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HANDGUN CONTROL, THE SECOND AMENDMENT, AND JUDICIAL LEGISLATION IN THE D.C. CIRCUIT: A NOTE ON PARKER V. DISTRICT OF COLUMBIA

Franklin E. Zimring*

This note examines the wholly novel constitutional calculus used by the D.C. Circuit Court of Appeals in 2007 to strike down the District of Columbia's prohibition of civilian handgun possession. The central feature of the court's analysis of handguns was finding that modern handguns should be regarded as "lineal descendents" of militia era flintlocks, a finding that ignores the provable fact that the pistols of 1794 were not concealed or concealable weapons. Because concealability is the central danger of the modern handgun, this critical element in the opinion is an error both of historical analysis and constitutional reasoning.

In Parker v. District of Columbia,¹ a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion that broke new constitutional ground in three respects. First, the court ruled that the Second Amendment provides a personal right to individual citizens to keep and bear firearms. Second, the court ruled that Second Amendment rights cover handguns as a category of arms. Third, the court held that the personal right of handgun possession does not permit municipal governments to forbid the acquisition and ownership of this class of weapon. While one other circuit court panel had argued for a personal right to bear arms in a criminal case, United States v. Emerson,² that opinion stopped short of restricting the government's power to prohibit the ownership and use of any firearms.

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2. United States v. Emerson, 270 F.3d 203, 219 (5th Cir. 2001).
So the *Parker* case is the first attempt to create a methodology for balancing state and personal interests in a constitutional universe of personal gun rights. This wholly novel constitutional calculus is not the subject of the bulk of Senior Circuit Judge Silberman's opinion—it occupies only the last eight pages of a fifty-eight page opinion. But it is the first indication of how a judiciary sympathetic to gun rights will accommodate personal and state interests, and it also provides data on the style and substance of judicial activism in the mold of the Federalist Society.

I do not propose to address in this note the individual versus collective right debate about the Second Amendment. Constitutional theory is not my professional competence, nor has it been a significant part of the legal and regulatory landscape of handgun control in the United States. My focus, instead, will be on the implementation of this newfound Second Amendment liberty, on the D.C. Circuit’s method of establishing a broad personal right to handgun ownership and use in *Parker*, and the court’s method of assessing the balance between state and personal handgun interests in striking down the District’s law.

What separates the D.C. Circuit in *Parker* from the constitutional discourse of *United States v. Emerson* is the opinion’s finding that personal rights to own and use handguns trump municipal and state interests in restricting the supply of concealable firearms. It is this two-step argument that pushes the court’s theory of the Second Amendment into a direct confrontation with more than a century of regulations in the United States and other developed countries that restrict the ownership and use of concealable firearms. How firmly rooted in constitutional history is the D.C. Circuit’s theory that concealable firearms are militia weapons? What precedent is there for dismissing the state interest in restricting personal ownership of concealable weapons?

I will first discuss the *Parker* court’s treatment of handguns as a subject of Second Amendment rights, then deal with the court’s method of balancing state and individual handgun interests. A final section will suggest more appropriate accommodations for a right to bear arms in a modern urban United States.

### I. MODERN HANDGUNS AS MILITIA WEAPONS

The D.C. Circuit doesn’t expressly construct an argument for a right to bear handguns but rather presents its analysis of the handgun issue as a response to the District of Columbia’s theory that "modern handguns are
not the sort of weapons covered by the Second Amendment." In its response to this argument, the court does not define what it means by "modern handguns" or indeed the term "handgun." But the court bases its test of Second Amendment coverage from language in United States v. Miller as proposing that weapons must bear "some reasonable relationship to the preservation or efficiency of a well regulated militia."  

Judge Silberman then constructs a classification system in which the universe of arms is divided into two categories, "militia weapons" and non-militia weapons, with all "personal" militia weapons covered by the personal right to bear arms and all other weapons presumably not so covered. Judge Silberman places emphasis on the Militia Act of 1794's list of personal weapons—pistols as well as rifles and sabers—as weapons that members of the militia are expected to own. All such weapons are presumably within the Second Amendment and all others are not.

But the District of Columbia sought to distinguish the pistols mentioned in 1794 from the handguns it restricted in 2007. Rejecting this argument, the Silberman opinion extends the Second Amendment's personal right to these modern armaments in a single short paragraph:

The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes Miller's standards. Pistols certainly bear "some reasonable relationship to the preservation or efficiency of a well regulated militia." They are also in "common use" today and probably far more so than in 1789. Nevertheless, it has been suggested by some that only colonial-era firearms (e.g., single-shot pistols) are covered by the Second Amendment. But just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a "search," the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol. See, e.g., Kyllo v. United States, 533 U.S. 27, 31-41, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (applying Fourth Amendment standards to thermal imaging search).

3. Parker, 478 F.3d at 397.
4. Id. (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).
5. Parker, 478 F.3d at 386-87.
6. Id. at 398-99.
The opinion never defines or delimits what it means by “the modern handgun,” nor does it indicate what elements of “the modern handgun” made it a “lineal descendant of that founding-era weapon.” The court does indicate that the capacity to fire more than the single-shot pistol of 1794 doesn’t disqualify modern weapons from Second Amendment status. Presumably the sawed-off shotgun in *United States vs. Miller* was not a “modern handgun” in the court’s analysis (even if it could be operated with one hand) because the Supreme Court in *Miller* didn’t think it a militia weapon. But why is that?

The *Parker* opinion is silent on two further technical changes between historic and modern handguns—concealability and the capacity for automatic fire. The pistol referred to in the Militia Act of 1794 was not a concealable weapon then or now. The only common 1794 pistol—the Kentucky flintlock—was fifteen inches long with a barrel more than twice the length of any contemporary pocket weapon. This is not a small matter because concealability is what makes handguns a particular danger in the modern city. It is the concealability of twentieth- and twenty-first-century handguns that is the defining reason for restrictions on their ownership and use all over the world, including in the District of Columbia.

The concealable firearm can be carried without being noticed and thus makes streets, parks, and public accommodations susceptible to firearms attacks. Table 1 compares the total length and barrel length of the only American handguns produced in volume during the militia era with three English “pistols” of the same period. The right side of the table presents parallel data for common modern handguns.

The four modern handguns average a total length less than half that of the Kentucky flintlocks and the barrel lengths of the pistols and revolvers range from less than half the early guns to less than one fifth the size. The English pistols of the earlier era are also twice or more the total of the modern handguns of 2008. These new multi-shot handguns were designed to be concealable and therefore the ease with which they can be carried should come as no surprise. The characteristic of modern handguns that distinguishes them from other firearms and has produced special legal regulations like those in the District of Columbia is concealability.

Table 1. Handgun Length and Barrel Length, Militia Era and Modern Handguns (in inches)

<table>
<thead>
<tr>
<th></th>
<th>1794 Total Length</th>
<th>1794 Barrel Length</th>
<th>2008 Total Length</th>
<th>2008 Barrel Length</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kentucky</td>
<td>15.5</td>
<td>10</td>
<td>Smith &amp; Wesson</td>
<td>6.3</td>
</tr>
<tr>
<td>Flintlock</td>
<td>19.5</td>
<td>12</td>
<td>642 (.38)</td>
<td>1.9</td>
</tr>
<tr>
<td>English Sea Service Pistols</td>
<td>15.5</td>
<td>10</td>
<td>Hi-Point</td>
<td>6.8</td>
</tr>
<tr>
<td>Light Dragoon</td>
<td>13</td>
<td>7.3</td>
<td>Beretta</td>
<td>8.3</td>
</tr>
</tbody>
</table>

By what method should we decide whether the non-concealable ancestor confers a constitutional privilege to own and use the concealable descendant? The opinion in *Parker* provides only one hint—the term “lineal descendant.” But the opinion is silent on what similarities and differences should carry weight in the determination of ballistic heredity. The single feature which justifies the special regulation of modern handguns—the ease of concealment—wasn’t a characteristic of the pistol discussed in the Militia Act. Why shouldn’t that difference influence Judge Silberman’s constitutional jurisprudence of lineal descent?

A second issue for lineal analysis is the capacity of some modern guns to fire several bullets with a single pull of the trigger. Should not these “automatic” weapons be considered just a technical upgrade of grandpa’s flintlock just like the earlier upgrade from the single-shot pistol to the semi-automatic handgun? That would make them lineal descendants of the pistol of 1794 and thus protected in the Silberman analysis. By what logic other than the historical precedent of restrictions under the National Firearms Act of 1934 can rapid fire improvements be excluded from the Second Amendment pantheon? And if the historical precedent

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of restriction is allowed to keep automatic guns out of the constitutional pantheon, why not also allow the restrictive precedents of laws against civilian possession of concealable guns to prevail? Is there a method here? New York's Sullivan Act put special restrictions on handguns in 1911, more than two decades prior to the National Firearms Act of 1934 was created. So the special restrictions on handguns have a rather long history of their own.

There are two independent problems which hamper Judge Silberman's "lineal descendant" approach to the classification of firearms for Second Amendment purposes. The first is the lack of any clear criteria for establishing what constitutes a "lineal descent" in the classification of modern guns. Why, for instance, isn't a short barreled shotgun a descendant of the muskets of 1794? If it is, isn't United States v. Miller itself Supreme Court authority against a Second Amendment handgun right?

The second problem is the conclusive use of weapon labels, what I will call a "categorical" approach, as a constitutional test. Why should it matter whether a short barreled shotgun in 2008 is a "lineal descendant" of a rifle when striking the balance between state interests and personal rights to own and use guns?

What the Parker opinion seems to do is confer Second Amendment status on entire categories of weapons from the era of the Militia Act and then extend this status to quite different guns in the modern era. And the opinion's authority for this approach is the Supreme Court's language about the linkage of firearms to "the preservation or efficiency of a well regulated militia." But the analysis of the Miller Court was neither historical nor categorical. The Court was talking about the gun Mr. Miller was carrying in 1938 and its functional relationship to the efficiency of a militia "at this time." The equivalent test in Parker would have been for the circuit court to ask whether the particular weapons possessed by the Parker plaintiffs were of current importance. That sort of test would deal with the functions and dangers of handguns as they are now and have been rather than asking if the current weapons are "lineal descendants" of the Kentucky flintlocks.

14. Id.
II. BALANCING STATE INTERESTS IN HANDGUN CONTROL

Writing in 2003 of the potential import of judicial activism and the Second Amendment, I argued that

the effect any personal right to bear arms would have on restricting regulation of guns is difficult to predict. The key questions are, first, whether particular weapons . . . would be covered and, second, what sort of balance between personal and governmental interests would animate decisions. . . . [B]ecause the entire constitutional calculus would have to be created without any background in prior case reasoning, the impact . . . for gun regulation is still a wide-open question.15

How did the circuit court handle the critical balance between the gun interests it recognized and state interests in the prevention of violence?

The Silberman opinion in Parker recognizes the need for a balancing of interests and lists some state handgun regulations that it approves, but the opinion does not indicate what elements make these regulations reasonable. Restrictions with historical pedigrees have the court's approval, including not only time and manner restrictions but also those that prohibit the carrying of concealed weapons. Such laws do not offend the Second Amendment according to Silberman because "these regulations promote the government's interest in public safety consistent with our common law tradition."16 But why is it reasonable for the state to prohibit law-abiding citizens from carrying concealed handguns in public places for self defense against crime and aggression by attackers? And if this is a reasonable way of controlling guns, why not prevent most citizens from owning easily concealable guns so that there are fewer such guns available to threaten the safety of the streets? Special attempts to restrict handgun ownership have a legislative history of almost a century in New York, Massachusetts, and New Jersey. Since prohibiting concealed weapons in public is approved in the Silberman analysis, the only constitutionally required self-defense settings for citizens left in this analysis are homes and

16. Parker, 478 F.3d at 399.
businesses. But aren’t rifles and shotguns just as good as handguns for self-defense in these areas?

Those seeking the answers to questions like these will turn the pages of the Parker opinion in vain. The court calls the regulations it approves “reasonable” but doesn’t provide any substantive guidance as to what features of a regulation make it reasonable. The opinion asserts that a ban on the carrying of concealed weapons does not “impair the core conduct upon which the right was premised,” but this also is a naked assertion. Many gun enthusiasts have great affection for carrying concealed weapons in public for self-defense. Why is this court’s theory of balance superior to their strong feelings? And if concealed weapons can’t be carried in public, what good are they? What, after all, was the reason officers were supposed to have 1794 model pistols as part of the common defense?

What makes Parker v. District of Columbia a historic demonstration of unworldliness in legal theory is its failure to deal with the central empirical fact of modern handguns—concealability—that has produced special problems in the modern city and a special and separate type of firearm in legislation all over the developed world. The only subject of the Parker case was special legislative treatment of handguns in the District of Columbia, but the court’s opinion never addresses this defining feature of the modern handgun.

Yet even this failure to confront the legal importance of concealability does not consistently justify the outcome the gun rights groups would desire, because of the opinion’s approval of the prohibition of carrying concealed weapons. The Parker opinion approves special treatment of concealable guns and never announces the principle that guides or limits this approval.

Having opened Pandora’s Box by announcing a personal right to bear arms enforceable against government, the D.C. Circuit should have provided principled, substantive guidance about the proper balance between public and individual interests in gun regulation. But the court’s efforts at balancing on this issue were abrupt, conclusory, and unprincipled. What should have been a central concern of this opinion seems to have been regarded as an afterthought.

17. Id.
III. A BETTER BALANCE

What would be the proper balancing test of a personal right to bear arms and the governmental interests that animate handgun restrictions such as those in the District of Columbia system? Whether or not a federal court regarded handguns as a category of weapons with Second Amendment coverage, there are clear historical and policy reasons to grant governments special powers to limit handgun misuse. Almost all handguns are concealable weapons, and this capacity to be carried and concealed is the reason why handguns were nine times as likely to be used in homicides and sixty times more likely to be the instruments of urban armed gun robbery when ownership and crime data were compared in 1968.18

Special restrictions to prevent handgun violence are a necessary part of rational public policy, even in a twenty-first-century United States with personal rights to firearms. But what restrictions are "reasonable" for special handgun controls? The prohibition of carrying concealed firearms is regarded by the Parker court as an uncontroversially reasonable state limitation presumably because concealable firearms increase the lethality of street crime.19 But doesn't the court's approval of this prohibition mean there is no Second Amendment right to carry guns as self-defense for street crime? I assume this finding means that the citizen's self-defense rights are limited to homes and businesses, an important issue when considering the costs and benefits of handgun ownership restrictions.

19. Parker, 478 F.3d at 399.
The argument for restricting the ownership of handguns is that prohibiting the carrying of such guns is difficult to enforce if they are easy to obtain. Cutting way down on the number of such guns in urban areas is an important supplement to the prohibition of carrying concealed guns, but it removes also the possibility of lawfully using concealable firearms as instruments of household self-defense. Are handguns superior to long guns for these purposes? This is a question that Judge Silberman does not address in his discussion of handguns in *Parker*. The opinion stresses that many gun owners prefer handguns for self-defense but does not indicate whether this preference relates to household use (presumably a Second Amendment interest) or carrying in cars and public places (which *Parker* concedes can be prohibited). Is the size or concealability of handguns a critical advantage for household self-defense? If not, there is a clear basis for restricting handgun availability to more effectively protect streets and other public places. Tens of millions of rifles and shotguns are owned for household self-defense as well as sporting purposes (Zimring and Hawkins report that two-thirds of all gun owning respondents mention self-defense as an ownership motive).20

If there is no special advantage to handguns in home defense, the defects in the current District of Columbia system might be relatively minor—prohibiting all handguns, rather just the overwhelming majority of such weapons that are concealable, and failing to provide special permits for high risk persons or occupations where weapons should be carried. A law that restricted ownership of firearms with barrels less than six inches long and that provided special needs exceptions would seem reasonable in a constitutional universe where carrying concealed weapons is not a fundamental right.

In this sense, even Judge Silberman's creation of a handgun inclusive Second Amendment right that extends categorically from the lineage of fifteen-inch flintlocks is not sufficiently radical to accommodate the political ambitions of the gun rights constitutionalists. But the lack of principles in the opinion leaves even this conclusion impossible to justify with the *Parker* opinion's language and reasoning.

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IV. THE NEW ACTIVISM

The nascent constitutional jurisprudence of handgun rights does seem to provide for an ironic personnel change when the friends and critics of judicial activism make their voices known. A personal right to handguns that limits government power to restrict such weapons is a stark example of judicial activism to limit the powers of other branches of government, and a clear case of the national government imposing limits on the authority of states and localities to reflect different public values. From the standpoint of federalism and the restriction of judicial power, the *Parker* opinion is a textbook example of judicial activism in full flower. And the abruptness and lack of core precedent for *Parker*'s new right is also striking. Even *Roe v. Wade* had *Griswold v. Connecticut* as a precursor and was in that sense less novel and unprecedented.

But the political sentiments served by this case study in judicial activism are those associated with the right wing in the United States, the part of the political spectrum that generated criticism for judicial activism in the era of Earl Warren. Will the red-state theorists prove more tolerant of judicial power when it represents their values on firearms issues? Will the blue-state civil libertarians embrace what the N.R.A. likes to call "firearms freedoms" as another chapter in the personal civil rights that protect individuals from the state in the modern age?

While the ironies of role reversal affect both sides of the political spectrum, it is the newly powerful conservative judges on the U.S. Supreme Court who will be most visibly involved with balancing their political preferences against cautionary jurisprudential principles. But even the political preferences of the new right in the U.S. are a mixed bag on questions like handgun control. There are substantial differences between the libertarian and cautionary branches of conservative political thought that can produce mixed feeling about deregulating concealed weapons in the twenty-first century. Should we support the local police or stay armed in fear of them? It should be an interesting spring for students of jurisprudence.