Firearms and Health: The Right to Be Armed with Accurate Information about the Second Amendment

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ABSTRACT

An organized campaign by groups such as the National Rifle Association has sought to convince policymakers and others that the Second Amendment to the US Constitution grants an unfettered right to individuals to possess any firearm, free from federal or state regulation. Although advocates may debate the meaning that *should* be given to the Second Amendment, under the American legal system the meaning of any particular constitutional provision is determined by the controlling precedent of Supreme Court cases. Two cases, *Presser v Illinois* and *United States v Miller,* remain the Supreme Court's latest word on the meaning of the Second Amendment. In *Presser,* the Court held that the Second Amendment is applicable only to federal, not state, laws. In *Miller* and subsequent federal cases, any Second Amendment "right" to bear arms is closely linked to the preservation of state militias, upholding a variety of federal gun legislation. Unless the Supreme Court modifies or reverses its *Presser* and *Miller* decisions, health advocates should understand that the Second Amendment poses no obstacle to even broad gun control legislation. (*Am J Public Health.* 1993; 83:1773–1777)

Introduction

In perhaps no other area of injury prevention has an organized campaign of misinformation played a greater role in chilling needed interventions than in efforts to control firearm injuries. One important component of that campaign is the attempt by the National Rifle Association (NRA) and its allies to portray the Second Amendment to the US Constitution as a significant obstacle to effective gun control legislation. It is not.

By any measure, injuries caused by firearms represent a public health problem of enormous and tragic proportions. Firearms are involved in about 34 000 deaths annually in the United States, ranking second only to motor vehicles as a cause of fatal injury.[1] Recently, in some states the number of gun deaths has even surpassed the number of motor vehicle deaths.[2] In addition, in 1985, there were an estimated 236 000 nonfatal firearm injuries, with a total lifetime cost of more than $14.4 billion.[3] Black Americans are at particular risk for firearm mortality. Among Black males aged 15 through 34 years, firearms are the leading cause of death.[4]

In an effort to respond to this epidemic of gun violence, numerous federal, state, and local laws have been enacted, limiting access to firearms for at least some categories of individuals and types of weapons.[5] A number of research studies have demonstrated the effectiveness of selected gun control laws.[6,7] Faced with the grim fatality statistics and encouraged by modest (thus far) legislative successes, public health professionals and others have advocated improved coordination and enforcement of existing laws as well as the adoption of new, more restrictive legislation.[8]

Opponents of existing and proposed laws, including the NRA, Gun Owners of America, and the Second Amendment Foundation, routinely argue that the Second Amendment to the Constitution grants an unfettered right to individuals to "keep and bear arms," thus rendering any gun control proposal unconstitutional. In fact, one such group, in opposing a ban on assault rifles, argued that "[i]t is precisely the AK-47's, Uzi's, and other civilian versions of military guns that are most clearly secured by the right to keep and bear arms."[9]

The Second Amendment

In its entirety, the Second Amendment states: "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 NRA and others have described this language as a "straightforward statement affirming the people's right to possess firearms."[10] Further, in an effort to advocate their own interpretation of the Amendment's important militia clause, they have claimed that "the perception that the Second Amendment guarantees a collective rather than an individual right is totally inaccurate"[10] and that "the term 'well regulated' is an expression of one objective to be achieved by the exercise of the right, not a limitation on the right to keep and bear arms."[11] (In addition, adorning the NRA's Washington headquarters is the language: "The right of the people to keep and bear Arms shall not be infringed." Reference to the opening "militia" clause

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is omitted.) Statements like this, backed by forceful, well-funded lobbying and public relations efforts (but not by evidence), can act as a powerful deterrent to the design and implementation of effective gun control policy. Public health advocates should understand why these arguments are without merit.

As is true of nearly every provision of the Constitution, the precise meaning of the Second Amendment has generated considerable scholarly debate.[12,13] That debate often focuses on determining the original intent of the framers in adopting the Amendment. Such discussions may have merit as academic exercises or as efforts to persuade persons and courts that the Amendment's language *should* be given a particular interpretation, but they do not reveal its current meaning or its effect on the constitutionality of gun control laws.

Under the American rule of adherence to precedent (known as *stare decisis*), the meaning of any particular constitutional provision is fixed by the body of case law, especially Supreme Court opinions, interpreting that provision. In a very practical sense, therefore, at any given time, a law means precisely what the courts have said it means. Since the late 1800s, courts have consistently provided the Second Amendment with an interpretation that poses no obstacle to effective gun control legislation at the federal, state, or local levels.

Courts have focused on two main issues in their examination of the Second Amendment. The first question is whether the Amendment proscribes only acts of Congress at the federal level or whether it also governs state and local laws. The second question is whether the Amendment protects only a "collective right" to bear arms, prohibiting only those laws that interfere with state militias, or whether it more broadly protects an "individual right," thereby invalidating laws that restrict individuals from keeping and bearing any weapon, even without some meaningful militia connection.

Federal vs State Application

The initial Supreme Court case interpreting the meaning of the Second Amendment addressed the first of these questions. In *United States v Cruikshank* (1876), the Supreme Court ruled that "the Second Amendment declares that [the right to keep and bear arms] shall not be infringed; but this means no more than it shall not be infringed by Congress."[14] Thus the Amendment would apply to federal but not state laws.

Ten years later, the Supreme Court again addressed the question of federal vs state application of the Second Amendment in its *Presser v Illinois* decision.[15] Illinois had passed a law forbidding, in pertinent part, "any body of men . . . to drill or parade with arms in any city or town" within the state without a license from the governor. That same year, Herman Presser marched through the streets of Chicago at the head of a parade organized by a group called the *Lehr und Wehr Verein* (Teaching and Defense Society), without having obtained a governor's permit. Presser carried a cavalry sword; his 400 men bore rifles. Presser was found guilty of violating Illinois law, and was fined $10.

On appeal Presser argued, in part, that the Illinois law violated the Second Amendment by interfering with the "right to bear arms." The Supreme Court upheld the constitutionality of the Illinois law and affirmed Presser's conviction. The Court held that the Second Amendment "has no other effect than to restrict the powers of the National Government," ratifying its *Cruikshank* decision. Under the reasoning of the *Presser* and *Cruikshank* decisions, therefore, state governments are free to enact gun control laws, consistent with their recognized "police power" to protect public health and welfare, unimpeded by the Second Amendment.

Most of the liberties guaranteed by the first 10 constitutional amendments (the Bill of Rights), liberties like freedom of speech and the press, were also initially seen as applicable only to the federal government. In the years since *Presser,* however, the Supreme Court began to selectively "incorporate" only those provisions of the Bill of Rights that it deemed fundamental to the American system of law into the Fourteenth Amendment's more general guarantee of "due process," which does apply to state actions. As a result of this selective incorporation, today nearly all of the amendments in the Bill of Rights are protected against state government infringement as well.[16] The Second Amendment, however, has never been so incorporated, and *Presser* remains the Supreme Court's latest word on the federal vs state application of the Amendment. (In addition to the Second Amendment, those provisions of the Bill of Rights that have not been "incorporated" include the Third Amendment, the Fifth Amendment clause requiring a grand jury indictment for criminal prosecutions, and the Seventh Amendment.)

Under the doctrine of *stare decisis,* lower federal courts have conformed to the holding of the *Presser* case. One recent example is *Fresno Rifle and Pistol Club, Inc v Van de Kamp,* first decided by a California federal district court in 1990 and then affirmed on appeal by the Ninth Circuit Court of Appeals in May 1992.[17] The *Fresno* case tested the validity of California's Assault Weapons Control Act of 1989.[18] This law, enacted in the aftermath of the Stockton, Calif, playground slayings, proscribed the manufacture, sale, and possession of certain firearms that were considered to be assault weapons. Local firearm owners and gun manufacturers were the plaintiffs who challenged the law's constitutionality. They were represented in court by the leading attorney-advocates for the US progun organizations.

The district court held that the California statute did not violate the Second Amendment in that the Amendment "stays the hand of the National government only." On appeal, the court of appeals, in affirming the lower court, confirmed that the Second Amendment is inapplicable to the states, holding that "[u]ntil such time as *Cruikshank* and *Presser* are overturned, the Second Amendment limits only federal action."

The *Fresno* case also presents an opportunity to examine several of the plaintiffs' (and, derivatively, the NRA's) other arguments regarding the federal vs state application of the Second Amendment. In an effort to avoid the holdings of the *Cruikshank* and *Presser* cases, the plaintiffs argued that the Fourteenth Amendment automatically incorporates every provision of the Bill of Rights, whether or not the Supreme Court has specifically examined that particular guarantee. In summarily rejecting this argument, the *Fresno* court recognized that this theory of "total incorporation" has never been accepted by the Supreme Court, which relies instead on the process of "selective incorporation" described above.

Another argument advanced by the plaintiffs in *Fresno* was based on the Supreme Court's recent opinion in *United States v Verdugo-Urquidez,*[19] a case involving the Fourth Amendment's right of "the people" to be free from unreasonable or warrantless searches and seizures.[20] The plaintiffs in *Fresno* claimed that the Court's opinion in *Verdugo-Urquidez* also implied that the Second Amendment must grant to "the people" an individual right to keep and bear arms protected from state infringement. Explicitly declining to ex-

plore the question of an individual right to bear arms, the *Fresno* court wrote instead:

> Even if *Verdugo-Urquidez* can be read to support the proposition that each of the amendments which speaks of a right of "the people" guarantees an individual right, the question remains *against whom* these rights may be asserted. Nothing in *Verdugo-Urquidez* upsets the Court's holding in *Cruikshank* and *Presser* that the Second Amendment rights, whatever their scope, can be asserted only against the federal government. Therefore, it is for the Supreme Court, not us, to revisit the reach of the Second Amendment.[17] [Emphasis in the original]

The *Fresno* case will not serve as the vehicle for any potential reassessment of the Second Amendment. In November 1992 the NRA (and other plaintiffs) allowed the Supreme Court's filing deadline for appellate review to lapse, thereby leaving the court of appeals' decision as the last word in the case.

Collective vs Individual Right

If court interpretations of the Second Amendment present no obstacle to state or local gun control, the logical remaining issue is the amendment's effect on federal firearms legislation. In 1939, the Supreme Court had an opportunity to address this question. Primarily in an effort to combat violence perpetrated by organized crime, Congress had enacted the National Firearms Act of 1934. The Act, which applied principally to sawed-off shotguns and machine guns, provided that such firearms could not be transported in interstate commerce without first being registered and subjected to a $200 tax. In 1938, Jack Miller and Frank Layton transported a sawed-off shotgun from Oklahoma to Arkansas without registering the gun or paying the tax. They were charged with violating the National Firearms Act. In federal district court in Arkansas they argued that the Act was an unconstitutional violation of the Second Amendment by the federal government, and the court agreed. The United States appealed the case, and in *United States v Miller* the Supreme Court reversed the lower court's judgment.[21] Interpreting the language of the opening "militia" clause of the Amendment, the Supreme Court held in essence that no individual right to keep and bear arms was granted, but only a collective right having "some reasonable relationship to the preservation or efficiency of a well regulated militia." Since the Court could find no state militia connection for Miller and Layton's assertion of a Second Amendment right, the constitutionality of the National Firearms Act (and of their criminal indictment) was upheld.

The Supreme Court has not felt compelled to revisit the Second Amendment directly since the *Miller* case. In 1980, in passing, the Court did apply the *Miller* test of "reasonable militia relationship" to the Omnibus Crime Control and Safe Streets Act of 1968, upholding the Act's constitutionality.[22] Numerous lower federal courts, however, have upheld a variety of gun control laws, demonstrating the continuing vitality of the *Miller* decision.

One such case involved a Kansas federal court's 1977 criminal conviction of Ted Oakes for possession of an unregistered machine gun in violation of federal law. Oakes had sold the machine gun to an undercover agent of the Bureau of Alcohol, Tobacco and Firearms and was in need of a strong argument that his prosecution was impermissible. Oakes first pointed out that the Kansas constitution provides that the state militia includes all "able-bodied male citizens between the ages of twenty-one and forty-five years" and that he fell within this age range. To bolster his argument, Oakes also noted that he was a member of a registered militia-type organization known as Posse Comitatus. These militia connections, he argued, fit the *Miller* test for Second Amendment protection: the gun's possession or use had some reasonable relationship to the preservation and efficiency of the state militia.

The court rejected Oakes's argument. In *United States v Oakes,* the court of appeals held that "to apply the [Second] Amendment so as to guarantee [Oakes's] right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy."[23] The court was even less impressed with Oakes's paramilitary membership. Under the rationale of this decision, federal laws affecting the ownership of guns would not be invalidated absent a much more substantial connection to the state militia than Oakes had asserted.

State Constitutions

Advocates seeking to use law to improve the public's health should recognize that the validity of any state law must also be tested against the commands of that state's constitution. An examination of the language of each state's constitutional provisions related to firearm possession is beyond the scope of this article, but a brief case discussion will illustrate that even facially broad state constitutional guarantees may not impede reasonable firearms regulation.

In 1987, the people of the state of Maine voted to amend their state constitution to provide that "[e]very citizen has a right to keep and bear arms; and this right shall never be questioned."[24] Prior to its amendment, that language had included the qualifying phrase "for the common defense." This phrase was deleted with the apparent intention of establishing, at the state level, a new individual right to bear arms rather than the previous collective right.[25]

Edward Brown was a Maine citizen and a convicted felon, having been convicted of continuing to drive his car after his license had been revoked. Existing Maine law prohibited felons from possessing firearms without a permit.[26] Brown was indicted for violating this law. At trial, Brown argued that his indictment was an unconstitutional violation of Maine's new constitutional provision, and the superior court agreed, dismissing that portion of the indictment. The state appealed the decision, and in *State v Brown* the Supreme Judicial Court of Maine (the state's highest court) reversed the lower court's decision.[27]

To analyze Brown's argument, the court examined two issues: (1) Does Maine's new constitutional amendment create an absolute right to keep and bear arms? and (2) If not, and some regulation is permissible, does Maine's regulation of firearms possession by convicted felons nevertheless exceed its "police powers" to protect the public's health and safety? To answer the first question, the court looked to the history of the enactment of the amendment, and also employed a "common sense view" of that context. In concluding that no absolute right to keep and bear arms was granted, the court said that "[p]lainly, the people of Maine never intended that an inmate at Maine State Prison, or a patient at a mental hospital would have an absolute right to possess a firearm."

To complete its analysis, the court next considered the permissible scope of the state's police power to regulate firearms. Following both state and federal precedents, the court determined that such regulation was permissible if it was reasonably related to a legitimate "police

power" goal of protecting the public health and safety. The *Brown* court had no trouble, therefore, in deciding that "[o]ne who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person."

Thus, even Maine's "individual" right to keep and bear arms was subject to reasonable regulation to further the public health and safety.

Quilici v Village of Morton Grove

A final case, illustrating many of the legal principles encompassed by the Second Amendment and by state constitutions, involved a sweeping gun control law enacted by the Village of Morton Grove, Ill, in 1981. That law prohibited all handgun ownership within the city limits, subject to certain exceptions for law enforcement officials and gun collectors.[28] Almost immediately, Victor Quilici and several other gun owners challenged the law's constitutionality under the Illinois and federal constitutions.

In *Quilici v Village of Morton Grove,* the federal court of appeals (for the Seventh Circuit), affirming a lower district court opinion, upheld the Morton Grove law under both the federal and state constitutions.[29] The *Quilici* court began its Illinois constitutional analysis with the language of that state's analog to the federal Second Amendment: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."[30] The plaintiffs claimed that this language forbade Morton Grove from enacting a ban on all handguns. Relying upon Illinois case law and the proceedings of the Illinois constitutional convention, the court rejected the plaintiffs' argument. Although the court determined that handguns belonged to the class of weapons protected by the Illinois Constitution, they concluded that "the right to keep and bear arms in Illinois is so limited by the police power that a ban on handguns does not violate that right." In fact, the court said that only an absolute ban on all firearms would be prohibited.

With regard to the federal Constitution, once again the plaintiffs argued that the Second Amendment rendered Morton Grove's new law invalid. Specifically, they argued that the *Presser* case should be read as denying a state the right to regulate firearms, and that *Miller,* linking any "right" to bear arms only to the state militia, was in essence "wrongly decided and should be overruled."

After reviewing the plaintiffs' arguments, the *Quilici* court upheld the constitutionality of the Morton Grove law. Plainly wondering how the plaintiffs could "assert that *Presser* supports the theory that the Second Amendment right to keep and bear arms is a fundamental right which the state cannot regulate," when the Supreme Court's opinion declares precisely the opposite, the court easily rejected this portion of their argument. Although the *Quilici* court's adherence to *Presser*'s holding—that the Second Amendment applies only to the federal government—was enough to decide the case, it went on to briefly discuss the *Miller* argument as well. The court recognized that *Miller* was controlling precedent and reminded the litigants that arguments to overrule a Supreme Court case "have no place before this court."

Constitutional Gun Control Laws

For health advocates interested in translating legal theory into practice, a more pragmatic question arises: Given the Supreme Court cases that have been discussed, what specific types of gun control legislation are constitutionally permissible?

At the state level, the issue is relatively straightforward. The *Cruikshank* and *Presser* cases hold that the Second Amendment is inapplicable to state action, so that almost any type of gun law enacted by a state or locality would fall outside the ambit of the Amendment. Thus laws that affect gun buyers, ranging from the one-gun-per-month purchase restriction recently adopted in Virginia to a complete ban on the ownership of handguns, as in Morton Grove, are all permissible under the federal constitution. Similarly insulated from a successful Second Amendment challenge are state laws that would regulate the design, performance, or manufacture of guns themselves, such as South Carolina's law prohibiting the sale of handguns with a melting point of less than 800°F,[31] or Maryland's law prohibiting the manufacture and sale of handguns that have not received the specific approval of a government board[32] (both laws in an effort to outlaw cheaply made "Saturday night specials").

At the federal level, the Supreme Court's decision in *Miller* means that only those laws that interfere with the preservation or efficiency of state militias would be invalid under the Second Amendment. Since this test must be applied on a case-by-case basis, determining whether a specific federal law would meet the test is somewhat more speculative than with state laws. Clearly, the federal government could not pass a law forbidding firearms use by a state's militia or National Guard, in furtherance of its militia functions. Other proposed or enacted laws, however, such as federal prohibitions on firearms ownership by convicted felons,[33] national gun purchase waiting periods, or laws requiring engineering modifications of guns themselves to make them safer, all would survive Second Amendment scrutiny.

Conclusions

The *Quilici* court's admonishment to those challenging the Morton Grove law, that legal arguments to overrule Supreme Court precedent have no place other than in the Supreme Court itself (or perhaps at the legislative level), also provides an important lesson for public health professionals. Today, the meaning of the Second Amendment is well settled: it does not apply to state action, and any federal "right to bear arms" must be closely linked to some militia purpose. In fact, every state and the federal government have a number of different laws regulating the manufacture, sale, or use of firearms, offering further, more practical evidence of the inapplicability of the Second Amendment to state laws.[34,35]

At some time in the future the Supreme Court may, in fact, overrule *Presser* and *Miller* and grant to the NRA and others the interpretation of the Second Amendment they seek. Until that time, however, public health advocates should understand that the Second Amendment poses no real obstacle to the implementation of even broad gun control legislation. □

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