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THE IMPENDING STORM: THE SUPREME COURT'S FORAY INTO THE SECOND AMENDMENT DEBATE

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I. Introduction

Parker v. District of Columbia made history as the first instance a federal appellate court struck a law on Second Amendment grounds. [1] In Parker, the United States Court of Appeals for the D.C. Circuit held the District of Columbia's firearm ordinance infringed on the Second Amendment. The provisions at issue banned handguns not registered prior to 1976, barred the movement of registered handguns within one's home without a license, and mandated all registered firearms be kept unloaded and either locked or disassembled. Without equivocation, the D.C. Circuit held the Second Amendment protects an individual right to keep and bear arms.

The reverberations of this bombshell will extend far beyond the banks of the Potomac. Prior to Parker, federal courts had overwhelmingly construed the right to keep and bear arms as extending to state militias, not individuals. As militias are a relic of a bygone era, such an interpretation renders the right to keep and bear arms nugatory. The Supreme Court's near seventy-year silence on the Second Amendment has permitted this reading to persist. Parker shattered this solitude, as the Supreme Court granted certiorari and will determine the parameters of the right to keep and bear arms for the first time since 1939.

This article asserts three distinct, yet related points. First, the D.C. Circuit's Second Amendment interpretation is correct as a matter of law and liberty. Second, when the Supreme Court interprets the Second Amendment, it should consider how states have treated firearm rights. Third, as the Supreme Court is increasingly using constitutional comparativism as an aid to interpret ***114** the Constitution, it should address the consequences curtailing firearm rights has wrought in other countries.

Pontificating on the Second Amendment has become a cottage industry. The purpose of this piece is not to add another detailed history of the right to keep and bear arms to the discussion. Instead, it examines the implications of Parker v. District of Columbia. To this end, Part II presents a brief overview of Second Amendment interpretations and case law. [2] It then describes the District of Columbia's firearm regulations and the Parker litigation.

Part III analyzes the D.C. Circuit's decision in Parker. [3] While pilloried by many commentators, Parker is a welcome respite from the gradual disintegration of the right to keep and bear arms. Second Amendment rights of many Americans have been undermined, and in some instances eviscerated, for too long. Parker offers the Supreme Court the opportunity to give the Second Amendment an expansive interpretation and restore its guarantees.

The remainder of this piece contemplates how the Supreme Court will interpret the Second Amendment. When facing issues of constitutional magnitude, the Court often considers two factors in its arsenal of adjudication. The first is the legislative trends of the States. The second is international law. This article does not debate the merits of these approaches. Rather, it analyzes the role these elements could play in a Second Amendment decision.

Part IV considers how national consensus influences the Supreme Court.[4] It first explores states' constitutional and statutory treatment of firearm rights. This section then examines cases involving abortion, homosexual rights, the death penalty, and euthanasia. The Court's invocation of national trends in these cases is considered. This factor is elevated in matters of first impression or where the Court revisits an issue. As the Court has not interpreted the Second Amendment since 1939, there is a compelling basis to consider how States have grappled with gun rights in the interim. Part IV concludes that the Court should maintain consistency and examine the national consensus surrounding the right to keep and bear arms. The social, legal, and legislative trends coalesce around a robust individual right to keep and bear arms. This consensus provides justification for the Court to acknowledge ***115** the Second Amendment guarantees an individual right.

Constitutional comparativism is another element influencing the Supreme Court. As Part V sets forth, the Court has considered the international community's treatment of issues such as homosexual rights, affirmative action, and the death penalty.[5] Given this pattern, the Court could delve into foreign opinion concerning firearms. If the Court is to consider the international community's approach to firearm rights, it should look beyond the recent pronouncements condemning firearms. While current views are salient, past experiences are instructive. Part V examines instances of foreign governments undermining firearm rights.[6] History is scarred with examples of disarmament being the prelude to atrocities. Too often, the nefarious nature of eradicating guns is never given its proper due. The Court should explore this phenomenon, for a consideration of international views would be incomplete without it.

An inherent inconsistency between the positions regarding constitutional comparativism and national consensus must be addressed at the outset. The argument that current international views should be downplayed takes the opposite stance of the claim that recent state developments should be emphasized. This seemingly conflicting line of reasoning can be rationalized. This article does not advocate discounting the origins of the right to keep and bear arms or ignoring eighteenth- and nineteenth-century firearm regulations in interpreting the Second Amendment. It simply contends that current national consensus is pertinent to the discussion. Similarly, if the Court contemplates foreign jurisprudence concerning firearms, contemporary international views are germane. However, the Court should also acknowledge the historical realities of inhibiting individual firearm rights.

II. Second Amendment Jurisprudence: The Road to Parker

The Second Amendment provides: “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.”[7] The D.C. Circuit's decision in Parker v. District of Columbia is the most recent federal appellate opinion interpreting the Second Amendment. ***116** To place it in proper perspective, one must consider the various Second Amendment readings and the cases culminating in Parker.

A. Interpreting the Right to Keep and Bear Arms

Two competing Second Amendment interpretations envelop the debate. These interpretations are the “individual right” and the “collective right.”[8] Under the collective right reading, the Second Amendment protects only the States' right to maintain a militia.[9] As a result, an individual has no constitutionally protected right to keep or bear arms.[10] Diametrically opposed to this reading is the individual right model, which contends the Second Amendment protects an individual's right to keep and bear arms, independent of militia service.[11] For support, individualists cite the Second Amendment's text, the Framers' understanding of the right, and the ubiquitous nature of firearms during colonial times.[12]

Some commentators denounce the individual versus collective division as outmoded.[13] While the dichotomy remains, increased attention to the Second Amendment has produced other interpretations.[14] One view that carries increasing currency

is a derivation of the individualist reading, described as the "narrow individual ***117** right" model.[15] Under this theory, the Second Amendment guarantees an individual right to arms if the gun is related to participation in a militia.[16]

This debate is not merely an academic exercise. Courts routinely parse legal scholarship to gain insight into Second Amendment theories and to bolster their decisions.[17] The interpretations disseminated by commentators have driven a discourse devoid of modern-day Supreme Court contributions.

B. The United States Supreme Court and the Second Amendment

The Supreme Court's interactions with the Second Amendment are sparse.[18] The Court has never explicitly incorporated the right to keep and bear arms into the Fourteenth Amendment.[19] This scenario is the product of two nineteenth-century cases which held the Amendment was a limitation only upon the federal government.[20] The Supreme Court directly addressed the Amendment only once in the twentieth century. The Court's 1939 decision in United States v. Miller is the last time it considered a Second Amendment challenge.[21] In Miller, authorities charged two men with illegally transporting a shotgun having a barrel less than eighteen inches, in violation of the National Firearms Act.[22] The district court held that the law violated the Second Amendment.[23] The Supreme Court reversed. Offering scant rationale, ***118** the Court stated that since there was no evidence the shotgun had "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."[24]

Miller's brusque analysis could be attributed to the defendants' failure to present an argument.[25] The defendants' position was never briefed, suggesting the Court did not have a complete record.[26] Nevertheless, the Court held the defendants could be convicted because they presented no evidence the shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia."[27] Because the record did not indicate whether such a gun was an ordinary military weapon, the Court remanded the case for fact-finding.[28] One Second Amendment authority concluded "while Miller held that the 'arms' protected by the Second Amendment are arms suitable for militia use, it did not question that the right is held by the individual."[29] Despite the Court's truncated analysis, Miller has been invoked to reject an individual right to keep and bear arms.

C. Federal Circuit Courts and the Second Amendment

The Supreme Court's reluctance to expound on Miller specifically, or the Second Amendment generally, has left the lower courts to their own devices. The individual right interpretation has not fared well in federal appellate courts until recently. Under the auspices of Miller, courts have determined the right to keep and bear arms extends only to state militias. The following excerpts from federal circuit cases capture the collectivist legacy spawned by Miller.

***119** The First Circuit stated, "the federal government can limit the keeping and bearing of arms by a single individual."[30] The Third Circuit held the Second Amendment was "a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power."[31] In Love v. Pepersack, the Fourth Circuit determined the Second Amendment "does not confer an absolute individual right to bear any type of firearm."[32] The Sixth Circuit held the Second Amendment right applies only to state militias, stating "there can be no serious claim to any express constitutional right of an individual to possess a firearm."[33] In Quilici v. Morton Grove, the Seventh Circuit ruled "possession of handguns by individuals is not part of the right to keep and bear arms."[34] The Eighth Circuit found no "fundamental right to keep and bear arms in . . . [the Second] amendment."[35] In Hickman v. Block, the Ninth Circuit ruled the right to keep and bear arms is held by the states, not citizens.[36] In the Tenth Circuit, the right to keep and bear arms does not encompass the right to possess a

weapon.[37] Finally, in United States v. Wright, the Eleventh Circuit held the expression "well regulated militia" referred "only to governmental militias that are actively maintained and used for the common defense."[38] These cases left no doubt as to where the federal courts of appeals stood.

At this juncture, an individual right to keep and bear arms was a dead letter. Every circuit entertaining the question rejected the individual right position. In 2001, the seminal case of United States v. Emerson upset this placid state.[39] Emerson involved a challenge to a law prohibiting individuals subject to a restraining ***120** order from carrying a handgun.[40] While the Fifth Circuit upheld the law, it was the court's Second Amendment pronouncements that made headlines.[41] The Emerson court reasoned that the word "people" used in the Second Amendment was no different from the other amendments, and thus it denoted individuals, not state governments.[42] The Fifth Circuit held the Second Amendment guaranteed an individual's right to keep and bear arms.[43] A shock to the system, Emerson resuscitated a constitutional right that had been on life support.

The Fifth Circuit's expansive reading was given a mixed reception by its sister circuits.[44] In the 2002 case Silveira v. Lockyer, the Ninth Circuit upheld a California state ban on assault weapons, basing its holding on a previous Ninth Circuit decision, Hickman v. Block.[45] Despite the settled nature of the Second Amendment in the Ninth Circuit, the Silveira court felt compelled to justify its stance in light of Emerson. The Ninth Circuit reaffirmed the Amendment conferred only a collective right, concluding it "was adopted in order to protect the people from the threat of federal tyranny by preserving the right of the states to arm their militias."[46]

A year after the Ninth Circuit decided Silveira, it entertained a challenge to a law prohibiting gun shows in Nordyke v. King.[47] Rejecting the challenge, the court followed Silveira in ruling that the Second Amendment protected only a collective right.[48] However, the Nordyke panel expressed discomfort with the analysis and holding of Silveira and noted that, if not bound by precedent, ***121** it "may be inclined to follow the approach of the Fifth Circuit in Emerson."[49] This veiled support notwithstanding, the Fifth Circuit stood alone until the D.C. Circuit stepped into the fray and addressed the constitutionality of the Washington, D.C. gun regulation.

D. The District of Columbia's Firearm Ordinance

The United States Congress passed the Home Rule Act in 1973, granting the District of Columbia greater self-determination.[50] Home Rule proved a catalyst for extensive gun regulation. In 1976, the Council of the District of Columbia considered a bill restricting city residents from possessing handguns.[51] The impetus was the proliferation of gun-related deaths; experts testified to the Council that in 1974, handguns were used in 155 of 285 murders in the District of Columbia.[52] In 1975, handguns were used in 695 aggravated assaults, 3,405 robberies, and 133 murders.[53]

These figures prompted the D.C. Council to enact the most far-reaching regulatory scheme in the nation. The District requires all firearms to be registered. However, this registration requirement is a façade vis-à-vis handguns, as the District prohibits registration certificates for handguns not registered before September 24, 1976.[54] Those firearms that are licensed are subject to additional restrictions. Each firearm must be "unloaded and disassembled or bound by a trigger lock."[55] The District further prohibits moving lawfully-owned handguns within one's own home ***122** without a permit.[56] While not challenged by the plaintiffs in Parker, the District also proscribes carrying firearms in public.[57]

Violations of these provisions are punishable by a $1,000 fine, one year's imprisonment, or both.[58] A second offense carries a $5,000 fine, five years' imprisonment, or both.[59] The District strictly enforces these provisions. The city has charged victims of home invasions who used guns in self-defense for violating firearm regulations.[60]

E. Parker v. District of Columbia

The provisions enacted in 1976 remained unaltered when six individuals brought a 42 U.S.C. § 1983 action against the District of Columbia in February of 2003.[61] The plaintiffs included George Lyon who wanted a gun in his home because "[g]uns are a tool, and they have a use. The use is protection and security."[62] Plaintiff Shelly Parker sought a gun to ward off neighborhood drug dealers angered by her anti-drug activism.[63] Plaintiff Dick Heller carried a handgun while on duty as a District of Columbia Special Police Officer guarding the Federal Judicial Center.[64] But when he applied for a registration certificate to own a handgun, the District denied his request.[65]

The plaintiffs' twenty-four-paragraph complaint alleged the District of Columbia infringed on their right to possess a personal firearm in their home, as guaranteed by the Second Amendment. ***123** [66] The plaintiffs took aim at the aforementioned provisions of the D.C. Code pertaining to the licensing, storing, and transporting of firearms.[67] The plaintiffs averred that the city's enforcement of laws banning the "possession of handguns and functional firearms within the home, forbidding otherwise lawful self-defense usage of arms, and forbidding the movement of a handgun on an individual's property," violated their Second Amendment rights.[68] The District filed a motion to dismiss, arguing the Second Amendment conferred no individual right to possess a firearm.[69]

1. The District Court's Decision

Finding that Dick Heller had standing to challenge the regulations because the District denied him a permit, the D.C. District Court began its Second Amendment analysis with United States v. Miller.[70] The district court seized on the Supreme Court's reticence post-Miller.[71] It inferred the Supreme Court's refusal to address the federal courts of appeals' collective right reading as tacit approval.[72] The district court cited Seegars v. Ashcroft, another D.C. District Court decision issued two months earlier which dismissed a similar challenge to the District's firearm regulations.[73] Seegars rejected the individual right theory and concluded "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."[74] After invoking Seegars, the Parker court confronted the Fifth Circuit's decision in Emerson. The court eschewed the merits of Emerson, and instead addressed the Emerson court's purported failure to adhere to Fifth Circuit precedent.[75] The district court claimed it did not "place a great deal of reliance on the stability of Emerson even within the Fifth Circuit." ***124** [76] However, the district court did not acknowledge the Fifth Circuit's denial of a petition for rehearing en banc in Emerson.[77]

The district court found additional guidance from the District of Columbia Court of Appeals, which held "the Second Amendment guarantees a collective rather than an individual right."[78] While the D.C. Court of Appeals had interpreted the Second Amendment, the United States Court of Appeals for the District of Columbia Circuit had not. The district court noted the D.C. Circuit upheld a statute prohibiting domestic violence offenders from possessing a gun in Fraternal Order of Police v. U.S.[79] However, the D.C. Circuit declined to address the Second Amendment's scope because there was no evidence showing a relationship between the plaintiffs' gun possession and the preservation of a militia.[80] Based on Fraternal Order of Police, the district court reasoned "the D.C. Circuit is likely to reject the notion that the Second Amendment guarantees an individual's

right to bear arms." [81] The district court found no individual right to keep and bear arms separate from service in the militia, and because the plaintiffs did not assert membership in the militia, granted the motion to dismiss. [82]

2. The Court of Appeals Decision

The plaintiffs appealed the district court's decision, arguing the District's ordinance banned the possession of functional firearms within their homes. [83] The thrust of their appeal was the Supreme Court's treatment of the phrase "the people," as articulated in the Bill of Rights. The appellants highlighted the Court's refusal to distinguish between "the people" of the Second Amendment and "the people" of the other amendments. [84] They argued ***125** that history, case law, and the Amendment's text support the individual right reading.

The District countered that its ordinance did not ban firearms, but merely prohibited "a narrow type of weaponry." [85] Moreover, handguns were not integral to militia service, and such guns had a propensity for being used in criminal activities. [86] The District's textual analysis emphasized the militaristic overtones of the Second Amendment as confirmation of the collective right interpretation. Not until the waning paragraphs of its brief did the District argue its non-state status rendered the Second Amendment inapplicable. [87]

A divided D.C. Circuit struck down the regulations. [88] The D.C. Circuit began its opinion with the determination that Heller had standing to challenge the ordinance because the denial of his registration certificate constituted an injury-in-fact. [89] Moving to the merits, the court described the District's position "to be that the Second Amendment is a dead letter." [90] This summarization was not an exaggeration, as the city contended at oral argument that it could legally ban all firearms outright. [91] The court examined the varying interpretations of the Second Amendment, including state appellate courts' readings of the Amendment, which the court felt "offer [ed] a more balanced picture." [92] Determining circuit and Supreme Court case law was devoid of definitive guidance, the D.C. Circuit began its dissection of the Second Amendment. [93]

Contrary to the District's affinity for the phrase "bear arms," the court found "the people" most dispositive. [94] Using the deceptively simple but doctrinally sound reading that "the people" used in the First, Fourth, Ninth, and Tenth Amendments referred to ***126** individual rights, the court discerned no reason why the Second Amendment should be different. For support, the D.C. Circuit cited a Supreme Court decision, U.S. v. Verdugo-Urquidez. [95] In Verdugo-Urquidez, the Court noted "the people" protected by the First, Second, and Fourth Amendments "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." [96] This language convinced the D.C. Circuit that the Second Amendment guaranteed individual protections indistinguishable from other amendments. [97]

Finding an individual right to keep and bear arms, the court made its second critical determination. The court resolved "the right to keep and bear arms was not created by government, but rather preserved by it." [98] The court articulated the basis of this right as twofold: private purposes such as self-defense and hunting and the public purpose of militia service. [99]

After making these determinations, the court responded to the District's reading of the Second Amendment's operative clause. Admitting the phrase "bear arms" had a militaristic connotation, the court pointed to a number of examples of its use in non-military contexts. [100] The court further objected to the District's Second Amendment interpretation because "the plain meaning of 'keep' strikes a mortal blow to the collective right theory." [101] The court's elevation of the individualistic components of the Amendment, "the people" and "keep," pervaded its interpretation and foreshadowed its ultimate holding. [102]

Turning to the Amendment's prefatory clause, the court highlighted the parties' divergent understanding of "a well regulated Militia." [103] The appellants envisioned a loosely formed, ad hoc group while the District regarded the militia as a well-organized and regimented fighting force. [104] The court likened the militia's rudimentary enrollment requirements to the current Selective ***127** Service Act. [105] The court concluded "a well regulated Militia" was not a select group of men, but a majority of the general male population. [106]

Establishing the foundation for its individual right interpretation, the court addressed the import of U.S. v. Miller. [107] Following the Fifth Circuit in Emerson, the D.C. Circuit emphasized the Miller Court's implicit refusal to adopt the government's collective right theory. [108] The court concluded that Miller supported the individual right interpretation, [109] reasoning that if the Miller Court endorsed the collective right reading, it would have highlighted the defendants' lack of militia affiliation. [110]

In summary, the D.C. Circuit read the Second Amendment as standing for two propositions. [111] The right to keep and bear arms has individual and civic justifications. The individual basis encompasses one's right to keep arms for self-defense and hunting. The civic or collective rationale entails responsibilities relating to the militia. Through this prism, the D.C. Circuit struck the challenged provisions as violating the Second Amendment. [112]

The court's application of the Second Amendment to the restrictions was anticlimactic. In finding the three provisions unconstitutional, the court disposed of each with a single paragraph. Section 7-2502.02(a)(4) of the D.C. Code was unconstitutional because handguns fell under the rubric of "arms" as referenced in the Second Amendment, and thus the District could not ban them. [113] Contravening the District's argument that handguns furthered criminality, the court noted that handguns were the preferred firearm "for protection of one's home and family." [114] The court was similarly succinct in discarding the ban on moving registered handguns within one's home. Invalidating § 22-4504, the court reasoned that "[s]uch a restriction would negate the lawful use upon which the [Second Amendment] was premised-- i.e., ***128** self-defense." [115] The court again relied on the self-defense justification to strike down § 7-2507.02, which mandated that a firearm be kept unloaded and disassembled or locked. Because this requirement "amounts to a complete prohibition" on using a gun for self-defense, it violated the Second Amendment. [116]

The court's decision provoked a dissenting opinion by Judge Henderson. She disputed the propriety of entertaining the appellants' challenge, calling the Second Amendment's meaning in the District of Columbia "purely academic." [117] Citing the district court's decision in Seegars v. Ashcroft, the dissent proclaimed the District was not a State for Second Amendment purposes "and therefore the Second Amendment's reach does not extend to it." [118] The dissent found support in U.S. v. Miller, reading it to provide the Second Amendment "relates to those Militia whose continued vitality is required to safeguard the individual States." [119] Other than this reliance on Miller to argue the Second Amendment only implicated States, the dissent refused to challenge the majority's individual right interpretation.

III. An Assessment of Parker v. District of Columbia

The Second Amendment guarantees a profound right with inherent responsibilities. Like any other right, it is subject to reasonable restrictions. But leaving the Second Amendment to the whims of politicians motivated more by political polls than constitutional considerations places it in a vulnerable position. The Washington, D.C. firearm ordinance reflects this reality as the Second Amendment has been in abeyance in the District since the Bicentennial.

The ordinance challenged in Parker is not a regulation, a restriction, or an inhibition. It is a ban that tramples over the Second Amendment rights of the District's residents. The ordinance is inimical to the Constitution and the beliefs espoused by its authors. Its blatancy is no less transparent than a law prohibiting speech critical of the government. The requirement that firearms be

kept unloaded and disassembled renders self-defense even in one's home a nullity. Prohibiting the transfer of a gun between rooms in a home is the height of intrusiveness. The District's ***129** scheme leaves its law-abiding citizens nothing more than "second class citizens." [120] Parker eradicates this stigma. The D.C. Circuit's reading is a straightforward interpretation that infuses a desperately needed dose of common sense into the Second Amendment debate.

A. The Majority Opinion in Parker v. District of Columbia

The majority's view of the District's ordinance was colored by the extreme position embraced by the District at oral argument. The District contended it had an unobstructed right to regulate firearms, including outlawing them. That the Second Amendment was, in the District's eyes, "a dead letter," may have doomed its prospects.

The D.C. Circuit exposed the collective right reading for its amendment-eviscerating tendencies. Stripped to its essentials, the collective right theory provides that the militia's obsolescence obviates any constitutional protections. In other words, the Second Amendment guarantees rights relating only to militias, but since such institutions are defunct, the Second Amendment is an anachronism that protects no rights in modern day America. The court found this outcome disturbing. The court's concern with the practical consequences of endorsing the collective right reading was justified. The underlying message of the collective right interpretation is subtle but unmistakable: the people cannot be trusted with the right to possess a gun. The collectivist notion further undermines the noble purpose of the Second Amendment, which charges individuals with the duty to defend themselves and their country. The D.C. Circuit understood that if the right to bear arms as a militia member in defense of a public force is permitted, it should encompass the right to keep arms as an individual in self-defense against a private force. Arms for personal defense are a natural corollary of arms for a public defense.

1. Recognizing the Evolution of the Right to Keep and Bear Arms

Parker's rationale takes a page from the "living Constitution" framework. This is logical, as the Second Amendment discussion parallels the living Constitution debate. The living Constitution ***130** theory posits that the Constitution is a malleable document subject to reinterpretation as times change and society evolves. [121] If one accepts the Constitution as living and evolving, then the collective right theory is of negligible worth. There is no dispute the state militia is non-existent today. However, the basis for militias--defending against aggression--is still relevant.

The living Constitution theory would acknowledge this critical function is effectuated not by militias, but by the widespread ownership of firearms. Millions of Americans rely on firearms to defend themselves and their families. This evolution establishes that the collective right reading is outmoded because it relies on a relic to the disregard of current societal norms. Thus, under the living Constitution approach, individual gun ownership furthers the right of self-defense and the maintenance of a free State. The obsolescence of militias coupled with the predominance of firearms used for self-defense warrants this result. Viewing the collective right interpretation through a living Constitution lens leads to the inescapable conclusion that such an incongruous reading does not comport with modern day realities. While the D.C. Circuit did not apply the living Constitution theory, the court's reasoning contains traces of this framework.

Expansive constitutional readings have become de rigueur. Courts have extended the First and Fourth Amendments to protect mediums and venues inconceivable in colonial times. Similarly, the Fourteenth Amendment has been interpreted to encompass guarantees like "liberty of the person both in its spatial and more transcendent dimensions" that are amorphous in scope and untraceable in origin. [122] Given this progression, the Second Amendment should be evaluated in a similar vein. The collective right theory is a retrograde reading because it suffers from the dual defects of contracting individual rights and ignoring the evolution of society. The D.C. Circuit's Second Amendment interpretation recognized the collective right reading's shortcomings and reflected the evolution of firearm rights.

2. Considering the States' Treatment of Firearm Rights

Unlike most federal appellate courts, the D.C. Circuit identified state appellate courts endorsing the individual right reading. ***131** [123] In sharp contrast to the near-unanimous approach of federal courts, seven state appellate courts endorse the individual right reading while ten follow the collective right approach. [124] The recognition of state courts' treatment of the right to keep and bear arms only scratches the surface. As the following section sets forth, the vast majority of state constitutions provide for an individual right to possess a firearm. [125] Furthermore, the legislative trends of the States favor an expansive reading of individual firearm rights. [126] The D.C. Circuit hinted that the federal courts' refusal to recognize individual gun rights is not universally embraced. Greater scrutiny would uncover how isolated the federal courts are. While the D.C. Circuit refrained from addressing the national consensus concerning the right to keep and bear arms, the Supreme Court might not.

3. D.C. Circuit's Evaluation of Supreme Court Precedent

The only foible of the D.C. Circuit's opinion is the conclusory fashion in which the court asserted "no direct precedent [in] the Supreme Court . . . provides us with a square holding on the question . . . ." [127] These words were belied by the court's analysis, as Miller was the D.C. Circuit's focal point. However, while the court devoted substantial attention to the opaque, but no less binding Miller, it was distilled through an informative rather than authoritative vein. Even if the Supreme Court admits the dissension generated by Miller is justified, it might rebuke the D.C. Circuit for demoting its decision.

The Parker court's treatment of Miller is understandable. Miller offers a Second Amendment starting point, but little else. Miller's terse opinion borrows more than it offers. Moreover, the backgrounds of Miller and Parker are dissimilar. While the D.C. Circuit did not raise this point, it bears noting that the Miller Court faced a Second Amendment challenge by criminal defendants. Additionally, the regulation in Miller was just that. The underlying law restricted only transporting certain types of guns. In sharp contrast, Parker involves a ban on possessing a functional firearm in one's home. Thus, the federal statute challenged in ***132** Miller is worlds away from the D.C. ordinance. These factual and legal distinctions cannot be swept aside.

Miller was not the only Supreme Court decision considered by the Parker court. The D.C. Circuit found guidance in the Court's pronouncement from U.S. v. Verdugo-Urquidez [128] that "the people" referenced in the Second Amendment were indistinguishable from "the people" depicted in the First and Fourth Amendments. [129] While the Supreme Court admitted its "textual exegesis is by no means conclusive," [130] it is difficult to conclude the D.C. Circuit's reliance was misplaced. If the Drafters intended the militia to be a special subset of individuals, it could have articulated these sentiments. However, as with the other amendments, they used the general term "the people." Such a reality renders a sui generis reading of the Second Amendment harder to sustain. The D.C. Circuit acknowledged this: "The Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well." [131] The D.C. Circuit's contention that "the people" described in the Bill of Rights should be read consistently is an island of analytical simplicity in a sea of constitutional complexities.

4. Applying the Natural Rights Theory to the Debate

The D.C. Circuit made another significant conclusion in its Second Amendment interpretation. Treading on the periphery of natural rights, the court stated the "the right to keep and bear arms was not created by the government, but rather preserved by it." [132] Commentators often recite the numerous firearm restrictions enacted throughout English history and during the colonial period. While these examples challenge the notion that colonists had an unencumbered right to possess a firearm, their force is diminished when the natural right theory is raised. For these prohibitions do not alter the axiom that individuals have a natural right to keep arms for self-defense. Once the D.C. Circuit enunciated this reading, arguments invoking the historical precedent for gun restrictions lost their strength.

The D.C. Circuit's pre-existing right theory has an inherent appeal. Blackstone articulated the English right to arms as an ***133** "auxiliary" one needed "to protect and maintain inviolate the three great and primary rights, of personal security, personal

liberty, and private property." [133] Man's yearning to defend himself, his home, and his freedom is no less palpable today. The right to protect oneself, whether against a street criminal or tyrannical government, is preserved in the scheme of ordered liberty. These are basic individual concerns that transcend any collectivist abstraction. The founders recognized this innate desire and transcribed it in the Bill of Rights. The D.C. Circuit's pre-existing right theory respects these principles.

Parsing the grammar of the Second Amendment does not alter the fact that firearms were a fixture of early America. Firearms served the function of feeding and protecting families. The right to possess arms was assumed for sport, hunting, and self-defense, in addition to militia duties. This picture coincides with the Parker court's holding that the right to keep and bear arms is a pre-existing right. An explicit right to use a gun to protect one's family was unnecessary because this was a natural, inherent right enjoyed by the people. As one commentator notes, "the most plausible reason for such silence is that the right to use private arms for personal self-defense was simply taken for granted by the Framers." [134] Reading the Second Amendment to prohibit people from keeping firearms in their homes is counterintuitive to the principles of liberty and limited government held by the Framers. Parker ameliorated this transgression.

B. The Dissenting Opinion in Parker v. District of Columbia

A dissent that chastises the majority for being too thorough is a rare occurrence. Yet this is how the Parker dissent opens: "exhaustive opinions on the origin, purpose, and scope of the Second Amendment . . . have proven irresistible to the federal judiciary." [135] The dissent's fascination with the longevity and history of the majority's opinion as a detriment is noteworthy. The majority's elaboration adds to, rather than detracts from, the strength of the opinion.

***134** The Parker dissent is notable not for what it says, but for what it does not. The dissent avoids the threshold issue presented by the case, as the singular focus of the dissent is the District's non-state status. Thus, exchange between the dissent and the majority is negligible. The dissent's premise is straightforward: because the District is not a state within the meaning of the Second Amendment, it forecloses any analysis of what the right to keep and bear arms entails. Instead of addressing the majority's Second Amendment interpretation, the dissent places all of its eggs in the federal district basket. The dissent's focus is remarkable given the low priority the District afforded the issue. The District did not raise the Amendment's inapplicability until the waning paragraphs of its brief. The District's perfunctory analysis of the issue further accentuates the lack of confidence it had in this argument.

U.S. v. Miller [136] is the basis for the dissent's reading that the Second Amendment does not encompass the District. [137] The dissent notes that Miller emphasizes "the declaration and guarantee of the Second Amendment . . . must be interpreted and applied together." [138] The dissent uses this reading to conclude the individual component cannot be isolated or elevated, and thus the Amendment's "character and aim do not require that we treat the District as a State." [139]

In holding the Second Amendment is inapplicable to the District of Columbia, the dissent adopts an outdated position. The Supreme Court has ruled on the applicability of the Bill of Rights to the District. In Callan v. Wilson, the Court held that the constitutional protections enshrined in the Fifth and Sixth Amendments were "secured for the benefit of all the people of the United States, as well as those permanently or temporarily residing in the District of Columbia as those residing or being in the several states." [140] The Court found nothing "to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property. [141] In Bolling v. Sharpe, the Court upheld the application of due process principles to District residents. [142] Noting that States ***135** were prohibited from maintaining segregated public schools, the Bolling Court reasoned, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." [143] The Court again echoed these sentiments in Pernell v. Southall Realty, where it held "like other provisions of the Bill of Rights, [the Seventh Amendment] is fully applicable to courts established by Congress in the District of Columbia." [144]

The dissent eschews these lessons and instead seizes on distinctions between the District and the States that have no import on the Second Amendment. The dissent's reliance on Adams v. Clinton [145] embodies this point. [146] In Adams, the Supreme Court affirmed the D.C. Circuit's holding that the Constitution did not guarantee District citizens the right to vote for members of Congress because the District did not constitute a "State" within the Constitution's voting clauses. [147] The concerns implicated in Adams did not turn on individual rights, but the complexities of the District's unique status and the voting issues inherent in such intricacies. The question raised in Adams went to the heart of the District's origins and purpose. In contrast, the Second Amendment encapsulates an individual guarantee overriding any state-district distinction.

Similarly, the dissent's dependence on Lee v. Flintkote and LaShawn v. Barry does not carry the day. [148] In Lee, the D.C. Circuit held "the District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment." [149] In LaShawn, the D.C. Circuit held the Eleventh Amendment had no application to the District. [150] The rights at stake in these two cases did not involve individual guarantees set forth in the First, Second, Fourth, Fifth, or Sixth Amendments. Thus, the case law cited by the dissent fosters the illusion that individual protections are in abeyance in the District. The dissent's reliance on cases concerning voting rights, the Tenth Amendment, and the Eleventh Amendment is a narrow reed upon which to base the contention that an individual right has no application in the District.

***136** The dissent's position is further weakened by the District of Columbia Court of Appeals' refusal to rely on the District's status to reject Second Amendment challenges. In Sandidge v. U.S., the D.C. Court of Appeals held the Second Amendment protects the right of the state to bear arms, not the individual. [151] The court did not address whether the District's non-state status rendered the Amendment inapplicable. [152] The court reaffirmed Sandidge in the 2003 decision of Barron v. U.S. [153] Thus, the dissent's novel proposition that the District is beyond the reach of the Second Amendment has not been embraced by the D.C. Court of Appeals.

The dissent's anachronistic reading that provisions of the Bill of Rights are inapplicable to the District is a microcosm of the collective right approach. The collective right theory stands the idea of expanding constitutional protections on its head. Condensed readings of constitutional guarantees fell out of favor. Constitutional rights have undergone extensive evolution and their reach has seen significant dilation in recent years. A Second Amendment interpretation should expand rather than contract individual rights. The rhetoric of the collective right reading does not reflect the reality of modern constitutional jurisprudence. The dissent suffers from this same failing.

One cannot ignore the Supreme Court's post-1950s expansive view of Constitutional rights. As Judge Alex Kozinski admonished in a Second Amendment case, "[i]f we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny." [154] It would be perverse to have a scenario in which the Court reads certain rights into the Constitution while it reads the right to keep and bear arms out of the Constitution. This enigmatic approach downplays the written text and exalts the judge's interpretive beliefs. The dissent's truncated approach ignores Supreme Court precedent that expands constitutional protections and applies the Bill of Rights to the District. These defects pervade the dissent's position and underscore the logic of the majority's holding. How the Supreme Court considers the D.C. Circuit's decision and delineates the contours of the Second Amendment is the subject of the remainder of this article.

***137 IV. The Role of National Consensus in the Second Amendment Debate**

Legal scholarship has not broached how national consensus impacts the right to keep and bear arms. Yet, national consensus is of fundamental importance because the Supreme Court has used it in various constitutional contexts. Since the Court has not grappled with the Second Amendment in almost seventy years, the States' treatment of firearm rights in the meantime is instructive.

Although the District of Columbia is not a "State," it is of little consequence for purposes of this discussion. The District is encompassed in the national consensus. It is an autonomous entity with its own jurisdiction and legislative and judicial bodies. Chief Justice John Marshall described it as "a distinct political society." [155] The District's views are as relevant as those of any State. When considering national consensus, the Supreme Court includes the District in its survey. [156] Moreover, a Second Amendment interpretation will impact the entire country, not just the District of Columbia. Thus, the national consensus concerning firearm rights is a pertinent element in the adjudication of Parker.

A. States and the Right to Keep and Bear Arms

While the Second Amendment is read narrowly in federal courts, an individual right to keep and bear arms has found a more conducive atmosphere in the state realm. As the D.C. Circuit noted in Parker, seven state appellate courts endorse the individual right view. [157] Furthermore, most state constitutions grant an individual right to keep and bear arms. The state constitutions fall into three categories: [158] thirty-six states provide an explicit ***138** individual right to keep and bear arms; [159] eight states emulate the Second Amendment, [160] and six states do not expressly provide for the right to keep and bear arms. [161]

The substantial number of state constitutions recognizing an individual right to keep and bear arms is significant. Even more salient is the states' direction. In each instance, states strengthened an individual right to keep and bear arms. [162] Since 1978, twelve states have amended or added provisions granting the right to keep and bear arms. [163] The following examples evince this development. In 1994, Alaska amended its Constitution to provide "[t]he individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State." [164] Delaware enacted a provision in 1987 stating, "[a] person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." [165] The State of Maine was blunt in its assessment that "[e]very citizen has a right to keep and bear arms and this right shall never be questioned." [166] Finally, West Virginia amended its Constitution in 1986 to read "[a] person has the right to keep and bear arms for ***139** the defense of self, family, home and state, and for lawful hunting and recreational use." [167] This recent trend accentuates what is otherwise obvious: states protect an individual right to keep and bear arms.

A common thread in forty-four state constitutions is evidence of a national consensus. The ubiquity of "concealed carry" laws erases any doubt. The lucidity of states' constitutional provisions regarding firearm rights has enabled them to expand such rights by enacting concealed carry permit laws. As their namesake suggests, these laws allow individuals to carry loaded firearms, subject to various qualifications. [168] A recent phenomenon, these laws have grown exponentially in the last twenty years. Eight states had right to carry laws in 1985. [169] Florida's passage of a concealed carry statute in 1987 opened the floodgates, as a deluge of states enacted similar provisions. [170] In 2007, forty-eight states had some form of concealed carry. [171] Of those forty-eight states, thirty-nine have laws mandating that officials may not arbitrarily deny a concealed carry application. [172] This system is described as "shall issue." [173] The other nine states have "may issue" processes in which licenses are granted only upon the showing of a compelling need. [174] Only two states, Wisconsin and Illinois, along with the District of Columbia, do not provide any concealed carry privileges. [175]

Given this landscape, it is no surprise that gun control referendums fail. In 1976, the people of Massachusetts voted against a measure that would ban handguns by a margin of more than two ***140** to one. [176] Californians defeated a handgun ban initiative by sixty percent in 1982. [177] An Illinois town turned down a proposal to ban handguns in 1985. [178] Wisconsin, while being one of only three jurisdictions that does not maintain some form of concealed carry, has expressed its pro-gun right sentiments in a series of proposals. Voters in Madison, Wisconsin rejected a non-binding handgun ban referendum in 1993 by fifty-one percent. [179] In 1994, Milwaukee voters rejected a binding handgun ban proposal by sixty-seven percent, and Kenosha voters

defeated a similar initiative by seventy-three percent.[180] These votes culminated in a 1998 statewide referendum in which Wisconsin voters approved, by a three-to-one margin, an amendment to their state constitution protecting the right to arms "for security, defense, hunting, recreation or any other lawful purpose."[181] One exception to this trend is San Francisco, whose voters approved a ban on handgun possession in 2005. However, a court later struck the ban down because state law preempted the ordinance.[182] While sporadic, these votes are consistent in their outcomes. They illustrate yet another manifestation of the people's belief in an individual right to possess firearms.

The confluence of state constitutions, concealed carry laws, and gun referendums highlights the anomalous position of the District of Columbia. The District's ordinance is the most intrusive gun restriction in the nation. However, the District's position is not entirely isolated. In 1982, the City of Chicago enacted an ordinance that amounted to a freeze on handgun ownership. All firearms must be registered with the city;[183] however, Chicago ***141** does not issue registration certificates for handguns.[184] San Francisco recently passed an ordinance mandating that all guns have a trigger lock or be stored in a locked container.[185] That the national consensus is not one-sided is further underscored by the amicus brief filed in Parker v. District of Columbia. The States of Massachusetts, Maryland, and New Jersey, along with the Cities of Chicago, Boston, and New York, supported the District of Columbia in its defense of the firearm ordinance.

B. How National Consensus Influences the Supreme Court

While exceptions to the movement favoring individual firearm rights exist, the Supreme Court cannot ignore the realities that gun restrictions are viewed skeptically. Thirty-six state constitutions provide for an individual right to keep and bear arms, and forty-eight states embrace concealed carry. These facts must be kept at the forefront as the following cases are discussed.

1. National Consensus and Homosexual Rights

Bowers v. Hardwick involved the constitutionality of a Georgia statute criminalizing homosexual sodomy.[186] Bowers is illuminating for its consideration of state trends.[187] The importance of how states viewed this conduct was encapsulated in the Court's framing of the issue. The Court described the question presented as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal."[188]

***142** The Bowers Court engaged in a brief Constitutional analysis before delving into the historical and contemporary prohibitions against sodomy. Highlighting that every state outlawed sodomy until 1961, the Court tallied the current figures, noting twenty-four states plus the District of Columbia criminalized sodomy.[189] In light of these statistics, the Court delivered its coup de grâce: "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[190] Disputing Hardwick's claim that morality was an improper basis for the law, the Court concluded it was "unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis."[191]

In the intervening years, those twenty-five states would dwindle to thirteen, leading the Court to lay Bowers to rest in the 2003 decision, Lawrence v. Texas.[192] Lawrence concerned a challenge to a Texas statute criminalizing homosexual sodomy. The Court overruled Bowers in concluding the petitioners could engage in private conduct under the protection of the Due Process Clause.[193] Like Bowers, the Lawrence Court reviewed the history of sodomy laws, but reached a different conclusion: "Over the course of the last decades, States with same-sex prohibitions have moved towards abolishing them."[194] In light of this inclination, the Court declared "that our laws and traditions in the past half century are of most relevance here."[195] A survey of state laws post-Bowers revealed that of the thirteen remaining states which criminalized sodomy, only four singled out the

homosexual variety.[196] The consensus in favor of decriminalizing homosexual sodomy formed the mainstay of the Lawrence Court's analysis, reasoning, and holding.

2. National Consensus and the Death Penalty

State trends have been at the forefront of every major Supreme Court capital punishment case of the last thirty years. In 1976, the seminal case of Gregg v. Georgia marked the return of ***143** the death penalty after the Supreme Court halted the punishment four years earlier in Furman v. Georgia.[197] The Gregg Court held capital punishment did not run afoul of the Eighth or Fourteenth Amendments.[198] The Court considered the contemporary values on the subject, using "objective indicia that reflect the public attitude toward a given sanction."[199] Developments after Furman established "that a large population of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction."[200] Thirty-five states enacted new statutes providing for the death penalty.[201] Citing a referendum and jury verdicts as additional support, the Court concluded capital punishment did not offend the evolving standards of decency.[202]

A year after Gregg, the Court held capital punishment for the rape of an adult woman was excessive in Coker v. Georgia.[203] The Coker Court noted that "[at] no time in the last 50 years have a majority of the States authorized death as a punishment for rape."[204] The Court seized on the sea change following Furman v. Georgia. Pre-Furman, sixteen states permitted capital punishment for rapists.[205] Post-Furman, only three states provided such a penalty.[206] Additional court challenges whittled the three down to a lone jurisdiction, Georgia.[207] The Coker Court stated that the trend of the states "obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."[208] Finding an Eighth Amendment violation, the Court concluded "the legislative rejection of capital punishment for rape strongly confirms our judgment" that the death penalty was disproportionate.[209]

Enmund v. Florida applied the principles of Coker, and held the death penalty unconstitutional for accomplices to murder.[210] State developments took center stage again. Eight states allowed ***144** the death penalty for a participant in a crime during which a murder occurred.[211] The Court held "[s]ociety's rejection of the death penalty for accomplice liability in felony murder" was manifested in the paltry number of jurisdictions imposing the punishment.[212] Like Coker, the Enmund Court used state trends to hold the death penalty in certain circumstances contravened the Eighth Amendment.[213]

As Coker and Enmund illustrate, national consensus is a prevalent factor in testing the boundaries of what crimes implicate capital punishment. The Court also used it in evaluating the age limitations of capital offenders. Stanford v. Kentucky considered whether the death penalty for sixteen- and seventeen-year-old offenders violated the Eighth Amendment.[214] The Stanford Court observed that twenty-five states provided the death penalty for seventeen-year-old offenders and twenty-two states permitted capital punishment for sixteen-year-old offenders.[215] The Court commented that such a scenario did not "establish the degree of national consensus" to render a punishment cruel and unusual.[216] The petitioners pointed to a federal statute limiting capital punishment to offenders age eighteen and older.[217] The Court deferred, reasoning that even a blanket federal prohibition on executing offenders under eighteen would not establish "a national consensus that such punishment is inhumane" given the "substantial number of state statutes to the contrary."[218] The Court discerned "neither a historical nor a modern societal consensus" against capital punishment for sixteen- or seventeen-year-old offenders.[219]

State developments would sound the death knell for Stanford. In the 2005 decision of Roper v. Simmons, the Supreme Court held the death penalty for an individual under eighteen when committing the offense violated the Eighth Amendment.[220] Examining the states' legislation, the Roper Court determined that the national consensus opposing the death penalty for juveniles supported

***145** striking down the law.[221] Thirty states prohibited the death penalty for juveniles.[222] Those states without a formal prohibition on executing juveniles engaged in the practice sporadically: "In the past 10 years, only three have done so."[223] The Court enumerated the reasons for its holding as "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice."[224]

State trends compelled the Court to again reverse course. In the 1989 case Penry v. Lynaugh, the Court held executing a mentally retarded individual was not cruel and unusual punishment.[225] But by 2002, state trends had eroded the underpinnings of Penry. In Atkins v. Virginia, the Court ruled such executions infringed upon the Eighth Amendment.[226] The Court noted society's attention to the issue and stated "the consensus reflected in those deliberations informs our answer."[227] The dispositive factor was the reaction to Penry. Sixteen states passed laws against executing mentally retarded individuals.[228] The Court emphasized "the consistency of the direction of change" in favor of prohibiting these executions.[229] Citing other manifestations of this movement, the Court determined the "consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders."[230] Finding the Eighth Amendment prohibited such punishments, the Court concluded it had "no reason to disagree with the judgment of the legislatures that have recently addressed the matter."[231]

The aforementioned cases attest that Eighth Amendment jurisprudence is driven by state developments. Moreover, this factor is important enough to persuade the Court to reverse itself in exceedingly short time frames. While the "evolving standards of decency" test lends itself to gauging national consensus, the next ***146** section shows another context in which the Court examines state trends.

3. National Consensus and Euthanasia

The fountainhead of right-to-die jurisprudence, Cruzan v. Director, Missouri Dept. of Health considered whether a Missouri law requiring clear and convincing evidence of an incompetent's wishes as to the withdrawal of treatment violated the Fourteenth Amendment.[232] In phrasing the issue, the Court noted, "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide."[233] The Court would return to this theme. Scrutinizing the Missouri requirements, the Court stated "[i]t is also worth noting that most, if not all, States simply forbid oral testimony entirely in determining the wishes of parties . . . ."[234] With national consensus in tow, the Court concluded the Constitution did not prevent a State from using a clear and convincing standard to determine an incompetent person's wishes to withdraw life saving treatment.[235]

The Court would revisit Cruzan in Washington v. Glucksberg, which addressed whether Washington State's prohibition of assisted suicide violated the Fourteenth Amendment.[236] The Court highlighted the near-universal ban on assisted suicide: "In almost every State--indeed, in almost every western democracy--it is a crime to assist a suicide."[237] The Court also noted the near-unanimous rejection of assisted suicide referendums.[238] While legislatures had introduced bills legalizing assisted suicide, none had passed.[239] To the contrary, states were enacting more explicit prohibitions of the practice.[240] These realities prompted the Court to conclude "voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide."[241] Through this prism, the Court contemplated the constitutional challenge. The state trend against assisted suicide permeated the Court's analysis. "To hold for respondents, we would have to reverse ***147** centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[242] This concern, coupled with Cruzan, formed the basis of the Court's holding that the Fourteenth Amendment did not protect the right to assisted suicide.[243] The Court's approach to this uncharted area was strikingly similar to its consideration of abortion.

4. National Consensus and Abortion

Abortion was another issue of first impression in which the Court drew upon state developments. Roe v. Wade exemplifies the invocation of state trends.[244] Roe and its companion case, Doe v. Bolton, involved challenges to a series of Texas and Georgia laws prohibiting abortion.[245] The opening paragraph of Roe captured the Court's sensitivity to legislative trends, where it enunciated that "[t]he Georgia statutes . . . have a modern cast and are a legislative product that . . . reflects the influences of recent attitudinal change . . . ."[246] The Court embarked on an extensive historical discourse of abortion. Most States banned abortion through the early 1960s.[247] At that juncture, the pendulum began to shift, as "a trend toward liberalization of abortion statutes . . . resulted in adoption, by about one-third of the States, of less stringent laws . . . ."[248]

After considering the States' treatment of the practice, the Court contemplated the views of the medical and legal professions. The Court observed the American Medical Association's shift in favor of abortion was sparked by "rapid changes in state laws" and a belief "that this trend will continue."[249] The American Bar Association experienced a similar epiphany in 1972, approving the Uniform Abortion Act.[250] The Roe opinion included the Act in full, along with the Act's Prefatory Note, which the Court described as "enlightening."[251] That the Court used this adjective is telling, given the opening sentence of the Note: "This Act is based largely upon the New York abortion act following a review ***148** of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject."[252] With the evolving national consensus at the forefront, the Court held that abortion fell within the parameters of personal liberty protected by the Fourteenth Amendment.

This article argues the Court should be consistent in considering national consensus. However, it would be disingenuous to ignore the Court's own inconsistency in contemplating this question. Stenberg v. Carhart proves this point.[253] In Stenberg, the Court entertained a constitutional challenge to a Nebraska law which criminalized the procedure of partial birth abortion.[254] The Court ruled the law infringed upon due process protections.[255] The majority recognized the widespread disapproval of the procedure, but never quantified it. It was left to the dissent to raise the issue of where the states lie.

Justice Scalia derided the ruling as "a 5-to-4 vote on a policy matter by unelected lawyers [overcoming] the judgment of 30 state legislatures."[256] Justice Kennedy bemoaned Stenberg's treatment of abortion precedent of which a central premise "was that the States retain a critical and legitimate role in legislating on the subject of abortion."[257] Justice Kennedy chastised the majority for substituting its own "judgment for the judgment of Nebraska and some 30 other States . . . ."[258] Justice Thomas ended his dissent lamenting that "today we are told that 30 states are prohibited from banning one rarely used form of abortion that they believe to border on infanticide."[259] Stenberg notwithstanding, the wellspring of abortion jurisprudence was created on the foundation of national consensus.

***149** 5. National Consensus and the Fourth Amendment

Legislative developments have influenced the Court in its determination of whether an arrest comports with the Fourth Amendment protection against unreasonable searches and seizures.[260] In U.S. v. Watson, the Court held an arrest executed without a warrant did not violate the Fourth Amendment.[261] Under the common law, officers could make an arrest without a warrant for an offense committed in their presence.[262] The Court noted "[t]his has also been the prevailing rule under state constitutions and statutes."[263] Noting almost every State granted statutory authorization for such arrests, the Court was hesitant to implement its "judicial preference" for securing a warrant before making an arrest.[264] Because "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause," the Court found the underlying arrest did not implicate Fourth Amendment concerns.[265]

Payton v. New York involved a challenge to a series of New York statutes allowing police officers to enter a home without a warrant to make a routine felony arrest.[266] The Court held the Fourth Amendment prohibited such entries.[267] Acknowledging the common law did not unequivocally establish precedent on the issue, the Court considered the consensus of the states.[268] Twenty-four state legislatures provided for warrantless entries and fifteen proscribed them.[269] The Court noted that "although the weight of state-law authority is clear, there is by no means the kind of virtual unanimity on this question that was present in United States v. Watson."[270] Citing the "obvious declining trend" reflected in recent state court decisions, the Court concluded national ***150** consensus did not favor warrantless arrests.[271] While national consensus did not deliver the sockdolager it did in other contexts, it nevertheless persuaded the Court to find warrantless entries ran afoul of the Fourth Amendment.

A final example is Atwater v. City of Lago Vista, which considered the constitutionality of warrantless arrests for minor criminal offenses.[272] The petitioners argued the Fourth Amendment limited police officers' misdemeanor arrest authority.[273] The Court held the history of the Fourth Amendment and modern developments rejected such a notion.[274] The Court noted petitioners' argument had never "become 'woven . . . into the fabric' of American law."[275] Instead, the Court found "two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace."[276] The contemporary scene was no different as "today statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers."[277] For effect, the Court attached an appendix to its opinion listing the fifty-one statutes authorizing warrantless arrests for minor offenses.

6. National Consensus and Free Speech

First Amendment cases have also been scrutinized through the purview of state developments. While there is a paucity of instances in which national consensus has been debated, the methodology has been invoked to determine the scope of the First Amendment. Burson v. Freeman involved a free speech challenge to a Tennessee law prohibiting the solicitation of votes and the distribution of campaign materials within 100 feet of the entrance to a polling place.[278] The respondent argued the statute limited her ability to communicate with voters.[279] The Court examined the origins of such restrictions and noted their popularity, as every state limited access to polling places.[280] The Court found ***151** "this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud."[281] Reiterating the importance of the well-established movement favoring speech limitations, the Court concluded that a "long history" and "substantial consensus" support the rationale of protecting the fundamental right to vote.[282]

In Republican Party of Minnesota v. White, the Court struck down a Minnesota canon of judicial conduct as incompatible with the First Amendment.[283] Only four states had similar speech restrictions, prompting the Court to observe "[t]his practice, relatively new to judicial elections and still not universally adopted, does not compare well with the traditions deemed worthy of our attention in prior cases."[284] The Court has devoted more attention to national consensus in other contexts. However, these two decisions established precedent for applying state trends to the First Amendment.

These excerpts demonstrate the substantial weight afforded to national consensus. The multitude of cases invoking national consensus reveals this is not an anomalous approach or limited to certain contexts. While this methodology is prosaic, it does ensure the Court's interpretation is within the realm of societal norms. The Court's consideration of state trends in various areas of constitutional jurisprudence acknowledges this fact. Whether this factor could be applied to the Second Amendment is the focus of the following section.

C. Applying National Consensus to the Right to Keep and Bear Arms

The parties' briefs filed in Parker did not address the national consensus on the right to keep and bear arms. The D.C. Circuit Court of Appeals was also silent. However, the preceding sections establish the plethora of instances in which the Supreme Court used state trends as a lodestar. There is ample precedent to apply national consensus in a Second Amendment case. Issues tangled in the intricate web of social, moral, and cultural values are the most common terrain for the invocation of national trends. Like ***152** abortion, sodomy, and the death penalty, gun rights represent the perfect storm of legal and social complexities. The Court's extended hiatus from the Second Amendment is further justification to take into account the states' approach to the right to keep and bear arms.

The underlying right asserted in Parker is enshrined in a federal amendment. While a collective right reading from the Court would leave the firearm provisions of the individual states intact, a meaningless Second Amendment would be an anomaly given the national consensus. It would further contrast with the forty-eight states that elevate individual firearm rights by dint of concealed carry permits. Additionally, a meaningful Second Amendment would protect citizens in states with weak commitments to gun rights.

Colonial and early state enactments addressing the right to keep and bear arms have been dredged up, pored over, and expounded upon. These analyses are a valuable aid in parsing the Second Amendment. But in the haste to divine the thought processes of state legislators in the 1770s, commentators and courts have disregarded the actions of state legislators in the 1970s. State constitutions, many ratified or amended in more recent times, are relegated to a footnote. Concealed carry laws are ignored. Debating the meaning of amorphous, opaque, and centuries-old writing ensures a livelier dialogue than simply noting the obvious. Mundane or not, the national consensus of the last thirty years cannot be cast out of the Second Amendment debate. This is not to suggest the evidence distilled from the colonial era is outdated, unimportant, or of lesser worth. However, recent state laws represent a clear, consistent, and modern approach to the right to keep and bear arms. Limiting the analysis to state enactments from the late eighteenth century is akin to looking in the rear view mirror to see the road ahead.

Many state constitutions eschew the militia aspect, or include it alongside the right to defend oneself as justifications for the right to keep arms. With the benefit of hindsight, states articulated firearm rights more clearly.[285] While the transparency with which state constitutions address the right to keep and bear arms is significant, there are additional manifestations of the states' amenable atmosphere to gun rights. Forty-eight states have some ***153** form of concealed carry. Forty states follow a “shall-issue” framework. Concealed carry laws are an accurate barometer of the national consensus towards firearms. Such laws are impervious to the biases of commentators and are undeniable in their message. Trusting a citizen with the right to carry a firearm in public is the ultimate embodiment of an individual right to keep and bear arms. Yet, the vast majority of jurisdictions permit concealed carry. Such a policy is the polar opposite of the District of Columbia ordinance. Thus, the District's gun ordinance is an aberration when considering the national consensus.

The thrust of this argument is not that the Court should use opinion polls or the majority view to guide its decision making. The raison d'être of the judiciary is its counter-majoritarian attributes. However, various questions of constitutional nature lend themselves to examining the evolving nature of society and determining where on that spectrum the current norm lies. National consensus is not the determinative factor of a constitutional analysis, but one of many considerations. Whatever the merits of this approach and whatever predominance national consensus is given, it should be done consistently. Because the Court has used state trends to gauge the scope of other constitutional protections, the Court should implement it in a Second Amendment case. The Court's longstanding silence on the right to keep and bear arms further engenders such a consideration. Over the last seventy years, states have experimented with licensing schemes, concealed carry permits, and weapons bans. Their determination that an individual right to keep and bear arms should be protected, embraced, and expanded, reflects the results of these interactions.

Applying national consensus to the Second Amendment ensures the right to keep and bear arms will not be interpreted in a time warp. It also maintains consistency. The Court has acknowledged modern realities in other constitutional contexts. Abortion, gay rights, and the death penalty have been viewed through the lens of an evolving society, and the Court was impacted by the

direction in which states leaned. The States have spoken with a single voice on the right to keep and bear arms. This clarity is significantly more pronounced in comparison to other issues. That the Court has been swayed by lesser consensuses reveals the import of the virtual unanimity on individual firearm rights.

*154 V. Individual Firearm Rights in the Foreign Realm

As the preceding section attests, a Second Amendment interpretation by the Court might examine factors beyond the individual-versus-collective paradigm. One such element is international jurisprudence. The concept of constitutional comparativism entails that international and foreign law should be used to interpret the U.S. Constitution.[286] Some Supreme Court justices have developed a penchant for this theory. Justice Ruth Bader Ginsberg stated "[w]e are the losers if we do not both share our experience with, and learn from others."[287] She admitted the Court could improve "the dynamism with which we interpret our Constitution" by considering foreign decisions.[288] Justice Stephen Breyer has extolled the virtues of engaging in a more expansive Constitutional review by engaging foreign views.[289] Justice Anthony Kennedy noted foreign courts "have been somewhat concerned . . . that we [do] not cite their decisions with more regularity."[290] This inclination has raised the ire of other justices.[291] Justice Scalia argued that the notion "American law should conform to the laws of the rest of the world--ought to be rejected out of hand."[292] However, these objections have not prevented the Court from considering the international opinion on the death penalty, affirmative action, and homosexual rights. While the Court's invocation of foreign law is not as widespread as its use of national consensus, international influence cannot be underestimated. The following section illustrates this point.

A. The Supreme Court's Use of Constitutional Comparativism

Homosexual rights have become a flashpoint in the constitutional comparativism clash. In Lawrence v. Texas, the Court invalidated a Texas criminal law that prohibited homosexual sodomy. ***155** [293] The Court considered whether the underlying statute comported with the Constitution in relation to "values we share with a wider civilization."[294] The Lawrence Court's critique of its predecessor, Bowers v. Hardwick, stemmed from multiple concerns. One source of consternation was Bowers' refusal to acknowledge the international jurisprudence involving sodomy. Five years before Bowers, the European Court of Human Rights invalidated anti-sodomy laws under the European Convention on Human Rights.[295] Unlike Bowers, the Lawrence Court professed greater awareness of international dynamics, relying on an amicus curiae brief of the United Nations that condemned anti-sodomy laws.[296] The Court remarked that "the reasoning and holding in Bowers have been rejected elsewhere."[297] In holding the Due Process right of privacy extended to same-sex intimacies, the Court was impacted by case law from the European Court of Human Rights and other nations protecting the "right of homosexual adults to engage in intimate, consensual conduct."[298] While Lawrence marks the latest invocation of international law, precedent for such an approach can be traced to Eighth Amendment case law.

Death penalty decisions are ground zero for the constitutional comparativism debate. Foreign influence on the "cruel and unusual" determination in the modern era has its roots in Trop v. Dulles.[299] Trop involved an Army deserter punished for his offense by losing his U.S. citizenship.[300] The Court ruled that such a penalty was cruel and unusual.[301] The Court noted the "virtual unanimity" of countries that did not inflict statelessness as punishment.[302] A United Nations survey cited by the Court revealed only two countries meted denationalization for desertion.[303]

***156** The Supreme Court's 1988 decision of Thompson v. Oklahoma marked the first death penalty case to consider foreign laws.[304] In Thompson, the Court considered whether the Eighth Amendment forbade executing juveniles fifteen years old and younger.[305] The Court held such punishments were cruel and unusual. In reaching this determination, the Court noted the

United Kingdom, New Zealand, and the Soviet Union excluded minors from capital punishment.[306] The Court found further support from "three major human rights treaties explicitly prohibit[ing] juvenile death penalties."[307] In Atkins v. Virginia, the Court ruled executing mentally retarded criminals violated the Eighth Amendment.[308] Citing an amicus brief authored by the European Union, the Court highlighted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[309] While the Court did not spend significant time on foreign laws in Thompson and Atkins, its raising the subject was groundbreaking.

Finally, in Roper v. Simmons, the Court used foreign guidance to determine the Eighth Amendment forbade the imposition of the death penalty on juvenile offenders. Boding ill for the Second Amendment, the Roper Court's holding that the death penalty for juvenile offenders was unconstitutional found "confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[310] The Court cited the United Nations Convention on the Rights of the Child, which prohibits capital punishment for crimes committed by individuals under eighteen.[311] The Court further relied on England's abolishment of executing any person under eighteen at the time of the offense, in effect since 1948.[312] Roper and its predecessors establish constitutional comparativism has become an integral part of the Eighth Amendment equation.

***157** Affirmative action is another issue in which the Court solicited international views. In Grutter v. Bollinger, the Court held that student body diversity in law school education constituted a compelling state interest.[313] In her concurrence, Justice Ginsburg noted the International Convention on the Elimination of All Forms of Racial Discrimination endorses "measures to ensure the adequate development and protection of certain racial groups . . . for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[314] Justice Ginsberg also cited the Convention on the Elimination of All Forms of Discrimination against Women for support.[315] While the international consensus did not command the majority's attention, it is revealing that such considerations impacted at least one justice.

The final case that bears mentioning is Printz v. U.S.[316] While foreign guidance had a peripheral role in the adjudication, its context is noteworthy. Printz concerned a challenge to the Brady Handgun Violence Protection Act ("Brady Act"). However, gun control and the Second Amendment played bit parts while federalism took center stage. The Printz Court held unconstitutional provisions of the Brady Act requiring local officials to accept Brady Act forms and perform background checks on handgun applicants.[317] The Court reasoned that state legislatures were not subject to federal direction.[318]

Constitutional comparativism reared its head in an exchange between the dissenting opinion of Justice Breyer and the Printz majority. Justice Breyer concurred with Justice Stevens' dissent that Congress had the ability to pass whatever laws are necessary and proper to carry out its enumerated powers.[319] But Justice Breyer further argued that foreign governments could shed light on the question of federalism. Referencing the federal systems of Switzerland, Germany, and the European Union, Justice Breyer remarked, "all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body."[320] To bolster ***158** his assertion, Justice Breyer cited authorities arguing the European paradigm facilitated less interference with local authority.[321]

Justice Breyer's theory drew a sharp retort from the majority. Justice Scalia, writing for the majority, stated, "[w]e think such comparative analysis inappropriate to the task of interpreting a constitution . . . ."[322] The majority further added, "[t]he fact is that our federalism is not Europe's."[323] While Printz devoted only a few paragraphs to international dynamics, its presence in a federalism opinion speaks volumes.

The sporadic use of constitutional comparativism can be traced to the nascent nature of this methodology. The frequency in which international views are solicited will increase, as this movement is in its ascendancy. The Second Amendment may

become implicated in this trend. Admittedly, the Second Amendment is sui generis, making comparison with other countries inexact.[324] Few nations have laws resembling the Second Amendment. Firearms have a unique significance in American law and culture, posing a problem for those seeking to rely on international views. Nonetheless, the Court's use of foreign law as an aid in interpreting the Constitution could surface in a Second Amendment decision. The following sections explore this scenario.

B. The International Community's Condemnation of Individual Firearm Rights

Current world opinion favors prohibiting individual access to firearms. Such views are severe enough to abrogate the Second Amendment. A manifestation of this view is the increasing interest of international bodies in controlling firearms. As one commentator notes, "[l]eft unchecked, international gun control will ***159** compromise a fundamental human right as viewed by U.S. citizens."[325] The United Nations began focusing on restricting firearms after passing a resolution in 1995.[326] A product of that resolution was a 1997 report which devised "methods to control and eliminate such accumulations and transfers of small arms and light weapons."[327] The U.N.'s efforts intensified in 2001 after it held a Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.[328] The conference defined "small arms" as, inter alia, "revolvers and self-loading pistols, rifles, sub-machine guns, assault rifles."[329] The second Biennial Meeting of States to Prevent, Combat and Eradicate the Illicit Trade in Small Arms was held in July 2005. The intransigence of the United States frustrated the U.N. Conference President, who decried, "I must, as President, also express my disappointment over the Conference's inability to agree, due to the concerns of one State, on language recognizing the need to establish and maintain controls over private ownership of these deadly weapons . . . ."[330] Ultimately, the United States' obstinacy would not impede the U.N.'s efforts.

In October of 2006, U.N. member states voted to create the Arms Trade Treaty.[331] This agreement will regulate the sale and ***160** transfer of guns. The resolution passed overwhelmingly, as 139 countries voted for the resolution, 24 abstained, and the lone opposing vote was the United States.[332] The resolution charges the U.N. to create "a comprehensive, legally-binding instrument establishing common standards for the import, export and transfer of conventional arms."[333] The treaty is currently being drafted, and it is clear the end result will spawn additional showdowns between the U.S. and the U.N.

The Second Amendment and international opinion are on a collision course. The contrast between the United States and its neighbors is embodied in their recurring disputes over firearm regulations. The United States' persistence in clinging to the Second Amendment has made it the bête noire of the international community. It is unclear whether the United States' isolated position will influence the Court's views. The Court would seemingly have to diverge from its recent efforts coalescing around international opinion if it read the Second Amendment broadly. Considering individual firearm rights through an international lens is a complex endeavor. While current world opinion disfavors individual gun rights, there lies a deeper issue which the international community and collective right adherents often ignore.

C. Disarmament: The Gateway to Tyranny

While the Second Amendment's meaning is one of constitutional interpretation, it is difficult to examine any issue, let alone the right to keep and bear arms, in a jurisprudential vacuum. Lurking beneath the patina of Second Amendment vernacular are policy considerations. Constitutional scholar Akhil Amar notes that since an expansive reading of the Second Amendment "is a policy choice rather than a clear constitutional command, we are entitled to ask ourselves whether a given broad reading makes good sense as a matter of principle and practice."[334] Thus, the policy implications of an individual right reading are a critical component of the Second Amendment question.

Given the attention on the Second Amendment, one would assume analysts have scrutinized the entire policy spectrum. But those advocating a narrow right to keep and bear arms have left a ***161** significant weakness exposed in their haste to highlight the deleterious consequences of guns. This Achilles' heel concerns the mayhem that ensues once individual firearm rights are

curtailed. Unarming a populace has been the hallmark of tyrannous regimes. History shows a defenseless population is an integral ingredient to genocide. While firearm restrictions are not synonymous with disarmament, the slope between the two is slippery. This in no way suggests collective right adherents seek disarmament or approve of despotic regimes, but rather have not fully addressed their positions' consequences. Collective right and gun control advocates' refusal to construe their positions in an historical light represents a significant failing. This neglect cannot be excused, as numerous commentators have outlined the sordid connection between disarmament and tyranny. [335]

Historians have deduced that in the twentieth century, 262 million deaths have been at the hands of governments. [336] One authority explains: "It is as though our species has been devastated by a modern Black Plague. And indeed it has, but a plague of Power, not germs." [337] Anxiety about a centralized government engaging in mass murder is not fanciful, but grounded in the harshness of history. While the background, impetus, and methodology of these genocides vary, there remains one constant: disarmament. Other factors that precipitate mass murder exist. However, it strains credulity to contend the link between disarmament and tyranny is tenuous. Abolishing guns promotes a pliant populace. This premise is proven by history and based in common sense, because "from the point of view of any aggressor, it is desirable if not essential that intended victims not possess weapons, especially firearms." [338]

Those advocating a weak Second Amendment do not defend tyrants. However, the society they seek is ripe for governmental abuse. That those pining for a narrow Second Amendment ultimately desire disarmament is not hyperbole. The following excerpts ***162** prove a meaningful Second Amendment is a necessary bulwark against disarmament advocates.

United States Senator Dianne Feinstein, commenting on an assault weapons ban, stated "[i]f I could have gotten 51 votes in the Senate of the United States for an outright ban, picking up every one of them, Mr. and Mrs. America turn them all in, I would have done it." [339] Former United States Senator Howard Metzenbaum complained that the same ban was insufficient, exclaiming, "until you ban them all, you might as well ban none . . . . [But, it] will be a major step in achieving the objective that we have in mind." [340] United States Congressman William L. Clay proclaimed the 1993 Brady Bill was a "minimum step" that Congress should take in its efforts to restrict firearms. Congressman Clay professed, "[w]e need much stricter gun control, and eventually we should bar the ownership of handguns except in a few cases." [341] A fellow member of the House of Representatives, Congressman Bobby Rush, was also forthright in his strategy: "Ultimately, I would like to see the manufacture and possession of handguns banned except for military and police use. But that's the endgame." [342] Senator Lincoln Chafee was no less bashful when he asserted, "I shortly will introduce legislation banning the sale, manufacture or possession of handguns . . . . It is time to act. We cannot go on like this. Ban them!" [343] The recent tragedy at Virginia Tech prompted Congressman Dennis Kucinich to draft legislation "that would ban the purchase, sale, transfer, or possession of handguns by civilians." [344] While such views have not garnered a majority of lawmakers, these statements are notable for their stridency and frankness.

The desire to ban firearms is not the exclusive province of federal officials. San Antonio Mayor Henry Cisneros and Baltimore ***163** Mayor Kurt Schmoke signed the Communitarian Network's The Case for Domestic Disarmament, which provided: "There is little sense in gun registration. What we need to significantly enhance public safety is domestic disarmament . . . . Domestic disarmament entails the removal of arms from private hands." [345] One gun control adherent admitted, "[w]e will never fully solve our nation's horrific problem of gun violence unless we ban the manufacture and sale of handguns and semiautomatic assault weapons." [346]

While not all collective right adherents espouse such views, their reading of the Second Amendment could lead to such restrictions. Such policies are not without consequences. The events below are examined with a singular focus on firearm laws. While other factors played a role in these massacres, the following sections weave a mosaic of murder, linked by the common strand of restricting firearm rights.

1. Turkey Disarms the Armenians

The dispute over Turkey's slaughter of Armenians during World War I is well known. Turkey's refusal to acknowledge the atrocities periodically sparks diplomatic rows with the United States and European Union. Unfortunately, the events that led to the carnage are often ignored. While the enmity between the Turkish government and Armenians was multifaceted, the government's solution to resolving the dispute was simple. Turkey first curtailed the firearm rights of Armenians, and then eliminated all their rights.

Turkey had learned the consequences of oppressing an armed populace. In 1894, Armenians had taken up arms and fought back after state-sanctioned persecution.[347] After weeks of fighting, the government promised the fighters pardons if they ceased fighting.[348] After acquiescing, the government slaughtered the entire contingent.[349] This experience was a catalyst to strip Armenians of their weapons.

In 1910, the Turkish government enacted a law banning the manufacture and importation of weapons, the carrying of weapons, ***164** cartridges, and gunpowder.[350] Five years later, as historian R. J. Rummell explains, "under the guise of wartime necessity, and to protect against possible sabotage and rebellion by Armenians, the government demanded that Armenians in all towns and villages turn in their arms or face severe penalties."[351] Armenian troops serving under Turkish forces "were disarmed, demobilized, and grouped into labor battalions. Concurrently, the Armenian civilian population was also disarmed . . . ."[352] These assessments are not slanted summations of revisionist scholars. The Turks made their intentions known in black and white. An "official proclamation" of the Ottoman Empire provided: "Armenians being prohibited to carry any fire arms, they must surrender to the government all kinds of arms, pistols, bombs and daggers that they have hidden in their houses or out of the doors."[353] Restricting firearm rights was the entreaty to eliminating 1.5 million Armenians between 1915 and 1917.

The atrocities that followed were wicked not only in their sadism but their expediency. The government murdered approximately seventy percent of the Armenians in a single year, surpassing Adolf Hitler, who killed about forty percent of the Jewish population over five years.[354] The soldiers would "rape the girls and murder the young men--all this in the presence of parents."[355] Officials would compete to devise the cruelest torment, the prize going to a man who devised the idea of "nailing horseshoes to the feet of his Armenian victims."[356] Such violence continued unabated as the Armenians had no way to fight back and the international community was transfixed with World War I. Turkey is the first instance of the twentieth century in which an unarmed population was led to its slaughter. Sadly, it was not the last.

***165** 2. The Soviet Union and Nazi Germany Repress Firearm Rights

The Armenian massacre was replicated in the Soviet Union and Nazi Germany, but to an exponential degree. The parallels between the Soviet and Nazi regimes' repressive techniques are striking. The Soviet Union began instituting firearm restrictions in 1918 when Vladimir Lenin decreed that all citizens surrender their firearms, ammunition, and sabers to the government.[357] A few years later, the government made firearm possession punishable by hard labor. Soviet Decree exempted Communist Party members from surrendering their arms: "The Military Commissars are ordered not to take rifles and revolvers in the possession of members of the Russian Communist Party . . . ."[358] By 1929, firearm owners were personae non gratae.[359] In tandem with these firearm restrictions, Joseph Stalin instituted policies clamping down on other freedoms. For the next twenty-five years, more than 20 million dissidents, unable to defend themselves, were starved to death or rounded up and exterminated.[360]

Across the Danube, Germany was engaging in its own atrocities, facilitated by an unarmed Jewish population. Nazi Germany represents the best known example of disarmament leading to genocide. As Adolf Hitler and his Nazi party solidified their grip on power, the Nazis enacted the "Weapons Law" in March of 1938 which implemented gun control, barred Jewish

people from businesses involving firearms, and exempted Nazi officials from any firearm restrictions.[361] A few months later Germany enacted additional gun control under the "Regulations Against Jews" Act.[362] The new law unabashedly singled out Jews, proclaiming: "Jews are prohibited from acquiring, possessing, and carrying firearms and ammunition, as well as truncheons or stabbing weapons. Those now possessing weapons and ammunition are at once to turn them over to the local police authority."[363] By 1939, the Nazi regime had completely repressed the Jewish population and other ***166** enemies of the state.[364] From 1939 to 1945, 10 million defenseless people were rounded up and exterminated.

3. Current Atrocities Spawned by Disarmament

The aforementioned examples are not relics of a bygone era. History repeats itself in Zimbabwe. Once "the breadbasket of Africa," the country is now a human rights crisis.[365] Elected in 1980, President Robert Mugabe has slowly perpetrated a systematic raping of people and land. As Newsweek reports, "Mugabe's rule is increasingly taking on the outlines of the worst dictatorships."[366] Mugabe at first limited his violence to white farmers. As author Amy Chua describes, "furious mobs wielding sticks, axes, crossbows, iron bars, sharpened bicycle spokes, and AK-47 automatic rifles have invaded and ripped apart white-owned commercial farms. Usually by the hundreds, sometimes a thousand at a time, the invaders . . . ransack and destroy . . . beating, raping, abducting."[367] Chua notes the "assaults have not been spontaneous. Rather, they have been sponsored and encouraged by the Zanu-PF government of President Robert Mugabe."[368]

Mugabe's oppressive tactics eventually became colorblind. Murder and torture have become the central planks of his domestic policy.[369] The country has descended into a police state, where voicing opposition to Mugabe is akin to a death wish. The government's ultimate goal is simple. Didymus Mutasa, Zimbabwe's Minister of State, chillingly commented, "We would be better off with only six million people, with our own people who support the liberation struggle. We don't want all these extra people."[370] Zimbabwe's population is twelve million.

Mugabe's crimes have proceeded with minimal encumbrance thanks to their victims' defenseless state. President Mugabe did ***167** not initiate the gun control laws of his country; he inherited them from the British, descendants of whom ruled the country until 1980. The 1957 Rhodesian Firearms Act mandated that all firearm purchases go through a licensed dealer in order to ensure a government paper trail. "The records of all transactions--the names of licensed gun owners, and details of the firearms they own--go straight to the office of the president, Robert Mugabe."[371] Mugabe took the firearm restrictions to a new level--abolishment. In 2000, the government ordered the seizure of all white-owned firearms. The Zimbabwe Information Minister confirmed that "police had orders to scour all 4,000 white-owned farms for unlicensed firearms . . . [and] ammunition."[372] Recognizing the benefits of disarming those he sought to exploit, Mugabe ordered all civilians to surrender their firearms in 2005.[373] This measure was followed by the government's "clean-up" campaign, which "left close to a million people without shelter after their shanty homes were demolished."[374]

Zimbabwe's economy has been in a downward spiral for years. The ruinous economic consequences caused by the seizure of white-owned farms represents a microcosm of Mugabe's financial incompetence. Mugabe has ruled with complete disregard for fundamental economic realities, with predictable results. Mugabe has instituted price controls on basic necessities such as food and gasoline.[375] Such policies have sent prices skyrocketing. As the economy headed due south, Mugabe fixed the exchange rate.[376] In the meantime, the government doled out money to allies of the government and wasted funds on boondoggles.[377] The sum total of these policies was manifested in inflation rates of 7600%.[378] Such stratospheric inflation rates cannot be corralled because the government ***168** has "failed to address the real cause: the regime's habit of printing money to pay its bills."[379]

The people of Zimbabwe endure these woes because their ability to effectuate change is negligible. Mugabe rigs elections and inflicts lethal violence on opposition party supporters. During election season, government-owned newspapers extol the virtues of Mugabe.[380] The Zimbabwe African National Union-Patriotic Front (ZANU-PF) dominates the parliament, airwaves, and foreign aid inflow. ZANU-PF-sponsored soldiers intimidate opposition voters into submission. One author described his experience during the 2000 election: "At least thirty people were killed, thousands were forced to flee their homes, and the [opposition party] was prevented from campaigning in large swathes of the country."[381] Thus, the results of Zimbabwean elections are preordained.

Mugabe's terror campaign has driven the nation to the brink of starvation and bankruptcy. The Zimbabwean people now face tremendous hardship, "including chronic food, fuel, and foreign currency shortages."[382] They cannot challenge Mugabe through either ballot or bullet. This sad scenario is yet another manifestation of prohibiting a people's right to keep and bear arms.

4. Ethiopia Averts Conquest

The historical picture of firearms and tyranny is not entirely lugubrious. One African nation proves firearms can ensure freedom. Excluding a brief five-year stint during World War II, Ethiopia bears the distinction of being the only country in Africa never colonized. This outcome cannot be attributed to geography, undesirability, or mere fortuity. Ethiopia's ability to stave off capitulation to colonial powers can be traced to firearms.

Ethiopia had a significant institutional advantage against colonial intrusion in that it already was an established state when the Scramble for Africa began in the late nineteenth century.[383] Thus, it would be disingenuous to assert firearms alone preserved Ethiopia. However, it would be equally disingenuous to downplay the role of weapons in Ethiopia and their importance in repelling ***169** colonial powers. Though other factors played a hand in the country's fate, Ethiopia's ability to defend itself was its saving grace. "It cannot be gainsaid that fire-arms played a basic role in the preservation of Ethiopian independence."[384]

A succession of Ethiopian rulers were driven to secure a stable flow of weaponry. During the 1860s, Emperor Theodore sought weapons through trade, diplomacy, and industry.[385] After Theodore's reign, Emperor Yohannes continued his predecessor's legacy, expanding the nation's supply of guns.[386] The successor of Yohannes, Emperor Menelik, completed the arms-obsessed troika. Menelik "decided that the procurement of modern weaponry was essential" to the nation's survival.[387] Through trading, Menelik acquired "tens of thousands of magazine-loading rifles, millions of rounds of ammunition and dozens of modern rifled artillery guns."[388]

These arms proved their worth on multiple occasions. In 1876, Ethiopian forces routed well-armed Egyptian invaders at Gura.[389] In 1896, Ethiopia stopped an Italian advance at the decisive Battle of Adowa, leading to the Treaty of Addis Ababa in which Italy recognized Ethiopia as an independent state.[390] Without firearms, Ethiopia would have succumbed to these foreign invaders. Ethiopia's experience is another example of the incomplete policy analysis by gun control adherents and collectivists. Commentators have ignored the important story of Ethiopia and the defensive use of firearms, painting a skewed picture of the effects of firearm restrictions. Ethiopia offers another compelling chapter in the saga of firearms in foreign lands.

D. A Collective Silence on the Consequences of Disarmament

The events set forth above convey the tragic consequences of defenseless people manipulated by tyrants. A 2004 law review article made a compelling case for the correlation between gun ***170** prohibitions and genocide.[391] This piece delivers a debilitating blow to those seeking increased firearm restrictions. Unfortunately, a rejoinder to their thesis has not yet been articulated. Collective right adherents are eerily silent on the role of disarmament in genocides. While ignoring the historical correlation between disarmament and mass murder, commentators scoff at the contention that firearms would prevent a national

government with standing armies and massive weaponry. A cursory review of military history reveals the frequency with which small arms can challenge a better-equipped force. [392] Firearms and sheer will have proven a combustible mix for those fighting insurgent forces. Colonial experiences with insurgencies reveal that no amount of manpower, material, or money could surmount determined insurgencies with a modicum of firepower. Americans should be sensitive to this axiom, as the recent events in Iraq once again establish that firearms can provide a formidable menace to sophisticated, technological, and heavy artillery. [393]

The refusal of gun control advocates to address the massacres facilitated by disarmament and its distant cousin, gun control, is fascinating. One exception to this silence involves gun control in Nazi Germany. [394] Some commentators have challenged the hypothesis that gun control paved the way for Hitler's atrocities." [395] Instead, they contend Germany's lack of gun restrictions engendered the capitulation of Nazi foes. One commentator rebuked this thesis. [396] "A regime that would disarm and murder an entire segment of the population hardly could be said to support . . . 'the right of the people to keep and bear Arms.' Indeed, that is the very kind of regime this right is meant to provide the means to resist." [397] A Holocaust historian confirms this point: "The indispensable ***171** need, of course, was arms." [398] The commentary addressing Nazi Germany's gun policies is an insufficient rejoinder because it ignores the larger picture, the penchant of despotic regimes for using gun control to further their ends.

Some epochs will see tyranny and violence abate. However, the despotic lust for power underlying the tyrannical governments of Stalin and Hitler will never vanish. That such a fate could befall the United States is brushed aside, ostensibly because Americans are too educated, wealthy, and technologically advanced. Such a view shows no appreciation for history. This approach is described as "one aspect of the theory of American exceptionalism-- the idea that we Americans are different from and perhaps better than the other members of the human race." [399] Take away the Bill of Rights and American "exceptionalism" evaporates. It is folly to think American soil inoculates its inhabitants from revolution, strife, or tyranny. This misconception is grounded in myopic romanticism. An advanced society can engage in atrocities as well as an undeveloped one. What a massacring movement cannot overcome, at least with not serious costs, is an armed populace. While the probability of such a catastrophe is infinitesimal, an insurance policy against such devastation is a wise course.

Justice Joseph Story called "the right of the citizens to keep and bear arms" the "palladium of the liberties of the republic," because it "offers a strong moral check against usurpation and arbitrary power of the rulers." [400] The bloodletting of the twentieth century reinforces this axiom. If the Supreme Court is to invoke international views, it should take notice of the tyranny that has ensued in foreign countries when a despotic regime controls an unarmed population. These events are no less relevant to the Court's international considerations than the fashionable opinions emanating from the latest world summit.

VI. Conclusion

The Second Amendment is not an abstraction. The Founding Fathers recognized an unarmed populace was a voiceless one. In their prescience, they understood the right to defend oneself would transcend time. The Second Amendment is the fountainhead ***172** from which all other constitutional rights flow. Reading the Second Amendment out of existence will have dire consequences for individuals and liberty alike. The plaintiffs in Parker can attest to such realities.

The D.C. Circuit's stance in Parker represents a retreat from the narrow interpretation afforded the Second Amendment. Judges and commentators who embrace a living Constitution that mirrors an evolving society on issues such as abortion, homosexual rights, and free speech, suddenly yearn for the colonial milieu of militias and muskets. The D.C. Circuit's rejection of this outdated and inconsistent approach to individual liberty should be embraced by the Supreme Court, for consistency is the cornerstone of credibility. Furthermore, a robust reading of the Second Amendment correlates with the evolving standards of firearm rights. The States regard individual firearm ownership as the foremost guarantee of safety and freedom. This coincides with the reality that the District's ordinance fosters, not foils, violent crime.

Events of the twentieth century demonstrate the Second Amendment's relevance. The hellish havoc engendered by disarmament stains the pages of history. Defenseless people are left vulnerable to the vicissitudes of megalomaniacs, foreign invaders, and fanatical pogroms. Vice President Hubert Humphrey believed "[t]he right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible." [401]

Respecting individual liberty has guided the modern Supreme Court's constitutional interpretation. Defending oneself is the epitome of fundamental liberty. As the guardian of constitutional guarantees, the Supreme Court must do something it has eschewed for nearly seventy years: breathe life into the Second Amendment.

Footnotes

a1 The author is an attorney practicing law at Kubasiak, Flystra, Thorpe & Rotunno in Chicago, Illinois. He expresses gratitude to his family members for their guidance.

1 Parker v. D.C., 478 F.3d 370 (D.C. Cir. 2007); see David Nakamura & Robert Barnes, D.C.'s Ban on Handguns in Homes Is Thrown out, Wash. Post A01 (Mar. 10, 2007). On appeal to the Supreme Court, the case became D.C. v. Heller when the D.C. Circuit found lead plaintiff Shelly Parker lacked standing. Parker, 478 F.3d at 375-78.

2 See infra nn. 7-49 and accompanying text.

3 See infra nn. 120-44 and accompanying text.

4 See infra nn. 155-284 and accompanying text.

5 See infra nn. 285-311 and accompanying text.

6 See infra nn. 324-81 and accompanying text.

7 U.S. Const. amend. II.

8 Michael C. Dorf, What Does the Second Amendment Mean Today? 76 Chi.-Kent L. Rev. 291, 293-94 (2000); Paul Finkelman, ''A Well Regulated Militia": The Second Amendment in Historical Perspective, 76 Chi.-Kent L. Rev. 195, 235 (2000); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 462-64 (1995).

9 Dorf, supra n. 8, at 293-94; Finkelman, supra n. 8, at 235; David Yassky, The Second Amendment: Structure, History, and Constitutional Change, 99 Mich. L. Rev. 588, 613-14 (2000).

10 Yassky, supra n. 9, at 613-14.

11 Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 207-08 (1983).

12 Anthony J. Dennis, Clearing the Smoke from the Right to Bear Arms and the Second Amendment, 29 Akron L. Rev. 57, 68-69 (1995).

13 Akhil Reed Amar, The Second Amendment: A Case Study in Constitutional Interpretation, 2001 Utah L. Rev. 889, 891 (2001) (examining the individualist and collectivist theories and surmising "[b]oth readings are wrong"). Some have contended this issue is driven purely by the belief system of the arbiter and not by constitutional theory or interpretation. One commentator notes, "[t]he choice is going to depend on the ideology of the interpreter." Erwin Chemerinsky, Keynote Address: Putting the Gun Control Debate in Social Perspective, 73 Fordham L. Rev. 477, 481(2004).

14 David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551, 554 (1991) (arguing the Second Amendment guaranteed the right of a virtuous and universal citizen militia to keep and bear arms, but today's gun owners do not fit this description).

15 Robert Hardaway, Elizabeth Gormley & Bryan Taylor, The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms, 16 St. John's J. Leg. Comment. 41, 56 (2002).

16 Id. at 56-57.

17 See Parker v. D.C., 478 F.3d 370 (D.C. Cir. 2007); Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002); U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001).

18 But see David B. Kopel, The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said about the Second Amendment, 18 St. Louis U. Pub. L. Rev. 99 (1999) (surveying 35 cases in which the Supreme Court addressed the Second Amendment).

19 Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 652-53 (1989).

20 Presser v. Ill., 116 U.S. 252, 664-65 (1886) (holding the right to own and carry guns does not include the right to carry guns in public as part of a group on a military parade); U.S. v. Cruikshank, 92 U.S. 542, 553 (1875) (holding the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes," to police powers). See also David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. Rev. 1359, 1459 (1998).

21 U.S. v. Miller, 307 U.S. 174 (1939).

22 Id. at 175; The National Firearms Act, 26 U.S.C.A. §§ 5801 et seq. (I.R.C. 1939).

23 Miller, 307 U.S. at 177.

24 Id. at 178.

25 U.S. v. Emerson, 270 F.3d 203, 221-22 (5th Cir. 2001). In lieu of a brief, counsel for the Miller defendants sent a telegram to the Court "[s]uggest[ing] case be submitted on [Government's] Brief." Stephen P. Halbrook, The Second Amendment in the Supreme Court: Where It's Been and Where It's Going, 29 Hamline L. Rev. 449, 449 (2006).

26 Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self-Preservation, 39 Ala. L. Rev. 103, 109 (1987) (citing lack of evidence, defendant's failure to present an argument, and defendant's disappearance following trial court's dismissal of their indictment as contributing to defendant's loss); Robert Dowlut, Federal and State Constitutional Guarantees to Arms, 15 U. Dayton L. Rev. 59, 73-74 (1989) (arguing that Miller was defective due to the one-sided participation).

27 Miller, 307 U.S. at 178.

28 Id. at 183.

29 Halbrook, supra n. 25, at 454.

30 Cases v. U.S., 131 F.2d 916, 922 (1st Cir. 1942). However, the First Circuit did caution that the government "cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia." Id.

31 U.S. v. Tot, 131 F.2d 261, 266 (3d Cir. 1942).

32 Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995).

33 Stevens v. U.S., 440 F.2d 144, 149 (6th Cir. 1971). The Sixth Circuit recently revisited the issue in U.S. v. Napier, where it found no reason to depart from its precedent that the Second Amendment does not guarantee an individual right to bear arms. U.S. v. Napier, 233 F.3d 394, 403 (6th Cir. 2000).

34 Quilici v. Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982).

35 U.S. v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988).

36 Hickman v. Block, 81 F.3d 98 (9th Cir. 1996).

37 U.S. v. Oakes, 564 F.2d 384 (10th Cir. 1977).

38 U.S. v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997). While the Second Circuit has not explicitly ruled on the issue, it has noted gun possession is not a fundamental right. U.S. v. Toner, 728 F.2d 115, 128 (2d Cir. 1984).

39 U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001).

40 Id. at 211-12.

41 Lyle Denniston, Individuals Have Gun Rights, Court Says Long-Awaited Case Departs from Long Practice in the US, Boston Globe A5 (Oct. 17, 2001); William Yelverton, The Shot Heard around the U.S.A., Tampa Trib. 2 (Oct. 21, 2001).

42 Emerson, 270 F.3d at 227-28.

43 Id. at 264-65.

44 The Third, Seventh, and Tenth Circuits have considered appeals which sought to follow the holding of Emerson. See e.g. U.S. v. Willaman, 437 F.3d 354 (3d Cir. 2006); U.S. v. Parker, 362 F.3d 1279 (10th Cir. 2004); U.S. v. Price, 328 F.3d 958 (7th Cir. 2003). In all three instances, the challenges were brought by criminal defendants and rejected by the courts, which declined to consider adopting Emerson. In none of the situations did the court lament or laud the Fifth Circuit's ruling.

45 Silveira v. Lockyer, 312 F.3d 1052, 1092-93 (9th Cir. 2002); Hickman v. Block, 81 F.3d 98(9th Cir. 1996). For an analysis of Silveira v. Lockyer, see Roy Lucas, From Patsone & Miller to Silveira v. Lockyer: To Keep and Bear Arms, 26 Thomas Jefferson L. Rev. 257(2004).

46 Silveira, 312 F.3d at 1086-87.

47 Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003).

48 Id. at 1191-92.

49 Id. at 1191.

50 Pub. L. No. 93-198, 87 Stat. 774 (1973).

51 Meg Smith, A History of Gun Control, Wash. Post C4 (Mar. 11, 2007).

52 See Katharine E. Kohm, Parker v. D.C.: Putting the "I's" in Militia, 42 U. Rich. L. Rev. 807, 815 n. 39 (2008) (internal citations omitted).

53 Id.

54 D.C. Code § 7-2502.02(a)(4) (West 2007) ("A registration certificate shall not be issued for a: ... (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976."); Id. at § 7-2501.01(12) ("'Pistol' means any firearm originally designed to be fired by use of a single hand.").

55 Id. at § 7-2507.02 (stating that "each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia").

56 Id. at § 22-4504.

57 Id. at §§ 22-4504, -4515. ("No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law."); Id. at § 22-4515("Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $1,000 or imprisonment for not more than 1 year, or both.").

58 Id. at § 7-2507.06.

59 Id. at § 7-2507.06(2)(A).

60 Appellant's Br. at 60, Parker v. D.C., 478 F.3d 370 (D.C. Cir. 2007) (available at http:// www.gurapossessky.com/news/parker/documents/appellantsbrief.pdf). Two examples of such prosecutions are described in the following articles: Barton Gellman, Rowan Gun Case in Jury's Hands, Wash. Post D1 (Sept. 29, 1988); Jim Keary, Intruder Shot in Home on Hill; Residence Had Been Burglarized Last Week, Wash. Times C9 (Feb. 5, 1997).

61 Pl.'s Compl., Parker v. D.C., 478 F.3d 370 (D.C. Cir. 2007) (available at http:// www.gurapossessky.com/news/parker/documents/complaint.pdf).

62 Elissa Silverman & Allison Klein, Plaintiffs Reflect on Gun Ruling; Residents Suing D.C. Explain Motivation, Wash. Post C1 (Mar. 11, 2007).

63 Id.

64 Appellant's Br. at 4-5, Parker v. D.C., 478 F.3d 370 (D.C. Cir. 2007) (available at http:// www.gurapossessky.com/news/parker/documents/appellantsbrief.pdf).

65 Id.

66 Pl.'s Compl. at 4, Parker v. D.C., 478 F.3d 370 (D.C. Cir. 2007) (available at http:// www.gurapossessky.com/news/parker/documents/complaint.pdf).

67 Id. at 5-6.

68 Id. at 7.

69 Def.'s Mot. Dismiss at 5, Parker v. D.C., 478 F.3d 370 (D.C. Cir. 2007) (available at http:// www.gurapossessky.com/news/parker/documents/DefsMotiontoDismissBrief.pdf).

70 Parker v. D.C., 311 F. Supp. 2d 103, 104 (D.D.C. 2004).

71 Id. at 105.

72 Id.

73 Seegars v. Ashcroft, 297 F. Supp. 2d 201(D.D.C. 2004).

74 Id. at 239. The D.C. Circuit later affirmed Seegars, holding that the litigants were not threatened with criminal prosecution and thus lacked standing. Seegars v. Ashcroft, 396 F.3d 1248 (D.C. Cir. 2005).

75 Parker, 311 F. Supp. 2d at 106.

76 Id. at 107-08.

77 U.S. v. Emerson, 281 F.3d 1281(5th Cir. 2001) (denying the petition for rehearing en banc).

78 Sandidge v. U.S., 520 A.2d 1057, 1058 (D.C. App. 1987) (quoting U.S. v. Warin, 530 F.2d 103, 106 (6th Cir. 1976)).

79 Parker, 311 F. Supp. 2d at 108 (citing Fraternal Or. of Police v. U.S., 173 F.3d 898, 906 (D.C. Cir. 1999)).

80 Fraternal Or. of Police, 173 F.3d at 906.

81 Parker, 311 F. Supp. 2d at 108.

82 Id. at 109.

83 Appellants' Br. at 16, Parker v. D.C., 311 F. Supp. 2d 103 (D.D.C. 2004) (emphasis in original). The D.C. Circuit would later define "functional firearms" as guns "readily accessible when necessary for self defense in the home." Parker, 478 F.3d 370, 374 (D.C. Cir. 2007).

84 Appellants' Br. at 27, Parker v. D.C., 311 F. Supp. 2d 103 (D.D.C. 2004).

85 Appellees' Br. at 12, Parker v. D.C., 311 F. Supp. 2d 103 (D.D.C. 2004) (internal quotes omitted).

86 Id. at 15-16. While remarking the plaintiffs' policy arguments were "addressed to the wrong forum," the District did not hesitate to devote a few pages of its brief to the subject of gun violence.

87 Id. at 38.

88 Parker, 478 F.3d at 396, petition for rehearing en banc denied, 2007 U.S. App. LEXIS 11029. The opinion noted that Circuit Judges Randolph, Rogers, Tatel, and Garland would grant the petition. Id.

89 Parker, 478 F.3d at 376.

90 Id. at 378.

91 Id.

92 Id. at 380.

93 Id. at 380-81.

94 Id. at 381.

95 Parker, 478 F.3d at 381 (citing U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990)).

96 Verdugo-Urquidez, 494 U.S. at 265.

97 Parker, 478 F.3d at 382.

98 Id.

99 Id. at 383.

100 Id. at 384-85.

101 Id. at 386.

102 Id.

103 Parker, 478 F.3d at 386.

104 Id.

105 Id. at 387 (citing The Selective Service Act, 50 U.S.C.A. app. § 453 (West 1990) (mandating that all American males register upon reaching the age of 18 as a contingency should the draft be reintroduced)).

106 Id. at 389.

107 U.S. v. Miller, 307 U.S. 174 (1939).

108 U.S. v. Emerson, 270 F.3d 203, 225 (5th Cir. 2001).

109 Parker, 478 F.3d at 394.

110 Id.

111 Id. at 395.

112 Id. at 399-401.

113 Id. at 400.

114 Id.

115 Parker, 478 F.3d at 400.

116 Id. at 401.

117 Id.

118 Id. at 401-02 (quoting Seegars v. Ashcroft, 297 F. Supp. 2d 201, 239 (D.D.C. 2004)).

119 Id. at 403-04.

120 Stephen Halbrook, Second Class Citizenship and the Second Amendment in the District of Columbia, 5 Geo. Mason U. Civ. Rights L.J. 105, 106 (1995).

121 Adam Winkler, A Revolution Too Soon: Woman Suffragists and the "Living Constitution", 76 N.Y.U. L. Rev. 1456, 1463 (2001).

122 Lawrence v. Tex., 539 U.S. 558, 562 (2003).

123 Parker, 478 F.3d at 406.

124 Id. at 380, n. 6.

125 See infra nn. 157-84 and accompanying text.

126 Id.

127 Parker, 478 F.3d at 380-81.

128 U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990).

129 Parker, 478 F.3d at 381 (citing Verdugo-Urquidez, 494 U.S. at 265).

130 Verdugo-Urquidez, 494 U.S. at 265.

131 Parker, 478 F.3d at 382.

132 Id. at 390.

133 William Blackstone, Commentaries vol. 1, **136-39 (Wayne Morrison ed., Cavendish Publg. Ltd.).

134 Jerry Bonanno, Facing the Lion in the Bush: Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution, 29 Hamline L. Rev. 463, 478 (2006).

135 Parker, 478 F.3d at 401 (Henderson, J., dissenting).

136 U.S. v. Miller, 307 U.S. 174 (1939).

137 Id.

138 Parker, 478 F.3d at 402 (Henderson, J., dissenting) (citing Miller, 307 U.S. at 178).

139 Id. at 406 (internal citations omitted).

140 Callan v. Wilson, 127 U.S. 540, 550-51 (1888).

141 Id. at 550.

142 Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

143 Id.

144 Pernell v. Southall Realty, 416 U.S. 363, 370 (1974).

145 Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000), aff'd, 531 U.S. 941 (2000).

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147 Adams, 90 F. Supp. 2d at 72.

148 Parker, 478 F.3d at 406; Lee v. Flintkote, 593 F.2d 1275 (D.C. Cir. 1979); LaShawn v. Barry, 87 F.3d 1389 (D.C. Cir. 1996).

149 Lee, 593 F.2d at 1278.

150 LaShawn, 87 F.3d at 1397-98.

151 Sandidge v. U.S., 520 A.2d 1057, 1058 (D.C. App. 1987).

152 Id.

153 Barron v. U.S., 818 A.2d 987, 994 n. 7 (D.C. App. 2003).

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155 Hepburn & Dundas v. Ellzey, 6 U.S. 445, 452 (1805).

156 See e.g. Bowers v. Hardwick, 478 U.S. 186, 193-94 (1986); Atwater v. City of Lago Vista, 532 U.S. 318, 344 (2001).

157 Parker v. D.C., 478 F.3d 370, 380 n. 6 (D.C. Cir. 2007) (referring to Hilberg v. F.W. Woolworth Co., 761 P.2d 236, 240 (Colo. App. 1988); Brewer v. Commonwealth, 206 S.W.3d 343, 347 n. 5 (Ky. 2006); State v. Blanchard, 776 So. 2d 1165, 1168 (La. 2001); State v. Nickerson, 247 P.2d 188, 192 (Mont. 1952); Stillwell v. Stillwell, 2001 WL 862620, at *4 (Tenn. App. July 30, 2001); State v. Anderson, 2000 WL 122218, at *7 n. 3 (Tenn. Crim. App. Jan. 26, 2000); State v. Williams, 148 P.3d 993, 998 (Wash. 2006); Rohrbaugh v. State, 607 S.E.2d 404, 412 (W. Va. 2004)).

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159 Id. at 921 (listing the following state constitutions: Ala. Const. art. I, § 26; Alaska Const. art. I, § 19; Ariz. Const. art. II, § 26; Colo. Const. art. II, § 13; Conn. Const. art. I, § 15; Del. Const. art. I, § 20; Fla. Const. art. I, § 8; Ga. Const. art. I, § 1, P VIII; Idaho Const. art. I, § 11; Ill. Const. art. I, § 22; Ind. Const. art. I, § 32; Kan. Const. B. of R., § 4; Ky. Const. § 1; La. Const. art. I, § 11; Me. Const. art. I, § 16; Mich. Const. art. I, § 6; Miss. Const. art. III, § 12; Mo. Const. art. I, § 23; Mont. Const. art. II, § 12; Neb. Const. art. I, § 1; Nev. Const. art. I, § 11; N.H. Const. pt. 1, art. 2-a; N.M. Const. art. II, § 6; N.D. Const. art. I, § 1; Ohio Const. art. I, § 4; Okla. Const. art. II, § 26; Or. Const. art. I, § 27; Pa. Const. art. I, § 21; R.I. Const. art. I, § 22; S.D. Const. art. VI, § 24; Tex. Const. art. I, § 23; Utah Const. art. I, § 6; Vt. Const. ch. 1, art. XVI; Wash. Const. art. I, § 24; W. Va. Const. art. III, § 22; Wis. Const. art. I, § 25; Wyo. Const. art. I, § 24).

160 Id. at 920-21 (listing Arkansas, Hawaii, Massachusetts, New York, North Carolina, South Carolina, Tennessee, Virginia, and Kansas as states with amendments similar to the Second Amendment of the U.S. Constitution).

161 Id. at 920, 925 (referring to the constitutions of California, Iowa, Maryland, Minnesota, and New Jersey, but noting the Minnesota Constitution states "[h]unting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good." Minn. Const. art. XIII, § 12.). New York provides a statutory provision stating "a well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed." N.Y. Civ. Rights Law § 4 (McKinney 1992).

162 Creamer, supra n. 158, at 921-25.

163 Alaska Const. art. I, § 19; Del. Const. art. I, § 20; Fla. Const. art. I, § 8; Idaho Const. art. I, § 11; Me. Const. art. I, § 16; Neb. Const. art. I, § 1; Nev. Const. art. I, § 11; N.H. Const. pt. 1, art. 2-a; N.M. Const. art. II, § 6; N.D. Const. art. I, § 1; W. Va. Const. art. III, § 22; Wis. Const. art. I, § 25.

164 Alaska Const. art. I, § 19.

165 Del. Const. art. I, § 20.

166 Me. Const. art. I, § 16.

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168 David McDowall et al., Easing Concealed Firearms Laws: Effects on Homicide in Three States, 86 J. Crim. L. & Criminology 193, 194-95 (1995).

169 John R. Lott, Jr., The Bias against Guns: Why Almost Everything You've Heard about Gun Control Is Wrong 73 (Regnery Publg. 2003). States with concealed carry permits include Georgia, Indiana, Maine, New Hampshire, North Dakota, South Dakota, Vermont, and Washington. Id.

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172 McDowall, supra n. 168, at 193.

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175 National Rifle Association Institute for Legislative Action, Issues, Fact Sheets, H.R. 2088, the Veterans' Heritage Firearms Act, http://www.nraila.org/Issues/FactSheets/Read.aspx?id=198&issue=003 (May 10, 2006).

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177 Peter Hart & Doug Bailey, Gun Control: What Went Wrong in California, 41 Wall St. J. 34 (Mar. 1, 1983).

178 Laurent Belsie, Chicago Suburb Sticks to its Guns, 77 Christian Sci. Monitor 3 (Apr. 4, 1985). The measure failed by a margin of more than 60 to 40%. Id.

179 Joel Broadway, Gun Ban Proposal Defeated, 97 Wis. St. J. 1A (Apr. 7, 1993).

180 Christopher R. McFadden, The Wisconsin Bear Arms Amendment and the Case against an Absolute Prohibition on Carrying Concealed Weapons, 19 N. Ill. U. L. Rev. 709, 714 n. 26 (1999).

181 Id. at 709; see also Wis. Const. art. I, § 25.

182 Bob Egelko, Judge Invalidates Prop. H Handgun Ban: Ruling Says Measure Intrudes on an Area Regulated by State, S.F. Chron. (June 13, 2006).

183 Chicago Mun. Code § 8-20-040. The statute reads: "Registration of firearms. (a) All firearms in the city of Chicago shall be registered in accordance with the provisions of this chapter. It shall be the duty of a person owning or possessing a firearm to cause such firearm to be registered." Id.

184 Id. at 8-20-050. The statute reads:
Unregisterable firearms.
No registration certificate shall be issued for any of the following types of firearms:
(a) Sawed-off shotgun, machine gun, or short-barreled rifle;

(b) Firearms, other than handguns, owned or possessed by any person in the city of Chicago prior to the effective date of this chapter which are not validly registered prior to the effective date of this chapter;
(c) Handguns, except:
(1) Those validly registered to a current owner in the city of Chicago prior to the effective date of this chapter ....
Id.

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221 Id. at 589 (O'Connor, J., dissenting (citing Penry v. Lynaugh, 492 U.S. 302, 332 (1989))).

222 Id. at 564.

223 Id. at 565.

224 Id. at 567.

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226 Atkins v. Va., 536 U.S. 304, 304 (2002).

227 Id. at 307.

228 Id. at 314-15.

229 Id. at 315.

230 Id. at 317.

231 Id. at 321 (internal quotations omitted).

232 Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 261 (1990).

233 Id. at 280.

234 Id. at 284.

235 Id. at 292.

236 Wash. v. Glucksberg, 521 U.S. 702, 702 (1997).

237 Id. at 710.

238 Id. at 717.

239 Id.

240 Id. at 718.

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243 Id. at 728.

244 Roe v. Wade, 410 U.S. 113 (1973).

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246 Roe, 410 U.S. at 116.

247 Id. at 139.

248 Id. at 140.

249 Id. at 143 (internal quotations omitted).

250 Id. at 146.

251 Id. at 147.

252 Roe, 410 U.S. at 147 n. 41.

253 Stenberg v. Carhart, 530 U.S. 914 (2000).

254 Id. at 921.

255 Id. at 945-46.

256 Id. at 955 (Scalia, J., dissenting).

257 Id. at 956-57 (Kennedy, J., dissenting).

258 Id. at 979.

259 Stenberg, 530 U.S. at 1020 (Thomas, J., dissenting). The Court would reverse itself 7 years later when it upheld the Federal Partial Birth Abortion Act in Gonzales v. Carhart, 127 S. Ct. 1610 (2007). As the matter did not involve a state law, the Court downplayed the impact of state trends, although it did acknowledge the 30 states that had banned the procedure when Stenberg was decided. Id. at 1623.

260 U.S. Const. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Id.

261 U.S. v. Watson, 423 U.S. 411 (1976).

262 Id. at 418.

263 Id. at 419.

264 Id. at 421-23.

265 Id. at 423.

266 Payton v. N.Y., 445 U.S. 573, 576 (1980).

267 Id.

268 Id. at 597-98.

269 Id. at 598-99.

270 Id. at 600.

271 Id.

272 Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

273 Id. at 336.

274 Id.

275 Id. at 340 (internal quotations omitted).

276 Id.

277 Id. at 344.

278 Burson v. Freeman, 504 U.S. 191, 193 (1992).

279 Id. at 194.

280 Id. at 206.

281 Id.

282 Id. at 211.

283 Republican Party of Minn. v. White, 536 U.S. 765 (2002).

284 Id. at 786.

285 Robert A. Creamer, History Is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment, 45 B.C. L. Rev. 905 (2004).

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293 Lawrence v. Tex., 539 U.S. 558 (2003).

294 Id. at 576.

295 Id. (citing Dudgeon v. U.K., 45 Eur. Ct. H.R. (ser. A) P 52 (1981)).

296 Id. at 576-77; Br. Amici Curiae of Mary Robinson et al., at 11-12, Lawrence v. Tex., 539 U.S. 558 (2003).

297 Lawrence, 539 U.S. at 576.

298 Id. (citing Dudgeon, 45 Eur. Ct. H.R. at P 52). The Court commented that the European Court of Human Rights has issued additional opinions protecting the right of homosexual adults to engage in consensual conduct. Id. (citing P.G. & J.H. v. U.K., App. No. 44787/98, Eur. Ct. H.R. P 56 (Sept. 25, 2001); Modinos v. Cyprus, 259 Eur. Ct. H.R. (1993); Norris v. Ir., 142 Eur. Ct. H.R. (1988)).

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315 Id.

316 Printz v. U.S., 521 U.S. 898 (1997).

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322 Printz, 521 U.S. at 921 n. 11 (majority).

323 Id.

324 Even comparing murder rates between the U.S. and other countries results in skewed findings. The most instructive comparisons with U.S. crime rates would use Australia or Great Britain, both of which instituted strict gun laws in recent years. As John Lott explains, in 1996 Britain banned handguns, and by 2000 gun crimes had risen 40%. Lott, Jr., supra n. 169, at 77. The UK leads

the U.S. by an almost 2-to-1 margin in violent crime. Id. "The English and American peoples still share notions of England as the peaceable kingdom, of America as the violent republic. But the truth of this particular comparison matters deeply because of its policy implications. The Anglo-American contrast is cited repeatedly as proof that more guns means more crime." Joyce Lee Malcolm, Guns and Violence: The English Experience 218-19 (Harv. U. Press 2002).

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