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## A Shot Heard 'Round The District: The District of Columbia Circuit Puts a Bullet in the Collective Right Theory of the Second Amendment

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# A SHOT HEARD 'ROUND THE DISTRICT: THE DISTRICT OF COLUMBIA CIRCUIT PUTS A BULLET IN THE COLLECTIVE RIGHT THEORY OF THE SECOND AMENDMENT

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#### I. INTRODUCTION

Long considered a dead letter, the Second Amendment roared back to life in spring 2007 when the District of Columbia Circuit held that the District of Columbia’s (“District”) ban on handguns was an impermissible violation of the Second Amendment.<sup>1</sup> *Parker v. District of Columbia* was unprecedented; although the Fifth Circuit previously held that the Second Amendment protects an individual right to keep and bear arms, it sustained the gun control law at issue.<sup>2</sup> With the *Parker* decision, however, a court held for the first time not only that the Second Amendment protected an individual right to keep and bear arms but also that the underlying gun control law was unconstitutional.<sup>3</sup> The *Parker* court’s decision constituted

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1. See *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) (limiting its holding to handgun possession inside the home for self-defense purposes and not reaching whether owners may carry handguns in public or in automobiles).

2. See *United States v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001) (holding that the Second Amendment allows the restriction of gun ownership in cases where the gun owner is subject to a domestic restraining order).

3. See *Parker*, 478 F.3d at 401 (reversing the decision of the District Court and ordering summary judgment for the plaintiff); Petition for a Writ of Certiorari at 2, *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (No. 07-290) (arguing that the court’s interpretation of the Second Amendment was in error and that it is reasonable to ban handguns when other firearms are permitted).

an irreconcilable split among the circuits and set the stage for Supreme Court intervention.<sup>4</sup>

This Comment argues that the Supreme Court should affirm the District of Columbia Circuit and hold that the Second Amendment protects an individual right to keep and bear arms within the home for self-defense purposes. Moreover, the Supreme Court should hold that this right is not fundamental and should apply a deferential, reasonableness review balancing test to cases involving purported infringement of the Second Amendment. Part II of this Comment provides the background for Second Amendment jurisprudence and discusses the history behind the District's gun ban and the resulting litigation. Part III of this Comment argues that the Supreme Court should hold that the Second Amendment protects an individual right to keep and bear firearms within the home for lawful self-defense. This Comment concludes with a recommendation that the District rewrite its gun laws to allow for lawful self-defense within the home.

## II. BACKGROUND

### *A. The Second Amendment: Initial Considerations*

#### *1. Theories of Interpretation*

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.”<sup>5</sup> For years, Second Amendment interpretation focused on whether it protects a collective or individual right to bear arms.<sup>6</sup> Collective right theorists believe that the Second Amendment protects the states' rights to maintain their militias.<sup>7</sup> Collective right theorists argue that because no individual right to bear arms exists, the government may lawfully restrict, or even ban, firearms possession.<sup>8</sup> The majority of the federal circuits espouse this theory.<sup>9</sup>

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4. See Petition for a Writ of Certiorari, *supra* note 3, at 2.

5. U.S. CONST. amend. II.

6. See Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 *FORDHAM L. REV.* 477, 481 (2004) (suggesting that individual politics and values, not constitutional interpretation or history, drive each theory).

7. See *id.* at 482 (describing that the Second Amendment protected the states from the federal government by prohibiting Congress from regulating firearms to the detriment of the states).

8. See, e.g., Petition for a Writ of Certiorari, *supra* note 3, at 2 (arguing that there is no individual right to keep and bear arms and that the District's ban on handguns is constitutional).

9. *Parker v. District of Columbia*, 478 F.3d 370, 381 n.4 (D.C. Cir. 2007) (observing that the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits adhere to the collective right theory).

In contrast, individual right theorists believe that the Second Amendment protects an individual right to bear arms, noting that the framers commonly would have understood the term “militia” to include the entire population of white males who were expected to keep and bear arms on demand.<sup>10</sup> Individual right theorists assert that it was commonly accepted and unremarkable that the framers enjoyed a right to keep and bear arms for self-defense.<sup>11</sup> A minority of the federal circuits espouse this theory.<sup>12</sup>

## 2. Recent Trends in Legal Scholarship

The *Parker* decision represents the culmination of two decades of legal scholarship that unraveled the former consensus surrounding the meaning of the Second Amendment.<sup>13</sup> While courts long have agreed that the Second Amendment protects the collective right of states to raise militias, in the last twenty years, even some liberal law professors have come to believe the Second Amendment protects an individual right to own a gun.<sup>14</sup> Previously, legal analysis played a secondary role to political ideology, with liberals tending to consider the Second Amendment a dead letter.<sup>15</sup> Before this trend emerged, nearly all of the circuits embraced the collective right theory.<sup>16</sup> Collective right theorists have suggested this trend may be the result of “a desire to be provocative” rather than simple “intellectual honesty.”<sup>17</sup> Whatever the reason, the effects of the new scholarship

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10. *Id.* at 387 (describing the second Militia Act of 1792, which required able-bodied white men to obtain a musket or rifle).

11. See David I. Caplan, *Gun Registration: Current Firearm Registration Law*, in GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 257 (Gregg Lee Carter ed., 2002) (asserting that there was an unqualified right to keep ordinary firearms for personal use in the 1700s).

12. See, e.g., *United States v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001) (holding that the Second Amendment protects an individual right to bear arms while sustaining a federal law restricting ownership); *Parker*, 478 F.3d at 400-01 (holding that the Second Amendment precludes an outright ban on handguns).

13. 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 (describing the speed of the shift in the constitutional debate over gun rights as “breakneck”).

14. See *id.* (explaining that law professors Laurence Tribe, Akhil Reed Amar, and Sanford Levinson agree on an individual right interpretation and noting their work has played a seminal role in “upending” the debate over the Second Amendment); see also Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 130 (1987) (declaring that the Second Amendment protects the right to self-defense, one of the most fundamental individual rights).

15. Liptak, *supra* note 13, at A18 (quoting law professor Sanford Levinson, who noted that liberals simply tend to read the Second Amendment out of the Constitution). Professor Levinson describes himself as an “A.C.L.U.-type who has not ever even thought of owning a gun.” *Id.*

16. See *id.* (explaining that the Fifth Circuit and the District of Columbia Circuit do not adhere to the collective right theory and noting that the Second Circuit has yet to decide the issue).

17. *Id.* (citing law professor Carl Bogus, who noted that “[c]ontrarian positions get

undeniably are reshaping the debate.<sup>18</sup>

### 3. *Standards of Review*

In evaluating laws that infringe constitutional rights, the Supreme Court uses a variety of tests and levels of scrutiny.<sup>19</sup> Where cases involve both an individual right protected by the Bill of Rights and legitimate governmental interests, the Supreme Court often uses a balancing test, a sort of reasonableness review, to determine whether a law offends the Constitution.<sup>20</sup> This middle ground approach requires a formal balancing of the burden a law places on an individual against the needs of the government, and asks whether that burden is reasonable; when the burden on the individual outweighs the governmental interest, the law is unconstitutional.<sup>21</sup> While the federal courts have yet to develop a cohesive standard of review for Second Amendment cases, all of the states use the deferential “reasonable regulation” standard.<sup>22</sup> Accordingly, there is uniformity among the states, and any law that reasonably regulates the arms right is constitutional.<sup>23</sup>

#### *B. Second Amendment Jurisprudence: From 1939 to 2007*

##### *1. The Precedent: United States v. Miller*

The Supreme Court has not heard a Second Amendment case in nearly seventy years.<sup>24</sup> The precedent, *United States v. Miller*, involved two men who transported an unregistered sawed-off shotgun across state lines in

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play” and that “[l]iberal professors supporting gun control draw yawns”).

18. See *Parker v. District of Columbia*, 478 F.3d 370, 380 (D.C. Cir. 2007) (describing the leading nineteenth-century authority on the Second Amendment as supporting an individual right theory and noting the current support of law professor Laurence Tribe).

19. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (describing the three levels of scrutiny—strict scrutiny, intermediate scrutiny, and rational basis review—used to analyze classifications under the Equal Protection Clause).

20. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (asserting that the Fourth Amendment demands a balancing of an individual’s right to privacy against the government’s interest in conducting a search).

21. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 717 (2007) (describing the application of this balancing test to Second Amendment cases in the states and suggesting that a regulation is unconstitutional if it destroys, literally or figuratively, the right to bear arms).

22. *Id.* at 686-87.

23. See *id.* at 687 (noting that nearly all of the state court decisions that use a reasonableness standard of review uphold gun control laws for public safety).

24. Appellants’ Brief at 50, *Parker v. District of Columbia*, 478 F.3d 370, 374 (D.C. Cir. 2007) (No. 04-7041).

violation of the National Firearms Act of 1934.<sup>25</sup> The Supreme Court held that no evidence suggested that sawed-off shotguns are reasonably related to use by a well-regulated militia and therefore were not protected by the Second Amendment.<sup>26</sup> The *Miller* decision, however, is far from clear in its analysis; although nine circuit courts have read *Miller* to protect the collective right of state militias under the Second Amendment, the case arguably failed to reach the substantive merits altogether.<sup>27</sup>

## 2. A Circuit Split Emerges: *United States v. Emerson*

The first case to break from the post-*Miller* jurisprudence came in 2001 when the Fifth Circuit held in *United States v. Emerson* that the Second Amendment protects a non-absolute, individual right to own a gun.<sup>28</sup> The *Emerson* court determined that it did not offend the Second Amendment to bar a particular class of people from possessing a firearm.<sup>29</sup> Although the *Emerson* court need not have reached whether the right protected was independent or collective, it represented the beginning of a split among the circuits and paved the way for *Parker*.<sup>30</sup>

### C. The District of Columbia Gun Ban

#### 1. Legislative History and Congressional Opposition

In June 1976, the District of Columbia Council (“Council”) enacted its current gun laws.<sup>31</sup> In an effort to reduce the District’s increasing violent crime, the Council banned possession of all handguns not registered by the

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25. 307 U.S. 174, 176 (1939) (discussing that the lower court held the Act did not attempt to regulate commerce and therefore usurped state police power in violation of the Second Amendment).

26. *Id.* at 178 (noting that there was no proof that sawed-off shotguns were considered ordinary military equipment and that without such proof the Second Amendment did not attach).

27. *See* *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (finding that the type of weapon was dispositive in *Miller* without reaching the question of the nature of the protected right).

28. 270 F.3d 203, 264-65 (5th Cir. 2001) (holding that a restriction prohibiting gun possession by persons subject to domestic restraining orders did not violate the Second Amendment).

29. *Id.* (noting that the nexus between lawless behavior and an enjoined party is minimally sufficient to support a bar from gun possession while the order is in effect).

30. *Cf. Confirmation Hearing for Judge John G. Roberts to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 594 (2005) (statement of John G. Roberts, Assoc. J., U.S. Court of Appeals for the Dist. of Columbia Cir.) (declining to provide his personal views as to the nature of the Second Amendment right because he felt the issue was likely to reach the Supreme Court).

31. D.C. Code §§ 7-2502.02(a)(4), 7-2507.02, 22-4504, 22-4515 (2001); *see* Jeffrey Rosen, *Forced into a Gun Debate*, TIME, May 7, 2007, at 33 (noting that the District’s gun ban is among the nation’s most radical gun control laws, and that no state has a substantially similar ban).

effective date of the Firearms Control Regulation Act of 1975.<sup>32</sup> One of the strictest gun bans in the United States, the District's law also restricted registered firearms, requiring owners to disable or disassemble and unload their guns, and forbidding an owner from transporting the guns from his or her property.<sup>33</sup>

Congressional opposition quickly emerged, and Representative Ron Paul (R-TX) declared that the law would fail under legal challenge.<sup>34</sup> Yet straightforward attempts to legislate over the District's gun laws have failed repeatedly.<sup>35</sup> In the 110th Congress, legislation is pending in both the House and the Senate that would repeal the District's gun laws.<sup>36</sup> Despite seemingly broad support, such legislation is unlikely to reach enactment given its highly partisan nature and the potential for political fallout.<sup>37</sup>

## 2. *The Litigation: Parker v. District of Columbia*

In the last few years, the focus of efforts to overturn the District's gun laws have moved from Congress to the courts.<sup>38</sup> Six carefully selected plaintiffs filed their case on February 10, 2003 in the United States District Court for the District of Columbia.<sup>39</sup> Prior similar cases involved criminals who attempted to invoke the Second Amendment to rebut their felony

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32. See Joan Indiana Rigdon, *Gun Fight*, WASH. LAW., Aug. 2007, at 21 (discussing how the Bureau of Alcohol, Tobacco, Firearms and Explosives targeted the District and ten other cities for a reduction in handgun violence). See generally Firearms Control Regulations Act of 1975, 23 D.C. Reg. 2464 (Oct. 1, 1976) (banning all functioning firearms from use in the home for self-defense).

33. Rigdon, *supra* note 32, at 21 (describing how an amendment to the District's laws even prohibited registered gun owners from moving their guns from room to room within their own homes).

34. See *id.* at 21-22 (observing that Congress may have been reacting to a perceived power grab; the District codified the gun laws within its health code, rather than its criminal code, to circumvent congressional and presidential disapproval).

35. *A History of Gun Control*, WASH. POST, Mar. 11, 2007, at C4 (describing failed attempts by Congress to revoke or amend the District's gun ban in 1976, 1999, 2003, 2004, and 2005).

36. See District of Columbia Personal Protection Act, S. 1001 and H.R. 1399, 110th Cong. (2007) (listing nearly half the Senate, and over half the House, as cosponsors).

37. See Steve Goldstein, *Despite Tragedy, Congress Cautious About Gun Laws*, PHILA. INQUIRER, Apr. 22, 2007, at A19 (describing the opinion of political pundits that supporting the 1994 ban on assault weapons cost Democrats the majority in Congress).

38. Rigdon, *supra* note 32, at 25-26 (explaining that between February and April 2003, eleven litigants filed two cases in the same court seeking a ruling on the District's gun laws).

39. See *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004) (refusing to provide the plaintiffs pre-enforcement relief); Rigdon, *supra* note 32, at 25 (exposing *Parker* as a carefully constructed test case that involved plaintiffs without criminal backgrounds and that would require a direct ruling on Second Amendment grounds).

charges, but the *Parker* litigants were a far more sympathetic group.<sup>40</sup> All six plaintiffs were District residents who wished to possess handguns in their respective homes for self-defense; one plaintiff owned a registered shotgun and wished to keep it assembled and unlocked and another was a District special police officer who carried a handgun at work and wanted one at home.<sup>41</sup>

Despite its potential to force a definitive ruling on the Second Amendment, the National Rifle Association (“NRA”) opposed *Parker*.<sup>42</sup> On April 4, 2003, the NRA filed its own test case, *Seegars v. Ashcroft*.<sup>43</sup> The NRA tried unsuccessfully to join *Seegars* with *Parker*.<sup>44</sup> The court dismissed the *Seegars* litigation after ruling that all of its plaintiffs lacked standing.<sup>45</sup> The District of Columbia Circuit affirmed the District Court’s dismissal of *Seegars* for lack of standing.<sup>46</sup> Soon thereafter, the District Court also granted the District’s motion to dismiss *Parker* on standing grounds.<sup>47</sup>

### 3. *The District of Columbia Circuit Adopts an Individual Right to Keep and Bear Arms*

On appeal, however, the District of Columbia Circuit reversed the District Court’s dismissal of *Parker*, holding that plaintiff Dick Heller had standing because he applied for, and the District denied him, a license to register a handgun to keep in his home.<sup>48</sup> The *Parker* court held that a ban

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40. Rigdon, *supra* note 32, at 25 (reasoning that sympathetic plaintiffs in a “clean” case would be more likely to prevail and more likely to obtain certiorari from the Supreme Court).

41. *Parker v. District of Columbia*, 478 F.3d 370, 374 (D.C. Cir. 2007) (affirming that the plaintiffs did not seek relief enabling them to carry weapons outside of their homes).

42. Rigdon, *supra* note 32, at 22, 25 (discussing that the NRA encouraged the *Parker* counsel not to file the case, or at least to build in a “trap door” so that the court could avoid ruling directly on the Second Amendment; the NRA supports the pending federal legislation to repeal the District’s gun laws in order to moot the litigation).

43. *See id.* at 26 (noting that the *Seegars* counsel had done some preliminary research for the *Parker* case and that the *Parker* counsel decried *Seegars* as a “copycat” litigation); *see also* 297 F. Supp. 2d 201, 203 (D.D.C. 2004) (asserting a right to bear arms in the home for self-defense).

44. Rigdon, *supra* note 32, at 25 (describing how the *Parker* counsel wanted to avoid the perception of NRA sponsorship).

45. *Seegars*, 297 F. Supp. 2d at 216 (noting that the plaintiffs were essentially asking for pre-enforcement review because they were unlikely to be prosecuted).

46. *See Seegars v. Gonzales*, 396 F.3d 1248, 1254-56 (D.C. Cir. 2005).

47. *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004) (rejecting an individual right theory and finding that the plaintiffs failed to state a viable claim).

48. *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007) (holding that the denial of a license by state regulation or administrative scheme is an Article III injury).

on the possession and movement of handguns inside the home, and a provision requiring that legally possessed firearms be rendered essentially inoperable, were unconstitutional.<sup>49</sup> Holding that the District's gun laws violated the Second Amendment, the District of Columbia Circuit struck down the District's gun ban.<sup>50</sup> The District appealed the ruling, and the Supreme Court granted certiorari in late 2007.<sup>51</sup>

What distinguishes *Parker* from *Emerson* is that a court held for the first time that the Second Amendment protected an individual right to bear arms while simultaneously striking down the underlying gun control law.<sup>52</sup> Even so, one thing is certain: no rights are absolute.<sup>53</sup> The government may infringe even fundamental rights where it can show that the law uses the least restrictive means necessary to achieve a compelling government purpose.<sup>54</sup> Even if the court affirms a fundamental right to bear arms, however, many gun control laws will survive a reasonableness review balancing test.<sup>55</sup>

### III. ANALYSIS

It has been nearly seven decades since the Supreme Court last decided a case involving the interpretation of the Second Amendment.<sup>56</sup> In that case, *United States v. Miller*, the Supreme Court opted simply to dispose of the case at bar rather than actually provide a thorough explanation of the nature and reach of the Second Amendment.<sup>57</sup> The time has come, however, for

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49. *Id.* at 400-01.

50. *Id.* at 401 (holding that the District could not completely ban at-home firearms possession for use in lawful self-defense).

51. See Linda Greenhouse, *Justices Will Decide if Handgun Kept at Home Is Individual Right*, N.Y. TIMES, Nov. 21, 2007, at A1.

52. See *Parker*, 478 F.3d at 399 (noting that such protections are not absolute and the government may regulate firearms possession).

53. *Id.* at 399 (listing presumably reasonable prohibitions on carrying a gun, including when intoxicated, to a public assembly, for terrorism purposes, or when concealed).

54. See Erwin Chemerinsky, Editorial, *A Well-Regulated Right to Bear Arms*, WASH. POST, Mar. 14, 2007, at A15 (noting that the First Amendment protects a fundamental, but not absolute, right to free speech; accordingly, reasonable gun control laws may not offend the Second Amendment).

55. Winkler, *supra* note 21, at 719-20.

56. See Chemerinsky, *supra* note 6, at 479-81 (describing the lack of substantive discussion of the Second Amendment in casebooks and in the most recent Supreme Court decision on the subject, *United States v. Miller*, and asserting that the Second Amendment is ideal for teaching constitutional law because it lends itself to either theory).

57. 307 U.S. 174, 182-83 (1939) (remanding the case for further proceedings without construing the scope or nature of the substantive right protected by the Second Amendment).

the Supreme Court to provide that long overdue explanation.<sup>58</sup> In March 2008, the Supreme Court heard oral argument on *District of Columbia v. Heller*, renamed on appeal, to determine the true nature and scope of the right that the Second Amendment protects, to mend the split among the federal circuits and to provide guidance to the lower courts.<sup>59</sup>

*A. The Supreme Court Should Affirm the District of Columbia Circuit and Hold That the Second Amendment Protects an Individual Right to Keep and Bear Arms*

The Supreme Court should affirm the decision of the District of Columbia Circuit and hold that the Second Amendment protects an individual right to keep and bear arms because the *Parker* decision reflects the collective wisdom of the states, academia, and a growing trend within the judiciary.<sup>60</sup> Furthermore, the Supreme Court should affirm the District of Columbia Circuit because a textual analysis of the Second Amendment supports an individual right theory.<sup>61</sup> Finally, the Supreme Court should affirm *Parker* and confirm that the only existing Supreme Court precedent, *United States v. Miller*, did not in fact hold that the Second Amendment protects only a collective right to keep and bear arms.<sup>62</sup>

*1. The Individual Right Theorists Are Not Alone: Political, Academic, and Judicial Support for the Individual Right Theory*

Contrary to the District's assertions in *Parker*, there is ample support for the individual right theory.<sup>63</sup> At the state-level, forty-four state

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58. See David Nakamura, *D.C. Wants High Court to Hear Gun Case; City Defending Restrictive Law*, WASH. POST, July 17, 2007, at A1 (reporting that the president of the Brady Center to Prevent Gun Violence characterized *Parker* as potentially the most significant Second Amendment ruling in American history).

59. See Petition for a Writ of Certiorari, *supra* note 3, at 29-30 (arguing that *Parker* prevents the District from saving lives through the enforcement of its gun laws); see also Brief in Response to Petition for Certiorari at 2, *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (No. 07-290) (asserting the need for a resolution to the circuit split on the profoundly important issue of the Second Amendment).

60. See Brief for the States of Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Utah, and Wyoming as Amici Curiae in Support of Appellants, *Parker v. District of Columbia*, 478 F.3d 370, at 21-22, 29-30 (D.C. Cir. June 16, 2006) (No. 04-7041) [hereinafter Brief for the States of Texas et al. in Support of Appellants] (arguing that the legal scholarship, the trends in constitutional law, and all the states support the individual right theory).

61. See Robert A. Levy, *Individual Ruling*, NAT'L REV. ONLINE, Mar. 13, 2007, <http://search.nationalreview.com/> (search "National Review Online" for "Levy" on date Mar. 13, 2007; then follow link "Individual Ruling") (asserting that the text, the history, and the intention of the framers support an individual right theory).

62. Brief in Response to Petition for Certiorari, *supra* note 59, at 7.

63. See Brief for the States of Texas et al. in Support of Appellants, *supra* note 60, at 1 (describing states' interests in having a final decision on the merits of the Second Amendment).

constitutions protect an individual right to keep and bear arms.<sup>64</sup> All fifty state legislatures protect a private citizen's right to own a handgun.<sup>65</sup> Forty-five states go even further and permit citizens to carry concealed handguns for self-defense.<sup>66</sup> Additionally, even before the Fifth Circuit's decision in *Emerson*, the United States government took the position that the Second Amendment confers an individual right to keep and bear arms.<sup>67</sup> In 2004, the Department of Justice concluded that the individual right theory of the Second Amendment is the only persuasive theory of interpretation.<sup>68</sup>

In addition to widespread political acceptance among the state legislatures and by the federal government, the individual right theory has gained traction within academia.<sup>69</sup> In the last twenty years, legal scholarship from across the political spectrum, including scholars who previously embraced the collective right theory, has moved largely to embrace the theory that the Second Amendment protects an individual right to keep and bear arms.<sup>70</sup> While it was politically consistent for liberals to

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64. *See id.* at 2 (noting that a finding by the Supreme Court stating that the Second Amendment protects only a collective, and not an individual, right would endanger the majority of state constitutions and would create uncertainty as to whether citizens who otherwise are allowed to carry a weapon lawfully would be subjected to unlawful arrest upon entering the District); *see also* Winkler, *supra* note 21, at 686 n.11 (listing the six states without a constitutional right to bear arms: California, Iowa, Maryland, Minnesota, New Jersey, and New York).

65. David P. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1410 n.190.

66. Brief for the States of Texas et al. in Support of Appellants, *supra* note 60, at 29-32 (describing the District's handgun ban as not only violative of the Constitution, but also contrary to every state legislature).

67. Letter from John Ashcroft, U.S. Attorney Gen., to James Jay Baker, Executive Dir. of the Nat'l Rifle Ass'n Inst. For Legislative Action (May 17, 2001), *available at* <http://www.nraila.org/images/Ashcroft.pdf> (last visited Mar. 21, 2008) (stating that Attorney General Ashcroft's unequivocal opinion is that the Second Amendment protects an individual right to keep and bear arms); *see also* Memorandum from the Attorney Gen. to all United States' Attorneys, Re: *United States v. Emerson* (Nov. 9, 2001), *available at* <http://www.usdoj.gov/ag/readingroom/emerson.htm> (last visited Mar. 21, 2008) [hereinafter Memorandum from the Attorney General] (discussing the Fifth Circuit's decision in *Emerson* and characterizing it as the correct interpretation of the Second Amendment).

68. Memorandum Opinion for the Attorney General: Whether the Second Amendment Secures an Individual Right, 1-2 (Aug. 24, 2004), *available at* <http://www.usdoj.gov/olc/secondamendment2.pdf> (last visited Mar. 21, 2008) [hereinafter Memorandum Opinion for the Attorney General, Second Amendment].

69. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 43 (Amy Guttman ed., 1997) (arguing that the framers' original belief was that the right to self-defense was an essential liberty and "absolutely fundamental").

70. *See* Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (noting that the scholarly commentary is correctly trending toward an individual right theory of the Second Amendment); *see also* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 14 (2000) (discussing the history and politics surrounding the trend toward supporting the individual right theory, including financial incentives provided by the NRA, and noting

interpret the Second Amendment narrowly in order to continue their traditional support for gun control efforts, interpreting the Second Amendment narrowly is legally inconsistent with interpreting other provisions in the Bill of Rights, most of which liberals prefer to read expansively.<sup>71</sup> Even law professor Laurence Tribe, a noted liberal law scholar, has moved from advocating for the collective right position to unequivocally, if not enthusiastically, embracing the individual right theory in his treatise on constitutional law.<sup>72</sup> The *Parker* court cited this conversion by a former collective right theorist as an example of the change in legal scholarship to support the individual right theory.<sup>73</sup>

Finally, while the judiciary moves slower than the legislatures or academia, there is now an unmistakable split among the circuits that is trending toward an individual right interpretation of the Second Amendment.<sup>74</sup> While the vast majority of the circuits adhere to the collective right theory, the Fifth Circuit and the District of Columbia Circuit have embraced the individual right theory, and the Second Circuit has not decided the issue.<sup>75</sup>

When the Fifth Circuit upheld a federal law barring gun ownership by persons subject to domestic restraining orders, it did so despite finding that that the Second Amendment protects an individual right to keep and bear

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that law review articles supporting the individual right theory outpaced articles supporting the collective right theory by a nearly 2:1 ratio).

71. See Liptak, *supra* note 13, at A18 (noting that some legal scholars suggest comparing the Second Amendment's right to bear arms to the First Amendment's protection for free speech, which liberals traditionally argue should be interpreted broadly); see also Chemerinsky, *supra* note 6, at 477-78 (noting the ironic politics surrounding gun rights, with conservatives arguing for an uncharacteristically broad reading of the Second Amendment when compared with their interpretation of other provisions of the Bill of Rights).

72. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 902 n.221 (3d ed. 2000) (arguing that the Second Amendment protects an individual's right to use a firearm in self-defense and not merely a collective right of the states); Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999 (suggesting, following the Columbine tragedy, that an individual right notwithstanding, reasonable gun control laws are constitutional).

73. See *Parker v. District of Columbia*, 478 F.3d 370, 380 (D.C. Cir. 2007) (comparing favorably the treatise of law professor Laurence Tribe with the leading authorities of the nineteenth century).

74. Brief in Response to Petition for Certiorari, *supra* note 59, at 1 (describing the split between the federal circuits and the state courts of last resort, and between the local court of last resort and federal circuit court within the District).

75. See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1052 (9th Cir. 2002); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921-23 (1st Cir. 1942) (holding that the Second Amendment protects a collective, and not an individual, right to keep and bear arms).

arms.<sup>76</sup> The *Emerson* holding is significant because it not only began the schism among the circuits by interpreting the Second Amendment to protect an individual right to keep and bear arms, but also because in sustaining a federal restriction on that right, the court also limited the scope of that right, finding that the right to keep and bear arms was neither fundamental nor absolute.<sup>77</sup>

Similarly, when the District of Columbia Circuit held that the Second Amendment protected an individual right to keep and bear arms and struck down the gun laws at issue in *Parker*, the Court also suggested that Second Amendment rights were not absolute because these rights are subject to the same sorts of restrictions as the First Amendment.<sup>78</sup> It is clear that the *Parker* court did not invent an individual right interpretation of the Second Amendment out of whole cloth; it merely built on what the Fifth Circuit started and what represents the views of the fifty states, the Department of Justice, leading legal scholars, and at least two Supreme Court justices.<sup>79</sup>

Lastly, over the last five years, a growing chorus of dissent within even the liberal Ninth Circuit threatens to add yet another circuit to this growing minority.<sup>80</sup> In a scathing dissent from a decision denying rehearing of a constitutional challenge to amendments to a state gun control law, Circuit Judge Kozinski suggested that the panel was selectively reading the Constitution to suit political ideologies and preferences.<sup>81</sup> Given that the panel split five to four on the decision denying rehearing, it may be fair to consider the Ninth Circuit a natural next proponent of the individual right theory.<sup>82</sup>

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76. *United States v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001) (agreeing with the lower court that the Second Amendment protects an individual right to keep and bear arms but disagreeing that the federal statute in question impermissibly infringes that substantive right).

77. *See id.* at 224 n.19 (citing the Sixth Circuit's decision in *United States v. Warin* and finding that Second Amendment protection for an individual right to keep and bear arms would not be an absolute right, free from congressional regulation).

78. *See Parker*, 478 F.3d at 399 (noting that even First Amendment protections, which use absolutist language, are not absolute but are subject to reasonable government regulation, including time, place, and manner restrictions).

79. *See* Brief in Response to Petition for Certiorari, *supra* note 59, at 15 (arguing that 161 years of state appellate court decisions support an individual right interpretation of the Second Amendment).

80. *See Nordyke v. King*, 364 F.3d 1025, 1026 (9th Cir. 2004) (denying rehearing en banc with dissents), *cert. denied*, 843 U.S. 820 (2004) (Kleinfeld, J., dissenting) (“[O]ur court’s view of the Second Amendment is indefensible.”).

81. *See Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (denying rehearing en banc, with dissents) (Kozinski, J. dissenting) (describing the panel’s tortured interpretation of the Second Amendment as having “all the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it and [being] just as likely to succeed.”).

82. *See id.* (Pregerson, J., dissenting) (arguing that the collective right theory is incorrect).

2. *But What Does It All Mean: A Textual Analysis of the Second Amendment Supports the Individual Right Theory*

Critics of *Parker* argue that its holding requires an inaccurate reading of the constitutional language.<sup>83</sup> Given that there are historical arguments that both support and dispute the *Parker* holding, the District cannot support its argument with only an appeal to historical intent and usage.<sup>84</sup> The language of 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.”<sup>85</sup> The second comma in the amendment divides it into two clauses; the first clause is prefatory (introductory) and the second is operative (effective).<sup>86</sup> This curiously drafted amendment has generated a lively debate on the drafters’ intent and its relevance for present-day gun control efforts.<sup>87</sup>

a. *Parsing The Language: The Structure of the Clauses and the Word Choice Used in the Second Amendment Support the Individual Right Theory*

The structure of the clauses and the word choice used in the Second Amendment support an individual right interpretation of the language.<sup>88</sup> The District in *Parker* incorrectly argued that the plaintiffs misconstrued the prefatory clause.<sup>89</sup> Simply because the prefatory clause expresses a

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83. See, e.g., *Parker*, 478 F.3d at 402 (Henderson, J., dissenting) (agreeing with *Seegars* that the District is not a state within the meaning of the Second Amendment and therefore, Second Amendment protections do not attach). While it is unclear whether the Supreme Court will credit this argument, the issue is beyond the scope of this Comment.

84. See Chemerinsky, *supra* note 54, at A15 (discussing how collective right theorists emphasize the prefatory clause while individual right theorists emphasize the operative clause, and explaining how two federal courts of appeals have reviewed the history surrounding the terms “militia” and “keep and bear arms” only to come to completely opposite conclusions about their original meanings).

85. U.S. CONST. amend. II.

86. *Parker*, 478 F.3d at 378 (noting that the District’s argument focuses on the meaning of the prefatory clause as controlling the Second Amendment, while the plaintiff’s argument focuses on the meaning of the operative clause).

87. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not protect a right to possess firearms that are not ordinary militia weapons); *United States v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001) (finding an individual right to keep and bear arms while sustaining a law restricting firearms possession in domestic violence cases); *Parker*, 478 F.3d at 401 (striking the District’s ban on handguns as inconsistent with an individual right to keep and bear arms).

88. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 497 (2004) (describing how the phrase “right of the people” has come to mean an individual right but also could have meant a collective, or militia, right as it was used in the eighteenth century).

89. See *Parker*, 478 F.3d at 378 (noting the plaintiffs conceded that the prefatory clause expressed a collective, civic purpose but did not concede that this purpose

fundamental of good government, however, does not mean that this principal limits or controls the meaning of the operative clause that follows.<sup>90</sup>

To the contrary, as the District of Columbia Circuit correctly noted, at the time of the Second Amendment's adoption it was common to use prefatory language to express a fundamental of good government that was narrower than the operative language used to accomplish it.<sup>91</sup> For example, the prefatory language preceding the Copyright Clause of the Constitution directs Congress to grant copyrights for the purpose of "promot[ing] the progress of science and the useful arts."<sup>92</sup> Yet the Supreme Court determined that the prefatory clause did not constitute a limit on Congress's powers, and this holding is instructive for interpreting the prefatory language of the Second Amendment.<sup>93</sup>

While the prefatory language of the Copyright Clause describes a desired political result—progress and invention—it does not limit Congress's legislative power to achieving that singular result; additional public benefits flowing from Congress's grant of a copyright might also result, such as incentive for continued innovation to other inventors.<sup>94</sup> Likewise, the drafters of the Constitution believed that the Second Amendment protected an individual right to keep and bear arms, and from that protection flowed a political benefit: the Second Amendment would prevent the federal government from destroying or dismantling the militia.<sup>95</sup>

The District also incorrectly argued that the plaintiffs misconstrued the phrases "the people," and "to keep and bear arms" by construing the Second Amendment to protect an individual right to keep and bear arms.<sup>96</sup> The plain language of the Second Amendment protects and guarantees a

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qualified the nature of the right provided by the operative clause that follows).

90. *Id.*

91. *See id.* at 389 (suggesting that the structure of the Second Amendment is not unusual when compared to state constitutional provisions).

92. *Eldred v. Ashcroft*, 537 U.S. 186, 211-12 (2003) (addressing whether the prefatory language functioned to limit Congress's power to grant copyrights or whether Congress retained broad powers to authorize copyrights).

93. *See id.* at 212 (describing the Copyright Clause as both a "power and a limitation" and explaining that the Constitution requires that Congress set up a system that accomplishes the goal of the prefatory language, not that the prefatory language limits Congress's power to legislate).

94. *See id.* at 213.

95. *See Parker*, 478 F.3d at 382 (noting that the Constitution is a political document and therefore an appropriate place to make political points).

96. *Id.* at 378-84 (arguing that the phrase "the people" refers to a militia or some subset of individuals rather than taking a broad view that "the people" encompass all citizens, and that the phrase "to keep and bear arms" is purely militaristic and evokes a civic duty, not a private guarantee).

“right” to “the people.”<sup>97</sup> Similarly, the First and Fourth Amendments, submitted and ratified contemporaneously with the Second Amendment, each protect a right of “the people” and not of “the states.”<sup>98</sup> It is clear that the framers intended “the people” to be a term of art, and these capable draftsmen used “the people” in the First, Second, Fourth, Ninth, and Tenth Amendments to refer to “a class of persons who are part of a national community.”<sup>99</sup> While the District incorrectly argued that the phrase “to keep and bear arms” could indicate only a military use, there is historical support that the framers intended the phrase to indicate private purposes not involving a militia.<sup>100</sup> For example, the right to keep and bear arms for private use, including for hunting and self-defense, existed prior to the creation of the American government under the Constitution.<sup>101</sup> This historical support contradicted the District’s argument and correctly persuaded the District of Columbia Circuit that whatever else it encompasses, the Second Amendment protects an individual right to keep and bear arms for self-defense purposes.<sup>102</sup>

*b. Location, Location, Location: The Proximity of the Second Amendment to Other Amendments Protecting Individual Rights Supports the Individual Right Theory*

The placement of the Second Amendment and its proximity to other individual right amendments within the Bill of Rights lends further credence to proponents of the individual right theory.<sup>103</sup> Indeed, the Bill of Rights consists almost entirely of amendments that protect individual, not collective, rights.<sup>104</sup> The Tenth Amendment, which reserves to the states

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97. See Brief for the State of Texas et al. in Support of Appellants, *supra* note 60, at 7-8 (emphasizing that in construing the meaning of the Second Amendment, courts must assume the framers intended the ordinary meaning of words).

98. *Id.* at 8.

99. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

100. *Parker*, 478 F.3d at 384, 395 (acknowledging that the phrase appeared in state constitutional provisions in the late eighteenth and early nineteenth century that were understood to encompass a private use of arms, including hunting and self-defense).

101. See *id.* (describing how the right to keep and bear arms served as a political salve that allowed the Federalists to satisfy the Antifederalists that citizens would have their weapons ready in the event the militia mustered). This civic purpose, while important, does not limit Second Amendment protection to militia service or require participation in a militia to enjoy the right to keep and bear arms. *Id.*

102. *Id.* at 381-82.

103. *Id.* (noting that courts have never have doubted that the purpose of the protections guaranteed to “the people,” and referred to in the First, Fourth, Ninth, and Tenth Amendments, was to protect individuals from the federal government; the Second Amendment is proximate to these Amendments and uses the same terminology).

104. U.S. CONST. amend. I (protecting freedom of speech, press, religion, petition, and assembly); U.S. CONST. amend. II (protecting the right to keep and bear arms);

those powers not delegated to the federal government, comes not only at the end of the Bill of Rights but indicates that the framers were perfectly capable of distinguishing between “the people” and “states.”<sup>105</sup> It is unlikely that the framers would have chosen to place a state’s right among the individual rights protected by the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Amendments.<sup>106</sup> Furthermore, it is even more unlikely that the framers would use the phrase “the people” to refer to individual rights in the First, Fourth, and Ninth Amendments while intending “the people” to mean “state governments” in the Second Amendment.<sup>107</sup>

*3. Clear as Mud: The Only Controlling Precedent, United States v. Miller, Did Not Establish Protection for a Collective Right Under the Second Amendment*

While the majority of circuits have construed *Miller* to protect only a collective right under the Second Amendment, it is not because the decision clearly indicates that was the Supreme Court’s intention.<sup>108</sup> More likely, the *Miller* court attempted to answer the question before it without ever intending to create a rule of general applicability for courts to use in future Second Amendment cases.<sup>109</sup>

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U.S. CONST. amend. III (protecting freedom from forced quartering of troops); U.S. CONST. amend. IV (protecting from unreasonable search and seizure); U.S. CONST. amend. V (protecting freedom from self-incrimination and double jeopardy, and the right to due process and private property); U.S. CONST. amend. VI (protecting, inter alia, the right to a jury in a criminal trial); U.S. CONST. amend. VII (protecting the right to a jury in a civil trial); U.S. CONST. amend. VIII (protecting from cruel and unusual punishment and excessive bail); U.S. CONST. amend. IX (protecting rights not otherwise enumerated in the Bill of Rights).

105. See *Parker*, 478 F.3d at 381-83 (discussing how consideration of the Bill of Rights as a whole, rather than as a collection of individual amendments, reinforces the argument that the Second Amendment protects an individual right; it would be “an inexplicable aberration” to read the amendment in any other way).

106. Brief for the State of Texas et al. in Support of Appellants, *supra* note 60, at 10 (noting that this would require the framers to switch between listing individual rights in the First Amendment, to a state right in the Second Amendment, and then back to individual rights in the next six amendments).

107. *Id.* at 10-11 (describing this unlikely scenario as a “tortured construction” of the Bill of Rights and noting that James Madison had intended originally to insert each provision of the Bill of Rights into the appropriate section of the Constitution, rather than placing it as a whole at the end; Madison would have placed the protections in what became the Second Amendment into article I, section 9, which protects the original “individual rights” in the Constitution, e.g., habeas corpus, and not in the section containing military and militia clauses, article I, section 8 and article I, section 10).

108. See *id.* at 19 (asserting that if the Supreme Court had discerned that the Second Amendment protected only a collective right, the decision would have turned on Miller’s lack of membership in a militia, not on the Supreme Court’s lack of judicial notice that sawed-off shotguns were of the kind commonly used by a militia).

109. See *Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring)

Although nine circuit courts have read *Miller* to protect the collective right of state militias under the Second Amendment, the decision also can be construed to provide an individual right to use militia-grade weaponry, which simply did not include sawed-off shotguns.<sup>110</sup> Alternatively, the *Miller* court's holding can be construed as simply answering the question before the Supreme Court. Rather than laying down a rule of general applicability, the *Miller* holding was intended only to dispose of the case at bar.<sup>111</sup> This interpretation of *Miller* is reasonable given the variables inherent in Second Amendment cases.<sup>112</sup>

Accordingly, courts should not seek to design a general test but should decide Second Amendment cases on their own facts.<sup>113</sup> A case-by-case approach will provide the flexibility needed for courts to make reasonable decisions and distinctions.<sup>114</sup> For example, although the District's gun laws are unconstitutional because they allow for a ban on the use of functional firearms inside the home for self-defense purposes, the federal law restricting persons who are subject to domestic violence restraining orders from possessing firearms while the order is in effect passes constitutional muster.<sup>115</sup> Using case-by-case analysis and deciding each case on its own facts should not lead the lower courts into confusion. On the contrary, deciding each case based on the facts presented, and using a common standard of review, should provide courts with the certainty they will need to determine whether a gun law crosses the line into unconstitutional infringement of the Second Amendment.<sup>116</sup>

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(noting that the *Miller* Court simply decided the case at bar without delving into the nature of the Second Amendment's protection of a substantive right); *see also* *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (interpreting the *Miller* holding as dependent on whether the weapon in question was of the kind related to a well-regulated militia).

110. *See Cases*, 131 F.2d at 922.

111. *Id.*

112. *Id.* (analogizing Second Amendment cases to due process cases and suggesting that a factual analysis is more desirable than a bright-line rule).

113. *See Winkler, supra* note 21, at 714 (noting that gun control efforts must strike a balance between the individual right to lawful self-defense and the collective right of the people to protection from the government).

114. *See id.* at 715 (arguing that the government may regulate the right to bear arms in order to protect the people, but it may not completely disarm the people in order to achieve that goal).

115. *See Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007) (describing the kinds of reasonable gun regulations the framers may have envisioned and asserting that such regulations would not offend the Second Amendment, including prohibitions on felons possessing firearms and carrying of concealed weapons); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (discussing how reasonable regulations that are consistent with the historical protections afforded by the Second Amendment would be constitutional, including restrictions on firearms possession by infants and adults with unsound minds).

116. *See Cases*, 131 F.2d at 922.

*B. The Supreme Court Should Affirm That Second Amendment Rights Are Not Fundamental and That Courts Should Use a Reasonableness Review Balancing Test When Deciding Second Amendment Cases*

The *Parker* holding is reasonable and recognizes that the Second Amendment protects pre-existing common law rights while allowing for government regulation for the public safety.<sup>117</sup> This approach does not invite a “parade of horrors,” nor does it completely eliminate the District’s ability and authority to regulate guns.<sup>118</sup> Rather, *Parker* supports the proposition that the government may limit Second Amendment rights with reasonable restrictions because Second Amendment rights are not fundamental and do not require a strict scrutiny or heightened review analysis.<sup>119</sup>

To date, neither the Supreme Court nor the circuit courts have held that the Second Amendment is a fundamental right.<sup>120</sup> Nor should the Supreme Court deem the right fundamental: gun owners are not a suspect class and do not have a history of persecution.<sup>121</sup> Without a suspect designation or a history of persecution, strict or even intermediate scrutiny would be inappropriate and would unnecessarily endanger otherwise constitutional and effective gun control efforts.<sup>122</sup>

Accordingly, the Supreme Court should use a reasonableness review balancing test for Second Amendment cases.<sup>123</sup> Using a reasonableness review balancing test will allow the Supreme Court to protect the constitutional rights of the people without reaching the absurd result that a

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117. See *Parker*, 478 F.3d at 399.

118. See Levy, *supra* note 61 (noting that *Parker* did not involve machine guns, assault weapons, or concealed firearms, and that it was limited to the individual possession of a functional handgun inside one’s home for self-defense purposes).

119. See *Parker*, 478 F.3d at 399 (discussing presumably reasonable restrictions such as time, place, and manner restrictions and prior Supreme Court decisions sustaining prohibitions on carrying concealed weapons or of convicted felons owning guns).

120. See, e.g., *United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999) (declaring that the right to possess an assault rifle is not fundamental because there is no individual right to own a firearm); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (characterizing the Second Amendment right as not fundamental because there is no individual right to own a firearm, and upholding the validity of a federal law concerning transporting firearms).

121. See *Olympic Arms v. Buckles*, 301 F.3d 384, 388-89 (6th Cir. 2002).

122. See, e.g., *Parker*, 478 F.3d at 399 (discussing prohibiting convicted felons from possessing firearms as a presumably constitutional, and reasonable, limitation of Second Amendment rights); *United States v. Wicks*, 132 F.3d 383, 389 (7th Cir. 1997) (upholding a previous ruling that felons are not a suspect class and asserting Congress need only a rational reason to prohibit felons from possessing firearms).

123. See *Winkler*, *supra* note 21, at 714 (noting that the notoriously intractable problems of violence and crime argue in favor of gun regulation but a heightened review analysis by the courts may impede legislative attempts at a solution).

state cannot exercise its police power to regulate for the health, safety, and welfare of its citizens.<sup>124</sup> Indeed, using this same balancing test has overwhelmingly allowed state gun control laws to withstand judicial scrutiny for nearly half a century.<sup>125</sup>

The Supreme Court should adopt this reasonableness standard so that federal gun control laws will survive scrutiny unless the individual can prove a material infringement of his or her right to self-defense.<sup>126</sup> A law constitutes material infringement when it prevents a law-abiding, mentally stable adult from lawful self-defense.<sup>127</sup> Upon a showing by the government that the law furthers a legitimate government purpose that outweighs the burden on the individual, the gun control law will survive.<sup>128</sup>

*C. The District's Gun Laws as Written Are Unreasonable, but Reasonable and Effective Gun Control Laws May Not Offend the Second Amendment*

The District's gun ban is the strictest in the nation, prohibiting its citizens from maintaining even registered firearms in a functioning condition within their own homes for self-defense purposes.<sup>129</sup> In its petition for certiorari to the Supreme Court, the District admitted it drafted its question presented—whether it could ban handguns while allowing lawfully registered long arms—based on the assumption that lawful firearms are available for self-defense.<sup>130</sup> This question presented is spurious, however, because under the District's laws, no person may keep a

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124. See *Parker*, 478 F.3d at 399-400 (suggesting that under rational basis review nearly every gun control law may be upheld as constitutional); BLACK'S LAW DICTIONARY 1196 (8th ed. 2004) (describing police power as the government's inherent power to enforce public security, order, health, morality, and justice).

125. Winkler, *supra* note 21, at 718 (noting that state courts have invalidated only six gun control laws since World War II).

126. See Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 FORDHAM L. REV. 573, 587 (2004) (arguing that the individual right to keep and bear arms is far from absolute and that "a great deal of regulation" is appropriate and desirable).

127. *Parker*, 478 F.3d at 399 (reasoning that felonious conduct and insanity, qualities that present a danger to society as a whole, may also prevent a person from legally possessing a firearm).

128. Massey, *supra* note 126, at 587.

129. Brief of Amicus Curiae Congress of Racial Equality in Support of Appellants Seeking Reversal at 22-24, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2006) (No. 04-7041) [hereinafter C.O.R.E. Brief] (describing how even registered and legally owned firearms must be kept unloaded, disassembled, or locked, rendering them essentially useless for self-defense purposes); see also Massey, *supra* note 126, at 587 (arguing that the real aim of gun control advocates is to eliminate private gun ownership).

130. See Brief in Response to Petition for Certiorari, *supra* note 59, at 18 (arguing that the District's question presented could just as easily ask whether the District could ban handguns while allowing bricks or other non-firearm weaponry, given that possessing functional firearms is illegal).

lawfully possessed firearm assembled, unlocked, and ready for use in self-defense.<sup>131</sup> Even the District recognized that it is extreme and unreasonable to prosecute a resident for using a firearm for self-defense inside his or her home, and the District unsuccessfully attempted to persuade the District of Columbia Circuit that a court would not apply the full force of the law against such a defendant.<sup>132</sup> Unconvinced, the District of Columbia Circuit noted that such an assurance would not suffice where a constitutional right hung in the balance.<sup>133</sup>

Despite the District's attempt to spin the litigation on appeal and in its petition for certiorari, the true question before the Supreme Court is whether the District may lawfully ban all functioning firearms, including handguns, without running afoul of the Second Amendment.<sup>134</sup> The District of Columbia Circuit held that the District could not and struck down the District's gun ban.<sup>135</sup>

Assuming the Supreme Court upholds the District of Columbia Circuit and finds that the Second Amendment protects a non-fundamental, individual right to keep and bear arms, the District still will not lose all ability or authority to regulate gun possession.<sup>136</sup> For over a century, the states have successfully regulated gun possession without impinging the Second Amendment.<sup>137</sup> At present, the District's law only serves to prohibit possession of functional firearms for self-defense from the people who need them the most: the law-abiding, mentally sound, men and women of the District.<sup>138</sup> The District should rewrite its law to allow its citizens to lawfully possess firearms, including handguns, that are fully functional

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131. *Id.* at 19-23 (noting that the District admitted the Supreme Court could reframe its question presented and arguing that such reframing is necessary before oral argument).

132. *Parker*, 478 F.3d at 400-01 (dismissing the District's assertion that courts would likely use a narrowing construction if self-defense was offered as a justification for unlawful possession).

133. *Id.* (deciding that judicial lenity cannot cure the unreasonable restriction of a constitutional right).

134. See Brief in Response to Petition for Certiorari, *supra* note 59, at 18-19, 22 (citing the District of Columbia Circuit's holding in *Parker* that allowing possession of long arms while disallowing them to be kept in a functioning state is essentially a ban on all firearms).

135. *Parker*, 478 F.3d at 401.

136. See Winkler, *supra* note 21, at 717 (suggesting that under a reasonableness standard, the court likely will consider any law that is not a complete ban on the right to keep and bear arms as a "mere regulation" of that right).

137. See *id.* (noting that the forty-two states with state constitutions that protect an individual right to keep and bear arms also have a long history of gun control that state courts find constitutional).

138. *Parker*, 478 F.3d at 399 n.17 (indicating that the irrational District gun laws effectively prevent only non-criminals from obtaining guns).

inside the home for the purpose of self-defense.<sup>139</sup>

#### IV. CONCLUSION

The need for self-defense in the District, a city with higher than national crime rates, is of the utmost importance.<sup>140</sup> The District's 2007 homicide rate was greater than that of New York, Philadelphia, or Chicago.<sup>141</sup> Of those homicides, seventy-seven percent were gunfire related.<sup>142</sup> Even the District's non-fatal gun-related crime rates increased.<sup>143</sup> These increased crime rates were not the result of the District of Columbia Circuit's decision to strike the District's gun laws; the law remained in effect while the District appealed to the Supreme Court.<sup>144</sup>

Illegal guns flow into the District in numbers so great that criminals likely pay only a small premium to obtain them.<sup>145</sup> Given that District citizens are at the mercy of police discretion for their protection needs, the need for adequate self-defense becomes even more critical for day-to-day survival.<sup>146</sup> From outward appearances, the District is fighting a losing

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139. See Brief in Response to Petition for Certiorari, *supra* note 59, at 25.

140. See C.O.R.E. Brief, *supra* note 129, at 22 (illustrating that the District's rate of crimes involving firearms and murders increased since the ban went into effect, rather than decreased); see also Press Release, Senator Kay Bailey Hutchison, Sen. Hutchison Introduces Legislation to Lift D.C. Gun Ban (Mar. 28, 2007), available at <http://hutchison.senate.gov/pr032807b.html> (last visited Mar. 21, 2008) (characterizing the District's restrictive gun laws as ineffective since the crime rates increased after its enactment).

141. See Allison Klein, *Killings In D.C. Up After Long Dip; Jump in Gun Crime Accompanies 2007 Death Toll of 181*, WASH. POST, Jan. 1, 2008, at A1 (noting the District's homicide rate of thirty per 100,000 people is still lower than that of Baltimore and Detroit).

142. See *id.* (describing a new technology that records gunfire, ShotSpotter, which recorded approximately fifty gunshots per week in a single police district in the District of Columbia).

143. See Ernesto Londoato, *Region's Homicide Total Steady For 2007; Declines Elsewhere Offset Rising Toll in D.C., Pr. George's*, WASH. POST, Jan. 1, 2008, at B1 (reporting a twenty-four percent increase in armed robberies and a seven percent increase in other violent gun crimes).

144. Robert Barnes & David Nakamura, *Gun Law Prevents Harm, D.C. Argues; Strict Controls Are Warranted to Quell Violence, Says Brief to Supreme Court*, WASH. POST, Jan. 5, 2008, at A02.

145. See David Nakamura & Robert Barnes, *D.C.'s Ban on Handguns in Homes Is Thrown Out; Fenty Promises to Fight Appellate Court's Ruling*, WASH. POST, Mar. 10, 2007, at A1 (noting that District police can hardly enforce the handgun ban on the streets and confiscated more than 2,600 guns in 2006).

146. See C.O.R.E. Brief, *supra* note 129, at 17-18 (commenting that poor and minority neighborhoods are often subject to both crime and insufficient police protection); see also *Castle Rock v. Gonzales*, 545 U.S. 748, 760-63 (2005) (holding that citizens have no constitutional right to state protection from crime); *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) (describing the right to self-defense from a potentially fatal attack as fundamental).

battle with violent crime and its own expectations for success.<sup>147</sup> Whether the District's gun laws actually reduce violent crime is debatable, and dueling statistics are easy to locate.<sup>148</sup>

According to the FBI's Uniform Crime Reports, violent crime rates increased exponentially since the enactment of the gun ban, ultimately reaching a high point of a ninety-seven percent greater rate of violent crime than before enactment of the gun ban.<sup>149</sup> At its zenith, the murder rate was triple the pre-enactment rate.<sup>150</sup> On the other hand, there are studies that show the District did see a decrease in gun-related homicides following enactment of its gun laws.<sup>151</sup> With statistics like these, the question is not only whether the gun ban is effective but whether District residents must also live in peril as a result of ill-conceived gun control laws.

Fortunately, a solution is at hand; the Supreme Court can remedy the District's ill-conceived gun laws by affirming the District of Columbia Circuit and holding that there is an individual right to keep and bear arms.<sup>152</sup> The Supreme Court should go further, however, and hold that this right is not fundamental and that the proper standard for deciding Second Amendment cases is a reasonableness review balancing test.<sup>153</sup>

Affirming that there is an individual right to keep and bear arms will resolve the split among the circuits and instruct the lower courts on the meaning of the Second Amendment.<sup>154</sup> Finding that the right is not

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147. Brief in Response to Petition for Certiorari, *supra* note 59, at 30 (describing a former District police chief's decision to lower the goal for solving homicides to just over fifty percent).

148. *See id.* at 27-29 (describing the District's gun laws as a "complete failure" and asserting that violent crime rates have actually increased since enacting the ban). *But see generally* Colin Loftin et al., *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615 (1991) (showing that gun-related homicides dropped following enactment of the District's gun laws and that neighboring Virginia and Maryland, which did not enact such laws, did not enjoy a decline in gun-related homicides during that time).

149. *See* Rothstein Catalog on Disaster Recovery and The Disaster Center website, <http://www.disastercenter.com/crime/dccrime.htm> (last visited Jan. 7, 2008); Klein, *supra* note 141, at A1.

150. *See* Brief in Response to Petition for Certiorari, *supra* note 59, at 28 (noting that even now, after thirty years under the ban, the murder rate is over thirty percent higher than it was in 1976).

151. *See* Petition for Writ of Certiorari, *supra* note 3, at 26-27 (reporting that the homicide rate increases by two percent for every ten percent increase in handgun ownership).

152. *See* Brief in Response to Petition for Certiorari, *supra* note 59, at 2 (arguing that the *Parker* decision was narrow and involved a de facto prohibition on functional firearms for self-defense purposes, rather than regulating mere possession of a weapon).

153. *Id.*

154. *See* Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretation of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 963 (1996) (asserting that lower courts have distorted the meaning of *Miller* to the

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fundamental and is subject to a reasonableness review balancing test will provide the lower courts with a consistent method for determining whether gun control proposals are constitutional.<sup>155</sup> Finally, using a reasonableness review balancing test will allow states to continue to craft constitutional gun control measures that are both reasonable and effective.<sup>156</sup> The Supreme Court must provide this guidance because the District, and the rest of the United States, is depending on it.<sup>157</sup>

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point where they border on intellectual dishonesty).

155. See Brief in Response to Petition for Certiorari, *supra* note 59, at 6 (suggesting that the Supreme Court should balance the government's interest in safety against the individual's right, but not advocating for additional heightened scrutiny analysis).

156. See Chemerinsky, *supra* note 6, at 484 n.4.

157. See Carol D. Leonnig, *Gun Ban Ruling Puts Fenty on the Spot; Going to High Court Would Be Risky*, WASH. POST, May 17, 2007, at B1 (describing how a Supreme Court decision could derail gun control efforts in Chicago, Detroit, New York City, and Massachusetts, and could affect federal gun control efforts including background checks and the ban on certain assault weapons); Jonathan Turley, *A Liberal's Lament: The NRA Might Be Right After All*, USA TODAY, Oct. 11, 2007, at 12A (asserting that the District's appeal endangers laws across the country as this Supreme Court is more likely than not to uphold *Parker*).