

FINDING THE BROAD COLLECTIVE RIGHT IN THE OPERATIVE CLAUSE OF THE SECOND AMENDMENT

INTRODUCTION

Second Amendment debate has largely focused on determining whether the amendment establishes an individual right to gun ownership or a collective right to state militias. The individualists emphasize that the right belongs to “the people,” and dispute the exclusivity of the right to “well organized militias.” In contrast, those subscribing to the collective right approach focus on the militias and strain to manipulate the phrase, “the people,” into something in line with this interpretation.

This comment attempts to bring the seemingly conflicting clauses of the Second Amendment into harmony. The first part of the comment outlines the conflict created by the two major interpretations. The second part provides an alternative interpretation of the operative clause of the Second Amendment, making it consistent with the collective right framework. The final part identifies what collective rights, besides that to a militia, the Second Amendment may afford “the people” of the United States.

I. THE CONFLICT BETWEEN THE CLAUSES

Two distinct clauses comprise the Second Amendment. The first—“A well regulated Militia, being necessary to the Security of a free State”—is identified as the *prefatory clause*.¹ The remainder of the amendment—“the right of the people to keep and bear Arms shall not be infringed”—is the *operative clause*.²

The opposing camps of Second Amendment interpretation each find their rock in one of these clauses. The collective model focuses on the prefatory clause. In this clause, collectivists

find ample support for the notion of a Second Amendment affording a “collective right”.³ So finding, they use the prefatory clause to “shape and define the meaning of the substantive [operative] provision contained in the second clause, and thus the amendment itself.”⁴

Conversely, individualists place emphasis on the operative clause and argue that the prefatory clause is insufficient to “mandate what would be an otherwise implausible collective rights . . . interpretation of the amendment.”⁵

In the recent 12th Circuit case, *Wiggum v. City of Springfield*, both parties and the court agreed that the prefatory clause declares the Second Amendment’s civic purpose.”⁶ The court attempts to reconcile the collectivity of the prefatory clause with the individual right it attributes to the operative clause. It does so by relying on the Supreme Court’s definition of a militia in the case *United States v. Miller*: “[T]he militia included ‘all males physically capable of acting in concert for the common defence’ who were ‘enrolled for military discipline.’”⁷

The 12th Circuit then delivers a lengthy recitation of the historical understanding of militias.⁸ Of course, no matter how broadly “militia” is defined, it cannot encompass all modern United States citizens. The court is left to concede that the individual right to gun ownership is not “contingent upon his or her continued or intermittent enrollment in the militia.”⁹

The collective right camp rests on equally unstable logic. Relying on strict definitions enunciating the military nature of the phrase “bear arms,”¹⁰ the collectivists both discount alternative historical significances of the term¹¹ and ignore the right “to keep” arms entirely.¹² There is no way to reconcile the two clauses when one announces a collective nature and the other establishes an individual right—one clause must yield.

II. “THE PEOPLE”—NEITHER INDIVIDUAL NOR GOVERNMENTAL

In the battle of Second Amendment definitions, one phrase holds the key to reconciling the prefatory and operative clauses of the amendment. The right to keep and bear arms inures to “the people.” The wrongful definition of this phrase by both camps of Second Amendment scholars is the source of the perceived conflict between the prefatory and operative clauses.

In *Wiggum*, the City of Springfield took the collective right approach and claimed that “the people” referred to either members of the militia or the states.¹³ The 12th Circuit correctly rejected this approach, noting that the Tenth Amendment clearly shows the distinction between states and “the people.”¹⁴ However, having successfully employed interpretive canon to rebut the collective definition, the 12th Circuit then embarks on misusing canon to give their own definition to “the people.” The majority concludes that the Second Amendment must grant an individual right because so many of its surrounding amendments do so.¹⁵ The court thus strains to use context to define the amendment without giving due consideration to how the phrase “the people” is used throughout the Constitution.

One scholar has noted that the Second “[A]mendment speaks of a right of ‘the people’ collectively rather than a right of ‘persons’ individually.”¹⁶ The most prominent use of the phrase “the people” in the Constitution is in the Preamble; “We the People” came together to establish a new government.¹⁷ The Constitution was neither established by individual persons nor the several states. “The People” is a collective body, comprised of American citizens and above, not under, the United States government.

Using this consistent definition of “the people,” the Second Amendment is no longer a house divided. Both the prefatory and operative clauses show the collective nature of the right

secured by the amendment. However, since the collective right is not granted to the states or any subdivision thereof, it seems unlikely that the right would be limited to protecting only the viability of official state militias. As explained by the 5th Circuit court which decided *Emerson*, the most natural reading instead is that there is a right (albeit a collective one) guaranteed by the Second Amendment which, when protected, serves the civic purpose of strengthening or enabling militias.¹⁸

III. A COLLECTIVE RIGHT BROADER THAN MILITIAS

Just like all other statutory prefaces, the prefatory clause of the Second Amendment provides insight into the nature of the operative clause of the amendment, while not possessing the necessary authority to bind or limit it. Thus Judge Skinner correctly establishes that “[d]espite the importance of the Second Amendment’s civic purpose, . . . the activities it protects are not limited to militia service.”¹⁹

As previously stated, the civic nature of the prefatory clause is beyond dispute.²⁰ It is, however, probable that the Second Amendment protects a civic right broader than just one to state-organized militias. There are several such collective rights which the amendment may protect.

One possible collective right (in addition to militias) that the Second Amendment aimed to protect is the social right to individual and collective protection from lawbreakers. Under English law during the Colonial Era, citizens were entrusted with the civic obligation to enforce the law.²¹ This duty began with protecting oneself, family and property.²² The obligation did not end here: Englishmen were further obliged to pursue felons, keep watch and rally under the sheriff as a posse.²³

This civic duty of law enforcement is not unfamiliar in American jurisprudence. Article I of the Constitution establishes that the purposes of citizen militias were first, “to execute the Laws of the Union,” and then to protect the nation from insurrection and foreign invasion.²⁴ That protection of self, family and others is a duty held by society collectively and not one abdicated to the government is evident in modern case law which holds “that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen.”²⁵ While we may not be under the same legal obligations to protect our neighbors as the colonists were, the Second Amendment may have been protecting the collective right to do so.

Another possible collective right held by “the people” as a super-governmental entity could be the right to rebel against tyranny or oppression.²⁶ This may come in the form of not-so-well-regulated militias or it may resemble the Warsaw Ghetto uprising referenced to in more than one federal appellate court.²⁷ In either form, it is a right neither guaranteed to any individual nor held by any branch of government; it is a collective right, held by the body that created the federal government and to which the federal government responds.

CONCLUSION

Recognizing that the Second Amendment confers a right on neither individuals nor governmental entities, the purpose of the Second Amendment begins to become clear. It is not just about militias coming forward in time of war. It is not about gun ranges and pheasant hunting. It is about securing the power of offense and defense to the collective whole of society and not to any governmental agency.

Writing in favor of an individual right approach, one scholar nevertheless enunciated the broad collective nature of the Second Amendment afforded to the sovereign American people:

The Second Amendment is about more than some modern doomsday scenario where government has run amuck, compelling collective self-defense by the body of the people. [It] is about maintaining the relationship between the sovereign people and the government that they empower. . . . It is about ensuring that the civilian citizens . . . are ultimately the master of, and not a subordinate to, government controlled forces. In this way, the Second Amendment maintains the balance of power between the government and the sovereign people that it governs.²⁸

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¹ Wiggum v. City of Springfield, 555 F.3d 373, 374 (12th Cir. 2007).

² *Id.*

³ See *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003).

⁴ *Silveira*, 312 F.3d at 1067.

⁵ *United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001).

⁶ *Wiggum*, 555 F.3d at 379.

⁷ *Id.* (citing *United States v. Miller*, 307 U.S. 174, 178-79 (1939)).

⁸ *Id.* at 379-85.

⁹ *Id.* at 386.

¹⁰ See *Silveira v. Lockyer*, 312 F.3d 1052, 1064-66 (9th Cir. 2003).

¹¹ See *United States v. Emerson*, 270 F.3d 203, 217 (5th Cir. 2001).

¹² See *Wiggum*, 555 F.3d at 379.

¹³ *Id.* at 376.

¹⁴ *Id.*

¹⁵ *Id.* at 377.

¹⁶ Akhil Reed Amar, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 104 (2002).

¹⁷ U.S. CONST. pmb., quoted in Amar, *supra* note 16, at 104.

¹⁸ *Emerson*, 270 F.3d at 219.

¹⁹ *Wiggum*, 555 F.3d at 386. Of course, the 12th Circuit does fail to recognize that, just like all other statutory prefaces, the prefatory clause should not be entirely disregarded in interpreting the operative clause.

²⁰ *See id.*, 555 F.3d at 379.

²¹ See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 2* (Harvard Univ. Press 1994); *see also* Amar, *supra* note 16, at 108 (explaining the historical concern over “roving bands of thugs and pirates” which may have influenced the ratification of the Second Amendment).

²² MALCOLM, *supra* note 21, at 2.

²³ *Id.* at 2-3.

²⁴ U.S. CONST. art. I, § 8, *quoted in* *United States v. Miller*, 307 U.S. 174, 177 (1939).

²⁵ Jerry Bonanno, *Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution*, 29 *HAMLIN L. REV.*, 463, 467-68 (SYMPOSIUM ISSUE: GUN CONTROL & THE SECOND AMENDMENT) (2006) (internal quotation marks omitted).

²⁶ *See Wiggum v. City of Springfield*, 555 F.3d 373, 377 (12th Cir. 2007) (referring to the deterrent effect of a well-armed populace against oppression).

²⁷ *Id.* at 377 (referring to the comparison made by Judge Kozinski of the 9th Circuit).

²⁸ Bonanno, *supra* note 25, at 469-70.