

B452. "Reasonable Regulation" The National Law Journal (April 5, 2004: 27).

Most of the attention that has recently been paid to guns has focused on extending the ban on assault weapons, continuing to conduct background checks, and protecting the gun industry from liability for consequences flowing from the use of its dangerous products. Much more attention should be paid to the attempts to erode the long-standing interpretation of the Second Amendment.

The Second Amendment is often referred to simply as "a right to bear arms." Actually, as readers of these pages hardly need to be reminded, the full text reads, "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." Still, whenever this issue has reached the high court, in cases spanning nearly 125 years, the court has ruled that there is no constitutional barrier to limiting or removing guns owned by individuals.

When one reads the relevant case law, from as early as 1875 (*United States v. Cruikshank*) to 1997 (*Printz v. United States*), the details of the cases vary, yet the decisions reached in all of them fundamentally affirm that the Constitution does not limit the states' ability to restrict private gun ownership. Consider the oft-cited *United States v. Miller* (1939). Jack Miller had not properly registered his sawed-off shotgun or paid a tax for transporting the weapon across state lines, as required under the 1934 Firearms Act. Miller claimed that the act violated his Second Amendment rights. The court ruled that because Miller could not prove that his shotgun had "some reasonable relationship to the preservation or efficiency of a well-regulated militia, it cannot be said that the Second Amendment to the Federal Constitution guarantees the right to keep and bear such an instrument, or that the [act] violates [the constitution]."

Fighting words

Miller and its antecedents seem plain enough. But, when I posted an overview of these cases on a Web page, it unleashed a storm of criticism. Among the many cuss words, several counterarguments were raised. Correspondents quoted Washington, Jefferson, Madison and George Mason to show that our founding fathers were proponents of private gun ownership. My response was that ours is a government of laws, which cannot be trumped by quotations from even the most important American icons.

The National Rifle Association (NRA), as a rule, does not challenge gun control laws before the Supreme Court—it knows what the outcome will be. Others have argued that we should not be bound in such arguments by what the Supreme Court states, as it can be wrong and even overrule itself. Fair enough. However, if we are not going to accept 125 years of consistent rulings as the legal standard, then what shall we rely on?

The challenge to the long-standing interpretation of the Second Amendment is coming from a combination of recent court decisions and the attorney general's strong support for the NRA. Several years ago, the high court declined to review a decision of the 5th U.S. Circuit Court of Appeals in *United States v. Emerson*. The case concerned Timothy Emerson, who was found guilty of possessing a firearm while subject to a court order prohibiting him from threatening his wife. The court ruled against Emerson, but supported his individual right to bear arms (arguing only that the government could restrict that right with "limited, narrowly tailored specific exceptions or restrictions"). In deciding not to hear the case, the Supreme Court, for the first time, allowed an individualized interpretation of the Second Amendment to

stand, an interpretation that has the enthusiastic support of Attorney General John Ashcroft. Meanwhile, the Supreme Court also recently declined to hear the case of *Silveira v. Lockyer*, in which the 9th Circuit ruled that the Constitution "does not provide any type of individual right to own or possess weapons." Where we go from here is one more important issue whose resolution will clearly depend on the outcome of the upcoming presidential and congressional elections.

As someone who served as a commando for 2 1/2 years, I hate and fear guns. It is true, as the NRA argues, that criminals (rather than guns) kill people, but it is also true that guns make it much easier for criminals to do so. No one standing atop the clock tower at the University of Texas could have killed 17 people and wounded 31 using knives or wrenches, to give but one example. And thousands of children die each year from the accidental discharge of firearms.

Guns are not the only thing that affects my vote, but you will not find it difficult to guess in which direction they are pointing me.