Order Code RL34446

CRS Report for Congress

District of Columbia v. Heller: The Supreme Court and the Second Amendment

April 11, 2008

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Prepared for Members and Committees of Congress

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Summary

In *Parker v. District of Columbia*, the United States Court of Appeals for the District of Columbia Circuit ruled in a 2-1 decision that provisions of the D.C. Code that prohibit persons from keeping handguns in their home are unconstitutional in that they infringe upon the individual right to keep and bear arms. Upon making this determination, the court ruled that three elements of the D.C. gun control statutes were unconstitutional: (1) an effective prohibition on the registration of pistols (D.C. Code § 7-2502.2); (2) a prohibition on carrying a pistol, insofar as the prohibition could be construed to prohibit the keeping of a handgun in the home and preventing it from being moved throughout a person's home (D.C. Code § 22-4504); and (3) a statutory requirement that a registered firearm be kept unloaded and disassembled or bound by a trigger lock (D.C. Code § 7-2507.02).

The Supreme Court of the United States granted a petition for certiorari on November 20, 2007, limited to the question of "[w]hether the following provisions, D.C. Code §§ 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?" The Supreme Court of the United States heard oral arguments in the case, now called *District of Columbia v. Heller*, on March 18, 2008, and a decision is expected to be issued during the summer of 2008. Heller marks the first time in almost 70 years that the Supreme Court has agreed to consider the nature of the right conferred by the Second Amendment to the Constitution of the United States. This report provides an overview of prior judicial treatment of the Second Amendment, with a focus on the litigation in *Heller* and the potential impact of its outcome.

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District of Columbia v. Heller: The Supreme Court and the Second Amendment

Introduction

In *Parker v. District of Columbia*,[1] the United States Court of Appeals for the District of Columbia Circuit held that the Second Amendment to the Constitution protects an individual right to possess firearms, and struck down provisions of the D.C. Code that prohibit persons from possessing handguns or using such firearms for self-defense in the home. The Supreme Court of the United States granted a petition for *certiorari* in *Parker* on November 20, 2007, limited to the question of whether those provisions of the Districts' firearms control law "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." The Supreme Court heard oral argument in the case, now called *District of Columbia v. Heller*, on March 18, 2008, and a decision is expected to be issued during the summer of 2008. *Heller* marks the first time in almost 70 years that the Supreme Court has agreed to consider the nature of the right conferred by the Second Amendment, and its disposition of the case could have significant and far-reaching consequences for future judicial and congressional consideration of this constitutional provision. Accordingly, this report provides an overview of prior judicial treatment of the Second Amendment, with a focus on the potential outcome and impact of the Court's pending decision.

The Second Amendment

The Second Amendment to the Constitution states that "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." Despite its brevity, the nature of the right conferred by the language of the Second Amendment has been the subject of great debate in the political, academic, and legal spheres for decades. Generally speaking, it can be said that there are two opposing models that govern Second Amendment interpretation. On one side of the debate is what is known as the "individual right model," which maintains that the text and underlying history of the Second Amendment clearly establishes that the right to keep and bear arms is committed to the people, as opposed to the states or the federal government. On the other end of the spectrum is the "collective right model" which interprets the Second Amendment as protecting the authority of the states to maintain a formal organized militia. A related interpretation, commonly referred to as the "sophisticated collective right model,"

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[1] 478 F.3d 370 (D.C. Cir. 2007).

posits that individuals have a right under the Second Amendment to own and possess firearms, but only to the extent that such ownership and possession is connected to service in a state militia.

One of the key arguments raised both in support of, and in contravention to, an individual right to keep and bear arms rests upon the text of the Amendment. The individual right model places great weight on the operative clause of the Amendment, which states that "the right of the people to keep and bear arms shall not be infringed." Accordingly, it is argued that this command language clearly affords a right to people, and not simply the states. To support this notion, it is argued that the text of the Tenth Amendment, which makes a clear distinction between "the states" and "the people" makes it evident that the two terms are in fact different, and that the founders knew how to say "state" when they meant it.[2] Under this reading, it may be argued that if the Second Amendment did not confer an individual right, it would simply have read that the right of the states to organize the militia shall not be infringed. Supporters of the collective right model often counter with the argument that the dependent clause, by referring to "a well regulated militia" qualifies the rest of the amendment, limiting the right of the people to keep and bear arms and imbuing the states with the authority to control the manner in which weapons are kept, and to require that any person who possesses a weapon be a member of the militia.[3]

An outgrowth of this rationale has been the argument that in modern times the militia is embodied by the national guard, and that the modern realities of warfare have negated the need for the citizenry to be armed.[4] The individual rights theorists counter these arguments by noting that the militia of the founders' era consisted of every able bodied male, who was required to supply his own weapon. Also, they point to 10 U.S.C. § 311, which as part of its express definition of the different classes of militia states that in addition to the national guard, there is an "unorganized militia" that is comprised of all able bodied males between the ages of 17 and 45 who are not members of the national guard or naval militia.[5] Moreover, proponents of the individual rights model deride the notion that an individual right to keep and bear arms can be read out of the constitution as a result of the existence of advanced technology or shifting societal mores.[6] As is illustrated below, various federal courts of appeal have given effect to each of these interpretive models, contributing to the uncertainty that has traditionally characterized the debate over the meaning of the Second Amendment.

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[2] *See, e.g.*, Randy Barnett, "Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment," 60 Stan. L. Rev. 937, 948 (2008).

[3] *See* David C. Williams, "The Mythic Meanings of the Second Amendment" 15 (2003).

[4] *See, e.g.*, H. Richard Uviller & William G. Merkel, "The Second Amendment in Context: the Case of the Vanishing Predicate," 76 Chi. Kent L. Rev. 403 (2000).

[5] *See* Ronald S. Resnick, "Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment," 77 U. Det. Mercy L. Rev. 1, 32 (1999).

[6] *Id*. at 50.

The Second Amendment in Federal Court

Despite the heated debate regarding the meaning of the Second Amendment, the Supreme Court has only decided one case, *United States v. Miller*,[7] that has tested a congressional enactment against this constitutional provision. An interesting aspect of the decision in *Miller*, as is illustrated by subsequent lower court decisions discussed below, is that it was, until recently, commonly cited as supportive of the proposition that the Second Amendment confers a collective right to keep and bear arms. However, the actual holding, while it did give effect to the dependent clause, could nonetheless be taken to indicate that the Second Amendment confers an individual right limited to the context of the maintenance of the militia.

United States v. Miller.

In *Miller*, the Court upheld a provision of the National Firearms Act that required the registration of sawed off shotguns. In discussing the Second Amendment, the Court noted that the term militia was traditionally understood to refer to "all males physically capable of acting in concert for the common defense," and that members of the militia were civilians primarily and soldiers only on occasion.[8] The Court then formulated a rationale that a weapon possessed by an individual must have some reasonable relationship to the preservation or efficiency of a well regulated militia. It is important to note that in *Miller* the defendant did not present any evidence in support of his argument. Accordingly, the Court held that "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[9]

The decision in *Miller* is perplexing, in that it indicates that there is a connection between the right to keep and bear arms and the militia, but does not explore the logical conclusions of its holding, leaving open the question of at what point regulation or prohibition of firearms would violate the strictures of the Amendment. Cases decided in the decades following *Miller* departed from this rather undefined test, with each succeeding decision arguably becoming more attenuated, to the point that judicial treatment of the Second Amendment for the remainder of the twentieth century almost summarily concluded that the Amendment conferred only a collective right to keep and bear arms.

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[7] 307 U.S. 174 (1939).

[8] *Id*. at 179.

[9] *Id*. at 178.

Appellate Decisions: 1942-2000.

This process of departure from, and attenuation of, *Miller* began with the 1942 decision in *Cases v. United States*.[10] In *Cases*, the Court of Appeals for the First Circuit stated that a literal application of the *Miller* test could prevent the government from regulating the possession of machine guns and similar weapons which clearly serve military purposes. Beginning its departure from *Miller*, the *Cases* court simply stated that it doubted that the Founders intended for citizens to be able to possess weapons like machine guns, and further declared that *Miller* did not formulate any sort of general test to determine the limits of the second amendment.[11] The court in *Cases* then applied a new test of its own formulation, focusing on whether the individual in question could be said to have possessed the prohibited weapon in his capacity as a militiaman. Applying that rationale to the case at hand, the court declared that the defendant possessed the firearm "purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of [a] well regulated militia."[12] In essence, the holding in *Cases* upheld the constitutionality of a federal law prohibiting, under certain circumstances, the possession of a weapon that could be viewed as a weapon of common militia use, on the basis that the weapon was not in fact used for such a purpose.

The court in *Cases* buttressed this qualification of the individual right approach by citing the Supreme Court's decisions in *United States v. Cruikshank*[13] and *Presser v. Illinois*,[14] (both of which were decided prior to the advent of modern incorporation doctrine principles) as support for the proposition that the Second Amendment does not confer an individual right: "[t]he right to keep and bear arms is not a right conferred upon the people by the federal constitution. Whatever rights the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right."[15]

The concept of the Amendment as a collective protective mechanism rather than a conferral of individual rights was reinforced by the Third Circuit's decision that same year in *United States v. Tot*.[16] In that case, the Third Circuit declared that it was "abundantly clear" that the right to keep and bear arms was not adopted with individual rights in mind.[17] The court's support for this statement was brief and

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[10] 131 F.2d 916 (1st Cir. 1942).

[11] *Id*. at 922.

[12] *Id*. at 923.

[13] 92 U.S. 542 (1875).

[14] 116 U.S. 252 (1886).

[15] *Cases*, 131 F.2d at 921.

[16] 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

[17] *Id*. at 266.

conclusory, and did not address any of the relevant, competing arguments.[18] This type of holding became the norm in cases addressing the Second Amendment for the remainder of the century, with courts increasingly referring to one another's holdings to support the determination that there is no individual right conferred under the Second Amendment, without engaging in any appreciably substantive legal analysis of the issue.[19]

United States v. Emerson.

The traditional, albeit highly undefined, balance among the circuits with regard to judicial treatment of the Second Amendment was upset by the 2001 decision in *United States v. Emerson*.[20] In *Emerson*, the Fifth Circuit became the first federal appellate court to hold that the Second Amendment confers an individual right to keep and bear arms. The court in *Emerson* was specifically addressing the constitutionality of 18 U.S.C. §922(g)(8), which prevents anyone under a domestic violence restraining order from possessing a firearm. The district court had ruled this provision to be unconstitutional on the grounds that it allows the existence of a restraining order, even if issued "without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights."[21] The court of appeals agreed with the district court's conclusion that the Second Amendment confers an individual right after engaging in an extensive analysis of the text and history of the Amendment,[22] stating that "the history of the Amendment reinforces its plain text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."[23] In making this determination, the court explicitly acknowledged that it was repudiating the position of every other circuit court that had addressed the meaning of the second amendment: "we are mindful that almost all of our sister circuits have rejected any individual rights view of the Second Amendment. However, it respectfully appears to us that all or almost all of these opinions seem to have done so either on the erroneous assumption that *Miller* resolved that issue or without sufficient articulated examination of the history and text of the Second Amendment."[24]

Announcing its formal holding, the *Emerson* court stated: "[w]e reject the collective rights and sophisticated collective rights models for interpreting the

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[18] *Id*. at 266.

[19] *See, e.g., Love v. Peppersack*, 47 F.3d 120, 123 (4th Cir. 1995) ("the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual right."); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) ("[i]t is clear that the Second Amendment guarantees a collective rather than an individual right.").

[20] 270 F.3d 203 (5th Cir. 2001), *rehearing and rehearing en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied, Emerson v. united States*, 536 U.S. 907 (2002).

[21] *United States v. Emerson*, 46 F.Supp.2d 598, 610 (N.D. Tex. 1999).

[22] *Emerson*, 270 F.3d at 218-259.

[23] *Emerson*, 270 F.3d at 260.

[24] *Emerson*, 270 F.3d at 227.

Second Amendment. We hold, consistent with *Miller*, that it protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*."[25] While adopting the individual rights model, the court in *Emerson* nonetheless reversed the district court decision, determining that rights protected by the Second Amendment are subject to reasonable restrictions:

> Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. Indeed, Emerson does not contend, and the district court did not hold, otherwise. As we have previously noted, it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms.[26]

Applying this standard to the provision before it, the *Emerson* court noted that while the evidence before it did not establish that an express finding of a credible threat had been made by the divorce court, the nexus between firearm possession by an enjoined party and the threat of violence was sufficient to establish the constitutionality of 18 U.S.C. §922(g)(8).[27] The decision in *Emerson* was accompanied by a special concurrence arguing that "[t]he determination whether the rights bestowed by the Second Amendment are collective or individual is entirely unnecessary to resolve this case and has no bearing on the judgment we dictate by this opinion."[28]

It is difficult to overstate the significance of the *Emerson* holding. Even though the decision did not result in the invalidation of any laws, it marked the first time that a circuit court adopted an individual rights interpretation of the Second Amendment, and, in turn, led to the most substantive exposition of the collective rights model by a sister circuit to date.

Silveira v. Lockyer.

In *Silveira v. Lockyer*,[29] the Court of Appeals for the Ninth Circuit rejected a Second Amendment challenge to California's Assault Weapons Ban, specifically repudiating the analysis in *Emerson* and adopting the collective right model interpretation of the Second Amendment: "[o]ur court, like every other federal court of appeals to reach the issue except for the fifth circuit, has interpreted *Miller* as

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[25] *Emerson*, 270 F.3d at 260.

[26] *Emerson*, 270 F.3d at 261.

[27] *Emerson*, 270 F.3d at 264-65.

[28] *Emerson*, 270 F.3d at 272 (Parker, J., special concurrence).

[29] 312 F.3d 1052 (9th Cir. 2003), *rehearing en banc denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied, Silveira v. Lockyer*, 540 U.S. 1046 (2003).

rejecting the traditional individual rights view."[30] The decision in *Silveira* is particularly significant, in that the Ninth Circuit essentially picked up the gauntlet thrown down in *Emerson*, engaging in its own substantive analysis of the text of the Amendment, but reaching the opposite conclusion than that of the Fifth Circuit. This is important, because the opinion in *Silveira* acknowledges and purports to rectify the deficiencies in prior cases that have summarily interpreted *Miller* as precluding an individual rights interpretation.

In particular, the Ninth Circuit began its analysis by stating that it agreed "that the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it."[31] After engaging in an extensive consideration of the same historical and textual arguments that were addressed in *Emerson*, the court in *Silveira* stated that "[t]he amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or posses firearms for personal or other use. This conclusion is reinforced in part by *Miller's* implicit rejection of the traditional individual rights position."[32] The court reinforced its conclusion, declaring:

> In sum, our review of the historical record regarding the enactment of the Second Amendment reveals that the amendment was adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms. The militias, in turn, were viewed as critical to preserving the integrity of the states within the newly structured national government as well as to ensuring the freedom of the people from federal tyranny. Properly read, the historical record relating to the Second Amendment leaves little doubt as to its intended scope and effect.[33]

Upon determining that the collective right model controls Second Amendment analysis, the court held that the amendment "poses no limitation on California's ability to enact legislation regulating or prohibiting the possession or use of firearms, including dangerous weapons such as assault weapons."[34] As in the *Emerson* decision, the opinion in *Silveira* was accompanied by a special concurrence that argued that the court's "long analysis involving the merits of the Second Amendment claims" and its "adoption of the collective rights theory" was "unnecessary and improper" in light of extant precedent mandating dismissal of such claims for a lack of standing.[35] A request for rehearing *en banc* was denied by the full court, resulting in the dissent of six judges.[36]

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[30] *Silveira*, 312 F.3d at 1063.

[31] *Silveira*, 312 F.3d at 1064.

[32] *Silveira*, 312 F.3d at 1066.

[33] *Silveira*, 312 F.3d at 1086.

[34] *Silveira*, 312 F.3d at 1087.

[35] *Silveira*, 312 F.3d 1093-94 (Magill, J., special concurrence).

[36] *Silveira*, 328 F.3d 567 (9th Cir. 2003) (Judge Pregerson: "the panel misses the mark by interpreting the Second Amendment right to keep and bear arms as a collective right, rather

(continued...)

The holdings in *Emerson* and *Silveira* for the first time presented the Supreme Court with two contemporaneous circuit court decisions that reached fundamentally different conclusions regarding the protections afforded by the Second Amendment. While this dynamic led to a great deal of speculation as to whether the Court would grant a petition for certiorari in *Silveira* to resolve this split, the Court denied the application, presumably due to the fact that, while the two decisions constituted a concrete split between two circuit courts on this issue for the first time, no firearm laws were actually invalidated. Accordingly, it is unsurprising that the Court followed conventional wisdom and traditional practice by avoiding the consideration of a significant constitutional issue in the absence of a clear and particularized conflict among the circuit courts.

Parker v. District of Columbia.

The stage for just such a conflict was set in 2007 with the decision in *Parker v. District of Columbia*, which marked the first time that a federal appellate court has struck down a law regulating firearms on the basis of the Second Amendment[37] In *Parker*, six residents of the District of Columbia challenged three provisions of the District's 1975 Firearms Control Regulation Act: D.C. Code § 7-2502.02(a)(4), which generally bars the registration of handguns (with an exception for retired D.C. police officers); § 22-4504(a), which prohibits carrying a pistol without a license, insofar as that provision would prevent a registrant from moving a gun from one room to another within his or her home; and § 7-2507.02, which requires that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device.[38]

The *Parker* court began its opinion by dismissing the claims of five of the six plaintiffs upon determining that the District's general threat to prosecute violations of its gun control laws did not constitute an injury sufficient to confer standing on citizens who had only expressed an intention to violate the District's gun control laws but had not suffered any injury in fact.[39] The remaining plaintiff, Dick Heller, was

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[36] (...continued)
than as an individual right. Because the panel's decision abrogates a constitutional right, this case should have been reheard en banc." *Id.* at 568. Judge Kozinski: "The sheer ponderousness of the panel's opinion — the mountain of verbiage it must deploy to explain away these fourteen words of constitutional text — refutes its thesis far more convincingly than anything I might say. The panel's labored effort to smother the Second Amendment by sheer body weight has all the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it — and is just as likely to succeed." *Id*. at 570.).

[37] 478 F.3d 370 (D.C. Cir. 2007).

[38] *Id*. at 373.

[39] In making this finding, the court relied upon its prior holdings in *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997) and *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005). Based on those cases, the *Parker* court determined that the "plaintiffs were required to show that the District had singled them out for prosecution," as opposed to making a showing of a general threat of prosecution stemming from a potential future violation of the District's gun control laws. *Parker*, 478 F.3d at 374. While noting that Supreme Court (continued...)

found to have standing due to the fact that he had applied for, and had been denied, a license to possess a handgun. Based on this fact, the court determined that the denial of a license "constitutes an injury independent of the District's prospective enforcement of its gun laws."[40] The court also allowed Heller's claims challenging 22-4504 (prohibiting the carriage of a pistol without a license) and 7-2507.02 (requiring firearms to be kept unloaded and disassembled or bound by a trigger lock) to stand, as the "would amount to further conditions on the [right] Heller desires."[41]

Turning to its substantive consideration of the Second Amendment, the *Parker* court engaged in a textual and historical analysis that largely mirrors the approach of the Fifth Circuit in *Emerson*. The court placed particular importance on the words "the drafters chose to describe the holders of the right-'the people.'"[42] Stating that this phrase is "found in the First, Fourth, Ninth, and Tenth Amendments," and that "[i]t has never been doubted that these provisions were designed to protect the rights of *individuals*," the court stated its determination that it necessarily follows that the Second Amendment likewise confers an individual right.[43] The court also rejected the contention that the prefatory clause of the Amendment qualified the effect of its operative clause, on the basis of its characterization of the historical factors at play. According to the court, early Congresses recognized that the militia existed independently as all "able-bodied men of a certain age," irrespective of any governmental creation, but that it nonetheless required governmental organization to be effective.[44] This interpretation enabled the court to dispose of the District's argument that "a militia did not exist unless it was subject to state discipline and leadership."[45] Specifically, by rejecting the notion that there is a state organization requirement for the creation of a militia, the court was able to interpret the prefatory clause as encompassing a broad swath of the populace, irrespective of a state's right to raise a collective protective force.[46] The court concluded its analysis by stating: "[t]he important point, of course, is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called."[47]

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[39] (...continued)
precedent generally allows for more relaxed standing requirements when faced with a "pre-enforcement challenge to a criminal statute that allegedly threatened constitutional rights," the *Parker* court stated that it was nonetheless bound by its decisions in *Navegar* and *Seegars* in the absence of an *en banc* decision overruling those cases. *Parker*, 478 F.3d at 374-75.

[40] *Id*. at 376.

[41] *Id*. at 376.

[42] *Id*. at 381.

[43] *Id*. at 381.

[44] *Id*. at 387-88.

[45] *Id*. at 386.

[46] *Id*. at 389.

[47] *Id*. at 389.

The *Parker* court then addressed the argument that the District of Columbia is not subject to the restraints of the Second Amendment because it is a purely federal entity. This argument rests upon the supposition that since the District is not a state, no federalism concerns are posed in the Second Amendment context since there is no possibility that the exercise of legislative power would unconstitutionally impede the organization of a state militia.[48] The court rejected this argument, noting that "the Supreme Court has unambiguously held that the Constitution and Bill of Rights are in effect in the District," and further referring to it as an "appendage of the collective right position."[49]

The final argument addressed by the court in *Parker* was the District's contention that "even if the Second Amendment protects an individual right and applies to the District, it does not bar the District's regulation, indeed, its virtual prohibition, of handgun ownership."[50] Engaging in a historical analysis, the court determined that long guns (such as muskets and rifles) and pistols were in "common use" during the era in which the Second Amendment was adopted.[51] While noting that modern handguns, rifles and shotguns are "undoubtedly quite improved" over their "colonial-era predecessors," the court held that the "modern handgun" is a "lineal descendant" of the pistols used in the founding-era, and that it accordingly meets the standard delineated in *Miller*.[52] The court went on to declare that "[p]istols certainly bear 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[53] The court then rejected the argument that the Second Amendment applies only to colonial era weapons, stating that "just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a 'search,' the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol."[54]

The court stressed that its conclusion on this point should not be taken to suggest that "the government is absolutely barred from regulating the use and ownership of pistols," stating that the "protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment."[55] The court stated that its holding did not conflict with earlier Supreme Court determinations that laws prohibiting the concealed carriage of weapons or depriving convicted felons of the right to keep and

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[48] *Id*. at 395.

[49] *Id*. at 395.

[50] *Id*. at 397.

[51] *Id*. at 398.

[52] *Id*. at 398.

[53] *Id*. at 398.

[54] *Id*. at 398.

[55] *Id*. at 399.

bear arms do not "offend the Second Amendment."[56] According to the court, regulations of this type "promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised."[57] The court went on to state that other "[r]easonable regulations also might be thought consistent with a 'well regulated Militia," including, but not necessarily limited to, the registration of firearms (on the basis that it would give the government an idea of how many would be armed for militia service if called upon), or reasonable firearm proficiency testing (as this would promote public safety and produce better candidates for service).[58]

Applying these standards to the provisions of the D.C. Code at issue, the court ruled that each challenged restriction violated the protections afforded by the Second Amendment. With regard to § 7-2502.02 (prohibiting the registration of a pistol), the court stated: "[o]nce it is determined-as we have done-that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them."[59] Turning to § 22-4504 (prohibiting the carriage of a pistol without a license, inside or outside the home), the court stated: "just as the District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised-i.e, self-defense."[60] Finally, with regard to § 7-2507.02 (requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device), the court stated that this provision, "Like the bar on carrying a pistol within the home, amounts to a complete prohibition on the lawful use of handguns for self-defense. As such, we hold it unconstitutional."[61]

In dissent, Judge Henderson argued that the majority opinion was dicta, as the "meaning of the Second Amendment in the District of Columbia is purely academic" since "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."[62] In support of this conclusion, Judge Henderson argued that *Miller* should properly be interpreted as conferring a right to keep and bear arms only in relation to

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[56] *Id*. at 399.

[57] *Id*. at 399.

[58] *Id*. at 399.

[59] *Id*. at 400.

[60] *Id*. at 400.

[61] *Id*. at 401.

[62] *Id*. at 402 (quoting *Seegars v. Ashcroft*, 297 F.Supp.2d 201, 239 (D.D.C. 2004), *aff'd in part, rev'd in part sub nom., Seegars v. Gonzalez*, 396 F.3d 1248, *reh'g en banc denied*, 413 F.3d 1 (2005).

preserving state militias.[63] Judge Henderson went on to argue that the Supreme Court and the D.C. Circuit both "have consistently held that several constitutional provisions explicitly referring to citizens of 'States' do not apply to citizens of the District."[64] While acknowledging that a determination as to whether the District qualifies as a state under a certain constitutional provision is dependent on the "character and aim of the specific provision involved," Judge Henderson maintained that the "Second Amendment's 'character and aim' does not require [treatment of] the District as a State," as the "Amendment was drafted in response to the perceived threat to the 'free[dom]' of the 'State[s]' posed by a national standing army controlled by the federal government."[65] Accordingly, given that the District was created as a federal entity by Congress, Judge Henderson argued that the District "had-and has-no need to protect itself from the federal government," thereby rendering the Second Amendment inapplicable to the District.[66]

District of Columbia v. Heller

The District of Columbia filed a petition for *certiorari* with the Supreme Court of the United States on September 4, 2007, requesting that it consider the question of "[w]hether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns."[67] On October 4, 2007, Heller, as the respondent, filed a brief with the Court in reply to the District's petition, urging it to address the question of "[w]hether the Second Amendment guarantees law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes."[68] The Court granted the petition for *certiorari* on November 20, 2007, limited to the question of "[w]hether the following provisions, D.C. Code §§ 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?"[69]

Merits Briefs.

In its Petitioner's Brief, the District argues that the Second Amendment protects a right to keep and bear arms only in relation to service in a governmentally

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[63] *Id*. at 404.

[64] *Id*. at 406.

[65] *Id*. at 406 (citing *Emerson*, 270 F.3d at 237-40, 259; *Silveira*, 312 F.3d at 1076).

[66] *Id*. at 406-07.

[67] *District of Columbia v. Heller*, Petition for a Writ of Certiorari, No. 07-290 (September 4, 2007). [http://www.scotusblog.com/movabletype/archives/07-290_pet.pdf].

[68] *District of Columbia v. Heller*, Brief in Response to Petition for a Writ of Certiorari, No. 07-290 (October 4, 2007). [http://www.scotusblog.com/movabletype/archives/07-290_bir.pdf].

[69] *District of Columbia v. Heller*, 128 S.Ct. 645, 169 L.Ed.2d 417, 76 USLW 3083 (November 20, 2007).

organized militia.[70] In particular, the District maintains that the "text and history of the Second Amendment confirm that the right it protects is the right to keep and bear arms as part of a well regulated militia, not to possess guns for private purposes...[it] does not support respondent's claim of entitlement to firearms for self defense."[71] In support of this proposition, the District's brief marshals detailed textual and historical information in much the same manner as the Ninth Circuit's opinion in *Silveira*.

The District's second argument rests on the same assertion made by Judge Henderson in her dissent in *Parker*; namely, that the Second Amendment does not apply to laws that are limited to the District of Columbia. On this point, the District maintains that "the Second Amendment was intended as a federalism protection to prevent Congress, using its powers under the Militia Clauses from disarming state militias. The Amendment 'thus is a limitation only upon the power of Congress and the National government' and does not constrain states."[72] Elaborating on this argument, the District asserts that "[l]aws limited to the District similarly raise no federalism-type concerns, whether passed by Congress or the [D.C.] Council, and so do not implicate the Second Amendment."[73]

In another line of argument, the District maintains that even assuming the existence of a private right to possess firearms, its regulation of handguns in the challenged provisions should be upheld "for the independent reason that they represent a permissible regulation of any asserted right."[74] In particular, the District argues that its laws governing the possession of handguns should be upheld as a reasonable measure aimed at "reduc[ing] the tragic harms" inflicted by such weapons.[75] In a related argument, the District maintains that the law requiring guns to be kept unloaded and disassembled or bound by a trigger lock should be upheld as a "reasonable regulation designed to prevent accidental and unnecessary shootings, while preserving citizens' ability to possess safely stored firearms."[76] The District attempts to further buttress the reasonableness of this regulation by asserting that the law contains an implicit self-defense exception from its requirements.

In the Respondent's Brief, Heller argues that the Second Amendment plainly protects an individual right to keep and bear arms, forwarding textual and historically based arguments of the type that were found persuasive in *Emerson* and *Parker*. Heller also maintains that the text of the Amendment does not support the conclusion that its only purpose is to ensure the existence of a well regulated militia, in light of historical evidence establishing the bearing of arms "often had purely civilian

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[70] *District of Columbia v. Heller*, Brief for Petitioners, No. 07-290 at 11 (January 4, 2008). [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_PetitionerFenty.pdf].

[71] *Id.* at 11-12.

[72] *Id.* at 35 (quoting *Presser v. Illinois*, 116 U.S. 252, 265 (1886)).

[73] *Id.* at 35-36.

[74] *Id.* at 40.

[75] *Id.* at 41.

[76] *Id.* at 55.

connotations."[77] Heller additionally argues that a militia may be "well regulated" without necessarily being subject to state control, both on the grounds that the term encompasses concepts of proper discipline,[78] and that there is a substantial history of "extra-governmental militias" in the colonial era.[79] Heller additionally argues that the American revolt against Great Britain implicitly compels a conclusion that the Second Amendment confers an individual right, as such an action "would not have been possible without the private ownership of firearms." Heller expands upon this point, stating: "should our Nation someday suffer tyranny again, preservation of the right to keep and bear arms would enhance the people's ability to act as a militia in the manner practiced by the Framers."[80]

Heller proceeds to argue that the District's effective ban on the possession of handguns is unconstitutional, essentially mirroring the reasoning of the court in *Parker*.[81] Arguments similar to those found dispositive in *Parker* are likewise raised with respect to the District's prohibition on the carriage of handguns (as it relates to movement within a home) and the requirement that firearms be kept unloaded and disassembled or bound by a trigger lock.[82]

Heller maintains that the case before the Court does not require the application of any standard of review, given that the provisions at issue involve a "ban on a class of weapons protected" under the Constitution, and a "statutory interpretation dispute concerning whether a particular provision enacts a functional firearm ban."[83] Heller argues additionally however, that if the Court were to apply a standard of review to laws that impact Second Amendment rights, the appropriate constitutional standard would be strict scrutiny, requiring a court to strike down any law infringing upon the Second Amendment unless it was narrowly tailored to serve a compelling governmental interest.[84]

Amicus Curiae Brief for the United States.

The Solicitor General of the Department of Justice submitted an *amicus curia* brief for the United States, requesting the Court to remand the case for further consideration.[85] In his brief, the Solicitor argues that while the court in *Parker*

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[77] *District of Columbia v. Heller*, Respondent's Brief, No. 07-290 at 11 (February 4, 2008). [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_Respondent.pdf].

[78] *Id*. at 17.

[79] *Id*. at 27.

[80] *Id*. at 32.

[81] *Id*. at 41.

[82] *Id*. at 52.

[83] *Id*. at 55.

[84] *Id*. at 54.

[85] *District of Columbia v. Heller*, Brief for the United States as Amicus Curiae (January 2008). [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_PetitionerAmCu

correctly held that the Second Amendment protects an individual right, the court nonetheless did not apply the correct standard for evaluating the Second Amendment claim at issue. In particular, the Solicitor expressed concern that the test delineated in *Parker* (namely that a weapon is protected under the Second Amendment if (1) it bears a reasonable relationship to the preservation or efficiency of a well regulated militia, and (2) is of the kind in common use at the time the Amendment was adopted) was too categorical in its approach, and could call into question the validity of long-standing federal firearm laws, such as restrictions on the possession of machine guns.[86] Instead, the Solicitor argues that "a more flexible standard of review" is appropriate.[87] To that end, the Solicitor proposes in his brief that a law that impacts Second Amendment rights in a way that is not "ground[ed] in Framing-era practice" should be subject to a heightened level of scrutiny that considers the "practical impact of the challenged restriction on the plaintiff's ability to possess firearms for lawful purposes," as well as "the strength of the government's interest in enforcement of the relevant restriction."[88] According to the Solicitor, under such an "intermediate level of review, the 'rigorousness' of the inquiry depends on the degree of the burden on protected conduct, and important regulatory interests are typically sufficient to justify reasonable restrictions."[89] The Solicitor goes on to argue that such a standard should be applied by the "lower courts in the first instance," and requests the Court to remand the case for further proceedings under this approach.[90]

Oral Argument.

The Supreme Court heard oral argument in *Heller* on March 18, 2008, considering in detail many of the issues raised by the decision in *Parker* and the briefs discussed above. Based on the questions and comments of the Justices, it would appear that there is a substantial likelihood that the Court will hold that the Second Amendment does in fact confer an individual right to keep and bear arms.[91] In particular, Chief Justice Roberts and Justices Alito and Scalia all made statements indicating that they support an individual rights interpretation. For instance, responding to the petitioner's assertion that the prefatory clause of the Amendment confirms that the right is militia related, Chief Justice Roberts stated: "it's certainly an odd way in the Second Amendment to phrase the operative provision. If it is limited to State militias, why would they say 'the right of the people'? In other

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[85] (...continued)
USA.pdf].

[86] *Id*. at 9.

[87] *Id*. at 9.

[88] *Id*. at 8.

[89] *Id*. at 8.

[90] *Id*. at 9-10.

[91] *See,* Linda Greenhouse, New York Times, March 18, 2008 ("A majority of the Supreme Court appeared ready...to embrace, for the first time in the country's history, and interpretation of the Second Amendment that protects the right to own a gun for personal use."). [http://www.nytimes.com/2008/03/18/washington/18cnd-scotus.html].

words, why wouldn't they say 'State militias have the right to keep arms'?"[92] Likewise, Justice Scalia declared:

> I don't see how there's any, any, any contradiction between reading the second clause as a — as a personal guarantee and reading the first one as assuring the existence of a militia, not necessarily a State-managed militia because the militia that resisted the British was not State- managed. But why isn't it perfectly plausible, indeed reasonable, to assume that since the framers knew that the way militias were destroyed by tyrants in the past was not by passing a law against militias, but by taking away the people's weapons — that was the way militias were destroyed. The two clauses go together beautifully: Since we need a militia, the right of the people to keep and bear arms shall not be infringed.[93]

Additionally, Justice Kennedy indicated that he may be supportive of an individual right interpretation, suggesting that the purpose of the prefatory clause was to "reaffirm the right to have a militia," with the operative clause establishing that "there is a right to bear arms."[94] Justice Kennedy's questioning further indicated that he may view a right to self defense as being of a constitutional magnitude, suggesting that the Framers may have also been attempting to ensure the ability "of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies... ."[95] While Justice Thomas remained silent during the oral argument, he has made statements indicating support for an individual rights interpretation of the Second Amendment in the past. Accordingly, while it is impossible to predict with any degree of certainty how the Court will ultimately rule in *Heller*, the factors mentioned above could be taken to indicate that at least a bare majority of the Court supports the individual right model of the Second Amendment.

Analysis and Conclusion

While the oral argument in *Heller* could be taken to indicate majority support for an individual rights interpretation, the Court could nonetheless accept the position espoused by the District and the majority of circuit courts that have addressed the scope of the Second Amendment; namely that "the people" have no constitutional right to possess a firearm except in relation to service in a militia. The Court could accomplish this by adopting the collective right model, which would presumably result in the validation of the laws at issue (given that there would be no individual right infringed thereby). Relatedly, the Court could adopt the sophisticated collective right model, which would likewise presumably validate the laws in question, as there is no indication that the firearms sought by Heller would be possessed in relation to militia service.[96]

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[92] *District of Columbia v. Heller*, Transcript of Oral Argument at 4, No. 07-290 (March 18, 2008. [http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf].

[93] *Id.* at 7.

[94] *Id.* at 5-6.

[95] *Id.* at 8.

[96] It is also conceivable that the Court could determine that the Second Amendment confers
(continued...)

A determination by the Court that the Second Amendment confers an individual right to keep and bear arms would obviously be significant from a constitutional and historical perspective. However, the practical significance of such a decision in *Heller* will depend largely upon the breadth of the Court's holding. In the event that the Court invalidates the laws at issue, it seems likely that the decision will be drafted in a manner that is narrowly and specifically tailored to the District's uniquely restrictive firearm registration and possession regulations. This approach would presumably leave lower courts with scant guidance on the proper standard to apply in reviewing less restrictive gun control laws.[97] Concordantly, it is unlikely that any individual rights holding would be drafted so broadly as to implicate any existing federal firearm laws. The Supreme Court and the appellate courts (including the Fifth Circuit in *Emerson*) have affirmed the broad authority of Congress to regulate firearm possession on numerous occasions, and there is little evidence to indicate that these provisions would be found to be constitutionally problematic under any individual right standard the Court might delineate.

In addition to the extensive scope of the gun control provisions that are at issue, the unique constitutional status of the District itself will likely contribute to a decision that leaves many open questions even if the Court affirms an individual right interpretation. As noted above, the Supreme Court has held, over 100 years ago, that the Second Amendment does not act as a constraint upon state law.[98] Since that time, the Supreme Court has held that most provisions of the Bill of Rights are applicable to the states as well, via incorporation principles derived from the Fourteenth Amendment. However, given that the Bill of Rights applies directly to the District, it seems likely that any individual right holding by the Court will leave unaddressed the issue of whether modern incorporation principles apply to the Second Amendment.[99]

Ultimately, irrespective of the interpretation of the Second Amendment that is delineated in *Heller*, it seems evident that issues relating to the possession and control of firearms will continue to raise significant questions of a constitutional magnitude for the foreseeable future.

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[96] (...continued)
an individual right, but nonetheless deem the laws in question to be valid. Such an outcome would depend on the Court construing any individual right as being subject only to rational basis review, and subsequently determining that the District's regulation of handguns is legitimately related to ensuring public safety. *See, e.g., Heller v. Doe*, 509 U.S. 320 (1993), for an overview of the standards governing rational basis review. This approach might garner the vote of Justice Breyer, who indicated a potential willingness at oral argument to support an individual rights interpretation so long as a ban on handguns in areas afflicted by high crime rate was deemed constitutional. *See* oral argument at 50-52.

[97] *See* Nelson Lund, "The Second Amendment Comes Before the Supreme Court: The Issues and the Arguments," Web Memo No. 1851, The Heritage Foundation, March 14, 2008.

[98] *See* n.13 and accompanying text, *supra*.

[99] It is of course possible that the Court will hold that the *Parker* court was incorrect in determining that Heller had standing to challenge the provisions at issue, or that the Second Amendment is simply not applicable to the District. Either finding would enable the Court to avoid passing on the nature of the right conferred by the Amendment. The Justices raised neither issue at oral argument, however, indicating that the Court will address the constitutional question before it.