Civil Rights

A Round in the Chamber: *District of Columbia v. Heller* and the Future of the Second Amendment

*By Sandra S. Froman & Kenneth A. Klukowski**

A new shot will be fired in the development of constitutional law this term when the U.S. Supreme Court decides the meaning of the Second Amendment in *District of Columbia v. Heller*.[1] Although the Court has only touched upon the Second Amendment in a few dozen cases, only once has the Court even begun to address its meaning.[2] But the question presented in *Heller* requires a clear statement about its meaning.[3] The Court will have to choose between three competing interpretations of the Second Amendment,[4] a task made more difficult by a profoundly disappointing brief filed by the Justice Department in the case.[5] What it does, and does not, decide will likely forever shape the future of Second Amendment jurisprudence and gun rights in America.

I. The Underdeveloped State of Second Amendment Jurisprudence

Not only has the Court hardly given the Second Amendment any attention, only three federal appellate court decisions have exposited significantly on it,[6] all of them in the past decade. Though it has been part of the Constitution since it was ratified in 1791, there is no clear rule of law on the Second Amendment in the law books today, whether in the *U.S. Reports* or "Con Law" casebooks.

But this should not be surprising. The Free Speech Clause was largely a blank slate a hundred years ago; the First Amendment largely undeveloped before 1904.[7] But then, a number of watershed cases were decided on free speech,[8] the Establishment Clause,[9] and the Free Exercise Clause.[10] The progeny of those cases have given us so much case law that now entire textbooks and law school classes are taught on the First Amendment, even just a single clause of it.

If you think back to law school, you will recall from Criminal Procedure that the same holds true of much of the Bill of Rights. Many of the seminal "Crim Pro" cases we cite in criminal case briefs are Warren Court decisions.[11] And those provisions were incorporated against the states during that same era.[12] A broad jurisprudence of the Bill of Rights is largely a legacy of the past six decades or so; the Second Amendment just so happens to have been left out of this recent trend.

The reasons for this dearth are easy to understand. There was little in the way of federal gun controls before the National Firearms Act of 1934,[13] which imposed a tax and registration requirement on machine guns, short shotguns, and short rifles.[14] Then came the Federal Firearms Act of 1938, creating a licensing system for gun dealers.[15] Gun control began in earnest with the Gun Control Act of 1968.[16] It was a perfect example of LBJ-style government expansion, typical of that era's politics.[17] And it was during that period of urban riots, sharply rising violent crime rates, and political assassinations that the idea of the Second Amendment not applying to individuals firmly took hold in much of the legal professoriate. There was not much law review literature on the subject then, no major cases to spur research on both sides through lawyers committed to zealous representation in the adversarial system. And the National Rifle Association did not create its political/lobbying arm (called the Institute for Legislative Action) until 1975.[18] At that time, the gun rights community relied on the books and law reviews of a handful of talented scholars and lawyers to lay the academic predicate for the private right to keep and bear firearms. Lawyers and scholars such as David Caplan began exploring the legal history of the Second Amendment's origins.[19] Then a series of works by others, including Don Kates,[20] Stephen Halbrook,[21] David Hardy,[22] and Nelson Lund,[23] started the scholarly defense of the Second Amendment in earnest.

But none of that was present until the 1970s. So the big government view of the Second Amendment went entirely unopposed, and law on the Amendment remained undeveloped. There were various reasons why a case requiring exposition of the Second Amendment never made it to the Court.[24] And with no major cases to force the issue, the Supreme Court did not need to act. Scholarly attention to the Second Amendment grew exponentially only after the 1989 publication of Sanford Levinson's "The Embarrassing Second Amendment" in the *Yale Law Journal*.[25] Levinson, a prominent constitutional law scholar, wrote that law professors had been ignoring the Second Amendment because of fear that the arguments raised by lawyers such as Kates, Halbrook, and Lund might indeed be correct.[26] Of course, there is no rule that the Supreme Court can only grant certiorari on subjects about which law professors have been writing frequently. Beginning in the 1960s, as gun control laws grew more pervasive, there were many challenges to state or federal gun laws which raised Second Amendment arguments, but the Court never took them.

II. The Cipher of *United States v. Miller*

The only precedent dealing with the meaning of the Second Amendment in depth is *United States v. Miller*.[27] Although a couple of previous cases dealt in some way with the Second Amendment, they spoke to what the Second Amendment does not mean, rather than what it does.[28] (In both cases, the Court simply stated that the Second Amendment did not control because it only applied to federal action.)[29] *Miller* was the first—and, as of today, the only—case that actually expounded on the Amendment's meaning.

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That opinion is brief.[30] Two defendants were indicted for transporting unregistered short-barreled ("sawed-off") shotguns across state lines in violation of the National Firearms Act,[31] and challenged the law on Second Amendment grounds.[32] The Court made several observations regarding gun rights, noted that the record before the Court was insufficient to determine whether the sawed-off shotguns have "a reasonable relationship to the preservation or efficiency of a well regulated militia,"[33] and remanded the case.[34]

While gun-control advocates say that this implicitly rejects the idea that the Amendment secures a private right to bear arms, that notion is incorrect. The primary anti-gun argument presented by the government in *Miller* was that the Second Amendment does not apply to individuals.[35] The Court did not accept that argument, and instead chose to explore the secondary argument of what relationship a sawed-off shotgun might have to militia activities.[36] The brief opinion simply found that the record was too spotty to test possible theories that could govern this case, and remanded for an evidentiary hearing to develop that record.[37] But, criminals being what they are, Mr. Miller managed to get himself killed, thus preventing the case from returning to the Court.[38]

Consequently, to label *Miller* "unenlightening" is something of an understatement. Courts have consistently described it with words like "cryptic," leaving scholars to try to salvage something definitive from it—without success.[39]

Miller is so unhelpful, in fact, that all of the competing interpretations of the Second Amendment cite *Miller* as their authoritative basis.[40] Regardless of how *Heller* is resolved, at least one blessing sure to come from it is the liberation of legal scholars having to sift through the tea leaves of *Miller* by giving us another case over which to argue. The *Miller* cipher may be about to exit the stage of legal debate altogether.

III. Competing Views of the Second Amendment and the Current Circuit Split

The paucity of case law and cryptic nature of *Miller* have led to three competing interpretations of the Second Amendment, each of which has supporters in the academy and on the bench.

The 'individual right' model of the Second Amendment is the view embraced by conservative legal minds. It asserts that the Second Amendment guarantees an individual right to law abiding and peaceable adult citizens to have firearms for any lawful purpose.[41] Such advocates believe that the Second Amendment exists to secure a fundamental right to personal protection,[42] derived from both natural law and English common law.[43] In addition to ordinary purposes (such as self-defense, target shooting, hunting, or collecting), the Second Amendment is also seen as providing a last resort against tyranny. It is also what Chief Judge Alex Kozinski calls a "doomsday provision,"[44] designed as a last resort to protect freedom against a government that would cast off the Constitution and declare itself a law unto itself.[45] As Chief Judge Kozinski writes, "[h]owever improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once."[46]

The 'collective right' model is the interpretation historically favored by the political left. It argues that the purpose of the Second Amendment was to provide for an armed military force, while still addressing the Framers' apprehension of standing armies.[47] This theory says that the Second Amendment conveys no individual right whatsoever; it is intended to prevent federal interference with state militias.[48]

As the scholarly analysis of the Second Amendment grew over the 1990s, however, the collective right model became increasingly untenable. Gun prohibition advocates, including those in the academy, began announcing that they too agreed that the Second Amendment is an individual right. They described their theory as a "narrow individual right."[49]

This "narrow individual right" applies only to a person who is actually serving in a state militia (by which the "narrow individual right" means a person in the National Guard)—thus, so narrow that it nearly vanishes, individual right advocates retort. The sophisticated collective right model is then, critics say, a nuanced version of the second model, as its name suggests.[50] It attempts to split the baby by saying that the Second Amendment does have an element of individual right, but only insofar as such possession is related to keeping the citizen equipped to render state militia service if the government so requires.[51] The right does not inhere to the citizen in a private capacity.

The existence of the sophisticated collective right model is a tribute to the success of sound scholarship over the past quarter century. Former Chief Justice Warren Burger expressed the view that had been unchallenged for a quarter-century when he said that the individual right interpretation is "one of the greatest pieces of fraud … on the American public … ever seen."[52] The growing individual right scholarship mentioned above evinces the opposite, however—leading to one current justice on the Court to reference the "growing body" of literature in contention with Justice Burger's view,[53] a thought echoed by other judges as well.[54]

The controversy here revolves around the first phrase of the Amendment, which reads: "A well regulated militia, being necessary to the security of a free state."[55] Both collective theories assert that the militia refers to military units such as the National Guard, that "well regulated" means government-controlled,[56] and that the remainder of the Second Amendment should only be a "right" insofar as it provides for these instrumentalities for the projection of state force.

The individual right model has two alternative arguments which interpret the Second Amendment differently. One approach notes that, in the early Republic, the militia was composed of virtually every able-bodied young adult male, and that modern federal law uses the same definition for "militia." A form of this argument was used by the D.C. Circuit in *Parker* to rule that categorical bans of firearms satisfying *Miller*'s criteria for militia "arms" are unconstitutional.[57] There are significant problems with this position.[58]

The other approach posits that the first clause is a prefatory clause and the second clause is an operative clause. The first clause announces one non-exclusive civic purpose for the right, but does not in any way constrain the effectual nature of the operative clause. The Amendment's drafting history supports this view.[59] This is the case with the Patent and Copyright

Clause, where it announces that its purpose is to "promote the progress of science and useful arts."[60] Yet no book has been denied copyright protection because it was poorly written. The public good preamble does not confine the right.[61] The challenge with this second position is it requires not giving legal effect to a constitutional clause.

These theories have come into play in three fairly recent appellate decisions. First in the Fifth Circuit decision handed down in 2001, *United States v. Emerson*,[62] where Charles Cooper (former head of DOJ's Office of Legal Counsel) and Nelson Lund (who served under Cooper) submitted a thorough analysis of the Second Amendment, resulting in a long, scholarly opinion by Judge Garwood embracing the individual right view. Then, largely as a rebuttal to *Emerson*, in *Silveira v. Lockyer*,[63] the Ninth Circuit embraced the collective right view. Now, in *Parker v. District of Columbia,* the D.C. Circuit has adopted the individual right view in a well-written opinion by Judge Silberman.[64] Now, the Justices of the Court will resolve the circuit split.

IV. *District of Columbia v. Heller* is an Ideal Test Case

This case could very well result in a clear ruling on the nature and meaning of the Second Amendment. Although the fact pattern of the case is conducive to a relatively narrow holding, the inescapable question of constitutional meaning in *Heller* will likely make it a landmark decision. Arguments will be heard March 18, 2008.

The facts of *District of Columbia v. Heller* make it a perfect test case. Indeed, *Heller* was carefully constructed as a test case. In the District of Columbia, it is a crime to have any sort of usable firearm.[65] Regarding handguns, it is illegal to have any sort of handgun in your home, even if that handgun is non-functional.[66] Long guns (rifles and shotguns) in the home are also illegal, unless the gun is unloaded and either disassembled or disabled by a trigger lock[67] ammunition required to be stored in a separate container. Such firearms are of course impractical for emergencies which call for them, such as defending against a home invasion. The D.C. law forbids making the gun functional under any circumstances, except for use at a licensed target range. (There are none in D.C.) The thirty-two-year-old ban is the most severe firearm regulation in America.

Several lawyers decided to challenge the law in court, finding six D.C. residents who wanted to own and possess firearms within the city. The lawsuit, originally named *Parker v. District of Columbia*, was filed in U.S. District Court for the District of Columbia.[68] Each plaintiff had different life circumstances and reasons for wanting to own a gun,[69] but were carefully chosen to obviate all other legal issues. Even the question of whether any Second Amendment right is incorporated via the Fourteenth Amendment is not at issue, because D.C. is exclusively under direct federal control, and so the Bill of Rights applies directly.[70] With these obstacles to adjudication on the merits overcome, a proper test case was born.

The trial court dismissed the case, stating that there is no right to own a gun.[71] The U.S. Court of Appeals for the D.C. Circuit reversed,[72] holding that the Second Amendment guarantees an individual right to keep and bear arms,[73] and therefore that the D.C. ban was unconstitutional.[74] The District petitioned for Supreme Court review, and the Court granted certiorari to hear the case under the name *District of Columbia v. Heller*.[75] (The suit was renamed *District of Columbia v. Heller* because Dick Heller was the only plaintiff that the D.C. Circuit found to have standing.[76] A cross-petition was filed by the *Parker*/*Heller* team, seeking review of the D.C. Circuit's decision that the other plaintiffs lacked standing.[77] The Court has not acted on the cross-petition.)

V. Issues in *Heller*

The question presented in *Heller*, as framed by the Justices themselves, is whether the D.C. Code provisions which prohibit having a handgun or functional firearm in the home violate a right to keep and bear arms apart from any militia service.[78] The reference to militia service is significant. This framing effectively conjoins the collective right and sophisticated collective right models into one option, suggesting that the Justices expect to either adopt or reject the individual right view.

The narrowness of the question deserves discussion. The firearms in question are ordinary rifles, shotguns, and handguns. The setting is the home, not on the street, in a car or in public places. There are no challenges to licensing, waiting periods or registration requirements. The plaintiffs are mentally sound, productive, law-abiding citizens, seeking a declaratory judgment, rather than having broken the law in defiance.

This also makes *Heller* a good "starter" case for Second Amendment jurisprudence. It does not explore the boundaries of the Amendment. It even takes place in the District of Columbia, which avoids the incorporation question. This case simply explores whether there is any actionable right in the Second Amendment.

VI. The Dangers of the Justice Department's Position

The foregoing discussion of facts and issues in *Heller* make the amicus brief filed for the United States both disturbing and harmful. The Justice Department took a position in this case that has shocked many in the legal community, and left everyone scrambling for a response.

The Office of the Solicitor General (OSG), which represents the United States in the Supreme Court, is an extremely influential advocate, even if the United States is not a party to a case. And OSG has filed a brief.[79] It is asking the Supreme Court to deny strict scrutiny or any per se rules to the Second Amendment, and instead to apply intermediate scrutiny.[80] It also asks for the Court, applying this lower level of constitutional protection, to then vacate the D.C. Circuit opinion and remand the case.[81]

Because there are a great many federal gun laws, and the Department of Justice has to defend them all, it is understandable that DOJ would try to urge the Court not to adopt strict scrutiny. Indeed, one would hardly expect the DOJ ever to urge the Court to adopt a test which might put even a single federal statute at serious risk of being declared unconstitutional.

One co-author of this article has published a law review

article taking the position that intermediate scrutiny is a vague standard,[82] that there are relatively few intermediate scrutiny cases, and that intermediate scrutiny under the Free Speech Clause is different than intermediate scrutiny under the Equal Protection Clause.[83] This article further suggests that the current rule for abortion from *Planned Parenthood v. Casey* appears to be some sort of intermediate scrutiny.[84] Hence, requesting intermediate scrutiny may hand the Court an opportunity to open vast, uncharted waters with no idea where it might lead.

There is another possibility that firearm regulations in other contexts could end up subject to something less than intermediate scrutiny.[85] In matters of free speech, some speech is subject to per se rules or strict scrutiny.[86] But content-neutral restrictions on the time, place or manner of speech are subject to a less demanding intermediate scrutiny.[87] Even more restrictions are constitutional in some settings.[88] Here we are dealing with an absolute ban on common handguns in the home. If such an extreme measure is subject to intermediate scrutiny, then could it be possible that less common firearms could be subject to less protection, or that lower scrutiny might be applied to restrictions which are not absolute bans, or restrictions outside the home? If so, then intermediate scrutiny could end up being the ceiling on firearm protections, not the uniform rule.

A third issue implicated by the OSG argument raises questions about the Second Amendment being incorporated against the states.[89] Thus far, the Supreme Court has only incorporated rights that are fundamental in nature.[90] Burdens on fundamental rights are generally subject to strict scrutiny,[91] although that is not always the case. By applying intermediate scrutiny, however, the Court might possibly lay a predicate that would allow gun-control advocates to present a plausible argument that the Court has already deemed Second Amendment rights to not be fundamental, and, therefore, that it cannot be asserted as a right against any state or local gun control law, even a complete ban or door-to-door confiscation.

The DOJ brief thus implicates issues that are not at bar, and fails to confine itself to the narrow and extreme facts in the case. Some might argue that this brief is not very dangerous because we can rely upon the justices to always limit themselves to the narrow facts of the case at bar. But such an assumption is quite a gamble. As the same co-author of this article has recently published, a multi-level system of review, such as that employed in Free Speech Clause jurisprudence, could perhaps more effectively deal with the varying circumstances and specifics of Second Amendment issues than a nebulous and malleable "standard" like intermediate scrutiny.[92] This framework was put together in a patchwork fashion, one case at a time, as new types of speech restrictions were at issue and the Court had to establish the appropriate standard of review for specific types of restrictions. Using First Amendment tools does not necessarily mean that gun controls would be found unconstitutional as often as speech controls are. But it does mean that courts would have doctrinal tools they already know how to use to accomplish those ends, rather than having to invent new tests to give shape to the nebulous "heightened scrutiny" proposed by the OSG.

Generally speaking, strict scrutiny is the appropriate test for burdens on the core exercise of fundamental personal rights explicitly enumerated in the Bill of Rights. There is no real risk that a strict scrutiny standard would lead to the wholesale invalidation of federal gun laws. Strict scrutiny is context-specific, and can account for the government's vital interest in saving lives and preventing crime. Laws banning convicted felons from possessing guns should easily pass strict scrutiny, despite the Solicitor General's stated worries on this point.[93]

Other gun laws, too, would pass strict scrutiny, if they truly are effective at protecting the public and are narrowly tailored so as not to infringe on legitimate firearms use by ordinary people. Moreover, if a particular gun control law burdening the core exercise of a constitutional right cannot meet that two-part test, then having it declared unconstitutional would not be objectionable. But the Court need not establish a uniform rule here; it should confine itself to declaring the rule for an absolute ban of an ordinary firearm in a home context. Such draconian measures should be unconstitutional, just as a ban on attending Baptist churches could not survive an establishment or free exercise challenge on the grounds that it does not ban attending all churches.[94] So long as the homeowner is a law-abiding and mentally-competent adult citizen, an absolute ban on handguns in the home should be invalid. Everything else can wait for another day.

CONCLUSION

If *Heller* holds that the Second Amendment secures an individual right, there will be more federal court cases. Even if the Supreme Court does not grant certiorari on another Second Amendment case anytime soon, we can reasonably expect a whole host of circuit court opinions in the federal system.

The next case the Court may take is whether the Second Amendment is incorporated to the states through the Fourteenth Amendment. The case *NRA v. Nagin*, scheduled for trial early this year, may well present that question in the context of a citywide gun confiscation during an emergency like Hurricane Katrina.[95] But all of that is contingent on the Court finding an individual right in *Heller*. Like the Shot Heard Round the World in 1775, the shot fired in *Heller* may echo for generations to come.

Endnotes

1 Parker v. District of Columbia, 478 F.3d 370, 381 (D.C. Cir. 2007), *cert. granted sub nom.*, District of Columbia v. Heller, 128 S. Ct. 645 (2007).

2 *See generally* David B. Kopel, Stephen P. Halbrook & Alan Kurwin Supreme Court Gun Cases (2004).

3 *See infra* Part IV & V.

4 *See infra* Part III.

5 *See infra* Part VI.

6 Parker v. District of Columbia, 478 F.3d 370, 381 (D.C. Cir. 2007); Silveira v. Lockyer, 312 F.3d 1052, 1060 (9th Cir. 2002); United States v. Emerson, 270 F.3d 203, 211 (5th Cir. 2001).

7 William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236, 1239 (1994).

8 Schenck v. United States, 249 U.S. 47 (1919).

9 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

10 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

11 *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the right to counsel is a fundamental right in the Sixth Amendment).

12 *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the exclusionary rule).

13 Pub. L. No. 73-474, 48 Stat. 1236-40.

14 *Id.*

15 Pub. L. No. 75-785, 52 Stat. 1250.

16 Pub. L. No. 90-618, 82 Stat. 1213.

17 The gun control movement of the 1960s was also fueled in large part by the assassinations of John F. Kennedy in 1963, Robert F. Kennedy in 1968, and Martin Luther King Jr. in 1968.

18 Nat'l Rifle Ass'n Inst. for Legislative Action, "Who We Are, And What We Do," *available at* http://www.nraila.org/About/ (last visited Jan. 25, 2008).

19 *See*, *e.g.*, David I. Caplan, *Handgun Control: Constitutional or Unconstitutional?—A Reply to Mayor Jackson*, 10 N.C. Cent. L.J. 53 (1978); David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham Urb. L.J. 31 (1976).

20 Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).

21 Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984).

22 David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559 (1986).

23 Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987).

24 Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of the Second Amendment*, 18 Geo. Mason. U. Civ. Rts. L.J. 167, 171-73 (2008).

25 Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

26 *See id.* at 642.

27 United States v. Miller, 307 U.S. 174 (1939).

28 Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876).

29 *Presser*, 116 U.S. at 264-66; *Cruikshank*, 92 U.S. at 551.

30 *Miller* is only ten pages in the U.S. Reports. 307 U.S. at 174-83.

31 *Id.* at 175.

32 *Id.* at 177.

33 *Id.* at 178.

34 *Id.* at 183.

35 Brief of Appellant at 15, United States v. Miller, 307 U.S. 174 (1939) (No. 696).

36 *Id.* at 18.

37 Some will say that this is simply what an individual-right advocate would say to steer clear of the possibility that the Court did indeed tie gun ownership to militia service. But this is not correct. The Court was presented with a government argument that firearm rights should be related to militia service. The Court noted that the record might support that argument, and so rather than accept or reject the argument it remanded. By all appearances *Miller* was never intended to be a final result, but the case never returned to the Court and so the matter was left unresolved.

38 Stephan B. Tahmassebi, *The Second Amendment & the U.S. Supreme Court*, American Rifleman, May 2000, *available at* http://www.nraila.org/Issues/Articles/Read.aspx?ID=7.

39 Silveira v. Lockyer, 312 F.3d 1052, 1064 (9th Cir. 2002).

40 *See infra* Part III.

41 *Cf.* United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001).

42 *See* Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007). Brief of Second Amendment Foundation as Amicas Cuciae Supporting Respondent at 31-40, District of Columbia v. Heller, No. 07-290 (U.S. Feb. 8, 2008).

43 Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason U. Civ. Rts. L.J. 229, 247-48 & n.63 (2008) (citing 1 William Blackstone, Commentaries on the Laws of England *125-*139 (1765)); *see generally* Joyce Lee Malcolm, To Keep and Bear Arms (1994); James Warner, *Disarming the Disabled*, 18 Geo. Mason U. Civ. Rts. L.J. 267 (2008).

44 *Silveira*, 328 F.3d at 570 (Kozinski, J., dissenting from denial of reh'g en banc).

45 *See* The Declaration of Independence para. 2 (1776); The Federalist No. 46 (James Madison).

46 *Silveira*, 328 F.3d at 569-70 (Kozinski, J., dissenting from denial of reh'g en banc).

47 *See Emerson*, 270 F.3d at 231, 235 & n.35.

48 *Silveira*, 312 F.3d at 1092. Ada

49 Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. Rev. 57, 57 & n.1 (1995) (quoting Adams v. Williams, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting)).

50 *See* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1003-04 (1995).

51 *Parker*, 478 F.3d at 379 & n.3; *Emerson*, 270 F.3d at 219.

52 Warren E. Burger, *The Right to Bear Arms*, Parade Magazine, Jan. 14, 1990, at 4. The article gave no indication that he was aware of the scholarly research in the last decade, confusingly, the Burger article also said that the Americans had a right to own guns, although it did specify where that right came from, if not from the Second Amendment. *Id.*

53 Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring).

54 *See* Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2002) (Kleinfeld, J., joined by Kozinski, O'Scannlain, and T.G. Nelson, JJ., dissenting from denial of reh'g en banc).

55 U.S. Const. amend. II.

56 *Silveira*, 312 F.3d at 1069.

57 Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007).

58 Lund, *supra* note 43, at 233-36, 240-41. Brief for the Second Amendment Foundation as Amicas Cuciae, *supra* note 42, at 18-31.

59 Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. Law & Pol. 157, 180-83 (1999); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 34-35 & nn. 77 & 80 (1996).

60 U.S. Const. art. I, § 8, cl. 8.

61 Lund, *supra* note 43, at 236-40.

62 270 F.3d 203 (5th Cir. 2001).

63 312 F.3d 1052 (9th Cir. 2003).

64 478 F.3d 370 (D.C. Cir. 2007).

65 Lund, *supra* note 43, at 229 & n.1 (2008).

66 D.C. Code § 7-2502.02(a)(4).

67 *Id.* § 7-2507.02.

68 Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004).

69 *Id.* at 103-04

70 *Parker*, 478 F.3d at 391 (citing Pernell v. Southall Realty, 416 U.S. 363, 369-80 (1974)).

71 *Parker*, 311 F. Supp. 2d at 109.

72 *Parker*, 478 F.3d at 401.

73 *Id.* at 395.

74 *Id.* at 401.

75 128 S. Ct. 645 (2007).

76 *Parker*, 478 F.3d at 378.

77 76 U.S.L.W. 3095 (U.S. Sept. 10, 2007) (No. 07-335).

78 128 S. Ct. 645 (2007).

79 The brief can be found at http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2007-0290.mer.ami.pdf.

80 Brief for the United States as Amicus Curiae at 28, District of Columbia v. Heller, No. 07-290, (U.S. Jan. 11, 2008).

81 *Id.* at 33.

82 *Cf.* Klukowski, *supra* note 24, at 185.

83 *Compare* Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying equal protection intermediate scrutiny whereby a law "must be substantially related to an important government interest) *with* United States v. O'Brien, 391 U.S. 367, 377 (1968) *and* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (applying free speech intermediate scrutiny under which the government action must be narrowly-tailored). So the tailoring in free speech intermediate scrutiny is characterized in the same terms as required by strict scrutiny, establishing a more demanding test under the Free Speech Clause than the Equal Protection Clause.

84 *See* Klukowski, *supra* note 24, at 185 & n.146 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (ruling that laws restricting abortion are unconstitutional if they impose an "undue burden" on seeking an abortion)).

85 *See* Klukowski, *supra* note 24, at 186-88.

86 *E.g.*, City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (applying a categorical rule against viewpoint discrimination); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (applying strict scrutiny to a content-based speech regulation).

87 *See O'Brien*, 391 U.S. at 377.

88 *E.g.*, Cornelius v. NAACP, 473 U.S. 788, 806 (1985) (concerning less protection of speech in a limited public forum).

89 *See* Klukowski, *supra* note 24, at 185-86, 189-90.

90 *Cf.* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

91 Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Not all restrictions on fundamental rights are subject to strict scrutiny. Free speech burdens are sometimes not subject to strict scrutiny. *See supra* notes 83-88 and accompanying text. *See also* Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Geo. J.C. B Pub. POC'Y 229, 277 B nn. 417-18 (2008) (describing the tests applied to the fundamental right of free religious exercise besides strict scrutiny).

92 Klukowski, *supra* note 24, at 186-88.

93 Brief for the United States as Amicus Curiae, *supra* note 81, at 8, 20, 25-26.

94 *Id.* at 183.

95 NRA v. Nagin, Civil No. 05-4234 (E.D. La. filed Sept. 22, 2005). *See generally* Stephen P. Halbrook, *Only Law Enforcement will be allowed to have Guns: Hurricane Katrina and the New Orleans Gun Confiscations.*[18] Geo. Mason v. Civ Rts. c.j. *339 (2008).*