Written by **Patrick Krey** on June 9, 2009

The Second Amendment and the States

This ruling contrasts with a recent ruling by "the U.S. Ninth Circuit Court of Appeals in San Francisco … that the Second Amendment is incorporated against the states and local governments" — in other words, states and local governments are bound by the Second Amendment. Which court is correct?

To understand the debate in this topic, it helps to briefly review constitutional history. When the Constitution was first proposed, opponents of the new document criticized it for lacking a bill of enumerated rights, which were common in virtually every state constitution of the time. In response to these complaints, proponents of the new Constitution agreed to add a series of amendments in the first Congress that would codify restrictions on the federal government to infringe certain fundamental rights. The resulting first 10 Amendments, collectively referred to as the "Bill of Rights," were ratified on December 15, 1791.

It is important to note two little-known historical facts regarding the proposal and ratification of the Bill of Rights. Alexander Hamilton, himself a prominent advocate of a liberal reading of the necessary and proper clause as well as a loose construction of the Constitution, argued that a Bill of Rights would be dangerous because it would imply that without such an enumeration of rights, the new government might actually have the power to infringe on these rights and might even now open the door for the government to regulate in these areas. In *Federalist # 84*, Hamilton wrote:

> I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? … I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national

> government.

Hamilton basically was saying that the national government lacked the power to do any of the things that the proposed Bill of Rights were prohibiting, and codifying these restrictions might lead some to argue that the national government could actually regulate in those areas, which he felt was completely unconstitutional.

In addition, James Madison, widely regarded as "The Father of the Constitution," wanted to have the Bill of Rights restrictions to be held against the states but was rebuffed in this effort because of widely held reservations to further empower the new government over the states. The first Congress refused to even submit such a proposal to the states for ratification because it was so unpopular. As a matter of fact, numerous states had gun-control laws on the books at the time, as well as state-chartered religions. It was not that the citizens were necessarily opposed to state involvement in these matters but rather did not want any federal intrusion.

These two historical facts illustrate that, at the time of the ratification of the Bill of Rights, it was recognized by the Framers and Ratifiers that the national government had no authority to enforce the Bill of Rights against the states, and whatever authority it did have was clearly delineated in the text of the Constitution itself. Therefore, the Bill of Rights did not give the national government any new powers but simply reiterated important restrictions upon it and *not* the states. This understanding is consistent with the position that not only does the Second Amendment protect an individual "right to bear arms" against federal action but also that the national government lack any power *whatsoever* to regulate within this area. Additionally, the states are free to regulate (or not regulate) in that area based on their own state constitutions.

The fact that the Bill of Rights did not apply against the states was not modified until after the ratification of the 14th Amendment and the judicial creation of the incorporation doctrine. The incorporation doctrine refers to the court selectively "incorporating" certain amendments in the Bill of Rights against state governments via a liberal reading of the 14th Amendment — completely contrary to the original understanding at the time of its ratification as explained by widely respected legal scholar Raoul Berger in *Government by Judiciary: The Transformation of the Fourteenth Amendment.* As the late Congressman Larry McDonald explained, the rationale behind the incorporation doctrine "runs completely contrary to thoughts and purposes of the original framers.... Their intent was to limit the rights and powers of the federal government, not to help expand them."

The courts liberal interpretation allowed the federal courts to widen their jurisdiction and judicially review numerous state laws. Some libertarians welcome this development in constitutional history as a great opportunity to spread freedom because it gives advocates of individual liberty "two bites at the freedom apple — one under his state constitution and one under the U.S. Constitution." Sadly, the constitutional record of incorporation is not something many advocates of individual liberty can be proud of.

Constitutional historian Kevin R.C. Gutzman details the sordid history of the incorporation doctrine:

> This is what the Incorporation Doctrine has given us: in place of reservation of these areas of law to state governments for regulation via legislative elections, we get seizure of control over them by unelected, unaccountable, politically connected lawyers (that is, federal judges) who purport to substitute "reason" for the (one infers) "unreasonable" regulations

> crafted by elected officials.... It was under the cover of the Incorporation Doctrine that federal courts recently invented a right of child rapists not to face the ultimate penalty for their crimes. It was under the cover of the Incorporation Doctrine, indeed, that a Supreme Court majority for several years banned capital punishment altogether. It was under the cover of the Incorporation Doctrine that the Supreme Court eliminated state prohibitions of various types of pornography. The Incorporation Doctrine also underlies the Court-created ban on prayer, even on moments of silence, in public schools. The Incorporation Doctrine has allowed federal courts to invent rights to burn flags, ban invocations at high school graduations, and establish essentially a national code of "acceptable" punishments.

Furthermore, it was with the help of the incorporation doctrine that the "politically connected lawyers" on the court were able to invent "penumbras" giving rise to the infamous *Roe v. Wade* decision, and there were even discussions at the height of judicial activism to engrain a right to a minimum wage within constitutional law. Libertarians should be careful what they wish for because the "interpreters" on the court do not always see eye-to-eye with their vision of liberty.

Ironically, libertarian proponents of incorporation who usually are almost universally opposed to state power, let alone massively centralizing power in a super state, are in effect advocating the use of a larger, more powerful central government (via its court system) to force smaller governments to "be more free" without recognizing the fact that freedom means different things to different people. Such a contradictory line of thought is in direct conflict with the proud Jeffersonian decentralist tradition of those who founded our constitutional republic.

This leads us back to gun-rights activists who are currently expending numerous resources trying to get federal judges to incorporate the bill of rights against the states. Ironically, years of money spent trying to get federal judges to advance the cause of gun rights resulted in the disappointing Supreme Court decision in *District of Columbia v. Heller* where the "conservatives" on the court acknowledged that the Second Amendment protects an individual right "to bear arms" *but* that right is not "unlimited" and there is still room for reasonable restrictions on gun control. As renowned constitutional attorney Edwin Vieira, Jr. wrote last fall in *The New American*, "Could Heller allow gun regulation to the point that the regulation could become a prohibition for all practical purposes? What effect will it have, if any, on existing or future gun laws in other jurisdictions throughout the country?"

The *Heller* decision was disheartening to gun rights advocates who believed that vast amounts of money spent on endless legal challenges would engrain an unlimited right to gun ownership in our constitutional law. Related efforts to incorporate the limited protections of *Heller* against the state will face similar frustration. Those who put their faith in "politically connected lawyers" to uphold their rights and advance the cause of freedom will continue to be disappointed. Perhaps these activists will now realize that federal judges are not reliable friends of individual liberty and instead will focus their energy on a much more realistic goal of making Congress constitutional.