

## A Right to Ban Arms?

### Individualistic and Collective Interpretations of the Second Amendment

Given that gun violence is a pervasive problem in the United States, it is important for states and localities to have a great degree of flexibility in crafting policies designed to lower the incidence of gun-related fatalities. As *Wiggum v. City of Springfield* reveals, an individual rights approach to the Second Amendment can limit a locality's ability to respond to gun violence in the way it best sees fit.<sup>1</sup> In this comment, I first consider the main arguments advanced by collective rights theorists and individual rights theorists (as presented in *Wiggum* and *Silveira v. Lockyer*) and conclude that the Second Amendment is largely ambiguous. Second, given this ambiguity, I argue that the better interpretation is the collective rights interpretation because it allows for greater state experimentation in the realm of gun policy.

The Second Amendment reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."<sup>2</sup> This amendment is unusual in that it contains an introductory clause which asserts that the amendment's purpose is to ensure that state militias remain strong: "A well regulated militia, being necessary to the security of a free state..."<sup>3</sup> This initial clause provides the main textual argument for the collective rights theory which argues that the Second Amendment merely provides a collective right to maintain state militias. The problem with this argument is that the founders probably would have worded the amendment differently if they were merely creating a collective right: "... [T]here was a more direct locution, such as 'Congress shall make no law disarming the state militias'..."<sup>4</sup> Still, there must be a reason why the

purposive clause was included. After all, the same argument made in support of the individual rights theory can be made against the individual rights theory: if the founders were creating a purely individual right, the amendment would have been worded differently. The founders could have omitted the initial clause entirely, or they could have included an additional clause establishing that the right to keep and bear arms was also necessary for protection and/or hunting.<sup>5</sup>

The *Silveira* court finds that the historical context also supports a collective rights view because it indicates that the amendment was passed to “assuage the fears of Anti-federalists that the...federal government would cause the state militias to atrophy...”<sup>6</sup> Also, no one in the First Congress seemed to believe the amendment created an individual right to possess a firearm.<sup>7</sup> However, the *Wiggum* court contends that the historical context actually supports an individual right since, during the founding era, “arms were kept for lawful use in self-defense and hunting.”<sup>8</sup> *Wiggum* also suggests that, regardless of the amendment’s purpose, the latter or “operative” clause clearly grants an individual right: “Despite the importance of the ...civic purpose...the activities [the amendment] protects are not limited to militia service.”<sup>9</sup> Additionally, the amendment uses the phrase “the people,” rather than “the states.”<sup>10</sup> Still, it is not clear that the two clauses should be read as *Wiggum* suggests. *Silveira* indicates that the first clause limits the meaning of the second clause: “The first clause does more than simply state the amendment’s purpose...: it also helps...define the meaning of the substantive provision contained in the second clause....”<sup>11</sup>

Another important inquiry involves the definition of “militia.” Collective rights theorists argue that the word “militia” refers to an actual state military force whereas individual rights theorists argue that “militia” refers to the entire citizenry, or everyone capable of serving in

the militia.<sup>12</sup> Collective rights theorists support their position by pointing to other portions of the Constitution where the term “militia” is used to refer to a state military entity.<sup>13</sup> However, there is also ample evidence that “militia” does not merely refer to an organized state entity. The second Militia Act of 1972 states that “... every free able-bodied white male citizen...who is...the age of eighteen years, and under the age of forty-five years...shall... be enrolled in the militia.”<sup>14</sup> Also, according to *United States v. Miller*, the only Supreme Court decision interpreting the Second Amendment, “the militia included ‘all males physically capable of acting in concert for the common defence.’”<sup>15</sup> The fact that the word “militia” is used to discuss a state military force elsewhere in the Constitution suggests the collective rights interpretation might be more compelling since the Second Amendment is itself contained in the Constitution. However, the individual rights theorists can point to the Constitution to support their position as well. As *Wiggum* discusses, the Second Amendment was placed in the Bill of Rights, which is “almost entirely a declaration of individual rights.”<sup>16</sup>

There is also disagreement about the meaning of the phrase “keep and bear arms.” Collective rights theorists contend that this phrase refers to carrying weapons in conjunction with military service. The *Silveira* court points to the Oxford English Dictionary which defines “to bear arms” as “to serve as a soldier, do military service, fight.”<sup>17</sup> *Silveira* also suggests that the initial draft of the Second Amendment which included “an exemption from ‘bearing arms’ for the religiously scrupulous” only makes sense if “bearing arms” is understood as a engaging in military service.<sup>18</sup> *Wiggum*, however, maintains that this interpretation ignores the verb “keep” which signifies an individual right.<sup>19</sup>

Ultimately, a person who reads both *Wiggum* and *Silveira*, might have little confidence that either court has stumbled upon the “true” meaning of the Second Amendment. Both courts make compelling arguments based on text, legislative history, and context, and both interpretations appear plausible. Akhil Reed Amar criticizes both interpretations and explains why the Second Amendment is so “slippery”: “the legal and social structure upon which the amendment is built no longer exists. The Founders’ juries...are still around today, but the Founders’ militia is not.”<sup>20</sup> Thus, while historical conditions have not dramatically changed in certain arenas, the conditions surrounding state militias are so different that the historical justifications for the Second Amendment seem largely irrelevant in contemporary society. Since the amendment does not appear to have a clear meaning, it may be necessary to consider policy arguments as a necessary tie breaker. Specifically, given high rates of gun violence, it may make sense to interpret the Second Amendment in the manner that would best reduce gun-related injuries and deaths.

Over a hundred people are killed every day as a result of gun violence in the United States and gun-related fatalities have been especially devastating to African-American communities.<sup>21</sup> Based on current statistical data, it is not clear what the best solution to this problem is.<sup>22</sup> Some argue that increasing gun ownership and allowing individuals to carry around concealed weapons would deter criminals from using guns and thus increase public safety and decrease violence.<sup>23</sup> Others hold the opposite view and believe that banning gun ownership is the best way to reduce gun violence. The only way to determine which policy actually better promotes public safety is to allow both policies to be tried and tested by states and localities. The problem with the individual rights approach to the Second Amendment is that it actually prevents certain policies from being implemented.<sup>24</sup> Gun bans or policies that

significantly restrict an individual's access to guns would probably violate the Second Amendment if it was read to guarantee individual access to guns.<sup>25</sup> However, a collective rights approach to the Second Amendment would not block a particular policy from being implemented. It merely would establish that individuals are not constitutionally entitled to own guns. States and localities operating through the democratic process could still decide to protect gun ownership. However, if they came to the opposite conclusion and supported a gun ban, that possibility would not be automatically foreclosed.

While the Second Amendment is placed in the Bill of Rights among other amendments strongly protecting individual rights, that alone does not justify an expansive reading of the amendment. A broad reading of the First Amendment does not jeopardize life and limb the way that a broad reading of the Second Amendment could. As Amar explains, "...violent felons...have a First Amendment right to print their opinions in newspapers. Yet such felons have never had a Second Amendment right to own guns... [S]ticks and stones and guns in the hands of dangerous felons can indeed hurt others in ways that their words cannot."<sup>26</sup>

In conclusion, the United States has undergone significant changes since the founding fathers penned the Second Amendment. State militias are no longer prominent and modern guns are far more dangerous than the single-fire muskets that existed in 1787.<sup>27</sup> With gunfire claiming the lives of thousands every year, local governments should not be barred from adopting policies that might offend an individual's right to keep and bear arms. Overall, because a collective rights interpretation gives individual states the power to experiment with their own gun control legislation, this interpretation is in keeping with the anti-federalist spirit of the Second Amendment.

**Word Count (exclusive of footnotes): 1486**

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<sup>1</sup> *Wiggum v. City of Springfield*, 555 F.3d 373, 387, 389 (12th Cir. 2007) (invalidating Springfield’s “virtual” ban on handgun possession based on an individual rights reading of the Second Amendment).

<sup>2</sup> U.S. CONST. amend. II.

<sup>3</sup> *Id.*

<sup>4</sup> *See Wiggum*, 555 F.3d at 375.

<sup>5</sup> Unlike the Second Amendment, Wisconsin’s Constitution is worded in a way that clearly establishes an individual right to gun ownership: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” *See State v. Hamdan*, 665 N.W.2d 785, 790 (Wis. 2003) (quoting the recently amended WIS. CONST. art. 1, § 25).

<sup>6</sup> *Silveira v. Lockyer*, 312 F.3d 1052, 1068 (9th Cir. 2003).

<sup>7</sup> *Id.* at 1074 (“[T]here is not a single statement in the congressional debate about the proposed amendment that indicates that any congressman contemplated that it would establish an individual right to possess a weapon.”).

<sup>8</sup> *Wiggum v. City of Springfield*, 555 F.3d 373, 377 (12th Cir. 2007).

<sup>9</sup> *Id.* at 385-86.

<sup>10</sup> *Id.* at 376 (“The most important word [in determining whether the right is individual or collective] is the one the drafters chose to describe the holders of the right: ‘the people.’”).

<sup>11</sup> *Silveira v. Lockyer*, 312 F.3d 1052, 1067 (9th Cir. 2003).

<sup>12</sup> *See id.* at 1062 (explaining the two different interpretations of the word “militia”).

<sup>13</sup> *See id.* at 1062-64 (discussing the use of the word “militia” in U.S. CONST. ARTS. I, II and U.S. CONST. AMEND. V).

<sup>14</sup> *See Wiggum v. City of Springfield*, 555 F.3d 373, 380 (12th Cir. 2007) (quoting the second Militia Act of 1972 to support its position that the word “militia” refers to all citizens capable of serving in the militia).

<sup>15</sup> *See Id.* at 379 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)).

<sup>16</sup> *Id.* at 377.

<sup>17</sup> *Silveira v. Lockyer*, 312 F.3d 1052, 1065 (9th Cir. 2003).

<sup>18</sup> *See Id.* at 1065-66 (“[T]he exemption... can only be understood as an exemption from carrying arms in the service of a state militia, and not from possessing arms in a private capacity.”).

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<sup>19</sup> *Wiggum v. City of Springfield*, 555 F.3d 373, 379 (12th Cir. 2007).

<sup>20</sup> Akhil Reed Amar, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 106 (2002).

<sup>21</sup> George J. Thomas, *Re-Emphasizing Localism in Gun Control Legislation*, 30 UWLA L. REV. 23, 23 (1999) (finding that 103 people die from gunfire every day and that the leading cause of death for African-Americans between age fifteen and thirty-four is gunfire). *See also* Dan Eggen, *Study: Almost Half of Murder Victims Black*, WASH. POST, Aug. 10, 2007, at A4 (discussing study by the Bureau of Justice Statistics which found that African-Americans are disproportionately harmed by gun violence).

<sup>22</sup> *See* Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 579 (2006) (discussing the need for better data collection mechanisms in order to acquire more information about violent deaths); *see also* Emma Schwartz, *In Congress, the Uphill Battle for Gun Control: Why It's Been Years Since Significant Federal Legislation*, U.S. NEWS AND WORLD REP., Mar. 17, 2008, at 41 (“Part of the challenge in going after guns used in crimes is the lack of solid research on exactly which laws help reduce gun violence...[A] 2003 report by the Centers for Disease Control and Prevention concluded there is ‘insufficient evidence’ to measure the efficacy of various gun control laws, largely because of limited data.”).

<sup>23</sup> For example, in response to school shootings, State Senator Karen S. Johnson has advocated allowing certain individuals to carry concealed weapons on college campuses. *See* Randal C. Archibold, *Arizona Weights Bill to Allow Guns on Campuses*, N.Y. TIMES, Mar. 5, 2008, at A10.

<sup>24</sup> *See Wiggum v. City of Springfield*, 555 F.3d 373, 388 (12th Cir. 2007) (“[J]ust as Springfield may not flatly ban the keeping of a handgun in the home, obviously it may not prevent [a handgun] from being moved throughout one’s house.”).

<sup>25</sup> *See* Jerry Bonanno, *Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution*, 29 HAMLINE L. REV. 463, 477 (2006) (“The major implication of adopting the individual rights theory of the Second Amendment...is that bans on the private ownership of protected firearms carry a strong presumption of invalidity.”).

<sup>26</sup> Akhil Reed Amar, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 107 (2002).

<sup>27</sup> *See id.* (explaining that modern guns are far more dangerous than single-fire muskets).