

---

## Author's Foreword

Attached is the paper that I wrote on the Second Amendment: comparing the Fifth Circuit to the Ninth. When I first started reading the decisions, I thought I would be able to easily see where the courts differed in opinions, but the more I got into each decision, the murkier it got. That's why I eventually just sat down for a week with both opinions, started comparing them side by side, and documenting what I saw as their major points. I purposely ignored the actual rulings in both cases, and focused on the supplemental information regarding the Second Amendment that each court supplied in their opinions. I also tried not to argue or respond to points that the courts made in their opinions with other sources or my own opinions. Bottom line, I wanted to understand the perspective of each court; how two courts, at the same level of the judiciary, reviewing the same historical record, came up with opposite opinions. I am not a lawyer, so I likely overlooked some lawyerly points, and the opinions expressed are solely my own and do not represent the opinions of any group or organization.

Citation-wise, I was a little loose. Each quoted passage is accurate and the original source is noted but I didn't peg it down to a specific page from each decision.

Should you choose to redistribute this document in any format, printed or electronic, I ask only that this page remain with the document, and that you do not change any of the text.

Phil Grandinetti

---

---

# Individual or Collective: Comparing Emerson to Silveira

Phil Grandinetti

"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." (Second Amendment to the Constitution of the United States, 1791)

"We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller*, that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*." United States Court of Appeals for the Fifth Circuit, October 16, 2001.

"After conducting a full analysis of the amendment, its history, and its purpose, we reaffirm our conclusion in *Hickman v. Block*, that it is this collective rights model which provides the best interpretation of the Second Amendment... The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use." United States Court of Appeals for the Ninth Circuit, December 5, 2002.

The argument over the Second Amendment takes many forms: moral, practical, political, historical, constitutional. Regardless of how they start out, debates over firearms usually degenerate to emotional diatribes with one side screaming "From my cold dead hands" while the other side sobs "If it saves one child's life...."

Both sides cite academic studies and anecdotes. Both sides claim their own interpretation of the Second Amendment. Proponents of gun rights claim it was written as an individual right to allow citizens to keep and use firearms. Gun regulators counter that it was written as a collective right, guaranteeing only that states could maintain their own militias. One side wants to keep their guns in the name of individual liberty; the other side wants to take them away in the name of public safety. It's a divisive issue. The anti-gun folks toss out their statistics and push for more regulations: waiting periods, licensing, registration, outright bans, confiscation, and frivolous lawsuits against gun manufacturers. The pro-gun folks counter by passing more state laws permitting their citizens to carry concealed weapons (CCW) and by passing state constitutional amendments to guarantee their rights to keep and bear arms. At least that happens in states other than California...

Two Federal Circuit Courts have recently reached contradictory conclusions regarding the meaning of the Second Amendment. While it is significant that they disagree fundamentally over the Second Amendment, it is noteworthy that both courts decided to explain their reasoning in reaching their respective decisions. Spelling it out has not been popular. Regarding the recent Silveira decision, *The Denver Post* ran an editorial that said in part:

"The problem with the court's dissertation is that it seems to be totally beside the point. The issue before the court was the validity of an assault-weapons ban enacted by the California legislature in 1999. The court's opinion dealt briefly with this issue and declared that the plaintiffs in the case lacked standing to bring the lawsuit. Why? Because the Ninth Circuit had previously held that the Second Amendment didn't confer an individual right to own arms, and therefore the plaintiffs' claims were without merit. So why all of the breast-beating about the Second Amendment?"

---

In *Silveira v. Lockyer*, Circuit Judge Frank Magill echoed this sentiment:

“The plaintiffs in this case are simply not entitled to standing and thus I cannot join the court’s discussion of the merits of their Second Amendment claims.”

"Precedent mandates that we affirm the district court's dismissal of these claims for lack of standing. Accordingly, it is unnecessary and improper to reach the merits of the Second Amendment claims or to explore the contours of the Second Amendment debate."

In *United States of America v. Emerson*, Circuit Judge Robert Parker wrote:

“I concur in the opinion except for Section V. I choose not to join Section V, which concludes that the right to keep and bear arms under the Second Amendment is an individual right, because it is dicta (**Dictum/dicta**: a judge's expression of opinion on a point other than the precise issue involved in determining a case.) and is therefore not binding on us or on any other court. The determination whether the rights bestowed by the Second Amendment are collective or individual is entirely unnecessary to resolve this case and has no bearing on the judgment we dictate by this opinion. The fact that the 84 pages of dicta contained in Section V 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.”

“If the majority was only filling the *Federal Reporter* with page after page of non-binding dicta there would be no need for me to write separately. As I have said, nothing in this case turns on the original meaning of the Second Amendment, so no court need follow what the majority has said in that regard. Unfortunately, however, the majority's exposition pertains to one of the most hotly-contested issues of the day. By overreaching in the area of Second Amendment law, the majority stirs this controversy without necessity when prudence and respect for *stare decisis* (**Stare decisis**: a doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice) calls for it to say nothing at all. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism and the Supreme Court* 5 (1999)(“[A] minimalist path usually--not always, but usually--makes a good deal of sense *when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds).*”) (italics in original). Indeed, in the end, the majority today may have done more harm than good for those who embrace a right to gun ownership.”

I believe that Judges Magill and Parker, along with the Denver Post, miss the point. Americans discuss and debate the meaning of the Second Amendment precisely because the Supreme Court has been unwilling to address it since 1939; whenever they have an opportunity to weigh in on the issue, they decline. The Supreme Court had this opportunity in the Emerson case, but in June decided once again not to get involved. Millions of Americans are passionate about their belief that the Second Amendment confirms an individual right to own and use firearms. Other Americans feel that the Second Amendment does not protect the right of an individual to own a firearm, and they are just as passionate in their beliefs. Meanwhile, legislators continue to pass laws further restricting firearm sales, possession, and use without even considering whether or not these new laws are Constitutional.

There is an arrogant attitude within the government that extends to the judicial branches. It’s an attitude that usually says the Constitution is only what the Supreme Court says it is; that it is too complicated for the average citizen to understand; that us common folk can’t figure it out for ourselves. In the case of the Second Amendment, the Supreme Court has let us stumble all over each other trying to figure out exactly

---

what it means. Why? Maybe because they won't like the answer they will arrive at. The inaction of the Supreme Court is what allows folks like California's Attorney General, Bill Lockyer, to flatly state that the Second Amendment limits only the power of the federal government and does not apply to the states. I actually agree to a point with Lockyer; the Bill of Rights as originally written, was only binding on the federal government. It did not apply to the states, and in some ways, this was a good thing. It allowed each of the states to develop its own framework for government without constraining each state to the Constitution except narrowly. It allowed innovation to occur. Now, you have 50 states that all look a lot like the federal government. It isn't until the addition of the Fourteenth Amendment and the advent of the 20<sup>th</sup> century, that the Supreme Court becomes activist and starts forcing *some* of the Bill of Rights onto the states. In my opinion, it is inconsistent to say that the First Amendment's establishment of religion clause must be followed by the states, but that the Second Amendment can be ignored. But there you go...

Perhaps the majority in both of these courts overstepped their mandates by delving deep into the history and meaning of the Second Amendment. If so, I am grateful that they did; it's about time someone in the federal government stepped up to the plate and addressed the issue instead of ignoring it.

**So how did two federal courts, at the same level of the judiciary, reviewing the same historical record, arrive at such different interpretations of the Second Amendment?** The answer isn't an easy one; you have to read rather lengthy decisions, weed out what is irrelevant, and determine the points of disagreement. My bias is towards an individual rights model, but I've tried to be as fair as possible in reviewing both courts' opinions. I have also tried to stay within the parameters established by the courts; reviewing only the evidence they presented and not going beyond to other sources that are relevant to the debate.

The Fifth Circuit Court justified their conclusion by examining the historical record:

- Models of the Second Amendment

  - United States v. Miller*

  - Analyzing the text of the Second Amendment

  - Objections to the ratification of the Constitution

  - Discussion of the Second Amendment during the first Congress

  - Comments/letters about the Bill of Rights in general and the Second Amendment in particular

  - Nineteenth century Constitutional commentary

The Ninth Circuit Court, for the most part, reviews the Second Amendment with an eye on refuting the Fifth's conclusions in the Emerson case. They tend to cover the same territory, but arrive at different conclusions. Both documents are available online at several websites so that you can read them for yourselves; just type in the case names as search terms.

---

## 1.1 Models of the Second Amendment

The Ninth Circuit Court begins with an examination of the three current models used to interpret the Second Amendment:

Collective Rights or States' Rights: The Second Amendment does not apply to individuals; rather, it merely recognizes the right of a state to arm its militia. This was the view advanced by the government in the Emerson case at the district court level.

Sophisticated Collective Rights: "Proponents of the next model admit that the Second Amendment recognizes some limited species of individual right. However, this supposedly "individual" right to *bear* arms can only be exercised by members of a functioning, organized state militia who bear the arms while and as a part of actively participating in the organized militia's activities. The "individual" right to *keep* arms only applies to members of such a militia, and then only if the federal and state governments fail to provide the firearms necessary for such militia service. Thus, under this model, the Second Amendment poses no obstacle to the wholesale disarmament of the American people. A number of our sister circuits have accepted this model, sometimes referred to by commentators as the sophisticated collective rights model. On appeal, the government has abandoned the states' rights model and now advocates the sophisticated collective rights model." (*United States v. Emerson*, October 16, 2001)

Individual Right: "The third model is simply that the Second Amendment recognizes the right of individuals to keep and bear arms. This is the view advanced by Emerson and adopted by the district court. None of our sister circuits has subscribed to this model, known by commentators as the individual rights model or the standard model. The individual rights view has enjoyed considerable academic endorsement, especially in the last two decades." (*United States v. Emerson*, October 16, 2001) **The Fifth Circuit Court accepted this model as the correct interpretation.**

In *Silveira v. Lockyer*, the Ninth Circuit Court defined three similar Second Amendment interpretations:

Collective Right: The Second Amendment "guarantees the right of the people to maintain state militias, but does not provide any type of individual right to own or possess weapons." (*Silveira v. Lockyer*, December 5, 2002) The Court notes that under this model, the state and federal governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms. **The Ninth Circuit Court adopted this model as the correct interpretation of the Second Amendment.**

The argument over the interpretation of the Second Amendment comes down to accepting either one of these two conflicting models: either it guarantees an individual right to possess and use firearms, or it merely guarantees that the states may maintain their own militias.

Limited Individual Right: "...individuals maintain a constitutional right to possess firearms insofar as such possession bears a reasonable relationship to militia service." (*Silveira v. Lockyer*, December 5, 2002) The Ninth Circuit Court presents this interpretation as an alternative to the Fifth's Sophisticated Collective Rights model, which they discount as a fabrication of that court.

Traditional Individual Right: "...holds that the Second Amendment guarantees to individual private citizens a fundamental right to possess and use firearms for any purpose at all, subject only to limited government regulations." (*Silveira v. Lockyer*, December 5, 2002)

The models presented by both courts are in agreement with each other and with recent discussions of the issue. It boils down to which interpretation you agree with, or which interpretation can be proven; the

---

individual rights model, or the collective rights model. In their decisions, both courts present evidence supporting their respective positions.

## ***1.2 Discussion of United States v. Miller***

The Fifth Circuit Court discusses the Miller case (*United States v. Miller, 1939*) in some detail. Their intent is to show that government's reliance on this court decision to prove the collective rights model is incorrect. The Ninth Circuit Court, after listing their three models, also discusses Miller. It is interesting to note the difference in the descriptions of the Miller case between the two courts:

Fifth Circuit Court: "There, the indictment charged the defendants with transporting in interstate commerce, from Oklahoma to Arkansas, an unregistered "Stevens shotgun having a barrel less than 18 inches in length" without having the required stamped written order, contrary to the National Firearms Act." (*United States v. Emerson, October 16, 2001*)

Ninth Circuit Court: "In that case, a criminal defendant brought a Second Amendment challenge to a federal gun control law that prohibited the transport of sawed-off shotguns in interstate commerce." (*Silveira v. Lockyer, December 5, 2002*)

Reading the Silveira description, you get the impression that sawed-off shotguns were illegal when in fact they were legal; you just had to pay an exorbitant tax to possess them, and you had to register them. Jack Miller and Frank Layton were originally charged with violating the National Firearms Act of 1934 by transporting a sawed-off shotgun from Oklahoma to Arkansas, and not paying a \$200 tax (on a \$20 weapon) for the privilege of doing so. They presented a Second Amendment challenge to the charges in a lower federal court and won. The United States government then appealed to the Supreme Court. In Emerson, the Court notes that Miller filed no briefs, nor did his attorney present a case to the Supreme Court. Silveira fails to mention that. Incidentally, the defendant, Jack Miller, was already dead by the time that the Supreme Court heard the case. For all the attention that the Miller case receives (in part, because it is the only relevant Supreme Court case regarding the Second Amendment in the last 60 years) only one side presented a case: the United States government. It is hardly surprising that the Supreme Court ruled against Miller. However, there is valid speculation that the Supreme Court in 1939 only ruled the way they did because no evidence was presented that a sawed-off shotgun was a military (militia) type weapon when in fact they had been used extensively in WWI.

The first point of disagreement between the two courts is in regards to the Miller decision. The Fifth Circuit Court believes that Miller does not support the collective rights version, nor do they believe that it clearly supports an individual rights interpretation. In their opinion, Miller does not resolve the issue of which of the three models is correct. The Ninth Circuit Court believes that the Miller decision supports a collective rights version of the amendment. However, the Ninth Circuit Court is somewhat curious here. They first state that their review of Miller supports the collective rights model. Several pages later, they mention that a collective rights interpretation of Miller is open to serious debate. In a footnote, they then state that Miller supports both a limited individual rights model as well as a collective rights model. In another footnote, they state that: "Miller neither adopts nor rejects the collective view." Both Courts agree that there has been little guidance from the Supreme Court in the matter of the Second Amendment, and that the Miller decision is open to interpretation.

At this point, the two Circuit Court decisions veer in different directions. The Fifth Circuit Court, after concluding its' discussion of Miller, begins an analysis of the history of the Second Amendment, while the Ninth Circuit Court produces other commentary supporting its' interpretation of the Miller decision.

---

When discussing the history of the Second Amendment, there is a clear shift in focus between the two courts. The Ninth Circuit Court focuses on the first clause, (A well regulated militia being necessary to the security of a free state) while the Fifth Circuit Court concentrates on the second clause (The right of the people to keep and bear arms shall not be infringed).

### ***1.3 An analysis of the text of the Second Amendment***

Both Courts analyze the wording and structure of the Second Amendment. Although the Fifth Circuit Court starts out with the second part of the amendment, it's easier to see the differences between the opinions of the two courts by examining them in the original order of the amendment.

Well regulated: The Ninth Circuit Court believes that this term supports the belief that only government controlled military forces can be well regulated, and that supports their interpretation of the word "militia." They cite a few sources to support their view. The Fifth Circuit Court feels that the term merely implies that a militia should be trained and disciplined, and they cite sources to support that view. Overall, it is difficult to discuss the phrase "a well regulated militia" by breaking it out into two parts: "well regulated" and "militia."

Militia: In the view of the Fifth Circuit Court, the militia is the people of America: "Plainly, then, "a well-regulated Militia" refers *not* to a special or select subset or group taken out of the militia as a whole but rather to the condition of the militia as a whole, namely being well disciplined and trained. And, "Militia," just like "well-regulated Militia," likewise was understood to be composed of the people generally possessed of arms, which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large." (*United States v. Emerson*, October 16, 2001) To back this up, they reference:

- The Miller decision
- The Federalist Papers (46)
- Early Constitutional opinions

In the *Silveira* decision, the interpretation of the Second Amendment hinges on the definition of the term "militia" as used in the amendment. They state: "...that the interpretation of the first clause and the extent to which that clause shapes the content of the second depends in large part on the meaning of the term 'militia.' If militia refers, as the Fifth Circuit suggests, to all persons in a state, rather than to a military entity, the first clause would have one meaning-a meaning that would support the concept of traditional individual rights. If the term refers instead, as we believe, to the entity originally defined by that designation, the state-created and organized military force, it would likely be necessary to attribute a considerably different meaning to the first clause of the Second Amendment and ultimately to the amendment as a whole." (*Silveira v. Lockyer*, December 5, 2002)

The Ninth Circuit Court is very clear: " We believe the answer to the definitional question is the one that most persons would expect: 'militia' refers to a state military force." To back this up, they reference:

- The first and second articles of the Constitution
- The Fifth Amendment
- The Articles of Confederation

Their point is that these references all relate to a state controlled military body. Their argument is that if "militia" means one thing in these documents, it must mean the same thing in the Second Amendment. This is the flipside to the argument advanced by gun proponents when defining what "people" means in the Second Amendment.

Between the two courts, there is a clear disagreement over what the militia is/was and who belongs to it. If the militia consisted of all the people, then clearly an individual rights model is valid. If the militia is a

---

select group of people, similar to our modern military and National Guard, a collective rights model is supported.

Surprisingly, neither court discusses the rest of the preface; “being necessary to the security of a free state.” The Ninth Circuit Court does mention, somewhat dismissively, that “unregulated” mobs such as the Michigan Militia, racists, white supremacists, others having anti-government views and “indeed any private band of individuals” are clearly not necessary to the security of a free state and are not what the Founders were thinking of.

People: The Fifth Circuit Court defines the word “people” in the amendment. In their view, this means that the word “people” as used throughout the Constitution including the Second Amendment, refers to individual Americans. The Ninth Circuit Court doesn’t have a problem with this, as in their view the militia clause is the important one. The Second Amendment relates first to the militia, and the militia is comprised of select people.

Keep: The Fifth Circuit Court is a little vague here, claiming that “keep” does not have any military connotations. The Ninth catches them on this, but also states that defining the word doesn’t help either side in interpreting the amendment. However, in this section, the Ninth Circuit Court does succinctly sum up the question of the Second Amendment: **“The question with respect to the Second Amendment is not whether arms may be kept, but by whom and for what purpose.”** A clearer description of the issue cannot be stated.

Bear arms: Fifth Circuit Court: “Proponents of the states' rights and sophisticated collective rights models argue that the phrase "bear arms" only applies to a member of the militia carrying weapons during actual militia service. Champions of the individual rights model opine that "bear arms" refers to any carrying of weapons, whether by a soldier or a civilian. There is no question that the phrase "bear arms" may be used to refer to the carrying of arms by a soldier or militiaman. The issue is whether "bear arms" was also commonly used to refer to the carrying of arms by a civilian.” (*United States v. Emerson*, October 16, 2001) They conclude that the term does not apply only to military applications.

Ninth Circuit Court: “We consider it highly significant that the second clause does not purport to protect the right to “posses” or “own” arms, but rather to “keep and bear arms.” The choice of words is important because the phrase “bear arms” is a phrase that customarily relates to a military function.” They conclude that the phrase: “strongly suggests that the right that the Second Amendment seeks to protect is the right to carry arms in connection with military service.” To further support this position, they quote the original proposed wording of the Second Amendment, which included the phrase ‘no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.’” (*Silveira v. Lockyer*, December 5, 2002) Why include a clause that allows conscientious objection not to bear arms in the military unless the whole amendment is referring to military usage and not personal usage?

So they disagree on this point; that bearing arms applies to the military or to individuals. Since the Ninth Circuit Court has already concluded that a militia is a government military body, it interprets each word of the Second Amendment in those terms.

The Fifth Circuit Court continues to examine the first clause or preamble of the Second Amendment. They don’t break it down word by word as does the Silveira court, but after convincing themselves that the real meaning of the amendment is the second part, they review the first to see if it supports anything other than an individual rights interpretation. The difference in opinion between the two courts appears to be in defining the term “militia.” One side is going to claim that a militia is a state organized and regulated body, while the other side is going to claim that the militia is everybody.

---

Analyzing the Second Amendment from a textual perspective produces two opposite results, depending upon which of the two clauses you place the emphasis, and whether or not you believe the militia is an organized government entity or simply refers to the people. Supreme Court precedence in the Miller decision doesn't clarify the issue either.

#### ***1.4 Objections to the ratification of the Constitution***

Both courts begin their historical analysis of the ratification from the same point: Anti-Federalists' fears of the powers of the newly proposed government. Both agree that concerns over the state of the militias under the new government led to the Bill of Rights and the Second Amendment:

The Fifth Circuit Court: "Thus, the Anti-Federalists wanted the Constitution amended in three ways *prior* to ratification: 1) addition of a Bill of Rights; 2) recognition of the power of the states to arm and train their militias; and 3) curtailment of the federal government's power to maintain a standing army." (*United States v. Emerson*, October 16, 2001)

The Ninth Circuit Court: "What our historical inquiry reveals is that the Second Amendment was enacted in order to assuage the fears of the Anti-Federalists that the new federal government would cause the state militias to atrophy by refusing to exercise its prerogative of arming the state fighting forces, and that the states would, in the absence of the amendment, be without authority to provide them with the necessary arms. Thus, they feared, the people would be stripped of their ability to defend themselves against a powerful, overreaching federal government...Specifically, the amendment was enacted to guarantee that the people would be able to maintain an effective state fighting force and that they would have the right to bear arms in the service of the state." (*Silveira v. Lockyer*, December 5, 2002)

The commentary of the Anti-Federalists is relevant because the strongest objection to the Constitution was over the lack of a bill of rights, which several states already had in their own constitutions. The Constitution could only be *ratified* by the states; it could not be amended or changed and then ratified. All or nothing. To obtain ratification, a "deal" was struck that if the Constitution was ratified, the first order of business would be to enact a federal bill of rights. This bill of rights would spell out additional limits on the *federal* government. It isn't until the passage of the 14<sup>th</sup> Amendment after the Civil War, that the Supreme Court begins to rule that most of the Bill of Rights are also binding on the states.

The Fifth Circuit Court examines the ratification process and the objections from the states to the Constitution. They cite several objections from various states that seem relevant to defining what the intent of the Second Amendment was, because in most cases, they include specific references to proposed amendments to the Constitution similar to the Second Amendment. All quoted directly from (*United States v. Emerson*, October 16, 2001):

In the **Pennsylvania** convention, the Federalists outnumbered the Anti-Federalists about two to one. Not surprisingly, then, on December 12, 1787, the Pennsylvania convention ratified the Constitution by a vote of 46 to 23. The convention did not propose any changes to the Constitution. However, the disenchanted Anti-Federalists, known as the Pennsylvania Minority, explained that they would have agreed to the Constitution if it had been amended to reflect fourteen principles, among which were the following:

"7. That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of

---

public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

**Massachusetts** ratified the Constitution on February 7, 1788, by a vote of 187 to 168. Although the convention proposed nine amendments, none of them has relevance to the issues with which we are concerned. However, during the Massachusetts convention, Samuel Adams proposed the following amendments:

"And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions."

**New Hampshire:** After adjourning on February 22, 1788, to avoid rejection of the Constitution, New Hampshire ratified the Constitution on June 21, 1788, by a vote of 57 to 47. The New Hampshire convention proposed twelve amendments, the first nine of which are identical to Massachusetts'. New Hampshire's proposed Amendments 10 and 12 were as follows:

**X.** That no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress; nor shall soldiers, in time of peace, be quartered upon private houses, without the consent of the owners.

**XII.** Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.

**Virginia:** On June 25, 1788, the Virginia convention ratified the Constitution by a vote of 89 to 79. The convention proposed a bill of rights containing twenty separate provisions and, in a separate section, proposed twenty amendments to the Constitution. The seventeenth part of Virginia's proposed Bill of Rights and the ninth and eleventh parts of its proposed amendments to the Constitution were as follows:

**17th.** That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

**9th.** That no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members present, in both houses.

**11th.** That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.

---

**New York:** On July 26, 1788, New York ratified the Constitution by a vote of 30 to 27. New York incorporated an extensive Declaration of Rights and thirty-three proposed amendments to the Constitution into its ratification. The relevant portions of each are:

That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state.

That standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power.

That no standing army or regular troops shall be raised, or kept up, in time of peace, without the consent of two thirds of the senators and representatives present in each house.

**North Carolina:** On August 1, 1788, North Carolina refused to ratify the Constitution until a bill of rights and other amendments were added. The North Carolina convention demanded the same Bill of Rights and amendments as proposed by Virginia. It was not until November 21, 1789, after the Bill of Rights was forwarded by the First Congress to the states, that North Carolina finally ratified the Constitution by a vote of 194-77.

**Rhode Island** did not ratify the Constitution until May 29, 1790, and then by a vote of 34-32. Rhode Island incorporated a bill of rights into its ratification and proposed twenty-one amendments to the Constitution. The apposite portions of each are:

**XVII.** That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state; that the militia shall not be subject to martial law, except in time of war, rebellion, or insurrection; that standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that, at all times, the military should be under strict subordination to the civil power; that, in time of peace, no soldier ought to be quartered in any house without the consent of the owner, and in time of war only by the civil magistrates, in such manner as the law directs.

**XII.** As standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity, and as, at all times, the military should be under strict subordination to the civil power, that, therefore, no standing army or regular troops shall be raised or kept up in time of peace.

The Ninth Circuit Court is pretty quiet about the debates/commentary during ratification. However, after stating that six ratifying committees urged the adoption of a bill of rights, and that four of the six proposed amendments related to the militia with wording similar to the Second Amendment, they state: "Ratification debates from those states demonstrate that the proposed amendments had nothing to do with an individual right to possess arms, whether for personal or other use. Indeed, the ratification debates were almost entirely, but not completely, devoid of any mention of an individual right to own weapons." (*Silveira v. Lockyer*, December 5, 2002) In light of the above quoted sections from the Emerson decision, it appears that they are incorrect. Possibly, they are using the term "ratification debates" to refer to some official recording that is outside of the sources cited by the Fifth Circuit Court. Or perhaps they are taking some liberties with the phrase "almost, but not entirely, devoid." Hard to say...

So another point of disagreement between the two circuit courts: the Fifth believes an individual right to keep and bear arms was acknowledged and understood during the ratification process, while the Ninth doesn't.

---

## 1.5 Discussion of the Second Amendment during the first Congress

The Emerson decision moves on to the proposal and adoption of the Second Amendment as part of the Bill of Rights. It is interesting to note the various wordings of the proposed amendment (quoted directly from *United States v. Emerson*, October 16, 2001):

James Madison, House of Representatives, June 8, 1789 (*excerpt reprinted in Young, supra* note 34, at 651-53). Madison proposed to insert, in Article 1, Section 9, between its Clauses 3 and 4, the following clause (among others): "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."

Madison's proposal was eventually submitted to a House committee of eleven members, of which Madison was one. That committee issued its report on July 28, 1789. The clause that would become the Second Amendment then read: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms." House of Representatives, Proceedings on Amendments, July 28, 1789 (*reprinted in Young, supra* note 34, at 680-82).

On August 24, 1789, the House completed its work on the proposed amendments and forwarded them to the Senate. At this time, the amendment read:

"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person."

The Senate, which had the House action before it from August 25 through September 9, 1789, made three changes: 1) the words "composed of the body of the people" were stricken; 2) the words "the best" were replaced by "necessary to the"; and 3) the entire religiously scrupulous clause was stricken. *See* The Complete Bill of Rights 173-76 (Neil H. Cogan, ed., 1997). The Senate debates were conducted in secret, so there is no direct evidence of why these changes were made. The Senate rejected a proposed amendment to add the words "for the common defense" just after "the right of the people to keep and bear arms". *Id.* Like the House, the Senate rejected a proposed amendment that would have required the consent of two-thirds of both houses of Congress to maintain a standing army in time of peace. *Id.* The Senate on September 8, 1789 also refused to adopt an amendment that would have given the states power to arm and train their militias.

The House approved the Senate version of the amendment, and Congress forwarded it to the states along with the rest of the Bill of Rights on September 26, 1789.

The Ninth Circuit Court makes this statement regarding the debates over what would become the Second Amendment: "Notably, there is not a single statement in the congressional debate about the proposed amendment that indicates that any congressman contemplated that it would establish an individual right to possess a weapon." (*Silveira v. Lockyer*, December 5, 2002) The Fifth Circuit Court produces citations that dispute the claim of the Fifth Circuit Court. Another point of disagreement: whether or not the congressional debates considered the Second Amendment to be a collective or individual right.

---

## ***1.6 Comments/letters about the Bill of Rights in general and the Second Amendment in particular***

The Fifth Circuit Court goes into some detail about the letters exchanged, opinions published, accounts, etc., that went on during the first Congress. These documents bolster the Fifth Circuit Court's claim that what everyone was debating at the time was an individual right to keep and bear arms. Notably referenced are (quoted directly from *United States v. Emerson*, October 16, 2001):

Anti-Federalist William Grayson expressed concern to fellow Anti-Federalist Patrick Henry that the only amendments that would be approved are those, like Madison's, that recognize individual rights. Letter from William Grayson to Patrick Henry (June 12, 1789) (*excerpt reprinted in Young, supra note 34, at 668-69*).

Federalist Fisher Ames was pleased that Madison's amendments primarily concerned noncontroversial individual rights. Letter from Fisher Ames to George Richards Minot (June 12, 1789) (*excerpt reprinted in Young, supra note 34, at 668*).

Federalist Tench Coxe, in a widely republished article, described what would become the Second Amendment this way:

"As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." A Pennsylvanian [Federalist Tench Coxe], REMARKS *on the first part of the AMENDMENTS to the FEDERAL CONSTITUTION, moved on the 8th instant in the House of Representatives*, Philadelphia Federal Gazette, June 18, 1789 (*excerpt reprinted in Young, supra note 34, at 671*).

Anti-Federalist Samuel Nasson recognized that the amendment guaranteed the right of individuals to keep arms for any lawful purpose.

"I find that Amendments are once again on the Carpet. I hope that such may take place as will be for the Best Interest of the whole[.] *A Bill of rights* well secured that we the people may know how far we may Proceede in Every Department[.] then their [sic] will be no Dispute between the people and rulers[.] [*I*]n that may be secured the right to keep arms for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy[.] [Y]ou know to learn the Use of arms is all that can Save us from a forighn foe that may attempt to subdue us[.] for if we keep up the Use of arms and become well acquainted with them we Shall allway be able to look them in the face that arise up against us[.] for it is impossible to Support a Standing army large Enough to Guard our Lengthy Sea Coast[.]" Letter from Samuel Nasson to George Thatcher (July 9, 1789) (*excerpt reprinted in Young, supra note 34, at 796-97*) (emphasis added).

And several others.....

The Ninth Circuit Court does not challenge any of these documents, nor do they provide any of their own to strengthen their collective rights position.

## ***1.7 Nineteenth century Constitutional commentary***

The Emerson decision then moves on to 19<sup>th</sup> century commentary regarding the Second Amendment that supports the individual rights model. You would expect that the closer in time to the ratification of the

---

Constitution and the adoption of the Bill of Rights, the more accurate the interpretations. All of the following interpret the Second Amendment as an individual right:

St. George Tucker: St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, 300 (1803)

William Rawle: William Rawle, *A View of the Constitution of the United States of America* 125-26 (Da Capo Press 1970) (2d ed. 1829)

Justice Joseph Story: Joseph Story, *Commentaries on the Constitution of the United States* 708-709 (Carolina Academic Press 1987) (1833)

Thomas Cooley: Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 270-72 (Rothman & Co. 1981) (original ed. 1880)

The Ninth Circuit Court does not mention any 19<sup>th</sup> century commentary in the *Silveira* decision. Perhaps they feel it is irrelevant.

The Fifth Circuit Court concludes their historical analysis by summarizing the key points:

Ratification of the Constitution occurred without any changes to the document. However, several ratifying committees had objections to it related to an individual right to keep and bear arms.

To appease the Anti-Federalists, Madison proposed the amendments to the first Congress that would eventually become the Bill of Rights. The debates in Congress are consistent with, and support an individual right to keep and bear arms.

The wording of the Second Amendment is consistent with the desires of the Anti-Federalists. (It is important to remember that the Bill of Rights was incorporated to *appease* the Anti-Federalists. As such, you can maybe extrapolate that the philosophy of the Anti-Federalists would be consistent with the Second Amendment.) The wording is also consistent with an individual rights' model.

The personal diaries and letters of the participants of the First Congress are consistent with the individual rights model.

Nineteenth century commentary from Constitutional scholars interprets the Second Amendment as an individual right.

They then conclude: "We have found no historical evidence that the Second Amendment was intended to convey militia power to the states, limit the federal government's power to maintain a standing army, or applies only to members of a select militia while on active duty. All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans. We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." (*United States v. Emerson*, October 16, 2001)

The Ninth Circuit Court, not surprisingly, comes to a somewhat different conclusion: "In sum, our review of the historical record regarding the enactment of the Second Amendment reveals that the amendment was adopted to ensure that effective state militias would be maintained, thus preserving the people's rights to bear arms. The militias, in turn, were viewed as critical to preserving the integrity of the states within the newly structured national government as well as ensuring the freedom of the people from federal tyranny. Properly read, the historical record relating to the Second Amendment leaves little doubt as to its intended scope and effect." (*Silveira v. Lockyer*, December 5, 2002)

After wading through 150 pages of court decisions, what does it all mean? Where are the main points of disagreement between the two courts?

**Table 1. Points of Disagreement: Emerson v Silveira**

<b>Issue</b>	<b>Fifth Circuit Court (Emerson)</b>	<b>Ninth Circuit Court (Silveira)</b>
Models of the Second Amendment	Three: individual, collective and sophisticated collective.	Three: individual, collective and limited individual.
How important is Miller and what precedent does it set?	The Fifth Circuit Court believes that Miller does not support the collective rights version, nor do they believe that it clearly supports an individual rights interpretation.	The Ninth Circuit Court believes that the Miller decision supports a collective rights version of the amendment.
What the militia is/was and who belongs to it.	The militia consists of all the people.	The militia is a select group of people, similar to our modern military and National Guard.
The term, “bearing arms.”	Bearing arms is a common usage.	Bearing arms is a military usage.
Did the debates over the ratification of the Constitution support either a collective or an individual rights model?	The Fifth believes an individual right to keep and bear arms was acknowledged and understood during the ratification process.	The Ninth believes the records show that an individual right was not considered.
Did the Congressional debates over the Bill of Rights support either an individual or a collective model?	The Ninth believes the records clearly indicate that it was an individual right under consideration.	The Fifth believes that the records show that it was the formal militia that was discussed.
Personal records kept or published during the First Congress.	Personal letters, diaries, and articles support an individual rights model.	Apparently, the Ninth isn’t impressed with the commentary and records outside of Congress.
Does 19 <sup>th</sup> century commentary on the Bill of Rights support either model?	Clearly, the Fifth shows that constitutional scholars of the 1800s supported the individual rights model.	The Ninth Circuit Court does not mention any 19 <sup>th</sup> century commentary in the Silveira decision. Perhaps they feel it is irrelevant.

The two Circuit Courts agree on a few things: that Miller is a weak precedent; that the Supreme Court has ducked the issue and provided virtually zero precedent or guidance for lower courts to follow; that there are three basic models to interpret the Second Amendment. The major disagreement between them is in resolving the argument between the words “militia” and “people” that appear in the first and second clauses of the amendment. All of their discussions following the textual rendering of the Second Amendment are used to either support that the militia is a state body or that it is composed of the citizens. Not that it matters, but my opinion is that the Fifth Circuit Court has it right: the Second Amendment is an individual right.

Both the Fifth Circuit Court and the Ninth Circuit Court, regardless of your position on the Second Amendment, ought to be thanked for taking the time to elaborate on their respective decisions. Beyond the Second Amendment, they provide a concise history lesson about the early years of our country, something that is sadly neglected nowadays. And if you are interested in the gun issue, these two opinions will likely set the tone for the debates over the next several years.