SUPREME COURT OF THE UNITED STATES

No. 91–164

UNITED STATES, PETITIONER *v.* THOMPSON/ CENTER ARMS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 8, 1992]

JUSTICE SCALIA, joined by JUSTICE THOMAS, concurring in the judgment.

I agree with the plurality that the application of the National Firearms Act (NFA) to Thompson/Center's pistol and conversion kit is sufficiently ambiguous to trigger the rule of lenity, leading to the conclusion that the kit is not covered. I disagree with the plurality, however, over where the ambiguity lies—a point that makes no difference to the outcome here, but will make considerable difference in future cases. The plurality thinks the ambiguity pertains to whether the making of a regulated firearm includes (i) the manufacture of parts kits that can possibly be used to assemble a regulated firearm, or rather includes only (ii) the manufacture of parts kits that serve no useful purpose except assembly of a regulated firearm. *Ante*, at 7–8, 12. I think the ambiguity pertains to the much more fundamental point of whether the making of a regulated firearm includes the manufacture, without assembly, of component parts where the definition of the particular firearm does not so indicate.

As JUSTICE WHITE points out, the choice the plurality worries about is nowhere suggested by the language of the statute: §5845 simply makes no reference to the "utility" of aggregable parts. *Post*, at 2 (WHITE, J., dissenting). It *does*, however, conspicuously combine references to "combination

of parts" in the definitions of regulated silencers, machineguns, and destructive devices with the absence of any such reference in the definition of regulated rifles. This, rather than the utility or not of a given part in a given parts assemblage, convinces me that the provision does not encompass Thompson/Center's pistol and conversion kit, or at least does not do so unambiguously.

The plurality reaches its textually uncharted destination by determining that the statutory definition of "make," the derivative of which appears as an operative word in 26 U. S. C. §5821 ("There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of $200 for each firearm made"), covers the making of parts that, assembled, are firearms. Noting that the "definition of `make' includes not only `putting together,' but also `manufacturing . . . or otherwise producing a firearm,'" the plurality reasons that if "a firearm were only made at the time of final assembly (the moment the firearm was `put together'), the additional language would be redundant." *Ante*, at 5.

This reasoning seems to me mistaken. I do not think that if "making" requires "putting together," other language of the definition section ("manufacturing" and "otherwise producing") becomes redundant. "Manufacturing" is qualified by the parenthetical phrase "(other than by one qualified to engage in such business under this chapter)," whereas "putting together" is not. Thus, one who assembles a firearm *and also engages in the prior activity of producing the component parts* can be immunized from being considered to be making firearms by demonstrating the relevant qualification, whereas one who merely assembles parts manufactured by others cannot. Recognition of this distinction is alone enough to explain the separate inclusion of "putting together," even though "manufacturing" itself includes assembly. As for the

phrase "otherwise producing," that may well be redundant, but such residual provisions often are. They are often meant for insurance, to cover anything the draftsman might inadvertently have omitted in the antecedent catalog; and if the draftsman is good enough, he will have omitted nothing at all. They are a prime example of provisions in which "iteration is obviously afoot," *Moskal* v. *United States*, 498 U. S. ___, ___ (1990) (slip op., at 3) (SCALIA, J., dissenting), and for which an inflexible rule of avoiding redundancy will produce disaster. In any event, the plurality's own interpretation (whereby "manufacturing" a firearm does not require assembling it, and "putting together" is an entirely separate category of "making") renders it not a bit easier to conceive of a nonredundant application for "otherwise producing."

The plurality struggles to explain why its interpretation ("making" does not require assembly of component parts) does not *itself* render redundant the "combination of parts" language found elsewhere in 26 U. S. C. §5845, in the definitions of machinegun and destructive device, §§5845(b) and (f), and in the incorporated-by-reference definition of silencer, §5845(a)(7) (referring to 18 U. S. C. §921). See *ante*, at 8–11. I do not find its explanations persuasive, particularly that with respect to silencer, which resorts to that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history. As I have said before, reliance on that source is particularly inappropriate in determining the meaning of a statute with criminal application. *United States* v. *R.L.C.*, 503 U. S. ___, ___ (1992) (SCALIA, J., concurring in part and concurring in judgment).

There is another reason why the plurality's interpretation is incorrect: it determines what constitutes a regulated "firearm" via an operative provision of the National Firearms Act (here §5821, the *making* tax) rather than by way of §5845, which defines firearms

covered by the chapter. With respect to the definitions of machineguns, destructive devices, and silencers, for instance, the reference to "combination of parts" causes parts aggregations to be firearms *whenever* those nouns are used, and not just when they are used in conjunction with the verb "make" and its derivatives. Thus, the restrictions of §5844, which regulate the importation of "firearm[s]" (a term defined to include "machinegun[s]," see §5845(a)(6)) apply to a "combination of parts from which a machinegun can be assembled" (because that is part of the *definition* of machinegun) *even though* the word "make" and its derivatives do not appear in §5844. This demonstrates, I say, the error of the plurality's interpretation, because it makes no sense to have the firearms regulated by the National Firearms Act bear one identity (which includes *components* of rifles and shotguns) when they are the object of the verb "make," and a different identity (excluding such components) when they are not. Subsection 5842(a), for example, requires anyone "making" a firearm to identify it with a serial number that may not be readily removed; subsection 5842(b) requires any person who "possesses" a firearm lacking the requisite serial number to identify it with one assigned by the Secretary of the Treasury. Under the plurality's interpretation, all the firearms covered by (a) are not covered by (b), since a person who "possesses" the components for a rifle or shotgun does not possess a firearm, even though a person who "makes" the components for a rifle or shotgun makes a firearm. For similar reasons, the tax imposed on "the making of a firearm" by §5821 would apply to the making of components for rifles and shotguns, but the tax imposed on "firearms transferred" by §5811 would not apply to the transfer of such components. This cannot possibly be right.[1]

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[1]The plurality, as I read its opinion, relies on the

Finally, even if it were the case that unassembled parts could constitute a rifle, I do not think it was established in this case that respondent manufactured (assembled or not) a rifle "having a barrel or barrels of less than 16 inches in length," which is what the definition of "firearm" requires, §5845(a)(3). For the definition of "rifle" requires that it be "intended to be fired from the shoulder," §5845(c), and the only combination of parts so intended, as far as respondent is concerned (and the record contains no indication of anyone else's intent), is the combination that forms a rifle with a 21–inch barrel. The kit's instructions emphasized that legal sanctions attached to the unauthorized making of a short-barreled rifle, and there was even carved into the shoulder stock itself the following: "WARNING. FEDERAL LAW PROHIBITS USE WITH BARREL LESS THAN 16 INCHES."

Since I agree (for a different reason) that the rule of lenity prevents these kits from being considered

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derivative of "make" that appears in §5821, not that appearing (in a quite different context) in the definition of "rifle." See 26 U. S. C. §5845(c) ("The term `rifle' means a weapon designed or redesigned, made or remade . . . ."). I think it would not be possible to rely upon the use of "made" in §5845(c), where the context is obviously suggestive of assembled rather than unassembled rifles. But even if the plurality means to apply its interpretation of "make" to §5845(c), it still does not entirely avoid the problem I have identified. The definition of "any other weapon," another in §5845's arsenal of defined firearms, does not contain relevant uses of the verb "make" or any derivative thereof. See 26 U. S. C. §5845(e). It necessarily follows that "any other weapon" will mean one thing when a making tax is at hand but something else when a transfer tax is.

firearms within the meaning of the NFA, I concur in the judgment of the Court.