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The Sophisticated Second Amendment: The Real Meaning Was There All Along

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INTRODUCTION

Since its ratification in 1791, the Supreme Court has avoided judicial interpretation of the Second Amendment. Unlike most other provisions of the Constitution, the Court has done very little to define, clarify, or create tests to analyze Second Amendment issues, leaving the legal community to struggle with the Amendment's somewhat vague language and ambiguous history regarding the right to "keep and bear arms." In response to a recent Circuit split over the issue, the Supreme Court considered *Heller v. District of Columbia*, a case that prompted the Court to explicitly interpret the Second Amendment for the first time in its two-hundred year history.

The Circuit split involved two drastically different approaches to the Second Amendment: one arising in the Ninth Circuit Court of Appeals (*Silveira v. Lockyer*), and one from the Fifth Circuit Court of Appeals (*United States v. Emerson*). In 2002, the *Silveira* Court found that the Second Amendment protects the collective right of the states' citizens to retain the modern equivalent of a state militia (to the extent it may exist), and that states should have the power to limit citizen possession of weapons used for any other purpose. The *Emerson* Court, on the other hand, found that the Amendment protects citizens' individual rights to own weapons without excessive government regulation.

By placing the *Heller* case on its docket, the Supreme Court seemingly resolved the Circuit split, striking down the D.C. gun regulations in the process. However, Justice Scalia's majority opinion and Justice Stevens' dissenting opinion each advance convincing arguments for individual and

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collective rights respectively, and the differences between these approaches may do more to enflame the Second Amendment debate than to resolve it.

The following sections of this article provide a detailed background of each case: *Silveira*, *Emerson*, and *Heller*. Against this backdrop, further analysis will then demonstrate how the similar interpretive styles used by each jurist led to very different results. The analysis will ultimately reconstruct the *Heller* opinion to advocate for a third, hybrid model that better captures the type of right created by the Framers through the Second Amendment.

LEGAL STANDARD

The Second Amendment to the United States Constitution 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.[1]

Given this construction, the Second Amendment is composed of two clauses:

- The Amendment begins with a "prefatory clause":

  > *A well regulated Militia, being necessary to the security of a free State….*

- The Amendment then closes with an "operative clause":

  > *… the right of the people to keep and bear Arms, shall not be infringed.*

The Second Amendment is the only amendment in the Bill of Rights that has a *prefatory clause* in addition to its *operative clause.* The manner in which the Framers intended these two clauses to work together, as well as their purpose in including a prefatory clause for this Amendment, was never directly explained.

Although the Supreme Court routinely avoided direct interpretation of the Second Amendment since its ratification,[2] three models of interpreting the

[1] U.S. Const. amend. II.

[2] The Supreme Court dealt directly with the Second Amendment for the first time in the 1939 case of *United States v. Miller.* In 1934, Congress passed the National Firearms Act (NFA) which imposed heavy taxes on firearms and made short-barreled shotguns and rifles, machine guns, mufflers, and silencers subject to an annual two hundred dollar federal tax. Transporting an untaxed weapon of such nature across state lines

Amendment emerged from the lower courts and academia. These models are known as the individual rights model, the collective rights model, and the sophisticated (hybrid) rights model.

(1) Individual Rights Model

Proponents of the individual rights model argue that the Second Amendment guarantees the right of all individual citizens to own arms. Advocates for individual rights argue that the term "the people" in the Amendment's *operative (keep and bear arms)* clause grants all individual citizens this right, as individuals. The *prefatory (militia)* clause, according to this theory, merely explains why such a right is needed. In other words, the *prefatory clause* clarifies that one purpose of the people's individual right to keep and bear arms is to defend their states, if needed, as an armed civilian militia.[3] Under the individual rights view, the militia clause provides a *purpose,* but not an exclusive *prerequisite,* for the right to gun ownership.

constituted a felony. Under the NFA, defendants Jack Miller and Frank Layton were charged with a felony for transporting an unregistered, 12-guage, double-barrel shotgun from Oklahoma to Arkansas. The defendants argued that the tax was an unconstitutional federal regulation of firearms. The United States District Court for the Western District of Arkansas disagreed, categorizing the NFA as "regulatory" in nature, rather than fiscal, holding that this "regulation" of firearms violated the Second Amendment. *United States v. Miller*, 307 U.S. 174, 175 (1939).

The Supreme Court reversed the district court's decision, holding that the NFA did not violate the Second Amendment because the firearm in question did not have a reasonable connection to "militia service." According to the *Miller* Court, the nature of militia-style weapons had direct relevance to the scope of the Second Amendment. The shotgun that Layton and Miller possessed could not be found among the "ordinary military equipment" of the day, so the Court found that the Second Amendment did not protect such a weapon. *Id*. at 178.

For over 60 years, *Miller* remained the Supreme Court's most direct precedent as to the scope of the Second Amendment. Eventually, some of the lower federal appellate courts sough to take the analysis a step further and to interpret the full nature of the rights protected by the Amendment.

[3] See, e.g., *United States v. Emerson*, 270 F.3d 203, 236 (5th Cir. 2001). At the time the *Emerson* Court adopted this model no other federal court of appeal had done so; however, the model had received some academic support. *Id.* at 220.

(2) Collective Rights Model

Advocates for collective rights argue that the Second Amendment protects each state's right to maintain a regulated militia, as indicated by the *prefatory (militia)* clause. Under this theory, the *operative (keep and bear arms)* clause creates a collective right on behalf of the state's citizens to keep and bear arms, but *only* for the reason specified in the *prefatory* clause – i.e., potential service in the "well-regulated militia." Under the collective rights view, the *prefatory* clause provides a clear and distinct limitation on the scope of the *operative* clause.[4] As such, the militia can be "regulated" by the states, plausibly to the extent that only those members of a highly organized military unit like the National Guard may own weapons.

(3) Hybrid and 'Sophisticated' Rights Models

Although less unified than the individual and collective models, several academics and theorists have suggested that the Second Amendment creates a right somewhere between individual and collective approaches.[5] This article advocates for a variant of this middle ground. The hybrid right herein presented is neither completely individual nor completely collective. Rather, this article will demonstrate the theory that the Second Amendment creates an individual right to be a part of the collective militia group. The Second Amendment does not create an individual right to own weapons for seemingly any lawful purpose, as the individual rights theorists advocate, nor does it merely create a right for states to raise and arm militias, as the collective rights theorists advocate. Instead, the hybrid model places the right to insist that the state be allowed to maintain an armed, well-regulated militia with the individual citizens themselves.

[4] See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002).

[5] Several academic writers began searching for a middle ground between the purely 'collective' and purely 'individual' rights outlined above. This middle ground is often dubbed the 'sophisticated collective rights model.' See, e.g., *Emerson*, 270 F.3d at 219 (citing sources). The *Silveira* Court also referred to this concept in passing, preferring a slight variant that it called the 'limited individual rights model.' *Silveira*, 312 F.3d at 1061, n.8 (citing sources).

LEGAL STANDARD APPLIED

Silveira v. Lockyer

The *Silveira* case dealt with a law regulating a certain class of weapons deemed dangerous to society. The State of California enacted the Assault Weapons Control Act (AWCA) to severely limit Californians' ability to obtain certain automatic and semi-automatic firearms commonly referred to as assault weapons. The AWCA prohibited possession of forty models of firearms named in the Act, and this coverage was later extended to include new technologies as well.[6] The AWCA was challenged by a group of Californians who had already lawfully acquired assault weapons or wished to do so. They argued that the law violated their Second Amendment right to keep and bear arms.[7]

The Ninth Circuit ruled that the plaintiffs did not have standing to challenge the AWCA because the Second Amendment did not provide them with an *individual* right to keep and bear arms. Instead, the court held that the Second Amendment simply grants a collective right to the states for maintaining their militias, free from any interference through disarmament by the federal government.[8] The Ninth Circuit viewed the Amendment's *prefatory clause* as evidence that the Framers' sole purpose behind the Second Amendment was to protect state militias from this type of federal interference.

As for the specific text of the Second Amendment, the *Silveira* Court began with a review of the *prefatory clause*, finding that use of the term "'militia' referred to a state military force."[9] In reaching this conclusion, the court analyzed the term "militia" as it was used throughout the Constitution as a whole. Based on this examination, the court reasoned that "militia" was intended to mean "controlled military forces."[10] The court also found that the modifier "well regulated" meant that the Amendment did not apply to citizens at large, and that only very specific, government-established and controlled military forces were meant to fall within its protection.[11]

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[6] *Silveira*, 312 F.3d at 1056-57.

[7] *Id.* at 1066.

[8] *Id.*

[9] *Id.* at 1069.

[10] *Id.* at 1070.

[11] The court explained:

The *Silveira* Court's reading of the *operative (keep and bear)* clause supported this view of the *prefatory (militia)* clause. According to the court, the phrase "keep and bear" indicates a military meaning. The court noted that the Amendment does not "protect the right to 'possess' or 'own' arms, but rather to 'keep and bear' arms."[12] The court found that "this choice of words is important because the phrase 'bear arms' customarily refers to a military function."[13] According to the *Silveira* Court, the inclusion of such terminology was a clear indication of the Amendment's purely military purpose.

The Ninth Circuit also looked beyond the text of the Constitution to its historical context, in order to bolster this military interpretation of the Second Amendment. The court found that during the founding era, the militia was a state-organized fighting force intended, in part, to curtail the power of the federal government. Opponents of the new federal Constitution had insisted that the federal government's power be restrained, in order to prevent the very real concern for potential tyranny at the hands of an all-powerful sovereign.[14] The *Silveira* Court therefore reasoned that the *prefatory* clause of the Second Amendment reflected the fears of those who believed "the people would be

> The Second Amendment was enacted soon after the August 1786 – February 1787 uprising of farmers in Western Massachusetts known as Shay's Rebellion. What the drafters of the amendment thought "necessary to the security of a free State" was not an "unregulated" mob of armed individuals such as Shay's band of farmers … groups of white supremacists or other racial or religious bigots, or indeed any other private collection of individuals. To the contrary, "well regulated" confirms that "militia" can only reasonably be construed as referring to a military force established and controlled by a governmental entity.

Id. at 1072; see also, generally, *id.* at 1070.

[12] *Id*. at 1072.

[13] *Id*.

[14] During the ratification debates over the Constitution, Anti-Federalists were fearful of the danger to liberty that a strong federal government posed. Among these fears was the possibility that the federal government would disarm the citizens' militia, form a select militia, or use a standing army to tyrannize the people. *Emerson*, 270 F.3d at 237-38. With such concerns in mind, the Anti-Federalists proposed the Second Amendment. Collective rights advocates often assert that the Amendment was not intended for protection of *individual* arms, because the debates did not center on the notion of an individual right. Instead, the Anti-Federalists simply spoke of their concern that the federal government would disarm the state militias. *Id*. at 1082.

stripped of their ability to defend themselves against a powerful, over-reaching federal government" if institutions like the militia were not granted constitutional protection.[15] Thus, the *Silveira* Court held that the Amendment evidences the desire to guarantee the *states'* rights to protect their militias, free from any threat of potential disarmament by the federal government.[16]

Under the Ninth Circuit's interpretation of the Second Amendment, the right to keep and bear arms is reserved collectively to the states and their regulated militias. Individual citizens with no connection to the state militia, like those in *Silveira*, did not have standing to bring Second Amendment claims before the court, because their personal (i.e., individual) rights simply were not at issue.[17]

Notably, the Ninth Circuit looked beyond the mere *text* of the Amendment to reach this collective rights conclusion. As the court explained:

> [T]he language of the amendment alone does not conclusively resolve the question of its scope. Indeed, the Second Amendment's text has been called "puzzling," "an enigma," and "baffling" by scholars of varying ideological persuasions. What renders the language and structure of the amendment particularly striking is the existence of a prefatory clause, a syntactical device that is absent from all other provisions of the Constitution, including the nine other provisions of the Bill of Rights.[18]

Given the ambiguity in the text, the court turned to a lengthy discussion of the Amendment's historical *context* in order to ascertain its original meaning. Even the court's direct deconstruction of the text was laden with references to historical context as well.

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[15] *Id*. at 1076.

[16] The Ninth Circuit's reading of *Miller* also supported a collective rights interpretation of the Second Amendment. According to the *Silveira* Court, the *Miller* decision operated on the premise that "because a weapon was not suitable for use in the militia, its possession was not protected by the Second Amendment," thereby affirming the protection of the militia as the Second Amendment's purpose. *Id*. at 1061.

[17] *Id*. at 1066.

[18] *Id*. at 1068 (internal citations and footnotes omitted).

United States v. Emerson

In the 2001 case of *United States v. Emerson*, the Fifth Circuit Court of Appeals conducted its own detailed examination of the Second Amendment. This court also deconstructed the text of the Amendment, while devoting even more attention to an examination of its historical context. However, the Fifth Circuit concluded that the Amendment guarantees the rights of all citizens to keep and bear arms, whether they are involved in militia service or not.[19] Thus, whereas the Ninth Circuit determined that the Amendment's history supported a collective rights view, the Fifth Circuit examined that same history, and used that history to support the individual rights model instead.

The *Emerson* case dealt with the validity of gun possession restrictions on persons subject to certain forms of court orders. In September of 1998, Sacha Emerson filed for a divorce and a temporary restraining order against her husband Timothy Joe Emerson. Though Mrs. Emerson testified that Mr. Emerson had once threatened to kill her, the court never specifically concluded that Mr. Emerson was a threat to his wife. Nevertheless, Mrs. Emerson was granted a temporary restraining order against her husband until their divorce was finalized.[20]

Mr. Emerson did not contest the court order, nor was there any evidence that he attempted to violate it. However, Mr. Emerson was charged with violating 18 U.S.C. § 922(g)(8)(C)(ii) when he was found in possession of a firearm. Under this code section, a person subject to a court order barring contact with a spouse or child could not possess firearms or ammunition. Emerson challenged his conviction, claiming that the statute violated his Second Amendment right to keep and bear arms.[21]

In analyzing Emerson's Second Amendment claim, the Fifth Circuit adopted an individual rights view of the Second Amendment.[22] The court began with an interpretation of the Amendment's text, this time turning first to the *operative (keep and bear)* clause. The court reasoned that "'the people,' as used throughout the Bill of Rights, including the Second Amendment, referred

[19] *Emerson*, 270 F.3d at 220.

[20] *Id*. at 210-11.

[21] *Id*. at 212. Emerson also raised due process and Commerce Clause challenges to the statute. Both issues are beyond the scope of this article.

[22] *Id*. at 260.

to individual Americans," rather than to a select group of actual militia members.[23] While many collective rights advocates argue that the terms "keep" and "bear" indicate an exclusively military meaning, the *Emerson* Court found that "there are numerous instances of the phrase 'bear arms' being used [during the relevant time period] to describe a civilian's carrying of arms."[24] Although "keep and bear" can relate to militia service, the court ultimately found that nothing in the Second Amendment requires an exclusively military meaning.

Turning next to the *prefatory (militia)* clause, the *Emerson* Court found that it simply "implies that the [*operative* clause] is one which tends to enable, promote or further the existence, continuation or effectiveness of that 'well-regulated Militia.'"[25] In the court's view, the effect of the *prefatory* clause was to exemplify one possible reason a citizen might keep and bear arms, rather than to constrain the right to that purpose alone.[26] On the basis of this textual deconstruction, the *Emerson* Court viewed the Second Amendment as an endorsement of the militia system, but also held that the Amendment guarantees each individual citizen's right to keep and bear arms regardless of any militia connection.

Next, the *Emerson* Court conducted an extensive historical analysis to support its individual rights view of the Amendment.[27] Like the *Silveira* Court,

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[23] *Id*. at 228-29.

[24] *Id*. at 230.

[25] *Id*. at 233.

[26] For instance, the court noted that a group known as the "Pennsylvania Minority," who proposed language at the Pennsylvania state ratification convention that would have specifically protected the rights of the "people … to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game…." Id. at 241 (emphasis added).

[27] *Id*. at 218. Judge Robert Parker, who believed that the case could have been decided on simpler grounds, described the *Emerson* Majority's efforts as follows:

> The determination whether the rights bestowed by the Second Amendment are collective or individual is entirely unnecessary to resolve this case…. The fact that the 84 pages of dicta … are interesting, scholarly, and well written does not change the fact that they are dicta and amount to at best an advisory treatise on this long-running debate. No doubt the special interests and academics on both sides of this debate will take great interest in the fact that at long last some court had determined (albeit in dicta) that the Second Amendment bestows an individual right. The real issue, however, is the fact

the *Emerson* Court examined the Founding era debates, acknowledging the concerns of the Anti-Federalists over possible disarmament of state militias by the newly proposed federal government.[28] The *Emerson* Court emphasized, however, that many Federalists did not think further protection for militias was necessary, because the American people were already armed and could therefore resist an oppressive standing army if needed.[29] The court viewed the developments leading up to the actual language of the Second Amendment as confirmation that it had been intended to satisfy the Anti-Federalists' concerns over protecting the militia, but also as an affirmation that this task could only be achieved by "recognizing the *individual* right of all Americans to keep and bear arms."[30]

Though the court found that the Second Amendment guaranteed Emerson an individual right to keep and bear arms, it ultimately concluded that § 922 was an acceptable limit on that right.[31] The court drew this conclusion by conceding that even constitutional rights may be subjected to "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally."[32] In other words, citizens have an individual right to challenge a gun control regulation under the Second Amendment, but in some cases the regulation will

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> that whatever the nature or parameters of the Second Amendment right, be it collective or individual, it is a right subject to reasonable regulation.

Id. at 272-74 (Parker, J., concurring) (citations omitted).

[28] In general, the court acknowledged that the Anti-Federalists feared the new federal government "would someday attempt to infringe one or more of the people's fundamental rights." *Id.* at 237.

[29] Thus, although the Federalists eventually agreed to appease the Anti-Federalists by adding the Second Amendment, many Federalists did not share the belief that the Amendment was really needed. *Id*. at 240.

[30] *Id*. at 259 (emphasis added). As the *Emerson* Court further explained:

> This is not to say that the Amendment's preamble is … lacking in true significance. Quite the contrary. Absent a citizenry generally keeping and bearing their own private arms, a militia as it was then thought of could not meaningfully exist. … [T]he right of individual Americans to keep, carry, and acquaint themselves with firearms does indeed promote a well-regulated militia by fostering the development of a pool of firearms-familiar citizens that could be called upon to serve in the militia.

[31] *Id*. at 261.

[32] *Id*.

survive. Finding that § 922 satisfied this requirement by creating limited, protective measures for divorce proceedings, the court held that the temporary suspension of Emerson's individual right to keep and bear arms was a reasonable form of state regulation.[33]

Here, the Fifth Circuit also looked beyond the *text* of the Second Amendment and considered its historical *context* as well. However, in reviewing the same basic historical record, this Circuit court came to a completely different conclusion, and labeled the Amendment as a protection for individual (rather than collective) rights instead. Thus, it had taken almost two hundred years for the federal courts to speak directly to the nature of the rights created by the Second Amendment, and for several years thereafter, the Amendment was interpreted differently in these different parts of the country.

District of Columbia v. Heller

At the end of the 2008 term the Supreme Court finally weighed in on the Second Amendment. The *District of Columbia v. Heller* case dealt with a group of long-standing statutes regulating gun possession in the District. With minor exceptions,[34] various provisions of the D.C. Code required registration of firearms (but *prohibited* registration of *handguns* under most circumstances), required licenses for carrying any lawfully registered handguns (issued in one-year periods at the discretion of the police chief), and further required that all forms of firearms be kept unloaded and disassembled or bound by trigger-locking devices (unless located in a place of business or used for lawful recreational activities).[35] This group of regulations made up what many considered to be the strictest gun control laws in the United States.

Dick Heller, a special police officer and D.C. resident, filed suit after being denied a registration certificate to keep a handgun at home for private self-defense.[36] Heller claimed that the District's denial of his application

[33] *Id*. at 262.

[34] According to the Court, none of the "minor exceptions" to the D.C. regulations were relevant to the case. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

[35] See, e.g., *id*. at 2788 (listing statutory citations).

[36] Heller was authorized to carry a handgun during the course of his duties at the Federal Judicial Center. However, not even the exemptions within the D.C. Code that would allow an officer to carry a weapon on duty would allow him to keep an operational handgun at home. *Id.*

violated his Second Amendment right to keep and bear arms.[37] Heller also challenged the D.C. Code provisions that would require him to keep any firearms in his home unloaded, locked or disassembled, because such provisions would render his weapons useless for self-defense.[38]

The district court dismissed Heller's Second Amendment challenge reasoning that the Amendment guarantees a right to keep and bear arms only to those serving in an organized militia.[39] The Circuit Court of Appeals for the District of Columbia overturned the district court's decision, adopting an individual rights model of the Second Amendment instead, thereby finding that Heller did have standing to challenge restrictions on his gun possession. The Supreme Court agreed to review the *Heller* case. For the first time, the Court made a clear and direct statement as to the nature of the rights protected by the Second Amendment.

In an opinion written by Justice Scalia, the Supreme Court issued a 5-4 decision affirming the *individual rights* interpretation of the Second Amendment. Rather than explicitly embracing *Emerson* or rejecting *Silveira* (or even mentioning the Circuit court opinions), Justice Scalia provided an independent analysis of the Amendment's text. In finding that the Second Amendment guarantees an individual right to keep and bear arms, he extended this right to the use of arms for self-defense or hunting, or any other "lawful purpose," in addition to militia service.[40]

Ultimately, Justice Scalia interpreted the *operative (keep and bear)* clause of the Amendment as a guarantee on the broad "individual right to posses and carry weapons in case of confrontation."[41] Only after thoroughly examining the *operative* clause, did Justice Scalia turn his attention to the Second Amendment's *prefatory (militia)* clause and its effect on the *operative* clause. Much as the *Emerson* Court had done, Justice Scalia concluded that the *operative* clause codifies the individual right to keep and bear arms, while the *prefatory* clause simply provides one example of the importance of such a right. Because handguns were considered reasonable weapons of choice for

[37] *Parker v. District of Columbia*, 478 F.3d 370, 373-74 (D.C. Cir. 2007), *aff'd sub nom., District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

[38] *Id.* at 374.

[39] *Id.*

[40] *Heller*, 128 S. Ct. at 2801.

[41] *Id*. at 2797.

most residents, the Court found that the D.C. laws would unconstitutionally prevent residents from "rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[42]

In a dissenting opinion, Justice Stevens deconstructed the text of the Amendment in the same basic manner as the Ninth Circuit had done in *Silveira*. Stevens argued that Justice Scalia was treating the *prefatory* clause as "mere surplussage" by ignoring its substantive limit on the scope of the *operative* clause.[43] According to Stevens, the *prefatory* clause "identifies the preservation of the militia as the Amendment's purpose," and the Amendment should only be read to protect those weapons necessary for preservation of the militia.[44] Accordingly, Stevens leaned in the direction of the collective rights view, and he argued that there was no constitutional protection for the right to keep a loaded weapon available at home for self-defense.[45]

ANALYSIS

The contemporary Second Amendment debate has been framed largely as a debate over the true meaning of the rights protected by the Amendment. Each court that has dealt with the issue has attempted to resolve this question by searching for the original meaning of the language used by its drafters. However, similar interpretive styles have yielded vary different results. The Ninth and Fifth Circuit courts, in *Silveira* and *Emerson* respectively, both employed this "originalist" approach, but to opposite ends. By examining the relevant history of the Second Amendment and the Founding era debates that surrounded it, the wide range of historical evidence collected merely led the *Silveira* and *Emerson* Courts in opposite directions as to the type of right they thought should be protected.

The Supreme Court likewise employed an originalist methodology in defining the Second Amendment, but shied away from relying on the Amendment's rich, albeit somewhat convoluted history. Both Justice Scalia's

[42] *Id*. at 2822.

[43] *Id*. at 2826. As early as *Marbury v. Madison*, 5 U.S. 137, 174 (1803), Chief Justice John Marshall had counseled that no portion of the Constitution should be treated as "mere surplussage."

[44] *Heller*, 128 S. Ct. at 2824.

[45] *Id*. at 2824-25.

majority opinion and Justice Stevens' dissenting opinion focus primarily on the text of the Amendment. This "textualist" version of originalism, as it is often called, emphasizes what a founding era reader most likely would have understood the Amendment to mean, citing historical sources *only* to gather definitions of unclear terms.[46] By avoiding a detailed examination of the Amendment's legislative history, and focusing primarily on its language, each justice hoped to define the scope of Second Amendment protection once and for all.

Although Justice Scalia drew the support of a narrow majority for his interpretation of the Second Amendment, reasonable minds continue to differ as to whether the originalist approach necessarily leads to his result. As was the case with the differing appellate court opinions, several members of the Supreme Court agreed with Justice Stevens' alternative originalist interpretation of the Amendment. The remaining sections of this article will demonstrate that each side puts inappropriate weight on the clause that best supports their argument. Those who favor collective rights over-emphasize the *prefatory* clause, and those who favor individual rights over-emphasize the *operative* clause.

Ultimately, this analysis will reconstruct the *Heller* opinion, utilizing arguments that make sense from both the majority and dissenting opinions, and exposing those that do not. By weighing the two clauses of the Second Amendment equally, and giving each key term in the Amendment appropriate consideration, the value of a new hybrid (middle ground) model will emerge. This particular view of the hybrid model is neither collective, nor individual in nature, but guarantees all citizens an individual right to be part of a well-protected collective.

A Proper Textual Analysis

(1) The Prefatory Clause

Jurists on each side of the Second Amendment debate have somewhat distorted the role of the prefatory clause. Those who advocate an individual rights model, like the *Emerson* Court and Justice Scalia in the *Heller* opinion,

[46] This textualist methodology is often referred to as the search for the "original meaning" of the law. In contrast, some originalists also look to historical context in the course of a broader search for the "original intent" of the law's drafters.

emphasize the operative clause and treat the prefatory clause as merely introductory material. Those who advocate a collective rights model, like the *Silveira* Court and Justice Stevens in his *Heller* dissent, place over-arching emphasis on the prefatory clause and significant limitations on the operative clause in the process. Each of these extremes creates some problems.

In defense of his heavy reliance on the Amendment's prefatory clause, Justice Stevens cites the often-quoted words of Chief Justice John Marshall in *Marbury* v. *Madison,* arguing that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[47] Stevens argues that the *Heller* majority all but ignores the Amendment's *prefatory clause,* and he seeks to remedy the majority's error in his dissenting opinion. Stevens is highly critical of what he seems to view as Justice Scalia's outcome-oriented attempt to "determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause."[48]

Recall that Justice Scalia begins his analysis with his own interpretation of the operative clause, and then turns to the prefatory clause merely to verify that his findings on the operative clause are not necessarily inconsistent with the prefatory clause. According to Stevens, such cavalier treatment of the prefatory clause is exactly what Chief Justice Marshall cautioned against when he stated that all clauses of the Constitution should be read with full affect.

Stevens' dissent, however, commits virtually the same error that the Majority opinion does. In Stevens' reading of the Second Amendment, the prefatory clause severely diminishes the effect of the *operative (keep and bear)* clause, just as Scalia's reading of the operative clause diminishes the effect of the prefatory clause. Under the long respected principle laid out in *Marbury*, no portion of the Constitution can be given so little weight that it has no practical effect. In both instances, the justices seemingly emphasize their preferred clause and proceed with their analyses in a manner that best supports their respective positions. While both Justices conduct a textual analysis, each only emphasizes analyses half of the relevant text.

Neither Justice Scalia nor Justice Stevens can fairly relegate an entire clause of the Second Amendment to a subordinate role; the two clauses must act together to achieve a common end. A full textualist interpretation of the Second Amendment – one aimed at ascertaining what a Founding era citizen

[47] *Id*. at 2826 (quoting *Marbury* v. *Madison*, 5 U.S. 137 (1803)).

[48] *Id*. at 2799 (majority opinion).

would have thought the text meant after reading it – logically begins with the portion of the text that would be read first. As Justice Stevens rightly argues, the *prefatory* clause "both sets forth the objective of the amendment and informs the meaning of the remainder of its text."[49] Because the *prefatory* clause acts as a preamble to the rest of the text, it should naturally be read first and the remainder of the text should be read with the first clause in mind.

However, contrary to Justice Stevens' approach, the *prefatory* clause does not fully dictate the meaning of the Amendment. Rather, the *prefatory* clause announces the purpose of the *operative* clause, and the *operative* clause must thereby comport with the *prefatory* clause, rather than vice versa as Justice Scalia finds.[50] Such a statement of purpose can neither be ignored nor elevated too highly, but should be properly read with the same weight as the *operative* clause.

Proceeding under the principle of assigning equal weight to both clauses, the first relevant terminology in the Amendment is the reference to a "well-regulated militia." The *prefatory* clause reads: "A well-regulated militia being necessary to the security of a free state…."[51] The Amendment begins by introducing an important colonial institution, the militia, and its relation to protection of the state.

Justice Scalia provides a strong argument that the ordinary Founding era "definition of the militia [was] all able-bodied men."[52] Scalia argues that an able-bodied man need not be a part of an actual organized unit to be considered a member of *the* militia. While there were several different organized militias in the founding era, *the* militia would have referred to a very broad group of people. Although early militia acts allowed for further organization of the militia into smaller sections of the population, Justice Scalia reasoned that the Second Amendment's use of the term "militia" entails a much broader segment of the population than the federal militia acts. A "well-regulated militia," Scalia reasons, "implies nothing more than the imposition of proper discipline and training" upon any potential member of the broad-based militia.[53]

[49] *Heller*, 128 S. Ct. 2826 (Stevens, J., dissenting).
[50] *Id*. at 2799 (majority opinion).
[51] U.S. Const. amend. II.
[52] *Heller*, 128 S. Ct. at 2800.
[53] *Id*. at 2799-2800.

Justice Stevens disagreed with Scalia's definition of the term "militia" and argued that the Amendment refers to specific, highly organized groups like the modern National Guard. In Stevens' view, the term "well-regulated" limits the Amendment's scope to this type of highly organized military environment, rather than extending it to the expansive body of people that Scalia has in mind.[54] According to Stevens, "In 1901 the President revitalized the militia by creating 'the National Guard of the several States.'"[55] Justice Stevens maintains that the militia, as it was understood by the Founders, went out of existence shortly after the Revolutionary war, and today the term "militia" is only applicable to those highly organized citizen-military units which enjoy similar strict organization.

Justice Stevens' argument, however, is unconvincing in light of Justice Scalia's evidence. Justice Scalia cites Article I of the Constitution in support of his definition of militia, and finds that the Constitution grants Congress the power to organize the militia. The power to organize *"the"* militia, rather than organize *"a"* militia, suggests that the militia is a broader body, already in common existence, yet requiring proper organization to serve the interests of national defense.[56] Under this view, the militia cannot be created (as the National Guard was in 1901) because the militia is already a popular body consisting of *all* armed citizens who may realistically act in the common defense of the state, if such a need should arise. In this regard, Justice Scalia presents the strongest view as to how the Amendment's prefatory reference to the "militia" should be understood. [57]

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[54] *Id*. at 2843 (Stevens, J., dissenting).

[55] *Id*. at 2844.

[56] *Id*. at 2800.

[57] *Id.* The National Guard is usually cited as the only modern, organized militia type of service maintained under state control. Members of the National Guard are not expected to keep and bear their own arms for this purpose. See, e.g., *Emerson*, 270 F.3d at 219. On the other hand, the modern militia statute refers in one section to the militia as consisting of certain citizens who have merely *made a declaration to become* members of the National Guard. A following section of the modern militia statute defines one class of the militia as "the unorganized militia, which consists of the members of the militia *who are not members of the National Guard* or Naval Militia." *Id.* at 236 n. 33 (quoting 10 U.S.C. § 311) (emphasis added). This language clearly suggests that militia service contemplates a broader category of citizens than merely the members of the National Guard.

Proceeding with the understanding that the militia is a broad-based body of citizens, as Justice Scalia suggests, the next step becomes further examination of the entity that the militia protects, the "state." Scalia erroneously holds that reference to the term "state" in the Second Amendment signifies protection of the nation as a whole, rather than each of the several states in their own right. Scalia argues that absent the term "several," the term "state" was commonly understood during the Founding era to mean the nation as a whole.[58] He therefore argues that the armed citizenry's responsibility is to protect the nation. This argument lacks sufficient foundation, so although Justice Scalia correctly identifies the broad body of people meant to make up the militia, he misidentifies the "state" as the object of the militia's protection.

Justice Stevens, by contrast, adopts a much more inclusive and ultimately more convincing reading of the term "state." Stevens notes that there were several instances in the Founding era and in the Constitution itself when the several states were referenced by direct use of the term "states." Most notably, the Tenth Amendment dictates: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the *States*, are reserved to the *States* respectively, or to the people."[59] Although the Tenth Amendment is commonly understood as a reference to authority retained by each of the several states, it merely uses the term "state" to do so. As Justice Stevens persuasively argues, the protection guaranteed by the Second Amendment should be construed in the same manner.[60]

All in all, combining Scalia's expansive view of the militia with Stevens' expansive view of protection for each individual state yields an understanding of the Second Amendment's *prefatory* clause most likely to have been understood by a Founding era citizen. Properly construed, the *prefatory* clause affirms the importance of maintaining a citizenry within each state that could act in defense of that state, whether against local rebellions, Native-American incursions, foreign invasions, *or* even the oppression of a tyrannical federal government, if any of these should ever occur.

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[58] *Heller*, 2007 128 S. Ct. at 2800.

[59] U.S. Const. amend. X (emphasis added).

[60] Justice Stevens, using several Founding era sources to further illuminate the nature of the term "state," argues that Second Amendment speaks to a state-militia, rather than a nationally organized militia. In relation to the militia, the term "state" could not mean the United States as a whole, because such reference would connote a federal army, not a militia. *Heller*, 2007 S. Ct. at 2826 (Stevens, J., dissenting).

Within the Amendment as a whole, the *prefatory* clause should then be read as a reflection of the importance of arming this group of citizens for such purposes (i.e., defending "freedom" and maintaining the "security" of their individual states). Such a reading does not suppose either a collective or individual leaning, nor is it constrained to fit within any one particular interpretation of the following language found in the *operative* clause of the Amendment. A proper reading of the *prefatory* clause simply evokes an understanding that the Second Amendment's purpose is to protect the militia, and in turn to enable the militia to protect each state. This overarching goal must inform any further examination of the Amendment: a broad-based (yet somewhat regulated) group of citizens were to be left ready to protect their state if their freedom or security were ever jeopardized.

(2) The Operative Clause

The *operative* clause of the Second Amendment reads: "… the right of the people to keep and bear arms shall not be infringed."[61] The *operative* clause contains the Second Amendment's most important phrases, defining "the right of the people" and what that right is – the ability "keep and bear arms." A proper analysis of the Amendment takes into account that this "right" is a means to an end. In other words, the right discussed in the *operative* clause is guaranteed in order to reach the goal specified by the *prefatory* clause. Therefore, a fair textual analysis of the *operative* clause must identify the right most conducive to a broad populace prepared to act as a militia in defense of their individual states.

This time, Justice Stevens is the one to argue (unconvincingly) that use of the term "people" should be viewed as a broad reference to the population as a collective body, rather than to the individual people themselves.[62] Scalia finds, to the contrary, that all of the rights guaranteed to "the people" in the

[61] U.S. Const. amend. X.

[62] Stevens unconvincingly argues that the term the "people" in the First Amendment's assembly and petition clause, that is "the right of the people to peaceably assemble and petition the government for redress of grievances," as acting as a collective when they assemble and petition. Stevens argues that "the people" act collectively when they assemble together or petition the government, and such a term cannot always dictate an individual right. *Heller*, 128 S. Ct. at 2826-27 (Stevens, J., dissenting).

Constitution's Bill of Rights should be viewed as rights of individuals.[63] Though the people act collectively in exercising some of their rights (such as freedom of assembly), each person in the collective has an *individual* right to be a part of that collective action.

Unknowingly, Justice Scalia creates a somewhat hybrid individual right in his response to Justice Stevens' collective definition of the "people." Although the right that the people retain is an individual one, it mandates some degree of collectivity. Such a right cannot be said to be strictly individual, nor strictly collective because it refers to the individual's right to be part of the collective. At its core the right of the people, when read in light of the *prefatory* clause's purpose, grants each able-bodied *individual* a right to participate in the *collective* militia.

Neither Stevens nor Scalia, however, is willing to concede such a middle ground. Because Justice Scalia largely dismisses the Second Amendment's *prefatory* clause, he fails to apply his individualized right as a right to act in the collective militia body. Because Justice Stevens over-emphasizes the *prefatory* clause, and misinterprets the term militia, he fails to identify the inherently individualized nature of the right to participate in (or be protected by) the collective he defines.

When read with the *prefatory* concern in mind (to preserve a broad body of people able to come together for the defense of their state), the Second Amendment's emphasis on "the people" creates a hybrid right. Such a reading of "the people" does not necessarily guarantee a right to keep and bear arms for any purpose whatsoever. Instead, it guarantees each individual, able-bodied citizen a right to keep and bear arms as a member of the well-regulated collective defined in the Amendment's *prefatory* clause.

While such a right belongs to the individual, it is given to the individual with a specialized, *collective* purpose in mind. Those citizens who are not qualified or choose not to make themselves ready for potential militia service also have a protected individual right – the right to know that the other citizens who *are* willing and able to serve in a militia will not be disarmed at the whim of the federal government.

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[63] *Id.* at 2790 (majority opinion). In a footnote directed toward Justice Stevens' definition of the term the "people" in the First Amendment, Scalia explains that although assemblies and petitions require other people, the First Amendment grants the right to participate in these groups to each individual in participation. *Id.*

Proceeding with the understanding that the Second Amendment announces an individual's right to keep and bear arms as a member of a broadly-defined militia requires, one further phrase deserves careful consideration. The Founders spoke directly in the *operative* clause of the right to "keep and bear arms." Justice Scalia would construe the phrase "keep and bear arms" as an affirmation of an individual right to own all weapons used for lawful purposes, including even hunting or personal self-defense.[64]

In discussing the impact of the terms "keep," "bear," and "arms," Justice Scalia placed particular emphasis on Founding era dictionaries to determine the meaning of such terms at the time they were used. Although most definitions suggested military meanings, he considered it important that a few definitions did not.[65] He therefore concluded that phrases such as "to keep arms" and "to bear arms" did not *necessarily* connote a military meaning, and they could have been understood by a Founding era citizen as references to gun possession in a broader sense.[66]

Notably, Justice Scalia presents his interpretation of the phrase "keep and bear arms" before he ever examines the meaning of the Amendment's *prefatory* clause. Because the Amendment announces its military limitations in the *prefatory* clause (which Scalia examines only *after* delivering his view of the "keep and bear arms" language), the interplay between the Amendment's two clauses receives unsatisfactory consideration.

Rather than explaining how the military emphasis of the *prefatory* clause should be harmonized this a phrase that has potential military meaning, Scalia is comfortable declaring that the "keep and bear arms" phrase should be viewed in light of both military and non-military meanings. The notion that the *prefatory* clause only "illustrates" one of these meanings does not give him cause for concern.

In Scalia's view, the fact that some founding dictionaries did not posit a military definition for the "keep and bear arms" terminology is wholly irrelevant. Because he does not find the militia reference in the *operative*

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[64] *Heller*, 128 S. Ct. at 2817.

[65] *Id*. at 2791-93.

[66] *Id*. at 2791-92. In essence Justice Scalia finds that because *some* historical usages of "keep and bear arms" carried no special military meaning, the Second Amendment's use of "keep and bear arms" does not dictate a military meaning.

clause itself, he therefore does not view that language as a clear limitation on the reach of the *operative* clause and the right guaranteed therein.

However, this reasoning overlooks the fact that it would have been redundant for the Founders to announce the scope of the Amendment in the *prefatory (militia)* clause and then to reiterate that scope within the *operative* clause. They had clearly incorporated the militia language in the *prefatory* clause, so why expect them to repeat it again? How could they have known that future jurists would analyze the *operative* clause in isolation, virtually ignoring the clear language used in the *prefatory* clause? While Justice Scalia is correct to assert that the phrase "keep and bear arms" might not be limited to a military meaning by itself, he inappropriately divorces the term from the context provided by the prior section of the Amendment.

By weighing the Second Amendment's *prefatory* and *operative* clauses equally, as this analysis has done, a right that is neither completely individualized nor completely collective emerges. The hybrid right recognizes that the Second Amendment protects an individual right to keep and bear arms so that a citizen can be prepared to serve in the broadly-defined militia. Although the hybrid model is gleaned from the strongest points in the Majority opinion and Stevens' dissent, it affirms neither. A collective right granted to the states would likely omit the term "the people."

Likewise an individual right to unbridled gun ownership would likely omit all discussion of the term "militia. Although the same arms used for militia service could theoretically be used for self-defense, hunting, and a variety of other lawful purposes, the latter group of uses is not necessarily protected by the Constitution. The mere fact that a rifle meant for civil defense can be used for hunting may enable hunting, but it does not explicitly protect hunting or prohibit government regulation of weapon usage during hunting.

The Second Amendment, when read accordingly, cannot be seen as granting a right to the state themselves, nor can it be seen as granting an unlimited right to gun ownership. Although collective and individual rights advocates attempt to omit (or at least minimize) those portions of the Amendment that stand in their way, such explanations are unsound methods of interpreting the Constitution. The hybrid model restores the natural relationship between the *prefatory* and the *operative* clauses of the Amendment, and ensures that the people have a right to keep and bear arms as a member of the broad-based, albeit well-regulated, citizen militia.

Hybrid 'Sophisticated' Rights in Practice

The hybrid right model is, perhaps, best understood in its application. If the Court had applied the hybrid approach to the *Heller* case, it would have upheld Mr. Heller's challenge to the D.C. Code section that prevents ordinary citizens from owning handguns.[67] This portion of the law makes handguns available to far too small a segment of the District's population to constitute a reasonable civilian militia. The hybrid approach recognizes a broadly construed civilian militia necessary for the security of the state. While it is still unclear whether Heller himself should be allowed to own a handgun, under the *sophisticated (hybrid) rights* model, such a broad prohibition on gun ownership deprives Heller of his right to be protected by a realistic civilian militia, and thus this portion of the D.C. Code violates the Second Amendment.[68]

Heller also challenged the D.C. Code section mandating that weapons be kept inoperable when located in the home.[69] This challenge would have failed under the *sophisticated (hybrid) rights* model. Although Heller cited the need to self and home defense in his desire to keep an unloaded and unlocked weapon in his home, the right to keep arms for self or home defense is not expressly guaranteed by the Second Amendment. Many gun enthusiasts cite self and home defense as one of the most practical uses of a personal firearm, but the Second Amendment is expressly limited in its protection of firearms to those that will preserve a well-regulated militia. Mandating that weapons be kept inoperable does limit a gun owner's ability to use them for self or home defense on the spur of the moment; however, it does *not* restrict a gun owner's ability to use the weapon for militia service. Therefore, since a law prescribing the manner in which a gun is stored at home does not make that gun unavailable for militia service, such a law does not violate the Second Amendment. Contrary to Justice Scalia's opinion on behalf of the majority of the Court, the D.C. Code section mandating disassembly of guns in the home should have been upheld.

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[67] D.C. Code § 7-2507.02 (2008).

[68] The *Heller* opinion does not clarify what type of handgun Heller wished to register. Further analysis may show that it was not a weapon conducive to militia service, which under the *Miller* precedent would prohibit Heller from owning that specific weapon. Since the District of Columbia is not a state, but rather a federal entity, it may not even be entitled to a militia. However, such discussions are beyond the scope of this article.

[69] § 22-4504.

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CONCLUSION

The Second Amendment debate may appear as a socially charged, value-based dispute over the propriety of gun control. However, this article has shown that judges can differ in their interpretation of the Amendment when they seek to apply it in concrete legal disputes as well. Fine theoretical distinctions between the *collective rights* theory and the *individual rights* theory come into play as various judges search for the Amendment's true meaning. This article has advocated for a middle ground, which juxtaposes individual rights and collective rights into a more realistic, and textually accurate, interpretation of the Second Amendment. The *sophisticated (hybrid) rights* theory proposed here is achieved through a textual interpretation of the Second Amendment; it draws from both sides of the philosophical debate by protecting both the individual's right to certain forms of gun ownership and the states' rights to regulate other forms of gun ownership.

Under the sophisticated rights model, a court may still find that assault weapons are not conducive to militia service, as the Ninth Circuit did in *Silveira*, or that plaintiffs suspected of domestic violence may have their gun possession rights temporarily suspended, as the Fifth Circuit did in *Emerson*. However, unlike the collective rights model, which severely limits gun ownership, or the individual rights model, which severely limits the government's ability to regulate gun ownership, the sophisticated rights model creates a middle ground, where at least some citizens are allowed to keep and bear arms for potential militia-style protection of their state, subject to reasonable regulation by that state. -

After hundreds of years, the Supreme Court seems to have settled the debate in favor of the individual rights model – for now. As in most matters of constitutional law, this debate could easily resurface and lead to a contrary ruling in the future. Furthermore, resolution of the philosophical debate is only the beginning when it comes to the way the Second Amendment will be applied in future cases. The *Heller* Court struck down the highly restrictive D.C. gun regulations; however, the Court did not speak directly to many related issues, such as the proper level of judicial scrutiny for analyzing other gun-control laws, or even the applicability of the Second Amendment as a limit upon state (as opposed to federal) regulation.[70]

[70] The "selective incorporation" of the Bill of Rights as limitations upon state

Further, the Court's notable omission of any reference to the *Silveira* and *Emerson* opinions leaves the lower courts without clear guidance as to whether analogous laws should be treated the same, or differently, in future cases. Thus, it is unclear from the Supreme Court's opinion what the fate of the California Assault Weapons Control Act, and many similar laws, might be.

When dealing with areas of human behavior that have such great significance to many Americans, as well as such a polarizing social effect, this sort of confusion is unacceptable. Citizens are right to question whether any (or all) of the judges who have ruled in these cases were manipulating their analysis to support outcome-oriented, value-based decisions.[71] If these judges' values *were* influencing their reasoning, resurrection of this long dormant Amendment has illustrated a grave danger in our judicial system. A passing trend in a policy debate should not be allowed to impact one of the pillars of our constitutional structure. A more "sophisticated," middle-ground interpretation of the Second Amendment would, at the very least, send a message to citizens on each side of the cultural divide that their views were considered, and taken into account, when our government was crafted over two hundred years ago.

government is beyond the scope of this article, as is the discussion of the levels of judicial scrutiny applied by the courts when individual rights are subjected to governmental regulation. The *Heller* Majority declined to rule directly on either issue, finding that to do so would not be necessary to the outcome of this particular case.

[71] Granted, it may very well be that these particular jurists were neutrally applying the interpretive philosophies that they believed most appropriate. However, neither the "originalist" method of interpreting legal language, nor its more limited "textualist" subcategory, enjoy universal judicial acceptance.

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