THE INTERPRETATION OF THE SECOND AMENDMENT AS A COLLECTIVE RIGHT LEADS TO A FEDERALISM ISSUE

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In District of Columbia v. Heller, the Supreme Court's granting of the Writ of Certiorari was limited to the following question:

> Whether the following provisions - D.C. CODE §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 - violate the second amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?[1]

The question seems to presume that there is some form of collective right associated with the militia. Because of the way that the question was narrowed, the collective rights issue is addressed only as dicta in the majority opinion,[2] but the collective rights issue is central to Justice Stevens' dissent. This raises interesting questions:

> does the Second Amendment protect both a collective right and an individual right?[3]

> drawing only from the language in *Heller*, what might a collective right be?

The latter question is the focus of this article.

Analyzing the descriptions of a collective right in the dicta and dissent is important because the law is whatever the last judge who ruled upon it says that it is.[4] The ideas expressed in various dissents have ultimately been

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* Since the Supreme Court's decision in D.C. v. Heller, the author has discussed this issue with his students in various classes, incorporated aspects of the issue on exams, and assigned aspects of the topic to a student as an independent study. Certainly, those interactions have influenced and shaped the author's thoughts about this topic and those contributions are recognized and appreciated.

1 District of Columbia v. Heller, 552 U.S. 1035 (2007).

2 District of Columbia v. Heller, 554 U.S. 570, 598-99 (2008).

3 Dave Hardy, *Standards of Review, the Second Amendment, and Doctrinal Chaos*, 43 S. ILL. U. L.J. 91 (2018) (answering the issue in the affirmative).

4 The original source of that statement has been lost to history.

adopted by later majority opinions.[5] Justice Scalia's dicta in the majority opinion has been used in ways with which he may well have disagreed.[6] But more importantly, every attorney has an obligation as a zealous advocate to present the best good-faith argument available on behalf of their client. "Cause lawyers" sometimes fall into the trap of trying to win a particular case with a specific legal argument that leads to a preferred precedent – rather than the best good-faith argument that might be presented.[7] The descriptions of the collective right as described in the two opinions in *Heller* present an opportunity to recognize that states can limit the national government's power to restrict gun rights.

I. DESCRIPTION OF THE COLLECTIVE RIGHT IN *HELLER*.

Developing a solid understanding from Heller of the two sides' positions regarding the collective right is cumbersome. The issue is not central to answering the question before the Court, and the dissent does not fully explain its position.[8] However, the language in the dissent regarding the collective right is definitive:

> The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States.[9]

and

> Similarly, the words "the people" in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the

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5 Among a multitude of others, the views expressed in the dissents of *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bowers v. Hardwick*, 478 U.S. 186 (1986) guided later majority opinions adopted in *Brown v. Board of Education*, 349 U.S. 294 (1955), *United States v. Darby*, 312 U.S. 100 (1941), and *Lawrence v. Tex*as, 539 U.S. 558 (2003), respectively.

6 *See* Worman v. Healey, 293 F. Supp. 3d 251 (D. Mass. 2018).

7 *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 983 (9th Cir. 2013) is one example.

8 District of Columbia v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting). *See id.* at 679 for a reference to Justice Stevens argument failing to define "the collective right" despite having chided the majority for the same failure.

9 *Heller*, 554 U.S. at 637.

> ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.[10]

In essence, the four dissenters took the position that the Second Amendment's primary purpose is to ensure that the states can defend themselves against "an intolerable threat to the sovereignty of the several States" to protect the "divided sovereignty created by the Constitution" from not only outside forces, but also from the United States government.[11]

The majority's position may not be inconsistent with this view. While the question presented to the court was limited to concerns related to an individual right, the majority does address this second purpose pertaining to a collective right:

> [W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny. . . Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. . . It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.[12]

While the majority does take the position that the word "state" in the amendment refers to a polity rather than one of the states in the United States[13], the descriptions by both the dissent and the majority stress that the collective right is designed to be able to resist the national government. The most effective way to ensure that the states are capable of resisting the national government militarily is by keeping the national government from diminishing in any way the armament available to the states. This understanding of the Second Amendment nullifies the national government's supremacy over the arming of state militias and leaves each state in control of any decisions related to the appropriate armament for its own militia – and the individuals therein.

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10 *Id.* at 645.
11 *Id.* at 637, 645.
12 *Id.* at 598-99 (majority opinion).
13 *Id.* at 597.

II. FEDERALISM CONCERNS

The dissenters assertion that the Second Amendment protects the states against "an intolerable threat to the sovereignty of the several States" to protect the "divided sovereignty created by the Constitution" presents an unusual federalism issue when national law conflicts with a particular state's legislation regarding the development and arming of the state militia.[14] Normally, the Supremacy Clause means that national legislation related to guns would preempt any conflicting state action related to guns.[15] However, a collective rights interpretation of the Second Amendment, as described by dissenters, would nullify any Supremacy Clause concerns because the Second Amendment then indicates that the national government lacks the power to interfere with the state militia. A few ancient, as well as existing, state laws provide a mechanism to explore how this conflict would be resolved.

In *United States v. Miller*[16] the Supreme Court referenced the then existing statute related to the Virginia Militia in support of a militia-centric reading of the Second Amendment:

> The General Assembly of Virginia, October, 1785 (12 Hening's Statutes), declared, "The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."
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> It further provided for organization and control of the Militia and directed that "All free male persons between the ages of eighteen and fifty years," with certain exceptions, "shall be inrolled or formed into companies." "There shall be a private muster of every company once in two months."
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> Also that "Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred, as follows: . . . every non-commissioned officer and private with a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket, a good knapsack and canteen, and moreover, each non-commissioned officer and private shall have at every muster one pound of good powder, and four pounds of lead, including twenty blind cartridges; and each serjeant shall have a pair of moulds fit to cast balls for their respective companies, to be purchased by the commanding officer out of the monies arising on delinquencies. Provided, That the militia of the counties westward of the Blue Ridge, and the counties below adjoining

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14 *See id.* at 637, 645 (Stevens, J., dissenting).

15 *See* U.S. CONST. art. VI, cl. 2.

16 United States v. Miller, 307 U.S. 174 (1939).

> thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof. And every of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer. If any private shall make it appear to the satisfaction of the court hereafter to be appointed for trying delinquencies under this act that he is so poor that he cannot purchase the arms herein required, such court shall cause them to be purchased out of the money arising from delinquents."[17]

The first italicized portion of that quotation could be used by any state to establish the supremacy of state legislation that conflicts with national laws by stating that the purpose of the law is ensure "[t]he defense and safety" of the state by "having its citizens properly armed and taught the knowledge of military duty."[18] While a state could take this position at any time, existing statutes below provide reasons for state statutes to specifically explain why they counter national enactments, and the collective rights position would allow for this additional purpose to have meaning.

In the wake of recent shootings, advocates and politicians are pursuing laws that would require a person to be over age twenty-one to purchase (and maybe possess) a gun. Some national retail outlets have stopped selling certain types of guns to people under the age of twenty-one. Interestingly, these actions conflict with the current Virginia requirement that those as young as sixteen years of age are part of the militia:

> The militia of the Commonwealth of Virginia shall consist of all able-bodied citizens of this Commonwealth and all other able-bodied persons resident in this Commonwealth who have declared their intention to become citizens of the United States, who are at least *sixteen years of age* and, except as hereinafter provided, not more than fifty-five years of age. The militia shall be divided into four classes, the National Guard, which includes the Army National Guard and the Air National Guard, the Virginia State Defense Force, the naval militia, and the unorganized militia.[19]

While the current Virginia statutes do not specify in detail how the militia should be outfitted, they do provide for militia organizations to own military property.[20] If Virginia were to modify and modernize its statutes to look like the one cited in *Miller*, it might (in part) look something like this: on the day appointed, citizens shall muster with an AR-15 style semi-automatic rifle, a 9mm semi-automatic pistol, 500 rounds of ammunition for

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17 *Id*. at 181-82 (emphasis added).
18 *Id*. at 181.
19 Va. Code Ann. § 44-1 (2018) (emphasis added).
20 Va. Code Ann. § 44-99 (2018).

each, a bullet proof vest, camouflage clothing, a medical field kit, a range finder, and night vision goggles.

If Congress passed legislation limiting gun ownership to people twenty-one years of age and older and prohibited weapons that the state specified shall be brought to muster, the question of whether a state, such as Virginia, would be able to nullify the national law arises. A Second Amendment that provides a bulwark for the states against "an intolerable threat to the sovereignty of the several States" to protect the "divided sovereignty created by the Constitution" would justify such state nullification of federal law.[21]

Around the time of *Heller*, and shortly thereafter, gun rights activists were successful in getting various versions of a Firearms Freedom Act passed in several states. Kansas, Montana, and Wyoming have enacted three examples. Kansas called theirs the Second Amendment Protection Act.[22] Because the enactment came post-*Heller*, the Kansas statute is couched in terms of protecting individual rights and resisting preemption by the national government pursuant to Commerce Clause authority:

> 50-1202. Legislative declaration. The legislature declares that the authority for K.S.A. 2017 Supp. 50-1201 through 50-1211, and amendments thereto, is the following: . . .
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> (c) The second amendment to the constitution of the United States reserves to the people, individually, the right to keep and bear arms as that right was understood at the time that Kansas was admitted to statehood in 1861 . . . .
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> (d) Section 4 of the bill of rights of the constitution of the state of Kansas clearly secures to Kansas citizens, and prohibits government interference with, the right of individual Kansas citizens to keep and bear arms.[23]

The Kansas statute also specified the type of items exempt from regulation by the national government:

> 50-1204. Personal firearms, accessories and ammunition manufactured in Kansas; exempt, interstate commerce.
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> (a) A personal firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those

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21 District of Columbia v. Heller, 554 U.S. 570, 637, 645 (2008) (Stevens, J., dissenting).

22 KAN. STAT. ANN. § 50-1201 (2018).

23 KAN. STAT. ANN. § 50-1202 (2018).

> items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in the state of Kansas.[24]

The Kansas act then essentially declares Kansas a sanctuary state pertaining to national gun regulation by prohibiting Kansas officials from enforcing such regulations[25] and making any similar actions by any national government representatives a felony.[26]

The Brady Campaign to Prevent Gun Violence challenged the Kansas Second Amendment Protection Act in federal district court, but the court concluded that the Brady Campaign lacked standing to pursue the matter.[27]

The problem with the Kansas statute is that it is crafted to nullify the U.S. government's regulation of interstate commerce. A similar design and argument was costly in the defense of the Montana gun rights sanctuary law.

In *Montana Shooting Sports Association v. Holder*, the Montana Firearms Freedom Act (denouncing national manufacturing requirements) was preempted by the Commerce Clause recognizing the supremacy of national statutes pertaining to the manufacturing requirements of guns.[28] However, several oddities should be noted:

> 1) these were private entities challenging the authority of the national government to regulate gun manufacturing under the Commerce Clause;
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> 2) the State of Montana was not a party to the suit to defend its laws;
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> 3) the private entities did not pursue arguments related to the protection of any Second Amendment rights of any type on appeal; and
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> 4) the dissent argues that the ruling on the validity of the Montana Firearms Freedom Act was unnecessary.[29]

The parties in the above case did not raise the issues related to the rights of individuals in the militia nor of the sovereign authority of the State of Montana to ensure the arming of its militia. The court provided a brief discussion of the sovereign authority of the State of Montana to address manufacturing in that state, but that is part of the basic preemption analysis involving the Commerce Clause. If the Second Amendment prohibits the national government from interfering with the state militia, then no catch-all

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24 KAN. STAT. ANN. § 50-1204 (2018).
25 *See* KAN. STAT. ANN. § 50-1206 (2018).
26 *See* KAN. STAT. ANN. § 50-1207 (2018).
27 *See* Brady Campaign to Prevent Gun Violence v. Brownback, 110 F. Supp. 3d 1086 (D. Kan. 2015).
28 *See* Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975 (9th Cir. 2013).
29 *Id*. at 983 (Bea, J., dissenting).

power, such as the Commerce Clause or tax and spend provisions,[30] should survive a conflict with state laws related to the militia.

The problem with many of the Firearm Freedom Acts is that the language seems primarily based upon the argument addressing what is truly local manufacturing.[31] But, if a state included the enforcement prohibitions on national government actors in a militia statute similar to Virginia's or included language similar to Wyoming's Firearms Freedom Act,[32] then that particular state should argue that national legislation that interferes with that state's sovereign authority to field its militia is "an intolerable threat to the sovereignty of the several States" to protect the "divided sovereignty created by the Constitution."[33]

III. ENFORCEMENT OF STATE LAWS

Kansas and Wyoming created state crimes for national government actors if national laws are enforced (or there is an attempt to enforce) contrary to the state law.[34] Normally laws, such as those enacted by Kansas and Wyoming, that would subject national government officials to state criminal sanction, would be unenforceable under the Supremacy Clause. Supremacy clause immunity is not a fully developed area of constitutional law, but there is a basic rule in place. The issue arises

> when a federal officer is "held in the state court to answer" for (1) an act that federal law "authorized" the officer to undertake, and (2) "in doing that act, he did no more than what was necessary and proper for him to do." For conduct to be "necessary and proper," an officer must subjectively believe that his actions were appropriate to carry out his federal duties, and that belief must be objectively reasonable. In other words, the Supremacy Clause prohibits a state from punishing, whether by local prosecution or

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30 Whether the national government could entice a state to restrict the armaments available to the militia using strings attached to money should be a completely separate article. But there is a distinct difference between spending money to exercise a power not specifically denied but retained by another sovereign as compared to spending money to exercise a power specifically prohibited as well as retained by another.

31 *See* KAN. STAT. ANN. § 50-1204(a) (2018); *see also* WYO. STAT. ANN. § 6-8-404(a) (2018).

32 WYO. STAT. ANN. § 6-8-406 (2018).

> (a) The legislature declares that the authority for W.S. 6-8-402 through 6-8-406 is the following: . . .
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> (viii) Article 1, sections 1 and 7, of the Wyoming constitution clearly provide that the people of the state have the sole and exclusive right of governing themselves as a free, sovereign and independent state, and do so and forever hereafter shall exercise and enjoy every power, jurisdiction and right, pertaining thereto, which is not, or may not hereafter be, by them expressly delegated to the United States of America; . . .

33 District of Columbia v. Heller, 554 U.S. 570, 637, 645 (2008) (Stevens, J., dissenting).

34 KAN. STAT. ANN. § 50-1207 (2018); *see also* WYO. STAT. ANN. § 6-8-405(b) (2018).

> private suit under state law, (1) a federal officer; (2) authorized by federal law to perform an act; (3) who, in performing the authorized act, did no more than what the officer subjectively believed was necessary and proper; and (4) that belief was objectively reasonable under the circumstances.[35]

If the courts ever established that the Second Amendment nullifies the Supremacy Clause related to a collective right to bear arms, supremacy clause immunity would presumably be unavailable to the official interfering with state laws that ensure that state militias have adequate armament. Even if a national government official could somehow claim supremacy clause immunity with a partially nullified Supremacy Clause, after a court has established the validity of the nullification, the government official would no longer be able to claim that the "belief (that the act was authorized by national law) was objectively reasonable under the circumstances." The criminal case might still be moved into the national court system under the congressional statute at issue in *Kleinert*, but the supremacy clause immunity defense should be unavailable.

IV. THE INDIVIDUAL RIGHT ARGUMENTS PERSIST

While an individual state would have to contest the national legislation that interferes with arming a militia, both the state and individual should be able raise this argument if the state also has laws similar to the old Virginia militia statutes referenced in *Miller* above. Because that old style of statute requires the citizen militia to turnout with certain designated armament, an individual should be able to use the logic of the dissent so that the individual does not have to choose between breaking one of two laws that are in conflict.

However, there should also be several other approaches an individual could take if the Second Amendment protects a collective right of the type described by the dissent in *Heller*. Two options are mentioned in other articles in this volume of this journal. Dave Hardy puts forth the idea of two Second Amendments.[36] Dave Kopel presents the argument that militiamen have the right to bear arms.[37] Lastly, the majority opinion by Justice Scalia in *Heller* also does a pretty good job of justifying a fundamental rights basis for gun rights associated with self-defense:

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35 Texas v. Kleinert, 855 F.3d 305, 314-15 (5th Cir. 2017) (internal citations omitted); *see also* Mesa v. California, 489 U.S. 121 (1989).

36 Dave Hardy, *Standards of Review, the Second Amendment, and Doctrinal Chaos* 43 S. ILL. U. L.J. 91 (2018).

37 Dave Kopel, *The Second Amendment and Young Adults*, 43 S. ILL. U. L.J. 119 (2018).

> By the time of the founding, the right to have arms had become fundamental for English subjects. . . . Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.[38]

Thus, even if an individual had to defend the right without use of the Second Amendment, substantive due process arguments under either the Fifth Amendment or the Fourteenth Amendment should suffice.

While the Supreme Court in *Heller* declined to specify the level of scrutiny demanded by the Second Amendment, typical fundamental rights strict scrutiny analysis should suffice – if the analysis is not twisted to satisfy certain agendas. Preservation of life and reducing mass killings should easily satisfy the government's compelling interest to pass legislation. Broad approaches at prohibiting gun ownership (such as setting a valid age of twenty-one rather than eighteen) probably would fail the narrowly tailored requirement of strict scrutiny. Simple registration requirements would also fail unless the government could show that they somehow significantly preserve life in a way that is not too burdensome. However, a requirement that an individual undergo forty hours of training once every three years to ensure the proper and safe use and storage of weapons should survive if the government can show that lives are preserved because the person: has been trained in identifying friend or foe prior to firing the weapon; knows how to safely handle a weapon; and knows how to safely store and transport a weapon.

V. CONCLUSION

While the federalism issue is implicit in Justice Stevens' dissent in *Heller*, two years later, in *McDonald v. Chicago*, he explicitly asserts

> [i]t was the States, not private persons, on whose immediate behalf the Second Amendment was adopted. Notwithstanding the *Heller* Court's efforts to write the Second Amendment's preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government. The Second Amendment, in other words, "is a federalism provision." It is directed at preserving the autonomy of the sovereign States . . . .[39]

If that is true, any conflict between state legislation and national legislation that might limit a state's ability to arm its militia should be resolved in favor

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38 *Heller*, 554 U.S. at 593-94.

39 McDonald v. Chicago, 561 U.S. 742, 897 (2010) (internal citations omitted).

of the states, even to the point of nullifying the national law and criminalizing the enforcement of national laws in violation of state laws. But, the states would not have carte blanche to limit the gun ownership rights of individuals because there are at least three legal arguments limiting state infringement of an individual right to keep and bear arms for self-defense.