

Text, Purpose, and the Second Amendment

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With its decision in *Parker v. District of Columbia*,¹ the D.C. Circuit became the first federal appellate court ever to strike down a law under the Second Amendment, which guarantees “the right of the people to keep and bear Arms.”² The court in *Parker* held that provisions of the D.C. Code that ban private possession of handguns and require the safe storage of other weapons violated the Amendment. The Supreme Court took the case, now called *District of Columbia v. Heller*, in November.³ This Note explains the basic error in the D.C. Circuit’s interpretive approach.

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The District of Columbia all but forbids the private possession of handguns throughout its territory; it does not forbid the possession of shotguns and rifles.⁴ The District separately requires a license to carry those handguns that it does allow,⁵ and it requires that when residents keep guns of any sort in their homes, they must keep those guns bound by a trigger lock or similar device.⁶ Dick Heller is a special police officer who carries a handgun while on duty at the federal judicial complex in D.C. In early 2002, Heller challenged the District’s handgun ban, licensing law, and trigger lock requirement in a suit filed in the U.S. District Court for the District of Columbia. Heller claimed that he wanted to keep a handgun at his home in the District to have ready in case he needed to defend himself and that the Second Amendment guaranteed his right to keep the gun for that purpose. The district court dismissed the complaint, holding that the Second Amendment did not protect an “individual right to bear arms separate and apart from Militia use.”⁷

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¹ 478 F.3d 370 (D.C. Cir. 2007).

² U.S. CONST. amend II.

³ The name of the case has changed in the Supreme Court because the D.C. Circuit held that five of the six plaintiffs in the case, including Shelley Parker, did not have standing. One plaintiff, Dick Heller, did have standing, and is the sole named respondent in the case as it stands before the Supreme Court.

⁴ See D.C. CODE § 7-2502.02(a)(4) (2001). The law functions by forbidding the possession of unregistered firearms and by forbidding the registration of handguns by individuals. It makes an exception for handguns that were registered prior to 1976, which it grandfathers in, and it makes a second exception for officers who have retired from the Metropolitan Police Department.

⁵ See D.C. CODE § 22-4504(a) (2001).

⁶ See D.C. CODE § 7-2507.02 (2001).

⁷ *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 105 (D.D.C. 2004).

Heller appealed the dismissal to the D.C. Circuit. In March 2007, a panel of the court reversed in a 2-1 decision. The D.C. Circuit held that the Second Amendment protects “an individual right to keep and bear arms” and, vitally, that “the activities [the Second Amendment] protects are not limited to militia service, nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.”⁸ The District petitioned the Supreme Court for review of the D.C. Circuit’s decision, and in November 2007 the Court agreed to hear the case.⁹ The case will be argued in March 2008 and will likely be decided before the Court begins its summer recess in June.

The Second Amendment provides 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.”¹⁰ The first clause announces the Amendment’s purpose. The Amendment’s ultimate goal is to ensure that the states remain “free,” and because a “well regulated Militia” is required in order to ensure the accomplishment of that goal, the Amendment’s more immediate purpose is to guarantee the vitality of the states’ militia forces. The structure of the Amendment reflects the fact that the need to protect the right to “keep and bear Arms” follows from the need to ensure the vitality of the militias. The text of this Amendment prohibits the federal government from disarming the people of a state if by doing so it frustrates the ability of that state to maintain a militia.

The D.C. Circuit’s decision striking down the handgun ban was wrong for the simple reason that it brushed aside the announced purpose of the Amendment, which is to ensure the security of the states by guaranteeing the continued vitality of their militias. The court of appeals held that this was indeed one of the purposes of the Amendment. But it held that it was not the Amendment’s sole purpose, and that the Amendment was also intended to protect private uses of arms that are nowhere mentioned in the text, like hunting and self-defense. The court of appeals should instead have interpreted the Second Amendment, and the Supreme Court should yet interpret it, in a way that effectuates its announced purpose and does no more.

Indeed, the D.C. Circuit’s analysis is at odds with the way that the Supreme Court interprets other provisions of the Bill of Rights. The more fully developed jurisprudence of the First Amendment gives one model of how a properly purposive analysis of the Second Amendment ought to look. Of course the First Amendment guarantees a right to speak freely. But there are certain ways in which we get to use our words and certain ways we do not. The defendant in *Cohen v. California*¹¹ wore a jacket that expressed his anger at the draft that supplied troops for the war in Vietnam. The defendant in *Texas v. Johnson*¹² burned a flag in order to express his disapproval of the policies of the Reagan Administration. The defendant in *Stromberg v. California*¹³ displayed a red flag that indicated her support for communism. These are all simple, basic

⁸ *Parker*, 478 F.3d at 395.

⁹ 128 S. Ct. 645 (2007).

¹⁰ U.S. CONST. amend II.

¹¹ 403 U.S. 15 (1971).

¹² 491 U.S. 397 (1989).

¹³ 283 U.S. 359 (1931).

First Amendment cases, in which the Court held that a defendant cannot be punished simply for trying to express an idea.

Watts v. United States,¹⁴ *Chaplinsky v. New Hampshire*,¹⁵ and *Brandenburg v. Ohio*¹⁶ all stand for what are often called exceptions to protection under the First Amendment. *Watts* says that “true threats” may be punished, *Chaplinsky* that “fighting words” may be, and *Brandenburg* holds that speech that threatens to incite imminent lawless action may also be banned.

As the first set of cases shows, we almost always get to use our words to communicate ideas. But as the second set shows, we do not necessarily get to use them to do other things beyond that mere expression—to threaten or to incite to violence.

Why do the cases often treat speech that communicates differently than speech that provokes some adverse action? It is because the Court has attributed a purpose to the First Amendment and has interpreted the Amendment’s guarantee to serve that purpose. This purpose is stated in various ways, but at heart it is something like ensuring that “no official, high or petty, can prescribe what shall be orthodox,”¹⁷ in order to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”¹⁸

That the Court has so clearly articulated the purpose of the First Amendment’s protection for freedom of speech is striking because the clause itself does not announce its purpose. The Court has nevertheless attributed a purpose to it and has interpreted the clause with that end in view. The great irony of the D.C. Circuit’s interpretation of the Second Amendment is that it takes just the opposite tack. Where the First Amendment is silent as to its purpose, the Court nevertheless reads it consistently with a purpose ascribed to it. In contrast, the Second Amendment names its purpose openly: it protects a right of the people to keep and bear Arms in order to ensure the security of the states. But the court of appeals’ decision ignored that announced purpose, and after engaging in an extended textual exegesis of the second clause standing alone, ultimately concluded that the phrase “the right of the people to keep and bear Arms” meant a right to own weapons for personal use.

That decision to ignore the announced purpose of the Amendment was error. This is so not just because it declines to give effect to the Amendment’s text. It was also error under the Supreme Court’s (limited) Second Amendment jurisprudence. *United States v. Miller*¹⁹ gave the lower courts explicit guidance on how to interpret and apply the Second Amendment. The Amendment, *Miller* said, was ratified “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of” the state militias, and the lower courts must therefore interpret the Amendment “with that end in view.”²⁰

¹⁴ 394 U.S. 705 (1969).

¹⁵ 315 U.S. 568 (1942).

¹⁶ 395 U.S. 444 (1969).

¹⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁸ *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

¹⁹ 307 U.S. 174 (1939).

²⁰ *Id.* at 178.

That is not to say that the court of appeals' ultimate holding made no sense even if its interpretation of the text itself and its reading of the doctrine are a little surprising. The D.C. Circuit reasoned that the Amendment's application should not be limited to its announced purpose because the Framers had other, unannounced purposes for enacting the Amendment. That view is premised on a tendentious view of the historical record, but the ultimate result of that reasoning—protection of an individual right to own weapons for personal use—could nevertheless have an instrumentalist justification. The reasoning would be that it makes sense to extend the protection of the Second Amendment to those who want to use guns solely for self-defense at home or for hunting, even if the Framers had not the slightest concern for such uses of weapons when they drafted the Amendment because that protection, the thought would run, would ensure that the Amendment's ultimate goal is reached even if it is divorced from the Amendment's actual text.

In other areas of constitutional interpretation, the Court has called for this kind of constitutional hypersensitivity where particularly delicate rights were at stake. The Warren Court in particular was an enthusiastic enforcer of constitutional prophylaxes. One example is the expansive overbreadth standing doctrine in First Amendment case law, which allows a party to challenge a statute on free speech grounds even if the speech the party is engaged in is itself not protected by the Constitution.²¹ Others are the Fifth Amendment and Sixth Amendment exclusionary rule of *Miranda v. Arizona*²² and the Fourth Amendment exclusionary rule of *Mapp v. Ohio*.²³ The cases in which these doctrines are applied are not cases in which an aggrieved party resists prosecution because his conduct cannot constitutionally be proscribed. Instead, the doctrines ensure that the government stays within bounds and so make sure that the relevant Amendment's purpose is effected. These are instrumental doctrines whose application the Court has determined is necessary to enforcing a constitutional restriction.

A similar reading might be made of the D.C. Circuit's decision. Under this reading, even though the Founders would have been indifferent to whether Dick Heller gets to keep a handgun for private purposes, they nevertheless would have wanted him to be able to challenge a statute that denies him his gun. That would be true, however, only if enforcing a right to own weapons for private use were actually necessary to ensuring that a state can call upon the service of an armed population when the need arises.

We have now had more than two centuries of experience living with our Constitution. And the threats to the security of a free state that the Framers perceived—threats that would have required the states to draw upon an armed populace in summoning a well-regulated militia—have never materialized. That is why the Court in *Miller* was correct to reject this kind of instrumentalist approach. *Miller* did not presume that any weapons regulation, even a weapons ban, would interfere with the state's militia. In-

²¹ See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965).

²² 384 U.S. 436 (1966).

²³ 367 U.S. 643 (1961).

stead it correctly asked for *evidence* that the challenged regulation would interfere with the “preservation or efficiency of a well regulated militia.”²⁴

Of course the Second Amendment should be rigorously enforced in an appropriate case. But experience has taught us that it needs no prophylactic protection. The Second Amendment’s guarantee has not proven “vulnerable to gravely damaging, yet barely visible, encroachments,” so, unlike the delicate rights protected by the First Amendment, the Second Amendment does not need to be “ringed about with adequate bulwarks.”²⁵

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There is a second and entirely separate result of a reading of the Second Amendment that is grounded in its announced purpose. Because the *Heller* case arose in the District of Columbia all of the discussion about what the right entails really ought not to have come up in this case in the first place. The District has argued that the District government has plenary power to regulate guns because Congress would have that power under the Seat of Government Clause, which gives Congress power to “exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States.”²⁶ This is the sleeper argument in the case, and it is an easy way for the Court to reverse without deciding much about the Amendment.

No citizen of any state has ever had any federally guaranteed right to own or use a gun—from the founding on, the people had only the rights that they had guaranteed themselves by “provid[ing] such limitations and restrictions on the powers of” their state government as their “judgment dictated.”²⁷ Ratification thus left the states with full power to regulate arms. The court of appeals concluded, however, that because the District “is a Federal District, ultimately controlled by Congress,” it was “directly constrained by the entire Bill of Rights.”²⁸ That conclusion could leave the District as the only place in the nation that *cannot* regulate guns.

The drafters could only have produced that result by accident; they did not intend it, and it would be a little silly to read the Constitution to produce it. The Second Amendment’s function was to prevent Congress from disarming the state militias. But the District is a pure creation of the federal Constitution; unlike the states, the District had no residual sovereignty that had to be protected against federal encroachment. Since it was this residual sovereignty—the sovereignty that made a state a “free State”—that the Amendment protected and since the District has no such sovereignty to protect, the Amendment has no application to District-specific legislation.

²⁴ *Miller*, 307 U. S. at 178.

²⁵ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

²⁶ U.S. CONST. art. I, § 8, cl. 17.

²⁷ *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (Marshall, C.J.).

²⁸ *Parker v. District of Columbia*, 478 F.3d 370, 391 n.13 (D.C. Cir. 2007).

Indeed, to read the Second Amendment to bind the District would be contrary to the purposes for which the District was founded, which was to guarantee the safety of the officers and institutions of the new national government. James Madison's admonition that the federal government needed "complete authority over the seat of government" in order to avoid the "interrupt[ion]" of its proceedings suggests that the Framers contemplated that the government would have full control over physical security in the District.²⁹ The point is underscored by the rest of the clause, which gives Congress "like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."³⁰ Congress's power to exercise complete control over weapons in "Forts, Magazines, [and] Arsenals" could not seriously be questioned, and Congress's power over the District is the same as its power over the land it dedicates to those uses.

Now, this argument that the District should have at least the same level of local control over dangerous weapons as the states could go by the boards if one concludes that the Fourteenth Amendment guarantees a substantive due process right to have Arms. This is the question of whether the Second Amendment has been incorporated against the states by the Fourteenth Amendment. The *Parker* majority avoided the question of incorporation: "While the status of the Second Amendment within the twentieth-century incorporation debate is a matter of importance for the many challenges to state gun control laws, it is an issue that we need not decide. The District of Columbia is a Federal District, ultimately controlled by Congress. . . . [T]he District is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation."³¹

The D.C. Circuit hinted at its view that the amendment really ought to be incorporated, even though the Supreme Court has "not yet" held as much.³² The "yet" suggests that incorporation of every clause of the Bill of Rights is just a matter of time rather than of doctrine.³³ In fact, there is a test, articulated in *Palko v. Connecticut*,³⁴ that determines whether a particular right guaranteed in the Bill of Rights is also guaranteed by the Fourteenth Amendment, and it asks whether the Amendment articulates a "principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty."³⁵

We can find plenty of evidence that the right to bear arms is not necessary for ordered liberty in the world's recent experience with armed populations. In the "Anglo-American regime" that is the touchstone for assessing what "ordered liberty" comprises,³⁶ gun regulations flourish. England banned handguns in 1997. Canada im-

²⁹ See THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961).

³⁰ U.S. CONST. art. I, § 8, cl. 17.

³¹ *Parker*, 478 F.3d at 391 n.13.

³² *Id.*

³³ *Id.* The Court has never adopted the view that the Fourteenth Amendment incorporated the provisions of the Bill of Rights wholesale. Compare *Adamson v. California*, 332 U.S. 46 (1947) with *id.* at 68–123 (Black, J., dissenting).

³⁴ 302 U.S. 319 (1937).

³⁵ *Id.* at 325.

³⁶ See *Duncan v. Louisiana*, 391 U.S. 145, 148–49 n.14.

posed heavy regulations on gun acquisition and possession in 1995, and Australia followed with similar regulations in 1996. Those countries regulate arms while maintaining a nicely ordered liberty.

It is hardly a stretch, on the other hand, to suggest that the attempted imposition of an Anglo-American regime of "ordered liberty" in Iraq and in Afghanistan has been hindered rather than helped by the fact that the populations of those two countries are among the most heavily armed in the world.³⁷ A well-armed populace has similarly contributed to anarchy and oppression rather than order and liberty in other countries and regions too numerous to count.

The disorder engendered by broad ownership of powerful modern weapons would render it a cruel irony to wedge a right to own guns into *Palko's* rubric. And that freedom is described just as poorly by the other phrases that the Court has used to describe the substantive rights that are incorporated in the Due Process Clause: it is not "basic to a free society" like the "security of one's privacy against arbitrary intrusion by the police"³⁸—the Amendment itself asserts that it is a "well regulated militia" that is necessary to protect "the security of a free State," not the right to keep and bear Arms in itself. Nor is the right to keep and bear arms a "natural right of the members of an organized society," said of the freedom of the press in *Grosjean v. American Press Co.*³⁹ or an "essential personal liberty of the citizen," said of the same in *Near v. Minnesota*.⁴⁰

There is no reason at all to rule out the possibility that some other, related but quite different substantive due process right to defend oneself and one's home will be found in the right case. There are some counter-indications, and indeed there is not a little irony in the fact that the same court that declined to take up the *Heller* case en banc did reach out en banc in order to reject a substantive due process right to defend oneself against much smaller invaders, and with much less dangerous weapons, that a panel of the court had found in *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*.⁴¹ But any such right is not at issue in the *Heller* case, which is limited to the question of whether the Second Amendment proper guarantees to District residents the right to own handguns.

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There is not much point in offering predictions on the view that the current Court will take on all of this. *Miller* is strong precedent for the District's view, but the Court

³⁷ See Neil MacFarquhar, *Sandbags Already on Streets, Baghdad Is a City in Waiting*, N.Y. TIMES, Mar. 12, 2003, at A1 ("[m]ost Iraqi households own at least one gun . . . [b]ut some gun shop owners report as much as a 50 percent jump in ammunition sales" just prior to U.S. invasion); Mark Landler, *Kabul Tries to Disarm Its Citizens In a Step Toward Law and Order*, N.Y. TIMES, Jan. 14, 2002, at A1 (reducing "ubiquity of weapons in . . . heavily armed" Afghanistan thought "critical to restoring order in the country").

³⁸ *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

³⁹ 297 U.S. 233, 243 (1936).

⁴⁰ 283 U.S. 697, 707 (1931).

⁴¹ See 495 F.3d 695 (D.C. Cir. 2007) (en banc) (terminally ill adult patients have no fundamental right under the Due Process clause to have access to experimental drugs), *overruling* 445 F.3d 470 (D.C. Cir. 2006).

may decide to read *Miller* narrowly. And if the Court is adventurous rather than cautious, it may work its way past the issue of the District's special status and evaluate whether the rule here is "reasonable" or not.

The reasonableness inquiry really ought to collapse back to the initial question of the scope of the right, for a court ought to evaluate whether a regulation is reasonable by asking whether the regulation interferes with the ability of a well regulated militia to protect its state. There has never been any contention that the District's regulations create that kind of interference, so they pass muster under a test of this sort. The court of appeals took a rather less tethered view of the reasonableness analysis—it suggested as a paradigmatic example of a reasonable prohibition on guns a rule prohibiting a gun to be carried in bars or churches. The "no bars" and "no churches" rules sound reasonable under any standard, but neither those examples nor anything else in the court's opinion suggests exactly how a court ought to measure the reasonableness of a rule. If reasonableness review really just means that the regulation has to be based in reason in some abstract sense, the District's law clears that hurdle, too. The city council took a hard look at handguns and decided that they were causing a great deal of harm in the District. It banned those guns while allowing District residents to keep shotguns and rifles. There are plenty of people who disagree, and strongly, with that decision as a policy matter, but it is hard to say that the District's decision had no basis in reason.

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The D.C. Circuit's decision in *Parker* is out of line with almost every federal court of appeals' view of the Second Amendment, and ignores what *Miller* called the Amendment's "obvious purpose."⁴² It also applies that Amendment to a federal enclave where it has no useful purpose and where it was never intended to have any effect. The Second Amendment announces its own purpose, and the Amendment should not be interpreted to restrict legislative power when the exercise of that power does not interfere with the announced purpose.

⁴² United States v. Miller, 302 U.S. 174, 178 (1939).