MILLER'S GHOST:
THE IMPORTANCE OF *UNITED STATES V. MILLER* TO *DISTRICT OF COLUMBIA V. HELLER*

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ABSTRACT: *The author surveys the 2nd Amendment by looking at United States v. Miller (1939) and District of Columbia v. Heller (2008), with especial attention given to the historical language of Miller that would eventually be applied to the Heller ruling. The case notes of Miller are outlined, as are the holdings written by Justice McReynolds. In its discussion of Heller, the article gives a strong expose of Justice Steven's decent, but rebuttals with Justice Scalia's majority opinion that upheld the Second Amendment, based upon a historical interpretation of the Second Amendment and Miller.*

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"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."
—United States Constitution, Amendment II

Americans are notably feisty in the protection of their rights, whether real or imagined. Perhaps this explains why the United States Congress has only occasionally passed laws that are sufficiently inconsistent with the Second Amendment to arouse the Supreme Court's challenge. The complex relationship of the two most prominent cases, 1939's *United States v. Miller*[1] and 2008's *District of Columbia v. Heller*[2], fueled the Court's debate. While the justices certainly wrestled with the language of the Second Amendment itself in *Heller*, an equally significant amount of wrangling took place over the meaning and application of *Miller*. Ultimately, however, the Court used *Miller* appropriately, despite Justice Stevens' opposition.

Regardless of Americans' determined attachment to their rights, it is somewhat surprising to find no major Second Amendment cases prior to *Miller*, although some gun restrictions have been in place since the colonial era. One potentially explanatory factor is the English common law's long tradition of including limited restrictions on gun ownership and usage. The government's power to regulate firearms was broadly accepted in the colonial period.[3] Americans had witnessed the largely incompetent performance of the militia during the Revolution (including a widespread lack of uniformity in training and equipment), and the need for its effectiveness was further demonstrated by Shays' Rebellion. The Constitutional Convention delegates consequently sought better military equipment and training for Americans by

1 United States v. Miller, 374 U.S. 104, (1939).

2 District of Columbia v. Heller, 554 U.S. 570, (2008).

3 See Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME AND JUSTICE 137, 140-47 (2001) (detailing the history of English gun control laws).

ensuring the right to keep and bear arms and also by moving the militia from under state control to federal. [4] Antifederalists, however, feared that federal control would weaken the states' defense against federal tyranny; these concerns birthed the Second Amendment.[5] Throughout most of pre-*Miller* legal history, courts refused to find an individual right to arms and consistently upheld gun regulations.

Americans collectively grew more nervous about guns in the post-Civil War era. In the 1930s, motion picture production codes tightened regulations regarding the portrayal of firearms, especially automatic weapons.[6] In addition to silver screen portrayals, "highly publicized and often glamorous firearms incidents" increased public consciousness about the dangers of these arms and fostered support for further regulation. In response to 1929's infamous "St. Valentine's Day Massacre," President Franklin Roosevelt wanted to regulate both handguns and automatic weapons. Although the bill stalled until 1934, it eventually passed as the National Firearms Act of 1934.[7] Within the next five years, the law became the object of the most significant Second Amendment case at the time.

When Jack Miller and Frank Layton transported an unregistered short-barreled shotgun from Claremore, Oklahoma to Siloam Springs, Arkansas, they violated the National Firearms Act of 1934. The act prohibited the unauthorized transfer of shotguns with barrels less than eighteen inches in

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4 *Id.* at 148 (points out that the Constitution tasks Congress with "organizing, arming, and disciplining" the militia in Article I, Section 8).

5 See also Rudolph B. Lamy, *The Influence of History upon a Plain Text Reading of the Second Amendment to the Constitution of the United States*, 49, AM. J. LEGAL HIST. 217, 224 (Apr., 2007); Michael D. Ridberg, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38, U. CHI. L. REV. 185, 191 (1970) (asserting three historical reasons for arms rights: militia maintenance, deterrence of oppression, and self-defense).

6 Bellesiles, *supra* note 3, at 174.

7 Greg S. Weaver, *Firearms Deaths, Gun Availability, and Legal Regulatory Changes: Suggestions from the Data*, 92, CRIM. L. & CRIMINOLOGY 823, 824J. j (Spring-Summer 2002).

length in accordance with Congress' power to regulate interstate commerce. Miller and Layton subsequently filed a motion to quash their indictment, contending that the National Firearms Act was unconstitutional because it infringed upon their right to keep and bear arms. A district court sided with Miller, and the government appealed to the Supreme Court.[8]

Although claims of ambiguity have arisen during the recent debates over gun control, Justice James McReynolds' opinion for the Court in *U.S. v. Miller* is remarkably concise, and its reasoning plain. In stating the Court's reversal of the district court's decision, McReynolds stated:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time 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. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[9]

Evidently, the relationship between a given class of weapon and the "preservation or efficiency of a well-regulated militia," is the critical factor in the Court's opinion. The issue of the Second Amendment as an individual or collective right is not addressed in the *Miller* opinion, despite the tendency of popular dialogue to

8 307 U.S. at 174-75.

9 *Id.* at 178.

argue that question.

For the Court, however, there was likely a political issue at hand as well as a textual one. As David Yassky asserts, *Miller* was not only a Second Amendment case but a New Deal case. "Indeed," says Yassky, "the National Firearms Act upheld in Miller was an important component of the New Deal program, and was touted as such in Roosevelt's political speeches."[10] The 1939 Court would have been loath to give precedence to an individual property right over the federal government's public welfare interest. Unlike the First Amendment, the Second did not (in the Court's eyes) provide a means of "ameliorating dangers of the new administrative state" and was not "rooted in key New Deal themes."[11] While the Court never openly declared these reasons, Yassky's conclusions on the Court's motives seem reasonable.

Yassky's ultimate conclusion—that *Miller* effectively reduced the Second Amendment to a tautology—is less convincing. He argues that the *Miller* decision could not have been primarily about classifying a weapon's protection under the Second Amendment based on whether or not it could be used by a militia. If this were the case, he says, the Court would have struck down another section of the National Firearms Act (NFA) that applied similar restrictions to machine guns, which were standard military equipment. He further contends that determining Second Amendment applicability based on military usage or non-usage would

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10 David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99, MICH. L. REV. 588, 664 (Dec., 2000).

11 *Id.* at 663 (observing that gun control was an important objective to Roosevelt in pursuit to the last of his "Four Freedoms": freedom from fear).

have "the perverse result that the deadlier a firearm is, the more likely it is to receive constitutional protection— because the military, of course, prefers weapons that are as efficient and effective at killing as possible."[12]

While convincing at first glance, Yassky's contentions can be countered both by closely examining the *Miller* opinion and by simple reasoning. Brandon P. Denning and Glenn H. Reynolds contend that *Miller* in no way rejects an individual rights interpretation of the Second Amendment but merely specifies that weapons unrelated to the militia are not guaranteed protection under the right to bear arms. Citing the Court's critical prefatory clause, "In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," they argue that *Miller* implies that if such a connection had been established, the law could have been struck down.[13] It is difficult to argue with such plain logic with regard to the crucial section of the *Miller* opinion, which "avoided any sweeping statements regarding the scope of the Second Amendment."[14]

In addition to the simple appeal to the text of McReynolds' opinion, two further arguments can dispel Yassky's assertions regarding the "perverse effect" of relying on the military usage or non-usage distinction, as well as his contention that the Court under such reasoning would have been forced to strike

12 *Id.* at 666.

13 Brandon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, 65, LAW & CONTEMP. PROBS. 113, 116 (Spring 2002).

14 *Id.*

down the machine gun restrictions of the NFA. Regarding the former, Yassky ignores the fact that some legislation is inherently paradoxical and that such paradoxes are often unavoidable.[15] As for the machine gun regulations, these were simply not the subject of the case at hand. No "case or controversy" regarding that provision of the NFA existed and the Court had no reason to address it. Yassky's historical analysis of the Court's motives is helpful, but his interpretation of the *Miller* decision is flawed. Denning and Reynolds are more compelling in their argument that *Miller* says only that weapons not potentially related to a militia can be regulated or banned.

Curiously, *Miller* received little attention prior to the 2008 *Heller* case. It was cited as a precedent for the qualification of universal language in *Konigsberg v. State Bar of California*[16] and also with regard to its commerce clause implications.[17] It is also footnoted as evidence that Second Amendment rights are not wholly without limitation in *Lewis v. United States*[18] and in the upholding of the Brady Act in *Printz v. United States*.[19] In all these cases, however, *Miller* was quite literally a footnote to larger

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15 Consider welfare benefits paying more money to unwed mothers the more children they have. Surely the government does not wish to incentivize having more children out of wedlock, yet providing for these mothers requires more money for those with more children. Such "perverse effects" are not always readily avoidable.

16 Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961).

17 Heart of Atlanta Motel v. United States, 379 U.S. 241, 276 (1964) (citing United States v. Miller, 374 U.S. 104, (1939)) (upholding the use of Commerce Clause power to advance "ends not entirely commercial").

18 445 U.S. at 65.

19 Printz v. United States, 521 U.S. 898, 939 (1997) (Thomas, J., concurring).

and only tangentially-related decisions.

Miller became a much more hotly debated topic as the Roberts Court considered the case of *District of Columbia v. Heller*, a challenge to the constitutionality of Washington D.C.'s handgun ban. The focus of the debate over *Miller* is in the repartee between Justice Scalia in the opinion of the Court and Justice Stevens' dissenting opinion. Two questions are at issue between Scalia and Stevens, one explicit and the other implicit. The two openly dispute whether (according to *Miller*) questions of Second Amendment applicability are dependent on the class of weapon or on how the weapon was being used. There is also an implicit dispute about the degree to which *Miller* is applicable to the *Heller* case.

In *Heller*, the Court struck down Washington D.C.'s handgun ban, holding that it violated the individual right to keep and bear arms provided by the Second Amendment. Justice Stevens sharply dissented from this ruling:

> Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States* v. *Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939), provide a clear answer to that question.[20]

20 554 U.S. at 636-37 (Stevens, J., dissenting).

While the first two grounds Stevens offers (the Amendment's text and history) certainly play a role, it is his analysis of *Miller* that forms the backbone of his dissent and his disagreement with Justice Scalia.

It is worth noting at the outset that there is no dispute over the individual or collective nature of the right to bear arms; despite popular debate on the subject, Stevens dispels in his opening sentence the notion that such a question is at issue and acknowledges that, at least according to *Miller*, the right to bear arms is an individual one.[21] What is debated is whether *Miller* permits the regulation of non-military arms (as Scalia asserts) or the non-military *usage* of arms regardless of whether or not those arms could be used militarily.

Stevens is clear from the beginning that he believes the *Miller* case held the latter rather than the former. He states unambiguously:

> The view of the Amendment we took in *Miller*--that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons--is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.[22]

One of his dissent's critical problems is that he does not defend

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21 *Id.* at 636 (Stevens, J., dissenting).

22 *Id.* at 637-38 (Stevens, J., dissenting).

this interpretation of *Miller* but merely asserts that such was the position taken by the Court. He goes on to cite a litany of lower-court cases that take a similar interpretation of *Miller* but fails to explore the text of the *Miller* opinion to justify his interpretation. Ironically, he then criticizes Scalia's majority opinion as "a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the opinion itself."[23] His lone attempt to cite another Supreme Court case is a casual reference to *Lewis v. United States*, which merely quotes *Miller*'s requirement of "some reasonable relationship to the preservation or efficiency of a well regulated militia," but does not expound upon whether a military class of weapon being used by a private citizen for non-military purposes bears such a relationship.[24]

Justice Stevens does make several points regarding the historical context of the Amendment in addition to his *Miller*-related arguments. He notes that the Second Amendment, while constructed similarly to state arms-rights provisions, does not specify non-military purposes (especially hunting and self-defense) as being protected even though at least two state provisions did so. He concludes, "The contrast between those two declarations and the Second Amendment . . . confirms that the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear Arms' was on military uses of firearms, which they viewed in the context of service in state militias."[25] Additionally, Stevens

23 *Id.* at 639 (Stevens, J., dissenting).

24 445 U.S. at 65.

25 554 U.S. at 640-43 (Stevens, J., dissenting).

accused the majority of disparaging the significance of the prefatory clause of the amendment and debates the Court's inclusive construction of the phrase "the people."[26] While these arguments are certainly important to Stevens, the structure and tone of his dissent makes his interpretation of *Miller* the focal point.

Justice Stevens' dissent is tightly argued and superficially persuasive—until one reads the majority opinion. There, Justice Scalia carefully refutes each of Stevens' objections. By way of introduction, he criticizes Stevens for "overwhelming reliance" upon *Miller* and proceeds to dismantle Stevens' interpretation of that decision.[27] "And what is, according to Justice Stevens, the holding of *Miller* that demands such obeisance?" asks Scalia. "That the Second Amendment 'protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons.'"[28] In reality, he replies, *Miller* did not mean and could not have meant anything of the sort.

As might be expected, Scalia begins by disputing the reason for which the Court upheld the NFA's ban on short-barreled shotguns. He emphasizes the specificity of the Court's ruling in its critical introductory sentence: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time 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

26 *Id.* at 643-45 (Stevens, J., dissenting).

27 *Id.* at 621.

28 *Id.*

bear such an instrument."[29] He further observes that the Court devoted significant attention to the question of whether short-barreled shotguns were used in the military. Such an examination, he says, would have been unnecessary if Stevens' assessment of the Court's reasoning were correct; in that case, the Court need only have noted that Miller was not a militiaman and ended its reasoning there without bothering to examine the type of weapon and its absence among military equipment. Scalia concludes, "*Miller* stands only for the proposition that the Second Amendment right . . . extends only to certain types of weapons."[30]

Scalia further fleshes out the way in which *Miller* classifies weapons. The phrase "part of ordinary military equipment" must be read in its historical context. Since militiamen were expected to supply their own arms, "ordinary military equipment" means the type of arms commonly employed by average citizens.[31] According to Scalia, this explains the lack of challenge to the ban on machine guns, which Stevens had considered evidence that the *Miller* decision did not rest on weapon classification. The machine gun ban was neither challenged nor voluntarily struck down by the Court because machine guns were not "ordinary military equipment" by a militia-oriented definition. As Scalia concluded, "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-

29 307 U.S. at 178 (emphasis added).

30 554 U.S. at 622-23.

31 *Id.* at 624-25.

barreled shotguns."[32] Scalia thus effectively dispatches Stevens' most prominent arguments—those relating to *Miller*.

Not only did Scalia readily correct Stevens' misinterpretation of *Miller*, he also emphasized Stevens' overuse of the *Miller* case. Having reached his conclusion that *Miller* says far less than what Stevens asserts, Scalia notes that it is "particularly wrong-headed" to extract further meaning from *Miller* because it was not intended to exposit the Second Amendment thoroughly.[33] Indeed, nowhere in the opinion (which, at a mere eight pages, is less than a quarter of the length of Stevens' dissent) does Justice McReynolds attempt to define the meaning of the Second Amendment, which is quoted once and only mentioned three times.[34] The vast majority of the opinion details the history of the term "militia," rather than concerning itself with the relationship between the Second Amendment's two clauses or the individual (or collective) nature of the right.[35]

In addition to these concerns, Scalia notes that Miller was not represented at all in the case before the Supreme Court, neither filing a brief nor appearing at oral argument: "reason enough, one would think, not to make that case the beginning and end of this Court's consideration of the Second Amendment."[36] Finally, Scalia dismisses with an acerbic footnote the lower court rulings to which Justice Stevens turned for support of his *Miller* interpre-

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32 *Id.* at 625.
33 *Id.* at 623.
34 307 U.S. at 176, 178.
35 See *Id.* at 178-82.
36 507 U.S. at 623.

tation:

> As for the "hundreds of judges," . . . who have relied on the view of the Second Amendment Justice Stevens claims we endorsed in *Miller:* If so, they over read *Miller.* And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.[37]

Scalia ends with that pointed criticism and returns to the heart of the disagreement between himself and Justice Stevens—how to interpret *Miller* and how much to rely upon it.

Americans concerned with the protection of their rights rejoiced at the Court's decision in *District of Columbia v. Heller*, satisfied that the original intent of the Second Amendment had been upheld. They most likely remained unaware of the role played by a semi-obscure case from 1939: *United States v. Miller*. Justice Stevens doggedly insisted that this case set a precedent for the proscription of non-military usage of arms, citing lower court interpretations of *Miller* as well as historical evidence pointing toward such an interpretation. However, Stevens' arguments collapse when read alongside the majority opinion of Justice Scalia. By correcting Stevens' interpretation of *Miller*, demonstrating its limited relevance to thorough Second Amendment jurisprudence,

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37 *Id.* at 624, Fn. 24.

and contextualizing the history surrounding both *Miller* and the Second Amendment, Scalia powerfully defended the *Heller* decision against the dissenters. *Heller* remains a stalwart and accurate precedent for future Second Amendment jurisprudence.