



## **FINAL THOUGHTS**

### **RISKY BUSINESS: WHAT IF THE SUPREME COURT AFFIRMS THE *PARKER* RULING?**

The decision of the United States Supreme Court to review the *Parker* decision obviously raises the stakes. Whereas the D.C. Circuit’s “private purpose” reading of the Second Amendment at least was limited in effect to the District of Columbia (and unlikely to be adopted by the nine other federal circuit courts that repeatedly have rejected it), Supreme Court review poses the prospect of a ruling that will affect the constitutional validity of local, state and federal gun laws across the nation for years to come. The Supreme Court may well issue the most significant judicial ruling in history on the Second Amendment.

We conclude *Second Amendment Fantasy* by pausing to consider the potential legal implications if the Supreme Court were to affirm the D.C. Circuit’s decision. Of course, much will turn on the Supreme Court’s treatment of the issues and the specific guidance it supplies for other courts in subsequent cases. But if the Supreme Court rules that individuals have a constitutional right to have guns for private use unrelated to militia service, several implications are clear right now.

First, the ruling will lead to an explosion of legal challenges to a wide range of gun laws. It will embolden the criminal defense bar to aggressively assert Second Amendment defenses against indictments and convictions for violations of gun laws, asserting that the laws under which their clients are being prosecuted are unconstitutional. It also will provoke a broad-based litigation campaign by ideological opponents of gun laws to challenge such laws across-the-board. The gun lobby and its supporters, by this strategy, will attempt to achieve in court what they could not achieve in the legislative process.

Because the strongest gun laws are at the local and state level, it is highly likely that a new Supreme Court precedent will be used to bring test cases against local and state laws, in an effort to reverse the longstanding Supreme Court precedent that the Second Amendment does not apply to the states through the Due Process Clause of the Fourteenth Amendment.<sup>1</sup> Strict local handgun laws, like Chicago’s, are likely targets, as are state assault weapon bans, like those in California and New Jersey, and state licensing and registration systems. Attacks on federal laws, like the federal machine gun ban and the Brady Law, also may be pursued.

---

<sup>1</sup> This principle has been established in a series of Supreme Court rulings beginning with *United States v. Cruikshank*, 92 U.S. 542 (1876).



Second, it seems clear that Supreme Court adoption of the *Parker* theory of the Second Amendment will put gun laws at far greater legal risk than under the now-prevailing “militia purpose” view. Robert A. Levy, the libertarian lawyer who is bankrolling the case, has stated his view that gun laws should be required to satisfy “strict scrutiny” and its attendant requirement that they be “narrowly tailored” – Supreme Court tests that most often force laws to be struck down. Publicly, Mr. Levy has tried to suggest that reasonable gun laws would survive *Parker*’s affirmance, but a quick look behind that rhetoric reveals it to be a ruse. Levy has conceded only that “reasonable” gun regulations could be “imposed on *some* weapons (e.g., *missiles*), *some* people (e.g., *preteens*) and *some* uses (e.g., *murder*).”<sup>2</sup> Needless to say, if those were the only “reasonable” restrictions that would survive, few gun laws would be safe.<sup>3</sup>

Once the right to keep and bear arms is separated from its long-established tether to a militia purpose, it is unclear what legal standard gun laws would need to survive constitutional challenge. There is little doubt, however, that recognition of a broad private right to be armed will create a new presumption against the constitutionality of gun laws, whereas currently there is a virtually absolute presumption in favor of their constitutionality. Guns would achieve a specially protected constitutional status imposing unique limits on the legislative authority of the elected representatives of the people that would apply to no other dangerous products. ***Ironically, regulation of guns, the only publicly-available consumer product designed to inflict lethal injury, would be required to meet a higher constitutional standard than regulation of cars, lawnmowers and other dangerous products capable of inflicting lethal injury, but not designed to do so.***

For more than two hundred years, long before the Supreme Court unanimously rejected a Second Amendment claim in *United States v. Miller*, the courts of our nation have stayed out of the business of second-guessing legislative policy choices regarding firearms. Millions of firearms have been made and sold in this country, and hundreds of gun laws have been passed, dating back to the Framers’ time,<sup>4</sup> but until *Parker* was handed down, no federal appellate court had ever held that a gun law violated the Second Amendment. That is as it should be.

---

<sup>2</sup> Robert A. Levy, *Unholster the Second Amendment*, L.A. Times, Nov. 14, 2007 (op-ed)(emphasis added).

<sup>3</sup> The *Parker* opinion itself went to great lengths to make its adoption of the “private purpose” view seem unthreatening. According to the majority opinion, the Second Amendment still would be subject to “reasonable restrictions,” such as prohibiting the carrying of concealed weapons, barring gun possession by convicted felons, or even registration of guns and proficiency testing. *Parker v. District of Columbia*, 478 F.2d at 399. Of course, this dicta would not bind even the D.C. Circuit in subsequent decisions.

<sup>4</sup> See, e.g., Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502-16 (2004) (explaining how widespread gun control was during colonial times). Among the laws that existed in colonial times was a Massachusetts statute that banned the possession of loaded firearms in the home. *Id.* at 512 & n. 172.



Federal, state, and local governments must be allowed to implement the democratically expressed will of the people to control firearms and protect the public. Consider, for example, the daunting reality of contemporary American gun violence confronting our public officials:

- An average of thirty-two people per day – the number of victims murdered on one day on the campus of Virginia Tech – are killed with guns in America.<sup>5</sup>
- If suicides and accidental shootings are included, eighty people a day die in America from gunfire.<sup>6</sup>
- For every gun death in this country, between two and three additional people are seriously injured from gunshot wounds.<sup>7</sup>
- Gun violence claims the lives of approximately eight children and teens every day.<sup>8</sup>
- A handgun is the weapon used to commit most of the homicides in this country.<sup>9</sup>
- Firearms are also used in hundreds of thousands of violent crimes every year.<sup>10</sup>

The *Parker* reading of the Second Amendment weakens, rather than strengthens, the power of elected officials to protect their communities from the plague of gun death and injury. This is the ultimate absurdity of the D.C. Circuit’s *Second Amendment Fantasy*.

---

<sup>5</sup> See Centers for Disease Control and Prevention. Data available at: <http://www.cdc.gov/ncipc/wisqars>. (Calculations by Brady Center).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Steven W. Hargarten, et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42 (1996).

<sup>10</sup> Indeed, from 1996 through 2005, there were about **five million** violent crimes committed with firearms in this country, victimizing almost six million people. See U.S. Department of Justice (“DOJ”), Bureau of Justice Statistics, *Non-fatal firearm-related violent crimes, 1993-2005*; DOJ, Bureau of Justice Statistics, *Homicide Trends in the U.S.* To arrive at this total, non-fatal gun crime must be added to gun homicides.