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The Unitary Second Amendment

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RESPONSE

THE UNITARY SECOND AMENDMENT

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In *The Commonplace Second Amendment*,[1] Professor Eugene Volokh argues that in interpreting the Second Amendment we should give primacy to the operative clause over the purpose clause: While the latter may refer to a "well-regulated militia," the former baldly proclaims, "the right of the people [not the militia] to keep and bear arms shall not be infringed."[2] As a result, we should read the provision to guarantee a right of all private individuals to arms. Despite my considerable admiration for Professor Volokh's article, I wish to disagree on two points. First, even if we accord primacy to the operative clause, that clause itself implicitly refers to a semi-collective entity—the "Body of the People"—rather than to private individuals. Second, while I agree with Professor Volokh that we should not read the purpose clause to "trump" the operative language, we also should not read the operative language to depart from the purpose clause. Instead, the best interpretive strategy is to read the two clauses together to produce a single consistent meaning, with neither clause taking primacy. We should, in other words, read the amendment as a unitary provision.

I

PROFESSOR VOLOKH'S ARGUMENT

Conventional wisdom has long held that the Second Amendment is unusual for containing a statement of purpose—"a well-regulated militia being necessary to the security of a free state"—as well as operative language—"the right of the people to keep and bear arms shall not be infringed."[3] Professor Volokh rebuts this view by explaining that many state constitutional provisions contain purpose clauses. As such clauses are commonplace, we should attach no great significance to them; we should instead read provisions with such clauses in the same way that we would read any other constitutional provi-

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1 Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. Rev. 793 (1998).

2 U.S. Const. amend. II.

3 See Volokh, supra note 1, at 793 & n.1.

sion.[4] In particular, we should avoid one pitfall common in Second Amendment scholarship: Some erroneously argue that the operative language should have no force once, in the opinion of judges, it stops serving the objective expressed in the purpose clause.[5] Instead, according to Professor Volokh, we should understand that bills of rights grow from a distrust of judges. As a result, judges should not try to decide whether the operative language serves the stated purpose.[6] Rather, they should just apply the language as they find it: the Framers "meant to constrain courts, not to leave them with complete discretion to do justice any way they think best. The enactors had broad ends in mind, but they chose to serve those ends by enacting into law some particular means."[7]

Applying this framework to the Second Amendment, Volokh concludes:

> The Framers may have intended the right to keep and bear arms as a means towards the end of maintaining a well-regulated militia. . . . But they didn't merely say that "a well-regulated Militia is necessary to the security of a free State" . . . . Rather, they sought to further their purposes through a very specific means.
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> Congress thus may not deprive people of the right to keep and bear arms, even if their keeping and bearing arms doesn't further the Amendment's purposes.[8]

On the other hand, the purpose clause does have some function: it "may *aid* construction of the operative clause but may not *trump* the meaning of the operative clause: To the extent the operative clause is ambiguous, the justification clause may inform our interpretation of it, but the justification clause can't take away what the operative clause provides."[9]

Professor Volokh describes his achievement in this article as "modest,"[10] but he is being overly modest himself. In a field, Second Amendment studies, which is primarily characterized by very well-worn arguments, he has discovered an important new element and has constructed an analytical frame around it with force and elegance. I trust that this highly significant article will inject new vibrancy into the discussion about the proper relationship of the purpose clause to the operative language. To open that discussion, I would like to disagree with Professor Volokh's argument in two ways.

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4 See id. at 794-96.
5 See id. at 797-800.
6 See id. at 798-99, 805-06.
7 Id. at 805-06.
8 Id. at 806 (footnote omitted).
9 Id. at 807.
10 Id. at 794.

II
THE MEANING OF THE OPERATIVE LANGUAGE

For the present point, I accept Professor Volokh's general framework of analysis, but I submit that he has misapplied that framework to the Second Amendment. Professor Volokh's treatment of my own work well illustrates this misapplication. Volokh offers my work as his principal example[11] of the error that he condemns—using the purpose clause to trump the operative language:

> David C. Williams . . . argues that the well-regulated militia protects the security of a free State only so long as pretty much everyone has arms, and so long as the arms-bearers are "virtuous," . . . ; because this is no longer the case, he argues that the right is essentially "meaningless" and "outdated."[12]

In short, Professor Volokh reads my work to argue that there is now a tension between the purpose clause and the operative language: By its explicit terms, the latter would protect a general right to arms, but the former would not, because a well-regulated militia no longer protects the security of a free state.

In fact, however, Professor Volokh has mischaracterized my approach. Rather than using the purpose clause to trump the operative clause, I have sought to interpret the latter in light of the former, so that there is no tension between the two. Professor Volokh believes that the operative phrase "the right of the people" is unambiguous; it means "the right of individual persons."[13] In fact, the Framers intended a different meaning: They meant to protect the right of the Body of the People to keep and bear arms. In eighteenth century America, the Body of the People had a clear and distinctive meaning. It referred not to disconnected individuals but to the people considered as a unified, homogeneous, organic, collective body, devoted to the common good.[14] In part, I read "People" to mean the Body of the People by using the purpose clause to guide interpretation of the op-

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[11] Professor Volokh offers only two other scholarly examples of this error, both of which address the Second Amendment only in a single footnote. See id. at 801 n.27 (citing Lawrence H. Tribe, American Constitutional Law 299 n.6 (2d ed. 1988); Christopher L. Eisgruber, The Living Hand of the Past: History and Constitutional Justice, 65 Fordham L. Rev. 1611, 1621 n.23 (1997)). In other words, my work is the only full-length example of this error offered by Volokh, and as I explain in the text, Professor Volokh has misread my work in this regard. One therefore might wonder just how common this error really is.

[12] Volokh, supra note 1, at 797 n.12 (quoting David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551, 554-55 (1991) [hereinafter Williams, Civic Republicanism]).

[13] See Volokh, supra note 1, at 810.

[14] See David C. Williams, The Militia Movement and Second Amendment Revolution: Conjuring with the People, 81 Cornell L. Rev. 879, 904-09 (1996) [hereinafter Williams, The Militia Movement]; Williams, Civic Republicanism, supra note 12, at 577-78, 582.

erative clause. By stressing the importance of the militia, the Framers implicitly referred to the tradition of civic republicanism, which placed militia service at the center of a well-ordered polity. Civic republicans rejected the premises of liberal individualism; instead, they emphasized the need for a republican citizenry—virtuous, devoted to the common good, in short, forming a Body of the People.[15] In part, I read "People" this way for reasons independent of the purpose clause: For example, state provisions on which the amendment was based referred to the Body of the People, as did draft versions of the Second Amendment itself.[16] Thus, when the Framers wrote "the People," they meant the Body of the People, rather than random individuals.

The Framers had good reason for vesting the right to arms in the Body of the People rather than in random individuals. If the people are disunified, divided into factions, then any armed uprising will necessarily be made in the interests of a slice of the population, rather than for the common good. Only if the people are truly unified, comprising a Body, could there be a true revolution, made by the Body of the People for the commonweal.[17] In my view, the American citizenry is so fractured today that such a revolution is impossible. Instead, if we have armed uprisings, they will take the form of a multiparty civil war rather than a true revolution as the Framers understood that term. And the civil war will be made in the interests of those who have guns (and gun ownership today is markedly demographically skewed), rather than in the interests of the whole.[18]

Even in the 1780s, of course, Americans were far from perfectly unified or universally armed, and some framers accepted that fact. Other framers, like the architects of the Second Amendment, were, however, writing in an old political tradition—civic republicanism—that railed against factionalization and disarmament as signs of corruption. They sought therefore to preserve and expand what was left of American armed homogeneity, so as to preserve the possibility of

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15 See Williams, Civic Republicanism, supra note 12, at 577-94.

16 See Williams, The Militia Movement, supra note 14, at 907.

17 See Williams, Civic Republicanism, supra note 12, at 581-86 (discussing republican conception of rights of resistance and revolution); Williams, The Militia Movement, supra note 14, at 904-09 (discussing Framers' theory of revolution and its relation to right to bear arms).

18 See Williams, Civic Republicanism, supra note 12, at 590-92 (observing that gun owners are "overwhelmingly male and married, more Protestant than Catholic, more white than black . . . , generally middle class, and reside primarily in rural areas"; and arguing that contemporary gun owners view gun ownership as means of protecting their individual interests rather than common good); Williams, The Militia Movement, supra note 14, at 922-52 (discussing factional nature of contemporary American populace and radical composition of militia groups).

universal revolution.[19] By contrast, today, that kind of homogeneity appears hopeless and unattractive. Indeed, courts have interpreted the Constitution itself as rejecting the hope of homogeneity in favor of rights of diversity.[20] In short, the Second Amendment cannot mean what it once meant; whether it can mean something new is a different and harder question.[21]

As a result, Volokh is right that I find the amendment "meaningless" and "outdated," because by its own terms it makes sense "only so long as pretty much everyone has arms, and so long as the arms-bearers are 'virtuous.'"[22] However, I reach this conclusion not by giving the purpose clause primacy over the operative language, but by reading the amendment as a unitary whole. In my view, both the purpose clause and the operative language protect the right of the Body of the People to own arms so as to make a revolution. Because we no longer have a Body of the People, however, the amendment simply cannot mean what it once meant. To be sure, I may be mistaken in my analysis in a variety of ways: I may be wrong that the Framers meant to refer to the Body of the People or that we no longer form a Body of the People. The one thing that I have not done, however, is what Professor Volokh accuses me of doing—using the purpose clause to trump the operative clause. In the same way, I would not use the purpose clause to trump the operative clause in any of the other constitutional provisions that Professor Volokh cites. As a result, I suspect that he and I would interpret them in much the same way. Only a much longer article, analyzing the language and background of each provision with care, would suffice to demonstrate the truth of this suspicion.

Fundamentally, then, Professor Volokh and I disagree not over the correct relationship between the purpose and operative clauses, but over the meaning of the operative clause itself. Professor Volokh believes that "the people" can mean only "private individuals." That view, I submit, is the product of a common twentieth century myopia that sees liberal individualism as the only conceivable frame of refer-

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[19] See Williams, Civic Republicanism, supra note 12, at 563-71 (offering historical reconstruction of role of right to bear arms in republican tradition); id. at 592-96 (discussing republican belief in necessity of universal militia); Williams, The Militia Movement, supra note 14, at 908-09 (discussing Framers' theory of universal revolution).

[20] See Williams, The Militia Movement, supra note 14, at 922-23, 949-50 (observing that nation has become increasingly diverse and that unity is no longer viable or perhaps even desirable goal).

[21] I offer some possibilities for giving the amendment meaning in Williams, Civic Republicanism, supra note 12, at 597-614.

[22] Volokh, supra note 1, at 797 n.12 (quoting Williams, Civic Republicanism, supra note 12, at 554).

ence. If we instead take seriously the Framers' own context, we can see that "the people" could refer to a number of different ideas—some more individual and some more collective.[23] Professor Volokh's response to this contention is that other provisions of the Bill of Rights use the phrase "the people" to refer to individuals, so we should read the same phrase in the Second Amendment *in pari materia*:

> Given that "the right of the people" is likewise used to describe the right to petition the government, the right to be free from unreasonable searches and seizures, and the rights to keep and bear arms recognized in various contemporaneous state constitutions—all individual rights that belong to each person, not just to members of the militia—"the people" seems to refer to people generally.[24]

This contention, I submit, again fails to take historical changes seriously. In the eighteenth century, the Framers of the Second Amendment could use the phrase "the people" to refer indiscriminately to either individuals or the Body of the People because there was no inherent contradiction between those two. Given the Framers' assumptions about the social world, people were simultaneously individuals and members of the Body of the People. Today, because of social changes, we can see the possible contradiction between these two meanings, as American citizens are more individual than ever, but have given up aspirations to peoplehood in the strong republican sense—perhaps rightly so. Today, then, we must draw a distinction between the two uses and inquire which use was primary in which amendment. Plainly, the Fourth Amendment emphasizes people as individuals, but in my view the Second Amendment emphasized the people as members of an organic collectivity, an entity that no longer exists.

In short, then, at the highest level of generality, the Constitution uses "the people" to refer to "American human beings," but different provisions emphasize different attributes of those human beings. There is nothing anomalous about this sort of usage; the Constitution routinely uses a single phrase to refer to one general concept but with different emphases in different provisions. Thus, the constitutional phrase "execute" and its various cognates all seem to refer, at a gen-

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[23] Akhil Amar powerfully advanced this view for the Bill of Rights as a whole. See, e.g., Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131 (1991) (arguing that individual and minority rights are not dominant concern of Bill of Rights and suggesting instead that Bill of Rights establishes organizational structure meant to protect popular majority against risk that self-interested government officials will act in countermajoritarian fashion).

[24] Volokh, supra note 1, at 802.

eral level, to "carrying out," but different provisions emphasize different elements of that concept, some of them in opposition to one another. For example, the President is instructed to "take Care that the Laws be faithfully executed,"[25] meaning that he must enforce laws made by someone else. In this sense, the executive power is defined in opposition to the legislative power, which is the power to make laws. Yet Congress is also given the power to "make all Laws which shall be necessary and proper for carrying into Execution"[26] the other powers listed in Article I, Section 8. This usage of "execute" refers to Congress making law, so as to carry out its legislative functions. It would clearly be improper to read these two usages to refer to exactly the same activity, and in my view, it would be similarly improper to read "the people" always to refer to the same entity or entities.

III
UNITARY INTERPRETATION

In short, then, Professor Volokh and I agree that we should use the purpose clause to interpret but not trump the operative language. Despite that agreement, we reach very different conclusions on the meaning of the operative language after consultation of the purpose clause. Our disagreement should emphasize just how much interpretive latitude judges may claim—in perfect good faith—when they use the purpose clause to interpret the operative language. Professor Volokh recognizes this danger; he concedes that "[t]he line between interpreting the operative clause in light of the justification clause and interpreting the justification clause to trump the operative clause is of course fairly uncertain."[27] At another point, he recognizes that the line "might seem like a gossamer distinction."[28] If that line is truly "gossamer," however, then we must wonder how far Professor Volokh's framework really restrains untrustworthy judges—a restraint which, in Volokh's view, is the whole reason for the distinction itself.

This practical problem, I submit, accompanies a conceptual problem. As I read *The Commonplace Second Amendment*, it proposes a two-stage interpretation process. Judges may use the purpose clause to interpret the operative clause but not to trump it.[29] For that distinction to make sense, the operative clause must have some meaning separate and apart from the purpose clause, so we can know when the purpose clause "trumps" that meaning, as opposed to contributing to

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[25] U.S. Const. art. II, § 3.
[26] Id. art. I, § 8.
[27] Volokh, supra note 1, at 810.
[28] Id. at 807.
[29] See id.

its interpretation. Accordingly, we must first read the operative language without considering the purpose clause; that reading may yield a single determinate meaning, or it may yield a range of meanings. If the latter, then we may use the purpose clause to choose from among those meanings but not to propose new and different ones. If the former, then our task is done before we even look at the purpose clause; we give the operative clause its plain meaning, and the purpose clause becomes surplusage. Apparently, Professor Volokh believes that the operative language "the right of the people" falls into this second category: It is "rather unambiguous" in its reference.[30]

I would like to propose a different, and I believe more attractive, model of interpreting the two clauses—judges should consider both clauses simultaneously from the beginning of the interpretive process, they should seek to give both as much meaning as possible, and they should prefer those interpretations that make the two clauses as consistent as possible. Thus, if we consult the purpose clause from the start, it might suggest readings of the operative language that we would not otherwise discern; it might broaden the universe of possible meanings. This difference, I believe, is at the heart of my disagreement with Professor Volokh. Looking only at the operative language, he maintains that "the people" must refer to random individuals. Looking at both clauses together, I maintain that the most plausible reading interprets "the people" as the Body of the People. Professor Volokh does not entertain that reading at all, because he has artificially delimited his universe of possible interpretations. The result is a reading that is untrue to the original context—an eighteenth century provision as understood through twentieth century spectacles.

My method of interpretation, I believe, has several advantages. First, as illustrated above, it is likely to yield more historically sensitive interpretations. Second, it takes all of the language of the amendment seriously. Third, it makes the amendment as a whole more coherent, rather than reducing it to one or the other clause. Fourth, it helps us to examine our modern preconceptions. And fifth, it helps us to break out of what I believe to be a hopelessly stymied debate over the primacy of the two clauses, a debate that, for many commentators, seems to be driven by modern political concerns.[31] The collective rights interpretation of the amendment attributes overwhelming sig-

[30] Id. at 810. By contrast, Professor Volokh believes that the phrase "arms" can generate a range of meanings, and so we should use the purpose clause to choose the meaning "militia-style arms." See id. at 810-11.

[31] For a thumbnail description of this debate, see Williams, Civic Republicanism, supra note 12, at 558-59 (comparing "individual rights" and "states' rights" positions). Needless to say, I do not believe that all commentators in either of these two camps are driven by

nificance to the first clause: Since the provision cares only about arms-bearing within a militia, and since the modern version of the militia is the National Guard, then gun control is generally constitutional.[32] By contrast, the individual rights theory of the amendment attributes overwhelming significance to the second clause: Since the provision protects the right of "the people," then private individuals have a constitutional right to own guns, and most gun control is unconstitutional.[33] In fact, I submit, we should seek to give equal weight to both clauses. The operative language suggests that the Framers did intend to guarantee a right for all Americans to own guns, but the purpose clause indicates that they presupposed that Americans would have a collective identity that they now lack. Accordingly, we should use the clauses to cross-interpret one another: We should read the "well-regulated militia" to mean a "universal militia," and we should read "the people" to mean the Body of the People.[34]

If we interpret the amendment in this way, our primary desire should be to read the two clauses together to produce a single meaning. If we are successful, then we will never need worry about whether the purpose clause may "trump" the operative clause, or the opposite. As a result, the operative language will, for the most part, disappear as an independent limit on perfidious judges. Instead, the real limit on judges will be the requirement that they interpret the amendment as a unitary whole. The result, I believe, will not be that judges are freer to wander the fields of meaning; as Professor Volokh concedes, his own framework poses only a "fairly uncertain" limit on judges.[35] Judges who act in bad faith will be able to ignore their duties under either model of interpretation. However, for judges who act in good faith, unitary interpretation permits a more sensitive, coherent, and honest process of reading this deeply confusing amendment.

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political concerns; I mean merely to suggest that the debate in general exhibits a high degree of political contention.

[32] See, e.g., John H. Ely, Democracy and Distrust 95, 227 n.76 (1980); Tribe, supra note 11, at 299 n.6; Peter B. Feller & Karl L. Gotting, The Second Amendment: A Second Look, 61 Nw. U. L. Rev. 46, 61-62 (1966).

[33] See, e.g., David I. Caplan, Restoring the Balance: The Second Amendment Revisited, 5 Fordham Urb. L.J. 31, 37-40 (1976); Joyce L. Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L.Q. 285, 314 (1983).

[34] See Williams, Civic Republicanism, supra note 12, at 588-94 (discussing republican view that only universal militia can safely hold arms); Williams, The Militia Movement, supra note 14, at 904-09 (discussing Framers' view that right of revolution, and hence right to bear arms, lies with "the Body of the People" only).

[35] See Volokh, supra note 1, at 810.