heller applied for and was denied a registration certificate to own a handgun. *Id.*

46. Parker v. District of Columbia, 311 F. Supp. 2d 103, 109 (D.D.C. 2004).

47. *See id.*

48. *See id.* at 106–07. The court noted that it does not "place a great deal of reliance on the stability of *Emerson* even within the Fifth Circuit." *Id.* at 107.

49. *Parker*, 478 F.3d at 373, 401. The court did not grant standing for the five other plaintiffs because there was no imminent prosecution against them and therefore they could not prove injury-in-fact. *See id.* at 375 ("[W]e are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution. No such allegation has been made.").

50. *See id.* at 380–81.

51. *Id.* at 395, 401.

52. *Id.* at 404 (Henderson, J., dissenting).

IV. ANALYSIS OF *PARKER*'S MAJORITY AND DISSENTING OPINIONS

A. *Majority Opinion*

1. Standing Is Only Conferred to Plaintiffs with Injuries-in-Fact or in Danger of Imminent Prosecution

The *Parker* court dismissed five of the six plaintiffs because they could not establish injury-in-fact, and therefore lacked standing to bring their complaints.[53] Relying on D.C. Circuit cases *Navegar, Inc. v. United States*[54] and *Seegars v. Gonzales*,[55] the court determined that the "plaintiffs were required to show that the District had singled them out for [imminent] prosecution" rather than just showing a general threat of punishment for future violations of D.C. gun control laws.[56] The case brought by the five dismissed plaintiffs was almost identical to the plaintiffs in *Seegars*, who were also contesting the D.C. gun control laws and likewise were not granted standing because they could not show injury beyond the apprehension of prosecution.[57] The *Parker* majority explained that the Supreme Court has allowed much more relaxed standing requirements when faced with a "pre-enforce-ment challenge to a criminal statute that allegedly threatened constitutional rights,"[58] but that it must adhere to its decisions in *Navegar* and *Seegars* until there is an en banc decision overruling these cases.[59]

One of the six *Parker* plaintiffs, Dick Heller, was granted standing because he applied for and was denied a gun license.[60] Following D.C. Circuit precedent, the court determined that the

53. *See id.* at 375. The majority opinion was written by Senior Judge Silberman, who was joined by Judge Griffith. *Id.* at 373.

54. 103 F.3d 994 (D.C. Cir. 1997). *Navegar* involved gun manufacturers who could not obtain standing under a pre-enforcement claim because their products merely fit the description of semi-automatic weapons, rather than being listed explicitly in the statute, as required for manufacturers to whom the court did grant standing. *Id.* at 1001.

55. 396 F.3d 1248 (D.C. Cir. 2005).

56. *Parker*, 478 F.3d at 374.

57. *See id.* (citing *Seegars*, 396 F.3d at 1255–56).

58. *See id.* at 374–75 (construing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298–99 (1979)).

59. *Id.* at 375.

60. *Id.* at 375–76.

denial of a license "constitutes an injury independent of the District's prospective enforcement of its gun laws" and that could possibly infringe on Heller's rights.[61] The court also allowed Heller's other claims challenging section 22-4504 (carrying a gun) and section 7-2507.02 (keeping guns disassembled) to stand despite lacking a concrete injury.[62] The District argued that using the licensing cases to confer standing was misplaced because the gun laws constituted a complete ban on ownership.[63] According to the District, there was no theoretical opportunity for licensing, so a license denial could not be an injury.[64] The court rejected this argument and determined that the gun laws did not completely ban registration and therefore Heller's denial was a distinct injury.[65] Finally, the court firmly established Heller's standing to proceed with his case by reciting Supreme Court and D.C. Circuit Court opinions which asserted that standing must be decided before examining the legal merits of a claim.[66]

2. The Second Amendment Protects an Individual Right to Keep and Bear Arms

The D.C. Circuit's analysis of the Second Amendment's text is similar to the Fifth Circuit's approach in *Emerson*.[67] The *Parker* court put significant emphasis on evaluating the words "the drafters chose to describe the holders of the right—'the people.'"[68] Because "the people" is used to describe the holders of the First, Fourth, Ninth, and Tenth Amendment's individual rights, it fol-

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61. *Id.* at 376.

62. *See id.* (explaining that denial of the license "would subsume these other claims too").

63. *Id.*

64. *See id.*

65. *Id.* The court reasoned that there was not a complete ban because retired police officers could register handguns and because not all types of guns were banned. *Id.*

66. *Id.* at 377. The D.C. Circuit's analysis of the standing-before-merits issue discredits the Ninth Circuit's approach in *Silveira v. Lockyer*. *See id.* at 376–77 (citing *Silveira*, 312 F.3d 1053, 1066–67 & n.18 (9th Cir. 2003)). In that case, the Ninth Circuit determined there was no standing because the Second Amendment does not confer an individual right. *See Silveira*, 312 F.3d at 1066–67. Instead, the *Parker* court relied on the U.S. Supreme Court's decision in *Warth v. Seldin* and its own decision in *Waukesha v. EPA* to definitively establish that determining whether a plaintiff has Article III standing requires "assum[ing] *arguendo* the merits of his or her legal claim." *Parker*, 478 F.3d at 377 (citing Warth v. Seldin, 422 U.S. 490, 501–02 (1975); Waukesha v. EPA, 320 F.3d 228, 235–36 (D.C. Cir. 2003)).

67. *See supra* notes 24–35 and accompanying text.

68. *Parker*, 478 F.3d at 381.

lows that the Second Amendment also confers an individual right.[69]

Agreeing with the rationale in *Emerson*, the *Parker* court presented the first part of the Second Amendment guarantee, "to keep . . . [a]rms," as a "straightforward term that implies ownership or possession of a functioning weapon by an individual for private use."[70] The court concluded that the second part of the guarantee, "to bear arms," was not limited to military service and, in many historical contexts, suggested an individual right.[71] Further, the court asserted that the right to bear arms preexisted the Constitution, and the Bill of Rights merely secured that individual right.[72]

The amendment's relation to preserving a "well regulated militia" did not alter the *Parker* court's reasoning that the guarantee clause conferred a personal right to bear arms.[73] Drawing on the second Militia Act of 1792, the majority explained that the Second Congress understood a militia already existed as all free "able-bodied men of a certain age," but still required organization into units by the states.[74] This distinction was important to discredit the appellees' argument that "a militia did not exist *unless* it was subject to state discipline and leadership."[75] By eliminating the state organization requirement for establishing a militia, the *Parker* court defined the purpose clause as encompassing a wider body of individuals independent of the state's right to raise a col-

69. *See id.* The court reasoned: "The Bill of Rights was almost entirely a declaration of individual rights, and the Second Amendment's inclusion therein strongly indicates that it, too, was intended to protect personal liberty." *Id.* at 383. *See also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (holding that "the people" is used uniformly throughout the Bill of Rights).

70. *Parker*, 478 F.3d at 385–86 (citing United States v. Emerson, 270 F.3d 203, 231, 232 n.31).

71. *Id.* at 384 (explaining that several founding-era state constitutions note the 18th century public did consider bearing arms to be associated with self defense, and noting a founding-era dictionary defined "bear" as "to carry," rather than in an exclusively military connotation). The appellees contended that an original draft of the Second Amendment included a conscientious objector clause for those religiously opposed to military service, and this use indicates the phrase "bear arms" does have an underlying military purpose. However, the court disposed of this theory because "there are too many instances of 'bear arms' indicating private use to conclude the drafters intended only a military sense." *Id.*

72. *Id.* at 382–83 (explaining that it was well understood that the Framers kept guns for self defense, hunting, and if the need arose, to overthrow a tyrannical government).

73. *Id.* at 389.

74. *Id.* at 387–88.

75. *Id.* at 386 (emphasis added).

lective fighting force.[76] "The important point, of course, is that the *popular* nature of the militia is consistent with an individual right to keep and bear arms."[77] The majority concluded the "well-regulated militia" clause was only intended to appease the Anti-federalists who did not want standing armies to gain precedence over state militias.[78] Analysis of the combined purpose and guarantee clauses convinced the *Parker* court that an individual right to bear arms was unequivocally intended by the Framers.[79]

3. The Supreme Court Has Ruled Implicitly That the Individual Rights Model Is the Proper Interpretation of the Second Amendment

Unrestricted by the lack of D.C. Circuit precedent, the *Parker* court noted that the only Supreme Court guidance was not dispositive of a collective rights interpretation.[80] Like the *Emerson* court, the *Parker* majority found it indicative that the Supreme Court in *Miller* did not rule in the government's favor on its primary theory—that the Second Amendment does not confer an individual right.[81] Instead, *Miller* "focused only on what arms are protected by the Second Amendment . . . and not the collective or individual nature of the right."[82] Essentially, the *Parker* court understood *Miller* as applying the purpose clause to limit "arms" to those used in militia service, rather than to limit the individu-

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76. *Id.* at 389 ("The statute thus makes clear that these requirements were independent of each other, i.e., militiamen were obligated to arm themselves regardless of the organization provided by the states, and the states were obligated to organize the militia, regardless of whether individuals had armed themselves in accordance with the statute."). The court also noted that in state constitutional texts, it was "quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it." *Id.* (citing Volokh, *supra* note 2, at 801–07). The court used this interpretation to conclude it was the "drafters' view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most salient political benefit—and thus the most appropriate to express in a political document." *Id.* at 390.

77. *Id.* at 389 (emphasis added).

78. *See id.* at 390.

79. *Id.* at 391. The court noted that the Supreme Court in *Dred Scott v. Sandford*, alluded to the individual right to keep and bear arms among the other reserved rights afforded to the states. *Id.* (citing Dred Scott v. Sandford, 60 U.S. 393, 449–50 (1850)).

80. *Id.* at 393 (citing United States v. Emerson, 270 F.3d 203, 224 (5th Cir. 2001)) (agreeing with *Emerson*'s position that *Miller* does not support a collective or sophisticated collective rights model, but does implicitly assume an individual rights theory).

81. *Id.* (citing *Emerson*, 270 F.3d at 221).

82. *Id.* (citation omitted).

als covered by the Second Amendment.[83] Because the militia was a broad set of all able-bodied men, it was necessary that they bring their own weapons to serve.[84] Clearly, these were the same weapons they would use in their private lives.[85] If the Second Amendment was not intended to protect the right to private weapons, it would have had a "deleterious, if not catastrophic, effect on the readiness of the militia for action."[86] Accordingly, the D.C. Circuit determined *Miller*'s holding supported a protection of private weapons, not necessarily limited to militia use, and, therefore, supported the individual rights theory.[87]

4. The Second Amendment Applies to the District of Columbia

The District and *Parker*'s dissenting opinion advanced the theory that because the District of Columbia is not a state, there is no federalism concern under the Second Amendment.[88] Without the issue of federal power threatening *state* militia organization, the whole purpose of the amendment is moot and therefore cannot apply to the District of Columbia.[89] The *Parker* majority discarded this theory as an "appendage of the collective right position" and because the language in the Second Amendment was meant to safeguard a "hypothetical polity" or the country as a whole, *not* the states alone. The District of Columbia is part of the country and "the Supreme Court has unambiguously held that the Constitution and Bill of Rights are in effect in the District."[90] Also indicative was the clear wording the Framers used when they intended to discuss provisions applicable to individual states in the Constitution. "With 'a free State,' we understand the framers to have been referring to republican government generally."[91]

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83. *Id.* at 394.

84. *Id.* (citing United States v. Miller, 307 U.S. 174, 179 (1939)).

85. *See id.*

86. *Id.*

87. *Id.* ("*Miller*'s definition of the 'Militia,' then, offers further support for the individual right interpretation of the Second Amendment.").

88. *Id.* at 395, 405–09 (Henderson, J., dissenting).

89. *Id.* at 395, 406–07 (Henderson, J., dissenting).

90. *Id.* at 395. The majority cited Madison's initial proposal for the amendment which included the words "free country" instead of "free state," and suggested that Anti-federalist Elbridge Gerry's criticism of the amendment's language indicated that he thought the standing army would be used to protect the *whole country*, not the individual states. *See id.* at 396.

91. *Id.*

Because the Framers wanted to avoid creating a federal standing army, they meant to include the entire country under the Second Amendment.[92] The *Parker* court concluded that the District of Columbia was "no less integral to that *national* function than its state counterparts."[93]

B. *Dissenting Opinion*

In the dissent, Judge Henderson argued that the majority opinion was dicta because "the District of Columbia is not a state within the meaning of the Second Amendment and therefore the Second Amendment's reach does not extend to it."[94] The dissent came to this conclusion by reading *Miller* as declaring the right to bear arms only in relation to preserving the states' militias.[95] Judge Henderson further explained that "both the Supreme Court and [the D.C. Circuit] have consistently held that several constitutional provisions explicitly referring to citizens of 'States' do not apply to citizens of the District."[96] However, Judge Henderson relented that determining whether the District is included as a "state" under a certain constitutional provision ultimately depends on the "character and aim of the . . . provision."[97] According to the dissent, the Second Amendment does not have this character.[98] Because the District is the seat of the federal government, it has no reason to obtain a military balance between itself and the federal government.[99] Therefore, the whole purpose of the amendment is moot with respect to the District.[100]

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92. *Id.*

93. *Id.*

94. *Id.* at 401–02 (Henderson, J., dissenting) (quoting Seegars v. Ashcroft, 297 F. Supp. 2d 201, 239 (D.D.C. 2004)). Judge Henderson also disagreed that Heller had standing to challenge all three D.C. gun control laws and believed his license denial injury-in-fact could only dispute the § 7-2502.02 registration statute. *Id.* at 402 & n.2.

95. *Id.* at 404 (citing United States v. Miller, 307 U.S. 174, 178 (1939)). Judge Henderson also noted the Militia Clauses of Article I make a point to describe the militia of the several *states*, rather than just the militia. *Id.* at 403–04 & n.6.

96. *See id.* at 406 (citing several cases that claimed the District of Columbia is not included in the 14th Amendment, the Constitution's voting clauses, 11th Amendment, and 10th Amendment (citations omitted)).

97. *Id.* (quoting District of Columbia v. Carter, 409 U.S. 418, 420 (1973)).

98. *See id.* at 407 (citing Seegars v. Ashcroft, 297 F. Supp. 2d 201, 238–39 (D.D.C. 2004)).

99. *Id.* at 406–07 (citing *Seegars*, 297 F. Supp. 2d at 238–39).

100. *Id.*

V. POTENTIAL IMPACTS OF THE *PARKER* DECISION

A. *A Tempered Effect on Gun Control*

At its most disabling effect on federal law, the *Parker* decision will require that federal gun control provisions are necessary to meet a compelling governmental interest.[101] This interest will not create an impossible threshold for gun control laws to meet in the immediate future.[102] Even the court in *Emerson* determined that the U.S government could deprive an individual of his Second Amendment rights with good reason.[103] However, the ruling will make the D.C. Circuit a popular location for challenging federal gun control laws and will produce increased opportunities for individual rights supporters to scrutinize and possibly overturn federal laws.[104]

The challenged District of Columbia laws in *Parker* were somewhat of an anomaly because they were so strict—effectively banning all handguns.[105] Most federal gun control laws do not reach this level of restriction, but whether laws justify any deprivation of the individual right to bear arms is now at the discretion of the courts.[106] State laws are insulated from the *Parker* decision because the Second Amendment has not yet been incorporated against the states.[107] For now, states can continue to create gun control laws freely.

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101. *See* Dorf, *supra* note 5, at 344–45 (explaining that the individual right can coexist with the gun control if the rights "yield to the compelling interest in preventing violent crime").

102. *See* Bruce Fein, *Unalarming, Impeccable Ruling*, WASH. TIMES, Mar. 20, 2007, at A15. *But see* Dorf, *supra* note 5, at 344–45 (arguing that an individual rights view is likely to impede strong gun control measures).

103. United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001) (holding that the federal law restricting interstate gun sales to or from individuals under a restraining order was not an undue restriction on the defendant's rights).

104. *See* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2007/05/circuit_denies.html (May 8, 2007, 12:31 EST) (quoting the Appellees' prediction if the *Parker* ruling stands).

105. *See supra* notes 39–44 and accompanying text.

106. *See Parker*, 478 F.3d at 399 (citing Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897)) (noting that laws "prohibiting the carrying of concealed weapons does not offend the Second Amendment" under an individual rights theory); *Emerson*, 270 F.3d at 261 (explaining that "limited, narrowly tailored specific exceptions or restrictions" on the right to bear arms still can be enacted).

107. *Parker*, 478 F.3d at 391 n.13.

B. *Will the Supreme Court Finally Speak? And What Will They Say?*

Following the D.C. Circuit's en banc denial,[108] the Apellees petitioned the Supreme Court to rule on the proper interpretation of the Second Amendment.[109] Additionally, the five plaintiffs—Parker, Ambeau, Palmer, Lyon, and St. Lawrence—who were dismissed by the D.C. Circuit for the lack of standing, also petitioned the Supreme Court in a separate certified question.[110] The five plaintiffs asked the Court to review whether the D.C. Circuit's decision to refuse pre-enforcement challenges to the jurisdiction's gun laws conflicts with Supreme Court precedent.[111]

After sixty-eight years of denials, the Court has accepted the Second Amendment question on certiorari to resolve the recent circuit split.[112] At their initial private conference on November 9, 2007, the justices chose to take "no action" on *District of Columbia v. Heller* and *Parker v. District of Columbia*.[113] The Court reconsidered these petitions on November 20, 2007, but only accepted the Appellees' question.[114] The Court maintained a no action decision on the five plaintiffs' cross-petition on standing following this most recent conference.[115] Oral argument for *Heller*

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108. Parker v. District of Columbia, No. 04-7041, 2007 U.S. App. LEXIS 11029, at *4 (D.C. Cir. May 8, 2007).

109. Petition for Writ of Certiorari, *Parker*, *filed sub. nom.*, District of Columbia v. Heller, 76 U.S.L.W. 3083 (U.S. Sept. 4, 2007) (No. 07-290).

110. Petition for Writ of Certiorari, *Parker*, 478 F.3d 370, *petition for cert. filed*, 76 U.S.L.W. 3095 (U.S. Sept. 10, 2007) (No. 07-335).

111. *Id.* at i; *see also* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/new-filings/dc-residents-seek-broader-right-to-challenge-laws/ (Sept. 10, 2007, 12:01 EST).

112. Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/ wp/uncategorizedcourt-agrees-to-rule-on-gun-case/#more-6178 (Nov. 20, 2007, 15:20 EST) ("Here is the way the Court phrased the granted issue: 'Whether 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?'").

113. Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/uncategorized/court-takes-no-action-on-gun-case/ (Nov. 13, 2007, 13:19 EST) (suggesting that reasons for the delay on November 9, 2007 include: "one or more Justices simply asked for more time to consider the . . . case[ ]"; "the Court may be rewriting the question or questions it will be willing to review"; or "the Court may have voted initially to deny review . . . and one or more Justices are writing a dissent from the denial").

114. *Supra* note 113.

115. *Id.* ("The absence of any action may mean that the Court has decided not to hear that case [*Parker v. District of Columbia*]. If that is so, it will be indicated in an order next Monday[, November 26, 2007]. The Court also may simply be holding the case until it de-

is scheduled for the week of March 17, 2008, perfect timing to put gun control in the forefront of the presidential debates.[116]

Scholarship trends and the current ideology of the Court indicate that the D.C. Circuit's *Parker* decision will be affirmed under an individual rights theory.[117] The constitutional question of pre-enforcement standing, if accepted on certiorari, is likely to be answered in favor of the five D.C. citizen plaintiffs as well.[118] Despite the probability the Court will affirm *Parker*'s position on the individual rights theory, the issue of state law primacy and the Bill of Rights would have to wait for another decision.[119] Whether

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cides the *Heller* case.")

116. Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/uncategorized/commentary-the-government-and-gun-rights/#more-6184 (Nov. 21, 2007, 10:37 EST).

117. Editorial, *Fenty Wastes Effort on Guns*, WASH. TIMES, Sept. 6, 2007, at A20 ("David T. Hardy, an Arizona attorney who has written extensively about Second Amendment law from an individual-rights perspective, predicted [D.C. Mayor] Mr. Fenty would lose. He counted Justices John Roberts, Antonin Scalia, Clarence Thomas and Samuel Alito in the pro-gun camp and said any of the five other judges could join them."); Dorf on Law, *supra* note 112 ("On the merits, I count four just about certain votes to reverse (Stevens, Souter, Ginsburg, Breyer), one likely vote to reverse on the merits (Kennedy), two likely votes to affirm on the merits (Scalia, Thomas), one probably leaning towards affirming (Roberts), and one unknown (Alito)."); Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_11_18-2007_11_24.shtml#1195588501 (Nov. 20, 2007, 14:55 EST) (Justice Kennedy tends to construe the Bill of Rights so its protections apply broadly . . . [which suggests he] will conclude that the Second Amendment does in fact create an individual right"); *see* Silveira v. Lockyer, 312 F.3d 1052, 1062 (2003) (explaining that Justice Thomas's concurrence in *Printz v. United States* "suggested that he may well support the traditional rights view") (citing Printz v. United States, 521 U.S. 898, 938–39 (1997) (Thomas, J., concurring)); Erin Sheley, *Gun Fight at D.C. Corral: A Victory for the Second Amendment*, 12 WKLY. STANDARD 27, Mar. 26, 2007 (suggesting that Justice Scalia supports the individual rights view); Denniston, *supra* note 113 ("Some observers who read the Court's order closely may suggest that the Court is already inclined toward an 'individual rights' interpretation of the Second Amendment. That is because the order asks whether the three provisions of the D.C. gun control law violate 'the Second Amendment rights of individuals.'"). *But see Silveira*, 312 F.3d at 1062 (explaining that Justice Stevens "strongly implied that he believes the [Second Amendment] offers no obstacles to the federal government's ability to regulate firearms"); Sheley, *supra* (acknowledging that neither Justice Alito, although dissenting in *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), nor Justice Roberts have taken a stand on the Second Amendment and that the "positions of the other justices also remain unclear").

118. Denniston, *supra* note 111 (explaining the petitioner's argument that the Court has recently ruled that "[m]erely because an individual has not violated a law to which he or she objects does not mean that individual may not bring a pre-enforcement challenge"); *see also* Press Release, CATO Institute, Citizens in Gun Challenge Ask Supreme Court to Reinstate Their Case Against the District of Columbia (Sept. 10, 2007), *available at* http://www.earthtimes.org/articles/show/news_press_release,174647.shtml ("As a matter of common sense and Supreme Court precedent, the government may not require citizens to jump through meaningless hoops in order to have their civil rights claims heard in court.").

119. Denniston, *supra* note 104; Denniston, *supra* note 113 ("But a ruling by the Court

the Supreme Court would be willing to decide the two cases in tandem to completely nullify the collective rights view is unknown.

C. *Applying the Second Amendment to the States*

Although *Parker* signals the judicial trend recognizing a Second Amendment individual right, neither *Parker* nor its Fifth Circuit counterpart, *Emerson*, explored whether the amendment applies to state action.[120] This distinction is vitally important. Unless a court can scrutinize a state's laws under the Second Amendment, there can be no constitutional control over the strictness of the laws, regardless of the adoption of an individual rights model. Originally, the Bill of Rights was only applicable to the federal government,[121] but after the enactment of the Fourteenth Amendment and through the process of selective incorporation, most of the first eight amendments were deemed applicable to state action.[122] However, the Second Amendment has not been incorporated against the states.[123]

Parker was able to skirt the difficult issue because the District of Columbia "is a Federal District, ultimately controlled by Congress. [It] is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation."[124] *Emerson* did not need to resolve the applicability of the Bill of Rights to the states because the defendant challenged a federal statute.[125] Al-

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recognizing an individual right to have a gun almost surely would lead to new test cases on whether to extend the Amendment's guarantee so that it applied to state and local laws, too.").

120. Parker v. District of Columbia, 478 F.3d 370, 391 n.13. (D.C. Cir. 2007) ("While the status of the Second Amendment within the twentieth-century incorporation debate is a matter of importance for the many challenges to state gun control laws, it is an issue that we need not decide.").

121. *See* United States v. Cruikshank, 92 U.S. 542, 553 (1876) (holding that the Second Amendment only applies to the federal government); Barron v. Baltimore, 32 U.S. 243, 247 (1833) (holding that the Bill of Rights only applies to the federal government).

122. *See Parker*, 478 F.3d at 407 n.13 (Henderson, J., dissenting).

123. *See id.*

124. *Parker*, 478 F.3d at 391 n.13 (citations omitted); *see also* Liptak, *supra* note 4, at A18 (explaining that Mr. Levy, the attorney for the *Parker* plaintiffs, chose to battle the collective rights view by filing suit in D.C. because "questions about the applicability of the Second Amendment to state laws were avoided because the district is governed by federal law").

125. *See* United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001) (explaining that the incorporation of Second Amendment against the states does not affect any of the

though not binding, the dissenting opinion in *Parker* suggested that incorporating the amendment against the states is nonsensical because the original intention of the amendment was to protect the *states* from disarmament by the federal government.[126] Essentially, Judge Henderson implied that the Framers had no intention of preventing the states from disarming their own citizens.[127]

Debate over the Second Amendment's application to the states necessarily turns on whether there is an individual right to bear arms in the first place.[128] If the Supreme Court does find there is a personal right, its next step would be to determine whether it rises to the level of a fundamental right in today's society, analogous to freedom of speech or freedom from unreasonable searches,[129] which would make incorporation against the states appropriate.[130] This inquiry will require analyzing the Second Amendment using the selective incorporation theories that justify protecting a right within the Bill of Rights from overbroad state action.[131]

As such, it may take time before the Supreme Court is presented with a chance to revisit these themes, much to the chagrin of individual rights supporters.

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issues before the court).

126. *Parker*, 478 F.3d at 407 n.13 (Henderson, J., dissenting).

127. *See id.*

128. *See* McAffee & Quinlan, *supra* note 15, at 799 (explaining that if the Second Amendment is viewed as an anachronism because the militias to which it applies no longer exist).

129. Yassky, *supra* note 10, at 660, 663 (noting how the Court historically has given a broad reading of fundamental rights to the First, Fourth, Fifth, Sixth, and Eight Amendments, but a much narrower reading to the Second, likely because the Second Amendment fell outside the ambit of the New Deal, the period when individual liberties were judicially expanded under the Bill of Rights).

130. Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 156 (2000) ("It would do no good to demonstrate conclusively that the framers and ratifiers of those years really did regard a fundamental right to own weapons as a necessary security against the danger of tyranny, if one could not at the same time produce a compelling rationale for its incorporation today.").

131. *Id.* at 106–07 ("To be sure, full deployment of the individual rights interpretation relies on . . . invoking the incorporation doctrine of the Fourteenth Amendment.").

VI. CONCLUSION

The *Parker* decision, and its likely Supreme Court affirmation, holds that there is an individual right to own a firearm free from undue government restriction.[132] This ruling has caused alarm among states with gun control laws similar to those challenged in *Parker*.[133] The lack of Second Amendment incorporation affords states with gun control laws temporary insulation from *Parker* and protects those state laws from immediate scrutiny by the courts.[134] Federal laws, and D.C. laws, however, *will* have to meet the burden of not infringing on the constitutional right.[135]

The *Parker* decision illuminates the inherent deadlock in the gun control debate.[136] Is it safer if guns are readily available for individuals to protect themselves or if strict laws are enacted to remove guns from the general population?[137] Particularly in the aftermath of the Virginia Tech tragedy, the suggestion of leniency in gun control appears undesirable considering that Virginia's permissive laws enabled the shooter to obtain his weapons.[138] The shocking account of New Jersey's school yard killings is a reminder that gun control laws are ineffective at reducing crimes committed with *illegally* obtained weapons.[139] If or when the individual rights theory is affirmed by the Supreme Court and the

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132. *Parker*, 478 F.3d at 395.

133. *See* James Oliphant, *D.C. Gun Case May Hit Chicago*, CHI. TRIB., Sept.5, 2007, § 1, at 3 ("If the high court were to endorse a broad view of the 2nd Amendment in the D.C. case, it would be a short step for Levy and other gun-rights activists to argue that the amendment also applies to such municipal ordinances as the Chicago ban."); *see also* James Vicini, *Hand Gun Ban Could Lead to Key Ruling*, REUTERS, Sept. 6, 2007, http://www.reuters.com/article/domesticNews/idUSN0524618720070906 ("[T]he nation's three largest cities—New York, Chicago and Los Angeles—have laws banning handguns or tightly regulating their possession and use.").

134. *See supra* note 126 and accompanying text.

135. *See supra* note 102 and accompanying text.

136. *See Parker*, 478 F.3d at 399 n.17 (noting that the *amici* point out how easily criminals can acquire guns while "D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns").

137. *See* Leslie Eaton & Michael Luo, *Shooting Rekindles Issues of Gun Rights and Restrictions*, N.Y. TIMES, Apr. 18, 2007, at A20 (presenting gun control's two schools of thought reflected in the aftermath of Virginia Tech tragedy—that the victims, if allowed to carry guns, could have protected themselves, and that if gun control was stricter the victims' need for protection would never have become necessary).

138. *See id.* (explaining how the Virginia Tech shooter obtained his guns legally and that "Virginia is second in the nation in the ease of getting handguns").

139. *See* Editorial, *Getting a Handle on Guns*, STAR-LEDGER (Newark), Aug. 17, 2007, at 20 ("[P]olice and prosecutors say few crimes in Newark are committed with legally owned guns, so registration isn't going to have a serious practical effect.").

Second Amendment is incorporated against the states, the real concern will be whether courts will allow lawmakers to adequately restrict these rights or permit individuals to dictate their own versions of gun control.

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