THE PATH TO FULL INCORPORATION OF THE SECOND AMENDMENT: AN INDIVIDUAL RIGHT

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The Second Amendment to the United States Constitution provides: "A well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The Anti-federalists insisted upon the Bill of Rights, including the right to be armed, in order to protect the rights of the people.[1] Perhaps the most hotly debated 27 words in the Bill of Rights, the amendment's odd wording leaves us to ponder the question of what right(s) the framers intended to protect.

Unfortunately the Supreme Court's holdings on the Second Amendment are just as confusing. It is important to note that, while many of the cases considered by the court involved the use of firearms, relatively few actually announced a holding relating directly to the Second Amendment.

An Individual Right, but Only from Federal Regulation

The court first addresses the Second Amendment directly in *United States v. Cruikshank,* 92 U.S. 542 (1875). A post-Civil War case, *Cruikshank* involved the issue of whether or not certain fundamental rights were made applicable to the states through the 14th Amendment, including the right to possess firearms. The court made two essential holdings with respect to firearms. The first was that the right to bear arms for lawful purposes was not created, conferred by, or dependent upon, the

Constitution for its existence. *Id.* at 553. Secondly, and at the time as importantly, the court held that the Second Amendment, "has no other effect than to restrict the powers of the national government," thereby refusing to incorporate it to the states through the relatively new 14th Amendment. *Id.* This holding undoubtedly led to the future hodgepodge of state firearms laws we see now.

Eleven years later, in *Presser v. Illinois,* 116 U.S. 252 (1886), the court held that "all citizens capable of bearing arms" constitute the militia and that they all have the individual right to keep and bear arms. *Id.* at 255. Ultimately the court simply reaffirmed the Second Amendment restricts only the power of federal government to regulate firearms and not that of the states.

Unless That Regulation is a Tax

In 1934, Congress passed the National Firearms Act (NFA), which regulated certain firearms, not by making them illegal, but rather by imposing hefty tax penalties for their possession, as well as by requiring firearms dealers to pay a tax in order to remain in business.[2] However, in the wake of Prohibition-era gangland violence – and some suggest the St. Valentine's Day Massacre in particular, the move to place restrictions, even if only monetarily, on the sale and possession of certain firearms and firearms-related businesses, appeared to many to be an impermissible restriction.

The first challenge to the NFA occurred in *Sonzinsky v. United States,* 300 U.S. 506 (1937). Sonzinsky, who had been convicted of failing to pay the $200 dealer licensing tax, argued that the NFA was never intended to raise revenue, because the taxes were so high as to virtually guarantee non-compliance, and was instead an unconstitutional attack on the Second Amendment itself. The court simply concluded that, as long as, on its face, the law appeared to raise revenue, it was an appropriate use of the federal taxing powers and not a violation of the Second Amendment. *Id.* at 513.

Or the Firearm is Reasonably Related to Military Use

Two years later, the court heard it's second NFA-related case with *United States v. Miller*, 307 U.S. 174 (1939). Unlike *Sonzinsky*, which added little to the discussion, *Miller* has given rise to more than 70 years of Second Amendment debate. In general, it is used for the argument that only firearms commonly used by the military and militia are protected by the Second Amendment. However, a closer reading suggests that this is incorrect. Jack Miller and Frank Layton traveled from Oklahoma to Arkansas with a double-barreled shotgun with barrel lengths less than 18 inches.[3] Unfortunately, Miller had not paid the $200 tax, nor had he registered the firearm

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appropriately as required by the NFA, prior to transporting the firearm across state lines. The district court dismissed the indictments against Miller and Layton as a violation of the Second Amendment and the government appealed.[4]

The Supreme Court holding is somewhat odd due to a convoluted procedural history, including the fact that appellees were not present nor represented before the Supreme Court and there was no real evidentiary record about the firearm below. In its holding, the court found that, unless evidence showing a short-barreled shotgun has some "reasonable relationship to the preservation or efficiency of a well-regulated militia" it was not protected by the Second Amendment. It then held that it was not "within judicial notice that this weapon is any part of the ordinary military equipment, or that its use could contribute to the common defense." *Id.* at 178. The court remanded the case back down to resolve the issues raised. By that time Miller had been murdered, and Layton accepted a plea bargain to avoid potential prison time. For that reason, no evidentiary hearing on the applicability of a short-barrel shotgun to military use was ever conducted, and so the real question raised in *Miller* remained unresolved.

That Is Until 2008

Until 2008, it was illegal for residents of the District of Columbia to possess or register handguns, and all lawfully licensed and possessed long guns (rifles and shotguns) were required to be unloaded and locked when in the home, essentially rendering it impossible for citizens to use firearms for lawful self-defense. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the court really, for the first time, fully dissects the meaning of the Second Amendment. The lengthy opinion held that the Second Amendment is useless if not intended to be an individual's right to keep and bear firearms for traditionally lawful purposes unconnected with military or militia. It also clarified the confusion created in *Miller,* by holding that the amendment covers "all instruments that constitute bearable arms." *Id.* at 582. Traditionally, lawful uses include self-defense within the home, which was denied by the D.C. prohibition on loaded firearms. *Id.* at 630. The court also held that the blanket ban on handguns violated the Second Amendment by prohibiting an entire class of firearm. *Id.* However the court stopped short of saying the Second Amendment conveys an unlimited right to possess any firearm one can imagine. *Id.* at 626 Rather the court elected to clarify the confusing *Miller* decision by holding that the right extends to weapons in common use at the time, and may change over time. *Id.* at 627. The court also held that reasonable restrictions as to possessing firearms in certain locations, such as schools, or by certain people, such as felons or the mentally ill, would not violate the Second Amendment. *Id.* at 626. In the end all that the ruling could not do was apply the Second Amendment as an individual right to the states, due to the fact that it applied only to federal law.

And Then Full Incorporation

In 2010, in the consolidated case of *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the court, relying on *Heller*, held that city of Chicago ordinances, banning the possession of handguns by private citizens, violated the Second Amendment, which the court held is now fully incorporated to the states under the Due Process Clause of the 14th Amendment. *Id.* at 3026.

Conclusion

While *Heller* and *McDonald* changed the landscape of Second Amendment jurisprudence, they will certainly not be the final word. Shortly after the court ruled in *McDonald*, the Seventh Circuit Court of Appeals held that Illinois, the last state to prohibit the carrying of concealed firearms by citizens, was violating the Second Amendment by depriving citizens of the right to carry or bear the most effective self-defense tool available, while outside of their homes. *Moore v. Madigan,* 702 F.3d 933 (7th Cir. Ill., 2012). Rather than appealing, the Illinois state legislature passed a law permitting the issuance of concealed carry permits. Only time will tell if we have heard the last word from the Supreme Court on the Second Amendment but, with two 5-4 decisions to rely on, I, for one, doubt it. ■

1. Lee, *Additional Letters From the Federal Farmer 170 (1788).*
2. 26 U S C, §§ 1132 1132 c.
3. *United States v. Miller,* 26 F. Supp. 1002 (W.D. Ark. 1939).
4. *Id at 1003.*

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