



## **MANGLING MILLER:**

### **HOW THE *PARKER* OPINION DISTORTED AND DEFIED SUPREME COURT PRECEDENT**

The 2-1 panel decision by the United States Court of Appeals for the D.C. Circuit in *Parker v. District of Columbia*<sup>1</sup> made errors of history, errors of law, and errors of logic. But perhaps no error was more fundamental, and troubling, than the court's misinterpretation – and disregard – of the Supreme Court's decision in *United States v. Miller*, 307 U.S. 174 (1939).

#### **Introduction**

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.”

Especially on matters of constitutional interpretation, the first order of business for a federal appeals court is to see if the Supreme Court has spoken on the issue. If it has, the next task is to determine what the Supreme Court said, and what it meant.

The Supreme Court's only extensive discussion of the Amendment is found in its unanimous *Miller* decision. As Judge Henderson stated in her dissent in *Parker*, the *Miller* opinion “unambiguously” set out the Supreme Court's “understanding of the Second Amendment” – that the “militia clause” of the Second Amendment limits the “right to keep and bear arms.” *Miller*'s key holding was the Court's unequivocal statement that:

With obvious purpose to assure the continuation and render possible the effectiveness of such forces [*i.e.*, the “well regulated Militia,”] the *declaration and guarantee* of the Second Amendment were made. *It must be interpreted and applied with that end in view.*<sup>2</sup>

Accordingly, the *Miller* Court read the Second Amendment as an indivisible whole, with only *one* purpose.

In direct defiance of the Supreme Court's mandate, the *Parker* majority held that the right guaranteed “is broader than its civic purpose,”<sup>3</sup> and instead was “premised on the private use of arms for activities such as hunting and self-defense.”<sup>4</sup> Indeed, the *Parker* court found that the activities protected by the Second Amendment “are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent

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<sup>1</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (renamed *District of Columbia v. Heller* in appeal to the Supreme Court).

<sup>2</sup> *Miller*, 307 U.S. at 178 (emphasis supplied).

<sup>3</sup> *Parker*, 478 F.3d at 399.

<sup>4</sup> *Id.* at 395.



enrollment in the militia.”<sup>5</sup> Despite the clear instruction of the Supreme Court that the entire Second Amendment must be “interpreted and applied” according to its “obvious purpose” to assure the effectiveness of militia forces, the *Parker* majority found that the Amendment protects activities that have nothing whatsoever to do with the militia. Yet *Miller* has not been overruled, and, in 1980, the Supreme Court made clear that it remained valid precedent, citing *Miller* as holding, “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’”<sup>6</sup>

Nine other federal circuits have read *Miller* to require a relationship with a well regulated militia for an armed citizen to seek protection under the Second Amendment.<sup>7</sup> The only case holding otherwise is *United States v. Emerson*, a 2001 split decision by a Fifth Circuit panel that did not strike down the underlying gun control law.<sup>8</sup> As other courts have noted since *Emerson*, “the Fifth Circuit stands alone in its interpretation of the Second Amendment as conferring an individual right to bear arms.”<sup>9</sup> Indeed, even subsequent Fifth Circuit panels have refused to read *Emerson* as recognizing a fundamental right to keep and bear arms.<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980) (parenthetical after *Miller* cite).

<sup>7</sup> See, e.g., *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995) (“Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right.”); *United States v. Napier*, 233 F.3d 394, 402-03 (6th Cir. 2000) (same); *U.S. v. Lippman*, 369 F.3d 1039, 1043-4 (8th Cir. 2004) (“In a line of cases starting with *United States v. Synnes*, 438 F.2d 764, 772 (8th Cir. 1971), we have held that the Second Amendment protects the right to bear arms when it is reasonably related to the maintenance of a well regulated militia.); *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2003), *rehearing en banc denied*, 328 F.3d 567 (9th Cir. 2003) (referring to *Miller*’s implicit rejection of traditional individual rights position); *U.S. v. Parker*, 362 F.3d 1279, 1282 (10th Cir. 2004) (“*Miller* has been interpreted by this court and other courts to hold that the Second Amendment does not guarantee an individual the right to keep and transport a firearm where there is no evidence that possession of that firearm was related to the preservation or efficiency of a well-regulated militia.”); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (analyzing *Miller* and concluding that “[t]o apply the amendment so as to guarantee appellant’s right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy”). See also *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976) *cert. denied*, 426 U.S. 948 (1976); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), *cert. denied*, 522 U.S. 1007 (1997); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *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).

<sup>8</sup> *United States v. Emerson*, 270 F.3d 203, 226 (5th Cir. 2001) (reading *Miller* as not resolving the issue).

<sup>9</sup> *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004).

<sup>10</sup> See *United States v. Darrington*, 351 F.3d 632, 635 (5th Cir. 2003) (“Again, *Emerson* is a carefully and laboriously crafted opinion, and if it intended to recognize that the individual right to keep and bear arms is a ‘fundamental right,’ in the sense that restrictions on this right are subject to ‘strict scrutiny’ by the courts and require a ‘compelling state interest,’ it would have used these constitutional terms of art.”) This principle was confirmed three years later in *United States v. Roach*, 201 Fed.Appx. 969, 974 (5th Cir. 2006).



In her *Parker* dissent, Judge Henderson reminded the majority of the obligation to follow precedent. She counseled: “[U]ntil and unless the Supreme Court revisits *Miller*, its reading of the Second Amendment is the one we are obligated to follow.”<sup>11</sup> It is revealing that the passage from *Miller* cited above, in which the Supreme Court unambiguously expressed its understanding that the right guaranteed by the Amendment must be “interpreted and applied” with reference to its stated militia purpose, is not quoted by the *Parker* majority until the twenty-fourth page of its opinion, *sixteen pages into its discussion of the Second Amendment*. After the *Parker* court finally deigned to discuss how the Supreme Court interpreted the Second Amendment, *Parker* turned the *Miller* decision on its head, “finding” meanings that are contrary to the opinion’s text.

### **The Supreme Court’s Decision in *United States v. Miller***

The case arose when Jack Miller and Frank Layton were arrested for bringing an unregistered, double barrel, sawed-off shotgun across state lines from Claremore, Oklahoma to Siloam Springs, Arkansas. They were charged with violating the National Firearms Act (“NFA”), which imposes strict licensing and registration requirements on sawed-off shotguns, machine guns and other “gangster-type” weapons.

Miller and Layton challenged their indictment, claiming that the NFA violated the Second Amendment of the United States Constitution. District Judge Heartsill Ragon, of the Western District of Arkansas, threw out the indictment in a perfunctory opinion that merely stated the facts and then concluded:

The court is of the opinion that this section is invalid in that it violates the Second Amendment to the Constitution of the United States, U.S.C.A., providing, “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.”<sup>12</sup>

The United States appealed directly to the Supreme Court.

The Supreme Court’s unanimous opinion, which reversed the District Court, was authored by Justice McReynolds.<sup>13</sup> The Court first discussed the factual background of the case and recited the NFA sections which Miller and Layton were charged with violating.

The Court rejected the defendants’ challenge to the indictment, finding that they could not be protected by the Second Amendment because the “possession or use” of a short-barreled shotgun could not be reasonably related to militia service. As we discuss more fully below, the Court necessarily considered whether the defendants’ weapon could be military equipment because the Court was bound by the facts alleged in the indictment, which included the type of

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<sup>11</sup> *Parker*, 478 F.3d at 404 (citing *Welch v. Tex. Dep’t of Highways and Pub. Transp.*, 483 U.S. 468, 478-79 (1987) (“The rule of law depends in large part on adherence to the doctrine of stare decisis.”)).

<sup>12</sup> *United States v. Miller*, 26 F.Supp. 1002 (D.C.Ark. 1939).

<sup>13</sup> Justices Hughes, Butler, Stone, Roberts, Black, Reed, and Frankfurter joined the opinion. Justice Douglas took no part in the consideration or decision of this case.



gun possessed, but said nothing about whether the defendants had any relationship to a “well regulated Militia.” Nonetheless, the Court made clear that the entire Second Amendment – not simply the word “Arms” – must be interpreted in light of its “militia” purpose:

In the absence of any evidence tending to show that *possession or use* of a "shotgun having a barrel of less than eighteen inches in length" at this time *has some reasonable relationship to the preservation or efficiency of a well regulated militia*, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>14</sup>

Significantly, the Court did not state that the only question was whether defendants’ shotgun was a military weapon, though it could have. Instead, the Court first stated that there was no evidence that its “possession or use” “has some reasonable relationship to the preservation or efficiency of a well regulated militia.”

The Constitution as originally adopted granted to the Congress power -- "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.*<sup>15</sup>

The key language in this passage requires the “guarantee” of the Second Amendment – “the right of the people to keep and bear Arms” – to be interpreted and applied to assure the continuation of the militia.

The *Miller* Court discussed, in depth, the “Militia which the States were expected to maintain and train” and the import of that Militia to the Framers of the Constitution and Bill of Rights.<sup>16</sup> The Court recognized the “well regulated” nature of the militia referenced in the Second Amendment:

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

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<sup>14</sup> *Miller*, 307 U.S. at 178 (emphasis added) (citing *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158).

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> *Id.* at 178–182.



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 expected to appear bearing arms supplied by themselves and of the kind in common use at the time.<sup>17</sup>

The Court’s subsequent discussion emphasized that militia service was a civic obligation, not an individual liberty. For example, the Court quoted “The American Colonies in the 17<sup>th</sup> Century” that in the colonies the militia system “implied the *general obligation* of all adult male inhabitants *to possess arms*, and with certain exceptions, *to cooperate in the work of defense.*”<sup>18</sup> The Court reviewed several state militia laws, all of which made the obligation to supply arms a condition of militia service.

- In 1632 “it was ordered that any single man who had not furnished himself with arms might be put out to service, and this became a permanent part of the legislation of the colony [Massachusetts].”
- The New York Legislature directed able-bodied men between 16 and 45 “be enrolled in the Company” and that “every Citizen so enrolled and notified” provide his own “Musket or Firelock, a sufficient Bayonet and Belt,” and specified ammunition and accoutrements;
- The General Assembly of Virginia directed that “all free male persons” between 18 and 50 “be inrolled or formed into companies,” and that “[e]very officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o’clock in the forenoon, armed, equipped, and accoutred,” with arms specified by law.<sup>19</sup>

The Court then noted that while states have employed different language in right to keep and bear arms provisions, “none of them seem to afford any material support for the challenged ruling of the court below.”<sup>20</sup> The Court then cited “some of the more important opinion and comments by writers” in a footnote titled, “Concerning the Militia.” Each of the cited authorities is entirely consistent with the Court’s view that the Second Amendment was designed to protect only one goal, the “preservation or efficiency of a well regulated militia,” that, in turn, is a military institution under Congressional and state control.<sup>21</sup>

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<sup>17</sup> *Id.* at 179 (emphasis added).

<sup>18</sup> *Id.* at 179-180 (emphasis added).

<sup>19</sup> *Id.* at 179-182.

<sup>20</sup> *Id.* at 182.

<sup>21</sup> The “Concerning the Militia” footnote cited the following:

- *Presser v. Illinois*, 116 U.S. 252 (1886), upheld the indictment of a man for belonging to a military organization, and parading with it, in violation of an Illinois law that prohibited “any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States” from forming a military company or drill or parade with arms, without a license. The Court rejected Presser’s argument that the Illinois law violated the Second Amendment. While the primary holding was that the Second Amendment does not apply against the states, that clearly is not why the *Miller*



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Court cited *Presser*, for that holding was irrelevant to the federal law issue in *Miller*. The relevant holding was that the Second Amendment posed no barrier to prohibitions on military organizations that do not qualify as the organized militia of the states.

- *Robertson v. Baldwin*, 165 U.S. 275 (1897), noted that the Second Amendment is not infringed by laws prohibiting the carrying of concealed weapons.
- *Fife v. State*, 31 Ark. 455 (Ark. 1876), interpreted a state constitutional provision protecting the citizens “right to keep and bear arms for their common defense,” and noted, among other things, that *Aymette*’s discussion of the Second Amendment stated that “the right to bear arms refers merely to the military way of using them, not to their use in bravado and affray [citation omitted].”
- *Jeffers v. Fair*, 33 Ga. 347 (Ga. 1862), a Confederate States of America case, stated: “The militia may be defined a body of citizens enrolled for military discipline. They are enrolled by State authority with reference to State boundaries; they are organized, officered and disciplined by State authority \* \* \*.”
- *Salina v. Blaksley*, 72 Kan. 230 (Kan. 1905), construed state constitutional provisions protecting people’s “right to bear arms for their defense and security” as applying “only to the right to bear arms as a member of the state militia or some other military organization provided by law,” a meaning which “is also apparent from the second amendment to the federal constitution.”
- *People v. Brown*, 253 Mich. 537 (1931), did not construe the Second Amendment, but noted that the broad *state* constitutional right stated, “**Every person** has a right to bear arms for *defense of himself* and the state” (emphasis added), and was therefore “not limited to militiamen nor military purposes.” However, the court still affirmed a conviction of carrying a blackjack as a reasonable police power to curb crime.
- *Aymette v. State*, 21 Tenn. 154 (Tenn. 1840), construing a state constitutional provision “that the free white men of this State have a right to keep and bear arms for their common defence,” stated that “The Words ‘bear arms’, too, have reference to their military use,” and “the phrase has a military sense, and no other \* \* \*  
\* A man in pursuit of deer, elk, and buffaloes might carry his rifle for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in his cane.”
- *State v. Duke*, 42 Tex. 455 (Tex. 1874), distinguished a state constitutional provision under which “Every person has a right to bear arms for the defense of himself and the State, under which such regulations as the Legislature may prescribe,” and noted that in the state provision, “There is no recital of the necessity of a well-regulated militia, as there is in the corresponding clause in the Constitution of the United States.”
- *State v. Workman*, 35 W.Va. 367 (W.Va. 1891), rejected a Second Amendment challenge to a concealed carrying conviction, noting the extensive restrictions on weapons carrying at common law, and that “the kind of arms referred to in the amendment [] must be held to refer to the weapons of warfare to be used by the militia \*\*\*.”
- *Cooley’s Constitutional Limitations*, Vol. 1, p. 729, stated that, “The alternative to a standing army is a ‘well-regulated militia,’ but this cannot exist unless the people are trained to bear arms.”
- *Story on the Constitution*, 5<sup>th</sup> ed., Vol. 2, p. 646, used “the right of the citizens to keep and bear arms” interchangeably with “a well regulated militia,” and noted that, “How it is practicable to keep the people duly armed, without some organization [through a system of militia discipline], it is difficult to see.”
- *Encyclopedia of the Social Sciences*, Vol. X, p. 471, 474, discussed the history of the militia, ultimately noting, “The older term ‘militia’ has tended, however, gradually to disappear, being replaced by ‘National Guard.’”



The Court's entire discussion made clear that the possession or use of "Arms" is tied inextricably to the possessor's participation in a state-regulated militia. Indeed, there is not a word to be found anywhere in the *Miller* opinion suggesting a right to possess arms outside of militia service.

It is thus apparent from reading *Miller* that several elements must be satisfied to warrant Second Amendment protection. Among the federal circuits, the United States Court of Appeals for the 10<sup>th</sup> Circuit laid this out as a multi-part test derived from *Miller*, stating that to come within the Second Amendment's protection, the arms must be possessed for a militia purpose, and the arms must be militia arms:

Drawing on *Miller*, we repeatedly have held that to prevail on a Second Amendment challenge, a party must show that possession of a firearm is in connection with participation in a "well-regulated" "state" "militia." .... Applying this principle, in *Haney* we set out a four-part test a party must satisfy to establish a Second Amendment violation: "As a threshold matter, [a party] must show that (1) he is part of a state militia; (2) the militia, and his participation therein, is 'well regulated' by the state; (3) [guns of the type at issue] are used by that militia; and (4) his possession of the [the gun at issue] was reasonably connected to his militia service."<sup>22</sup>

### **Words Not Spoken: Parker's Invention of an Argument Never Made**

Rather than addressing the Supreme Court's actual holding, and *Miller*'s finding of an inextricable tie between arms possession and participation in a well regulated militia, the *Parker* court began its discussion of *Miller* by stating: "On the question whether the Second Amendment protects an individual or collective right, the Court's opinion in *Miller* is most notable for what it omits." There is, of course, no principle of interpretation that directs courts to construe what higher courts didn't say, rather than what they did say. This rule of omission is an invention of the *Parker* majority.

Reverting to a discussion of the government's brief filed in the *Miller* case, *Parker* posited that the government's "first argument" was that the right to keep and bear arms "exists only where the arms are borne in the militia or some other military organization provided by law and intended for the protection of the state," and that the *Miller* Court:

did not decide the case on this basis. Rather, the Court followed the logic of the government's secondary position, which was that a short-barreled shotgun was not within the scope of the term 'Arms' in the Second Amendment."<sup>23</sup>

*Parker* went on:

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<sup>22</sup> *United States v. Parker*, 362 F.3d 1279, 1283 (10<sup>th</sup> Cir. 2004) (citing and quoting *United States v. Haney*, 264 F.3d 1161, 1165 (10<sup>th</sup> Cir. 2001)).

<sup>23</sup> *Parker v. District of Columbia*, 478 F.3d at 393.



If the *Miller* Court intended to endorse the government’s first argument, *i.e.*, the collective right view, it would have undoubtedly pointed out that the two defendants were not affiliated with a state militia or other local military organization.<sup>24</sup>

The first problem with this argument is that the *Parker* court was simply wrong on the facts. The *Miller* Court could not have “pointed out that the two defendants were not affiliated with a state militia or other local military organization,” for the case was presented on demurrer, where only the facts alleged in the indictment were before the Court. The indictment did not allege that the defendants were or were not militia members. The only pertinent allegation in the indictment was that the defendants possessed a short-barreled shotgun. This is not surprising, as the type of gun was an element of the crime, but relationship to a militia was not. Given the procedural posture of the case, and the Supreme Court’s view that the “guarantee” of the Second Amendment must be interpreted with its militia purpose in mind, the proper course was to decide the case on the ground that a short-barreled shotgun was not a militia weapon.

Second, even if the indictment had alleged that the defendants did or did not possess their gun in relation to militia service, it was completely improper for the *Parker* court to speculate as to *Miller’s* meaning by looking beyond the opinion itself. In our legal system, precedent is construed based on what courts actually say in their opinions, not by speculating about other views those courts may have held but did not express. This “hidden” or “implied” holding analysis is a novel method of reading case law that seems to have its genesis in the determination of some federal judges to nullify the clear meaning of the *Miller* opinion. First asserted by the Fifth Circuit in *United States v. Emerson*<sup>25</sup>, it was followed with great enthusiasm in the *Parker* majority opinion. One could call it the “mind reading” rule of interpretation. Under this novel rule, rather than following the clear language of the Supreme Court’s opinion, lower courts are free to divine what they think the Court actually meant to say, but didn’t. *Miller’s* inconvenient truth is its clear holding that the Second Amendment “must be interpreted and applied” to further “its obvious purpose to assure the continuation and render possible the effectiveness” of a well regulated militia. The Supreme Court stated that the militia purpose controls the entire Second Amendment, not just the “Arms” in question.

Third, if the *Miller* Court thought it had been presented with two distinct arguments by the government and viewed only the second “weapons-based argument” as valid, it could have said so. It could have said that individuals with no relation to a militia may have the right to keep and bear arms, but those arms must be of common military use. The *Miller* Court, of course, said no such thing. The plain holding of *Miller* was that *because* the guarantee of the right to keep and bear arms in the Second Amendment must be interpreted according to its militia purpose, in the absence of evidence that a sawed-off shotgun has a militia use, it cannot be constitutionally protected. Although, as we have argued, the words of the *Miller* opinion should determine its meaning, it is noteworthy that when Justice McReynolds announced the opinion in *Miller* from the bench, his words, as reported in the *New York Times*, were entirely consistent with this interpretation. The *Times* reported:

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<sup>24</sup> *Id.*

<sup>25</sup> 270 F.3d 203 (5<sup>th</sup> Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).



Justice McReynolds drawled from the bench: “We construe the amendment as having relation to the military service and we are unable to say that a sawed-off shotgun has relation to the militia.”<sup>26</sup>

Fourth, if the *Parker* majority were correct that the right to “keep and bear Arms” was to serve the private purposes of hunting and self-defense, in addition to the civic purpose of militia service, and if the Supreme Court in *Miller* was focused entirely on the nature of the weapon at issue, why is there nothing in the *Miller* opinion about whether a short-barreled shotgun can be used for hunting or self-defense? If significance can be attached to what the Supreme Court did not say in *Miller*, how can Judge Silberman explain *that* omission?

Finally, as explained in detail below, the *Parker* court simply invented the idea that the government argued two alternative positions in its brief in *Miller*. Like the gunman on the Grassy Knoll, there was no second argument.

### **What The Government Actually Argued In *Miller***

The brief filed by U.S. Solicitor General (later Supreme Court Justice) Robert Jackson in *Miller* presented an extensive and erudite discussion demonstrating that the Second Amendment only protects the right to keep and bear arms in service to a “well regulated Militia.” The government did argue that “Arms” must have a militia/military use to come within the Second Amendment, but that was presented as a second necessary element of the Second Amendment, not an alternative one. For example, in its “Summary of Argument” the government stated:

In both [England and America] the right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security. Indeed, the very language of the Second Amendment has reference only to the keeping and bearing arms by the people as members of the state militia or similar military organization provided for by law. The “arms” referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes, and the cases unanimously hold that weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment.<sup>27</sup>

If the government were to make an alternative argument, the Summary of Argument would be the place to state it. Instead, the government made crystal clear that to come within the protection offered by the Second Amendment, one must 1) keep and bear arms as “members of the state militia or similar military organization provided for by law;” and 2) “moreover,” keep and bear arms that are “ordinarily used for military or public defense purposes.” “Moreover” has

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<sup>26</sup> “Supreme Court Bars Sawed-Off Shotgun: Denies Constitution Gives Right to Carry This Weapon,” *New York Times*, May 16, 1939, quoted in SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* at 202.

<sup>27</sup> Brief for Appellant (hereinafter “Government’s Brief”) at 4-5, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696).



several definitions: “beyond what has been said; further; besides.”<sup>28</sup> Each meaning makes clear that the government, by using “moreover,” indicated that the military function of “arms” was an **additional** element required to come within Second Amendment protection, not an **alternative** one.

The rest of the government’s brief made its position even more clear. The brief argued that the Second Amendment, by stating that the right “shall not be infringed,” protects a pre-existing right that existed at common law at the time of the Amendment. It then examined the long history of extensive restrictions on who could “keep and bear arms” and under what circumstances, all of which make clear that there was no private, individualized right to keep and bear arms at common law. The government discussed the 1328 Statute of Northampton, which prohibited all but the king’s ministers or servants from riding anywhere armed, as well as a 1670 English statute<sup>29</sup>, which prohibited all but those “having lands of a yearly value of 100 pounds, other than the son and heir of an esquire or person of higher degree” from having or using “guns, bows, etc.”<sup>30</sup>

The government concluded that the right that existed at English common law, “it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for private purposes.”<sup>31</sup>

The government then quoted extensively from *Aymette v. State*<sup>32</sup>, which reached the same historical conclusion: that “no private defence was contemplated” in reference to the right.<sup>33</sup> The government then restated its conclusion:

In this country, as in England, it has been almost universally recognized that the right to keep and bear arms, guaranteed in both the Federal and State Constitutions, had its origin in the attachment of the people to the utilization as a protective force of a well-regulated militia as contrasted with a standing army which might possibly be used to oppress them. . . . Indeed, the very declaration in the Second Amendment that “a well-regulated militia, being necessary to the security of a free State,” indicates that the right secured by that Amendment to the people to keep and bear arms is not one which may be utilized for private purposes but only which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.<sup>34</sup>

The government then quoted *Salina v. Blaksley*<sup>35</sup>, that construed a State constitutional provision as applying “only to the right to bear arms as a member of the state militia, or some

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<sup>28</sup> RANDOM HOUSE COLLEGE DICTIONARY 868 (Revised ed. 1980).

<sup>29</sup> 22 Car. II, c. 25, sec. 3 (Eng.).

<sup>30</sup> Government’s Brief at 10-11.

<sup>31</sup> *Id.* at 12.

<sup>32</sup> 2 Humphr. (Tenn.) 154 (Tenn. 1840).

<sup>33</sup> Government’s Brief at 14.

<sup>34</sup> *Id.* at 15 (internal citations omitted).

<sup>35</sup> 72 Kan. 230 (Kan. 1905).



other military organization provided for by law,” and explains that the Second Amendment has the same meaning.<sup>36</sup> *State v. Buzzard*<sup>37</sup> was then quoted to the same effect, that the object of the Second Amendment “could not have been to protect or redress by individual force \* \* \*.”<sup>38</sup>

The *Parker* court ignored these eighteen pages of argument by the government – as well as the three pages of the brief that follow. Instead, Judge Silberman’s opinion hung its entire “alternative argument” theory on a single phrase of the government’s brief. The phrase is mentioned after the government’s lengthy discourse on the militia meaning of the Second Amendment, when the government acknowledged that:

While some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property as well as the right of the people to bear them collectively (*People v. Brown*; *State v. Duke*) the cases are unanimous in holding that the term “arms” as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals.”<sup>39</sup>

The death knell for *Parker*’s “alternative argument” reading of the government’s brief is that the two cases cited by the government – *Brown* and *Duke* – did not construe the Second Amendment to protect an individual, non-militia-related right. Indeed, they did not construe the Second Amendment at all.

Both *Brown* and *Duke* construed *state* constitutional right to bear arms provisions which, unlike the Second Amendment, specifically and explicitly protect an individual, private right. *Brown* notes that the language of its state Constitution -- “**Every person** has a right to bear arms for the **defense of himself** and the state” -- is “not limited to militiamen nor military purposes \*\*\*.” *Duke* construed a similar state constitutional provision, and noted: “There is no recital of the necessity of a well regulated militia, as there is in the corresponding clause in the Constitution of the United States.” Nonetheless, both courts found that even where the state constitution protects a private, non-militia right, the arms that are protected must be commonly kept and appropriate for self-defense and community defense.

Hence, in this passage the government merely stated that even under state constitutions that, **unlike the federal constitution**, protect a right to bear arms for private purposes, an NFA-like prohibition on short-barreled shotguns would be constitutional. There is no support for *Parker*’s position that the government cited *Brown* and *Duke* for an alternative, private/non-militia interpretation of the Second Amendment under which the Amendment limited “Arms” to those commonly used for public defense, but guaranteed the right to persons regardless of their connection to a “well regulated Militia.”

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<sup>36</sup> Government’s Brief at 15-16.

<sup>37</sup> 4 Ark. 18 (Ark. 1842).

<sup>38</sup> *Id.* at 24.

<sup>39</sup> Government’s Brief at 18 (internal citations omitted).



The government made even more clear that it was not proposing an alternative argument in the text immediately following the portion of the brief quoted by the *Parker* majority, in which it quoted the *Aymette* court's recognition that the right to keep and bear arms:

is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such that as are usually employed in civilized warfare, and that constitute the ordinary military equipment \* \* \*.<sup>40</sup>

The government concluded its argument two pages later by quoting the only other case in which the NFA was attacked on Second Amendment grounds: *United States v. Adams*.<sup>41</sup> *Adams* adopted the two-step Second Amendment test (militia use and militia arms):

The second amendment to the Constitution, providing, “the right of the people to keep and bear arms, shall not infringed,” has no application to this act. The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights.<sup>42</sup>

The government's brief to the Supreme Court in *Miller* made a *single* argument throughout: Because the purpose of the right to keep and bear arms is to ensure the viability of the militia, the absence of evidence of a gun's militia utility is fatal to constitutional protection. The Supreme Court agreed.

### **Parker, Miller and the Militia**

Oddly, though finding that the Second Amendment right is in no sense contingent on even “intermittent” participation in a militia, the *Parker* court devoted multiple pages to an analysis of the nature of the militia. This, indeed, reveals a central contradiction in the majority's opinion: If the right to keep and bear arms protects activities unrelated to the militia, of what relevance is the court's discussion of the militia? In a subsequent essay, we will explore in depth the *Parker* court's treatment of the militia. For now, our focus is on the *Parker* majority's strange conclusion that the discussion of the militia in the *Miller* opinion supports its “private purpose” view of the Second Amendment.

As noted above, the *Miller* opinion featured a detailed exposition of the nature of the “well regulated Militia,” establishing that it was a form of compulsory military service imposed on much of the adult male population, in which a government edict required members to furnish and use their own guns in militia service. Drawing on the *Miller* discussion, the *Parker* court noted that membership of the militia was “vast” and that its members were required to supply their own private arms in militia service. Therefore, Judge Silberman wrote, “we think the *Miller* Court recognized” that it would be “foolish and impractical” for the First Congress to

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<sup>40</sup> *Id.* at 18-19 (emphasis in original).

<sup>41</sup> 11 F.Supp. 216 (D.C.Fla. 1935).

<sup>42</sup> Government's Brief at 21, quoting *U.S. v. Adams* at 218-219.



have distinguished between “the ownership and use of ‘Arms’ for private purposes and the ownership and use of ‘Arms’ for militia purposes” since “the very survival of the militia depended on men who would bring their commonplace, *private* arms with them to muster.”<sup>43</sup> The words “we think” before “the *Miller* Court recognized” is the poker player’s ‘tell.’ It is yet another speculative leap regarding the unstated thoughts of the Supreme Court, as divined by the *Parker* panel.

Mind reading aside, the discussion of the militia in *Miller* hardly supports the right to keep and bear arms for individuals who, like the plaintiffs in *Parker*, have no connection to a “well regulated Militia.” The *Parker* opinion quoted the following description of the militia from *Miller*: “**All males physically capable of acting in concert for the common defence**” who were “**enrolled for military discipline.**”<sup>44</sup> The opinion later explained that “[b]ecoming ‘enrolled’ in the militia appears to have involved providing one’s name and whereabouts to a local militia officer – somewhat analogous to our nation’s current practice of requiring young men to register under the Selective Service Act.”<sup>45</sup> According to the *Parker* majority, “*Miller* defined 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.**”<sup>46</sup> Thus, the *Parker* court concluded, “there was no organizational condition precedent to the existence of the ‘Militia’.”<sup>47</sup>

How the *Parker* majority could believe that this discussion of the militia in *Miller* supports the “private purpose” theory of the Second Amendment must remain a mystery. Judge Silberman was determined to show that the militia, even the “well regulated Militia,” was not organized, but was rather merely “the raw material from which an organized fighting force was to be created.”<sup>48</sup> Yet his opinion cited *Miller* as establishing that to be considered a militiaman, one must at least have “enrolled” by registering with a militia official in the way we used to register for the draft. How did this establish the Second Amendment rights of the plaintiffs in *Parker*, who made no claim that they had given their names to a local militia officer or registered for militia service in any way?

The militia may have been “vast” in its membership in 1791, and it may have been heavily dependent on privately-owned guns, but *Miller* made it clear that the “well regulated Militia” of the Second Amendment was, by definition, a military force organized under governmental authority. *Miller* made it equally clear that the purpose of the right guaranteed was to ensure the viability of that organized military force, not to enable individuals to use guns for self-defense or hunting. As to the plain language of the *Miller* opinion, the *Parker* court was simply in denial.

### **Conclusion: *Parker* Can’t Get There From Here**

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<sup>43</sup> *Id.* (emphasis in original).

<sup>44</sup> *Parker*, 478 F.3d at 386 (emphasis in original).

<sup>45</sup> *Id.* at 387.

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 388.



The Supreme Court may well revisit its *Miller* decision and reconsider the meaning and scope of the Second Amendment. It is possible that the Court could read the first thirteen words of the Amendment as a nullity, and hold that all persons have a broad right to weapons, even if they have nothing to do with militias and perhaps even oppose “the security of a free State.” But until then, all other courts are obligated to follow the clear, unequivocal precedent set forth in the *Miller* decision. Notwithstanding the *Parker* court’s linguistic contortions, the Second Amendment today does not protect any individual right to keep and bear arms, absent a reasonable relationship with a well regulated militia. That is what the Supreme Court has stated – and, not incidentally, what the Framers intended.