MILITIA MADNESS:

HOW THE *PARKER* COURT SUBSTITUTED AN "ARMED POPULACE" FOR THE "WELL REGULATED MILITIA" OF THE SECOND AMENDMENT

The first two installments in the Brady Center's rolling critique of the 2-1 panel decision by the United States Court of Appeals for the D.C. Circuit in *Parker v. District of Columbia*[1] explained how the court erred by disregarding the binding precedent of *United States v. Miller*,[2] and by improperly obliterating the militia purpose contained in the Second Amendment's text.[3]

In this third installment, we explain how the *Parker* court, while disregarding the militia purpose of the Second Amendment as having no limiting effect, also totally mischaracterized the "well regulated Militia" that the Framers meant to protect. To the Framers, the "well regulated Militia" was an armed, organized, and disciplined governmental military institution made up of citizens. It helped fight the British during the Revolutionary War, and afterwards was called out to suppress armed insurrectionists like the farmers in Shays's Rebellion.[4] Thereafter, it was formally embodied in the Constitution and protected by the Second Amendment. It has existed, in some form, ever since.[5] The "well regulated Militia['s]" value to our society has always been to serve the three purposes laid out for it in the Constitution: "to execute the Laws of the Union, suppress Insurrections and repel Invasions."[6] Service in the militia was a civic duty, not a right.

The *Parker* opinion ignored this history and these purposes. Instead, the court substituted a fabricated world in which the "well regulated Militia" is an "armed populace" of citizens merely "subject to organization" who keep guns for "private purposes" and therefore have them available if called into militia service.[7] Like so many other parts of the *Parker* opinion, this is a fantasy.

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[1] 478 F.3d 370 (D.C. Cir. 2007), rehearing en banc denied (May 8, 2007) (renamed *District of Columbia v. Heller* in the Supreme Court appeal).

[2] 307 U.S. 174 (1939). *See* Brady Center, *Mangling Miller: How the Parker Opinion Distorted and Defied Supreme Court Precedent* (2007), at www.gunlawsuits.org.

[3] *See* Brady Center, *Decision by Eraser: How the Parker Court Obliterated Half of the Second Amendment* (2007), at www.gunlawsuits.org.

[4] *See* Saul Cornell, *A Well-Regulated Militia, The Founding Fathers and the Origins of Gun Control in America* 30-37 (2006) (explaining how Shays's Rebellion helped lead the Framers to strengthen federal control of the militia).

[5] *See* H. Richard Uviller and William G. Merkel, *The Militia and the Right to Arms* (Duke University Press 2002) (recounting the militia's evolution from the revolutionary period up through today).

[6] U.S. Const. Art. I, § 8. It did not always serve these purposes well, however, which is why Congress formed the militia into the National Guard at the beginning of the 20th Century. *See* Frederick Bernay Weiner, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 187-94 (1940).

[7] *Parker*, 478 F.3d at 389 (arguing that "well regulated Militia" was intended to comprise armed citizens who were "subject to organization … as distinct from actually organized"); *id.* at 383 (concluding that the

If the Second Amendment is read naturally, in the order it is written, then its militia purpose explains "the right of the people to keep and bear Arms," not the other way around.[8] A "well regulated Militia" is the Amendment's aim, not merely some side benefit of arms owned for "private purposes." Moreover, it is the "well regulated Militia" composed of men "fighting for their common liberties" and "united and conducted by governments"[9] that satisfied Anti-Federalist concerns about the potential threats of a standing army, not *Parker's* vision of an "armed populace."[10]

<u>*Parker's* Distorted Intepretation of a "Well Regulated Militia"</u>

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

As our second installment explained, the *Parker* majority began its analysis of this text by slicing and dicing it. Starting with the last fourteen words of the Amendment, the court interpreted each word in isolation and assumed this sentence fragment protected ownership and use of arms by individuals for wholly "private purposes."[11]

In reaching this conclusion, the court never even considered whether the first half of the Second Amendment should inform its meaning. Indeed, the court flatly rejected the approach mandated by a unanimous U.S. Supreme Court in *U.S. v. Miller*, which held that the Second Amendment "must be interpreted and applied" with its "obvious purpose" in view – "to assure the continuation and render possible the effectiveness" of the "well regulated Militia."[12] Dissenting Judge Henderson ably pointed out this error.[13]

Belatedly, the court turned to the Second Amendment's first half. Even then, however, *Parker*'s analysis is devoid of any explanation of why it included this discussion. After four pages, the court found that these words ultimately had no bearing

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"right to keep and bear Arms" was "premised on the commonplace assumption that individuals would use them for private purposes").

[8] *Miller,* 307 U.S. at 178. The Select Committee of the House of Representatives, to which Madison's original draft of the Second Amendment was referred, actually reversed Madison's sentence to place the "well regulated Militia" first. It stayed there during subsequent drafts. *See* Uviller and Merkel, *supra* note 5, at 97-106. *See also* Steven J. Heyman, *Natural Rights and the Second Amendment,* 76 Chi-Kent L. Rev. 237, 263 (2000) ("Indeed, most of the state constitutions speak not of a right to bear arms, but rather of the importance of a citizen militia.").

[9] *See infra* notes 78-79 and accompanying text (discussing and quoting Madison's Federalist No. 46).

[10] *Parker*, 478 F.3d at 390.

[11] *See Decision by Eraser, supra* note 3, at 2-10.

[12] *Miller,* 307 U.S. at 178.

[13] *Parker*, 478 F.3d at 404 ("[U]ntil and unless the Supreme Court revisits *Miller*, its reading of the Second Amendment is the one we are obliged to follow.").

on the Amendment's meaning. The majority concluded: "The prefatory language announcing the desirability of a well-regulated militia … is narrower than the guarantee of an individual right to keep and bear arms."[14] The *Parker* court had no basis, in text or history, for this pronouncement, and its "analysis" provided none. Moreover, the *Parker* court's approach violates perhaps the most fundamental rule of Constitutional interpretation: that no clause can be presumed to be without effect.[15] Let us retrace the *Parker* court's discussion of the phrase "well regulated Militia."

- **If Citizens Must First be Enrolled to be Militiamen, How Can the Existence of the Militia Precede its Organization?**

To define the word "Militia," the *Parker* majority drew upon statements from *Miller* and the Militia Act of 1792,[16] but consistently misinterpreted them. Rather than try to understand the entire Second Amendment, or even the first half of the Amendment, as a whole, the *Parker* court continued its slice and dice methodology by plucking the word "Militia" out of the sentence and defining it in isolation. It compounded this error by never once considering how the word "Militia" is used throughout the Constitution, even though it demanded this intratextual comparison when evaluating the meaning of the phrase "the people."[17] The Ninth Circuit has fully exposed the hypocrisy of this approach.[18]

Here is one of the first passages from *Miller* quoted by the *Parker* court:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens ***enrolled*** for military discipline." And further, that ordinarily when called for service these men were

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[14] *Id.* at 390. As we explained in *Decision by Eraser, supra* note 3, at 4, 11 & nn. 21, 61, this conclusion renders the first half of the Second Amendment superfluous.

[15] *See Decision by Eraser, supra* note 3, at 1, 15 (citing and quoting *Marbury v. Madison*).

[16] Act of May 2, 1792, ch. XXVIII, 1 Stat. 264.

[17] *Parker*, 478 F.3d at 382. In a subsequent installment in our series, we will examine in detail the *Parker* court's argument that the use of the phrase "the people" in the Second Amendment itself defeats the claim that the right guaranteed is confined to militia service.

[18] *Silveira v. Lockyer*, 312 F.3d 1052, 1069-72 & n.25 (9th Cir. 2002) (explaining how the multiple uses of the word "Militia" throughout the Constitution unquestionably establish it as a governmental military entity). *See also* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 125 (2000) ("Any effort to define 'militia' intratextually must begin with Article I, Section 8, Clause 16, which treats the militia as an entity that Congress has the legislative responsibility for 'organizing, arming, and disciplining.'").

> expected to appear bearing arms supplied by themselves and of the kind in common use at the time.[19]

The *Parker* majority followed this block-quoted passage from *Miller* with extensive quotations from the Militia Act of 1792 that required "able-bodied white male citizens of the respective states" to be ***"enrolled"*** in the militia, and required, "[t]hat every citizen, ***so enrolled*** and notified, shall, within six months thereafter, provide himself with a good musket or firelock" and other material needed by militiamen.[20] The court even emphasized that "the [Militia] Act's ***first requirement*** is that the 'free able-bodied white male' population between eighteen and forty-five ***enroll*** in the militia."[21] Moreover, among the twin characteristics of the militia, *Parker* identified enrollment as one of them:

> *Miller* defines the militia as having only two primary characteristics: It was all free, white, able-bodied men of a certain age ***who had given their names to the local militia officers*** as eligible for militia service.[22]

Despite these statements, the *Parker* majority drew the following inexplicable conclusion in the very next sentence of its opinion: ***"Contrary to the District's view, there was no organizational condition precedent to the existence of the 'Militia.'"***[23] The court continued with this misguided analysis:

> Congress went on in the Militia Act of 1792 to prescribe a number of rules for organizing the militia. But the militia itself was the ***raw material*** from which an organized fighting force was to be created…. The crucial point is that the existence of the militia preceded its organization by Congress, and it preceded the implementation of Congress's organizing plan by the states.[24]

These passages highlight a chicken-and-egg problem with the *Parker* court's analysis. The militia could not have been the "raw material from which an organized fighting force was to be created" because, as the court acknowledged – even ***emphasized*** – the first act in forming a militia is to ***enroll*** adult male members in it by providing their names to local militia officers. The court failed to realize that even the act of enrollment requires the existence of an organized militia, complete with militia officers ready and able to receive and record those names. Moreover, unless a citizen is enrolled, it is quite

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[19] *Parker,* 478 F.3d at 386 (quoting *Miller*, 307 U.S. at 178-79) (emphasis added).

[20] *Id*. at 387 (quoting Militia Act of 1792).

[21] *Id.* (first emphasis added; second emphasis in original).

[22] *Id.* (emphasis added).

[23] *Id.* (emphasis added).

[24] *Id.* at 388.

clear that he cannot be a militiaman. The person might be in possession of a firearm, but he or she would not be in the militia.

Even more devastating for the *Parker* court's argument is the fact that for a militia to ***function***, i.e., act as a militia in fulfillment of one of the purposes outlined in Article I of the Constitution, it cannot just be an inert list of enrolled members. To be a militia, a body of citizens must form into an organized, trained, and disciplined fighting force. A militia may not have the same level of professionalism as a standing army, but it must be organized, trained, and disciplined in much the same way. Anything less is not a militia.

The *Parker* majority seems to have ***wanted*** the militia to be an ***"armed populace"*** that exists independent of any organization or purpose,[25] but, given the militia's requirement that citizens be enrolled in a military institution to be part of it, *Parker's* arguments never quite make it there. Historical facts and the meaning of words are, after all, stubborn things. Noah Webster's 1828 dictionary makes it clear that word "militia" meant an enrolled fighting force:

> The body of soldiers in a state ***enrolled*** for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations.[26]

Why is this important if the *Parker* court already rejected the notion that the militia purpose of the Second Amendment has any limiting effect on the rights of individuals to own firearms for "private purposes"? Presumably, though this is by no means clear from the opinion, it is because the *Parker* majority sought a backdoor way of protecting the rights of the lone plaintiff granted standing in the case – Dick Heller.[27] If he were in the militia, the *Parker* court might have tried to argue, then his right to "keep and bear Arms" might also be protected as part of that role irrespective of whether he had ever been organized, trained, or disciplined. That argument would fail for the reasons explained above. But it would also fail because there is no evidence that Mr. Heller ever ***enrolled*** in any militia.[28]

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[25] The court comes close to suggesting that it is when it uses that phrase in the context of discussing Madison's Federalist No. 46. *Parker*, 478 F.3d at 390. We discuss below how *Parker* totally misconstrues Madison's text. *See infra* notes 73-80 and accompanying text.

[26] Noah Webster, *Noah Webster's First Edition of An American Dictionary of the English Language* (American Christian history education series, The Foundation, 4th ed. 1985) (1828) (emphasis added).

[27] For a discussion of Mr. Heller's circumstances, *see Parker*, 478 F.3d at 373-74, 376.

[28] Moreover, even if he had enrolled, this would not change the fact that his firearms ownership rights would have to be connected to his service in the militia. *See Miller*, 307 U.S. at 178.

Another approach the *Parker* court might have taken would have been to attempt to equate "the people" in the Second Amendment with the "Militia." That was the view advanced by the Fifth Circuit in *United States v. Emerson*,[29] the only federal circuit court opinion in U.S. history other than *Parker* to hold the Second Amendment protected individual ownership of firearms. Tellingly, however, the *Parker* majority was unwilling to go that far, instead concluding that

> [t]he militia was a large segment of the population – ***not quite synonymous with "the people," as appellants contend*** – but certainly not the organized "divisions, brigades, regiments, battalions, and companies" mentioned in the second Militia Act.[30]

The *Parker* majority does not explain why it did not take this leap. Perhaps the court declined because it is an absurd position.[31] Indeed, as historian Jack Rakove has ably explained, the Senate in the First Congress actually deleted the phrase "composed of the body of the people" after the phrase "well regulated Militia" from the draft of the Second Amendment.[32] This permitted Congress, which had been granted the power to "organiz[e], arm[], and disciplin[e], the Militia" in Article I, to retain "all the authority it needed to determine whether a select militia would or would not prove more desirable than a massed array of the whole male population."[33] This is exactly what Congress did in 1903 when it formally created the National Guard after more than 100 years of failing to turn a broad militia into a useful fighting force.[34]

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[29] 270 F.3d 203, 234 & n.36 (5th Cir. 2001) ("And, 'Militia,' just like 'well regulated Militia,' likewise was understood to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large.").

[30] *Parker,* 478 F.3d at 388 (emphasis added).

[31] *See Silveira*, 312 F.3d at 1069-72 (explaining multiple reasons why the "Militia" is a governmental military entity and not "the people"); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 Chi-Kent L. Rev. 291, 305-06 (2000) (explaining how, if the militia and the people are one and the same, this equation would "prove[] to be enormously embarrassing" to individual rights scholars).

[32] Rakove, *supra* note 18, at 125.

[33] *Id. See also id.* at 128-32 (recounting history of the debates of the Constitutional Convention to explain that "the framers, clearly reasoning on the basis of hard-earned experience, saw the militia as an institution that would henceforth be regulated through a combination of national and state legislation firmly anchored in the text of the Constitution, rather than some preexisting, preconstitutional understanding."); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chi-Kent L. Rev. 3, 15-16 (2000) (explaining that while Madison favored a universal militia and Hamilton argued for a select militia, they "agreed as a constitutional matter to leave this up to Congress" by giving Congress the power to organize the militia).

[34] *See* Weiner, *supra* note 6, at 187:

> The basic fallacy of the 1792 [Militia] Act was that it was unselective. It imposed a duty on everyone, with the result that this duty was discharged by no one. Its provisions were unworkable when they were adopted; they were soon obsolete; as measures of national defense, they were worthless; and for generations prior to their repeal, in 1903, they were, in Maitland's phrase, no more than "an interesting cabinet of antiquities."

The *Parker* court concluded its discussion of the term "Militia" by claiming that the "current congressional definition of the 'Militia' accords with its original usage."[35] It then quoted the Dick Act of 1903, which replaced the Militia Act with a system dividing the militia between members of the National Guard and the "reserve" or "unorganized" militia.[36] The court asserted that the District's militia law is similarly structured.[37]

As with its previous discussion, however, the *Parker* majority continued to draw false conclusions from the evidence. The "unorganized" militia mentioned in the Dick Act bears no resemblance to the militia spelled out in the Militia Act of 1792. More importantly, under current law, the "unorganized" militia is not authorized to use force of arms to carry out any of the three purposes spelled out for the militia in Article I, § 8 of the Constitution. Before it could do that, its members would have to be incorporated into the organized militia, subject to the control and discipline of militia officers under direction of the states or federal government.[38] The *Parker* majority conveniently ignored these facts.

Moreover, there is no evidence that the plaintiff, Dick Heller, would qualify as a member of any militia, organized or unorganized, as he has not met even the most basic requirement that he be ***enrolled***. As we will see below, the Second Amendment does not simply reference the "Militia." Its purpose is to protect "[a] well regulated Militia, being necessary to the security of a free State." By no possible stretch can Mr. Heller's firearm(s) further that purpose.

- **How Can a "Well Regulated" Militia Simply Be Citizens "Subject to Organization"?**

Unable to make sense of the word "Militia," the *Parker* majority strayed even farther from historical reality and the text of the Second Amendment when it attempted to interpret the phrase "well regulated Militia."

Responding to the District's point that the "'[t]he militia was not individuals acting on their own,'" the court admitted that the "militia was a collective body designed

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See also id. at 194 (quoting President Theodore Roosevelt as saying: "Our militia law is obsolete and worthless."); *Perpich v. Department of Defense,* 496 U.S. 334, 341 (1990) (explaining how the militia "was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force."); Uviller and Merkel, *supra* note 5, at 109-44 (explaining historical devolution of broad militia into more selective and functional National Guard).

[35] *Parker*, 478 F.3d at 388.

[36] *Id.* (citing 10 U.S.C. § 311).

[37] *Id.* at 388 (citing D.C. Code § 49-401).

[38] *See generally Perpich v. Department of Defense,* 496 U.S. 334 (1990) (explaining workings of Militia Clauses and the Dick Act).

to act in concert."[39] This was a significant admission, because it cannot be reconciled with the court's position, stated later in its opinion, that the "well regulated Militia" was a pre-organized "armed populace" merely "subject to organization … as distinct from actually [being] organized." By analogy, that would be like saying a "football team" is the individual players sitting at home. No one would accept that view. A football team, like a militia, is a "collective body" designed, and trained, to act in concert.

Confronting the use of the phrase "well regulated" to modify "Militia," the *Parker* court argued that the Framers of the Second Amendment could not have intended, by inclusion of that phrase, to turn "the popular militia embodied in the 1792 [Militia] Act into a 'select' militia that consisted of semi-professional soldiers like our current National Guard."[40] However, the "militia purpose" interpretation of the Second Amendment need not, and does not, assert that the term "well regulated" means that the militia protected by the Second Amendment is necessarily a "select" militia like our current National Guard. This is yet another "straw man" that the *Parker* majority was anxious to knock down. Rather, the "militia purpose" interpretation asserts only that the term "well regulated" supports the conclusion that the militia protected by the Second Amendment is necessarily organized, trained, and disciplined by government, regardless of whether its membership includes a broad swath of the population, as it did during the Framers' time, or is the "select" group of citizen-soldiers that Congress formed into the National Guard when it passed the Dick Act in 1903. Whatever the nature of its membership, it would seem plain that a "well regulated" militia, by definition, cannot be simply a group of citizens "subject to organization," but must be, in fact, "organized."

Having rejected what it concluded "well regulated Militia" did ***not*** mean, the court then turned to its view of "what the drafters of the Second Amendment contemplated as a 'well regulated Militia.'"[41] It purported to find this meaning in the requirements imposed on militiamen by the Militia Act of 1792. They must (1) enroll, and (2) arm themselves. These requirements were independent, the court asserted.

> [M]ilitiamen were obligated to arm themselves regardless of the organization provided by the states, and the states were obligated to organize the militia, regardless of whether individuals had armed themselves in accordance with the statute. We take these dual requirements – that citizens were properly supplied with arms and ***subject*** to organization by the states (as distinct from actually organized) – to be a clear indication of what the authors of the Second Amendment contemplated as a "well regulated Militia."[42]

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[39] *Parker*, 478 F.3d at 388.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 389 (emphasis supplied, italics in original).

The *Parker* court went on to explain that another aspect of "well regulated" is the exclusion of certain persons from militia service.[43] And the court returned to the assertion – pointless as it was – that the militia was not an "elite or select body."[44]

Unfortunately, *Parker's* view of what the Framers intended by the phrase "well regulated Militia" is completely divorced from reality. It is quite irrelevant whether the requirements of the Militia Act of 1792 can be broken down into the independent steps that seem to captivate the *Parker* majority. There is no evidence that members of the First Congress were engaged in a similarly atomistic exercise when they drafted the Second Amendment. To anyone of that time, the phrase – "A well regulated Militia, being necessary to the security of a free State" – would obviously have meant the organized state militias that had fought in the Revolutionary War and been sent thereafter to suppress insurrections like Shays's Rebellion.[45] Many of the Framers had served in such militias or commanded them. It is not credible to conclude that they viewed those military institutions as simply a mass of armed citizens "subject to organization."[46] After all, the Constitution followed the Articles of Confederation, which required that: "Every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered."[47] And the Second Amendment followed the Constitution itself, which sets out rules for organizing, arming, and disciplining the militia.[48] Thus, they were hardly writing on a clean slate.

It is also impossible to imagine how a "well regulated Militia" – if it is intended to mean completely unorganized armed citizens merely ***subject*** to organization – could be "necessary to the security of a free State." For that to be true, wouldn't it first have to be "well regulated," i.e., properly trained, disciplined and organized?[49] How else could it ***function*** to protect state security? General George Washington, who relied more on his army of regulars than state militias to fight and win the Revolution, was not even

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[43] *Id.*

[44] *Id.*

[45] *See Silveira,* 312 F.3d at 1069-72 (discussing history and Constitutional context of the militia); *A Well Regulated Militia, supra* note 4, at 39-70 (discussing history of the militia prior to and during the drafting and ratification of the Second Amendment); Uviller and Merkel, *supra* note 5, at 193-94 (explaining that the phrase "well regulated" indicated a militia that was a "creature of statute, defined and governed by laws and regulations, rather than an informal collection of armed citizens.").

[46] Recall the analogy we made that such a claim is like suggesting that a "football team" is simply the players sitting at home, "subject to organization." It is ridiculous.

[47] ARTICLES OF CONFEDERATION art. VI.

[48] U.S. Const., Art. I, § 8.

[49] The Oxford English Dictionary defines "well regulated" as: "governed by rule, properly controlled or directed," or "of troops: properly disciplined." Oxford English Dictionary Online (2d ed. 1989). Certainly, as evidenced by state militia laws of the eighteenth century, those institutions were well regulated. *See* Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 508-10 (2004).

enamored of "well regulated" militia when facing off against British troops.[50] Imagine how he might have felt about the military value of pre-organized armed citizens. He certainly would not have called them "well regulated."[51] To extend the analogy we have been using, that would be like calling a random set of twenty-two people a "well regulated" football team if they were merely enrolled and happened to own some football equipment, but had never met or trained together.

Amazingly, the *Parker* court did not even mention the phrase – "being necessary to the security of a free State" – when discussing the meaning of a "well regulated Militia," as if this language provides no additional context to understand what the Framers meant.[52]

Moreover, when the *Parker* majority finally discussed this language, in rebuttal to Judge Henderson's dissent, it invented the idea that the phrase "a free State" was intended to mean "republican government" and not a state of the union.[53] The court asserted that "[e]lsewhere the Constitution refers to 'the states' or 'each state' when unambiguously denoting the domestic political entities such as Virginia, etc.," as if "a free State" was intended to mean something completely different.[54] It is, in fact, impossible to find a single instance of the word "State" or "States" in the Constitution (apart from "United States") that ***does not*** refer to a domestic political entity other than *Parker's* assumed single example in the Second Amendment. Thus, it is absurd to conclude that the modifier "each" or the use of the plural "States" somehow converts these Constitutional phrasings into references to the states of the union while the singular word "State" does not. A quick perusal of the Constitution finds numerous uses of the singular word "State" that undoubtedly refer to domestic political entities and not "republican government generally."[55]

The *Parker* court's discussion of the legislative history of the Second Amendment – in which the phrase "the best security of a free country" was amended to "being necessary for the security of a free State" – is equally unpersuasive.[56] Given the fact that the sole point of the Congressional debate on the Second Amendment was to preserve

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[50] *See* Uviller and Merkel, *supra* note 5, at 59 (quoting General Washington as writing: "Militia, you will find, Sir, will never answer your expectation, no dependence is to be placed upon them."); *id.* at 65 (quoting General Washington: "Regular troops alone are equal to the exigencies of modern war, as well for defence as for offence…. No militia will ever acquire the habits necessary to resist a regular force.").

[51] This view was also shared by Alexander Hamilton, writing in Federalist No. 29. *See* Hamilton 182 (Rossiter 1961).

[52] *Parker*, 478 F.3d at 386-90 (spending four pages analyzing the militia clause of the Second Amendment without even once mentioning this language).

[53] *Id.* at 396.

[54] *Id.*

[55] *See, e.g.,* Article I, § 2 (two uses); § 3 (two uses), § 9 (three uses), § 10 (five uses). Additional examples can be found in subsequent articles.

[56] *Parker*, 478 F.3d at 396.

state militias from an overreaching standing army, it made perfect sense to change "country" to "State."[57] Moreover, had Congress intended to protect the security of "republican government," it would have been better to have left Madison's original draft alone (or to insert the words made up by the *Parker* majority). Congress did not do so.[58]

In the end, as with its discussion of the word "Militia," it is not clear why the *Parker* court engaged in its fanciful analysis of the phrase "well regulated Militia." It got the court no closer to supporting a right to firearms ownership for the lone plaintiff in the case. Dick Heller is no more a part of a "Militia" than he is part of a "well regulated Militia" or a "well regulated Militia, being necessary to the security of a free State."

- **Are Private Arms for "Private Purposes" Really "the Best Way to Ensure That the Militia Could Serve When Called"?**

The *Parker* majority came closest to revealing its purpose in discussing the "Militia" and "well regulated Militia" with the following key passage:

> The important point, of course, is that the popular nature of the militia is ***consistent with*** an individual right to keep and bear arms: Preserving an individual right was the ***best way*** to ensure that the militia could serve when called.[59]

The first half of this sentence did not get the court any closer to its goal, however. Regardless how "popular" the nature of the militia was in the 1790s or is today, there is no logical or historical connection between such service and private ownership of arms for "private purposes."[60] Nor does it matter whether the militia and individual ownership of arms are "consistent." They have always coexisted in our society. That does not mean that a right to keep and bear arms for private uses follows from "the right of the people to keep and bear Arms" in support of a "well regulated Militia, being necessary to the security of a free State." Militiamen required to purchase arms by the Militia Act of 1792 might possess them for their entire lives, but that does not support the notion that non-militia use of those firearms was protected by either the Militia Act or the Second Amendment.[61]

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[57] *See* Uviller and Merkel, *supra* note 5, at 97 ("Most significantly, the [House] Select Committee substituted "State" for "country" as the referent of the "best security" clause, so that the proposed amendment now addressed more directly anti-federal concern about state security.").

[58] The *Parker* majority's claim that Elbridge Gerry's floor commentary somehow led the rest of Congress – in which, as an Anti-Federalist, he was a decided minority – to adopt his views, is ridiculous. *Parker*, 478 F.3d at 396. Whatever Gerry may have felt about the threat of a ***state*** standing army, "he was alone in this apprehension." Uviller and Merkel, *supra* note 5, at 100. Moreover, his amendments ***lost***. *Id.*

[59] *Parker*, 478 F.3d at 389 (emphasis added).

[60] *See Decision by Eraser, supra* note 3, at 5 & nn. 26-27 (explaining legal disconnect between right to bear arms and use of weapons in self-defense).

[61] *See id.* at 10 (noting the fact that militiamen were required to purchase militia arms and keep them at home did not protect the use of those arms for "private purposes" "any more than military weapons issued

The second half of the sentence appears to suggest that only through a Constitutional right to private ownership of arms for private purposes will the "well regulated Militia" be able to serve when called. This claim at least finally provided an argument that attempted to connect the "right of the people to keep and bear Arms"[62] with the "preservation or efficiency of a well regulated militia."[63]

This argument cannot be sustained, however, because it is both illogical and historically inaccurate. The Militia Act of 1792 required militiamen to purchase and maintain particular types of weapons suitable for militia service, and to bring those weapons with them when called to militia muster.[64] Had Congress felt the "best way" to arm the militia was to protect a right to be armed for hunting and self defense through the Second Amendment, obviously there would have been no need to include within that Act – passed the year following ratification of the Amendment – a requirement for militiamen to purchase "'a good musket or firelock.'"[65]

Moreover, leaving arms ownership up to the whims of private citizens would have fared even worse than the Militia Act as an effective means of arming state militias.[66] Instead of a statutory requirement for militiamen to arm themselves with specific weapons suitable for militia service, individuals would have had the right under the *Parker* court's interpretation of the Second Amendment to choose to own arms suitable or unsuitable for militia service, or no arms at all. How could that possibly be the "best way to ensure that the militia could serve when called"?[67]

There is simply no connection between service in a "well regulated Militia" and private ownership of arms for private purposes. Guaranteeing a right to possess guns for private purposes is neither a necessary nor a sufficient condition for arming state militias.

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to soldiers or members of the modern militia, or police sidearms issued to law enforcement officers, are constitutionally protected when used for private purposes"). *See also Silveira*, 312 F.3d at 1074 ("Arms can be 'kept' for various purposes – military, social, or criminal. The question with respect to the Second Amendment is not whether arms can be kept, but by whom and for what purpose.").

[62] U.S. Const., Amend. 2.

[63] *Miller*, 307 U.S. at 178.

[64] Act of May 2, 1792, ch. XXVIII, 1 Stat. 264.

[65] *Parker*, 478 F.3d at 387 (quoting Militia Act).

[66] *See supra* note 34, *infra* notes 68-69, and accompanying text (discussing historical failure of Militia Act of 1792 to arm state militias).

[67] For the same reasons, the *Parker* court's later claim that "[t]he individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty," *Parker*, 478 F.3d at 395, is also false. Private arms might be completely unsuitable for militia service, and constitutional protection of militia arms for militia service does not imply parallel protection of private arms for "private purposes." *Cf. Aymette v. State,* 21 Tenn. 154 (1840) (explaining the legislature's right to prohibit keeping weapons not used in civilized warfare or that would not contribute to the common defense).

It is not necessary, since the Constitution gave Congress the power to require the possession of guns for militia purposes (which it exercised in 1792), nor is it sufficient, because it makes the effective arming of the militia dependent on the uncertain choices of private citizens about whether to arm themselves and what arms to possess. The disconnect can be seen in the example of plaintiff Dick Heller, whose private firearm(s) have never had any connection to the militia.

Historically, the attempt to arm state militias by requiring militiamen to purchase muskets and bring them to militia musters was largely unsuccessful.[68] Only a small percentage of militiamen ever supplied their own arms. To keep the militia armed, the requirements outlined in the Militia Act of 1792 were gradually replaced with arms provided by the states and paid for by the states or the federal government.[69] The *Parker* opinion completely ignored this historical record.

The *Parker* majority also completely missed the significance of the fact that the Militia Act of 1792 required militiamen to be armed as part of a ***duty*** owed to government.

> "[T]he ideal of liberty at the root of militia was not part of a radical individualist and anti-statist ideology." Instead, the right to arms found expression in a world much more deeply committed to communal, civic obligations than our own, in which liberties and duties intertwined in a fashion difficult for adherents of postmodern radical individualism to accept.[70]

This is completely contrary to the idea that gun ownership in connection with militia service was a matter of individual rights comparable in nature to other individual rights in the Bill of Rights. A "well regulated Militia" must follow the orders of its officers, whereas an arms-bearing individual is free to march to his own drummer. The latter person might change hats and become a minuteman, but then he's no longer exercising his individual rights. The only reason the Second Amendment uses the phrase "the right of the people" is because there was concern that Congress might not provide for the state militias to be armed.[71] Once the Militia Act of 1792 was passed, however, this concern faded into insignificance.

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[68] *See* Garry Wills, *To Keep and Bear Arms,* N.Y. Rev. Books, Sept. 21, 1995, at 71 ("It is true that Congress passed a militia law in 1792 providing the every able-bodied man should equip himself with a musket to serve in the militia – but it was a dead letter, since no organized training was provided for."); *A Well Regulated Militia, supra* note 4, at 123 (noting that by 1809, there was widespread agreement in Congress that the Militia Act of 1792's goal of having militiamen arm themselves had been unsuccessful).

[69] *See* Uviller and Merkel, *supra* note 5, at 109-46 (recounting the decay of the old militia, the period of volunteers, and the rise of the National Guard).

[70] William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment,* 17 Stan. L. & Pol'y Rev. 671, 687 (2006) (quoting Cornell & DeDino*, supra* note 49, at 494).

[71] *See Decision by Eraser, supra* note 3, at 5 & n.23 ("'The whole tenor of the House debates indicates clearly that the Framers' purpose in the drafting of the Second Amendment was to protect the constitutional

- **Did the Second Amendment Protect an "Armed Populace" or a "Well Regulated Militia"?**

Finally, the *Parker* majority at least understood that the Second Amendment was passed to palliate the Anti-Federalists by protecting the militia and its role from potential excesses of the newly-created standing army.[72] But even here the opinion distorted reality when it suggested that the Federalists "relied on the existence of an ***armed populace*** to deflect Antifederalist criticism."[73]

The Federalists did not rely on the existence of a populace armed with weapons to use for "private purposes" to serve as the bulwark against the potential tyranny of a standing army, as the *Parker* majority suggested. After all, just prior to the Constitutional convention, the nation's leaders had to deal with armed uprisings like the 1786 Shays Rebellion, whose band of rebels likely would have been considered to be using firearms for "private purposes."[74] The Framers reacted to such uprisings by urging that the "well regulated Militia" be called out to ***suppress*** them.[75]

The experience with Shays's rebels led the Framers to define three purposes for the militia in the Constitution: "execute the Laws of the Union, suppress Insurrections, and repel Invasions."[76] The Framers also established a strong element of national control of the militia in the Constitution, granting Congress the power to call forth the militia, organize, arm, and discipline it, and govern such part of them that may be employed in service of the United States, while reserving to the states the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress.[77]

It was this institution and this structure that the Federalists relied upon in explaining to Anti-Federalists that a standing army could not hope to impose tyranny

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status of the militia; there is no suggestion of any concern with a personal liberty to carry arms for private purposes.'") (quoting Uviller and Merkel, *supra* note 5, at 99).

[72] *Parker*, 478 F.3d at 390.

[73] *Id.* (emphasis added).

[74] *See* Uviller and Merkel, *supra* note 5, at 72-73 (Shays's Rebellion "became one of the most compelling stimuli to formation of a stronger Union with a more vigorous executive, reliable military, and effective judicial system."); Paul Finkleman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 211-12 (2000) ("Shays's Rebellion had deeply frightened the elected political leaders who governed the nation after the Revolution…. Indeed, Shays's Rebellion helped convince many of the need for a new constitution with a strong national military.").

[75] Uviller and Merkel, *supra* note 5, at 73 (noting that although the governor called out the militia to suppress Shays's band, it was initially too weak and unreliable to do so).

[76] U.S. Const, art. I, § 8.

[77] *Id. See also Perpich,* 496 U.S. at 342-55 (explaining scope and rationale of Militia Clauses); Rakove, *supra* note 18, at 125 (explaining how Militia Clauses give Congress the power to define and control the militia).

upon the American people. It is quite clear from Madison's Federalist No. 46, only selectively quoted in *Parker*,[78] that far from supporting an insurrectionist's or "private purposes" view of the Second Amendment, Madison viewed the "well regulated Militia" composed of men ***"fighting for their common liberties"*** and ***"united and conducted by governments"*** as a bulwark against potential federal overreaching.

> "[A standing army] would not yield, in the United States, an army of more than twenty-five or thirty thousand souls. ***To these would be opposed a militia amounting to near a half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence***.[79]

An "armed populace" might have included the disgruntled citizens that rose up in Shays's Rebellion. A "well regulated Militia," on the other hand, was the antithesis of such a mob.[80]

Conclusion

The phrase – "A well regulated Militia, being necessary to the security of a free State" – is not difficult to understand. It quite obviously embodied the armed, organized, and disciplined governmental military institution made up of citizen-soldiers that had existed since well before the union was formed. The Framers lived with that institution. They could not have misunderstood it.

Unfortunately, the *Parker* majority ignored that historical reality and substituted an alternative reality made out of whole cloth. Instead of citizen-soldiers imbued with a civic duty to keep and bear arms to "execute the Laws of the Union, suppress Insurrections, and repel Invasions," *Parker* substituted an "armed populace" of citizens merely "subject to organization" (but not actually organized) who kept arms for "private purposes" unrelated to civic responsibilities. *Parker's* thesis defies the plain meaning, and historical significance, of the phrase, "a well regulated Militia, being necessary to the security of a free State."

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[78] *See Parker,* 478 F.3d at 383 n.9 (quoting Federalist No. 46 but omitting its discussion of the role of the militia); *id.* at 390 (citing Federalist No. 46 but again omitting its clear explanation that Madison was defending the well regulated militia and not an "armed populace" as a bulwark against tyranny).

[79] The Federalist Papers, No. 46: Madison 299 (Rossiter 1961). *See also* Rakove, *supra* note 18, at 142-44 (discussing how other aspects of Madison's Federalist No. 46 confirm that the militia was conceived as the antithesis of an armed populace).

[80] *See* David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms,"* 22 Law & Hist. Rev. 119, 148 (2004) ("The brief success of the Shaysites demonstrated the difference between a well-regulated militia under state control and the dangers of unorganized armed men claiming to embody the rights secured by the Revolution.").