BEARING ARMS

SECOND AMENDMENT

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.

In spite of extensive recent discussion and much legislative action with respect to regulation of the purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there is no definitive resolution by the courts of just what right the Second Amendment protects. The opposing theories, perhaps oversimplified, are an "individual rights" thesis whereby individuals are protected in ownership, possession, and transportation, and a "states' rights" thesis whereby it is said the purpose of the clause is to protect the States in their authority to maintain formal, organized militia units.[1] Whatever the Amendment may mean, it is a bar only to federal action, not extending to state[2] or private[3] restraints. The Supreme Court has given effect to the dependent clause of the Amendment in the only case in which it has tested a congressional enactment against the constitutional prohibition, seeming to affirm individual protection but only in the context of the maintenance of a militia or other such public force.

In *United States v. Miller*,[4] the Court sustained a statute requiring registration under the National Firearms Act of sawed-off

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[1] A sampling of the diverse literature in which the same historical, linguistic, and case law background is the basis for strikingly different conclusions is: STAFF OF SUBCOM. ON THE CONSTITUTION, SENATE COMMITTEE ON THE JUDICIARY, 97TH CONGRESS, 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982); DON B. KATES, HANDGUN PROHIBITION AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT (1984); GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (Robert J. Cottrol, ed. 1993); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Symposium, *Gun Control*, 49 LAW & CONTEMP. PROBS. 1 (1986); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

[2] Presser v. Illinois, 116 U.S. 252, 265 (1886). *See also* Miller v. Texas, 153 U.S. 535 (1894); Robertson v. Baldwin, 165 U.S. 275, 281–282 (1897). The non-application of the Second Amendment to the States is good law today. Quilici v. Village of Morton Grove, 695 F. 2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

[3] United States v. Cruikshank, 92 U.S. 542 (1875).

[4] 307 U.S. 174 (1939). The defendants had been released on the basis of the trial court determination that prosecution would violate the Second Amendment and no briefs or other appearances were filed on their behalf; the Court acted on the basis of the Government's representations.

shotguns. After reciting the original provisions of the Constitution dealing with the militia, the Court observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view."[5] The significance of the militia, the Court continued, was that it was composed of "civilians primarily, soldiers on occasion." It was upon this force that the States could rely for defense and securing of the laws, on a force that "comprised all males physically capable of acting in concert for the common defense," who, "when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[6] Therefore, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is 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."[7]

Since this decision, Congress has placed greater limitations on the receipt, possession, and transportation of firearms,[8] and proposals for national registration or prohibition of firearms altogether have been made.[9] At what point regulation or prohibition of what classes of firearms would conflict with the Amendment, if at all, the *Miller* case does little more than cast a faint degree of illumination toward an answer.

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[5] Id. at 178.

[6] Id. at 179.

[7] Id. at 178. In Cases v. United States, 131 F. 2d 916, 922 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943), the court, upholding a similar provision of the Federal Firearms Act, said: "Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia." *See* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (dictum: *Miller* holds that the "Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'").

[8] Enacted measures include the Gun Control Act of 1968. 82 Stat. 226, 18 U.S.C. §§ 921–928. The Supreme Court's dealings with these laws have all arisen in the context of prosecutions of persons purchasing or obtaining firearms in violation of a provisions against such conduct by convicted felons. Lewis v. United States, 445 U.S. 55 (1980); Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); United States v. Bass, 404 U.S. 336 (1971).

[9] E.g., NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1031–1058 (1970), and FINAL REPORT 246–247 (1971).