Is the Second Amendment an Individual or a Collective Right: United States v. Emerson's Revolutionary Interpretation of the Right to Bear Arms

Michael Busch
COMMENT

IS THE SECOND AMENDMENT AN INDIVIDUAL OR A COLLECTIVE RIGHT: UNITED STATES V. EMERSON'S REVOLUTIONARY INTERPRETATION OF THE RIGHT TO BEAR ARMS

MICHAEL BUSCH†

INTRODUCTION

The protections of the Bill of Rights are among the most important safeguards against an oppressive government provided by the Constitution.¹ Included in these protections is

† J.D. Candidate, June 2004, St. John's University School of Law; B.S., State University of New York at Albany, 2000.


The Constitution originally was silent as to these individual rights. At the time, many Anti-federalists wanted a new constitutional convention. See BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 103–05 (1977) (noting the various debates on how to protect individual rights not guaranteed in the Constitution). James Madison, who originally opposed a bill of rights, changed his mind and stated that “a bill of rights 'will kill the opposition everywhere, and by putting an end to disaffection to [discontent with] the Government itself, enable the administration to venture on measures not otherwise safe.'” JOAN C. HAWKHURST, THE AMERICAN HERITAGE HISTORY OF THE BILL OF RIGHTS: THE SECOND AMENDMENT 22 (1991).

Originally these amendments applied to protections against state power; however, the Senate removed their application to the states. SCHWARTZ, supra, at 202–03; Bowling, supra, at 54. This version of the amendments was sent to the
the Second Amendment (the “Amendment”), which provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Although approximately two hundred years have passed since its inception, the scope of the Amendment remains in dispute. One common question is whether the Amendment applies to state as well as federal governments. Other questions

states for ratification in October 1789, receiving the three-quarters approval necessary for ratification in December 1791. Bowling, supra, at 55–59. It was not until the ratification of the Fourteenth Amendment in 1868 that the protections of the Bill of Rights extended to the states. See CORTNER, supra, at 5.

2 U.S. CONST. amend. II.

3 The Bill of Rights was presented to Congress in 1789. See generally LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 75 (1975). The debate on ratification, however, continued through 1791. See STEPHAN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 76–83 (1984) (discussing the history of the adoption of the Second Amendment).

4 Initial commentaries inferred that the Fourteenth Amendment extended all of the Bill of Rights to state governments. For example:

Moore seems to place the right recognized in the Second Amendment on a level of equal significance as the rights protected by the First and Fourteenth Amendments. Posed in a discussion of the rights incorporated into the Fourteenth Amendment, the opinion also appears to imply that right to have arms is protected from state infringement.

HALBROOK, supra note 3, at 3 (commenting on Moore v. City of East Cleveland, 431 U.S. 494 (1977), which noted that the Due Process Clause embodies more than isolated constitutional guarantees including the right to keep and bear arms).

Recent views take the position that the Second Amendment applies only to the national government. See Vietnamese Fisherman’s Ass’n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex. 1982) (stating that the Second Amendment is not incorporated in the Fourteenth Amendment, and thus is not directly enforceable against the states); see also Quilici v. Vill. of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (noting that the Supreme Court has held that the Second Amendment applies only to congressional power, and as a result, it is a right which states can regulate); Cases v. United States, 131 F.2d 916, 921–22 (1st Cir. 1942) (stating that the Second Amendment does not apply directly to the people, rather it only acts to prevent the federal government from infringing on this right); United States v. Korerski, 518 F. Supp. 1082, 1090 (D. N.H. 1981) (stating that the Amendment is not a positive grant of power but rather a limitation on the federal government’s power to infringe on this right).

Still, controversy remains as to whether the Fourteenth Amendment applies the Bill of Rights as against the states. “The notion that the First Amendment, for example, does not apply to the states is ‘long gone,’ and no one would argue thus today (nevertheless, the Supreme Court has yet to ‘incorporate’ the Second Amendment).” GREGG LEE CARTER, THE GUN CONTROL MOVEMENT 25 (1997) (citation omitted).
are the amount of protection extended by the right to bear arms\(^5\) and to whom these protections extend.\(^6\)

Although these issues cannot easily be separated, this Comment will focus, to the extent possible, on who may claim the protection of the Amendment. At times the protection afforded by the Amendment is characterized as an individual right;\(^7\) at other times it is viewed as a collective right.\(^8\)

In determining which view is embodied in the Amendment, this Comment will first consider its historical origin. However illuminating the historical background of the Amendment may be, it is not necessarily dispositive of what the Framers actually intended. For this reason, this Comment will next consider the wording of the Amendment, the Supreme Court’s interpretation of the Amendment, the application of the Fourteenth Amendment, and the social considerations at issue.

This distinction is crucial because the more collectively the right is interpreted, the more broadly Congress can legislate to restrict the right to bear arms.\(^9\) This distinction was first

\(^5\) The question of what limits Congress faces in enacting gun control legislation is the focus of many debates. See HARRY HENDERSON, LIBRARY IN A BOOK: GUN CONTROL 4 (2000) (noting that since Congress began regulating gun control in 1927, the debate on the extent of the right provided by the Second Amendment has been a national one). See generally KENNETT & ANDERSON, supra note 3, at 133–65 (outlining the major debates concerning gun control).

\(^6\) Different interpretations of the right to bear arms lead to different conclusions as to whom the rights protect. At a basic level, they may be categorized as either an individual or a collective right. See HENDERSON, supra note 5, at 16–18. See generally John Council, Emerson Gives Ammo to Both Sides in the Gun Control Debate: Court says Individuals Have Right to Firearms But Congress May Place Limits, 17 TEXAS LAWYER 33 (2001).

\(^7\) Arguably, an individual right extends to all qualified people. See CARTER, supra note 4, at 28–33 (contending that, as originally understood, the Second Amendment was an embodiment of the common right to possess firearms).

\(^8\) Most courts today interpret the Amendment to refer to a collective right maintained by the states or individuals involved in a recognized state militia. See id. at 24–28 (maintaining that the Second Amendment confers a collective right); Council, supra note 6, at 17 (“[United States v. Emerson] is the first in decades to hold clearly that the right to bear arms belongs to ordinary citizens—not just to the military or a ‘well regulated militia.’ ”); see also HENDERSON, supra note 5, at 17 (discussing the contrasting views of whether the Second Amendment confers an individual or collective right).

\(^9\) See Council, supra note 6, at 37 (“There’s been an explosion in the last decade or so of federal legislation concerning firearms that infringes on the right to bear arms . . . . I think [Emerson] raises the question whether that stuff is constitutional. And I think that answer to that question is probably ‘no.’” (quoting a representative of the Texas State Rifle Association, filing an amicus brief in support of the court’s holding in United States v. Emerson)).
implicated in 1927, when Congress passed the first major federal legislation on gun control. After the Supreme Court opinion in *United States v. Miller,* most lower federal courts have interpreted the protection of the Second Amendment as a collective right. Surprisingly, the Supreme Court has stayed relatively silent on the issue, never stating clearly whether the right is collective or individual. Although the Supreme Court recently denied certiorari, it may be forced to reconsider the issue in light of the Fifth Circuit's recent departure from the traditional interpretation.

---

10 The 1927 Act prohibited the mailing of concealable firearms. *Henderson,* supra note 5, at 16. Although this was the first federal regulation, it did not have much effect because arms could be transported in various other ways. *Id.* The National Firearms Act of 1934 soon followed, imposing a $200 tax on the manufacture, sale, or ownership of an automatic weapon or a sawed-off shotgun. *Id.* The first substantive regulation appeared in 1938 with the Federal Firearms Act—requiring "all manufacturers, importers, and dealers in firearms be licensed. It forbade delivery of a gun to a person who had been convicted of (or under indictment for) a crime or did not meet local licensing laws." *Id.*

11 307 U.S. 174 (1939). This case is discussed in more detail in Part II.B.

12 See supra note 8; see also Silveira v. Lockyer, 312 F.3d 1052, 1063 (9th Cir. 2002) (finding only a collective right conferred by the Second Amendment); United States v. Hinoestroza, 297 F.3d 924, 927 (9th Cir. 2002) (same); United States v. Twenty-Two Various Firearms, 38 Fed. Appx. 229, 230 (6th Cir. 2002) (same); United States v. Hager, 22 Fed. Appx. 130, 132 (4th Cir. 2001) (same).

13 The Supreme Court last took up the individual/collective distinction in 1939, in *United States v. Miller,* but it chose not to directly address the matter. See *Henderson,* supra note 5, at 53–84 (providing a detailed account of the facts and legal conclusions in *United States v. Miller*).

14 See United States v. Emerson, 122 S. Ct. 2362 (2002). A number of reasons may exist for the Supreme Court's refusal to hear the appeal. The Court typically only hears cases when there exists a "deep split" of opinion in the circuits. See Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies,* at 194 (2000) (discussing how petitions for certiorari will only be granted for "compelling reasons" such as conflict within the Court of Appeals), at http://www.aallnet.org/products/2000-17.pdf.

In the present case, the departure from the traditional view had no effect since the law was held constitutional. So even though it is a split in typical interpretation, it has not yet had any effect on the application of federal law. Another reason is that the Court typically denies the majority of certiorari requests. *Id.* at 195 (noting how, in 1995, the Supreme Court granted only four percent of 2,456 paid certiorari petitions). A denial of certiorari, however, is not implicative of a rejection or affirmation of the lower court's finding. See *id.* (discussing how scholars have debated over whether or not justices are more likely to deny certiorari when they are satisfied with the lower court's holding).

15 See United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001) (noting that by subscribing to an individual rights model, the court was breaking with traditional court interpretations), cert. denied, 122 S. Ct. 2362 (2002).
Recently, in *United States v. Emerson*, the Fifth Circuit held that the Amendment confers an individual right to bear arms. On August 28, 1998, Sacha Emerson filed for divorce in Tom Greene County, Texas. Mrs. Emerson, among other things, requested a temporary restraining order. On September 14, 1998, the state judge issued a restraining order, enjoining Mr. Emerson from engaging in twenty-two enumerated acts. A five-count indictment was returned against Mr. Emerson on December 8, 1998. After dropping counts two through five, the government proceeded to prosecute the remaining charge, alleging that Mr. Emerson unlawfully possessed, “in and affecting interstate commerce,” a firearm while subject to the restraining order—a violation of 18 U.S.C. § 922(g).

In response, Mr. Emerson contended that § 922 violated his right to bear arms. The district court agreed and

---

16 270 F.3d 203 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).
17 Id. at 260.
18 Id. at 210.
19 Id. The restraining order was granted after the trial judge held a hearing to determine if Mr. Emerson posed a threat. Id. at 210–11. Mrs. Emerson in testimony stated, “He hasn’t threatened to kill me. He’s threatened to kill a friend of mine.” Id. at 211. Evidence also tended to show that Mr. Emerson acted in a threatening manner towards his wife. In his concurrence Judge Robert M. Parker stated:
   [T]he evidence shows that Emerson pointed the Beretta at his wife and daughter when the two went to his office to retrieve an insurance payment. When his wife moved to retrieve her shoes, Emerson cocked the hammer and made ready to fire. Emerson's instability and threatening conduct also manifested itself in comments to his office staff and police. Emerson told an employee that he had an AK-47 and in the same breath that he planned to pay a visit to his wife's boyfriend. To a police officer he said that if any of his wife's friends were to set foot on his property they would “be found dead in the parking lot.”
   Id. at 273 (Parker, J., concurring).
20 Id. at 211.
21 Id.
22 Id. at 211–12.
23 Id.; see also 18 U.S.C. § 922(g) (2000).
24 Mr. Emerson was indicted specifically under 18 U.S.C. § 922(g)(8). *Emerson,* 270 F.3d at 212. 18 U.S.C. § 922 provides in relevant part:
   “(g) it shall be unlawful for any person-(8) who is subject to a court order that-(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the
granted Emerson’s motion for dismissal.\textsuperscript{25} On appeal,\textsuperscript{26} the Fifth Circuit reversed the trial court’s determination after a lengthy analysis of the Second Amendment.\textsuperscript{27} The court held that § 922 was not a violation of Emerson’s Second Amendment rights.\textsuperscript{28} The court construed the right to bear arms as an individual right but stated:

[T]hat does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.\textsuperscript{29}

In examining the different interpretations of the right to bear arms, the court identified three major divisions of understanding:\textsuperscript{30} (1) a state rights, or collective right, in which the Amendment only functions to recognize a state’s right to arm a militia;\textsuperscript{31} (2) an individual right that only applies to persons engaged in a state’s militia;\textsuperscript{32} and (3) a pure individual right

\begin{itemize}
\item use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

\textsuperscript{26} \textit{Emerson}, 270 F.3d at 210.
\textsuperscript{27} See generally \textit{Emerson}, 270 F.3d 203.
\textsuperscript{28} \textit{Id.} at 260.
\textsuperscript{29} \textit{Id.} at 261.
\textsuperscript{30} \textit{Id.} at 218 (“In the last few decades, courts and commentators have offered what may fairly be characterized as three different basic interpretations of the Second Amendment.”).
\textsuperscript{31} This view assumes that the Amendment restricts the federal government from disarming the states. \textit{See id.} at 218–19. Within this view, there are varying contentions of how the Amendment applies. \textit{See id.} at 218 n.10 (collecting cases). The dispute concerns whether the Second Amendment encompasses any individual right within the militia, or whether the Amendment simply prohibits federal interference with the militia. \textit{See id.} at 219–20.
\textsuperscript{32} This view recognizes an individual right to bear arms, however, only when acting as members “of such militia, and then only if the federal and state governments fail to provide the firearms necessary for such militia service.” \textit{Id.} This view is sometimes referred to as the “sophisticated collective rights model.” \textit{Id.} at 219–20 (“At present, virtually the only such organized and actively functioning militia is the National Guard . . . .”); \textit{see also id.} at 219 (collecting cases).
AN INDIVIDUAL OR COLLECTIVE RIGHT

enjoyed by all persons of qualified age and standing. As the court found the statute to be constitutional, these distinctions had no effect on the outcome. Nevertheless, the decision opened the door for some circuit courts to hold federal gun regulations unconstitutional. If that happens, the Supreme Court will have to address the issue in order to avoid a patchwork of federal regulations across the country. To understand which view correctly embodies the meaning the Drafters intended, the history of the Amendment must be examined.

I. HISTORICAL EVOLUTION OF THE RIGHT TO BEAR ARMS

The ancestry of the right to bear arms dates back to the beginning of the Greek and Roman civilizations. It was thought that to fight tyranny, the individual citizens of governing bodies must be armed. This idea was reinforced in

---

33 The last view presumes that the Second Amendment extends the right directly to each citizen. See id. at 220 (noting that no circuit has embraced this view; however, the individual interpretation has found significant endorsement in academic circles).

34 See Printz v. United States, 521 U.S. 898, 938 (1997) (Thomas, J., concurring) ("If, however, the Second Amendment is read to confer a personal right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.").

35 Most in-depth views of the Amendment examine the legislative history of the amendments—including ratification debates—because the Supreme Court has not enunciated explicitly which view of the Second Amendment is correct. See Emerson, 270 F.3d at 236–38 (examining the circumstances surrounding the adoption of the Bill of Rights); see also HENDERSON, supra note 5, at 18 (discussing the meaning of the words "the people" and "individuals" in the Bill of Rights); KENNETT & ANDERSON, supra note 3, at 75 (exploring the drafting of the Bill of Rights).

36 The rationales behind a right to bear arms rest in large part on the books of public right of Greek origin. Key to these sentiments was the idea that standing armies represented a threat to the citizenry and a people's militia was necessary to fortify against tyranny. See HALBROOK, supra note 3, at 7. Revolutionary militias were formed and inspired by Roman ideologies. Id. "Machiavelli's influence was clear in George Mason's speech to the Fairfax Independent Militia Company, which was composed of volunteers who supplied their own arms and elected their own officers." Id.

37 The idea that a government could become tyrannical was not new. To defend against this, every man of able-bodied age was expected to retain and train with the weapons of the day. See id. at 18 (stating a law requiring grown men to arm themselves). "The armed citizen was the last hope of the republic, according to Cicero's last orations in the Senate, the Philippi, a series of orations directed against Marcus Antonius. According to Cicero, Antonius 'is an enemy against whom arms have rightly been taken up.'" Id.
England\textsuperscript{38} and later carried to the English colonies. In the English kingdom, citizens were expected to keep arms as both a right and a duty.\textsuperscript{39} Revolts resulted when kings attempted to usurp this right and to leave all such power in the ruling upper class.\textsuperscript{40} In fact, this is one reason why the American Revolution took place.\textsuperscript{41} The "shot heard 'round the world"\textsuperscript{42} was partially in response to the King's attempt to disarm colonials.\textsuperscript{43} After the

\textsuperscript{38} English citizens were expected to retain and train in arms to defend both their country and individual freedoms from tyranny. \textit{See} KENNETT \& ANDERSON, \textit{supra} note 3, at 17-22; \textit{see also} HALBROOK, \textit{supra} note 3, at 37-54 (describing the common law approach of England to the right to bear arms—from its inception to modern applications).

\textsuperscript{39} \textit{See} CARTER, \textit{supra} note 4, at 28 ("For then and thereafter, up through the ratification of the Second Amendment in 1791, various governments clearly intended that individual citizens have both a right \textit{and the duty} to keep and bear firearms."); HALBROOK, \textit{supra} note 3, at 38 ("Because of the preference that an armed people, rather than a standing army, be entrusted with the power of defense, the keeping and bearing of arms came to be considered as not simply a right but a duty.").

\textsuperscript{40} \textit{See} HALBROOK, \textit{supra} note 3, at 43 ("A paramount aim of the Glorious Revolution of 1688 was to abolish the standing army of James II and to reinstate the rights of the Protestants to keep and carry arms."). However, an argument can be made that this was more of a power struggle between the monarch and Parliament. King James II wanted to rule without Parliament and reinstate the Catholic religion in England. Parliament was at odds with this idea and reacted to reclaim power. \textit{See The "Glorious Revolution" of 1688, at http://www.saburchill.com/history/chapters/chap4013.html} (last updated Nov. 30, 2002). The restriction of arms to only those in upper, noble classes was an acknowledgement of the fear generated in the monarchy by the commoner's possession of arms. \textit{See} HALBROOK, \textit{supra} note 3, at 43 ("Perhaps [Henry VIII] recognized that acquisition of firearms by commoners was the death knell of England's absolute monarchs.").

\textsuperscript{41} The American colonies had a similar reaction to the Monarch's attempt to disarm them. "The American revolutionary war against British colonialism had roots in Bacon's rebellion, which took place a century before 1776. English commoners who settled in America were subject to some of the same forms of abuse that had been perpetrated on their counterparts in England by the Restoration monarchs." HALBROOK, \textit{supra} note 3, at 55. No one will contend, though, that this was the only reason for the conflict. Many conflicts with the Crown existed, including the Stamp Act, the imposition of new taxes, and the general displeasure with being ruled by a sovereign located across the Atlantic.

\textsuperscript{42} The "shot heard 'round the world" refers to the battle that took place on April 19, 1775 in Lexington, Massachusetts. \textit{See} KENNETT \& ANDERSON, \textit{supra} note 3, at 57.

\textsuperscript{43} The battles that started the Revolutionary War were partially a reaction to the British commandeering of colonial arms. \textit{See id.} at 57-64. In reaction to both the standing armies placed in New York and Boston, as well as the Boston Massacre, the colonials, fearing these standing peacetime armies, created militias made up of common citizens. \textit{See id.} at 61-62. The same fears that led the Monarchy to disarm English citizenry applied to the colonials. \textit{See} HALBROOK, \textit{supra} note 3, at 55-56. One particular instance of the Crown's attempt to disarm colonials was General
ensuing victory over England, the citizens of the newly established country demanded protections from an oppressive federal government. Central to these fears was the idea that a standing army represented a threat to their liberty. Thus, the Second Amendment was born.

So why, with this clear historical evolution of the right, is there any doubt that the Amendment covers an individual right? One reason is that the romantic idea of a militia defending against an oppressive government may be largely a fiction. Even assuming that the colonials could have won the war in guerilla fashion, evidence shows that the prevalence of weapons in colonial and earlier times was not as great as gun advocates have stated. According to probate records, the majority of weapons were not even in working condition. The rifles of the time were inaccurate and required a complicated and time-

---

Gage's military occupation of Boston in 1775. See id. at 59. General Gage refused to let occupants of Boston leave without surrendering their arms. Id. The arms were supposed to be returned upon return to the city, however, they were instead given over to British regulars. Id. at 59–60.

Originally the country was governed under the Articles of Confederation, which left almost complete power in the states. Even before it was ratified, however, the populace had become dissatisfied. See John P. Kaminski, The Constitution Without a Bill of Rights, in THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 18 (Patrick T. Coneley et al. eds., 1992). An argument can be made that the right to bear arms did not spring from the common man's interest in self-defense, but rather was manufactured into the populace's psyche to spur gun sales. See GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 242–43 (1999).


Some contend, on the contrary, that the Amendment was not enacted to protect against a standing army. This argument is based on the fact that the Constitution provided for federal control over the militias. See WILLS, supra note 44, at 113–14 (noting that the Second Amendment provided no protection against a standing army because Congress had been given the power to control the state militias in the Constitution). Notwithstanding legislative and executive control over the militias, the fact remains that the militias once created would have the choice to follow federal directions or to disregard them.

Proponents of this idea rely on the Vietcong's victory over the United States. Evidence shows that the Vietcong finally won the undeclared war with purely conventional means. See WILLS, supra note 44, at 25.

See id. at 28–31 ("Guns for both militias and the Continental Army were so scarce that George Washington fills page after page with laments for his inability to get them—and he meant muskets as well as the even scarcer cannon and artillery.").

Id. at 29.
consuming process for use. Thus, the notion of individuals with their rifles defending against insurrection or arming themselves out of necessity to provide their families with food, as appealing as it sounds, is likely incorrect.

II. IS A COLLECTIVE OR INDIVIDUAL VIEW EMBODIED IN THE SECOND AMENDMENT?

A. Wording of the Second Amendment

The controversy of whether the right to bear arms is collective or individual is largely attributed to the wording and the placement of the Amendment. Unlike the other amendments in the Bill of Rights, the Second Amendment contains a preamble stating its purpose. The Amendment purports to protect the "security of a free State" by way of a state militia. The preamble's wording strongly contrasts with the second part of the Amendment that emphasizes the "people."

Proponents of the individual rights model argue that the preamble is simply explanatory of why the people must retain this right. If the rights of the people were meant to be subordinate to protection of the states, the Amendment would have been constructed as such.

---

50 Id.
51 The debate on the scope of the Amendment revolves around both the inclusion of a preamble, see infra note 52, and the inclusion of the word "people," see United States v. Emerson, 270 F.3d 203, 227-29 (5th Cir. 2001) (noting that the Supreme Court has recognized that the term "people" seems to reflect a term of art applied by the framers of the Constitution and the Amendments).
52 "A distinguishing characteristic of the Second Amendment is the inclusion of an opening clause or preamble, which sets out its purpose. No similar clause is found in any other amendment." United States v. Emerson, 46 F. Supp. 2d 598, 600 (N.D. Tex. 1999), rev'd, 270 F.3d 203 (5th Cir. 2001).
53 See U.S. CONST. amend. II; see also HENDERSON, supra note 5, at 17. Henderson notes that two questions are raised by peculiar wording of the Second Amendment: "(1) Does the reference to the militia simply state the framer's [sic] purpose in guaranteeing the right to bear arms, or does it limit that right to arms that can be used in the militia? (2) Does 'the people' refer to a collective right to maintain a militia or to an individual right to keep and bear arms?" Id.
54 See supra notes 51-52.
55 See Emerson, 270 F.3d at 233 (stating that the preamble simply defines why a right to bear arms is necessary).
56 See Emerson, 46 F. Supp. 2d at 601 ("However, if the amendment truly meant what collective rights advocates propose, then the text would read 'a well-regulated Militia, being necessary to the security of a free State, the right of the States to keep and bear Arms, shall not be infringed.' ").
Advocates of a collective interpretation argue that the first clause qualifies the second, restricting the protection conferred by the right. To interpret the first part of the Amendment in any other way would rob it of its significance. The right conferred simply protects the states from the disarmament of their militias—known today as the national guard—by the federal government.

Although the Fifth Circuit in Emerson chose the former argument after examining the Amendment's history and wording—and considering the Supreme Court's decision in United States v. Miller—the Court, if it decides to address the collective/individual distinction, will likely hold the right to be collective in nature. Three main reasons exist for this: (1) the Supreme Court's interpretation of the right in Miller, (2) the lack of application of the Fourteenth Amendment to the states, and (3) social considerations in light of a changing society.

B. Support for the Collective View Found in United States v. Miller

Despite Emerson's contention that Miller supports an individual view, Miller can more easily be understood as endorsing a collective interpretation—an opinion with which most circuit courts have agreed. Miller involved the indictment

---

57 This view sees the first part of the Amendment as a limitation, or qualification, of the right encapsulated in the Second Amendment. See HENDERSON, supra note 5, at 17–18 (discussing how after United States v. Miller, most courts see the preamble to the Second Amendment as a qualifying clause).

58 If one reads the Second Amendment as conferring an individual right, then the preamble would be nothing more then excess verbiage. This would be an odd contention in light of the fact that the Second Amendment is the only Amendment with a preamble. See supra note 52.

59 This view subscribes to the theory that "the people" exercise the rights under the Second Amendment through state militias. See Evan P. Schultz, Bullets for Ballots in D.C., LEGAL TIMES, Aug. 5, 2002, at 58 (noting that today this right or protection is utilized by the state national guards).

60 The reasoning behind this will be discussed in the following section. See infra Part II.B. To briefly summarize, the Court in Miller examined the defendant's rights with respect to the first part of the Amendment. This would tend to refute the individualist contention that the preamble is simply a statement of purpose. See United States v. Miller, 307 U.S. 174, 178–83 (1939).

61 See infra Part II.D.

62 After United States v. Miller, circuit courts have typically subscribed to one of the two collective views. See United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001) (noting that none of its "sister circuits" have adopted an individualistic view); see also HENDERSON, supra note 5, at 53–84 (outlining key court decisions
of two bootleggers for transportation of shotguns with barrels less than eighteen inches in length, without paying a $200 tax, in violation of the National Firearms Act of 1934. The defendants argued, among other things, that the law violated their Second Amendment rights. The district court held the indictment invalid, citing a violation of the defendant's Second Amendment rights. The government then appealed directly to the Supreme Court. Although the Court did not clearly specify which view has supported—the Court never explicitly mentioned a collective view—it's holding strongly suggests that the Amendment embodies some form of a collective right. In reversing the lower court, the Supreme Court stated:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

The Supreme Court thus seemed to indicate that the preamble to the Second Amendment means more than simply describing its purpose. The observation that the preamble is a

relating to interpretation of the Second Amendment); Council, supra note 6, at 17 (noting that Emerson is the first case to so hold in decades).  
63 Miller, 307 U.S. at 175; see also Henderson, supra note 5, at 53 (providing a concise summary of the facts of Miller).
64 The defendants also argued that the tax was an infringement on the state's police power and beyond the power conferred to Congress under its power to tax. Miller, 307 U.S. at 176. The defendants claimed the tax was not a revenue generating measure, but rather a measure designed to circumvent the constitutional limits of congressional power. Id.  
65 Miller, 307 U.S. at 176.  
66 Id. at 177.
67 See Silveira v. Lockyer, 312 F.3d 1052, 1062 (9th Cir. 2002). The court stated: As a result of its holding in the negative, however, the Miller Court's opinion stands only for the proposition that the possession of certain weapons is not protected, and offers little guidance as to what rights the Second Amendment does protect. Accordingly, it has been noted, with good reason, that "the Supreme Court's jurisprudence on the scope of [the Second] Amendment is quite limited, and not entirely illuminating." Id. at 1061 (quoting Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999))).  
68 See id. at 1068 ("What Miller does strongly imply, however, is that the Supreme Court rejects the traditional individual rights view.").  
69 Miller, 307 U.S. at 178.
70 The Court does more than imply that the preamble places a substantive limitation. See id. at 178 (noting that Congress was granted the power to "call[...]}
restrictive limitation on the right of the people supports either of
the two collective views.  

Proponents of the individual view point out that the Court
held this way only because the defendants were not present. The reason that this fact bolsters support for an individual view
is not clear. Further, the Court chose to examine the weapon's
applicability to militia use. In fact, the Court's question is more
descriptive of the right embodied in the Amendment than the
answer to that question. By focusing on whether shotguns
with a barrel of less than eighteen inches apply to militia use,
the Court acknowledged that the preamble has a limiting

forth the Militia" and the purpose of this Amendment is to temper Congress's
control). In examining the issue the Court noted the general fear of standing armies
that existed when the Second Amendment was written. Id. at 179. The Court linked
this argument to the need for militias and their history in filling this role. Id. at
178–79.  

Both collective views recognize the preamble as a limitation on the protection
conferred in the Second Amendment, whereas the individual view does not. See
United States v. Emerson, 270 F.3d 203, 218–22 (5th Cir. 2001). The individual
viewpoint sees the preamble as simply stating the purpose. See United States v.
Emerson, 46 F. Supp. 2d 598, 601 (N.D. Tex. 1999) rev'd, 270 F.3d 203 (5th Cir.
2001). In advancing this viewpoint, the court noted that if the Framers of the
Amendment had meant only for the states to receive this protection they would
have indicated as much. Id. (noting if that had been the intention of the framers the
Amendment would have read: "'[a] well regulated Militia, being necessary to the
security of a free State, the right of the States to keep and bear Arms, shall not be
infringed.'") (alteration in original). Id.  

In determining that stare decisis did not apply, the Emerson court noted that
the Supreme Court had not ruled definitively because it had based its decision on
refusal to take judicial notice in light of the defendant's absence. See Emerson, 270
F.3d at 221–24 (noting that the Supreme Court had not distinctly ruled out an
individual application of the Second Amendment). Hence, the Supreme Court had
not ruled out a individual application, it simply required an examination of the
"arms" applicability to a militia use. The Emerson court also noted that the
Supreme Court, in rendering its decision, focused on the military nature of the arm,
not on the nature of the defendants. Id. at 224. For this reason the court felt the
high Court had not subscribed to the collective view but had, rather, chosen to limit
the protection under an interpretation of the phrase "bear arms." Id. at 229–30. The
court's interpretation of the holding in Miller seems shaky though, as the
acknowledgement of the preamble's purpose seems to apply easier to a collective
right than an individual right.

In determining whether the defendant's Amendment rights had been
violated in Miller, the Court refused to take judicial notice of the militia
applicability of a sawed-off shotgun. See Miller, 307 U.S. at 178. By examining the
issue with respect to a weapon's militia applicability, the Court recognized that the
first part of the Amendment was more than just a statement of purpose. A logical
inference from this is that the preamble to the Amendment has a limiting effect.
effect—to do otherwise would have robbed the first part of the Amendment of any meaning. The Court simply refused to take judicial notice of the applicability of a sawed-off shotgun to militia use without evidence presented by the defendants to this effect.

The Emerson court felt that the militia distinction was based on the interpretation of the word “arms” in the Second Amendment. In advancing this reasoning, the court noted that the Supreme Court in Miller did not reference any involvement of the defendants in any ordinary militia organization—a significant consideration in any collective interpretation. The Fifth Circuit seemed to ignore, however, the fact that the protection does not extend to all weaponry, even within a collective view. This analysis also overlooks the language that the Supreme Court used in rendering its decision. Specifically, the Court there noted that without evidence demonstrating that the weapon was related to the “preservation or efficiency of a well regulated militia,” the Court could not find the law unconstitutional. If the Court’s determination was based on an examination of whether a sawed-off shotgun was an “arm” under the Second Amendment, the Court would have phrased the issue as such, instead of examining whether it was the type of arm a

---

74 Id.
75 See supra notes 52 and 56.
76 Miller, 307 U.S. at 178.
77 Emerson, 270 F.3d at 224. In arguing its case the government put forth two arguments. The first argument was essentially the sophisticated collective rights model. Id. at 222. The second argument was that recognizing this collective/individual view (the sophisticated model), courts did not typically recognize such weapons as having military use. Id. at 222–23.
78 In either of the collective views, participation in a militia is a prerequisite to obtaining the protections of the Amendment. See supra notes 31–32.
79 The Emerson court took the position that the government’s second argument represented simply an interpretation of what “arms” could be considered within the Amendment. Emerson, 270 F.3d at 224. The government’s second position can be read, however, to argue that the sawed-off shotgun falls beyond the protection extended by the Amendment, even with respect to a collective view. See id. at 222–23.
80 See Miller, 307 U.S. at 178.
81 Id.; see also Dennis A. Henigan, The NRA Gets More Firepower from the Second Amendment as a Rhetorical Weapon than as a Barrier to Gun Control Laws, THE RECORDER, Aug. 3, 1992, at 9 (“More then 50 years ago, the Supreme Court wrote in United States v. Miller, that the ‘obvious purpose’ of the amendment was the continuation of the state militia, cautioning that ‘the amendment must be interpreted and applied with that end in view.’”)

---
militia would use. The Fifth Circuit in Emerson also examined the inclusion of the word "people" in the Amendment and found that this supported an individual application. Contrary to this view, however, the inclusion of "people" does not necessarily indicate an individual right. The word "people" can just as easily be seen as a right of the people collectively.

The Supreme Court's holding in Miller has long been thought to encapsulate a collective view; however, because the question was not answered directly, further analysis is warranted.

C. Lack of Applicability of the Fourteenth Amendment as Support of the Collective View

The Bill of Rights was originally meant to apply to the states as well as to the federal government. In fact, it seems that James Madison had lobbied for a clause similar to the Fourteenth Amendment prior to the drafting of the Constitution. Before presenting the amendments to the states for ratification, the legislature modified them so that they only applied to the federal government. If the amendments were all meant to apply to the states, arguably the Amendment would encompass an individual right. This contention would have merit simply because a collective view protects the right of the people collectively.

82 The Emerson court reasoned that the government's argument in Miller revolved around the meaning of "arms" in the Amendment. Emerson, 270 F.3d at 222-23. If the Supreme Court had interpreted the government's second argument, as the Emerson court reasoned, the Court would likely have not used the word "militia" in examining the shotgun's character, and would have opted instead to phrase the issue in the term "arms."

83 See id. at 226-29 (noting that the word "people" should be accorded the same meaning as when it appears in other amendments).

84 The prevailing opinion is that the Court's decision in Miller is indicative of a collective rights model. See Henigan, supra note 81 (noting that the Supreme Court in Miller placed significance in the preamble to the Amendment). However, since the Supreme Court never announced the collective view directly, questions still remain. See generally Miller, 307 U.S. 174; Henderson, supra note 5, at 53 (providing a concise summary of the facts of Miller).

85 See Wills, supra note 44, at 107 (noting that the original Bill of Rights was meant to extend to the states; however, before presentation to the states, the legislature modified it so as to apply only to the federal government); see also Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 411 (14th ed. 2001) (noting that the Bill of Rights, as ratified, applied only to the federal government).

86 See Wills, supra note 44, at 104-05.

87 See Schwartz, supra note 1.
states to arm its militia. Therefore, a collective application applied to the states would effectively prohibit the states from prohibiting the states from arming a militia. It is easy to see how this application would not make sense—a paradoxical effect would result from the application of a collective protection to the states.88 This, of course, leaves open the question of what the basis was for non-applicability to the states if Congress so intended.89 A stronger argument, however, ameliorates the need for examination of those motivations—mainly the incorporation of the Fourteenth Amendment.90

As previously noted, the Bill of Rights was added because of the fear that the federal government would be too powerful and as such, individual protections would be necessary to protect citizens from an oppressive federal government.91 Originally, proponents of the Bill of Rights wanted the protections added into the Constitution where other protections against the states were expounded.92 The legislature opted instead to draft separate amendments.93 In 1868, the legislature drafted the Fourteenth Amendment, which has been interpreted as

88 If the preamble of the Second Amendment was simply a statement of purpose—as individualists contend—then it would be paradoxical to apply these restrictions to the same body which it purports to protect. Henigan, supra note 81.

89 One view advanced is that the Bill of Rights was only meant to be an additional check on the limited powers of the federal government. SULLIVAN & GUNTHER, supra note 85, at 411 ("Express checks on arbitrary exercises of authority were meant to add an external check to supplement whatever internal restraint would operate in a federal government of limited powers."). Given this view, it would be unnecessary to extend these protections to the state governments.

90 The need to examine the reasoning behind not applying the Bill of Rights to the states is largely irrelevant. With the ratification of the Fourteenth Amendment and subsequent Court incorporation of the other Amendments, it is more instructive to examine the reasoning behind not including the Second Amendment as one of those that is applied to the states. See generally HALBROOK, supra note 3, at 107–53 (examining the Fourteenth Amendment's history and its application to the Second Amendment).

91 See supra note 1.

92 The original proposition was to include the protections of the Bill of Rights in the express restrictions placed on the states in the Constitution for example, the restriction on ex post facto laws. Constitutional restrictions on states, such as the ex post facto clause, are in Art. I, Sec. 10. See U.S. CONST. art. I, § 10; see also WILLS, supra note 44 at 105–06 ("I wish, also, in revising the Constitution we may throw, into that section [Article I, Section 10] which interdicts the abuse of certain powers in the state legislatures . . . .") (quoting 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1027 (1971)).

93 In the end, the convention decided to place the Bill of Rights as separate amendments. See SULLIVAN & GUNTHER, supra note 85, at 411.
extending some of the governmental limitations of the Bill of Rights to the states. 94 The courts, in so interpreting the Fourteenth Amendment, reasoned that under the Due Process Clause some protections afforded by the Bill of Rights were extended to limit the power of the states. 95 In reasoning as such, the courts noted that it was not the presence of the privilege in the Bill of Rights but rather its application to due process that incorporated it into the Fourteenth Amendment. 96 The courts, however, have reasoned that the Fourteenth Amendment does not incorporate the right to bear arms. 97

The second case testing the incorporation of the amendments involved a Second Amendment challenge. 98 In Pressner v. Illinois, 99 the Supreme Court held that the Second Amendment applied only to the federal government. 100 Although this case was before the incorporation of any of the amendments of the Bill of Rights, subsequent cases have held that there is no reason to overrule Pressner. 101 This strongly favors the view that the Amendment was only directed at protecting the states from the federal government, not the individual person from all parts of the government. 102 In response, individual-rights advocates note that comments by the states ratifying the Fourteenth

94 See Twining v. New Jersey, 211 U.S. 78, 99 (1908) ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." (citing Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897))).

95 See SULLIVAN & GUNTHER, supra note 85, at 435 ("[T]he Court has long found that 'fundamental fairness' as reflected in due process may afford the defendant rights that correspond to some of the guarantees in the Bill of Rights.").

96 See, e.g., Twining, 211 U.S. 78, 99 (1908) ("If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.").

97 See SULLIVAN & GUNTHER, supra note 85, at 435 ("[T]he majority of the Court has never accepted the view that the 14th Amendment due process clause 'incorporated' all the provisions of the Bill of Rights.").


99 116 U.S. 252 (1886).

100 See KONVITZ, supra note 98, at 46 (noting that the Second Amendment has no relation to the power of the states to enact regulations of firearms).

101 See Fresno Rifle and Pistol Club v. Van De Kamp, 965 F.2d 723, 730–31 (9th Cir. 1992) (holding that there was no reason to overrule Pressner or to conclude that Miller left open the question of incorporation of the Second Amendment).

102 The ideology behind the Amendment was to protect the states from being disarmed by the federal government. See Schultz, supra note 59 ("The Framers envisioned Minutemen bearing guns, not Daniel Boone gunning bears.").
Amendment indicate that they considered the right to bear arms a fundamental right and thus should be included under the Fourteenth Amendment. As demonstrative as this may be of intention, however, the courts interpreting Supreme Court decisions have noted that the Fourteenth Amendment—whether under the Privileges and Immunities Clause or the Due Process Clause—does not extend to the right to bear arms. Furthermore, most courts have noted that the Second Amendment does not represent a right but only a restriction on federal intrusion. If the Second Amendment really protected an individual right to bear arms, then the Fourteenth Amendment would likely have resulted in its application to the states. If this were the case, state gun control laws would be challenged and heard by the Supreme Court much more frequently.

This issue, however telling on what the right encapsulates, is not likely to receive attention from the Supreme Court, since most states have provisions in their state constitutions that largely follow the Second Amendment.

103 See HALBROOK, supra note 3, at 123. But see KONVITZ, supra note 98, at 8–9 (Citing Justice Washington's description of fundamental rights—in Corfield v. Corywell, 6 F. Cas. 546 (No. 3230) (Cir. E.D. Penn. 1823)—which did not include the Second Amendment).

104 See, e.g., Quilici v. Village of Morton Grove, 695 F.2d 261, 269 (7th Cir. 1982) (noting that the right to bear arms is not a fundamental right which a state can not regulate). Morton Grove, Illinois, prohibited the possession of all handguns. See HALBROOK, supra note 3, at 5. The Supreme Court denied review of the decision finding the prohibition constitutional. See Quilici v. Village of Morton Grove, 464 U.S. 863 (1983).

105 See, e.g., Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) (holding that the Second Amendment does not protect individuals from state action; it only prevents the federal government from infringing this right).

106 See CARTER, supra note 4, at 24 (“[T]he courts have consistently decreed that both federal and state governments can restrict who may and may not own a gun, and can also regulate the sale, transfer, receipt, possession, and use of specific categories of firearms.”). Even with the decision in Emerson, the federal courts have not invalidated gun control laws. For example:

Without exception, the federal courts have upheld restrictions on private ownership of firearms against Second Amendment attack. The NRA's continued insistence that gun control laws infringe a fundamental personal right, despite the unanimous rulings of the courts to the contrary, is, in the words of former Chief Justice Warren Burger, "one of the greatest pieces of fraud . . . on the American people by special interest groups that I have ever seen in my lifetime.”

Henigan, supra note 81.

107 See HALBROOK, supra note 3, at 260; HENDERSON, supra note 5, at 13–14.
D. Social Considerations and Constitutional Interpretations

In addition to the structural arguments, there are good sociological reasons for a collective interpretation. Like the other protections in the Bill of Rights, the Second Amendment is not considered an absolute privilege. In *Robertson v. Baldwin*, the Court stated:

[T]he first 10 amendments to the Constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case.

Even early in its inception, the right to bear arms remained subject to qualifications. These qualifications were implied into the right to bear arms denoted in the Bill of Rights. Even the *Emerson* court recognized that an individualistic view of the Amendment does not remove the ability of Congress to enact qualifications as long as they are narrowly tailored.

In large part, the first gun control laws were a reaction to social conditions of the era. This trend towards social

---

108 See United States v. Emerson, 270 F.3d 203, 223 (5th Cir. 2001) ("In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."). The court goes on to give examples, such as libel as an exception to freedom of speech, or the introduction of dying declarations, as an exception to the right to confront an accuser. *Id.*


110 Thus, insane people and persons convicted of violent crimes were not permitted to possess weapons. *See supra* notes 33 and 108.

111 See *HALBROOK*, *supra* note 3, at 37-38; *supra* note 108.

112 The *Emerson* court found that the Amendment embraces an individual protection. The court declined to find the legislation unconstitutional. In espousing this view, the court noted that Congress retained the ability to narrowly tailor legislation restricting the rights announced in the Amendment. *Emerson*, 270 F.3d at 260.

113 The debate over modern gun control legislation became prevalent in the 1920s as a reaction to organized crime that sprung from Prohibition. *HENDERSON*, *supra* note 5, at 15. Public exposure to the issue began with the Valentine's Day Massacre in 1929. *Id.* This event resulted in the high profile killing of seven mobsters with the Thompson machine gun. *Id.* The debate reached national fervor with the attempted assassination of President Franklin Delano Roosevelt. *Id.* The first substantial national legislation followed—the National Firearms Act of 1934.
consciousness declined in the 1940s and 1950s only to regain prominence with the political unrest of the 1960s. Some of the most recent legislation came as a reaction to the attempted assassination of President Ronald Reagan. To a large extent, these high profile acts of violence underscore the need for greater regulations and protections from gun-related violence. Other countries, when faced with national tragedies involving guns have reacted decisively and have enacted firm regulations in response. Fortunately, the recent boom in the economy in the late 1990s had a reductive effect on crime and, consequently, a decrease in social concern. Today, in the midst of an economic downturn, crime is on the rise. These crimes are facilitated by the abundance of firearms available in the United States.

Id. at 16.

The 1960s saw a rash of social unrest. The high profile assassinations of John F. Kennedy, Martin Luther King, and Robert F. Kennedy, as well as riots and political revolt in response to the Vietnam War, increased the public's awareness and sparked the movement for gun control. See KENNETT & ANDERSON, supra note 3, at 223–24 (commenting that the Kennedy assassination had a cooling effect on America's love for the gun); see also HENDERSON, supra note 5, at 92 (listing relevant high profile gun related crimes in the 1960s). During the 1960s, the major piece of legislation passed was the Gun Control Act of 1968. Id. at 33. The Gun Control Act has been interpreted as banning inexpensive handguns, along with "certain types of semiautomatic shotguns (Street Sweepers) and some assault weapons." Id. at 33.

See HENDERSON, supra note 5, at 23–24, 105.


The FBI's statistics are telling as to national crime rates. For example: [T]he Federal Bureau of Investigation announced that preliminary 2001 data indicate a 2.0-percent increase in the Nation's Crime Index from the 2000 figure. The Crime Index, which is measured by the FBI's Uniform Crime Reporting (UCR) Program, is composed of murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft. The Modified Crime Index includes the property crime of arson. Press Release, Federal Bureau of Investigation, 2001 Preliminary C.I.U.S. (June 24, 2002), http://www.fbi.gov/pressrel/pressrel02/01bprelimcius.htm (last visited Feb. 21, 2003).

Gun Control Network, Some Facts About Guns ("Homicide rates tend to be
only has to look at the local headlines to find instances of gun violence. These points are underscored by the tragic occurrences that recently took place in Washington, D.C. and its surrounding areas where a two-man sniper team that held the American psyche hostage for over twenty days has been charged with taking the lives of numerous innocent victims.¹²⁰

Today the United States remains one of the world leaders in gun-related violence.¹²¹ Regulation on a federal scale would help remove and control the number and type of firearms available as well as regulate who possesses those weapons. Because of the diversity of state regulations, getting a weapon is merely an exercise in crossing borders.¹²² This being so, allowing the individual states to promulgate their own regulations and requirements effectively subjects all states to the least restrictive state’s regulations and requirements. National gun control legislation would not result in an instant reduction in gun-related violence, but it would have a positive effect. Regulations would inhibit criminals from obtaining weapons, as studies show that these weapons in large part result from sales, not theft—as pro-gun lobbies claim.¹²³

One thought to keep in mind is that a collective view of the Amendment does not lead to an immediate loss of a person’s right to own weapons.¹²⁴ A collective view would simply bestow on Congress a greater ability to legislate gun control laws that related to firearm ownership levels. Everything else being equal, a reduction in the percentage of households owning firearms should occasion a drop in the homicide rate.”¹²⁵

¹²⁰ See generally Carol Morello et al., Pair Seized in Sniper Attacks; Gun in Car Tied to 11 Shootings; 2 Arrested After Vehicle Is Spotted at Rest Stop, WASH. POST, Oct. 25, 2002, at A1 (detailing the capture and summarizing the events involved in the investigation).

¹²¹ See Gun Control Network, Some Facts About Guns: Gun Death—International Comparisons (showing that the U.S. has the greatest percentage of gun-related violence per population), http://www.gun-control-network.org/facts.htm (last visited Feb. 21, 2003).

¹²² See HENDERSON, supra note 5, at 259–60.

¹²³ With this in mind, the number of guns in circulation would be reduced, since criminals seeking guns would have a much more difficult time obtaining weapons. See Feldman, supra note 116, at 300–01 (referencing a study showing that more criminals buy their guns than steal them).

¹²⁴ The Amendment does not represent a privilege or a right; rather, it embodies a protection. See supra note 104 and accompanying text. But see HENDERSON, supra note 5, at 7 (noting that gun advocates see the right to bear arms as a right similar to freedom of speech).
fall within its other enactment powers. In many ways, this would have very little effect since very few gun-control laws have actually been found unconstitutional, even without the Amendment’s scope defined. In fact, challenges to state laws restricting gun possession and ownership have not been accepted by the federal courts simply because the consensus is that the Amendment does not apply to the states. This fact alone is of little comfort, though, since federal legislation would be enormously more effective than individual state restrictions. With present concerns raised as we enter the twenty-first century, few would dispute that greater restrictions would at the least help to curb gun violence.

In response, gun advocates note two objections to these arguments. One argument is that in large measure private ownership of weapons helps prevent crime. In many respects this is true. Owning a handgun has been shown to deter burglars even when the weapon is not used. This argument notwithstanding, a 1986 study showed that a gun in the home was forty-three times more likely to kill a family member or friend than an intruder. Additionally, a person with a gun in the home is almost three times as likely to be murdered.

125 With the exception of United States v. Lopez, 514 U.S. 549, 531 (1995)—involving the Gun Free School Zone Act, which was decided on commerce power grounds—no state or federal legislation has been declared unconstitutional. See supra note 97 and accompanying text; see also Henigan, supra note 81. In Printz v. United States, the Court severed a portion of the Brady law as unconstitutional because it required the states’ chief law enforcement officer to perform a reasonable background check. Printz v. United States, 521 U.S. 898, 933–35 (1997) (holding that this was beyond Congress’s power).

126 See CARTER, supra note 4, at 24.

127 See HENDERSON, supra note 5, at 259.

128 Gun restrictions and regulations are so varied from state to state that they easily lose their effect because of the ease of interstate travel. See EDWARD F. DOLAN, JR., GUN CONTROL: A DECISION FOR AMERICANS 14–16 (1978) (noting that different restrictions and regulations may even occur within a state); see also JOHN R. LOTT, JR., MORE GUNS: LESS CRIME 49 (1998) (explaining that waiting periods vary from state to state).


130 See David Kopel, Sticking to Our Guns, THE AMERICAN LAWYER (Jan.–Feb. 1994), at 49 (citing a study showing that defensive use of handguns occurs up to 2.5 million times a year).

131 See HENDERSON, supra note 5, at 20.

132 Arthur L. Kellerman et al., Gun Ownership as a Risk Factor for Homicide in
Other countries with tougher gun control laws have significantly lower homicide rates caused by firearms. In fact, the United States’ homicide rate attributed to firearms was nearly eight times higher than that of Britain or Canada. Not disputing the truth in this contention, it is still easy to see that the claim that gun ownership prevents crime is a circular argument—if criminals lack weapons then people will not need them to defend themselves. Additionally, it is important to note that possession of a firearm may lead a person to engage in riskier behavior. "For example, allowing citizens to carry concealed firearms may encourage them to risk entering more dangerous neighborhoods or to begin traveling during times they previously avoided."

The second argument is that the Constitution should not be viewed as changing with the times but rather should be viewed only from the original meaning of its plain language. This view has significant merit because to alter the meaning of the Amendment would go against the very principles of judicial review. The Constitution, however, was meant to be a living, growing document, able to adapt to changing times as the need arose. In addition, if taken literally, all views—individual and

---

134 See supra note 123.
135 See Lott, supra note 128, at 34.
137 The court’s role is to interpret, not to legislate, or impose it’s own set of morals or beliefs into the exercise of the provision. See United States v. Emerson, 270 F.3d 203, 272–73 (5th Cir. 2001) (Parker, J., concurring) (noting that the appellate court’s job is to review decisions, not opinions). Judge Parker felt the court’s decision to address the individual/collective distinction was unnecessary. Id. (Parker, J., concurring).
138 See Brest, supra note 136, at 17–18 (noting that the living Constitution provides both stability and flexibility).
collective—would seem to interpret the Amendment as protecting possession of any weapon capable of militia use. Few would dispute that this was not the intention of the framers. An argument like this would allow citizens to possess varying levels of military hardware.

An important point to consider is that by allowing our subjective concerns to shape our interpretation of the Constitution, we may be abridging some rights or privileges previously enjoyed. The Emerson court stated:

"[Even if] few tears [would] be shed if and when the Second Amendment is held to guarantee nothing more then the state National Guard, this would simply show that the Founders were right when they feared that some future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may tolerate the abridgement of property rights and the elimination of a right to bear arms; but we should not pretend that these are not reductions of rights."

In a large way the Amendment itself is a remnant of the past. Even if a different, more limited interpretation of the

139 The proposition of United States v. Miller, 307 U.S. 174, 178 (1939), was that weapons could not be considered for military use without evidence. If this position were taken in context with an individual view of the Second Amendment, arguably an individual would have the constitutional right to possess military hardware. See Henigan, supra note 81 (noting that this doctrine would allow a private individual to possess rocket launchers, grenades, conventional, and even nuclear arms). A collective view in this context would also allow any member of a state militia—national guard—to possess any weapon that had military utility.

140 See Emerson, 270 F.3d at 273 (Parker, J., concurring) ("And whatever the scope of the claimed Second Amendment right, no responsible individual or organization would suggest that it would protect Emerson's possession of the other guns found in his military-style arsenal the day the federal indictment was handed down.") Emerson had in his possession "a semi-automatic M-1 carbine, an SKS assault rifle with bayonet, and a semi-automatic M-14 assault rifle." Id. (Parker, J., concurring).

141 See id. at 273 (Parker, J., concurring).


143 See Emerson, 46 F. Supp. 2d at 610 ("[I]t is very likely that modern Americans no longer look contemptuously, as Madison did, upon governments of Europe that 'are afraid to trust the people with arms . . .'.") (quoting Antonin Scalia,
Second Amendment is adopted, does any reason to cling to this right still remain?

The need for a militia to defend against an oppressive government was a valid consideration at the inception of our nation. Today, most would agree that this fear is no longer a valid one. Notwithstanding the abridgement of our concern regarding an oppressive government, few would dispute the fact that even the most well-armed dissident would have a difficult time defending against any modern military.

CONCLUSION

The history of the right to bear arms is long and complex. It can be traced back to the origins of modern civilization. Originally, the idea developed from the concept that the singular citizenry needed the right to protect both itself and its society. Throughout history, when governments moved to disarm their populace—to make them more docile—the result was public discontent and revolt. This tradition was carried to the colonies. The language that the framers chose to protect this right, however, leaves open the question of exactly what it entails. The Amendment has been interpreted in three different ways. The first two ways represent varying degrees of retention of this right by the states—known as the collective models. The third way recognizes an individual protection provided by the Second Amendment—the individual model. Although most courts agree that the Amendment represents a collective right, the scope of the Amendment remains a debatable subject.

With the Fifth Circuit’s recent holding in United States v. Emerson, the debate has entered the judicial arena once again. This split in interpretation has yet to cause any noticeable differences in outcome. Eventually, however, it is inevitable that the Emerson court’s application will lead to the finding that a

---

Response, in A Matter of Interpretation, supra note 142, 137 n.13)), rev’d, 270 F.3d 203 (5th Cir. 2002).

144 The view of the Framers can best be summed up by Thomas Jefferson: “The strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.” Daniel J. Schwartz, “A Well-Regulated Militia,” The American Lawyer, Nov. 1995, at 28 (quoting Thomas Jefferson, 1 Thomas Jefferson Papers 334 (C.J. Body ed., 1950)). The reason for the Amendment was to balance the state and federal powers—reflected by a fear of a standing army. This is no longer a valid concern for our modern society.
federal gun control law is unconstitutional. This holding will likely lead to an appeal heard by the Supreme Court. Until the Supreme Court announces whether the protection afforded applies to an individual or a collective right, the courts will remain subject to these differences in view. Upon review, the Supreme Court will likely hold the right to be collective in nature. Based on consideration of the Supreme Court’s decision in Miller, applicability of the Fourteenth Amendment, and social concerns, it seems likely that the Amendment would be considered collective in nature. The resulting effect of such a decision would not be as drastic as some would argue. The question of how much gun control is needed would still belong to the legislature—most likely those of the states, where it presently resides. Federal regulations, however, offer the kind of consistency that state laws cannot effectuate. This consistency would result in greater effectiveness and a safer society for all,