

A Modern Interpretation of the Second Amendment

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INTRODUCTION

Daily, we are bombarded with television programming filled with shoot outs and murders with guns. America's addiction to violence is not only seen in Hollywood, but also pervades our real life. Children are beginning to use these deadly weapons with relative ease as seen in both the Columbine and Santee school shootings. Guns have infiltrated our everyday lives, and it is time for a reality check. Gun right advocates claim that it is their Constitutional right to bear arms, while gun control activists wish to do away with guns almost entirely. The Second Amendment ensures "the security of a free State" by securing the "right of the people to keep and bear arms," yet it is not clear who exactly the "people" are.¹ Because of this central ambiguity, it is time to frame the Second Amendment with a contemporary understanding in order to redefine its meaning.

Recently, two different Federal circuit courts have reached opposing conclusions regarding the scope and meaning of the Second Amendment. In *United States v. Emerson* (1999), the 5th Circuit court concluded that the "people" referred to in the Amendment are individuals. In contrast, the 9th Circuit court established in *Silveira v. Lockyer* (2002) that the Amendment refers to "people" as a whole, and consequently only secures a collective right to maintain arms. The 5th Circuit erred in the *Emerson* decision by failing to consider a modern interpretation of the Amendment. By developing three schools of thought to categorize various views regarding gun ownership rights, the ruling of the 9th Circuit is the most accurate interpretation of the Second Amendment to date. However, the *Silveira* decision also failed to demonstrate a modern interpretation. A modern interpretation of the Second Amendment is necessary in order to apply its principles to present day society. The Second

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¹ U.S. Const. amend. II.

Amendment, in its most accurate interpretation, provides only the privilege to maintain operative militias; it does not bestow any individual right to bear arms for other uses. Creating a modern understanding of the Second Amendment will allow the “security of a free state” to still be protected without providing an individual right to bear arms.² Over the course of this paper, I intend to support a modern understanding by accomplishing five tasks: 1. Proving that assault weapons are legitimate threats, 2. Critiquing common tools of analysis used to reveal the Amendment’s meaning, 3. Evaluating the two conflicting 9th and 5th Circuit decisions, 4. Proving that the 9th Circuit decision is most accurate, and finally, 5. Presenting a modern understanding of the Second Amendment.

DEFINING ASSAULT WEAPONS AS DANGEROUS THREATS

In an attempt to combat gun-related violence, states have focused their attention upon assault weapons. To understand the rationale behind such legislation, an awareness of assault weapons operation is critical. Automatic assault weapons, such as machine guns, have been outlawed for a considerable amount of time on the basis that they pose too great a danger to society. Automatic weapons allow a user to continuously fire bullets while keeping the trigger depressed. At the same time, current legislation has targeted semi-automatic weapons, which are slightly different in operation from the automatic weapons discussed above. Semi-automatic weapons reload bullets into the chamber immediately after one bullet has been fired. This allows the user to send off multiple rounds of ammunition by repeatedly depressing the trigger, as opposed to keeping the trigger continually depressed with automatic weapons.³ This distinction in operation has allowed semi-automatic weapons to remain available in the marketplace. However, semi-automatic weapons pose a significant threat to public safety. The ability to continuously fire without reloading delays makes semi-automatic weapons unsuitable for the streets. Aside from slight differences in reloading, semi-automatic weapons are virtually identical to automatic weapons, which have long since been outlawed. Semi-automatic guns are classified as assault weapons and should not be placed in the hands of the common citizen. Instead, they should be used

² Id.

³ *Silveira v. Lockyer et al.*, 312 F.3d 1057 (2002).

exclusively to protect the safety of our communities by regulated government entities such as the military and law enforcement. Many agree with this view, arguing that semi-automatic weapons serve no functional purpose in modern-day society, and should be outlawed like automatic weapons. However, gun advocates seek shelter under what is debatably a constitutionally protected right to maintain these weapons. Proponents of the latter view argue that despite the danger these weapons may pose, the Second Amendment has established an absolute right that should not be trampled upon. While our communities remain divided on the issue, there is denial concerning the legitimate danger and threat assault weapons pose. California has responded to this threat by enacting legislation virtually outlawing assault weapons from public use, and raising questions regarding the meaning of the Second Amendment.

THE CALIFORNIA STATUTE THAT REACTED TO THE DANGEROUS THREAT

In 1989, a school shooting took place at Cleveland Elementary in Stockton, California. Five children were killed when a young student opened fire in the schoolyard using an AK-47.⁴ Questions about how the young child was able to obtain the weapon sparked bitter controversy in California, and ultimately resulted in legislative discussion. This horrific event eventually led to the enactment of the Robert-Roos Assault Weapons Control Act (AWCA), which rendered it a felony to own, manufacture or sell certain assault weapons in California. The statute can be summarized as a ban on the possession of assault weapons by private individuals, with a grandfather clause that permits the retention of previously owned weapons if they are registered with the state. Also included is a statutory exception allowing the possession of assault weapons by retired peace officers that acquire them at the time of retirement.⁵ The legislature provided this justification for enacting the law: the automatic weapons delineated in the statute ‘have a high rate of fire and capacity for firepower and its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill human

⁴ Id.

⁵ Id.

beings.”⁶ The AWCA correctly identified assault weapons as a dangerous threat and sought to prevent further violence from taking place. In addition, the statute serves as an example of a state legislature taking the steps necessary to ensure that assault weapons are placed only in the hands of individuals recognized by the government to protect society. However, such legislative actions have led to a substantial amount of controversy regarding the meaning of the Second Amendment.

THE SECOND AMENDMENT DEBATE:
LANGUAGE AND HISTORICAL CONTEXT ANALYSIS DO NOT
LEAD TO A CORRECT INTERPRETATION

The AWCA is the first of its kind in America; sparking heated controversy over the meaning of the Second Amendment. Some have argued that the statute is in violation of the Amendment, claiming that there is a Constitutional right to own such weapons free of excessive government regulation. Throughout the years, both federal and state courts have continually struggled to ascertain the correct meaning of the Second Amendment. 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.”⁷ Given the way the Amendment is written, one can argue that it conveys an absolute privilege to own weapons. Moreover, the words “shall not be infringed” could arguably be referring to the protection of an individual right. Conversely, it can be argued that only a right to bear arms for militia use was established. The preamble to the amendment: “A well regulated Militia...” could perhaps be read as an indication of the context in which bearing arms is meant to fit. As a result, members of the militia then become the only group entitled protection by the Amendment. However, the language does not establish what exactly constitutes a “militia”, other than by asserting the necessity of a militia to the state. In addition, it is also unclear from the vague language whether the “people” who are entitled to bear arms are being referred to collectively or as a whole. Clarification of these ambiguities will bring us closer to a modern understanding of the Second Amendment. Yet, as

⁶ Id.

⁷ U.S. Const. amend. II.

demonstrated here, both syntax and word placement in the Amendment do not reveal any distinct meaning. Given that a strict textual analysis of the Amendment will not correctly lead us to a definitive answer, an alternative technique must be employed.

Unfortunately, the context in which the Amendment was written does not bring us closer to an accurate interpretation. The Bill of Rights was enacted in 1789 after many criticisms to the Constitution had been raised.⁸ This was a time of political turmoil, as America had recently been engaged in its war for independence. Americans were discontent with their prior government, and as a result were forced to take up arms in order to defend themselves against the British army. At the time, the militia was a self-sponsored group of men who fought together because no state army had been established. Ultimately, the American militia was successful in defeating the British army. The development of the Constitution followed, and the Bill of Rights was designed in response to the problems and issues the country was facing at that point in time. Moreover, the Second Amendment specifically established the right to a militia, that Americans had relied upon a militia to win the Revolutionary War. Therefore, it was imperative to secure the right of the people to fight for the protection of the state.

This historical background could support the notion that our Founding Fathers meant for individuals to have the right to form and operate effective militias. The militia proved useful in defeating the British, and therefore was a valuable right worth protecting. The alternate hypothesis, that it was intended to allow individuals the right to bear arms might also be supported by the historical context. The militia was composed of men who individually possessed weapons. In order to be able to fight, the men were entirely dependent on their artillery. Therefore, it was necessary to secure the right of individual men to possess weapons. While both notions carry some validity, the results remain inconclusive after viewing both arguments. Since valid arguments can be posited for either view, we are not able to reach a definitive answer using this mode of analysis. Understanding the historical context behind the Second Amendment can provide one unbiased point: the situation and circumstances surrounding the enacting of the Amendment are very different from those that confront Americans today. Given that both textual

⁸ Available at <<http://www.nara.gov/exhall>> (visited March 2003).

and historical context analysis failed to provide an accurate interpretation of the Second Amendment, we must now look to the courts for guidance.

TWO FEDERAL COURT DECISIONS CREATE CONTROVERSY ABOUT THE SECOND AMENDMENT

An analysis of court opinions on Second Amendment issues can provide us with insight regarding a modern interpretation. Throughout the years, the judicial branch has addressed a number of cases regarding the Second Amendment and gun control. Two of the most controversial decisions are *Silveira v. Lockyer* (2002) and *U.S. v. Emerson* (1999). The 9th Circuit decision in *Silveira* established that the Second Amendment does not provide an individual right to bear arms. On the other hand, the 5th Circuit in *Emerson* reinforced an individual right to own and possess weapons. Both opinions regarding the scope of the Second Amendment are revolutionary, and no other court has yet to perform an extensive analysis regarding the hotly contested issue. As a result, we are left with two recent Circuit Court opinions reaching opposing conclusions on the issue of whether the Second Amendment establishes an individual or collective right to bear arms. A detailed analysis of the two opinions is to follow.

In 2001, Sean Silveira and eight other men filed suit challenging the AWCA⁹ statute claiming that the act violates their Second Amendment right to bear arms. A California District court dismissed the claims and the plaintiffs consequently filed an appeal naming California Attorney General Bill Lockyer and Governor Gray Davis as defendants in December 2002. The final result: the 9th Circuit court dismissed Silveira's claim of a Second Amendment violation holding that it did not confer an individual right to bear arms.¹⁰

The 9th Circuit's analysis of the Second Amendment is complicated, but yet informative. The discussion begins with a description of what Judge Reinhardt terms the three "principal schools of thought" regarding the scope of the Amendment.¹¹ The first is the "traditional individual rights" model, which holds that the Second Amendment guarantees an absolute individual right to

⁹ Robert Roos Act was dropped and is commonly known as Assault Weapons Control Act or AWCA.

¹⁰ Silveira at 106.

¹¹ Id.

maintain weapons, for any purpose. The model favors limited government intervention and regulation on gun control. The “limited individual rights” model refers to the same constitutionally guaranteed individual right, but only when reasonably connected to militia service. The model is a variation of the traditional model, and also favors limited government regulations. Reinhardt’s final model is the “collective rights model.” Subscribers to this view believe the Second Amendment does not provide an individual right to own weapons, and provides only the right to maintain effective state militias. This view supports virtually unlimited government regulation, subject only to Equal Protection laws and other constitutional provisions.¹²

In reaching their decision, the Court primarily relied upon the legal reasoning from the 1939 Supreme Court decision in *U.S. v. Miller*. The defendants in the case were indicted for transporting a double barrel 12-gauge sawed off shotgun in violation of interstate commerce regulations. The defendants’ shotgun was sawed off to further their ability to conceal the weapon. The defendants in the case disputed the indictment by claiming a violation of their Second Amendment right to bear arms. In *Miller*, the Supreme Court noted that:

In the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than 18 inches in length has some reasonable relationship to the preservation or efficiency of a well-regulated militia, the Second Amendment does not guarantee the right to keep and bear such an instrument.¹³

The 9th Circuit interpreted the decision as an affirmation of the “collective rights” model. The Court used the *Miller* decision as case precedent to support their model for Second Amendment interpretation. Ultimately the defendants’ Second Amendment challenge in *Silveira* was rejected on the basis that the Second Amendment does not confer an individual right to bear arms, and the collective rights view was affirmed.

The decision in *Silveira* makes some important assertions, some of which were discussed earlier:

¹² Id.

¹³ *U.S. v. Miller et al.*, 307 U.S. 174 (1939).

Although the text and structure of the amendment, standing alone, do not conclusively resolve the question of its meaning, when we give the text its most plausible reading and consider the amendment in light of the historical context and circumstances surrounding its enactment we are compelled to reaffirm the collective rights view...¹⁴

These statements indicate a unique strength in their analysis. The Court was able to discern that a textual analysis of the Second Amendment does not lead to a correct interpretation. Although the Court spends much time analyzing the text, clause by clause, they acknowledge that ambiguity remains. The Court reaffirmed that “the Amendment protects the people’s right to maintain an effective state militia, and does not establish the individual right to own or possess firearms for personal use...”¹⁵ This position is consistent with the collective rights model, and is the crux of the 9th Circuit’s influential decision.

In the 2001 *U.S. v. Emerson* decision, the 5th Circuit court reached conclusions that are in direct conflict with the reasoning of the 9th Circuit:

We agree with the district court that the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by *Miller*, regardless of whether the particular individual is then actually a member of a militia.

The *Emerson* court also reached an opposite interpretation of the *Miller* decision. They held “consistent with *Miller*, that it [the Amendment] protects the right of individuals...”¹⁶ The 5th Circuit noted that the Supreme Court in the *Miller* court did not state that the Second Amendment does not guarantee an individual right to bear arms. Instead, the *Miller* court established that the weapon in question did not qualify as being connected with any militia service. As a result, the Court reasoned that the decision in *Miller* was not an affirmation of the “collective rights model” as the 9th Circuit had expressed. The Court’s analysis provides specific details regarding the actual syntax and

¹⁴ Silveira at 30.

¹⁵ *Id.*

¹⁶ *U.S. v. Emerson*, 270 F.3d 203, 225 (1999).

wording of the Amendment as well as contextualizing the Amendment with the rest of the Bill of Rights. The emphasis on the individual was established because the Court believed that the Bill of Rights is primarily focused upon individual rights. It is argued that the other rights provided by the Bill of Rights are given to individuals, and that the Second Amendment should not be considered any different. Through an analysis of initial drafts of the Bill of Rights, the legislative history of the document is ultimately exposed. It was the intention of the *Emerson* court to indicate the Founder's intent to confer an individual right to bear arms at the time the Second Amendment was written. In summation, the Court rejects the collective interpretation and implicitly decides on an individual rights view of the Second Amendment.

WHICH DECISION IS CORRECT?

AN ANALYSIS AND CRITIQUE OF THE TWO OPINIONS

Both the *Emerson* and *Silveira* decisions contained lengthy discussions regarding what the court determined to be significant in its analysis of the scope of the Second Amendment. While the reasoning used in *Silveira* was accurate, the 9th Circuit failed to demonstrate a proper modern understanding of the Second Amendment. This understanding would have consisted of a revised version of the Second Amendment that could clarify the definition of a militia while allowing us to apply its original principles to modern society. The *Silveira* court correctly identified the danger that assault weapons pose, and determined that the collective rights view best described the intention behind the Second Amendment. Moreover, the *Silveira* court also succeeded at understanding that focusing primarily on structure and wording would not resolve the ambiguity of the Amendment. Yet the Court hastily created three rigid schools of thought on the Amendment, which seem to leave out critical concepts. Each of the three views focus on a meaning that stems from the actual wording of the Amendment, its history, and case precedent. Without undercutting the importance of any of these factors, by constraining all interpretations of the Second Amendment to three rigid schools of thought, the *Silveira* court has failed to consider the importance of a modern understanding. For example, subscribers to the "limited individual rights" model may agree that the well regulated militia from the Amendment refers to the present day National Guard, thereby removing any supposed individual right to bear arms

and placing it in the hands of the collective militia. This could potentially push the “limited individual rights” view closer to the “collective rights” view. Yet the rigidity of the *Silveira* reasoning does not allow room for this type of fluidity. The Court also failed to define the concept of a militia in present day terminology. For instance, given our nation’s ever increasing dependence upon the armed forces in regards to the protection of national security, many argue that the militia serves an entirely different purpose today then it during the Revolutionary War. Instead, what is mentioned is a justification for interpreting the word “militia” as a collective entity. “The term refers to a state military entity, not the people of the state..”¹⁷ Although this completed their argument in favor of the collective rights view, it did not advance any notions about a contemporary definition of a militia. Had the Court accomplished this, they would have provided a solid ground from which we could gather a modern applicable meaning of the Amendment and its purpose. Ultimately, a modern understanding is necessary to be able to re-establish the rules of gun ownership in light of the danger that assault weapons pose.

In addition to outlining the three primary schools of thought regarding the Second Amendment, the *Silveira* court also arrived at the decision by using parts of a Supreme Court decision from 1939. The *U.S. v. Miller* decision can, at best, provide us with insight on where the court stood in 1939 and clarify the view that weapons not connected with militia service are subject to restrictions outside the Second Amendment’s scope. A decision based primarily on obsolete precedent is not convincing, and as a result, a modern understanding is needed. Societal needs in 1939 are vastly different from the needs of today, and it is crucial that legislative decisions are constructed with this societal context in mind. Given the rapid rise in the use of assault weapons, it is imperative that decisions regarding the scope of the Second Amendment take into consideration the ever-changing needs of modern-day society. The *Silveira* court also incorrectly dismissed the fact that the *Miller* decision was worded in the negative; specifying only what is not in the Amendment’s scope rather than what is. Thus, the *Miller* Court did not tell us what the scope of the Second Amendment actually is. A negation of something is not necessarily an affirmation of the opposite, and the 9th Circuit failed to recognize the crucial distinction. It is not logical to assume that because the *Miller* court negated the individual rights model, they would automatically affirm the collective rights

¹⁷ *Silveira* at 38.

model. By asserting the implication of the “collective rights” model, the 9th Circuit made an incorrect inference regarding the *Miller* decision.¹⁸ The Court should have at most inferred a rejection of the “traditional rights” model. This fact, combined with the vast gap between 1939 and modern-day societal needs, should have forced Judge Reinhardt and the 9th Circuit to seek alternative avenues in hopes of strengthening their argument. In summation, the failure to demonstrate a modern application of the Amendment and its connection to what can be considered the modern day militia, leaves the 9th Court’s analysis incomplete. The analysis’ strength lies in the confirmation of the collective rights view, as well as an acknowledgement of the Amendment’s textual constraints. The collective rights view ensures that only a specific, regulated group of people are entitled the right to bear arms, thus reducing the danger of making assault weapons publicly accessible. For the above reasons, the final decision of the *Silveira* court is currently the closest correct judicial interpretation of the Second Amendment. However, by basing its reasoning on both an outdated precedent and rigid model of commonly accepted schools of thought on the Second Amendment, the *Silveira* decision has failed to establish a modern understanding.

The 5th Circuit also applied the logic behind the 1939 *Miller* decision to their ruling, and ultimately did so with more accuracy than the 9th Circuit. They interpreted *Miller* as having established that the weapon in question was not protected by the Second Amendment because it did not possess any militia related function. In addition, the 5th Circuit noted how *Miller* did not claim that one must have a connection with actual military service to receive Second Amendment protection. The *Emerson* court makes clear that if this connection was required for Second Amendment protection, the *Miller* court would have dealt with this issue by determining if the defendants possessed any connection to a militia or military service. In the end, the *Emerson* court correctly notes that the *Miller* decision established nothing more than the precise exclusion of the sawed off shotgun from the Amendment’s protection. The limited scope of the *Miller* decision can be attributed to a lack of militia connection, and it is not reasonable to assume the implication of anything further.¹⁹

Despite its correct interpretation of the *Miller* decision, the *Emerson* decision is flawed. The decision focused primarily on a lengthy analysis of the

¹⁸ Id.

¹⁹ Emerson at 38.

context of the Amendment. The context specifically discussed the relationship between the Second Amendment and the other Amendments in the Bill of Rights. The argument advanced was that the assignment of rights in the document refers to individuals, and therefore the Second Amendment should be no exception.²⁰ Although this is conceivable, the reasoning fails to consider the notion that an individual right is being established, yet only in direct connection with a collective right. The right to maintain and participate in an effective, well-regulated state militia is awarded to the *individual*. The right to bear arms is awarded to the militia- the *collective group*. Ultimately, the above viewpoint can be summarized as an individual right to maintain a collective right. Therefore, it is incorrect for the 5th Circuit to note that gun control advocates view the Second Amendment as an exception to individualistic ideals. Rather, the Second Amendment confers an individual right to bear arms in direct connection with a collective right to participate in a militia. This distinction is never raised in the Court's opinion, and ultimately contributes to its inaccuracy.

In addition, the *Emerson* court attempted to answer the complex question raised earlier: who are the 'people' being referred to in the Amendment? 'There is no evidence in the text of the Second Amendment, or any other part of the Constitution, that the words 'the people' have a different connotation within the Second Amendment than when employed elsewhere...'²¹ The above statement by the *Emerson* Court indicated that the people referred to were the individuals, similar to other rights conferred in the Bill of Rights. The *Emerson* court never explored the possibility that due to the unique nature of the structure of the Second Amendment, the connotation may be dissimilar. The hasty dismissal of the fact that the Second Amendment is worded vaguely, which ultimately separates it from the rest of the Amendments in the Bill of Rights, further contributes to the flawed analysis of the *Emerson* court.

Aside from the above omissions, the 5th Circuit develops a convincing argument regarding the intentions of the Founders. The *Emerson* court advances a series of arguments in favor of the individual rights model by discussing different drafts of the Amendment. The Court includes various versions of the Amendment drafted prior to being sent to the Senate for

²⁰ Id.

²¹ Id.

approval. Through the Amendment's evolution, it appears as if the intentions of the Founder's may have been to confer an individual right to bear arms. However, the Court also stated that the Senate revised the Amendment before approval. The revision included the removal of certain language from the drafts, which happened to refer to individuals. Ultimately, the possibility remains that the Senate intended to establish a collective right. However, the 5th Circuit does not acknowledge this possibility, and relies too heavily on the intentions of the Founders. Since the Senate was charged with the final approval of the Second Amendment, we should not be as concerned with the intentions of the Founders. Thus, the *Emerson* court incorrectly applied the Amendment's legislative history to their analysis. Moreover, an analysis of intent does not promote a modern understanding of the Amendment. These arguments prove futile in developing a standard applicable to modern-day society.

As with the 9th Circuit, the 5th Circuit Court also failed to demonstrate a modern understanding of the Second Amendment. There was no discussion of what interpretations could be gathered based on modern-day factors. The *Emerson* court did in fact define the word militia, but only in connection with what the Amendment meant at the time of its inception. As a result, the Court merely attempted to restate the original intention of the Amendment. Unfortunately, the Founders were referring to single barreled shotguns, which were regarded as out-dated, impractical weapons. The Court ultimately rejected the plausibility of the "collective rights" views and permitted the "individual" view to reign. While this decision is structurally less flawed than the 9th Circuit ruling, it still arrived at an incorrect interpretation of the Amendment, and is in need of a revision which reflects modern-day standards. The repetition of the original meaning does not reflect the needs of today's society, as we have changed immensely since 1789. Due to an evolution in both technology and behavior, the use of guns has considerably changed over the years. In summation, it is imperative to establish a new meaning of the Amendment which reflects today's societal needs.

THE NEW MEANING OF THE AMENDMENT DOES NOT CONFER AN INDIVIDUAL RIGHT TO BEAR ARMS.

We need to contextualize the original meaning of the Second Amendment in order to fully understand its purpose. After contextualizing its

meaning, we can then provide a modern interpretation of the Amendment while achieving the same purpose. To accomplish this, we need to define words that appear in the original Amendment in contemporary terms. The Amendment was written in order to ensure the “security of the free state” by having a “well regulated militia”.²² The modern-day equivalent to the militia is the National Guard. This organization is meant to both repel foreign invasion and maintain homeland security. Due to their legitimate military function and regulation by the states, the National Guard is entitled to bear arms. “The Federal government provides the resources necessary for warfare, including firearms” to the National Guard.²³ Thus, as members of a well regulated organized militia, these individuals should receive a Second Amendment shelter securing their right to bear arms. The Army and related organizations are federally regulated, which results in a loss of state sovereignty.

The purpose behind creating a militia is to guarantee this sovereignty, and therefore only *local* groups satisfy this goal. Members of the unorganized militia should not expect protection under the Second Amendment, because they are unregulated and are often of questionably legitimacy. The groups’ unregulated nature does not satisfy the preamble to the Amendment: “a well regulated militia, being necessary to the security of a free state...”²⁴ Therefore, the only groups entitled protection under the Second Amendment should be members of the National Guard or other comparable groups. To qualify as comparable, a group must be regulated according to State laws, which would exclude any illegal and or dangerous organizations. The above categories encompass the groups that can be considered a militia and as a result, receive protection under the modern Second Amendment. This progressive understanding of the word “militia” should now be used to frame an argument for the correct interpretation of the Amendment.²⁵

I do not propose to define the intentions of the Founders in drafting the Bill of Rights. The Founders had many intentions for the Constitution which are no longer relevant in modern-day society. An example of this would be

²² U.S. Const. amend. II.

²³ Emerson at 25.

²⁴ U.S. Const. amend. II

²⁵ Id.

bestowing rights solely to white men. At our nation's inception, women and black men were not considered equal participants in society and as a result were not given the same rights as white men. However, as time has gone on, America has given up on these notions, and ultimately adjusted to the pace of society's change. We must similarly give up any subjective intentions that our Founders may have had at the time of the Amendment's inception, and focus on the objective function the Amendment fulfilled. The context in which the Amendment was written is far removed from what we observe today. Today, our National Guard meets the function of assuring the "security of a free state". Therefore, the original function of the Amendment can still be met by today's standards, without conferring a complete individual right to bear arms. It is possible to uphold the standards of the Founders, while maintaining a contemporary outlook. The modern understanding of the Second Amendment should include the National Guard as our "well regulated" militia, and few individual rights beyond such groups should be tolerated.

In light of the newly defined militia, there is little success in the argument for an individual right to bear arms. An individual person does not possess a significant ability to contribute to the "security of the state" and should not be allowed to own weapons (with the exception of those who possess weapons for sport). Therefore, in accordance with the original preamble and meaning of the Second Amendment, only people who belong to legitimate militias, law enforcement or sport groups should be granted the right to bear arms.

A NEXT BEST ALTERNATIVE:

THE CONTEMPORARY COLLECTIVE RIGHTS VIEW

Using the models that Judge Reinhardt discussed in the *Silveira* opinion, the argument outlined in this paper can be termed the contemporary collective rights view. It is difficult to pull a clear legal standard out of the *Miller* decision, due to the restrictive nature in which the holding was established. Given the outdated nature of the *Miller* decision, we must use caution in restating their conclusions. One can hypothesize that the Supreme Court implied a connection to the concept of a militia when applying Second Amendment protection. The *Miller* court read the Second Amendment in its correct original intention by understanding the connection between bearing arms and the militia. Furthermore, the *Miller* decision has given us a small

gateway to an understanding of a contemporary meaning of the Amendment. Already acknowledging the significance of the Amendment's preamble, it becomes time to modernize our legal standard. This can only be done by establishing a new definition of a militia, something no court has yet accomplished.

The Second Amendment is meant to apply to the "militia", and is intended to ensure the functioning of this "militia" for the maintenance of our security.²⁶ This security is not to be confused with security from each other, but is rather intended to be a protection of the state as a whole, other nations, and foreign entities. As a society we should be able to rely on our law enforcement for community protection rather than taking up arms ourselves. However, a main inefficacy of the contemporary collective rights view is shown when our local law enforcement fails to protect us. Despite this real world fallacy in the idealized picture being painted here, it is important to note the distinction the Amendment implicitly makes between the securities of the people as a whole versus protection from one another. Having made this clarification, we can then state our definition of a modern day militia.

The Second Amendment is intended only for those who are members of the "militia". The "militia" in 1789 was a group of able-bodied men ages 17-50, who fought together with personal muskets and bayonets to protect their homeland against the British. The "militia" in 2003 is a fully functioning, well regulated, group of men and women whose duty is to protect the safety of their state. This duty is equivalent to the service performed by the militiamen from 1789. Therefore, a well regulated group that consists of individuals united by the purpose of *defensively* protecting the state will qualify as a militia. This modern interpretation of the militia is what will allow us to understand the applicability of the Second Amendment to today's society. The Second Amendment should provide protection only for groups such as the National Guard, and other groups, if any, that meet the above criteria. The contemporary collective rights view restricts Constitutional protection to collective ownership and is an attempt to remain consistent with the goals of our Founders as well as the needs of today. This view is validated by the decision in *Silveira*, as well as the reasoning used in *Miller*. The decision in *Emerson* in favor of the individual rights view is not consistent with the goals of the Second Amendment, and does not reflect the necessary modern interpretation.

²⁶ Id.

We must follow in the footsteps of such revolutionary cases as *Brown v. Board of Education*: ‘In approaching this problem, we cannot turn the clocks back to 1868 when the Amendment was adopted, or even to 1896 when *Plessey* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.’²⁷ Just as the *Brown* case revolutionized the 14th Amendment and abolished the Separate but Equal doctrine, we must reinterpret the Second Amendment. By adopting a modern interpretation of preexisting law, the *Brown* ruling is now considered to be one of the most significant Supreme Court decisions in U.S. history. Although it is important to recognize both the historical context in which the Second Amendment was written, as well as the structure of its wording, it is imperative for us to adapt to the changing times and create a new interpretation. These sources are valuable, yet an exclusive analysis of structure and context ultimately leads to an inconclusive interpretation.

The view presented here reflects the circumstances we face today. A reevaluation of the Amendment we long took for granted needs to be take place, and a decision more accurate than *Silveira* or *Emerson* should be established. Our society contains a number of structural flaws that may prevent us from ever being able to successfully implement a perspective such as the contemporary collective rights view. However, continuing with the *Brown vs. Board of Education* analogy, there comes a time where the Supreme Court must embrace a radical change in the name of upholding modern-day societal standards. As a result, it is time to frame the Second Amendment with a contemporary understanding in order to redefine its meaning. In summation, it is imperative that the Courts account for modern-day societal needs by drafting Second Amendment decisions which implement the contemporary collective rights view.

²⁷ *Brown v. Board of Education*, 347 U.S. 483 (1952).