The Second Amendment, The States, and the People

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Amazing as it may seem, since ratification of the Bill of Rights in 1791, the Supreme Court has never provided a definitive statement as to whether, in the Justices' opinions, the Second Amendment applies to the States as well as to the General Government. Until now. For the Court has just agreed to hear *McDonald v. City of Chicago*,in which finally that issue is squarely presented. This case is being heralded as being of groundbreaking significance.

For among most contemporary judges, lawyers, and members of the legal intelligentsia, the reach of the Second Amendment passes for a controversial question; however, both the original Constitution and the Second Amendment made abundantly clear that "the right of the people to keep and bear Arms" applies to *every* level of government, without exception, throughout the United States.

According to the resolution of the Congress that submitted the Bill of Rights to the States for ratification in 1789, the first 10 Amendments to the Constitution constituted "further declaratory and restrictive clauses" added "in order to prevent misconstruction or abuse of its powers." In *The Federalist*, No. 84, however, Alexander Hamilton argued that "bills of rights ... are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than was granted.... The truth is ... that the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights." In the case of "the right of the people to keep and bear Arms," Hamilton was quite correct.

The Second Amendment provides that "[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 Amendment did not purport to create, for the first time in 1789, "the right of the people to keep and bear Arms," though. Instead, it recognized that right's prior existence, in order to guarantee its future exercise. Indeed, the original Constitution actually required both the General Government and the States, not just to protect, but also affirmatively to promote, that exercise. This is because the original Constitution incorporated within its federal structure "the Militia of the several States."

Inasmuch as neither the original Constitution nor the Second Amendment defined the term "Militia," its meaning must be drawn from antecedent American law — in particular, from the great mass of *pre*-constitutional Colonial and State Militia statutes that regulated the Militia of the Colonies and then the independent States from the 1600s through the late 1700s. Four salient principles of the Militia derived from these statutes: First, the Militia were State governmental institutions. Second, every able-bodied free male from 16 to 50 or 60 years of age had a duty to serve in the Militia in some capacity. (Today, that universal duty would extend to every able-bodied female as well.) Third, every member of the Militia, not specially exempted for some good and sufficient reason supportive of the common defense and the general welfare, was required at all times to possess in his own home his own firearm, ammunition, and necessary accoutrements ("to keep ... Arms"), and whenever necessary to bring forth that equipment into the field ("to ... bear Arms"). Fourth, all such armaments were specifically suitable for Militia service — which meant that Militiamen's firearms had to be at least equivalent to those the regular armed forces carried. Thus, what the Second Amendment later described as "the *right* of the people to keep and bear Arms" was first and foremost a *duty*. Yet it was a right as well — because, if an individual has a duty of citizenship, embodied in law, "to keep and bear Arms," he must as well have a corresponding right to do so, protected against any interference not only by other citizens but also by rogue public officials.

In keeping with these principles, when (as the Preamble to the Constitution states) "We the People of the United States" "ordain[ed] and establish[ed] th[e] Constitution" "in Order to ... provide for the common defence," the Constitution delegated to Congress the power and the duty "[t]o provide for

organizing, arming, and disciplining, the Militia." Self-evidently, the power "[t]o provide for ... arming ... the Militia" absolutely excludes a contrary power "[t]o provide for ... [*dis*]arming" them. Moreover, because Congress cannot "provide for ... arming ... the Militia" without somehow arming all of "the people" of the several States — that is, "We the People of the United States" — who constitute the Militia, Congress has a duty "[t]o provide for ... arming" every individual possibly eligible for duty in the Militia.

Consistent with the Constitution, Congress cannot fail, neglect, or refuse to arm — let alone attempt affirmatively to disarm — "the people," because that would effectively destroy "the Militia of the several States." And Congress has no more authority to destroy the Militia than it does to destroy any other parts of the States' governmental structures. Or to destroy the States themselves, for "the security" of which the existence of "well regulated Militia" is "necessary." Or to destroy the Constitution's federal system, of which the States and their Militia are components as vital as Congress.

Thus, as against the General Government, "the people" in each State enjoy "the right ... to keep and bear Arms" under the original Constitution.

Because the Constitution is "the supreme Law of the Land," and because "the Members of the several State Legislatures, and all executive and judicial Officers ... of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution," the States are powerless to interfere, in any way, with the performance of Congress's duty "[t]o provide for ... arming ... the Militia." Therefore, no State (or any political subdivision thereof) may prevent "the people" within her own jurisdiction either from being "arm[ed]" by the provision of Congress or from arming themselves on their own recognizance with equipment suitable for Militia service should both Congress and that State's government fail, neglect, or refuse "[t]o provide for arm[ing]" them. Plainly, too, no State may affirmatively disarm "the people," particularly when Congress and that State's government have failed, neglected, or refused to arm them, and "the people" have therefore been compelled to arm themselves in order to fulfill their constitutional duty.

This limitation on the States' power to infringe "the right ... to keep and bear Arms" was acknowledged (albeit only in dicta — a judge's remark not binding as legal precedent) in the Supreme Court's decision in *Presser v. Illinois*, 116 U.S. 252, 265 (1886):

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserve military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the [Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

Of course, *Presser* was plainly wrong in asserting that "all citizens capable of bearing arms" constitute a "reserve militia of the United States." For *no* "militia *of the United States*" exists under the Constitution. Rather, "all citizens capable of bearing arms" comprise "the Militia *of the several States*," and at all times, not just as "reserves." Nonetheless, the essential point remains true, that no State can constitutionally "prohibit [her] people from keeping and bearing arms" that they would need for their Militia service.

In addition, the original Constitution commanded "[t]he United States" to "guarantee to every State in this Union a Republican Form of Government." When the Constitution was ratified, each of the States had "a Republican Form of Government." *Minor v. Happersett*, 88 U.S. (21 Wallace) 162, 175 -176 (1874). Prior to ratification, each of the States (or, earlier, Colonies) had long maintained her own Militia. Indeed, the Articles of Confederation had required that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred." So, in the America of the late 1700s, "a Republican Form of Government" meant nothing less than a government that incorporated a Militia — "composed," as Virginia's Declaration of Rights stated in 1776, "of the

body of the people, trained to arms." That being so, if any State today were to infringe her people's "right ... to keep and bear Arms" — and thereby undermine her own "Republican Form of Government" — "the people" could demand that the United States should intervene to protect that right.

Thus, as against each of the States, "the people" enjoy "the right ... to keep and bear Arms" under the original Constitution.

Solidified by the Second Amendment

The Second Amendment strongly amplified the original Constitution's guarantee of "the right of the people to keep and bear Arms," as against both the General Government and the States.

No one doubts that the Amendment's command reaches the General Government. Confusion arises, however, from the Supreme Court's erroneous decision in *Barron v. City of Baltimore*, 32 U.S. (7 Peters) 243 (1833), that the Fifth Amendment — and by extension the entire Bill of Rights — does not apply to the States. Although this decision has been followed many times in different contexts, it is simply wrong. See generally William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, Illinois: University of Chicago Press, 1953), Volume 2, Chapter XXX.

To be sure, the entirety of the First Amendment — "*Congress* shall make no law..." — and part of the Seventh Amendment — "no fact tried by a jury, shall be otherwise reexamined in any Court *of the United States*..." — can apply to the General Government only. But the remainder of the Bill of Rights is phrased in broad language that contains not even an implicit limitation to "Congress" or "the United States." For example, both the Ninth and Tenth Amendments *must* apply to the States as well as to the General Government — or how else logically could "the people" *fully* "retain[ ]" the "rights," and have *fully* "reserved to ... them" the "powers," to which those Amendments refer?

The Second Amendment's application to the States is even more obvious. First, in general, the Amendment's reference to "a free State" cannot conceivably embrace only the General Government, and not as well the very States that comprise the federal system, and without which the General Government would never have been formed in the first place and could not continue to exist. In particular, the Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State." But the Constitution provides for *no* "well regulated" — or even *any* — "Militia *of the United States*," only "the Militia *of the several States*." (Although the Constitution allows "the Militia of the several States" to "be employed in the Service of the United States" in certain circumstances, it does not deprive them of their status as State institutions through such temporary "Service.") So "a free State" for which "[a] well regulated Militia" is "necessary" must include each and every one of "the several States." Now, inasmuch as "the right of the people to keep and bear Arms" is operationally essential to "[a] well regulated Militia," and "[a] well regulated Militia" is "necessary to the security of a free State," then "the right of the people to keep and bear Arms" must be "necessary to the security of a free State." And inasmuch as no "free State" may undermine her own "security" — especially by "infring[ing]" "the right of [her own] people" which her own "supreme Law" declares to be "necessary to th[at] "security" — that "right" must be enforceable against each of the States.

Second, perhaps not every "free State" everywhere in the world must be "a Republican Form of Government"; but every "Republican Form of Government" in America must be "a free State." The Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State" — which means that such a Militia is "necessary to the security of a [Republican Form of Government]." "[T]he right of the people to keep and bear Arms, shall not be infringed" because the actual exercise of that right is one of the primary characteristics of "[a] well regulated Militia." Therefore, inasmuch as each State must maintain herself as "a Republican Form of Government," or be compelled to comply with that requirement by the United States, each State must guarantee "the right of the people to keep and bear Arms" *both within her own jurisdiction through her own laws, and within the jurisdiction of every other State through her participation in the General Government.*

That is, the Second Amendment applies not just to each State individually, but even to all of the States collectively.

Fourteenth Amendment Confusion

Many people who mistakenly accept or acquiesce in the doctrine of *Barron v. City of Baltimore* believe that the Second Amendment can nevertheless be applied to the States through Section 1 of the 14th Amendment, which (in relevant part) provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

Effectively overruling the Supreme Court's erroneous decisions in *Barron* and *Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857), Section 1 (correctly construed) includes within "the privileges and immunities of citizens of the United States" all of the freedoms included in the Bill of Rights. See generally Crosskey, *Politics and the Constitution*, Volume 3, Chapter XXXI. This is particularly obvious in the case of the Second Amendment's "right of the people to keep and bear Arms," inasmuch as Chief Justice Taney opined in *Scott* that, if Negroes were citizens of the United States and thereby "entitled to the privileges and immunities of citizens ... it would give them the full liberty of speech ...; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*." 60 U.S. (19 Howard) at 416-417. (Emphasis added.) If Taney knew any sources for these "privileges and immunities" other than the First and Second Amendments, he failed to identify them.

Properly applied in this particular, the 14th Amendment would be especially valuable, because it prohibits every State from "mak[ing] *or enforc[ing] any* law which shall abridge the privileges or immunities of citizens." Now, a State can "make" a "law" only within her own jurisdiction. But she can "enforce" not only her own "law[s]," but also all valid "law[s]" enacted by the General Government. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947). So, properly construed, the Amendment would preclude the States, not simply from making and trying to enforce their own invalid "law[s]," but also from participating in any manner in the enforcement of each and every unconstitutional "law" of the United States. Indeed, the Amendment would even require the States to oppose within their own territories the attempted enforcement of all such invalid "law[s]" by rogue agents of the United States. Correctly understood, then, Section 1 of the 14th Amendment would provide a firm constitutional basis for the doctrine and practice of "interposition," through which the States could protect their citizens from usurpation and tyranny at the hands of rogue officials of the General Government.

Unfortunately, the Judiciary has made a thorough mish-mash of the jurisprudence of the 14th Amendment. Notwithstanding the Amendment's evident purpose and expansive power to secure individuals' fundamental freedoms from abridgment by both the States and the General Government, the Supreme Court has perversely but consistently misconstrued the "privileges and immunities" language so as to render it more or less useless. See Crosskey, *Politics and the Constitution*, Volume 3, Chapter XXXII. So, unless the contemporary Court is willing to reverse a long line of decisions, "lose face" both intellectually and politically, and pry open a massive judicial can of worms with respect to numerous freedoms protected by the Bill of Rights but as yet not protected at all or only partially protected by the 14th Amendment, it will not apply the Second Amendment to the States under the "privileges and immunities" rubric.

The Court has held, though, that some freedoms guaranteed by the Bill of Rights (and even others that are not) can be enforced against the States under the aegis of the 14th Amendment by "incorporating" those freedoms within "due process of law" by judicial *fiat*. This doctrine is particularly amorphous and insidious, because it licenses the Justices to decide, not only which freedoms are to be "incorporated" at all, but also the extent to and the conditions under which they are to be protected. Nonetheless, the typical formulae in favor of "incorporation" that the Court has enunciated over the years strongly support protection of "the right of the people to keep and bear Arms." For instance, that "due process of law" protects: (i) "those fundamental principles of liberty

and justice which lie at the base of all our civil and political institutions" — *Hurtado v. California*, 110 U.S. 516, 535 (1884); or (ii) "the fundamental principle[s] of liberty and justice which inhere ... in the very idea of free government and [are] the inalienable right[s] of a citizen of such a government" — *Twining v. New Jersey*, 211 U.S. 78, 106 (1908); or (iii) those tenets "implicit in the concept of ordered liberty" — *Palko v. Connecticut*, 302 U.S. 319, 325 (1935).

Self-evidently, inasmuch as the Second Amendment itself declares, *as a matter of constitutional fact and law that even the Supreme Court cannot disregard let alone deny*, that "[a] well regulated Militia" is "necessary to the security of a free State" — the only place in the Constitution in which *any* establishment or organization is described as "necessary" for any purpose — and inasmuch as that Amendment directly links "the right of the people to keep and bear Arms" with such a Militia in a cause-and-effect relationship, then that "right" must "lie at the base of all our civil and political institutions," because without it those "institutions" can have no lasting "security." Similarly, for those reasons, "the right of the people to keep and bear Arms" must be in the very forefront of "the inalienable rights of a citizen of [a free] government" — for surely every "citizen of [a free] government" has "the inalienable right[ ]" and duty to defend it, and to expect his fellow-citizens and public officials to assist him in doing so. And being a defining characteristic of "[a] well regulated Militia," which is itself "necessary to the security of a free State," "the right of the people to keep and bear Arms" must be, not only "implicit in the concept of ordered liberty," but withal "necessary" to achieve and preserve it.

So, even under the Supreme Court's misconceptions about the 14th Amendment, "the right of the people to keep and bear Arms" should be held applicable to the States.

Of course, one may wonder why, if the Second Amendment's application to the States is so patent, the Amendment has never been so applied until now — that is, why States' gun-control laws have never been challenged in the Supreme Court. The answer is two-fold. First, during the entire 19th century and a good part of the 20th, America suffered from no pervasive "gun control" of the modern variety. For decades, most adult free males were members of "the Militia of the several States," and therefore statutorily required to be armed. Many other Americans armed themselves voluntarily. No well-financed and politically influential pressure groups touting "gun control" existed. Traditional conceptions of "State's rights" — to which *Barron v. City of Baltimore* paid court — were still widely held. And limitations in various States' laws on individuals' rights "to keep and bear Arms" often aimed solely at such narrow matters as concealed weapons, or were discriminatorily enforced only against African-Americans and other minorities. Second, judicial review of legislation has always been cumbersome and slow, and particularly where constitutional issues are involved depends upon precisely the right case coming up for review. As "gun controllers" gained political power in both the General Government and the States, though, and increasingly manifested their intent to strip everyone outside of the Armed Forces and police agencies of every aspect of "the right ... to keep and bear Arms," more and more Americans found themselves the victims or at least the targets of ever-more-invasive restrictions on that right. In response, proponents of the Second Amendment began actively to assert "the right of the people to keep and bear Arms" through litigation and lobbying for remedial legislation. Under these circumstances, it was only a matter of time until the conflict in the States between "gun control" and the Second Amendment finally came to the fore judicially.

A Legislative Solution Preferable

Nonetheless, a great pitfall threatens any case such as *McDonald v. City of Chicago*. For the Court could end up deciding that, although "the right of the people to keep and bear Arms" does apply to the States, it is merely a so-called "*individual* right" disconnected from "[a] well regulated Militia," and therefore subject to whatever "regulations" of State and local governments judges and legislators may deem appropriate. Actually, such a result is far more likely than not, in light of the mess the Court made of the Second Amendment on the same grounds in *District of Columbia v. Heller*. See "Gun Rights on Trial," The New American (September 1, 2008).

Notwithstanding that many patriots believe the notion of an "individual right" to be correct, and even though it may provide some protection for "the right of the people to keep and bear Arms" in isolated instances, at base the notion that the Second Amendment protects only an "individual right" is part and parcel of the strategy the enemies of "ordered liberty" are employing in order to deceive Americans so that they will not organize themselves in the *one and only* way the Constitution itself tells them is "necessary to the security of a free State." First, these miscreants contend that *no* real "*right* of the people to keep and bear Arms" exists at all, but that public officials can impose whatever "gun controls" they deem politically expedient. When that argument meets too much political resistance, they concede that such a "right" does exist, but that it is merely an "*individual* right" related in some murky manner to personal self-defense alone — and, being merely an "*individual* right" alone, must always yield to all "reasonable regulations" enacted in the service of "compelling governmental interests," as public officials define those terms. Which inevitably results in the transmogrification of a true "*right* of the people to keep and bear Arms" into nothing more than a temporary license controlled by public officials for their own purposes — which returns the argument to its starting point.

The purpose of this black propaganda, of course, is to prevent Americans from thinking through, *and acting upon*, the constitutional directive that the preservation of "a free State" absolutely depends upon the maintenance of "[a] well regulated Militia," and that the existence of "[a] well regulated Militia" absolutely depends upon "the people's" permanent personal possession of firearms, ammunition, and necessary accoutrements suitable for Militia service. This is hardly surprising. Aspiring usurpers and tyrants expect that if "the people" will not learn how to organize themselves for collective self-defense in times of domestic tranquillity, they will not be able to organize themselves during the confusion and even terror of a major social crisis, when time is short and actions must be taken in the face of repression by the usurpers' and tyrants' armed forces and *para*-militarized police. Therefore, the success of usurpation and tyranny depends upon keeping "the people" as disorganized as possible for as long as possible.

This is why the Second Amendment declares that "[a] *well regulated* Militia" is "necessary to the security of a free State," and why "the right of the people to keep and bear Arms" must be understood *and exercised* in that context. To that end, "the people" need to be concerned less with judicial protection of that right for a few individuals here and there, and more with legislative enforcement of it, so that "the Militia of the several States" — each "composed of the body of the people, trained to arms" — become the dominant political institutions through this country, just as the Constitution requires.

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