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LIMITS ON THE POWER OF STATES TO REGULATE FIREARMS

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The same author has written a paper on Limits on the Federal Power to Regulate Firearms.

LIMITS ON THE POWER OF STATES TO REGULATE FIREARMS

I. INTRODUCTION

Although state gun control legislation is proposed as one method of controlling the spread of firearms in California, there are many objections raised. This paper explores the validity of these objections, focussing federal and state constitutional rights and prohibitions. (A related paper analyzes constitutional rights of the individual and state that would prevent the federal government from passing gun control legislation.)

First, the federal Constitution's prohibition on interfering with the "right to bear arms" is examined, and alternative constructions are analyzed to see whether this is considered a right conferred on individuals or on the state. Regardless of the construction used, the Second Amendment prohibition has no effect on state legislatures wishing to formulate gun control measures.

A second argument used to prevent the California legislature from passing gun control legislation is that the California Constitution also confers an individual right of the individual to own guns. The California Constitution contains nothing explicit, however, on the right to bear arms. Finally, some common constitutional methods of challenging state gun control legislation are discussed, though virtually none of these have been successful.

II. THE SCOPE OF THE SECOND AMENDMENT: INDIVIDUAL RIGHT OR STATE RIGHT?

The question of whether the Second Amendment confers an individual right to bear arms or merely prohibits the federal government from interfering with the state militia has not been clearly decided by the Supreme Court. The individual right approach treats the Second Amendment as a right of individual citizens which cannot be restricted by the federal government. [No. 1] The more popular interpretation, the state's right approach, characterizes the Second Amendment as a right granted to the states that cannot be infringed by the federal government. [No. 2] Though the Supreme Court has remained silent on the scope of the Second Amendment, both of these academic interpretations of the right to bear arms have been discussed by at least one federal appeals court. [No. 3]

A. The Individual Right Approach

Under the individual right interpretation, the federal government may not completely prohibit individual gun ownership. [No. 4] The question of whether a state may prohibit gun ownership is less clear; the answer depends on whether the Second Amendment has been applied to the states through the doctrine of selective incorporation. [No. 5]

1. The Doctrine of Selective Incorporation

The Bill of Rights only protects citizens against action by the federal government. However, through the doctrine of selective incorporation, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment may limit action by state and local governments as well. [No. 6] Nevertheless, the Supreme Court rejects the notion that the Fourteenth Amendment incorporates the entire Bill of Rights. [No. 7] Instead, the Court has decided on a case by case basis which rights are so "fundamental" as to be brought into the Fourteenth Amendment and to bind state and local governments. [No. 8] However, ambiguity remains. Some provisions of the Bill of Rights have still not been considered by the Supreme Court since it began applying the incorporation doctrine.

The Second Amendment is not among those rights incorporated into the Fourteenth Amendment. In United States v. Cruikshank, the Supreme Court held that "the second amendment . . . means no more than that it shall not be infringed by Congress." [No. 9] Subsequently, in Presser v. Illinois, the Court rejected a claim that the Second Amendment could invalidate a state law. [No. 10] In that case, the Court upheld an Illinois statute which made it unlawful for a group other than the state militia or federal troops to drill or parade with arms in public without permission from the governor. [No. 11] The defendant argued that this law violated the Second Amendment guarantee of the right to bear arms. [No. 12] Relying on Cruikshank, the Court disagreed, reasoning that "the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the states." [No. 03]

2. The Validity of Nonincorporation

Because the Second Amendment has never been explicitly addressed in formal incorporation analysis, the conclusion that the amendment only applies to actions by the federal government has been questioned. The decisions in Cruikshank and Presser came several years before any provisions of the Bill of Rights were incorporated, thus one cannot be sure that the justices in the Second Amendment cases considered the possibility of incorporation. [No. 14]

The first incorporation decision occurred in 1897, eleven years after Presser and twenty-two years after Cruikshank. [No. 15] Today, only three provisions of the Bill of Rights, including the Second, Fifth and Seventh Amendments, remain unincorporated. [No. 16] The almost total incorporation of the Bill of Rights lends support to the theory that incorporation of the Second Amendment is inevitable. However, more than one hundred years have passed since Cruikshank and Presser were decided, during which time the Supreme Court has been content to let those decisions stand.

The Supreme Court's reluctance to revisit the Second Amendment incorporation question is most notable in its refusal to hear an appeal of a case in which the Seventh Circuit upheld a local government's ban on possession of handguns within its borders. [No. 17] The appeals court, citing Presser, based its decision on the nonapplicability of the Second Amendment to state and local governments. [No. 18]

Likewise, the Ninth Circuit has followed Cruikshank and Presser in upholding California's Roberti-Roos Assault Weapons Control Act of 1989 (AWCA). [No. 19] The plaintiffs attempted to have the AWCA declared unconstitutional on several grounds, including arguing that the law violates the Second Amendment right to bear arms. [No. 20] The court rejected this argument, holding that the Second Amendment only binds the federal government. [No. 21] This case was never appealed to the Supreme Court.

More than a century after they were decided, Cruikshank and Presser remain good law. Thus, the right to bear arms granted by the

Constitution, if analyzed as an individual right, only limits the federal government's attempts to restrict firearms. State and local governments are not bound by the Second Amendment.

B. The State's Right Approach

The alternate interpretation of the Second Amendment, the state's right approach, has received more support in Supreme Court opinions than has the individual right theory. [No. 22] Under this analysis, the right to bear arms has no application to state legislation, and means only that the federal government may impose any firearm restriction so long as it does not impede a state's militia. [No. 23]

In United States v. Miller, the Supreme Court, noting that the purpose of the Second Amendment was to ensure an effective militia, upheld a federal law banning the transport in interstate commerce and subsequent ownership of sawed off shotguns. [No. 24] The Court found that such weapons may be prohibited because they bear no reasonable relationship to a well regulated state militia. [No. 25] Moreover, the Supreme Court recently cited Miller in support of its conclusion that Congress may restrict firearm possession by felons because such a law does not impair a state's right to preserve its militia. [No. 26]

These decisions suggest that the Court favors a Second Amendment test that determines whether the prohibited weapon bears a reasonable relationship to the state militia. Such a test presumes that the Second Amendment is a right granted to states, not to individuals. In practice, courts allow the federal government broad power to restrict firearms: since the Miller decision in 1939, "no federal court has found any individual's possession of a military weapon to be `reasonably related to a well regulated militia.'" [No. 27]

C. Second Amendment Conclusion

Under the state's right analysis, the Second Amendment only restricts federal government action and imposes no barrier to state or local governments.

Likewise, if an individual right analysis is used, only the federal government is bound by the Second Amendment. State and local governments are not restricted as long as the Second Amendment remains unincorporated into the Fourteenth Amendment.

III. THE CALIFORNIA CONSTITUTION

The California Constitution does not contain a provision guaranteeing the right to bear arms. [No. 28] Furthermore, because the Second Amendment does not apply to state legislation, California state laws are not subject to U.S. constitutional attacks based on the right to bear arms. [No. 29] The California Supreme Court notes that the claim that a weapons regulation "violates the Second Amendment has been rejected by every court which has ruled on the question." [No. 30] The court also states that "[i]t is long since settled in this state that regulation of firearms is a proper police function." [No. 31] Therefore, absent a state constitutional amendment, California firearms restrictions are not limited by the right to bear arms.

IV. OTHER ARGUMENTS AGAINST STATE GUN CONTROL LEGISLATION

Gun control legislation has been challenged on a wide variety of bases with virtually no success. Some of the more common methods for challenging weapons regulations are discussed below. However, most challenges are fact-specific to their particular case. Therefore, this list is merely illustrative of some possible arguments.

A. Fifth Amendment of the U.S. Constitution

The Fifth Amendment privilege against self-incrimination was used to invalidate a portion of the National Firearms Act of 1934. [No. 32] The privilege against self-incrimination permits persons to refuse to give inculpatory testimony. The Act contained a gun registration requirement that was directed primarily at persons who had obtained weapons illegally. [No. 33] The Supreme Court found that requiring such persons to register their weapons forced them to incriminate themselves for these other criminal acts. [No. 34]

However, the self-incrimination argument ultimately failed. After Congress rewrote the offending provision by only requiring lawful possessors of firearms to register, the Supreme Court ruled that the Act no longer violates the privilege against self-incrimination. [No. 35]

B. Ninth Amendment of the U.S. Constitution

Parties have argued that the right to possess firearms for the purpose of self-defense, if not explicitly listed in the Bill of Rights, is a right contained in the Ninth Amendment. [No. 36] The Ninth Amendment states that "[t]he enumeration in the Constitution of

certain rights shall not be construed to deny or disparage others retained by the people." [No. 37] The Seventh Circuit rejected this argument, finding no Supreme Court precedent to support the theory that the Ninth Amendment protects any specific right. [No. 38] In fact, the Ninth Amendment has not been used to define the rights of individuals or to invalidate state or federal laws. [No. 39]

C. Preemption

The argument that state gun control legislation is preempted by federal law has not been accepted. The supremacy clause [No. 40] of the Constitution requires that federal law override conflicting state law. [No. 41] The Ninth Circuit explains that preemption generally occurs when Congress has explicitly or implicitly intended to supersede state law. [No. 42] The court also notes that "Congress expressly disavowed any intent to occupy the field of gun control in the Gun Control Act of 1968." [No. 43] In fact, the purpose of the Act was to assist the states in regulating firearms. [No. 44] Furthermore, the Act mandates compliance with state and local gun control laws. [No. 45] Thus, it cannot be argued that Congress intended to supersede state legislation.

V. CONCLUSION

Courts thus far have been reluctant to invalidate gun control laws under any constitutional provision, particularly the Second Amendment. Under either the individual right analysis or the state's right analysis the conclusion is the same: state and local governments are not bound by the Second Amendment. Furthermore, the California Constitution does not contain a provision guaranteeing the right to bear arms. Finally, other constitutional arguments for invalidating state legislation generally have been unsuccessful or, if successful, the constitutional defects have been corrected by Congress.

NOTES

[No. 1] John E. Nowak & Ronald D. Rotunda, Constitutional Law (4th ed. 1991).
[No. 2] Id.
[No. 3] Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 729 (9th Cir. 1992).
[No. 4] Id.
[No. 5] Id.
[No. 6] E.g., Duncan v. Louisiana, 391 U.S. 145 (1968).
[No. 7] See Palko v. Connecticut, 302 U.S. 319, 323 (1937). See also Duncan, 391 U.S. at 163 (Black, J., concurring); Nowak and Rotunda, supra note 1.
[No. 8] Duncan, 391 U.S. at 149. See also infra note 16 (listing unincorporated provisions of the Bill of Rights).
[No. 9] 92 U.S. 542, 553 (1875).
[No. 10] 116 U.S. 252 (1886).
[No. 11] Id.
[No. 12] Id. at 264.
[No. 13] Id. at 265.
[No. 14] Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 653 (1989).
[No. 15] Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).
[No. 16] The Fifth Amendment right to criminal prosecution only on grand jury indictment remains inapplicable to the states, Hurtado v. California, 110 U.S. 516 (1884), and the Seventh Amendment guarantee of a jury trial in a civil case also remains inapplicable to the states, Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916).
[No. 17] Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983).
[No. 18] Id. at 270.
[No. 19] Fresno Rifle and Pistol Club, 965 F.2d 723.
[No. 20] Id. at 729.
[No. 21] Id. at 730.
[No. 22] Nowak and Rotunda, supra note 1.
[No. 23] Id.
[No. 24] 307 U.S. 174, 178 (1939).
[No. 25] Id.
[No. 26] Lewis v. United States, 445 U.S. 55, 65 n.8 (1980).
[No. 27] United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992).
[No. 28] Witkin Sum. Const Law 143.
[No. 29] See, e.g., In re Rameriz, 193 Cal. 633, 651 (1924).
[No. 30] Galvan v. Superior Court of San Francisco, 70 Cal. 2d 851, 866 (1969).

[No. 31] Id.
[No. 32] Haynes v. United States, 390 U.S. 85 (1968).
[No. 33] Id. at 96.
[No. 34] Id.
[No. 35] United States v. Freed, 401 U.S. 601 (1971).
[No. 36] Quilici, 695 F.2d at 271.
[No. 37] U.S. Const. amend. IX.
[No. 38] Quilici, 695 F.2d at 271.
[No. 39] Nowak and Rotunda, supra note 1.
[No. 40] U.S. Const. art. VI, cl. 2.
[No. 41] Nowak and Rotunda, supra note 1.
[No. 42] Fresno Rifle and Pistol Club, 965 F.2d at 725-26.
[No. 43] Id. at 726 n. 4.
[No. 44] Id.
[No. 45] Id.