

The Second Amendment – the next questions

This week, the Supreme Court settled a Constitutional debate that had, for decades, left an unremended gap in the Bill of Rights. In the case of *District of Columbia v. Heller*, the Court finally ruled that the Constitution's Second Amendment protects an individual right to own firearms.

The *Heller* decision overturned Washington DC's strict handgun ban, and also invalidated several decades of lower court precedent which held that the right "to keep and bear arms" belonged to government militias, rather than to individual citizens. In this regard, *Heller* provided not only a narrow triumph for the plaintiff in the case; but also a broader affirmation of America's tradition of guaranteed, individual liberties.

In matters of Constitutional law, however, a single courtroom victory seldom provides resolution to all aspects of a given issue. Anthony Heller's victory at the Supreme Court raises a raft of additional questions about firearms law that will likely take years of litigation to resolve. On the eve of the high court's *Heller* opinion, it is worth taking a moment to preview some of these upcoming battles.

A matter of incorporation

The next major test of Second Amendment law is likely to involve the question of whether the amendment restrains the conduct of state governments in the same way that it binds the federal government. *Heller* only addressed the Second Amendment as a matter relevant to federal authority. This was proper, given that all of the questions that the Court confronted in *Heller* were federal in nature. However, a substantial number of American gun regulations are not federal laws, but state statutes. Discovering the extent to which the Court is willing to extend *Heller's* check on federal power to the states is the next order of business for advocates of gun owners' rights.

To understand why *Heller* became the effective test case for the Second Amendment, one must first understand the legal concept known as "incorporation".

The Bill of Rights, as originally conceived, applied only to the actions of the federal government, and did not bind state legislatures or local

municipalities in any way. Since the DC handgun ban impacted an exclusively federal jurisdiction, *Heller* presented a clean test of the fundamental tenets of the Second Amendment. Raising a legal challenge to a state or municipal gun law would have given the court the option of dodging the matter on a technicality. Instead, *Heller* avoided complicating side arguments, and allowed the court to dig down to the amendment's most basic underpinnings.

While the Bill of Rights was initially meant to constrain only federal power, its role has been altered by subsequent amendments to the Constitution. Specifically, the ratification of the Fourteenth Amendment in 1868 broadened the effective scope of the Bill of Rights, and set the stage for its prohibitions to apply to the states as well.

Fearful that state governments would enact punitive, race-based laws to restrict the rights of freed persons in the post-Civil War South, Congress wisely passed a constitutional amendment that prohibited states from infringing upon "the privileges and immunities" of national citizenship. In the legal realm, this has meant that the Supreme Court has gradually moved to "incorporate" various parts of the Bill of Rights as checks against state power.

In the years since the incorporation doctrine was first adopted by the Court, most of the Bill of Rights has been applied to state governments. The Second Amendment is among the last provisions of the Bill of Rights that have yet to be incorporated in this way. Because of this, the "incorporation question" is sure to fuel the next significant round of Second Amendment litigation. Due to the Court's consistent track record of incorporating fundamental, individual rights, it is also highly likely that this matter will be resolved in the affirmative once it reaches the Supreme Court docket.

To keep and bear which arms?

While the incorporation question will loom large over future gun cases, it will not be the most contentious issue to arise from the *Heller* decision. The far more controversial area of inquiry will involve answering specific questions about which arms the people are entitled to keep and bear. In other words, federal courts will have to discern, on a case-by-case basis, which guns are protected against governmental action. In the realm of Constitutional law, these sorts of questions most often get answered by applying a standard of review known as "strict scrutiny."

This “strict scrutiny” standard places a high burden on the government to show that a particular regulation or action does not limit protected, Constitutional behavior. For example, in *Cohen v. California*, the Supreme Court ruled that the state of California could not prohibit the wearing of clothing which bore obscene words.

The Court invalidated that section of the California penal code as an infringement upon a fundamental, First Amendment right. At the same time, the strict scrutiny doctrine also assumes that Constitutional liberties are not absolute in every instance. Because of this, courts have allowed limited circumstances in which rights may be restricted, but only when such restrictions serve a “compelling governmental interest”. In the First Amendment realm, the Court has ruled that speech conduct which constitutes libel or “terroristic threats” is not protected, and may therefore be regulated by the state. By answering such highly specific questions, the Court has allowed a complex body of First Amendment law to emerge.

Like its First Amendment cousin, Second Amendment doctrine may become equally complex and rule-based over time. The questions posed to the courts will be narrow, and will likely be focused on which calibers and functions fall within the scope of the right to “keep and bear arms.”

While not providing a definitive answer, the Court in *Heller* hinted that it might look to a portion of the 1939 case “*United States v. Miller*,” which was the high court’s only prior Second Amendment case. In general, *Miller* set out a two-pronged test whereby guns protected by the Second Amendment must be,

1. Arms in common use;
2. Arms that could serve a militia purpose, if so needed.

The *Heller* opinion is unclear as to whether it would affirm both prongs of this test, but it very explicitly endorses the idea that arms “in common use” are entitled to Constitutional protection. Thus, the Court seems prepared to ensure the protection of some classes of firearms that have been hotly pursued by gun-ban groups in the recent past.

For instance, virtually all side arms would fall under *Miller*’s first category,

save for some of the more exotic. This prong of the *Miller* test would also clearly cover the majority of semi-automatic assault rifles, many of which are in common use throughout the nation. If lower courts were to later adopt the second “militia” prong of *Miller*, it should be noted that many of these same assault rifles would make an even better match for *Miller*’s dual criteria. Many common assault rifles like the Colt AR-15 have functional characteristics that make them extremely useful in a military setting. For example, the AR-15 is a near duplicate of the army’s M-16 combat rifle, with the exception that it cannot fire automatically.

By embracing the first part of the *Miller* test, the high court has also clearly indicated that there are limitations on the extent of Second Amendment rights. Thus, firearms which fail to satisfy the Court’s “common use” test will likely fail the overall test of Constitutional protection. These instruments will probably include sawed-off shotguns, which were the guns at issue in the 1939 *Miller* opinion.

Heller is also explicit about the fact that it will allow certain regulatory schemes governing firearms to stand. The Court’s opinion tackles this question directly by stating that *Heller* should not “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.” It is probable that the Court will also find that the regulation of machine guns falls into this same category. Other than this, *Heller* gives little in the way of detailed guidance on these questions, and leaves the specifics for another day.

Looking forward

Some gun rights advocates have raised concerns about whether the *Heller* decision clings too closely to *Miller*, which qualifies the individual “right to bear arms” by looking to common social norms regarding firearms use. While this may be a legitimate issue, it is worth stepping back to note the broader scope of what has been achieved.

In large measure, *Heller* is a victory for civil libertarians of all stripes – and not just gun rights advocates. By refusing to ignore one provision of the Bill of Rights, the Court has indicated its willingness to view the document in a more holistic fashion. However, as subsequent legal questions play themselves out, civil libertarians must keep a wary eye open, for the federal courts have sometimes shown a tendency to develop doctrines that are overly deferential to the needs of the government, while narrowing the

scope of protected rights.

As the next rounds of firearm litigation move forward, America's lower courts need to ensure that *Heller* has substance, and not just form.

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