

Second amendment and the American judiciary

Deva Ram

Ph.D. Scholar at CCUSLAS, SIS, JNU, New Delhi, India

Abstract

This paper will deal with the various interpretations of the Second Amendment mainly by US Supreme Court from the militia-based understanding of the individual's right to keep and bear arms. In the American political system, it is largely the judiciary that decides what the constitution means. All the court cases during the ninetieth and twentieth century (prior to the *Heller Case*), do not endorse the individual right of citizens to bear arms.

Keywords: militia, individual rights, bill of rights, founding fathers, US constitution

Introduction

The Second Amendment has generated relatively less constitutional law than other rights (Spitzer 2014). In order to understand the second Amendment, the texts of right played the crucial role because its language is ambiguous and having the scope of various interpretations. The Second Amendment says, "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." As the sentence makes clear, that the right to bear arms is prefaced by the necessity for the government to maintain a militia in order to ensure security for the nation. As the former Supreme Court Justice Warren Burger noted that the Second Amendment must be read as though the word 'because' was the opening word of the sentence. That is the keeping and bearing arms stems from and is connected to the maintenance of a government organized and regulated militia (Burger 1990).

History of constitutional interpretations

In first case, the Supreme Court established two principles, first, that the Second Amendment pose no obstacle to at least some regulation of firearms and second, that the Amendment not incorporated, meaning that it pertains only to the federal government (*United States v. Cruikshank* 1876).

Ten years later, the Supreme Court confirmed the understanding that the right to bear arms came to play only in connection with the formation and conduct of the militia, as formed and regulated by the government. The Court emphatically rejected the idea that citizens could create their own militias, much less that the Second Amendment protected citizens' rights to own weapons for their own purposes (*Presser v. Illinois* 1886).

Supreme Court ruled that prohibiting the carrying of dangerous weapons did not violate the Second Amendment (*Miller v. Texas* 1894). Again, the Court said that a law barring the concealed weapons did not violate the Second Amendment of Bill of rights in US Constitution (*Robertson v. Baldwin* 1897).

The most important Supreme Court case in this sequence

which came in the twentieth century, the unanimous Court ruled that citizens could only possess a constitutional right to bear arms in connection with service in a militia. In addition, it affirmed the constitutional right of the congress, as well as the states, to regulate firearms (*United States v. Miller* 1939). In the twenty-first century, Supreme Court reversed its previous interpretation of the right to keep and bear arms. Supreme Court of the United States upheld that the Second Amendment to the United States Constitution applies to federal enclaves and protects individuals right to possess a firearm for traditionally lawful purposes, such as self-defense. At the same time, the Court recognized that the government can regulate gun rights (*District of Columbia v. Heller* 2008). Two years later, the Court ruled that Second Amendment rights are applicable to the states through the Fourteenth Amendment (*McDonald v. City of Chicago* 2010).

Federal Enactments

Regulation of ownership of firearms in the American tradition dates back to the period when the Second Amendment itself was adopted. Several early state legislatures had made an endeavour to put a ban on the ownership of firearms. A case in point are the legislators of Georgia who had in 1837 ratified a ban on handguns. However after a period of eight years, the state's Supreme Court upheld the decision as a violation of the Second Amendment. After the Civil War, during the Reconstruction period, several states in the south adopted "black codes" as an answer to emancipation, which amongst several other things, barred the African-Americans from possessing firearms^[1].

In 1938, the Federal Firearms Act was signed into law by President Roosevelt. The objective behind this law was not only to regulate interstate trade but also to limit the ownership of such firearms by criminals through imposing the requirement of licence both for the manufacturers as well as the interstate dealers of such weapons. This legislation

¹ "The U.S Supreme Court Review", U.S Supreme Court Case Tracker, May 1, 2016, <http://supremecourtreview.com/default/issue/index/id/16>

exemplifies the objective of the U.S Congress to maintain a record of the gun trade in the country. In view of this legislation, scholars at this point of time analysed that licensing regulations must not be considered as an infringement on the Second Amendment as regulation of a right must not necessarily be considered as an infringement of a right [2].

Over time law has changed. Previously in the Founding era, states regulated guns i.e. the weapons of the militia were often registered on the government rolls or the blacks were forbidden from possessing firearms. However, today gun laws have become more extensive and controversial. An important legal development has been the adoption of the Fourteenth Amendment. Originally the Second Amendment applied only to the federal government, allowing the states to regulate weapons as they deemed fit. Although evidence suggests that the Privileges or Immunities Clause of the Fourteenth Amendment was designed to safeguard the individual right to bear arms from the encroachment of states, yet the Supreme Court had outdone such an interpretation in the *United States v. Cruikshank* case (1876) [3].

Essentially the role of courts is to interpret the Constitution as a non-partial third party. They are instrumental in safeguarding constitutional rights as well as granting clarification to the rights. Alexander Hamilton in the *Federalist Papers* No. 78 mentioned that the role of the court was that of an intermediary for the people to safeguard that no legislation was in contradiction to the Constitution. This was because “the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.” [4]

The course followed by courts permits changes but protects and offers respect to the original intent of these documents. It is for this reason that courts are more conservative and consistent towards change whereas legislators seem to be more susceptible to ratifying laws that are in tune with the present desires of their constituents. The legal effect of the Second Amendment had been very less until recently. The significance and more precisely the political utility of the Second Amendment became more prominent and volatile after World War I. Legislators at this point of time ratified laws namely the National Firearms Act of 1934 as a response to the passage of the Gun Control Act of 1968 after the assassinations and civic strife of the 1960s and the multiplication of ‘gangster weapons’. Several legislators have endorsed the individual perspective of the right to bear arms. However, such an interpretation varies with reference to the degree of regulation [5].

In several cases that were pronounced in the nineteenth century, the US Supreme Court announced that the objective of the Second Amendment was not to bar the state regulation of firearms. A case in point is the *United States v. Cruikshank*

case, 92 U.S. 542, 553 (1875), in which the Court mentioned that the Amendment “has no other effect than to restrict the powers of the national government,” and in the *Presser v. Illinois* case, 116 U.S. 252, 265 (1886), the Court restated that the Second Amendment “is a limitation only upon the power of the Congress and the National government, and upon that of the States.” [6] In the *United States v. Cruikshank* case the Court held that the right to bear arms for lawful purposes was not a constitutional yet it was an inalienable right that was not approved by the Constitution. It was put forth that the second amendment only restricted the Congress from meddling with that right [7].

In 1939, the US Supreme Court addressed the scope of the right to “keep and bear arms” in the *United States v. Miller* case. The courts overruled the Amendment’s challenges to the gun control laws, interpreting the Amendment to bar laws that meddle with the state’s militias. The Court discussed the rationale and the limitations of Amendment and deliberated the real purpose “to assure the continuation and render possible the effectiveness” of the state militia forces. Further, the court deliberated that the right to possess firearms was not extended to every individual, but to the maintenance of state-based militias [8]. This was the first gun control statute that controlled the possession of firearms. The Supreme Court viewed the Second Amendment in concurrently with the Militia Clause Article 1, Section 8 of the Constitution and deduced that “in the absence of any evidence tending to show that possession or use of a [sawed off] shotgun...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.” Ever since the *United States v. Miller* case, most of the decisions regarding the Second Amendment by the federal court have interpreted the statute as preserving the authority of the state to regulate militias [9].

In the recent years, the judicial orthodoxy has been questioned by a group of revisionist scholars. In 1997 *Printz v. United States* case, Justice Thomas recommended a reconsideration of the Second Amendment. He claimed that the Amendment constructs a “personal right to keep and bear arms” and further mentioned that such a right would prohibit aggressive gun control decree.

The collective rights view precedent that sustained for a period of seventy years stood challenged in 2008 in the *District of Columbia v. Heller* case. *Heller* challenged the constitutionality of the Washington DC ban on handguns that had prevailed for 32 years. To many the statute appeared to be the most stringent law of the nation. The Court in a 5-4 decision, precisely notifying the tradition of the Second Amendment, declared that the Amendment stood for individual ownership of firearms. Further, it was also declared that the two District of Columbia provisions, one that

² Ibid.

³ Nelson Lund and Adam Winkler, “The Second Amendment”, <http://constitutioncenter.org/interactive-constitution/amendments/amendment-ii>

⁴ Alexander Hamilton, “The Federalist Papers: No. 78,” *The Avalon Project of the Lillian Goldman Law Library, Yale Law School.* (15 October 2013).

⁵ “Judicial Interpretation of the Second Amendment”, *Lawsonline.com*, <http://lawsonline.com/LegalTopics/SecondAmendment/judicial-interpretation-second-amendment.shtm>

⁶ “United States: Gun Ownership and the Supreme Court”, *Library of Congress*, <https://www.loc.gov/law/help/second-amendment.php>

⁷ “Descriptions of the Supreme Court Gun Cases”, *Constitution Society*, http://www.constitution.org/21l/bardwell/supreme_cases.html

⁸ Charles L Blek Jr., “Our Second Amendment”, *Human Rights*, Vol. 26, No. 4, Fall 1999, pp 3-4.

⁹ “United States: Gun Ownership and the Supreme Court”, *Library of Congress*, <https://www.loc.gov/law/help/second-amendment.php>

necessitated the lawful firearms at home to be trigger locked and the other that banned handguns, stood in complete violation of this right. Further, the Court declared that the scope of the Second Amendment was not restricted to militia service, “nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrolment in the militia.”

According to Justice Scalia, the majority who had scrutinised the text, perceived that the it codified a “right of the people”- a similar language used in various other individual-rights contexts, namely the preamble (“We the people”), the Tenth Amendment (powers that are not delegated to the federal government are preserved for “the people”). The phrase “right of the people” had not been used in other constitutional provisions except to describe individual right. Justice Scalia had heavily relied on the historical context in his interpretation of the Second Amendment, leading to the frequent citation of the concept of self-preservation put forth by Blackstone as well as other English theorists.

In a more recent *McDonald v. Chicago* case (2010) presented before the Supreme Court reflected upon the ban on handguns in Chicago. In a 5-4 majority, the Court declared that the Second Amendment did constrain the states via the Fourteenth Amendment’s Due Process Clause ^[10].

Thus, the judiciary plays a critical role in understanding the Second Amendment. As history upholds, it is the judicial interpretation of the words of the Second Amendment through its various cases, that finally gives shape to the law as an individual right of citizens to bear arms or collective rights of states to maintain a state-based militia.

References

1. Amar, Akhil Reed. The Second Amendment: A Case Study in Constitutional Interpretation, *Utah Law Review*. 2001; 4(1):889-914.
2. Hays, Stuart R. The Right to Bear arms: A Study in Judicial Misinterpretation, *William and Mary Law Review*. 1960; 2(1):381-406.
3. Yassky, David. The Second Amendment: Structure, History, and Constitutional Change, *Michigan Law Review*. 2000; 99(3):588-668.
4. Charles, Patrick J. The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court, Jefferson: McFarland & Co Inc. 2009.
5. Doherty, Brian. Gun Control on Trial: Inside the Supreme Court Battle Over the Second Amendment, Washington, DC: Cato Institute Press. 2009.
6. Wills, Garry, Saul Cornell. Whose Right to Bear Arms did the Second Amendment Protect, Boston: Bedford. 2000.

¹⁰ “The U.S Supreme Court Review”, *U.S Supreme Court Case Tracker*, May 1, 2016, <http://supremecourtreview.com/default/issue/index/id/16>