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The New First Amendment and Its Impact on the Second

DANIEL O. CONKLE*

When the *Indiana Law Journal* invited me to submit commentary on the future of the law, I was terrified by the prospect. Having proclaimed long ago that “[p]rediction is a hazardous business,”¹ I was prepared to decline the invitation, or perhaps to submit a title and nothing more.² As the deadline approached, I became more and more frantic. Finally, I gave up. I decided not only to decline the invitation, but also to resign from the faculty. It was a matter of principle.

I worked late into the night, preparing my letters to the *Journal* and to the Dean. It was hard to find the words.³ Fatigue overcame me, and I fell asleep at my desk. Immediately I began to dream. And what a dream it was! When I awoke, I was delirious with joy. Now I could contribute to the *Journal* after all. Now I would not have to resign. Now I could predict the future, because, at least for one small corner of the law, I had actually seen what the future might hold.

In my dream, I was standing in a long corridor. Near the end of the corridor was an open door in which stood a very peculiar man. He was dressed all in black, from his head to his foot. And, yes, the stump of a pipe he held tight in his teeth.⁴ The man beckoned me toward him and, with some hesitation, I walked down the corridor and followed the man through the door. We entered a large and ornate office. The man spoke not a word, but went straight to his desk.⁵ He picked up a document and handed it to me. It was a draft opinion of the United States Supreme Court, and I realized at once that I was standing in the chambers of a Supreme Court Justice. The peculiar man now looked familiar. Could it be Justice Scalia? No, this man was much too old.

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1. Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 635 (1985).

2. Among the titles that I considered: “How the Constitution Can Survive Its Third Century: The Critical Issues and Their Proper Resolution,” “Toward a General Theory of Law, Economics, and Postmodern Feminism: A Philosophical Analysis,” and “Attack of the Killer Tomatoes Revisited: Constitutional Personhood and the Right to Due Process.”

3. My WordPerfect thesaurus file had inexplicably disappeared, and our computer assistant had gone home for the night.

4. The smoke, it encircled his head, but it looked more like a halo than a wreath. Cf. CLEMENT C. MOORE, *THE NIGHT BEFORE CHRISTMAS* (1949).

5. Cf. *id.*

But the resemblance was striking, so I asked him. He smirked in response and ushered me to the door.

I stood in the corridor and read the draft opinion from start to finish. It was dated May 12, 2011. Labeled "Draft Opinion of the Court," it did not identify its author. I assume that the opinion was written by the man who gave it to me, but I cannot be sure. I also cannot be sure that the opinion was actually issued by the Court, and I know nothing of any concurring or dissenting opinions. But as I already have noted, "[p]rediction is a hazardous business."⁶

What follows, without further commentary, is the draft opinion that I read.⁷

* * * * *

JOHNSON v. INDIANA, No. 10-603
Draft Opinion of the Court - May 12, 2011

During a Fourth of July celebration in Indianapolis, Petitioner Johnson fired his machine gun into the air. He was charged and convicted under Section 35-47-5-9 of the Indiana Code, which provides that "[a] person who . . . operates a loaded machine gun" commits a criminal offense. The Indiana Supreme Court affirmed in an unpublished decision. We granted certiorari to consider Johnson's claims that the statute is unconstitutional on its face and as applied. We accept Johnson's facial challenge, and we therefore reverse his conviction.

I

It is settled that "[L]iberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803 (1992); see *id.* at 2876 (SCALIA, J., concurring in the judgment in part and dissenting in part) (describing this phrase as "august and sonorous"). Yet nineteen years after the adoption of the new First Amendment, its impact on the definition of liberty is still questioned.

In 1992, the States ratified a new amendment to the Constitution, one that James Madison had originally proposed more than 200 years before. This amendment, which limits the ability of Congress to grant itself a raise,¹ was

6. See *supra* note 1 and accompanying text.

7. Curiously, all of the draft's citations were to cases decided in 1992 or before, and many of them referred only to the unofficial *Supreme Court Reporter*. I can offer no explanation for this curiosity, except to repeat that "[p]rediction is a hazardous business." See *supra* note 1 and accompanying text.

* * * * *

1. The text of this amendment provides as follows: "No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall

proclaimed at the time of its ratification to be the Twenty-Seventh Amendment.² This popular understanding, however, was “plainly wrong—even on the . . . methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition are applied.” *Casey, supra*, 112 S. Ct. at 2875 (SCALIA, J., concurring in the judgment in part and dissenting in part). As written and approved by the First Congress, this amendment was intended to *precede* what ultimately became the First Amendment. Upon its ratification, the pay-raise amendment therefore became not the Twenty-Seventh Amendment, but the new First Amendment, and this in turn required that all of the other amendments be renumbered.³ Thus, the old First Amendment has become the new Second Amendment, and so on.

Through the crucible of litigation, this Court gradually has confronted the implications of this renumbering. Given our strong commitment to selective *stare decisis*, see *Casey, supra*, 112 S. Ct. 2791,⁴ we have ruled that our precedents under the old Second Amendment continue to control under the new Second Amendment. We accordingly have held that under the new Second Amendment, state restrictions on expression and religion are not subject to federal constitutional review, because the doctrine of incorporation does not extend to Second Amendment rights. See *Presser v. Illinois*, 116 U.S. 252, 264-68 (1886).

have intervened.” Speaking in support of his proposal, Madison noted the “seeming impropriety” and the “seeming indecorum” in allowing Senators and Representatives “to put their hand into the public coffers, to take out money to put in their pockets.”⁵ The Founders’ Constitution 28 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting Rep. Madison’s remarks in the House of Representatives on June 8, 1789). By contrast, Representative Don Edwards, a member of Congress in 1992, called this amendment “disturbing”: “If James Madison had been interested in this provision, he would have put it in the Constitution. He was sitting there the whole time.” Richard L. Berke, *1789 Amendment Is Ratified But Now the Debate Begins*, N.Y. Times, May 8, 1992, at A1, A21 (quoting Rep. Don Edwards). We express no view on this “Madison was sitting there” argument, but we note that it would apply equally to all of the Bill of Rights (assuming that Madison in fact remained seated throughout the Constitutional Convention).

2. See Berke, *supra* note 1; *1789 Amendment on Congress Pay to Be Certified*, N.Y. Times, May 14, 1992, at A9; *Foley, in Switch, Backs Amendment on Pay Raises*, N.Y. Times, May 15, 1992, at A8; Don J. DeBenedictis, *27th Amendment Ratified*, A.B.A. J., Aug. 1992, at 26.

As these 1992 sources indicate, the age of the proposal made some question the validity of its ratification. As far as we are concerned, however, the older the better. Thus, that the enactment rests in part on the acts of “representatives of generations now largely forgotten,” *Dillon v. Gloss*, 256 U.S. 368, 375 (1921), surely is a point in its favor. We need say no more on the validity of this amendment, for to do so “would unduly lengthen this opinion.” *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

3. The new First Amendment actually was the second of twelve proposed amendments to the Constitution. The last eleven of these twelve have now been ratified, but the first proposal, dealing with the number and apportionment of Representatives, has not. We express no view on the renumbering that might be required if that proposal ultimately is ratified.

4. The rewriting of precedents, of course, is an entirely different matter. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (SCALIA, J.).

Here, the issue is the continuing impact of our precedents under the old First Amendment. The logic of our Second Amendment jurisprudence might suggest that these precedents should be applied to the new First Amendment, but that would be mindlessly formalistic.⁵ The better analogy, we believe, is to the doctrine of reverse incorporation, whereby the Equal Protection requirements of what was then the Fourteenth Amendment were incorporated into what was then the Fifth. Here, as there, any other result would be “unthinkable.” *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). We therefore hold that our precedents under the old First Amendment, which is the new Second Amendment, are now applicable to issues arising under the new Third Amendment, which was previously the Second.

II

The relevant constitutional language provides that “the right of the people to keep and bear Arms, shall not be infringed.”⁶ The right to keep and bear arms, *i.e.*, weapons,⁷ holds a “preferred position” in our constitutional jurisprudence. See, e.g., *Saia v. New York*, 334 U.S. 558, 562 (1948). In the words of JUSTICE BRANDEIS, “Those who won our independence . . . valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (BRANDEIS, J., concurring). What could be more reflective of courage than the bearing of arms, either as an end in itself or as a means to some other good? The right to bear arms is a fundamental right that applies to the States as well as the federal government. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). It includes not only the right to possess arms, but also the right to use them, subject of course to reasonable time, place, and manner regulations.

Respondent, the State of Indiana, argues that its machine-gun prohibition, as applied to Johnson, is valid as a time, place, or manner regulation. In

5. Mindless formalism, as opposed to thoughtful formalism, generally is characterized “by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions.” *Lee v. Weisman*, 112 S. Ct. 2649, 2685 (1992) (SCALIA, J., dissenting).

6. The amendment provides in full as follows: “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.” Since this case does not involve a militia, the amendment’s introductory language is not relevant to our decision.

7. The State argues that the right “to keep and bear Arms” is designed merely to prohibit certain forms of barbaric punishment that might otherwise escape the constitutional ban on cruel and unusual punishments. But since this case does not involve a claim of barbaric punishment, this argument is not relevant to our decision.

particular, the State contends that Johnson's firing of the gun occurred among a crowd of people, and that, in this type of setting, the State has an interest in public safety that is sufficient to override Johnson's constitutional claim.⁸ This argument misses the mark.⁹ In the first place, Johnson did "not stand on his chair and shout obscenities." *Lee v. Weisman*, 112 S. Ct. 2649, 2681 (1992) (SCALIA, J., dissenting). Nor did he display "[a] shockingly hard core pornographic movie that contains a model sporting a political tattoo." *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2543-44 n.4 (1992) (SCALIA, J.). Furthermore, he and his group of onlookers did not "crowd[] into the Hoosierdome to display their genitals to one another." *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2465 (1991) (SCALIA, J., concurring in the judgment). But by its terms, the machine-gun prohibition applies nonetheless. It is a total ban on the use of machine guns.¹⁰ As a result, our time, place, and manner cases are not controlling.

Indeed, we need not conduct an as-applied analysis at all, because the Indiana law is clearly unconstitutional on its face. General laws that are not specifically targeted¹¹ at weapons are immune from constitutional scrutiny. Thus, for example, a State can maintain a general law against robbery, even if this law is sometimes applied to robbers who use guns. See *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990) (SCALIA, J.); *Barnes, supra*, 111 S. Ct. at 2463-68 (SCALIA, J., concurring in the judgment). When a law specifically restricts the possession or use of weapons, however, even for a purpose that has nothing to do with their suppression (for instance, to reduce noise), we insist that the law meet a high standard of justification. *Barnes, supra*, 111 S. Ct. at 2465-66 (SCALIA, J., concurring in the judgment).

Here, the Indiana law not only is directed at weapons, but it is aimed¹² at a particular type of weapon, machine guns.¹³ Clearly, this is a law that is intended to suppress weapons precisely because they are weapons. See

8. In the alternative, the State contends that in the context of a Fourth of July celebration, Johnson's firing of his gun really was an act of symbolic expression, and that this places his claim under the new Second Amendment, which does not apply to the States. But "virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition." *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2466 (1991) (SCALIA, J., concurring in the judgment) (emphasis in original).

9. "[S]o to speak." *Lee v. Weisman*, 112 S. Ct. 2649, 2685 (1992) (SCALIA, J., dissenting).

10. True enough, the law applies only to "loaded" machine guns. But that is precisely the kind of machine gun that Johnson was using.

11. "[S]o to speak." *Lee, supra*, 112 S. Ct. at 2685 (SCALIA, J., dissenting).

12. "[S]o to speak." *Id.*

13. The law also applies to a person who "hurls or drops a bomb loaded with either explosives or dangerous gases." Ind. Code § 35-47-5-9(2). But since this case does not involve a bomb, this language is not relevant to our decision.

Barnes, supra, 111 S. Ct. at 2466 (SCALIA, J., concurring in the judgment). But “[the right to bear arms] means that government has no power to restrict [a weapon] because of . . . its [weaponry].” *R.A.V., supra*, 112 S. Ct. at 2543-44 n.4 (1992) (quoting *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972)). Not only does the Indiana law violate this prohibition, it appears to reflect a kind of weaponry discrimination, the most offensive form of weapon regulation. Under the Indiana law, the use of machine guns is banned, but there is no similar ban on the use of weapons *against* machine guns, which “seemingly [are] usable *ad libitum*.” *R.A.V., supra*, 112 S. Ct. at 2548. Indiana “has no such authority to license one side . . . to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.” *Id.* In a decision that was summarily affirmed by this Court, Judge Easterbrook concluded that the old First Amendment would not tolerate a viewpoint-discriminatory ban on pornography. “This is thought control,” he wrote. *American Booksellers Assn. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986). By analogy, this is gun control.

The State’s attempt to satisfy strict scrutiny is feeble. It makes no claim that it has banned the use of machine guns “not because they harm others but because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ *i.e.*, immoral.” *Barnes, supra*, 111 S. Ct. at 2465 (SCALIA, J., concurring in the judgment). If the State had asserted a “traditional moral belief” of this kind, *id.*, we would be reluctant to disturb its judgment. Instead, the State contends only that machine guns are harmful, and, indeed, that they are particularly harmful. But other things are harmful as well, and the State has not banned all harmful things. Thus, “the only interest distinctively served” by the Indiana law “is that of displaying [the State’s] special hostility towards the particular [weapons] thus singled out.” *R.A.V., supra*, 112 S. Ct. at 2550.

Indiana has attempted to make an ideological statement about machine guns, but this the Constitution forbids. “[O]fficial suppression . . . is afoot.” *Id.* at 2547. The judgment of the Indiana Supreme Court is therefore

Reversed.