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Guns and Dictum: Is the Fifth Circuit's Finding of an Individual Right under the Second Amendment Dictum or Holding

Stephen E. Ryan

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After Timothy Emerson's wife filed for divorce, he was temporarily enjoined from, *inter alia*, threatening harm to her.[1] The issuing court made no express finding that Emerson posed a credible threat of harm.[2] He subsequently was charged with possession of a firearm[3] under 18 U.S.C. § 922(g)(8),[4] which prohibits possession while under such an injunction.[5] The federal district court dismissed the indictment on Second Amendment grounds, finding that the Second Amendment[6] conferred an individual right to keep and bear arms and that § 922(g)(8) was unconstitutional on its face for disarming a citizen without a particularized finding of a credible threat.[7]

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1. United States v. Emerson, 270 F.3d 203, 211 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.).

2. *Id.*

3. *Id.* at 212.

4. Section 922(g)(8) provides in relevant part:

> (g) It shall be unlawful for any person—
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> . . .
>
> (8) who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; . . .
>
> 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.

18 U.S.C. § 922(g)(8) (2000).

5. *Emerson*, 270 F.3d at 212.

6. The Second Amendment provides: "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." U.S. CONST. amend. II.

7. United States v. Emerson, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999), *rev'd*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.).

On October 16, 2001, the Fifth Circuit in *United States v. Emerson*[8] reversed the district court, finding that although the Second Amendment does confer an individual right, § 922(g)(8)'s restriction of that right is constitutional.[9] With this ruling, the Fifth Circuit became the first circuit court to recognize an individual Second Amendment right to keep and bear arms.[10] In a special concurrence, however, Judge Robert Parker argued that the individual right determination is dictum because it "is entirely unnecessary to resolve this case and has no bearing on the judgment."[11] This Recent Development argues that the Fifth Circuit's individual right determination was not dictum, but holding under both descriptive and prescriptive tests suggested by the case law of the Supreme Court and the Fifth Circuit, and proffers a rubric for testing necessity under the prescriptive test.

To evaluate Judge Parker's criticism, the line between dictum and holding must be clarified. Judge Richard Posner has pointed out that definitions of dictum are "somewhat inconsistent, somewhat vague, and somewhat circular."[12] *Black's Law Dictionary* defines "obiter dictum" (literally "something said in passing") as "[a] judicial comment ... that is unnecessary to the decision in the case and therefore not precedential,"[13] and defines "holding" as "a court's determination of a matter of law pivotal to its decision."[14] Though the descriptions "unnecessary" and "pivotal" will prove to be vague in application, insofar as what is unnecessary is not pivotal, and what is pivotal is not unnecessary, holding and dictum complement each other; a particular determination by a court is either holding or dictum, but *not both*.[15] Holding can be distinguished from *ratio decidendi* ("*ratio*") (literally "the reason for deciding"), which *Black's* defines as "[t]he rule of law on which a court's decision is founded."[16] This distinction is made particularly salient considering *Black's* earlier

8. 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.).
9. *Id.* at 265–66.
10. *Id.* at 261.
11. *Id.* at 272 (Parker, J., specially concurring).
12. United States v. Crawley, 837 F.2d 291, 292 (9th Cir. 1988).
13. BLACK'S LAW DICTIONARY 1100 (7th ed. 1999).
14. *Id.* at 737.
15. *See* STANISLAW POMORSKI, AMERICAN COMMON LAW AND THE PRINCIPLE NULLUM CRIMEN SINE LEGE 43 (2d ed. 1975). Pomorski explains the complementary natures of dictum and *ratio*, *id.* ("Starting from a negative assumption it may be said that any general proposition of law contained in the decision of the court which is not *ratio* is *dictum*."), identifying *ratio* with holding. *Id.* at 39. *See infra* note 18 and accompanying text.
16. BLACK'S LAW DICTIONARY, *supra* note 13, at 1269.

definition of *ratio* as "[t]he rule of law on which a court *says* its decision is founded."[17] *Ratio* might be dictum or holding depending on the particular definitions of holding and *ratio* applied, and on whether a court has accurately identified the rule of law upon which its decision is necessarily founded.

The difference between *ratio* and holding, if any exists, is confusing.[18] Courts and commentators typically use *ratio* and holding interchangeably,[19] though some commentators recognize the distinction implied in *Black's* varying definitions.[20] This confusion stems in part from a technique for deriving the *ratio* (as equivalent to holding) of a case proposed by influential English scholar Eugene Wambaugh[21] and from the response to an elaboration on that technique by Professor A.L. Goodhart.[22] Wambaugh proposed that a legal proposition from a case is dictum if the negation of that proposition would not change the case's ultimate outcome, i.e., affirmed or reversed.[23] Goodhart added that the *ratio* test should

17. BLACK'S LAW DICTIONARY 522 (Pocket ed. 1996) (emphasis added).

18. *See* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 712 (1999).

19. *See* Rogers v. Tennessee, 532 U.S. 451, 469 (2001) (Scalia, J., dissenting); Dalton v. Specter, 511 U.S. 462, 470 (1994); United States v. Dixon, 504 U.S. 688, 718 (1993) (Rehnquist, J., concurring in part and dissenting in part); Foucha v. Louisiana, 509 U.S. 71, 108 (1992) (Thomas, J., dissenting); POMORSKI, *supra* note 15, at 39; Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 423 (1992).

20. *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 72 (4th ed. 1991); GLANVILLE WILLIAMS, LEARNING THE LAW 75 (11th ed. 1982); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. J. INT'L L. & ECON. 873, 945 (2001); Christopher Hawthorne, Note, *"Deific Decree": The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1789 (2000).

21. EUGENE WAMBAUGH, THE STUDY OF CASES 17–18 (2d ed. 1894).

22. Arthur L. Goodhart, *Determining the* Ratio Decidendi *of a Case*, 40 YALE L.J. 161, 173–80 (1930); *see* Thurmon, *supra* note 19, at 423–26 (discussing Goodhart's emphasis on the importance of a judge's reasoning in applying Wambaugh's more functional test of necessity).

23. Wambaugh described his test as follows:

> In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also .... In short, when a case turns on only one point the proposition or doctrine of the case, the reason of the decision, the *ratio decidendi*, must be a general rule without which the case must have been decided otherwise.

take into account the judge's expressed reasoning for reaching his conclusion, not because such reasoning embodied the *ratio*, but because it helped reveal the facts the judge considered to be material.[24] For Goodhart, the *rationes* are the propositions necessary to the case's outcome, as determined by Wambaugh's test, given the facts the judge considered material.[25] Goodhart's focus on the judge's reasoning to determine what is necessary to a case's outcome was later adopted by scholars to support the notion that the *ratio* "is the rule or principle that the precedent-setting court *considered to be necessary* for its decision."[26] The term "prescriptive" has been applied to the tests of Wambaugh and Goodhart,[27] which look "for the logically necessary proposition, the rational link between the judge's view of the facts and his decision."[28] The term "descriptive" has been applied to Goodhart's critics' approach, which focuses on what the court *considers* to be necessary.[29] A court determining the *rationes* of a prior decision under a prescriptive analysis will look to what the court *did*, under a descriptive analysis, to what the court *says* it did. The terms "prescriptive" and "descriptive" have not been adopted by American courts, but they will be used in this Recent Development to distinguish between tests that emphasize necessity (prescriptive) and those that do not emphasize necessity (descriptive).

The definition of holding is subject to the same dichotomy between what a court does and what it claims to do. Chief Justice John Marshall, in *Cohens v. Virginia*,[30] defined dicta as expressions that "go beyond the case" because only the question before the court

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WAMBAUGH, *supra* note 21, at 17–18.

24. Goodhart, *supra* note 22, at 169–74. Essentially, Goodhart proposed that the facts identified by the court as relevant to its conclusion are within the universe of the case. *See infra* note 82 and accompanying text.

25. Goodhart, *supra* note 22, at 169; *see* Thurmon, *supra* note 19, at 424–25.

26. Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 799 (1988) (emphasis added); *see* CROSS & HARRIS, *supra* note 20, at 72; Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW 183, 184–88 (Laurence Goldstein ed., 1987); Thurmon, *supra* note 19, at 425.

27. Collier, *supra* note 26, at 799; Thurmon, *supra* note 19, at 425. Julius Stone first applied the term "prescriptive" to definitive tests of holding. Julius Stone, *The* Ratio *of the* Ratio Decidendi, 22 MOD. L. REV. 597, 600–01 (1959).

28. Thurmon, *supra* note 19, at 425.

29. Collier, *supra* note 26, at 799. Goodhart's critics "focused on his refusal to accept a judge's expressed reasoning as governing," Thurmon, *supra* note 19, at 425 (citing CROSS & HARRIS, *supra* note 20, at 67–69), and included, most notably, J.L. Montrose and A.W.B. Simpson. *See generally* J.L. Montrose, *The* Ratio Decidendi *and the House of Lords*, 20 MOD. L. REV. 124 (1957) (criticizing Goodhart for abandoning the notion that the *ratio* was what a court considered to be necessary); A.W.B. Simpson, *The* Ratio Decidendi *of a Case*, 22 MOD. L. REV. 453 (1959) (same).

30. 19 U.S. (6 Wheat.) 264 (1821).

is "investigated with care."[31] This definition is muddled. Its first component hints at a prescriptive-type test if "expressions within the case" is defined as expressions necessary to the outcome. The latter component hints at a descriptive-type test, insofar as it relies on the degree to which the court focused its attention on a particular proposition. Focusing on a proposition gives evidence that the court considered the determination of that proposition to be necessary to resolve the issue before it, indicating Marshall's emphasis on the importance of accuracy; only fully considered propositions are desirable as statements of law.[32] Overall, Marshall's characterization of holding has a descriptive flair. The court, after all, will choose which propositions to investigate with care, independent of their prescriptive necessity to the case's outcome. Nevertheless, subsequent Supreme Court cases have read a lack-of-necessity requirement into Marshall's "beyond the case" language, yielding a prescriptive characterization of holding.[33] Marshall's "fully investigates" language is occasionally reprised, but usually only as a supplement to the necessity test.[34] Though lack-of-necessity is required for a proposition to be dictum, the contrapositive is not the case. Courts have found a proposition to be holding absent its necessity to a case's outcome, most notably where "there are two

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31. *Id.* at 399–400. Chief Justice Marshall wrote:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Id.

32. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994).

33. *E.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound."); McDaniel v. Sanchez, 452 U.S. 130, 141 (1981) (characterizing dicta as propositions that are "unnecessary to the decision"); Kastigar v. United States, 406 U.S. 441, 454–55 (1972) (finding that a proposition was "unnecessary to the court's decision, and cannot be considered binding authority"); Sullivan v. Iron Silver Mining Co., 109 U.S. 550, 554 (1883) ("This court should not express an opinion upon [a proposition], unless its determination is necessarily involved in the adjudication of the case at bar."), *aff'd*, 143 U.S. 431 (1892); Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 287 (1853) ("[T]here must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties.").

34. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 627–28 (1935) (suggesting that both prescriptive and descriptive components should be considered); *see also* Dorf, *supra* note 32, at 1998 (arguing that the holding/dictum distinction should take into account rationales, rather than just facts and outcomes).

grounds, upon either of which an appellate court may rest its decision, and the court adopts both, the 'ruling on neither is *obiter*.' "[35] In such a situation, neither proposition is necessary, at least not in the strictly logical sense of Wambaugh's test, but both are nonetheless holding.[36]

Consider a case where the court has identified the following propositions: (1) If A then C; (2) If B then C; (3) A; (4) B. The court concludes that because A and B obtain, C is the proper outcome of the case, where C is either affirming or reversing the lower court. According to *United States v. Title Insurance & Trust Co.*,[37] A and B are both holding.[38] But under the Wambaugh test, negating A will result in the same outcome, C, by way of B. Thus, neither A nor B is strictly necessary to the case's outcome.[39] Presumably, a descriptive justification, *inter alia*, upholds the *Title Insurance* rule. Though each individually is unnecessary to the outcome, presumably both A and B were fully considered, thus they should qualify as holding.

The Fifth Circuit has echoed the Supreme Court's prescriptive characterization of holding,[40] as well as the *Title Insurance* exception.[41] But it gives fuller support for the descriptive aspect of Marshall's definition by more often emphasizing full consideration,[42] and it expands the circumstances in which a proposition can be holding absent necessity. Under *United States v. Adamson*,[43] a

35. United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924) (quoting Union Pac. R.R. Co. v. Mason City & Ft. Dodge R.R. Co., 199 U.S. 160, 166 (1905)); *see also* Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) (echoing the *Title Ins. & Trust Co.* test).

36. *See supra* notes 21–26 and accompanying text.

37. 265 U.S. 472 (1924).

38. *See id.* at 486.

39. *Nota bene*, this analysis applies just as well to the two propositions "If A then C" and "If B then C."

40. United States v. Castillo, 179 F.3d 321, 327 n.9 (5th Cir. 1999) (quoting Lawson v. United States, 176 F.2d 49, 51 (D.C. Cir. 1949)), *rev'd*, 530 U.S. 120 (2000) (characterizing dictum as "language unnecessary to a decision"); Indiviglio v. United States, 249 F.2d 549, 561 (5th Cir. 1957) ("[N]o opinion can be binding authority unless the case calls for its expression."), *rev'd on other grounds*, 357 U.S. 574 (1958).

41. McLellan v. Miss. Power & Light Co., 545 F.2d 919, 925 n.21 (5th Cir. 1977) ("It has long been settled that all alternative rationales for a given result have precedential value.").

42. *Castillo*, 179 F.3d at 327 n.9 (noting that dictum is the "opinion of a judge which does not embody the resolution or determination of the court . . . made without argument or full consideration of the point" (quoting *Lawson*, 176 F.2d at 51)); *In re* Cajun Elec. Power Co-op., Inc., 109 F.3d 248, 256 (5th Cir. 1997) (stating that dictum is a proposition which "being peripheral, may not have received the full and careful consideration of the court that uttered it" (quoting Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986))).

43. 665 F.2d 649 (5th Cir. 1982).

proposition unnecessary to a case's outcome will be binding precedent if it is "fully presented and litigated and . . . will likely arise on retrial."[44] The Fifth Circuit's *Adamson* rule provides more latitude for finding holding on a purely descriptive analysis in situations other than the *Title Insurance* exception.

The derivation of the holding/*ratio* problem can be inferred from the prescriptive/descriptive distinction reflected in the case law. Commentators who seize upon opposing definitions of holding and *ratio*, one descriptive and one prescriptive, will distinguish the two,[45] but otherwise will use them interchangeably.[46] Given that the differing definitions of holding and *ratio* can be explained by the descriptive/prescriptive distinctions,[47] the use of *ratio* can be dropped, with the understanding that the term holding suggests both descriptive and prescriptive components.

Applying the descriptive and prescriptive tests to the holding/dictum question surrounding *Emerson*'s finding that the Second Amendment confers an individual right requires a detailed outline of the court's chain of reasoning. Such an outline will facilitate the logical manipulation required to test the individual right proposition both for necessity under the prescriptive test and for satisfaction of the *Title Insurance* exception and full consideration aspects of the descriptive test. Thus follows a chain of the determinations the *Emerson* court made in reversing the dismissal of the indictment:

> 1. Because § 922(g)(8)(C)(ii) does not require an express judicial finding of a credible threat, the injunction against *Emerson* qualifies under the statute.[48]
>
> 2. Though Emerson was unaware that § 922(g)(8) made it a crime to possess a firearm while under such an injunction, he was not deprived of his Fifth Amendment right to Due Process.[49]
>
> A. As a general rule, ignorance of the law is no excuse.[50]

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44. *Id.* at 656 n.19.

45. *See supra* notes 16–17 and accompanying text; *see also* sources cited *supra* note 20 (characterizing *ratio* descriptively and holding prescriptively).

46. *See supra* note 19 and accompanying text.

47. *See supra* notes 18–36 and accompanying text; Collier, *supra* note 26, at 798–99.

48. United States v. Emerson, 270 F.3d 203, 213–14 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.).

49. *Id.* at 216.

50. *Id.*

B. Section 922(g)(8) does not fall into the *Lambert v. California* exception to the general rule.[51]

3. Congress did not exceed its Article I, Section 8 Commerce Clause powers in enacting § 922(g)(8).[52]

4. The Second Amendment recognizes an individual right to keep and bear arms.[53]

A. *United States v. Miller* does not endorse a collective right model.[54]

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51. *Id.* at 215–16. The *Lambert* exception applies where: "1) the defendant had been prosecuted for passive activity; 2) the defendant was unaware of the need to register [his weapon]; 3) circumstances that would have prompted an inquiry into the necessity of registration were lacking; and 4) an average member of the community would not consider the punished conduct blameworthy." *Id.* at 215 (citing Lambert v. California, 355 U.S. 225, 228 (1957)).

52. *Id.* at 217 (citing United States v. Pierson, 139 F.3d 501, 503 (5th Cir. 1998)).

53. *Id.* at 260.

54. *Id.* at 226 (referring to United States v. Miller, 307 U.S. 174 (1939)). The *Emerson* court explains three models of the Second Amendment: (1) the "collective rights" model, in which "the Second Amendment does not apply to individuals; rather, it merely recognizes the right of a state to arm its militia," *Id.* at 218; (2) the "sophisticated collective rights model," in which an individual right applies only to members of a "functioning, organized state militia," who bear the arms while participating "in the organized militia's activities," *id.* at 219; and (3) the "individual rights" model, which recognizes "the right of individuals to keep and bear arms," *id.* at 220. There seems to be little difference between the first two models. The collective rights model merely refers to a condition precedent for conferring an individual right, as does the sophisticated collective rights model. If it does less, the right is, as Dave Kopel wrote in a somewhat reactionary, though undoubtedly correct manner, "[l]ike collective property in a Communist country," belonging "to everyone at once in theory, but to only the government in practice." Dave Kopel, *A Right of the People: The Meaning of the* Emerson *Decision*, NAT'L REV. ONLINE (Oct. 25, 2001), *at* http://www.nationalreview.com/kopel/ kopelprint102501.html [hereinafter Kopel, *A Right of the People*] (on file with the North Carolina Law Review). Hereinafter, "collective right model" will be used to refer to both model one and model two, as their minor differences are not relevant to the present discussion.

The *Emerson* court's steps in concluding that *United States v. Miller*, 307 U.S. 174 (1939), did not endorse a collective right model involve multiple determinations that in concatenation suggest the conclusion, rather than a series of premises leading to a conclusion. Their necessity as a whole depends entirely on the necessity of determination 4.A. Because each additional determination is of declining marginal argumentative force, it is difficult to ascertain its necessity individually. Regardless, they are irrelevant to the analysis.

Emerson's interpretation of *Miller*, the most recent Supreme Court case on the Second Amendment, has proven controversial, contrary as it is to many other circuit courts' interpretations. *See* Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961, 981–98 (1995–1996) (cataloguing the many and various putative misinterpretations of *Miller*); Kenneth E. Barnes, *"There Must Be a Limit":* U.S. v. Emerson *and the Federal Courts*, (*forthcoming in* THE LONG LIST OF 'GUN CONTROL' MYTHS, *available at* http://www.saf.org/pub/rkba/Legal/EmersonSP.html (last visited Nov.

B. The text of the Second Amendment suggests it confers an individual right.[55]

i. "People" refers to individual Americans.[56]

ii. "Bear arms" refers generally to the carrying or wearing of arms, not just in a military context.[57]

iii. "Keep arms" refers generally to individuals keeping arms, not just in a military context.[58]

iv. The Second Amendment preamble does not mandate a collective right interpretation.[59]

C. The history of the Second Amendment supports the textual reading.[60]

5. Nevertheless, Emerson's individual Second Amendment right was not violated.[61]

2, 2002) (on file with the North Carolina Law Review)) (exhaustively cataloguing lower court precedent on the Second Amendment).

In *Miller*, defendants were charged with possession of a sawed-off shotgun in violation of the National Firearms Act, and they asserted a Second Amendment defense. *Miller*, 307 U.S. at 175–77. The district court overturned the indictment citing this defense, and the Supreme Court reversed. *Id.* at 177, 183. In its brief, the government first argued that the Second Amendment only protected members of a militia, and the defendants were not such. Alternatively, it argued that the term "arms" in the Second Amendment did not include weapons commonly used by criminals, such as sawed-off shotguns. *Emerson*, 270 F.3d at 222. The *Emerson* court concluded that the *Miller* Court decided the case based on the second argument, finding that the arms at issue were not covered by the Second Amendment. *Id.* at 224. Thus, *Emerson* concludes, *Miller* did not endorse a collective right model. *Id.* at 226–27. For a glimpse into the debate over the interpretation of *Miller*, see Michael C. Dorf, *Federal Court of Appeals Says the Second Amendment Places Limits on Gun Control Legislation* (Oct. 31, 2001), *at* http://writ.news.findlaw.com/dorf/20011031.html (on file with the North Carolina Law Review) (arguing that *Miller* as interpreted by *Lewis v. United States*, 455 U.S. 55 (1980), sets a collective right precedent); Stephen P. Halbrook, *Reports of the Death of the Second Amendment Have Been Greatly Exaggerated: The* Emerson *Decision*, INDEP. INST. (Nov. 19, 2001), *at* http://www.independent.org/tii/news/011119Halbrook.html (on file with the North Carolina Law Review) (taking the *Emerson* position); Dave Kopel, *Guns in Court*, NAT'L REV. ONLINE (May 30, 2001), *at* http://www.nationalreview.com/kopel/kopelprint053001.html (on file with the North Carolina Law Review) (taking the *Emerson* position); Publius, *US Supreme Court Debunks "Gun Control," at* http://www.saf.org/pub/rkba/Legal/Debunks.htm (last visited Nov. 2, 2002) (on file with the North Carolina Law Review) (taking the *Emerson* position with vociferous and histrionic glee).

55. *Emerson*, 270 F.3d at 236.

56. *Id.* at 229.

57. *Id.* at 231.

58. *Id.* at 260.

59. *Id.* at 233. The preamble of the Second Amendment states: "A well regulated Militia, being necessary to the security of a free State . . . ." U.S. CONST. amend. II.

60. *Emerson*, 270 F.3d at 237.

61. *Id.* at 263. For a slightly different presentation of the court's chain of reasoning in reaching this conclusion, see Kopel, *A Right of the People*, *supra* note 54.

A. The Second Amendment individual right is subject to "limited, narrowly tailored specific exceptions or restrictions that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms."[62]

B. Section 922(g)(8) on its face is such a reasonable restriction, even though it did not require an explicit finding of a credible threat by the issuing court.[63]

C. Under § 922(g)(8), as applied to Emerson, the injunction was sufficient to deprive Emerson of his Second Amendment right, "albeit likely minimally so."[64]

6. Reversed.[65]

In his concurrence, Judge Parker argues that step four above is dictum because it is unnecessary to resolve the case.[66] His prescriptive criticism, countered *infra*,[67] errs in dismissing the possibility that a descriptive evaluation could, particularly in the Fifth Circuit,[68] justify the individual right determination as holding. First, the *Emerson* majority certainly thought step four was holding, stating that "unless we were to determine the issue of the proper construction of section 922(g)(8) in Emerson's favor . . . resolution of this appeal *requires* us to determine the *constitutionality* of section 922(g)(8)."[69] The court's assertion that the determination satisfies the prescriptive test adds descriptive weight: the assertion embodies the resolution of the court under *United States v. Castillo*[70] because the court identified it as a determination necessary for resolution of the case, and gives evidence of full consideration under *Castillo*[71] and In re *Cajun Electric Power Co-op, Inc.*[72] Second, the court more than

62. *Emerson*, 270 F.3d at 261.
63. *Id.* at 263.
64. *Id.* at 265.
65. *Id.*
66. *Id.* at 272 (Parker, J., specially concurring).
67. *Infra* notes 79–119 and accompanying text.
68. *See supra* notes 40–43 and accompanying text (citing Fifth Circuit cases endorsing the *Title Insurance* exception and defining dictum as the absence of full consideration).
69. *Emerson*, 270 F.3d at 264 n.66.
70. 179 F.3d 321, 327 n.9 (5th Cir. 1999) (quoting Lawson v. United States, 176 F.2d 49, 51 (D.C. Cir. 1949); *see supra* note 42.
71. *Castillo*, 179 F.3d at 327 n.9 (quoting *Lawson*, 176 F.2d at 51); *see supra* note 42 and accompanying text.
72. 109 F.3d 248, 256 (5th Cir. 1997); *see supra* note 42 and accompanying text.

satisfied Marshall's "investigates with care"[73] language, as interpreted in cases such as *Adamson* and *Humphrey's Executor v. United States*;[74] its exhaustive Second Amendment analysis (steps four and five above) covers over forty pages.[75]

Finally, the individual right determination falls squarely within the *Title Insurance* exception endorsed by both the Supreme Court and the Fifth Circuit,[76] which allows holding designations in the absence of necessity for descriptive reasons.[77] Application of the *Title Insurance* framework developed above[78] to the individual right determination yields the following: (1) If the Second Amendment confers an individual right, the case is reversed (if A then C, from steps four and five); (2) If the Second Amendment does not confer an individual right, the case is reversed (If B then C, assumed by Judge Parker); (3) The Second Amendment confers an individual right (A, from step four); (4) Reversed (C, from step six). Obviously the court cannot determine that the Second Amendment both does and does not confer an individual right. It cannot determine both A and B because B, in this case, is "not A." Determination B, advocated by Judge Parker, that the Second Amendment does not confer an individual right, is missing. But *Emerson* differs from *Title Insurance* only in the *Emerson* court's specification of which determination, A or B, led to the outcome. Judge Parker's argument would amount to the following: if the court determined A and "if A then C," yielding C, A is not holding because the court could have just as easily determined B and "if B then C," yielding C. But even if the court had determined all four propositions, both A and B would be holding under *Title Insurance*. That the court was *more* specific—singling out A and "if A then C" as the sources of outcome C, rather than relying on both paths to outcome C—gives even stronger indication that A is holding than the *Title Insurance* exception alone. If the hypothetical presence of a collective right determination, B, and its connection to the same outcome, "if B then C," could not render A dictum, neither can their absence. The *Emerson* court's failure to make determination B, therefore, does not prevent the application of the

73. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821); *see supra* note 31 and accompanying text.

74. 295 U.S. 602 (1935); *see supra* notes 34, 43 and accompanying text.

75. United States v. Emerson, 270 F.3d 203, 218–60 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

76. United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); McLellan v. Miss. Power & Light Co., 545 F.2d 919, 925 n.21 (5th Cir. 1977).

77. *See supra* notes 38–40 and accompanying text.

78. *See supra* notes 37–40 and accompanying text.

Title Insurance exception, giving further descriptive support to recognizing *Emerson*'s individual right determination as holding.

The prevalence of the prescriptive test in the case law of both the Supreme Court and the Fifth Circuit[79] suggests that descriptive support for a holding designation is not as strong as prescriptive support. Because necessity is the most commonly cited requirement of the prescriptive test,[80] to justify a determination as holding on solely descriptive grounds invites prescriptive disagreement. Only a test for satisfaction of the narrowest prescriptive definition of holding will yield universally reliable holding designations. Such a test will be similar to Wambaugh's test[81] for logical necessity. This Recent Development proposes a test of logical necessity within the universe of the case. That is to say, a particular proposition is necessary if absent that determination the court could not have reached the ultimate outcome of the case, affirmed or reversed, using only the remaining facts and legal propositions the court has determined—i.e., the only premises available within a case's "universe." Satisfaction of this test guarantees a prescriptive justification of holding: first, because logical necessity is *a priori* the strictest test of any referent of "necessary"; and second, because allowing all possible premises outside the universe of the case to determine the necessity of a determination within the universe of the case would, absurdly, preclude any determination from being necessary to a case's ultimate outcome.

Consider the determinations A and "if A then C" within a case, yielding outcome C. Conceiving a set of alternative determinations outside the universe of the case, X and "if X then C," will always be possible, and consideration of such determinations in evaluating the necessity of "if A then C" will render "if A then C" unnecessary dictum.[82] Internalizing premises outside the universe of the case would thus prevent a court from proposing a test to resolve a question with precedential effect because there will always be a possible hypothetical test which would give the same result.

Thus, Judge Parker's prescriptive criticism is valid only if the individual right determination is unnecessary under the logical necessity within the universe of the case test. He suggests that if the court had not determined that the Second Amendment conferred an

79. *See supra* notes 33, 40, and accompanying text.

80. *See supra* notes 33, 40, and accompanying text.

81. *See supra* note 23.

82. Absent "if A then C," outcome C can still be reached via "X" and "if X then C," therefore, "if A then C" is unnecessary to the outcome.

individual right, and instead found a collective right, § 922(g)(8) would survive scrutiny, and if the court did determine that the Second Amendment confers an individual right, § 922(g)(8) nonetheless survives scrutiny. Therefore, regardless of the individual right determination, § 922(g)(8) survives Second Amendment scrutiny, and the individual right determination is not logically necessary to the holding.[83] According to Judge Parker, § 922(g)(8) "is simply another example of a reasonable restriction on whatever right is contained in the Second Amendment."[84]

Evaluating the individual right determination for necessity requires fleshing out the logical necessity test. A particular determination is logically necessary within the universe of the case if determination of its negation would necessarily not result in the same outcome, given only the determinations within the universe of the case (N2).[85] This is so because the statement of necessity "if C is the outcome, then A must have been a determination," yields, by *modus tollens*, "if A were not a determination, then C could not be the outcome" (N1).[86] Testing A's negation under N2 is the most

83. United States v. Emerson, 270 F.3d 203, 273 (5th Cir. 2001) (Parker, J., specially concurring), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.).

84. *Id.* at 273 (Parker, J., specially concurring). Judge Parker also supports his assertion that the individual right determination is dictum with the judicial maxim requiring federal judges "to avoid constitutional questions when the outcome of the case does not turn on how [they] answer." *Id.* at 272. But this maxim does not actually effect the dictum question. After the court dispenses with step one, the determination that the injunction falls into § 922(g)(8), it must make some sort of constitutional determination, as the remaining questions at issue are the Fifth Amendment, the Commerce Clause, and the Second Amendment. *See id.* at 264 n.66. Parker objects to the majority's decision to specify what type of right the Second Amendment confers, rather than just concluding that regardless of the type of right conferred, § 922(g)(8) survives scrutiny. *See id.* at 272–73 (Parker, J., specially concurring). The maxim suggests how a court should reach a decision: a court should bring as few determinations as possible within the universe of the case. The majority may have violated the maxim in bringing the individual right determination within the universe of the case, but since it did so, only the logical necessity test will determine whether that determination is dictum. The maxim implies two different points: first, that dictum involving constitutional determinations masked as holding is worse than dictum not involving constitutional determinations masked as holding; and second, that if a court has a choice of steps to a particular conclusion, where one requires fewer logically necessary constitutional determinations than the other, the former is preferable. The first point applies here if the individual right determination is dictum, the second if it is not. If, as will subsequently be established, the individual right determination is necessary, Parker nevertheless retains a critique of the majority's methodology under the maxim's second point, but loses the dictum criticism.

85. *See* WAMBAUGH, *supra* note 21, at 17–18.

86. *Modus tollens* is a rule of inference of the formal logic stating that from two previously obtained sentences of the forms "if p then q" and "not q," the sentence "not p" may be inferred. WILLIAM GUSTASON & DOLPH E. ULRICH, ELEMENTARY SYMBOLIC LOGIC 100–01 (2d ed. 1989). Thus from any statement "if p then q," a corresponding

convenient way to determine what outcome must result if A was not a determination. But note that testing A's negation, in the sense of determining the outcome if the court actually made the determination "not A," as Wambaugh suggests,[87] is a stricter test than the basic test of necessity N1, which only requires that if A were not a determination, C could not be the outcome. Testing within a universe containing "not A" tests within a specific member of the set of all universes in which determination A is absent.

Consider the following set of propositions: (1) if A then C; (2) A; yielding (3) C. Under N1, A is necessary if outcome C could not obtain if A were removed from the universe of the case. The only premise available would be "if A then C." The court could not reach outcome C, unless it relied on determinations that are, from the perspective of the original case, outside its universe; "if A then C," alone, yields nothing. Thus, under N1, A is necessary to outcome C because absent A, C could not be the outcome using only premises within the universe of the case. In fact, no outcome could be reached at all. Under N2, A is necessary if outcome C could not obtain given substitution of determination "not A" for determination A. Left with only "not A" and "if A then C," the court, again, could reach no outcome at all. Because "not A" does not result in the same outcome as A, A is necessary.

The distinction between N1 and N2 is an antecedent distinction in that it concerns the meaning of the antecedent "not A" of the if-then statement "if 'not A' then not C." The distinction derives from the interpretation of the negation of A in the operation of *modus tollens* upon the basic statement of necessity "if outcome C obtains, A was determined." Under N1, A's negation is only a negative existential statement taking A outside the universe of the case: it is not the case that A was determined. Under N2, A's negation involves a negative existential statement taking A outside the universe of the case coupled with a positive existential statement bringing the determination "not A" within the universe of the case. N2's positive existential statement is unwarranted by the formal logic because *modus tollens* will only negate the positive existential statement "A was determined." N1 is the actual test of necessity. N2 is a convenient, though imperfect, proxy for N1 in most cases. Note, however, that if a court makes the additional determination "we must

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sentence "if 'not q' then 'not p'" can be derived and by transposition, a rule of replacement, the latter sentence may be substituted for the former. *Id.* at 102.

87. WAMBAUGH, *supra* note 21, at 17–18; *see supra* note 23 and accompanying text.

determine either 'not A' or A," N2 becomes a perfect proxy for N1; removal of A from the universe of the case effects the imposition of "not A" into the universe of the case via the existential disjunction "A must be determined or 'not A' must be determined" and its result by the rule of implication[88] "if A is not determined then 'not A' must be determined." But reliance on "either 'not A' or A must be determined" to justify the positive existential component of N2's interpretation of A's negation (i.e., bringing "not A" within the universe of the case) raises the ominous specter of whether a determination made by the court, which is itself unnecessary and therefore dictum, as the " 'not A' or A" determination must be,[89] can be used to buttress the necessity of another statement. As will be discussed further below,[90] a determination such as "A or 'not A' " if sufficiently implicit in the court's reasoning or mandated by precedent, should be allowed within the universe. Regardless, N2 and N1 need be distinguished only if a determination fails N2, i.e., if "not A" yields the same outcome as A.[91]

A particular outcome C, such as reversed, has a perfect complement in its opposite outcome, affirmed. Why is the "no outcome" result allowed to satisfy N1/N2? Why does necessity not require that "not A" necessarily result in outcome "not C," in the sense of C's opposite and complete complement, affirmed, rather than merely requiring that determination "not A" not result in outcome C? The simple answer is that for A to be necessary to C, it must only be the case that A's absence from the universe prevents the court from reaching C—that is simply what necessity means. That situations arise where neither could "not C" be reached should not be of concern. But the concern over C's complement supplies a safe harbor test for necessity, stricter than N1/N2. Under the safe harbor (N3), A is necessary if absent A, or given the determination "not A," the opposite outcome, "not C," would necessarily be reached. N3 is a safe harbor because its satisfaction guarantees satisfaction of N1/N2, but satisfaction of N1/N2 does not guarantee satisfaction of N3. Thus,

88. Implication is a rule of replacement of the formal logic stating that any sentence of the form " 'not p' or q" may be replaced by a corresponding sentence of the form "if p then q." GUSTASON & ULRICH, *supra* note 86, at 102.

89. The " 'not A' or A" determination is unnecessary because absence of "either A must be determined or not A must be determined" still allows outcome C via A and "if A then C."

90. *Infra* text accompanying note 92.

91. This will only be the case where the determination "if 'not A' then C" is allowed within the universe, and determination "A or 'not A,' " necessary to bring "not A" into the case under N1, and thus to reach C, is not.

N3 can be used as an imperfect proxy for N1/N2, necessitating a resort to N1/N2 only when a proposition fails N3. The distinction between N1/N2 and N3 is a consequent distinction, in that it concerns the meaning of the consequent "not C" of the if-then statement "if 'not A' then 'not C.' "

The "no outcome" problem suggests another germane concern. When, if ever, might it be permissible to go outside the universe of the case to test a determination's necessity? Or, how explicit must a court be about a proposition to justify its inclusion within the universe of the case? Consider again the following set of determinations: (1) if A then C; (2) A; yielding (3) C. Determination A fails N3 because neither removal of A from the universe nor removal coupled with the addition of "not A" to the universe necessitates "not C." N1 and N2 are satisfied because, under either, no result could be reached at all. But assume that a certain proposition, "if 'not A' then C," was *a priori* self-evident or a clear binding rule of precedent such that a court would be forced to apply it after determining "not A." Assume further that the absence of A from the universe of the case renders the determination "not A" equally mandated, as in the case described above[92] where the court is bound by precedent to decide either A or "not A" by virtue of, for example, a particular question's conventional split between two (and only two) resolutions. If, given the absence of A, the court would be forced to determine "not A" and "if 'not A' then C," a good argument exists for allowing both "not A" and "if 'not A' then C" into the universe. If these determinations are allowed, the court could reach the same outcome, C, in the absence of A, and thus A would be unnecessary dictum.

What sort of propositions should be brought into the universe of the case? The prescriptive test for holding, by emphasizing necessity, evaluates what a court will be *forced* to do given the absence of the determination tested and the operation of the premises remaining within the universe. It follows that any proposition outside the universe of the case as decided that the court would be *forced* to apply if the determination tested were removed should be brought within the universe of the case. Precedent dictates what propositions a court would be *forced* to apply.[93] Therefore, precedent binding upon a court will be allowed within the universe. As a result, precedent from higher courts will be the best candidates for

92. *Supra* note 90 and accompanying text.

93. *See, e.g.*, Harkless v. Sweeny Indep. Sch. Dist., 427 F.2d 319, 321 (5th Cir. 1970) (stating that "a decision of a higher court is binding as precedent").

inclusion,[94] followed by cases from the same court, which are firmly entrenched.[95] Only precedent that a court could not overturn will exert the requisite force upon the court's decision. If a court is in a position to overturn a particular precedent, a court would not then be bound to apply it, and thus it should not be allowed within the universe. In a sense, unambiguous precedents binding upon a court form a set of axioms freely reachable for inclusion within the universe of a case before that court.

This Recent Development proceeds by evaluating several of the *Emerson* court's determinations, under the tests outlined above, to flesh out the types of situations where such extra-universal premises might be allowed, before testing the individual right determination based on the rubric developed. To summarize, three tests will be applied:

> (N1) If it is true that if A is not a determination then C cannot be the outcome, A is necessary. If proposition A fails N1, it is not necessary to the outcome;
>
> (N2) If it is true that if "not A" is a determination then C cannot be the outcome, A is necessary. If proposition A fails N2, proceed to N1;
>
> (N3) If it is true that if A is not a determination or "not A" is a determination then "not C" is the outcome, A is necessary. If proposition A fails N3, proceed to N2.[96]

In *Emerson* the ultimate outcome (C) was reversal of the district court.[97] In step one, the court determined that the injunction against Emerson qualified under the statute (A).[98] This determination will be holding under N3 if the opposite determination would necessitate the opposite outcome, affirmation. If the court had determined that the statute did not cover Emerson's injunction, it is inarguable that the district court's dismissal must be affirmed (not C).[99] If Emerson's

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94. *See, e.g., id.* (stating that "a decision of a higher court is binding as precedent").

95. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992) (stating that the Supreme Court must follow its own precedent unless the prior ruling is clearly in error); Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212, 215 (5th Cir. 1980) ("We are bound by the former decisions of this court."); Whatley v. United States, 428 F.2d 806, 807 (5th Cir. 1970) (stating that the court is bound by previous Fifth Circuit decisions).

96. *Supra* notes 85–91 and accompanying text.

97. United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.); *see supra* note 65 and accompanying text.

98. *Emerson*, 270 F.3d at 213–14; *see supra* note 48 and accompanying text.

99. *See* United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd* 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.).

activities are not covered by the statute, he cannot be indicted under it. The subsequent inquiries in steps two through five could be dismissed. Because substitution of "not A" for A yields "not C," A is necessary under N3. The intermediary premise asserting that a defendant whose conduct falls outside the statute cannot be indicted under the statute, however, is not contained within the opinion. It is outside the universe. But the required intermediary premise is so deeply-rooted in judicial common sense, and the common law, that for the court to ignore it and assert that Emerson be punished under a statute that does not cover his conduct would fly in the face of deeply-rooted clear binding precedent.[100] The court would have no such option; it must recognize the intervening premise. The premise can be brought within the universe of the case for the purpose of testing necessity, and given "not A," the court would be forced to conclude "not C." Thus A is necessary under N3. This is the sort of self-evident intermediary premise that demands inclusion in the universe of the case. Clear binding rules of precedent, then, which under no circumstances could be rationally overturned, form a set of axioms accessible from any case's universe.

In step two, the Fifth Circuit concluded that Emerson's Fifth Amendment right was not violated (A).[101] Under N3, if the court had determined that the right had been violated (not A), by finding that his actions fell into the *Lambert* exception to the rule that ignorance of the law is no excuse, such determination would entail upholding the district court (not C). Again, the notion that a court must dismiss an indictment that violates a defendant's Fifth Amendment Due Process right is firmly entrenched binding precedent that the court must apply.[102] In fact, for the court to ignore the intermediary premise in this situation would violate the more general mandate of *Marbury v. Madison*[103] that a right infringed by a law repugnant to the Constitution must be remedied by a court's voiding of the law as applied to the defendant.[104] This intermediary premise too requires inclusion in the universe of the case, and under N3, the step two

100. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428–29 (1963) (holding that where a criminal statute is inapplicable to defendants for interfering with activities protected by the First and Fourteenth Amendments, defendants cannot be held liable under the statute).

101. *Emerson*, 270 F.3d at 217; *see supra* notes 49–51 and accompanying text.

102. *See, e.g.*, Lambert v. California, 355 U.S. 225, 228–30 (1957) (dismissing defendant's indictment under a statute requiring felons to register with the city of Los Angeles because the statute violated Due Process clause notice requirements).

103. 5 U.S. (1 Cranch) 137 (1803).

104. *Id.* at 176–77.

determination is holding because determination of "not A" yields "not C." The N3 analysis of step three's Commerce Clause determination[105] yields the same result: it is holding on admission to the universe of the irrefutable premise that a defendant cannot be indicted on a statute that violates the Commerce Clause. The court could not have affirmed an indictment under a statute that violates the Commerce Clause. The intermediary premise is firmly entrenched in binding precedent,[106] and ignoring it would violate the general mandate of *Marbury*.[107]

Viewed as a single unit, steps' four and five determination that Emerson's Second Amendment right has not been violated is holding under N3 on admission to the universe of the equally mandated premise that an indictment in violation of the Second Amendment must be dismissed.[108] The question is whether the intermediate steps in reaching that determination, especially the step four individual right determination (A), is holding. It is holding under the N3 safe harbor if inclusion within the universe of its contrary determination, a collective right (not A),[109] logically entails the opposite outcome, affirmation of the district court (not C). This is obviously not the case, because a collective right determination by no means logically entails affirming the district court's reversal of the indictment. No precedent mandates the necessary intermediary premise—that § 922(g)(8) violates the Second Amendment under a collective right interpretation. Because the court is not constrained by precedent, it has the option to affirm given a collective right determination. Because "not A" does not entail "not C," the determination fails N3. Failing N3, the individual right determination must be evaluated under N2.

Under N2, the determination is necessary if determination of a collective right (not A) could not result in the same outcome—affirmation (not C). The determination will fail N2 only by inclusion

105. *Emerson*, 270 F.3d at 217; *see supra* note 52 and accompanying text.

106. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 567–68 (1995) (reversing defendant's conviction under the Gun-Free School Zones Act of 1990 for possession of a handgun at his school because the Act violated the Commerce Clause).

107. *See supra* notes 103–04 and accompanying text.

108. Though no recent cases have found a law to violate the Second Amendment, presumably *Marbury*'s mandate that a court must void an unconstitutional law applies. *See supra* note 104 and accompanying text.

109. The actual negation of the individual right determination is "the Second Amendment does not confer an individual right." Because the court was essentially choosing between the individual right and collective right models, *Emerson*, 270 F.3d at 218–21, testing a collective right determination as a particular iteration of the set of possibilities created by denying the individual right determination makes sense.

within the universe of a premise asserting that § 922(g)(8) survives Second Amendment scrutiny under a collective right interpretation, allowing the court to affirm (C) given a collective right (not A). Only inclusion of such a premise will allow a collective right finding to result in reversal; otherwise a collective right finding will have no premise to operate upon, and no result could be reached at all. The majority makes no mention of such a premise,[110] though Judge Parker certainly would agree with it.[111] The question, then, is whether this is the sort of premise that requires inclusion within the universe of the case. The analysis above[112] requires inclusion only where a court is forced by precedent to find C given "not A."

Note, first, that there is no such precedent binding the court. The question of whether the Second Amendment conferred an individual right or a collective right was one of first impression in the Fifth Circuit.[113] Given that no court would decide the effects of a collective right without first determining the existence of a collective right, it follows that no Fifth Circuit precedent mandates how the collective right interpretation should be applied to a statute. Nor does any Supreme Court precedent control how the collective right interpretation would be applied in this case. *United States v. Miller* was decided, according to the *Emerson* court, not based on a particular interpretation of the Second Amendment right, but on the meaning of the term "arms."[114] Of course, it may be suspect to use the *Emerson* court's characterization of *Miller* to justify the notion that the court was not bound by *Miller* to find that § 922(g)(8) would survive scrutiny under a collective right interpretation. After all, insofar as this characterization is necessary, and thus holding, only if the individual right determination is necessary, to justify the necessity of the individual right determination via a characterization whose necessity is contingent upon the very point it is used to approve may be circular. But even ignoring the court's characterization of *Miller*, if *Miller* did endorse a collective right interpretation it still would not mandate the effect of that interpretation on the validity of § 922(g)(8). In validating the statute at issue, *Miller* pointed only to an absence of evidence "tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this

110. The absence of such a premise is shown in the chain outline. *See supra* notes 48–65 and accompanying text.

111. *See Emerson*, 270 F.3d at 273 (Parker, J., specially concurring).

112. *Supra* notes 92–95 and accompanying text.

113. *See Emerson*, 270 F.3d at 264 n.66.

114. *Id.* at 224; *see supra* note 54.

time has some reasonable relationship to the preservation or efficiency of a well-regulated militia."[115] This relationship is a far cry from the reasonable relationship of § 922(g)(8)'s proscription of "any firearm or ammunition"[116] to such preservation. The laconic *Miller* Court gave no indication of how such a reasonable relationship would be determined,[117] and it certainly left no mandate as to the application of a collective right interpretation comparable to the mandates forcing inclusion of the premises discussed *supra*.[118] Thus, given the absence of any Supreme Court case endorsing a collective right interpretation, or, at least, the absence of any case stipulating the effect of such interpretation, no Supreme Court precedent could control *Emerson*'s application of a collective right interpretation to § 922(g)(8).

With no binding precedent mandating its decision, the *Emerson* court would be free to affirm under a collective right interpretation. Because the required intermediary premise cannot be included in the universe of the case, the individual right finding is necessary under N2, and thus is holding. For a subsequent court to find the determination dictum, it would have to assert that the *Emerson* court, given binding precedent, had no choice but to find that § 922(g)(8) survived scrutiny under a collective right interpretation. Given the *lack* of binding precedent, this assertion is simply not the case. The majority gives no indication how it would have applied a collective right interpretation. Perhaps Emerson's great-great-great-grandpappy was a minuteman and the minuteman code says the great-great-great-grandson of a minuteman is a minuteman. The universe lacks contrary determinations of fact that might suggest a particular treatment under a collective right. The court may further have decided that in limiting the coverage of the Second Amendment right to militiamen, the class of narrowly tailored exceptions should be otherwise narrowed, and thus that the issuing court's failure to make a particularized finding renders § 922(g)(8) as applied to Emerson violative of the Second Amendment, allowing the court to affirm. Such a decision may seem a bit farfetched, but the court would have been free to so find, or to find a violation of the Second Amendment under a collective right in some other way. The intermediary premise necessary to conclude that the collective right finding would result in reversal is not forced upon the court, as was,

115. United States v. Miller, 307 U.S. 174, 178 (1939).
116. 18 U.S.C. § 922(g)(8)(C)(ii) (2000).
117. *Miller*, 307 U.S at 182.
118. *Supra* notes 97–107 and accompanying text.

for example, affirming upon finding that Emerson's Fifth Amendment right was violated.[119] For the court to find a collective right and simultaneously affirm the trial court's dismissal would certainly have been unusual. But insertion of the required intermediary premise based on mere speculation about the likelihood of the outcome given a collective right finding effectively robs the *Emerson* court of the ability to determine a method for analyzing how the statute would be evaluated under a collective right interpretation, which would have been within its discretion had it determined a collective right.

Allowing mere speculations on what a court would or should do given the absence of a particular premise within the universe of the case would make it much easier for subsequent courts to find determinations dicta. Under Judge Parker's reasoning,[120] any time a court could use either of two possible tests[121] to resolve a question, it must apply both or risk the test applied being labeled dictum via speculation that the same outcome would have been reached under the alternative test. If under each analysis the same outcome is reached, the court could not indicate which analysis is correct, for this would be dictum under the logical necessity test. Proposing a test to resolve a question with precedential effect would be much more difficult. Only if all the tests the court considers are applied and one gives a unique result would a test be holding. Fewer tests for resolving questions would be consistently applied because fewer tests would be holding. As a result, one of the goals of precedent, that

119. *See supra* notes 101–07 and accompanying text.

120. The dissent's reasoning, interestingly enough, is echoed by Michael C. Dorf, the same Michael C. Dorf who advocated a broader view of holdings that takes rationales into account. *Compare* Dorf, *supra* note 54 ("The court's result meant that it did not really have to reach the question of whether Emerson had Second Amendment rights in the first place. After all, even assuming he did, the court had found the government's interest overrode them."), *with* Dorf, *supra* note 32, at 2034 ("[I]t would be a gross misunderstanding of *Gates* to term its entire discussion of the totality of the circumstances dictum. As in *Roe*, so in *Gates*, a different rationale for the decision reached by the Court may have been plausible, but that does not change the actual rationale of the case."). The Second Amendment does funny things to people. For arguments supporting the majority's view, see David I. Caplan, *A Wrong Turn on Second Amendment Rights* (Jan. 7, 2002), *at* http://www.law.com (on file with the North Carolina Law Review); Kopel, *A Right of the People*, *supra* note 54.

121. By "tests," the author simply means the method by which a question is resolved. For example, to determine if § 922(g)(8) violated the Second Amendment, the *Emerson* court tested under an individual right rubric. United States v. Emerson, 270 F.3d 203, 236, 263 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002) (mem.).

"like cases be treated alike,"[122] would be eroded. It may be argued that few cases exist in which the court considers and rejects alternative tests for resolving a question. Even if this were the case, to allow inclusion within the universe of the effect of a considered test's application (i.e., inclusion of "if 'not A' then C"), is not a far cry from allowing within the universe any speculatively plausible test the court *might* have considered, had it not applied the test it did, if it plausibly could result in the same outcome (such as inclusion of both "B" and "if B then C"). Such an inclusion simply involves two speculations as to likelihood rather than one. And if this double speculation is allowed, *any* test a court proffers for analyzing a question could be rendered dictum by inventing a plausible test that would give the same result. Precedent would not just be eroded, but virtually destroyed, for to cement as holding a test for resolving a question a court would have to go through every plausible rubric for resolving the question and find one that gives a unique result.

Though courts tend not to engage in the explicit analyses of necessity developed above, they do tend to consider a proposed test holding even when an alternative test would likely yield a similar result, further dispelling the notion that *Emerson*'s individual right finding is dictum. The *Emerson* majority wrote of its individual right finding, "in reaching that issue we have only done what the vast majority of other courts faced with similar contentions have done (*albeit* our *resolution* of that question is different)."[123] The court had in mind the numerous circuit court cases which have determined, as putative holding, that *Miller* endorsed a collective right interpretation and, thus, that the Second Amendment afforded no protection in the instant case.[124] But under Judge Parker's rationale, because in many of these cases an individual right determination would result in the same outcome, the determinations are dictum.

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122. *See* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 777–81 (1995) (discussing the consistency virtues of precedent); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572–73 (1987) (same). For a detailed argument that dictum/holding determinations should give special significance to the rationales of prior cases and an account of the danger a narrow definition of holding poses to stare decisis, see generally Dorf, *supra* note 32.

123. *Emerson*, 270 F.3d at 264 n.66.

124. *See, e.g.*, Love v. Pepersack, 47 F.3d 120, 122 (4th Cir. 1995) (holding that the Second Amendment confers a collective right); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (holding that the Second Amendment confers a collective right). For a list of such cases, see *Emerson*, 270 F.3d at 218 n.10; Barnes, *supra* note 54.

In addition, the United States Supreme Court has developed tests for the constitutionality of an activity and nevertheless found that the challenged activity survives scrutiny, or, as Dave Kopel more elegantly put it, has "spelled out a binding rule of law without handing the challenger a victory."[125] In both cases, the determination subsequently was cited as binding precedent. In *Strickland v. Washington*,[126] the Supreme Court held that the proper standard for attorney performance is that of reasonably effective assistance, and because defense counsel's strategy was reasonable, the defendant's death penalty conviction stood and the lower court was reversed.[127] The Court could have defined a much stricter standard for attorney performance, which would have likewise resulted in reversal. Nevertheless, the *Strickland* rule subsequently has been cited as binding precedent.[128]

In *Jackson v. Virginia*,[129] the Supreme Court found that to satisfy Due Process, the state must prove every element of a crime beyond a reasonable doubt, and that the evidence nonetheless showed that a rational trier of fact could have found the defendant guilty of murder beyond a reasonable doubt.[130] Again, the Court proffered a test to adduce the constitutionality of a certain act and found that the act passed the test where numerous other possible tests could have rendered the same result. The *Jackson* rule subsequently has been cited as binding precedent.[131] Dropping the "within the universe of the case" requirement from the logical necessity test would allow, in both *Strickland* and *Jackson*, inclusion of intermediary premises linking the stricter tests to the same outcome, rendering their constitutional determinations dicta. In both of these cases, there are multiple paths open to the Court that could yield the same result, yet the Court's decision to establish a particular test became binding precedent. By the same token, *Emerson*'s finding that the Second Amendment should be tested under an individual right rubric is binding precedent in the Fifth Circuit.

When courts make precedent, they establish methods as well as results.[132] Encompassed within a holding is some degree of the

125. Kopel, *A Right of the People*, *supra* note 54.
126. 466 U.S. 668 (1984).
127. *Id.* at 694–701.
128. Glover v. United States, 531 U.S. 198, 200 (2001).
129. 443 U.S. 307 (1979).
130. *Id.* at 324–25.
131. Wright v. West, 505 U.S. 277, 285 (1992).
132. *See* Dorf, *supra* note 32, at 2033–36; Thurmon, *supra* note 19, at 423–36.

method utilized in reaching a particular end. If the only precedential information a court could glean from prior cases were the particularized holding from a particular set of facts, precedent would not be very helpful to courts resolving issues which, though similar, proffer variant facts. Any time a court establishes a test, a plausible alternative test could have resulted in the same outcome, but the test the court actually chooses nonetheless has, and should have, precedential weight. Allowing only determinations within the universe of the case and determinations mandated by clear binding precedent to establish the necessity of a proposition creates a bright-line test that allows a court to develop a precedential analysis for resolving an issue, but nonetheless excludes truly unnecessary determinations.

Emerson's determination that the Second Amendment confers an individual right is holding under either a descriptive or prescriptive analysis, despite Judge Parker's claim that it is "entirely unnecessary." It is logically necessary to the outcome as tested within the universe of the case, and thus meets the strictest possible prescriptive test of holding. Case law from both the Supreme Court and the Fifth Circuit suggests that the determination satisfies descriptive justifications for holding as well. The determination is placed within the logical construct of the case in a manner comparable to Supreme Court cases' determinations subsequently cited as binding precedent. The determination is holding and constitutes precedent in the Fifth Circuit.

STEPHEN E. RYAN