



WISHFUL THINKING:

HOW THE PARKER COURT TWISTED AND MISREPRESENTED THE HOLDINGS OF SUPREME COURT AND STATE CASES

The first four installments of *Second Amendment Fantasy: The D.C. Circuit's Opinion in the Parker Case*¹ showed that the two judges in the *Parker* majority disregarded binding Supreme Court precedent (*Mangling Miller*), effectively “erased” the first thirteen words of the Amendment (*Decision by Eraser*), distorted the nature of the “well regulated Militia” referenced in the constitutional text (*Militia Madness*), and obscured the issue of what right the Second Amendment grants to “the people” (*Parker* and “*The People*”).

This installment addresses the *Parker* majority’s citation to state and Supreme Court case law containing passing references to the Second Amendment in footnotes and *dicta*, or even a brief mention of the Amendment in a *dissent*, as support for its activist re-interpretation of the Second Amendment. All told, of the eleven state and Supreme Court cases examined below and cited by *Parker* as holding that the Second Amendment grants a right to possess firearms for private purposes, only two state cases can possibly be read to support such a theory.² Yet these two cases contain only brief references to the Second Amendment in *dicta* that even *Parker* admits is contradicted by binding Supreme Court precedent.³

The *Parker*’s majority’s reliance on such *dicta* violates Justice Marshall’s stern warning on the hazards of citing pronouncements about the law that are not at issue in a case: “It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings, and, at best, inexplicitly stated as establishing important law principles.”⁴ The *Parker* court’s claim that these eleven cases support its view of the Second Amendment is nothing more than wishful thinking.

Misrepresenting Supreme Court Case Law

In *Mangling Miller*, we examined how the *Parker* majority twisted and misinterpreted the Supreme Court decision in *United States v. Miller*.⁵ In *Parker* and “*The People*,” we discussed how the *Parker* court took *dicta* in *United States v. Verdugo-Urquidez*⁶ – a case that had nothing

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

² These cases are *Rohrbaugh v. State*, 607 S.E.2d 404, 412 (W. Va. 2004) and *State v. Anderson*, 2000 WL 122218 (Tenn. Crim. App. Jan 26, 2000), and are examined below.

³ As discussed below, these two cases concern the interpretation of state law, and *Parker* concedes that the Supreme Court has repeatedly held that the Second Amendment “constrain[s] only federal government action and [does] not apply to the actions of state governments.” *Parker* at 391 n.13, citing *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); *Presser v. Illinois*, 116 U.S. 252, 264-66 (1886); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900); *Twining v. New Jersey*, 211 U.S. 78, 98 (1908).

⁴ *Alexander v. Baltimore Ins. Co.*, 4 Cranch 370, 379 (U.S. 1808).

⁵ 307 U.S. 174 (1939).

⁶ 494 U.S. 259 (1990).



to do with the Second Amendment – and wrongly ascribed to it a holding that the Second Amendment grants “the people” a right to be armed for private purposes unrelated to the militia. In fact, as explained in detail in *Parker and “The People,” Verdugo-Urquidez* never answers or even addresses the question of what right was granted to “the people” by the Second Amendment. The *Parker* court engaged in similar intellectual dishonesty with its reliance on other Supreme Court cases that have nothing to do with the Second Amendment. These cases are *Dred Scott v. Sandford*,⁷ *Robertson v. Baldwin*,⁸ and *Muscarello v. United States*.⁹

The *Parker* court’s desperation is perhaps most starkly revealed by its reliance on one of the most thoroughly discredited cases in Supreme Court history, *Dred Scott v. Sandford*.¹⁰ *Dred Scott*, of course, infamously held that slaves were property and not entitled to the same rights as citizens. It’s later-reversed holding had nothing to do with the Second Amendment. In *dicta*, the Court analyzed whether slaves were entitled to the protections of the Constitution by listing a few examples: “Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.”¹¹ From this lone sentence, the *Parker* majority concluded that “this passage expresses the view, albeit in passing, that the Second Amendment contains a personal right” because it “is included among other individual rights....”¹²

Of course, *Dred Scott’s dicta* proves nothing. As we have already noted in our second and fourth installments in this series, labeling a Second Amendment right as “personal” or “individual” does not in any way advance our understanding of the Amendment’s purpose. The Supreme Court of Tennessee, in the 1840 *Aymette* case, pointedly asked: “to keep and bear arms for what?”¹³ The fact that the Second Amendment’s right is secured to “the people” does not mean that the Amendment’s declaration and guarantee can be divorced from its militia purpose.¹⁴

Moreover, recognizing the fatally flawed reasoning the *Dred Scott*, the Supreme Court has cautioned against citing it, as the case failed to heed “[t]he wisdom of refraining from avoidable constitutional pronouncements” that are “not ‘absolutely necessary to a decision,’”

⁷ 60 U.S. 393 (1857).

⁸ 165 U.S. 280 (1897).

⁹ 524 U.S. 125 (1998).

¹⁰ 60 U.S. 393 (1857), cited by *Parker*, 478 F.3d at 391.

¹¹ *Dred Scott* 60 U.S. at 450.

¹² *Parker*, 478 F.3d at 391.

¹³ *Aymette v. State*, 21 Tenn. 154 (1840).

¹⁴ The Second Amendment, as the Supreme Court later explained, has the “obvious purpose to assure the continuation and render possible the effectiveness of such forces,” *i.e.*, the “well regulated Militia,” and so it “must be interpreted and applied with that end in view.” *United States v. Miller*, 307 U.S. at 178. *Dred Scott* does not discuss this purpose or analyze the meaning of the Second Amendment, and expresses no opinion about the use of the term “the people” in the Second Amendment.



because of “the fallibility of the human judgment.”¹⁵ The *Parker* majority apparently ignored this advice. The *Parker* court’s reliance on the infamous *Dred Scott* decision as somehow pronouncing a view on the Second Amendment was hopelessly misplaced.

Likewise, the *Parker* court’s citation to *Robertson v. Baldwin*¹⁶ as supporting a right to bear arms unrelated to militia service missed the mark.¹⁷ *Robertson* upheld the constitutionality of a federal law authorizing the apprehension of merchant seamen deserters. In so doing, the Court noted in passing that “the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.”¹⁸ The *Parker* majority seized on this single sentence to argue that, although *Robertson* recognized that the Second Amendment is limited and does not grant an individual a right to carry concealed weapons, it thereby suggested that “the people” have a broad right to keep firearms unrelated to militia service. *Parker* oddly asserted that because *Robertson* mentioned a restriction on an individual’s right to carry firearms, this “suggests that the underlying right, too, concerned personal ownership of firearms.”¹⁹ A surely more obvious – or at least equally plausible – reason for the *Robertson* Court’s statement is that because the Second Amendment protects a person’s right to keep and bear arms while serving in a “well regulated Militia,” the carrying of concealed weapons certainly is not protected because it has nothing to do with service in a militia. It was simply wishful thinking by the *Parker* majority to read into *Robertson* any notion that the Second Amendment protects a right to possess firearms unconnected to a militia.

Finally, the *Parker* court cited a passing reference in a dissent in *Muscarello v. United States*²⁰ as stating that the Second Amendment does not pertain to “mere soldiering.”²¹ In *Muscarello*, the Court held that a federal statute prohibiting the carrying of a firearm during and in relation to a drug crime also allows a conviction if a person has a firearm in a vehicle while transporting drugs. The decision turned on the meaning of “carrying,” and the Court held that this included possession of a gun in a car near, but not actually on, a person involved in a drug crime. Again, the case did not concern the Second Amendment, and the Court’s majority did not cite the Second Amendment. The dissent examines possible definitions of “carry,” and briefly notes that the Second Amendment includes the word “bear” and that Black’s Law Dictionary defines carry as “wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.”²² In other words, the dissent simply noted that “bear” appears in one part of a

¹⁵ *U.S. v. International Union United Auto., Aircraft and Agr. Implement Workers of America*, 352 U.S. 567, 590-91 (1957), quoting 1 Cooley, *Constitutional Limitations* (8th ed.), 332; *Burton v. United States*, 196 U.S. 283 (1905).

¹⁶ 165 U.S. 275, 280 (1897)

¹⁷ *Parker*, 478 F.3d at 392.

¹⁸ *Robertson*, at 165 U.S. at 281-82.

¹⁹ *Parker*, 478 F.3d at 392.

²⁰ 524 U.S. 125, 143 (1998).

²¹ *Parker*, 478 F.3d at 385.

²² *Muscarello*, 524 U.S. at 143.



definition of carry. The dissent was not commenting at all, however, on how this pertains to rights granted by the Second Amendment. At most, the court was noting that “bear” can mean “carry,” but this tells us nothing about the meaning of the right granted by the Second Amendment. The *Parker* court had no basis to hold that this brief mention of “bear” as one possible meaning of “carry” by the dissent in *Muscarello* provided any basis to hold that the Second Amendment grants a right to possess firearms outside of service in a militia.

Misrepresenting State Case Law

As with its misrepresentation of Supreme Court precedent, the *Parker* court played fast and loose with the holdings of state courts. *Parker* was the first federal appellate court to ever strike down a gun law based on the Second Amendment. In an apparent attempt to diminish the unprecedented nature of this ruling, the *Parker* majority claimed that “[t]he lower courts are divided between ... competing interpretations” of the Second Amendment. After first citing the federal appellate courts, however, the *Parker* court was forced to note that these were of no help, as they “have largely adopted the collective right model.”²³

The *Parker* court then claimed that “State appellate courts, whose interpretations of the U.S. Constitution are no less authoritative than those of our sister circuits, offer a more balanced picture.”²⁴ Specifically, the court asserted: “Of the state appellate courts that have examined the question, at least seven have held that the Second Amendment protects an individual right” unconnected to militia service, while “at least ten state appellate courts (including the District of Columbia) have endorsed the collective right position.”²⁵ The court then cited eight (not seven) state cases it claimed have held that the Second Amendment grants an individual right to possess firearms for private purposes unrelated to a militia.

Evidencing sloppiness, wishful thinking, or simply downright dishonesty, six of these eight cases express no opinion whatsoever on whether the Second Amendment grants an individual right to keep and bear arms for private purposes unrelated to militia service.²⁶ These

²³ *Parker*, 478 F.3d at 380. In fact, only one other Federal appellate court has ever adopted the individual rights view, and in that case, the court ruled that the gun law in question was nonetheless constitutional. *United States v. Emerson*, 270 F.3d 203, 218-21 (5th Cir. 2001). Every other Federal appellate court to consider the issue has held that the Second Amendment does not grant such an individual right. See, e.g., *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995), cert. denied, 516 U.S. 813 (1995); *United States v. Napier*, 233 F.3d 394, 402-03 (6th Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000); *U.S. v. Lippman*, 369 F.3d 1039, 1043-44 (8th Cir. 2004); *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2003), rehearing en banc denied, 328 F.3d 567 (9th Cir. 2003); *U.S. v. Parker*, 362 F.3d 1279, 1282 (10th Cir. 2004); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), cert. denied, 522 U.S. 1007 (1997). See also *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (interpreting *Miller* to stand for rule that, absent reasonable relationship to preservation of well regulated militia, there is no fundamental right to possess firearm).

²⁴ *Parker*, 478 F.3d at 380.

²⁵ *Id.* at 380 n.6.

²⁶ *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. 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,



six cases *never* discuss the meaning of the Second Amendment and *never* discuss the extent of the right protected by the Second Amendment, let alone hold that “the Second Amendment protects an individual right” to possess firearms for private, non-militia purposes. Indeed, most of these cases involve claims by criminal defendants where courts simply paraphrase in passing or in a footnote the Second Amendment’s grant of a “right to bear arms.” A right for what purpose? These courts do not say.

Only two of the cases cited by *Parker* could possibly be interpreted to contain any statement that the Second Amendment grants a right to bear arms for private, non-militia purposes.²⁷ These cases contain *dicta* that briefly suggest a right to bear arms unconnected to a militia, without ever analyzing this right, as it was not at issue in the case. Indeed, the dubious nature of these statements is highlighted by the fact that both cases involve interpretations of state law, to which the Second Amendment does not apply. Even the *Parker* court admitted that the Supreme Court has repeatedly held that the Second Amendment “constrain[s] only federal government action and [does] not apply to the actions of state governments.”²⁸ The *Parker* majority’s reliance on two cases’ passing references in *dicta* contradicted by binding Supreme Court precedent is hardly the “more balanced picture” that the *Parker* court claimed to exist in Second Amendment jurisprudence.

Let us review these cases one by one.

Five of the cases cited by the *Parker* court are cases involving criminal defendants appealing convictions for violent crimes or drug-related crimes. In *Brewer v. Commonwealth*,²⁹ the Kentucky Supreme Court cited the Second Amendment in a footnote without examining whether it grants a right to possess firearms unconnected to militia service. In *Brewer*, a drug trafficker appealed his conviction for engaging in organized crime and drug trafficking, and also appealed the forfeiture of his firearms. The court rejected the appeal of the organized crime and drug trafficking convictions without mentioning the Second Amendment. The court then analyzed whether state drug laws allow for the forfeiture of personal property that has no nexus to charged drug crimes. The court noted that firearms are “personal property,” and concluded that the seized firearms in this case had no proven link to drug crimes. The court also mentioned the Second Amendment in a footnote, citing it as support for the existence of an undefined “constitutional right to bear arms....”³⁰ The court did not explain the scope of this “right to bear arms,” and did not base the holding of the case on the Second Amendment. Rather, the court

192 (Mont. 1952); *Stillwell v. Stillwell*, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001); *State v. Williams*, 148 P.3d 993, 998 (Wash. 2006).

²⁷ *Rohrbaugh v. State*, 607 S.E.2d 404, 412 (W. Va. 2004); *State v. Anderson*, 2000 WL 122218 (Tenn. Crim. App. Jan 26, 2000).

²⁸ *Parker* at 391 n.13, citing *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); *Presser v. Illinois*, 116 U.S. 252, 264-66 (1886); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900); *Twining v. New Jersey*, 211 U.S. 78, 98 (1908).

²⁹ 206 S.W.3d 343 (Ky. 2006).

³⁰ *Id.* at 347 n.5.



cited other sections of the Kentucky constitution that require the state to prove a nexus between any seized personal property and drug crimes.³¹

Yet again, in *State v. Blanchard*,³² the court cited the Second Amendment in passing, but never discussed its meaning. The case involved an unlawful drug possessor who argued that the state should be required to prove that an Uzi in his kitchen had a sufficient nexus to drugs in his living room to justify his conviction for possession of a firearm while possessing illegal drugs. The court mentioned the Second Amendment in only one sentence, simply stating, “The right to bear arms is established by the Second Amendment to the United States Constitution and Article I, § 11 of the Louisiana Constitution.”³³ The court did not examine what this “right to bear arms” guarantees, except to point out what it does *not* guarantee – namely, it does not prohibit Louisiana from “restrict[ing] that right for legitimate state purposes, such as public health and safety.”³⁴ If the court was really holding that the Second Amendment granted a personal right to possess firearms for private purposes, would it casually mention with no discussion that this right can be abrogated for “public health” purposes? Ultimately we cannot know what the court meant, as it simply did not address the nature of the right provided by the Second Amendment or how this right relates to service in a well regulated militia.

State v. Nickerson,³⁵ involved an appeal of an assault conviction. The court discussed the constitutional and statutory framework under which the State of Montana authorizes the use of force or violence. In doing so, the court noted that Montana law “accords to the defendant the right to keep and bear arms and to use the same in defense of his own home, person and property,” but that the Second Amendment provides that “the right of the people to keep and bear arms shall not be infringed.”³⁶ Unlike the Montana Constitution, the Second Amendment does not mention any right to “keep and bear arms” in defense of “home, person, or property.”³⁷ The court determined that, under *Montana* law, the defendant was authorized to use a gun to eject intruders from his home.³⁸ Besides quoting a portion of the Second Amendment in one sentence of the case, the court did not discuss or analyze what the Second Amendment means or whether it grants a right independent from service in a well regulated militia.

In *State v. Anderson*,³⁹ Ballard Anderson challenged his conviction and sentence for reckless homicide in the shooting death of his friend Mike Rimer. Anderson was at his rural Tennessee home with two guests, Jeff McKinney and his girlfriend, Pam Hickman. Three other

³¹ *Id.* at 348.

³² 776 So.2d 1165 (La. 2001).

³³ *Id.* at 1168.

³⁴ *Id.* (citations omitted).

³⁵ 247 P.2d 188 (Mont. 1952).

³⁶ *Id.* at 192.

³⁷ *Id.*

³⁸ *Id.* at 193.

³⁹ 2000 WL 122218 (Tenn. Crim. App. Jan 26, 2000).



persons, including Anderson’s friend Mike Rimer, then arrived at Anderson’s home while Anderson was “processing deer meat for dinner.” Although Rimer was drunk and had been using illegal drugs, and had previously assaulted McKinney and attempted to rape Hickman, Anderson invited Rimer to stay for dinner. During the dinner, a fight broke out between Anderson and Rimer, and Anderson retrieved his rifle and shot and killed Rimer, who was unarmed. Although Anderson’s conviction concerned his shooting of Rimer, rather than simply possessing a firearm in his home, the court’s unpublished opinion “briefly note[s]” in a footnote that Anderson’s “introduction of a gun occurred within the confines of his home, protected by state and federal constitutions.”⁴⁰ In the same footnote, the court reaffirmed that this statement was *dicta*, not at issue in the case, stating, “It was only the manner of its use, however, which was unlawful.”⁴¹ The court was only concerned with Anderson’s use of the gun to kill Rimer, and clearly was not proclaiming that Anderson’s use of a gun in his home was somehow protected, as it upheld his conviction. In this footnoted *dicta*, the court simply did not analyze or examine the nature of the right granted by the Second Amendment. It also did not explain how its statement can be reconciled with Supreme Court precedent holding that the Second Amendment does not apply to state laws, but merely limits the federal government.⁴² The *Parker* court placed far too much reliance on this statement which is “briefly note[d]” in *dicta* in this unpublished opinion’s footnote.⁴³

In *State v. Williams*,⁴⁴ Matthew Williams challenged his conviction for illegal possession of a short-barreled shotgun. He argued that in order to convict him, the state must prove that he knew the characteristics of the shotgun that made it unlawful (in other words, he knew it was less than 18 inches long). The state argued that mere possession of a short-barreled shotgun is illegal, without any proof that the possessor knows that the length of the shotgun. The court determined that Williams was correct in arguing that the state must prove he knew the length of the shotgun, but had no problem finding that he did know, as the 13-inch length of the gun was obvious. In determining whether the state must prove knowledge of a gun’s length to convict under this law, the court states that possession of a shotgun 18 inches or longer is normally legal under state law. The court also paraphrases the Second Amendment in passing, stating, “Citizens have a constitutional right to keep and bear arms under both the federal and state constitutions. U.S. Const. Amend. II; Wash. Const. Art. I § 24.”⁴⁵ The court did not determine what this right

⁴⁰ *Id.* at *7, n.3 (citing U.S. Const. amend. II; Tenn. Const. art. 1, § 26).

⁴¹ *Id.*

⁴² See *Parker* at 391 n.13, citing *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); *Presser v. Illinois*, 116 U.S. 252, 264-66 (1886); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900); *Twining v. New Jersey*, 211 U.S. 78, 98 (1908).

⁴³ The court also “briefly note[d]” in its footnote, “We believe that the appellant’s possession of the gun or guns in his home may readily be distinguished from the person who unlawfully carries a weapon in a non-constitutionally protected place for a purpose of going armed or to facilitate the commission of a crime.” The court did not explain whether its belief referred to the state or Federal constitution here, or what it meant by a “non-constitutionally protected place.” In any event, the court clearly was not holding that the Second Amendment somehow “constitutionally protected” the defendant’s conduct actually at issue in the case, as it upheld his conviction.

⁴⁴ 148 P.3d 993 (Wash. 2006).

⁴⁵ *Id.* at 998.



means, however, such as whether it protects a personal right to possess firearms with no connection to a well regulated militia.

The only one of the eight state cases cited by *Parker* as proclaiming an individual right unconnected to militia service that even mentions an “individual right,” albeit with no explanation or analysis, is *Rohrbaugh v. State*.⁴⁶ Yet even this case upholds the gun law in question as constitutional. In *Rohrbaugh*, the court was asked to decide whether Tommy A. Rohrbaugh, a former convict who had pled guilty to felony sexual assault and misdemeanor contributing to the delinquency of a minor, was entitled to possess firearms. West Virginia law forbids sex offenders from possessing firearms,⁴⁷ but Rohrbaugh claimed that he nonetheless had a constitutional right to possess firearms. In examining the constitutionality of this law, the *Rohrbaugh* court stated that the West Virginia and U.S. Constitutions contain “direct pronouncements of an individual’s right to keep and bear arms.”⁴⁸ Yet, it never provided any basis for this statement with respect to the Second Amendment, explained what this right guarantees, or examined whether this right is linked to service in a militia. It also did not reconcile this statement with Supreme Court precedent holding that the Second Amendment limits only the federal government, not state governments.⁴⁹ Instead, the *Rohrbaugh* court focused on the meaning of the state constitution, which unlike the Second Amendment, provides that “[a] person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.”⁵⁰ It then concluded that the West Virginia law is “reasonable,” and therefore valid under the state and federal constitutions.⁵¹ The passing reference to the Second Amendment simply constituted *dicta*, unnecessary to the court’s decision and contravened by binding Supreme Court precedent.

The *Parker* majority also cited the unpublished child custody case of *Stillwell v. Stillwell*.⁵² In *Stillwell*, a father challenged a court order prohibiting him from carrying a firearm and requiring him to keep all firearms locked up when visiting with his son. The court stated that it was bound by Tennessee Supreme Court precedent in *Hawk v. Hawk*,⁵³ holding that “when no substantial harm threatens a child’s welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit.”⁵⁴ The court concluded that the father’s possession of a firearm was lawful, and so a court could not tell him how to raise his child by imposing a restraint on his firearm possession

⁴⁶ 607 S.E.2d 404 (W.Va. 2004).

⁴⁷ W.Va. Code § 61-7-7(b).

⁴⁸ *Rohrbaugh* , 607 S.E.2d at 412.

⁴⁹ See *Parker* at 391 n.13, citing *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); *Presser v. Illinois*, 116 U.S. 252, 264-66 (1886); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900); *Twining v. New Jersey*, 211 U.S. 78, 98 (1908).

⁵⁰ *Rohrbaugh* , 607 S.E.2d at 412, quoting W.V. Const. Art. III, § 22.

⁵¹ *Rohrbaugh* , 607 S.E.2d at 414.

⁵² 2001 WL 862620 (Tenn. Ct. App. July 30, 2001).

⁵³ 855 S.W.2d 573 (Tenn.1993).

⁵⁴ *Stillwell*, 2001 WL 862620 at *4, quoting *Hawk*, 855 S.W.2d at 577.



around the child unless there was a risk of substantial harm to the child. Concluding that there was no finding that the father posed any risk to the child, the court held that there was no justification to infringe his right to raise his child by dictating restrictions on his firearm possession. The court also noted in passing that “we believe the constitutional rights under the Second Amendment of the United States Constitution as well as Article I, Section 26 of the Tennessee Constitution are worthy of the same protection as is the constitutional right to privacy in *Hawk*.”⁵⁵ The court did not explain the extent of the Second Amendment’s constitutional right or explore how this right was linked to service in a well regulated militia.

Finally, one case cited by Parker involved tort claims unrelated to the Second Amendment. In that case, *Hilberg v. F.W. Woolworth Co.*,⁵⁶ the court mentioned the Second Amendment only in passing, in one sentence, and never analyzed what the Second Amendment means or stated what this right protects. In *Hilberg*, plaintiffs appealed a summary judgment ruling in a tort suit stemming from an accidental shooting of a young boy. The plaintiffs brought negligence claims against the gun seller and negligence and strict liability claims against the gun manufacturer. The court upheld the lower court’s rejection of the negligence claims, without mentioning the Second Amendment. The court then rejected the plaintiff’s claim that the gun manufacturer should be strictly liable for injuries caused by the accidental shooting. In doing so, the court mentioned in passing, “The right to bear arms is guaranteed by the Constitution of the United States, U.S. Const. amend. II and the Colorado Constitution, Co. Const. art. II, § 13, subject to the valid exercise of police power.”⁵⁷ A right for what purpose? The court did not say. This brief sentence constitutes the only mention of the Second Amendment in the opinion. The court did not analyze the meaning of this right, except to point out that whatever this “right” may be, it is limited by a state’s “exercise of police power.” It is sheer fantasy to suggest that the *Hilberg* court’s brief mention of the Second Amendment’s limited “right to bear arms” was actually a holding that the Second Amendment protects a right to possess firearms for private purposes unrelated to militia service.

Conclusion

In past installments, we showed how the *Parker* majority’s re-interpretation of the Second Amendment was based on wholesale distortion of the text of the Second Amendment, the holding of binding Supreme Court precedent of *United States v. Miller*, and the historical record. In this installment, we examined the *Parker* court’s wishful thinking that its extraordinary ruling had some basis in other Supreme Court rulings and state case law. A review of these cases finds that the *Parker* majority went to desperate lengths to twist and misrepresent Supreme Court and state case law to suggest a foundation for its interpretation that simply does not exist.

⁵⁵ *Stillwell* at *4.

⁵⁶ 761 P.2d 236 (Colo Ct. App. 1988), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

⁵⁷ *Hilberg*, 761 P.2d at 240.



The *Parker* court stands out as the only federal appeals court in our Nation’s history to strike down a gun law based on the Second Amendment. The explanation for its holding does not lie in the Supreme Court or state cases it cited, as these contain either no mention of the meaning of the Second Amendment whatsoever or simply passing references to a paraphrased “right to bear arms” – frequently in footnotes, unreported opinions, and *dicta* – with no analysis of what this right guarantees. An examination of the cases cited by the *Parker* majority makes clear that its ruling was simply wishful thinking with no foundation to support its holding.