D.C. as a Breeding Ground for the Next Second Amendment Test Case: The Conflict within the U.S. Attorney's Office

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[L]et me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms.¹

Since the confirmation of John Ashcroft as Attorney General, statements like the one above and positions taken by Solicitor General Ted Olson have spurred multiple challenges to laws restricting an individual’s right to carry a firearm, claiming that they violate the Second Amendment.² The current Administration’s dramatic policy shift from that of the prior Administration has re-armed advocates of individual rights who otherwise have been fighting a losing battle outside the arena of academia.³ Particularly in the District of Columbia (D.C.), the threat

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² See, e.g., Brief for the United States in Opposition at 21 n.3, United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002) (stating the view of Solicitor General Ted Olsen that the Second Amendment grants the individual the right to bear arms subject to reasonable restrictions); Brief for the United States in Opposition at 7 n.2, United States v. Haney, 264 F.3d 1161 (10th Cir. 2001), cert. denied, 122 S. Ct. 2632 (2002) (No. 01-8272) (stating the position of the government that the Second Amendment grants an individual right); see also Arthur Santana & Neely Tucker, Cases Take Aim at District’s Gun Law: Attorneys Use Bush Administration’s Second Amendment Stand in Attack on Ban, WASH. POST, June 13, 2002, at A20 (noting that within the first two weeks of June, 2002, about thirty motions were filed in the D.C. Superior Court relying on the Bush administration’s stance on the Second Amendment).

³ See Letter from John Ashcroft, supra note 1. Cf. Letter from Seth Waxman, Solicitor General of the United States, to Anonymous Recipient (Aug. 22, 2000), at http://www.rkba.org/federal/doj/waxman-emerson.html. In this letter, then-Solicitor General Seth Waxman wrote that the Assistant United States Attorney arguing the Emerson case was correct in asserting that only collective rights are protected under the Second Amendment. Id. Waxman stated:

That position is consistent with the view of the Amendment taken both by the federal appellate courts and successive Administrations. More specifically, the Supreme Court and eight United States Courts of Appeals have considered the scope of the Second Amendment and have uniformly rejected arguments that it
of judicial warfare over the Second Amendment has convinced some legal commentators that a successful constitutional challenge to the D.C. Code may soon be near.4

With more than thirty motions to dismiss weapons charges filed in the D.C. Superior Court since early June 2002, D.C. has become a breeding ground for what may be the next Second Amendment test case.5 Constitutional scholars find D.C. laws susceptible to challenge for three reasons: 1) the statutes restrict handgun ownership to law enforcement officials only; 2) Fourteenth Amendment incorporation is inapplicable to issues in D.C. and 3) there is conflict between the Attorney General’s statements and the D.C. Assistant U.S. Attorney’s prosecution of weapons offenses.6 As of now, D.C. Superior Court judges have denied

extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia.

Id.; see also Karen Branch-Brioso, Justice Department Footnote Marks Policy Reversal, ST. LOUIS POST-DISPATCH, May 12, 2002, at B1 (noting that the majority of Second Amendment scholarship promulgates the individual-rights view, but a large percentage of such writings were authored by Stephen Halbrook, who often served as lead lawyer on National Rifle Association (NRA) cases against gun control); David Yassky, The Sound of Silence: The Supreme Court and the Second Amendment—A Response to Professor Kopel, 18 ST. LOUIS U. PUB. L. REV. 189, 190-91 (1999) (arguing that the federal district court in Texas relied on the views perpetrated by individual-rights scholars in deciding United States v. Emerson); Dennis A. Henigan, Ashcroft’s Bad Aim: What Is Going on with the Justice Department and Guns?, LEGAL TIMES, Vol. 25, No. 30, July 29, 2002 (stating that “[t]here is no doubt that Second Amendment challenges to gun laws will now become a standard part of the criminal defense attorney’s tool kit” and using, as an example, John Walker Lindh’s reliance on the policy shift in his motion to dismiss his firearms charges); William L. McCoskey, The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry, 77 IND. L.J. 873, 878 (2002) (stating that “[u]ntil fairly recently, however, many constitutional scholars simply ignored or marginalized the Second Amendment as relatively unimportant in the study of constitutional law.”).

4. See Neely Tucker & Arthur Santana, D.C. Handgun Ban Challenged in Court: Attorneys in 2 Cases Cite Ashcroft Stance on 2nd Amendment, WASH. POST, May 30, 2002, at A1 (stating that “the District is a logical place for the interpretation to be tested”); Robert A. Levy, Bearing Arms in D.C., LEGAL TIMES, July 22, 2002, at 42 (examining the factors that make D.C. gun laws so ripe for constitutional challenge). See also D.C. Code § 22-4504(a) (2001) (“No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed.”); D.C. Code § 7-2502.01 (2001) (delineating the persons to which a registration certificate may be issued, effectively restricting issuance to law enforcement officials).

5. Santana & Tucker, supra note 2 (noting that these challenges are based on the Bush administration’s declarations that the Second Amendment grants an individual right); see also Levy, supra note 4 (stating that under the right circumstances, a D.C. resident could become the subject of a test case).

6. See Levy, supra note 4 (arguing that the D.C. law is particularly susceptible to challenges because it does not fall within the “reasonable regulation” test put forth by the
these motions to dismiss, citing binding precedent from the D.C. Court of Appeals. However, some of these defendants have filed appeals with the appellate court, and some scholars speculate that those defendants intend to have their cases heard by the High Court.

This goal may prove to be unattainable, however, because the U.S. Supreme Court has refused to address the Second Amendment issue since its 1939 decision, *United States v. Miller.* In *Miller*—a case inconsistently interpreted by circuit courts and legal scholars alike—the Court held only that a "'shotgun having a barrel of less than eighteen inches in length'" had no "reasonable relationship to the preservation or efficiency of a well regulated militia," and therefore, the right to keep and bear such an instrument was not guaranteed by the Second Amendment. More recently, Second Amendment scholars on both sides of the issue were surprised by the Supreme Court's denial of certiorari in a case that had the potential to settle the individual versus collective rights debate.

In *United States v. Emerson,* the Fifth Circuit became the first circuit to embrace the individual rights view—a view that previously thrived only in academic circles. With *Emerson* controlling in the Fifth Circuit, and a split existing between the Fifth Circuit and all other circuits, the Supreme Court's denial of certiorari poses more interesting questions to

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7. See Sandidge v. United States, 520 A.2d 1057, 1059 (D.C. 1987) (holding that the D.C. gun laws are constitutional on the grounds that the Second Amendment grants a collective, not an individual, right to bear arms).

8. See, e.g. Santana & Tucker, supra note 2 (citing the belief amongst some scholars that the denial of D.C. defendants' motions to dismiss is just the first step on the path to the Supreme Court).

9. United States v. Miller, 307 U.S. 174 (1939). For a recent example of scholarly analysis of the High Court's silence and of the *Miller* opinion, see McCoskey, supra note 3, at 878 (stating that "the Supreme Court has been mostly and conspicuously silent on the extent of the right . . . [and the *Miller* decision] did nothing to conclusively settle the issue").


11. See, e.g., Oskar M. Pérez, United States v. Emerson: The Decision That Will Potentially Force the Supreme Court to Finally Decide Whether the Second Amendment Protects the State or the People, 48 LOY. L. REV. 367, 383-85 (2002) (arguing that the Supreme Court would have to decide the Second Amendment issue if it chose to hear the Emerson case).

12. United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002) (splitting from the other circuits in ruling that the Second Amendment granted an individual right to bear arms); see also Yassky, supra note 3, at 190-91 (arguing that the federal district court in Texas relied on the views perpetrated by individual-rights scholars in deciding *Emerson*).
Second Amendment scholars. What rationale lies behind the Supreme Court’s sixty years of silence? What factors must the ideal Second Amendment test case possess in order to be heard? Or perhaps most importantly, what is the likelihood that the Supreme Court will ever decide whether the Second Amendment grants an individual or a collective right?

This Comment attempts to answer those questions. It begins with a review of the judicial interpretations of the Second Amendment presented by the Supreme Court, the circuit courts, and the D.C. Court of Appeals. Next, this Comment explains the positions of the Attorney General and the Solicitor General, and compares them to the arguments made by both the government (D.C. U.S. Attorney’s Office) and the defendants in some of the challenges now pending in the D.C. Superior Court and the D.C. Court of Appeals. Finally, this Comment explores the possibility that one of these challenges will reach the High Court and explains the unlikelihood of such an outcome.

13. See Emerson, 270 F.3d at 218-20. In leading up to his own “individual rights” view of the Second Amendment, Judge Garwood first categorizes the views of other courts. Id. Judge Garwood categorizes the Fourth, Sixth, Seventh, and Ninth Circuits as having adopted a “states’ rights” or “collective rights” view, meaning that the Second Amendment merely recognizes the right of a state to arm its militia. Id. He also indicates that the First, Third, Eighth, Tenth, and Eleventh Circuits have adopted a “sophisticated collective rights model,” which considers that the “individual’ right to bear arms can only be exercised by members of a functioning, organized state militia who bear the arms while and as a part of actively participating in the militia’s activities.” Id. (emphasis in original).

14. See Robert Hardaway et al., The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms, 16 St. John’s J. Legal Comment. 41, 48-51 (2002) (hypothesizing the reasons for the Supreme Court’s silence); but see David B. Kopel, The Supreme Court’s Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment, 18 St. Louis U. Pub. L. Rev. 99 (1999) (arguing that the Supreme Court has addressed the issue both directly and indirectly in thirty-five cases since 1820).

15. See, e.g., Robert A. Levy, Will Individuals Get Their Second Amendment Rights? The District Presents the Test Case, Legal Times, July 22, 2002 at 42 (suggesting that a successful challenger to the D.C. law might be an otherwise responsible, law-abiding citizen who participates in a peaceful demonstration, such as marching armed in the nation’s capital).

16. See generally Hardaway, supra note 14, at 48-51 (putting forth several possible reasons why the Supreme Court has refused to address the issue since Miller). Cf. Kopel, supra note 14 at 99, 123 (arguing, generally, that the Supreme Court has addressed the Second Amendment right indirectly in thirty-five cases, and at least one Justice would welcome a chance to settle the issue definitively); Yassky, supra note 3 (disagreeing with Kopel’s interpretation that the thirty-five cases illustrate the Court’s belief that the Second Amendment confers an individual right).
I. BACKGROUND\textsuperscript{17}

The Second Amendment states: “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.”\textsuperscript{18} Although the Second Amendment has not been repealed or changed in the more than two centuries since its adoption, and although constitutional scholars have vastly ignored it, within the past few decades it has become a hotly-contested issue amidst legal scholars, politicians, other public figures, and now, members of the judiciary.\textsuperscript{19}

Students of Second Amendment jurisprudence are identified as either “individual rights” proponents or “collective rights” advocates—titles that emerged after a William and Mary Law School student promulgated the “individual rights” view in a 1960s law review article.\textsuperscript{20} As common sense dictates, the individual rights view interprets the Second Amendment as guaranteeing individuals the right to bear arms for any legal purpose.\textsuperscript{21} The collective rights view, on the other hand, arguably divides into two smaller factions.\textsuperscript{22} Adopters of the “states rights” view believe that the Second Amendment “merely” recognizes the right of a state to arm its militia; proponents of the “sophisticated collective rights model” recognize an individual right, but they believe that right may “only be exercised by members of a functioning, organized state militia

\textsuperscript{17} Almost every scholarly article on the Second Amendment begins by delineating the differences between the individual rights and collective rights theories and by giving a full textual and historical analysis of the Amendment. See, e.g. Hardaway, \textit{supra} note 14; Prince, \textit{infra} note 30; Yassky, \textit{infra} note 19. This Comment provides only an overview of these two schools of thought, partially because I believe that both arguments lack legal validity.

\textsuperscript{18} U.S. CONST. amend. II.


\textsuperscript{20} Bogus, \textit{supra} note 19, at 5 (crediting a student at William and Mary Law School as the first to publicize the individual-rights theory).

\textsuperscript{21} Hardaway, \textit{supra} note 14, at 56-57 (stating that “[t]he broad individual right view pictures the Second Amendment as guaranteeing an ‘individual right to bear arms for all legal purposes – barring virtually all regulations of firearms’”).

\textsuperscript{22} See United States v. Emerson, 270 F.3d 203, 218-220 (5th Cir. 2001) (relying on legal scholarship, Judge Garwood expounded upon the three schools of thought).
who bear the arms while and as a part of actively participating in the organized militia's activities." 23

Both sides largely depend on a textual analysis of the Amendment. 24 Individual-rights textualists interpret the Second Amendment’s use of “people” consistently with its use in the First and Fourth Amendments which refer to individual Americans. 25 Collective-rights theorists arguably interpret “people,” as used in the Second Amendment, as referring to “States respectively.” 26 “Bear Arms” is interpreted by collective rights models as pertaining only to members of the militia carrying weapons during militia service; alternatively, the individual rights followers interpret it as a civilian’s carrying of arms. 27 The greatest textual disagreement between the two sides, however, concerns the interpretation of the preamble. 28

Individual rights theorists interpret the militia clause broadly, arguing that it refers to “the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large.” 29 Collective rights proponents, on the other hand, interpret “militia” consistently with its use in Article I, Section 8 and Article II, Section 2 of the Constitution. 30 They further posit that the Militia Clause is not the justification for the right to bear arms, but that the clause makes that right operative; as one writer stated, “the existence of the right is dependent on the existence of a militia.” 31

23. Id. at 218-19 (noting also that the government in Emerson relied on the states’ rights view).

24. See discussion infra Part I.

25. Emerson, 270 F.3d at 227-28 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)). According to the Verdugo-Urquidez Court, “the people” “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” Verdugo-Urquidez, 494 U.S. at 265.

26. Emerson, 270 F.3d at 227 (arguing, however, that “[t]his would also require a corresponding change in the balance of the text . . . [t]hat is not only far removed from the actual wording . . . but also would be in substantial tension with Art. 1, § 8, Cl. 16”).

27. Id. at 229 (stating, however, that “[t]here is no question that the phrase ‘bear arms’ may be used to refer to the carrying of arms by a soldier or militiaman”).

28. See discussion infra Part I; see also, Kopel, supra note 14 at 110.

29. Emerson, 270 F.3d at 235 (relying on Madison and his Federalist Papers to support this view).

30. See, e.g., John Randolph Prince, The Naked Emperor: The Second Amendment and the Failure of Originalism, 40 BRANDEIS L.J. 659, 713-14 (2002). Prince argues that “the militia [did] not consist of self-selected groups of armed citizens challenging authority. Rather, the militia was subject to the orders and discipline of both state and federal authority.” Id. at 714

31. Hardaway, supra note 14, at 133 (disagreeing with the Emerson court’s view that “the right exists independent of the existence of the militia”).
In addition to textual considerations, analysts also rely on historical context or their interpretations of the Framers' intent. Both sides generally acknowledge that the Constitution's protection of the militia was the Anti-Federalists' response to fears that the federal government would use its standing army to oppress the American people. However, individual rights advocates argue that a review of the legislative history of the ratification of the Second Amendment and newspaper articles and personal letters written at the time illustrate that:

The Second Amendment's preamble represents a successful attempt, by the Federalists, to further pacify moderate Anti-Federalists without actually conceding any additional ground, i.e. without limiting the power of the federal government to maintain a standing army or increasing the power of the states over the militia . . . . [There is] no historical evidence that the Second Amendment was intended to convey militia powers to the states, limit the federal government's power to maintain a standing army, or applies only to members of a select militia while on active duty.

The collective-rights theorists contend, however, that “[g]iven the ratification context from which these clauses came, it should be noncontroversial that the proposal did not embody a right to the private, non-militia possession of arms.” Although these textual and historical arguments were largely proliferated in law review articles, they or their presence has recently been noted in judicial opinions.

32. See Prince, supra note 30, at 662 (“Nearly everyone who is involved with Second Amendment scholarship . . . uses an originalist perspective, relying heavily on various readings of eighteenth-century republican ideology.”).

33. See, e.g., Emerson, 270 F.3d at 238-39. The Anti-Federalists feared that the federal government would act or fail to act so as to destroy the militia, e.g., failure to arm the militia, disarmament of the militia, failure to prescribe training for the militia, creation of a select militia or making militia service so unpleasant that the people would demand a standing army or select militia. These concerns over the militia were exacerbated by the third issue: the federal government's power to maintain a standing army (art. I, § 8, cl. 12). The Anti-Federalists feared that the federal government's standing army could be used to tyrannize and oppress the American people. Without a militia to defend against the federal government's standing army, the states and their citizens would be defenseless. Id. at 237-39.

34. Id. at 259-60 (arguing that “[a]ll of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans”).

35. Hardaway, supra note 14, at 94-95. Hardaway reviewed the modifications made to the Second Amendment and argued that each change strengthened “the militia orientation of the Amendment.”

36. See, e.g., United States v. Emerson, 270 F.3d 203 (5th Cir. 2001) (incorporating a discussion regarding the textual and historical analysis of the Second Amendment).
II. JUDICIAL INTERPRETATION OF THE SECOND AMENDMENT

A. The Supreme Court's Approach and Why It Has Caused So Much Confusion

1. The Stepping-Stone for Debate: United States v. Miller

It is generally accepted that Miller is the only twentieth century case in which the Supreme Court directly addressed the Second Amendment. Miller came before the Court as a challenge to Jack Miller's indictment for "unlawfully, knowingly, willfully, and feloniously transport[ing] in interstate commerce ... a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length" in violation of the National Firearms Act (the Act). The District Court of Kansas held that Section 11 of the Act violated the Second Amendment. The Supreme Court reversed, stating:

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.

In its analysis, the Court began by exploring the Framers' purpose for including the militia clause in the Second Amendment. Addressing Article I, Section 8 of the Constitution, which grants to Congress the
power to call forth the militia, the Court stated: "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." This seemingly straightforward language has resulted in differing interpretations among the lower courts, begging the question of whether the Supreme Court will address the Second Amendment issue in the near future.

2. A Prediction for the Future: Printz v. United States

Some legal commentators have argued that the Second Amendment was addressed by the Supreme Court in Printz v. United States. In Printz, the Court held that part of the Brady Handgun Violence Prevention Act (Brady Act) was unconstitutional because it forced state and local law enforcement officers to perform an essentially federal function, federal background checks on handgun purchasers. Although the Court based its decision on the Commerce Clause and did not significantly address the Second Amendment issue, Justice Thomas' concurring opinion suggested that a grant of certiorari to a Second Amendment case may not be far off. He stated:

The Second Amendment similarly appears to contain an express limitation on the Government's authority . . . . This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a personal right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections . . . . Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that

43. Id. at 178.
44. See discussion infra Part II.B.
46. Kopel, supra note 14, at 121-24 (arguing that Justice Thomas's concurring opinion suggests that this Court would welcome the opportunity to decide definitively whether the right to bear arms is an individual or collective right).
48. Printz, 521 U.S. at 937-39 (Thomas, J., concurring) (opining that perhaps the Court would someday have the opportunity to determine whether the Second Amendment grants an individual or collective right); see also Kopel, supra note 14, at 120-25 (using Thomas's concurring opinion to assess the likelihood that the Supreme Court will finally put an end to the Second Amendment debate).
the right to bear arms "has justly been considered, as the palladium of the liberties of a republic."\(^ {49}\)

Perhaps this statement by Justice Thomas was unnecessary in the context of the case in which it was written; nonetheless, it illustrates at least one Justice's view that \textit{Miller} was not dispositive on the Second Amendment issue.\(^ {50}\)

\textit{B. Within the Circuits—The Trickle-Down Effect}

\textit{1. The First Circuit's Interpretation: Cases v. United States}\(^ {51}\)

In \textit{Cases}, the defendant appealed his conviction by the District Court of the United States for Puerto Rico for transporting and receiving a firearm with ammunition.\(^ {52}\) The defendant alleged that the Federal Firearms Act was an unconstitutional violation of his right to bear arms.\(^ {53}\) The First Circuit Court of Appeals affirmed the conviction, finding no violation of the defendant's constitutional rights.\(^ {54}\) In regard to the Second Amendment, the court stated:

The right to keep and bear arms is not a right conferred upon the people by the federal constitution. Whatever rights in this respect the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right.\(^ {55}\)

In interpreting \textit{Miller}, however, the \textit{Cases} court adopted the proposition that the Second Amendment only addresses the types of weapons that may be possessed; specifically, it noted that the possession of those weapons that reasonably relate to the preservation of a well-regulated militia may avoid regulation by the federal government.\(^ {56}\) Yet, the \textit{Cases} court quickly pointed out its belief that, in \textit{Miller}, the Supreme Court was

\begin{footnotes}
\footnote{49. \textit{Printz}, 521 U.S. at 937-39 (Thomas, J., concurring) (emphasis in original).}
\footnote{50. Kopel, \textit{supra} note 14, at 120-25.}
\footnote{51. \textit{Cases} v. United States, 131 F.2d 916 (1st Cir. 1942).}
\footnote{52. \textit{Id.} at 919. \textit{See also} Federal Firearms Act, 52 Stat. 1250 (1942) (current version at 15 U.S.C. § 902(e),(f) (2002)) making it a criminal offense for any person convicted of a violent crime to receive a firearm).}
\footnote{53. \textit{Cases}, 131 F.2d at 919 (reiterating defendant's contention as to the Federal Firearms Act unconstitutionality).}
\footnote{54. \textit{Id.} at 919 (finding that none of the defendant's contentions were sound).}
\footnote{55. \textit{Id.} at 921 (noting, additionally, that the Act "undoubtedly curtails to some extent the right of individuals to keep and bear arms but it does not follow from this as a necessary consequence that it is bad under the Second Amendment").}
\footnote{56. \textit{Id.} at 922 (interpreting \textit{Miller} to mean that "under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual . . . but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia").}
\end{footnotes}
not delineating a fail-safe rule to apply in all Second Amendment cases, but instead merely addressed the specific facts of that case.\textsuperscript{57} The \textit{Cases} court further stated that such a rule may have already become outdated, even though only three and a half years had passed between \textit{Miller} and \textit{Cases}, because of advancements in lethal weaponry and the frequency of certain “Commando Units” in employing such weaponry.\textsuperscript{58} Thus, the \textit{Cases} court suggested a more flexible interpretation of \textit{Miller}, advocating for case-by-case determination of what constitutes a valid restriction under the Second Amendment.\textsuperscript{59}

2. Clarifying the Militia-Relationship Requirement: United States v. \textit{Tot}\textsuperscript{60}

Like the First Circuit, the Third Circuit in \textit{United States v. Tot} acknowledged that the Second Amendment was adopted to protect the states’ rights to organize and maintain militias.\textsuperscript{61} The defendant in \textit{Tot} was convicted under the Federal Firearms Act when law enforcement found a .32 caliber Colt automatic pistol during his arrest and their search of his home.\textsuperscript{62} The defendant contended that the statute was unconstitutional as applied to that type of weapon.\textsuperscript{63} In response, the

\textsuperscript{57} \textit{Id.} (refusing to extend the holding in this case beyond what was necessary to resolve it).

\textsuperscript{58} \textit{Id.} (suggesting that interpreting \textit{Miller} as an absolute rule has little practical value in modern application). The court reasoned that, “under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus.” \textit{Id.}

\textsuperscript{59} \textit{Id.}

Considering the many variable factors bearing upon the question it seems to us impossible to formulate any general test by which to determine the limits imposed by the Second Amendment but that each case under it, like cases under the Due Process Clause, must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line.

\textit{Id.}

\textsuperscript{60} 131 F.2d 261 (3d Cir. 1942).

\textsuperscript{61} \textit{Id.} at 266.

It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.

\textit{Id.}

\textsuperscript{62} \textit{Id.} at 263; see also Federal Firearms Act, 15 U.S.C.A. § 901(f) (1938) (making it unlawful “to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce” if a person has been convicted of a violent crime).

\textsuperscript{63} \textit{Id.} at 266.
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The court summarized its interpretation of the common law view on the right to bear weapons and of the Framers' intent for including the Second Amendment in the Constitution. The Third Circuit then found that the defendant failed to show that his possession of the pistol bore any reasonable relationship to the "preservation or efficiency of a well regulated militia," as required by Miller. The Third Circuit then affirmed Tot's conviction, stating that "[t]he contention of the appellant in this case could, we think, be denied without more under the authority of United States v. Miller." The court also noted that restricting mental patients, young children, and criminals from possessing weapons was reasonable.


The Fourth Circuit adopted the militia-relationship requirement in Love v. Pepsack. April Love brought a civil suit against members of the Maryland State Police Department because it denied her application to purchase a handgun based upon her having a record of prior arrests.

64. Id. "Weapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since." Id. "The experiences in England under James II of an armed royal force quartered upon a defenseless citizenry was fresh in the minds of the Colonists. They wanted no repetition of that experience in their newly formed government." Id.

65. Id. The [Miller] Court said that in the absence of evidence tending to show that possession of such a gun at the time has some reasonable relationship to the preservation or efficiency of a well regulated militia, it could not be said that the Second Amendment guarantees the right to keep such an instrument. The appellant here having failed to show such a relationship, the same thing may be said as applied to the pistol found in his possession.

66. Id. Here the court relied on early state constitutions that prohibited people from bearing arms in public places and carrying concealed weapons. Id. The court then argued that such classifications did not prevent the maintenance of the militia. Id. at 266-67.

67. 47 F.3d 120 (4th Cir. 1995).

68. 978 F.2d 1016 (8th Cir. 1992).

69. Love, 47 F.3d at 124 ("Since [Miller], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."

70. Id. at 122. Love attempted to purchase a handgun in 1990. Id. Following state law, she completed her application honestly and correctly. Id. Upon review of the application, police discovered that Ms. Love had four prior arrests. Id. Despite only one of the arrests resulting in a misdemeanor conviction, the application was denied. Id. The state court ordered the police to approve the application because prior arrests were not listed as one of the grounds for denial under the Maryland Code. Id. Love then filed a new suit alleging that the statute violated due process and the Second Amendment; the suit was dismissed and Love appealed. Id.
Love argued that Maryland infringed her constitutional right to keep and bear a handgun, but the Fourth Circuit Court of Appeals disagreed. The court stated, “even as against federal regulation, the amendment does not confer an absolute individual right to bear any type of firearm.” Interpreting the Miller decision as requiring that the possessor bear some relationship to a well-regulated militia, the court held that Love failed to prove how her possession of a handgun would “preserve or insure the effectiveness of the militia.”

The Eighth Circuit followed suit, adopting the militia requirement in United States v. Hale. Convicted on thirteen counts of possession of a machine gun and three counts of possession of unregistered firearms, Wilbur Hale appealed on the grounds that his indictment violated his Second Amendment rights. Relying on the “type of weapon” interpretation of Miller, Hale argued that the types of weapons seized from him were common to military use, and thus related to a well-regulated militia. The court disagreed, stating that it could not “conclude that the Second Amendment protects the individual possession of military weapons.” Elaborating on its interpretation of

71. *Id.* at 123. Relying on scholarly material, Love argued that she had a constitutional right to own a firearm and the state law had no authority to deny her that right. *Id.* The Court disagreed. *Id.*

72. *Id.* at 124.

73. *Id.* (citing United States v. Johnson, 497 F.2d 548 (4th Cir. 1974) as precedent for the proposition that the defendant bears the burden of proving how his or her possession of a handgun ensures the effectiveness of the militia).

74. United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) (stating that “[t]he purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia”).

75. *Id.* at 1017-18. Relying on Miller, Hale argued “that the Second Amendment bars the federal government from regulating the particular weapons seized because the weapons are susceptible to military use and are therefore, by definition, related to the existence of ‘a well regulated militia.’” *Id*; see also 18 U.S.C. § 922(o)(2002); 26 U.S.C. § 5861(d)(2000).

76. *Hale*, 978 F.2d at 1018.

These [weapons seized] included one MAC-10 .45 caliber submachine gun, three “Sten-type” 9 millimeter fully automatic submachine guns, two M-1 carbines with kits for enabling fully automatic fire, one .22 caliber pistol with a silencer, and five .223 caliber assault rifles modified into “M-16 type” fully automatic machine guns. The agents also seized the principal components or “receivers” of one MAC-10, one Sten, and one “M-16 type” machine gun.

*Id.* at 1017.

77. *Id.* at 1019 (relying largely on the *Cases* opinion). The Court stated: “The claimant of Second Amendment protection must prove that his or her possession of the weapons was reasonably related to a well regulated militia. Where such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was ‘in preparation for a
Miller, the court stated, "Miller simply 'did not hold... that the Second Amendment is an absolute prohibition against all regulation of the manufacture, transfer and possession of any instrument capable of being used in military action.'" By adopting the individual case approach set forth in Cases, the court concluded that Hale's possession of the weapons was not reasonably related to preservation of a militia. Finally, the court noted that there was no need, in this case, to determine, as the defendant argued, whether the Second Amendment grants an individual or a collective right.

4. The Sixth Circuit's Strict Definition of "Militia" in United States v. Warin

United States v. Warin reflects the Sixth Circuit's determination of whether amendments to the National Firearms Act violated the Second Amendment. In Warin, the defendant was convicted for knowingly possessing an unregistered submachine gun. Warin was an active member of the sedentary militia of Ohio and worked for a company that developed firearms for the government. The defendant made the military career," the Second Amendment did not protect the possession of the weapon. Id. at 1020 (citations omitted) (emphasis in original).

78. Id. at 1019 (citing United States v. Warin, 530 F.2d. 103, 106 (6th Cir. 1976)). The court further stated that the "rule emerging from Miller is that, absent a showing that the possession of a certain weapon has 'some reasonable relationship to the preservation or efficiency of a well-regulated militia,' the Second Amendment does not guarantee the right to possess the weapon." Id.

79. Id. at 1020. The court stated that because the Supreme Court has not addressed the issue since 1939, the Cases decision "remains one of the most illuminating circuit opinions on the subject of 'military' weapons and the Second Amendment." Id. at 1019. The court further noted that, since Miller, no federal court had found that a defendant's possession of a weapon met the militia-relation requirement. Id. at 1020. "'Technical' membership in a state militia (e.g., membership in an 'unorganized' state militia) or membership in a non-governmental military organization is not sufficient to satisfy the 'reasonable relationship' test. Membership in a hypothetical or 'sedentary' militia is likewise insufficient." Id. (citations omitted).

80. Id. at 1020 ("Whether the 'right to bear arms' for militia purposes is 'individual' or 'collective' in nature is irrelevant where, as here, the individual's possession of arms is not related to the preservation or efficiency of a militia.").

81. Warin, 530 F.2d 103.


83. Warin, 530 F.2d at 104 (describing the weapon as "a 9 mm prototype submachine gun measuring approximately 21 inches overall length, with a barrel length of approximately 7 1/2 inches, which had not been registered to him in the National Firearms Registration and Transfer Record as required").

84. Id. at 105.
The Next Second Amendment Test

weapon at issue, which was a type used for military purposes. Warin, therefore, argued that his case differed from the facts of Miller, because both he and the weapon he possessed were reasonably related to a well-regulated militia. However, the Sixth Circuit Court of Appeals disagreed and affirmed his conviction. The Warin court followed the First Circuit decision in Cases, which held that Miller did not set forth a general rule, but was specific to the facts of Miller's case. The court, therefore, considered the facts before it and concluded that the Second Amendment granted a collective right to bear arms. Additionally, the court found that the possession of arms must at the present time bear some reasonable relationship to the preservation of a well-regulated militia. Finding that Warin was only a member of a "sedentary militia," the court held that the Second Amendment did not protect him.

85. Id. Both sides stipulated the following facts: 1) The armed forces of the United States use machine guns; 2) this particular type of gun contributes to the United States' armed forces ability to successfully protect and efficiently defend the country; 3) submachine guns comprise part of the United States equipment and this type of firearm reasonably relates to the preservation of a well-regulated militia. Id.

86. Id. Warin argued that Miller implied that "a member of the 'sedentary militia' may possess any weapon having military capability" and application of the Gun Control Act to him was therefore unconstitutional under the Second Amendment. Id. at 105.

87. Id. at 103.

In Miller the Supreme Court did not reach the question of the extent to which a weapon which is "part of the ordinary military equipment" or whose "use could contribute to the common defense" may be regulated. In holding that the absence of evidence placing the weapon involved in the charges against Miller in one of these categories precluded the trial court from quashing the indictment on Second Amendment grounds, the Court did not hold the converse—that the Second Amendment is an absolute prohibition against all regulation of the manufacture, transfer and possession of any instrument capable of being used in military action.

Id. at 105-06.

88. Id. at 106 (reiterating the First Circuit's reasoning that "it was not the intention of the Supreme Court to hold that the Second Amendment prohibits Congress from regulating any weapons except antiques 'such as a flintlock musket or a matchlock harquebus' "). "If the logical extension of the defendant's argument for the holding of Miller was inconceivable in 1942, it is completely irrational in this time of nuclear weapons." Id.

89. Id. at 106.

90. Id. (relying on prior precedent from the Sixth Circuit, as well as persuasive jurisprudence from sister circuits).

91. Id. at 106-07 (emphasizing that simply because Warin was eligible to enroll in the state militia, he did not automatically have the authority to possess a submachine gun). The court further noted that a state statute exempted members of the organized militia from a provision prohibiting all persons from acquiring, possessing, carrying, or using a "dangerous ordnance" (including automatic firearms), but that exemption did not extend to members of the "sedentary militia." Id. Finally, the court opined that there was no evidence "that a submachine gun in the hands of an individual 'sedentary militia' member
5. The Fifth Circuit Upsets the Balance: United States v. Emerson

Despite the varying interpretations of Miller followed by each circuit, it was generally accepted that the right to bear arms was a collective right, not an individual one. With the Fifth Circuit’s opinion in United States v. Emerson, however, that general statement is no longer true. In Emerson, the defendant was indicted for violating 18 U.S.C. § 922(g)(8)(C)(ii), which makes it a crime for a person under a restraining order to possess or transport firearms or ammunition. Emerson’s wife filed a petition for divorce and for a temporary injunction, and the judge granted the injunction. Subsequently, a grand jury indicted Emerson for unlawfully possessing a firearm while subject to a restraining order, in violation of 18 U.S.C. § 922(g)(8)(c)(ii). The district court dismissed the indictment, finding the statute unconstitutional because it stripped Emerson of his right to bear arms under the Second Amendment without first establishing his criminal status.

would have any, much less a ‘reasonable relationship to the preservation or efficiency of a well regulated militia.’” Id. (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).

92. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

93. See discussion supra Part IIB.

94. See Perez, supra note 11, at 368 (stating that unlike many other court decisions that support the collective rights model, Emerson analyzes the Second Amendment issue in great detail and concludes that the Amendment permits an individual right to bear arms).

95. Emerson, 270 F.3d at 210; see also 18 U.S.C. § 922(g)(8) (2000). The statute states in relevant part:

It shall be unlawful for any person . . . who is subject to a court order that . . . restrains such person from harassing, stalking, or threatening an intimate partner . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

96. Emerson, 270 F.3d at 210-11. Emerson’s wife filed a petition for divorce, requesting inter alia a temporary injunction prohibiting Emerson from engaging in twenty-nine specified acts. Id. After a hearing, in which Emerson appeared pro se, the judge issued the temporary order. Id.

97. Id. at 211-12. The count alleged that Emerson “unlawfully possessed ‘in and affecting interstate commerce’ a firearm, a Beretta pistol, while subject to the [restraining order].” Id. at 212. Emerson moved to dismiss the indictment on the grounds that the statute violated the Second Amendment both facially and as applied to him. Id.

98. United States v. Emerson, 46 F. Supp. 2d 598, 611 (N.D.Tex. 1999). Judge Cummings’s opinion included a lengthy discussion on the two schools of Second Amendment scholarship, a textual analysis of the Second Amendment, a historical analysis, a structural analysis, judicial interpretations, and prudential concerns regarding the Second Amendment, before concluding that the Second Amendment protects an individual’s right to bear arms. Id. at 599-610. Judge Cummings explicitly stated, “The rights of the Second Amendment should be as zealously guarded as the other individual
The Fifth Circuit Court of Appeals reversed and remanded the case; however, it spent considerable effort discussing the history, textual analysis, and judicial interpretation of the Second Amendment. This analysis led the Fifth Circuit to conclude that: 1) *Miller* does not support a collective rights model; 2) the text of the Second Amendment does not suggest a collective rights model; and 3) no historical evidence supports the argument that the Second Amendment was intended only to convey militia powers to the states; therefore, the Second Amendment was meant to protect the rights of individual Americans. However, the court recognized that a citizen's right to bear arms may be limited by such factors as felony convictions or a determination of unsound mind.

Liberties enshrined in the Bill of Rights. *Id.* at 610. Therefore, in finding § 922(g)(8) unconstitutional, Judge Cummings stated:

> Under this statute, a person can lose his Second Amendment rights not because he has committed some wrong in the past, or because a judge finds he may commit some crime in the future, but merely because he is in a divorce proceeding. Although he may not be a criminal at all, he is stripped of his right to bear arms as much as a convicted felon. Second Amendment rights should not be so easily abridged.

*Id.* at 611; see also Stephen P. Halbrook, *Rewriting the Second Amendment*, AMERICAN HUNTER, Oct. 1, 2001 (stating that “Judge Cummings' opinion is unequaled in its scholarship and analysis of federal jurisprudence concerning the Second Amendment” and praising the decision as “the only decision squarely to face the music—the text of the Second Amendment, the Framers' intent, and the relevant U.S. Supreme Court decisions”).

99. *Emerson*, 270 F.3d at 210, 227-59. For views arguing that Judge Garwood's opinion overstepped its bounds, see *Emerson*, 270 F.3d at 272 (Parker, J., specially concurring) (labeling the majority’s discussion of the Second Amendment “84 pages of dicta” and refusing to concur with that portion of the decision); John Council, *Ammo for Both Sides in Gun Case*, LEGAL TIMES, Oct. 22, 2001 (quoting one scholar's belief that the opinion lacks judicial restraint because “federal courts are not permitted to give advisory opinions, and that's what they've done on the issue of whether there is an individual right or a collective right in the Second Amendment”).

100. *Emerson*, 270 F.3d at 226, 233, 260. After analyzing the opinion, the court concluded that *Miller* neither supported a collective rights approach nor an individual rights view, therefore “*Miller* itself does not resolve that issue.” *Id.* at 226-27. The court then diagramed the text of the Amendment, examining the terms “people,” “bear arms,” “keep ... arms,” and the effect of the preamble. *Id.* at 227-36. It found that the collective-rights proponents tortured their meanings in a manner “inconsistent with the substantive guarantee's text, its placement within the bill of rights and the wording of the other articles thereof and of the original Constitution as a whole.” *Id.* at 236. Additionally, the court reviewed the history of the Amendment, including the Anti-Federalists' fears, the Federalist response, the legislative history, and nineteenth century commentary, before concluding “that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans.” *Id.* at 259-60.

101. *Id.* at 261 (“As we have previously noted, it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms.”).
The court then concluded that the statute reasonably excluded persons subjected to restraining orders.  

C. Within D.C.—An Unmovable Barrier?  

1. Setting Precedent: Sandidge v. United States

Precedent binds the D.C. Superior Court to the D.C. Court of Appeals’ interpretation of the Second Amendment in Sandidge v. United States. Lee Sandidge appealed his conviction for carrying an unlicensed pistol, possessing an unregistered firearm, and unlawfully possessing ammunition, on the sole ground that the D.C. firearms statutes violated his constitutional right to keep and bear arms. The

102. Id. at 264. The court found that “Emerson actually posed a credible threat to the physical safety of his wife, and . . . [he] could, consistent with the Second Amendment, be precluded from possessing a firearm while he remained subject to the order.” Id. at 261.


104. Id. at 1058 (agreeing with the Cases court that the Constitution does not grant the right to bear arms; the state governments confer such rights).

105. Id. at 1057 (noting that Sandidge was convicted by a jury for violating D.C. Code § 22-3204 (1981), § 6-2311 (1981), and § 6-2361 (1981); see also D.C. Code § 22-3204 (1981) (current version at D.C. Code § 22-4504 (2001))). This statute states:  

Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty.  

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:  

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person’s dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $5000 or imprisoned for not more than 5 years, or both; or  

(2) If the violation of this section occurs after a person has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or another jurisdiction, the person shall be fined not more than $10,000 or imprisoned for not more than 10 years, or both.

Id.; D.C. Code § 6-2311 (1981) (current version at D.C. Code § 7-2502.01 (2002)). This statute states:  

Registration requirements. (a) Except as otherwise provided in this unit, no person or organization in the District of Columbia (“District”) shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. A registration certificate may be issued: (1) To an organization if: (A) The organization employs at least 1 commissioned special police officer or employee licensed to carry a firearm whom the organization arms during the employee’s duty hours; and (B) The registration is issued in the name of the organization and in the name of the president or chief executive officer of the
D.C. Court of Appeals affirmed the convictions, finding no Second Amendment violation. The \textit{Sandidge} court left no room for misinterpretation; it aligned itself with other courts that have interpreted only a collective right under the Second Amendment. \footnote{107}

The \textit{Sandidge} court expressly rejected the argument that, under \textit{Miller}, Congress may only regulate classes of weapons that are unrelated to the militia. \footnote{108} Instead, the court interpreted \textit{Miller} as the Supreme Court's organization; (2) In the discretion of the Chief of Police, to a police officer who has retired from the Metropolitan Police Department; or (3) In the discretion of the Chief of Police, to the Fire Marshal and any member of the Fire and Arson Investigation Unit of the Fire Prevention Bureau of the Fire Department of the District of Columbia, who is designated in writing by the Fire Chief, for the purpose of enforcing the arson and fire safety laws of the District of Columbia.

(b) Subsection (a) of this section shall not apply to: (1) Any law enforcement officer or agent of the District or the United States, or any law enforcement officer or agent of the government of any state or subdivision thereof, or any member of the armed forces of the United States, the National Guard or organized reserves, when such officer, agent, or member is authorized to possess such a firearm or device while on duty in the performance of official authorized functions; (2) Any person holding a dealer's license; provided, that the firearm or destructive device is: (A) Acquired by such person in the normal conduct of business; (B) Kept at the place described in the dealer's license; and (C) Not kept for such person's private use or protection, or for the protection of his business; (3) With respect to firearms, any nonresident of the District participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction; provided, that such person, whenever in possession of a firearm, shall upon demand of any member of the Metropolitan Police Department, or other bona fide law enforcement officer, exhibit proof that he is on his way to or from such activity, and that his possession or control of such firearm is lawful in the jurisdiction in which he resides; provided further, that such weapon shall be unloaded, securely wrapped, and carried in open view.

\textit{Id.}; D.C. Code § 6-2361 (1981) (current version at D.C. Code § 7-2506.01 (2001)). This statute states:

\textit{Persons permitted to possess ammunition. No person shall possess ammunition in the District of Columbia unless: (1) He is a licensed dealer pursuant to subchapter IV of this unit; (2) He is an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties when possessing such ammunition; (3) He is the holder of the valid registration certificate for a firearm of the same gauge or caliber as the ammunition he possesses; except, that no such person shall possess restricted pistol bullets; or (4) He holds an ammunition collector's certificate on September 24, 1976.}

\textit{Id.}

106. \textit{Sandidge}, 520 A.2d at 1058.

107. \textit{Id.} (stating that the Second Amendment “protects a state’s right to raise and regulate a militia by prohibiting Congress from enacting legislation that will interfere with that right”).

108. \textit{Id.} (noting that \textit{Sandidge}'s reliance on \textit{Miller} was “misplaced” and adopting the interpretation of the \textit{Cases} court, which held that \textit{Miller} did not set forth a general rule).
declaration that the Second Amendment only protects a state’s (or the District of Columbia’s) right to raise and regulate a militia; it does not restrict Congress or local governments from regulating the use and possession of weapons that are not related to such a militia.109

2. Ashcroft vs. His Assistants

There are currently a number of defendants in D.C. seeking to overturn Sandidge.110 In June 2002, for example, Michael Freeman unsuccessfully challenged his indictment for carrying a pistol without a license, possession of an unregistered firearm, and unlawful possession of ammunition, as violations of the Second Amendment.111 Primarily, Freeman argued that the statutes had the effect of permitting only law enforcement officers to register firearms, thereby denying the average D.C. citizen the right to bear arms.112 Freeman relied on the decision in Emerson, the position taken by the Solicitor General in opposition to the petition for certiorari in Emerson, and the memorandum endorsing Emerson sent by Attorney General John Ashcroft to every U.S. Attorneys’ Office.113

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109. Id. at 1059 (holding that Sandidge was unable to show that his possession of a handgun related to D.C.’s preservation of a militia).

110. See Tucker & Santana, D.C. Handgun Ban Challenge, supra note 4 (stating that “two D.C. defendants are likely to be the first of many to . . . make constitutional challenges to the city’s handgun ban”); Neely Tucker and Arthur Santana, U.S. Backs District Gun Law in Court: Argument Differs from Ashcroft’s, WASH. POST, May 31, 2002 (discussing the “first of at least three cases that challenge the District’s prohibition on handguns as unconstitutional”); Santana & Tucker, supra note 2 (noting that thirty motions were filed in the D.C. Superior Court in June of 2002, to dismiss gun-carrying charges); Levy, supra note 4 (discussing the cases already before the D.C. courts); Editorial, Guns and Ideology, WASH. POST, Aug. 5, 2002 (analyzing one of these challenges).


112. Id.

113. See Brief for the United States in Opposition at 19 n.3, United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002). The Solicitor General stated:
The current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse.

Id.; see also United States v. Freeman, No. F-1048-02 (D.C. Super. Ct. June 11, 2002) (order denying defendant’s motion to dismiss); Branch-Brios, supra note 3 (describing the memo Ashcroft sent to every U.S. Attorney, “notifying them they should contact headquarters in ‘all cases in which Second Amendment issues are raised’” and quoting a
In a letter to the National Rifle Association (NRA), Ashcroft wrote, "[l]et me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms." Ashcroft’s position relies on the Supreme Court’s decision in United States v. Verdugo-Urquidez, which noted that the use of the words “the people,” as used throughout the Bill of Rights, secures rights to the individual, and relies on this interpretation as revealing the intent of the Founding Fathers. Ashcroft also authored a well-publicized memorandum to all attorneys in the Department of Justice describing further the government’s policy shift. These actions have

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Brady Center attorney’s view that the memo “is basically a gift to criminals”); Henigan, supra note 3 (describing the “quandary Ashcroft has created for federal prosecutors”). Henigan states:

For example, in proceedings in United States v. Freeman . . . the government did cite the controlling legal authority in the District . . . . In doing so, however, prosecutors explained that this authority “contains reasoning that is inconsistent with the position of the United States as to the scope of the Second Amendment,” noting that they were, nevertheless, ethically obligated “to point the Court to controlling legal authority known ‘to be dispositive of a question at issue.”

Id. 114. Letter from John Ashcroft, supra note 1. For an example of the public outcry that followed this letter, see Henigan, supra note 3 (describing the letter as an “extrajudicial statement . . . to an opposing amicus party in a pending case, stating that he agreed with that party’s interpretation,” and commenting on the ethics complaints filed with the Justice Department’s Office of Professional Responsibility against Ashcroft by Common Cause and the Brady Center to Prevent Gun Violence).

115. Letter from John Ashcroft, supra note 1 (stating his belief that “the Amendment’s plain meaning and original intent prove [that] . . . [like the First and Fourth Amendments, the Second Amendment protects the rights of ‘the people’ . . . This view of the text comports with the all but unanimous understanding of the Founding Fathers”); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (plurality opinion) (stating that “the people” has the same meaning throughout the Bill of Rights).

116. See Linda Greenhouse, Justice Department Backs Individuals’ Right to Bear Arms, HOUS. CHRON., May 8, 2002 (quoting from Ashcroft’s letter to all federal prosecutors, which states, “in my view, the Emerson opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment”). For opinions on the Ashcroft policy shift, see Jacob Sullum, Second Thoughts, REASON MAG. Aug. 1, 2002 available at http://reason.com/0208/ct.js.second.html. (“[Ashcroft’s] position, even if adopted by the U.S. Supreme Court, is not likely to have practical consequences anytime soon.”); Branch-Brioso, supra note 3 (quoting one legal historian’s belief that the Justice Department’s policy shift will have more significance in the political area than in the courts. Cf. Sens. Edward M. Kennedy and Charles Schumer, Editorial, Ashcroft’s Assault on Gun Laws, THE BOSTON GLOBE, July 21, 2001 (stating that “[a]ll law-abiding Americans should be deeply concerned about Ashcroft’s efforts to . . . dramatically reverse longstanding Justice Department measures to keep guns out of the hands of those who pose the greatest risk to safety and security” and urging Ashcroft to “live up to the commitments he made during his Senate Judiciary Committee confirmation hearings”); Henigan, supra note 3 (arguing that “the department’s position amounts to an invitation to
led defendants like Freeman to question the dual role of the U.S. Attorney's Office—a division of the DOJ—as employees of Ashcroft and as prosecutors of weapons possession offenses.¹¹⁷

Even so, Freeman's motion to dismiss the indictment was denied by D.C. Superior Court Judge Keary on the grounds that Sandidge provided conclusive precedent.¹¹⁸ Judge Keary explicitly stated that "Sandidge is fully consistent with the Supreme Court's ruling in 1939 in United States v. Miller . . . interpreting the Second Amendment as protecting only a collective, rather than an individual right, to bear arms." Judge Keary's denial further noted that the inconsistency between the Sandidge holding and the position taken by the Department of Justice had no effect on the force of that precedent.¹²⁰ Finally, the order pointed out that even if the court adopted a collective rights interpretation of the Second Amendment, the statutes were constitutional as applied to this defendant, because, like the defendant in Emerson, he was a convicted felon.¹²¹ This denial, however, has not stopped Freeman from appealing federal judges to decide for themselves whether a gun law under attack is sufficiently 'reasonable' . . . instead of deferring to the judgment of Congress or state legislatures'); Educational Fund to Stop Gun Violence Submits an Opposition to Block Ashcroft Letter, U.S. NEWSWIRE, Aug. 16, 2001 (describing the Memorandum of Law filed by the Educational Fund to Stop Gun Violence in an attempt to prevent Ashcroft's letter from being admitted in the Emerson case). The article stated:

The Educational Fund's Memorandum of Law demonstrates that the Attorney General acted outside his statutory authority in issuing a legal opinion at all because the law authorizes him to render legal opinions only to and at the request of the President and certain other members of the executive branch . . . . Even when the Attorney General has been requested to render a legal opinion, it is improper for the Attorney General to opine on an issue reserved to the courts, such as proper interpretation of the Second Amendment.

Id.

¹¹⁷ United States v. Freeman, No. F-1048-02 (D.C. Super. Ct. June 11, 2002) (reiterating the defendant's reliance on the Attorney General's memorandum and the assertion in Freeman "that the United States now unequivocally interprets the Second Amendment as an individual and personal right, rather than a collective right of states to maintain militias, given the recent position taken by the Solicitor General and the Attorney General").

¹¹⁸ Id. at 1, 3 (stating that Sandidge "is conclusive precedent in this jurisdiction and is dispositive of defendant's instant constitutional challenge, as it involved the same statutes challenged by defendant in this case").

¹¹⁹ Id. at 3-4.

¹²⁰ Id. at 4 ("While there may be an inconsistency between the Court of Appeals' holding in Sandidge and the position expressed recently by the United States Department of Justice in Emerson, that inconsistency does not diminish in any way the binding precedential force of the Court of Appeals Sandidge ruling on this court").

¹²¹ Id. (noting Freeman's prior legal infractions).
III. INTERPRETING THE COURT'S SILENCE

Today's challengers to the District's gun laws have a large hurdle to overcome. First, they must convince the D.C. Court of Appeals to reconsider the Sandidge decision and its interpretation of Miller.\(^\text{123}\) If successful at the appellate level, their petitions for certiorari to the Supreme Court must demonstrate that the Miller decision was inconclusive.\(^\text{124}\) Although Justice McReynolds' unanimous opinion in Miller succinctly stated the proposition that the right to bear arms only belongs to those persons acting in reasonable relation to a well-regulated militia, this reading has been disputed.\(^\text{125}\) Gun lobbyists and individual rights theorists have circulated an alternative theory.\(^\text{126}\) Subscribers to this alternative believe that the Court's opinion in Miller holds that only the weapons themselves must bear some reasonable relation to a well-regulated militia—that there can be no restrictions on an individual's right to own any type of weapon that is currently of military value.\(^\text{127}\)

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\(^{122}\) See Santana & Tucker, supra note 2.

\(^{123}\) See Henigan, supra note 3 (contemplating the consequences of cases that might challenge D.C. firearm statutes and the potential arguments advanced by prosecutors).

\(^{124}\) See discussion infra Part III (assessing the scholarly opinion that the reason the Supreme Court has not granted certiorari to a Second Amendment case since Miller is because the Court believes Miller is dispositive on the issue).

\(^{125}\) United States v. Miller, 307 U.S. 174, 175, 178 (1939). Justice Douglas took no part in the consideration or decision. Id. at 183; see also Halbrook, supra note 98 (arguing that "[t]he test was not whether the person in possession of the arm was a member of a formal militia unit, but whether the arm 'at this time' is 'ordinary military equipment' or its use 'could' potentially assist in the common defense"); McCoskey, supra note 3, at 881 (illustrating how both sides have used Miller to support their interpretations of the Second Amendment).

\(^{126}\) See e.g. Halbrook, supra note 98, at 76 (promulgating this theory and his support—as counsel to the NRA—for the individual-rights view).

\(^{127}\) See generally, Hardaway, supra note 14, at 112. The article states:

There are two possible interpretations of this holding. The first is that the Second Amendment guarantees the right to bear arms to those who need such arms in order to serve in the militia. The second is that every citizen has a right to possess a weapon of the type used by a militia. Under this reasoning, Miller grants an unrestricted right to possess weapons if these are ordinary military equipment of the day. The first interpretation has been uniformly adopted by all of the Circuit Courts. The second interpretation of Miller, though not adopted by a single Circuit Court, has nevertheless been put forth by the Gun Lobby.

Id.; Brannon P. Denning and Glenn H. Reynolds, Enduring and Empowering: The Bill of Rights in the Third Millennium: Telling Miller's Tale: A Reply to David Yassky, 65 LAW & CONTEMP. PROB. 113, 117 (2002) (stating that the Court's rejection of the government's collective rights argument further supported the contention that the Miller Court "implicitly adopted an individual rights interpretation of the Second Amendment"); see
Although widely discouraged by the circuit courts, this theory incredulously leads to the conclusion that every law-abiding U.S. citizen has the right to keep and bear such military weapons as grenades and bazookas—the interpretation after Emerson that the bearer must have some relation to a militia is no longer an absolute.  

So, why does the Supreme Court refuse to resolve the question? Arguably, the Supreme Court’s reluctance to grant certiorari to any Second Amendment case following Miller indicates the Court’s satisfaction with the circuits’ interpretations of Miller. However, the Court’s refusal to hear the Emerson case—where the Fifth Circuit

also Kopel, supra note 14, at 106-08 (stating that the author of the Miller decision, Justice McReynolds, was “arguably one of the worst Supreme Court Justices of the twentieth century,” that the decision “can plausibly be read to support either the Standard Model or the State’s Rights theory,” and “does not foreclose either,” and that were it the only guide to the Second Amendment, “the individual right vs. government right argument might be impossible to resolve conclusively”).

128. See Hardaway, supra note 14, at 112-13 (suggesting that an individual-rights interpretation of Miller, as adopted by the Emerson court, “would allow regulation of private possession of any firearm that would not be of use in a militia . . . such as shotguns, Saturday Night Specials and antique guns,” but not the regulation of private possession of “useful military hardware such as bazookas, tanks, grenades, or small tactical weapons”). Cf. Halbrook, supra note 98, at 76 (arguing that the test set forth in Miller was correctly interpreted by Judge Cummings in Emerson and by Attorney General Ashcroft in his letter to the NRA).  

129. For a recent case that scholars expected would raise the Second Amendment question before the Supreme Court, see United States v. Bean, 89 F. Supp. 2d 828 (2000), cert. granted, 534 U.S. 1112 (2002) (Mem.). Bean was a gun dealer who lost all right to possess firearms after being convicted of a felony. Id. at 829-30. Bean later petitioned the Bureau of Alcohol, Tobacco and Firearms (BATF) for relief under an exception within the statute which gave BATF the authority to reinstate such privileges where it was determined that the felon was no longer a danger to society. Id. at 830. The BATF, however, sent Bean notice that it would not grant his request due to the Congress’s annual budget appropriation bill, which provided that “none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c).” Id. Bean then petitioned the district court, arguing that BATF’s denial was subject to judicial review. Id. Bean was granted relief by the district court, and the case was appealed to the Supreme Court. Tony Mauro, Second Amendment Stays in Background in Gun Case, THE RECORDER, Oct. 17, 2002 at 3. Although Bean never argued his case from a Second Amendment standpoint, typical Second Amendment arguments appeared in some of the Supreme Court briefs, and many were disappointed that the Second Amendment didn’t “play at least a cameo role during Supreme Court oral arguments.” Id.  

130. Hardaway, supra note 14, at 46. The article states:  

As long as each circuit court is following Miller . . . it may reasonably be argued that there has been no need for the Court to accept certiorari because the law is clear and the circuit courts are following it, and that it is highly improbable that the Supreme Court would leave uncorrected nine circuit court interpretations of such a high profile amendment of the Bill of Rights.

Id.
disregarded the conventional interpretation of Miller—suggests that the Court may willingly accept other interpretations.\footnote{See McCoskey, supra note 3, at 889, 893-94. Although the court refused to review the Emerson decision, the court may eventually grant certiorari in another case in order to resolve the circuit split. \textit{Id.} at 880. Additionally, McCoskey notes an unpredictable outcome if the Court does grant certiorari. \textit{Id.} at 894.} This idea that Miller has not definitively settled the issue is further manifested by some interesting words penned by Justice Thomas in his concurring opinion in \textit{Printz v. United States}, where he suggested that the Court may have a chance to decide the issue at some point in the future.\footnote{Printz v. United States, 521 U.S. 898, 938-39 (1997) (Thomas, J., concurring); see also Kopel, supra note 14, at 121-25 (discussing Justice Thomas's concurring opinion in \textit{Printz}, and Thomas's belief that the Supreme Court has not yet ruled on the individual rights issue). See also McCoskey, supra note 3, at 894 (discussing the references made by Judge Cummings and Judge Garwood to Justices Scalia and Thomas' writings favoring an individual rights view). For the view of retired Chief Justice Warren Burger, see BBC News, \textit{Analysis: What is the NRA?} (Mar. 1, 2000) available at http://news.bbc.co.uk/1/hi/world/americas/332555.stm. (pointing out that the Second Amendment "is the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American People by special interest groups that I have seen in my lifetime").}

The \textit{Cases} court addressed the question of why the Supreme Court has remained silent all these years.\footnote{Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942); see also discussion supra Part II.B1.} As Judge Woodbury wrote:

Considering the many variable factors bearing upon the question it seems to us impossible to formulate any general test by which to determine the limits imposed by the Second Amendment but that each case under it, like cases under the due process clause, must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line.\footnote{Cases, 131 F.2d at 922.}

In fact, the \textit{Cases} court considered both whether the weapon used by Cases was capable of military use and whether Cases himself was a member of a military organization.\footnote{Id. at 922-23.} Finding that the weapon may have military use, but that the defendant was not related in any way to a military organization, the court determined that the defendant possessed the weapon for his own recreation.\footnote{Id.} The court held, therefore, that the Federal Firearms Act was constitutional \textit{as applied to that defendant}.\footnote{Id. at 923.}

If the members of the Supreme Court agree with Judge Woodbury's words, the issue of whether the Second Amendment grants an individual
or collective right to bear arms would never warrant decision; instead, the issue would become moot.  

If this is the case, the Supreme Court's continued silence may acknowledge the need to evaluate these challenges on a case-by-case basis and that both the individual rights and the collective rights interpretations share some degree of validity.

For example, in 2001, legal scholars believed that Emerson would provide "the catalyst that forces a final answer to the question of whether or not there is an individual right to own a firearm." As one scholar pointed out, "Emerson not only challenges the Supreme Court to decide what the scope of the Second Amendment really is, but it also provides guidance to the Supreme Court by listing the crucial topics necessary to resolve this issue." Yet, the Supreme Court declined the opportunity to discuss these issues. In fact, the defendant in Emerson joined the

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138. See United States v. Emerson, 270 F.3d 203, 273 (5th Cir. 2001) (Parker, J., specially concurring) (suggesting that a decision regarding whether the right is collective or individual is "of no legal consequence").

139. Id.

140. Wade Maxwell Rhyne, United States v. Emerson and the Second Amendment, 28 HASTINGS CONST. L.Q. 505, 506 (2001) (predicting that if the Fifth Circuit upheld Emerson, the conflict between the Fifth Circuit and the other circuits would warrant review by the Supreme Court and a final determination of whether the Second Amendment grants a collective or individual right); see also Jack Trachtenberg, Comment, Federalism, Popular Sovereignty, and the Individual Right to Keep and Bear Arms: A Structural Alternative to United States v. Emerson, 50 BUFFALO L. REV. 445, 481 (2002) ("[I]f the Court grants certiorari, it will likely be presented with the duty of resolving the Circuit split on the meaning of the Amendment. The Court would have the opportunity ‘to either enshrine or eliminate the Second Amendment right to keep and bear arms.’"). See generally Roger I. Roots, The Approaching Death of the Collective Right Theory of the Second Amendment, 39 DUQ. L. REV. 71, 73 (2000) (arguing that the Emerson decision would spark "embarrassing scrutiny" of the collective rights theory in the courts); Perez, supra note 11, at 368-69 (also arguing that Emerson will force the Supreme Court to resolve these neglected matters).

141. Perez, supra note 11, at 383-85. The author states:

First, the Supreme Court will have to undertake a thorough textual analysis of the Second Amendment to devise its scope .... [T]he Supreme Court will have to address the issue of why, if the framers had meant only to guarantee the rights of states to have militias and of their militiamen to keep and bear arms, would they word the Second Amendment as they did .... Secondly .... the Supreme Court will have to discuss why James Madison introduced the right to keep and bear arms amendment along with other amendments that he described as protecting private and natural rights .... Thirdly, the Supreme Court will have to discuss whether the anti-tyranny function of the Second Amendment has become outdated.

Id. at 383-84.

142. Emerson v. United States, 536 U.S. 907 (2002) (denying certiorari without comment); see also Council, supra note 99 (arguing that the Fifth Circuit's ruling "left both sides of the political spectrum claiming victory" because the decision acknowledged both an individual right and the legislative ability to limit that right).
ranks of parties in at least nine other circuit court cases that petitioned the Court to decide the issue definitively and were denied review.  

*Emerson*, however, was in a different posture than the other cases, because it created a split between the circuits by interpreting the Second Amendment as a shield for individual rights.  

Typically, a "conflict between circuit courts," a "federal circuit departure from [the] usual course of judicial proceedings," "important federal questions that have not been decided by the Supreme Court" or federal questions that conflict with the Supreme Court form the criteria for granting certiorari.  

*Emerson* presented these issues; nevertheless, the Court refused to hear it. This leads to the question: what issues would a Second Amendment case have to present in order to get the High Court's attention?

### IV. The Futility of Finding a "Poster-Boy"

Robert A. Levy, a senior fellow in constitutional studies at the Cato Institute, has repeatedly predicted that Michael Freeman's case may end up before the Supreme Court. However, as Levy points out, Freeman is more "a poster boy for gun control" than a poster boy for the individual rights view of the Second Amendment. Even Attorney General John Ashcroft would presumably agree that disallowing convicted felons the right to bear weapons is a reasonable restriction; and such a finding would surely be consistent even with the approach taken by the Fifth Circuit in *Emerson*.

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143. See Hardaway, supra note 14, at 46 (reciting the argument that the reason the Court had previously denied certiorari in those cases was because the Court believed that the circuits were correct in rejecting an individual rights theory).

144. See discussion supra Part II.B.6.

145. Hardaway, supra note 14, at 47-48. In the article, the authors speculate on the reasons why the Supreme Court has refused "to resolve one of the most contentious constitutional debates of all time." Id. at 48.


147. See discussion infra Part IV.

148. Levy, supra note 15. Levy states, "Michael Freeman is probably a bad dude... Most likely, Freeman never imagined that he'd become a constitutional test case. Yet his Second Amendment claim could end up before the Supreme Court." Id.

149. Id. (acknowledging Freeman as an unsympathetic defendant). But see Santana & Tucker, supra note 2 (noting that another defendant, Bashuan Pearson, who has appealed his case to the D.C. Court of Appeals, has a more unique case because he was arrested only on the gun charge).

150. See Letter from John Ashcroft, supra note 1, at n.1 ("Of course, the individual rights view of the Second Amendment dos [sic] not prohibit Congress from enacting laws restricting firearms ownership for compelling state interests, such as prohibiting firearms..."
Levy, however, puts forth a more intriguing hypothetical—what if members of pro-gun groups organized "a peaceful demonstration in the nation's capital by responsible, armed citizens volunteering to be arrested for handgun possession?" If law-abiding, upstanding D.C. citizens with no prior records were arrested for brandishing their pistols on the Capitol lawn, and then challenged the D.C. gun laws as unconstitutional, would the Supreme Court be more likely to hear their case?

As Levy notes, the D.C. statute is more ripe for constitutional challenge than those of other states. First, D.C. law restricts gun ownership to law enforcement officials. Second, due to D.C.'s unique status, it is subject to the Second Amendment in a manner similar to the Federal government. Finally, Levy contends that because the D.C. U.S. Attorney's Office prosecutes violators of these weapons statutes, an office under the control of the Attorney General, John Ashcroft can no longer allow the U.S. Attorneys' Offices to "prosecute infractions of a law that the Department of Justice deems to be unconstitutional."

Ownership by convicted felons, just as the First Amendment does not prohibit shouting 'fire' in a crowded movie theater.

151. Levy, Will Individuals Get Their Second Amendment Rights?, supra note 15 (planting the idea in the heads of pro-gun group members in order to produce "more-sympathetic litigants," and "validate the Justice Department's newly announced position").

152. Id.; see also Halbrook, supra note 98 (noting that "[n]o federal court has ever upheld a general prohibition by law-abiding citizens of firearms"); Henigan, supra note 3. Henigan states:

The defendant in Freeman was a convicted felon, making it easy for the government to argue that his gun possession would not be protected even under the broad individual rights view. But for illegal possession cases not involving convicted felons, the government's concession of a broad individual right may have a materially adverse impact.

Id.

153. Levy, Will Individuals Get Their Second Amendment Rights?, supra note 15 (outlining the reasons for the D.C. law's susceptibility to challenge).

154. Id. Levy notes that "the law applies not just to 'unfit' persons like felons, minors, or the mentally incompetent, but across the board to ordinary, honest, responsible citizens." Id. Levy further contends that a handgun, unlike the sawed-off shotgun in Emerson or the machine gun in Haney, is a personal weapon used for an individual's self-defense. Id.

155. Id. Cf. Sandidge v. United States, 520 A.2d 1057, 1059 (D.C. App. 1987) (Nebeker, J., concurring) (stating his conclusion that "the [S]econd [A]mendment does not apply to the seat of national government . . . . Nothing suggests that the founders were concerned about 'free territories,' 'free protectorates,' or a 'free Seat of Government of the United States.'").

156. Levy, Will Individuals Get Their Second Amendment Rights?, supra note 15.
Still, it is unlikely that the Supreme Court will grant certiorari in these cases.\textsuperscript{157} The Supreme Court’s reluctance to unequivocally state whether the Second Amendment grants an individual or collective right to bear arms is not because the issue is too hot.\textsuperscript{158} The Second Amendment’s right to bear arms surely is not as controversial as abortion or segregation.\textsuperscript{159} The Court is not reluctant because it is overly burdened by other more important cases, nor is it unwilling because it fears opening the floodgates of Second Amendment litigation; such concerns have not hampered the Court on other controversial issues.\textsuperscript{160} Judging by their individual records, it is doubtful that the Court members fear their own personal integrity might be attacked if they favor either a collective or individual right; it is equally doubtful that they would hesitate to address the issue until they can ensure each other’s ruling.\textsuperscript{161} Nor does the contention that they are unwilling to end the debate result from a belief that Miller was conclusive on the issue.\textsuperscript{162}

Instead, as Judge Woodbury suggested in Cases, the Supreme Court has made a conscious choice to leave the determination of reasonable regulations under the Second Amendment to the triers of fact.\textsuperscript{163} The question of whether the right is individual or collective holds limited legal value; courts may decide each case in terms of whether the statute in question reasonably regulates the right without deciding whether that right is individual or collective.\textsuperscript{164} Few would argue that it was the

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\item\textsuperscript{157} See discussion infra Part IV.
\item\textsuperscript{158} Hardaway, supra note 14, at 48 (referring to the Second Amendment issue as a "proverbial legal 'hot potato'").
\item\textsuperscript{159} Id. at 49 (concluding that "[t]he notion that the High Court is simply too timid to resolve a contentious legal issue is . . . distinctly unsatisfying, given that the settlement of such issues is one of the primary reasons for the very existence of the High Court").
\item\textsuperscript{160} Id. at 49-50 (comparing the Second Amendment issue to school prayer and abortion).
\item\textsuperscript{161} Id. at 49-51. The authors examine the Court’s prior decisions in the face of past controversial situations and argue that “the Court has an admirable record of courage in deciding issues of great concern, and providing leadership where the legislative bodies have been timid.”
\item\textsuperscript{162} See Printz v. United States, 521 U.S. 898, 937-39 (1997) (Thomas, J., concurring) (suggesting that he would welcome the opportunity to determine whether the Second Amendment granted an individual or collective right).
\item\textsuperscript{163} See Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942) (suggesting that it is not the role of the federal courts to speculate on whether the Second Amendment grants an individual or collective right, where the determination of a specific case does not depend on such a discussion).
\item\textsuperscript{164} See United States v. Emerson, 270 F.3d 203, 273 (5th Cir. 2002) (Parker, J., specially concurring).
\end{enumerate}

The real issue, however, is the fact that whatever the nature or parameters of the Second Amendment right, be it collective or individual, it is a right subject to reasonable regulation. The debate, therefore, over the nature of the right, is
Framers' desire to authorize every United States citizen to own a nuclear warhead, and few would argue for permitting only law enforcement officers to possess a hunting rifle. Consequently, the line between an individual right subject to reasonable restrictions and a collective right subject to a reasonable relation to a militia becomes blurred. Each case must be decided on an individual basis, with each court deciding the constitutionality of the law as applied to the defendant before it.

V. CONCLUSION

With Emerson, the theory that the Second Amendment grants an individual right to bear arms has moved out of the world of academic inquiry and into the judiciary. Many legal scholars therefore have predicted a definitive declaration from the High Court in the near future. This contention, however, is likely without merit. The Supreme Court's unwillingness to explicitly state whether the right is individual or collective is not a measure of avoidance, but a conscious decision to "avoid constitutional questions when the outcome of the case does not turn on how [they] answer." It is unlikely, moreover, that a

misplaced. In the final analysis, whether the right to keep and bear arms is collective or individual is of no legal consequence.

Id.

165. Id. (stating that "no responsible individual or organization would suggest" that the Second Amendment protects the right of Emerson or any other defendant to possess every type of weapon created or supercedes the rights of "others to be free from bodily harm or threats of harm").

166. Id.

167. Id.

168. See, e.g., Branch-Brioso, supra note 3 (finding that the majority of Second Amendment scholarship promulgates the individual-rights view, but noting that a large percentage of such writings were authored by the NRA's lead lawyer, Stephen Halbrook); see also Yassky, supra note 3, at 190-91 (1999) (arguing that the federal District Court in Texas relied on the views advanced by individual-rights scholars in deciding United States v. Emerson); Henigan, supra note 3 (stating that "[t]here is no doubt that Second Amendment challenges to gun laws will now become a standard part of the criminal defense attorney's tool kit").

169. See, e.g., Tucker & Santana, D.C. Handgun Ban Challenged, supra note 4 (stating that "the District is a logical place for the interpretation to be tested"); Levy, Will Individuals Get Their Second Amendment Rights?, supra note 4 (examining the factors which make D.C. gun laws so ripe for constitutional challenge). Cf. Gregory L. Poe, Caught in the Crossfire: Gun Control and the Second Amendment, Panel Discussion presented by the Washington Council of Lawyers, Oct. 23, 2002 (stating his view that gun advocates will want to delay bringing a valid test case before the Supreme Court until a new justice with an individual rights view gets appointed and that this type of litigation is not going anywhere right now on the federal level).

170. See discussion infra Part IV.

171. United States v. Emerson, 270 F.3d 203, 272 (5th Cir. 2002) (Parker, J., specially concurring) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).
test case will emerge that hinges so completely on the Court's resolution of this issue. As a result, in spite of the fact that new challenges to the Second Amendment may be more plentiful, especially in the District of Columbia, there is little likelihood that any of those challenges will resolve this age-old debate.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality... unless such adjudication is unavoidable." Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. at 105 (1944). Judge Parker, ironically, quotes Judge Garwood's concurring opinion in Walton v. Alexander, 20 F.3d 1350, 1356 (5th Cir. 1994) (Garwood, J., concurring specially), which stated that, "[i]t is settled that courts have a strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." Id.

172. For possible prediction of what the ideal test case might look like, see Levy, supra note 4 (suggesting that if law-abiding citizens challenged their inability to obtain a lawful license to carry a handgun in the District, they may find more success); see also Stephen P. Halbrook, Caught in the Crossfire: Gun Control and the Second Amendment, Panel Discussion presented by the Washington Council of Lawyers Oct. 23, 2002 (suggesting that the ideal test case would have been a case in Texas challenging the application of the Gun Free Schools Act to home schools; that case, however, was dismissed for want of prosecution).

173. See discussion supra Part IV.