PARKER AND "THE PEOPLE":

HOW THE *PARKER* COURT OBSCURED THE REAL ISSUE IN THE SECOND AMENDMENT DEBATE

The first three installments of *Second Amendment Fantasy: The D.C. Circuit's Opinion in the Parker Case* showed that the *Parker* majority disregarded binding Supreme Court precedent (*Mangling Miller*), effectively "erased" the first thirteen words of the Amendment (*Decision by Eraser*), and distorted the nature of the "well regulated Militia" referenced in the constitutional text (*Militia Madness*). This installment addresses the *Parker* court's "lead-off" argument: that the use of the term "the people" in the Second Amendment itself establishes that the right guaranteed by the Amendment extends to private purposes such as hunting and self-defense and is not confined to service in a "well regulated Militia."

Framing the Issue by Obscuring It

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." The *Parker* majority wrote that "[I]n determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right – 'the people'." [1] Noting that the term "the people" is found in the First, Second, Fourth, Ninth, and Tenth Amendments, the court asserted that it "has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation."[2] The majority concluded: "The natural reading of the 'right of the people' in the Second Amendment would accord with usage elsewhere in the Bill of Rights." "The people," according to the *Parker* court, cannot mean "some subset of individuals such as 'the organized militia,'" and also cannot mean "the states." Thus, the *Parker* court concludes, "the right in question is individual."[3]

The court, however, simply obscured the real issue. There is no question that the Second Amendment guarantees a right to "the people" -- that much is clear from the text. The issue is: *What* right does the Second Amendment grant to the people? Is it the right to possess and use guns for private purposes like hunting or self-defense, as asserted by the *Parker* majority, or rather the right to be armed for purposes related only to service in a government-organized militia?

It is no doubt true that the right of the people to keep and bear arms is different in important ways from the rights guaranteed by other provisions of the Bill of Rights. This becomes clear from the context in which the right is expressed in the Second Amendment. The right to keep and bear arms is the only right guaranteed in the Bill of

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[1] *Parker v. District of Columbia,* 478 F.3d 370, 381 (D.C. Cir. 2007).
[2] *Id.*
[3] *Id.*

Rights that has an expressed purpose to promote the security of a governmental entity; i.e. "a free State." [4] This is not to argue that the Second Amendment grants a right to "the states," rather than to "the people," an argument that functions as yet another straw man that the *Parker* court insists on knocking down.[5] (The court does this by noting that the Framers were quite capable of distinguishing between "the people" and "the states," and did so explicitly in the Tenth Amendment.)[6] The "militia purpose" argument, rather, is that the ultimate interest served by the people's right to keep and bear arms in the Second Amendment is the security of a free State. This distinguishes it from the other rights guaranteed by the Bill of Rights, none of which are modified by an express, limiting purpose, and all of which are more clearly intended as a protection of the private interests of those asserting the right. This distinction, however, makes the Second Amendment no more or less a "right of the people" than any of the other guarantees in the Bill of Rights.

In point of fact, there is far less uniformity in the nature of the rights guaranteed "the people" in the Bill of Rights than the *Parker* majority would have us believe. The *Parker* court asserts that all of the rights guaranteed in the first ten amendments are "individual" and not "collective" in nature. This is far from the truth. "The right of the people peaceably to assemble" in the First Amendment necessarily has a "collective" element; indeed the word "assemble" presupposes the participation of others. Other rights, in contrast, lack this necessarily "collective" element, such as "the right of the people…to petition the Government for a redress of grievances" in the First Amendment and "the right of the people to be secure…against unreasonable searches and seizures" in the Fourth Amendment. In the Ninth Amendment, providing that the enumeration of certain rights in the Constitution "shall not be construed to deny or disparage others retained by the people," it is unclear whether the "rights…retained by the people" are exclusively "individual" or rather have a collective element as well. The Tenth Amendment speaks not of "rights" at all, but of "powers." It provides that the powers not given the Federal government by the Constitution, nor prohibited by the Constitution to the states, "are reserved to the states respectively, or to the people." Although there may be some ambiguity here, it would seem that the "powers…reserved…to the people" would be reserved not to each person as an individual, but rather to "the people" collectively as the ultimate sovereign in our democracy.

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[4] In the last installment of *Second Amendment Fantasy* we addressed the *Parker* court's indefensible position that "a free State" refers not to a government entity, but rather to "republican government generally." *See Militia Madness* at 9-10.

[5] Although a "straw man" argument, unfortunately at least one court has adopted the position that the Second Amendment grants rights to the states, at least in the sense that only a state has standing to bring a Second Amendment case. *See Hickman v. Block,* 81 F.3d 98 (9th Cir. 1996). However, there is nothing in the text of the Second Amendment suggesting that only states, and not individuals, may bring Second Amendment claims. Second Amendment claims brought by individuals must be grounded in an asserted right to be armed in connection with service in an organized militia. *See generally,* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change,* 99 Mich.L.Rev. 588, 613-614 (2000).

[6] *Parker,* 478 F.3d at 381.

Apart from the Bill of Rights, there are two other uses of the phrase "the people," in the Constitution, both of which suggest a collective element. Article I, Section 2 provides that the House of Representatives "shall be composed of Members chosen every second Year by the People of the several States…." Obviously, choosing the Members of the House of Representatives is done by "the People" understood collectively. Of course, the most famous constitutional use of the term "the People" is in the first words of the Preamble, declaring that "We the People of the United States…do ordain and establish this Constitution for the United States of America." The collective sense of this usage is plain.

In the final analysis, though, deciding whether the "right of the people to keep and bear arms" is properly labeled "individual" or "collective" does not get us very far toward answering the central question of identifying the scope of the right guaranteed.[7] But there is nothing about the use of the term "the people" in the Second Amendment that itself defeats the "militia purpose" interpretation. Under the "militia purpose" view, individuals can assert the right guaranteed by the Amendment insofar as they are engaged, or seek to be engaged, in the constitutionally-protected conduct – possessing and using arms as part of a well regulated militia – and are being impeded in their efforts by Federal authority.

Imagining *Verdugo-Urquidez* as a Second Amendment Case

In support of its view that inclusion of the term "the people" itself defeats the "militia purpose" view of the Second Amendment, the *Parker* majority places surprising reliance on the Supreme Court's ruling in *United States v. Verdugo-Urquidez.*[8] According to the *Parker* majority, in this case, the Supreme Court "endorsed a uniform reading of 'the people' across the Bill of Rights."[9]

But the *Verdugo-Urquidez* opinion says nothing about whether the right of the people to keep and bear arms is limited to armed service in the militia; indeed, *Verdugo-Urquidez* is not a Second Amendment case at all. The case concerned whether the Fourth Amendment's "right of the people to be secure…against unreasonable searches and seizures" applies to a search by federal DEA agents of the Mexican home of a suspected Mexican drug trafficker. In holding that the accused Mexican trafficker could not assert

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[7] It is unfortunate that participants in the debate over the meaning of the Second Amendment have consumed much energy on the question of whether it is properly labeled an "individual" or "collective" right. Some courts adopting the "militia purpose" view also have labeled it a "collective right." *See, e.g., Love v. Pepersack,* 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), and participants in the popular debate over the Amendment's meaning frequently adopt the "individual" vs. "collective" rights framing of the issue. As explained above, like the "right of the people peaceably to assemble," the Second Amendment, properly understood, has an inherently collective element. Like the right to assemble, however, this collective element does not preclude individuals from bringing Second Amendment claims.

[8] 494 U.S. 259 (1990)

[9] *Parker,* 478 F.3d at 381.

a Fourth Amendment claim, the Supreme Court noted the use of the phrase "the people" in various Amendments of the Bill of Rights, including the Fourth Amendment:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth 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.[10]

Interestingly, the Court treated the "the people" in the First, Second, Fourth, Ninth and Tenth Amendments as indicating a *less* expansive scope than the use of the words "person" and "accused" in the Fifth and Sixth Amendments.[11]

The reference to the Second Amendment in *Verdugo-Urquidez* suggests, in dicta, the Supreme Court's view that "the people" given the right to keep and bear arms are part of "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." At most, this suggests that aliens living abroad have no Second Amendment rights.[12] The paragraph says nothing about whether the right given by the Second Amendment to "the class of persons who are part of a national community" is a right to be armed for militia purposes, or for private purposes. If anything, the dicta in *Verdugo-Urquidez* seems to contradict the statement in *Parker* that "the people" cannot mean "some subset of individuals…." Under the Supreme Court's formulation, "the people" means the "subset of individuals" who can be considered part of our national community. Nothing in *Verdugo-Urquidez* contradicts the view that the Second Amendment right applies to the "subset of individuals" who possess guns, or seek to possess guns, as part of an organized militia.

<u>Conclusion</u>

There is little doubt that the *Parker* majority saw its argument based on the meaning of "the people" in the Second Amendment as its most potent argument supporting the "private purpose" interpretation. When examined carefully, though, the court's argument is simply an extreme example of its flawed "slice and dice" approach to the Amendment's text. By examining the words "the people" in complete isolation from the remainder of the text, the *Parker* court obscured the real issue: What is the nature and scope of the right to keep and bear arms guaranteed to the people by the Second Amendment? As argued throughout *Second Amendment Fantasy,* there is only one answer to that question that accounts for all the words of the Second Amendment and

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[10] *Verdugo-Urquidez*, 494 U.S. at 265.
[11] *Id.* at 265-66.
[12] Although *Verdugo-Urquidez* suggests that connection to our national community is a unifying element in the multiple uses of "the people" in the Bill of Rights, this says nothing about whether the various rights guaranteed to "the people" differ in their nature and scope.

accurately reflects its history: the Amendment guarantees to the people the right to keep and bear arms in service to a well regulated militia.