Location:
CONSTITUTIONAL LAW; WEAPONS - GUN CONTROL;
Scope:
Other States laws/regulations; Court Cases;

OLR RESEARCH REPORT

August 20, 2010 2010-R-0314

SUMMARY OF THE RECENT *MCDONALD V. CHICAGO* GUN CASE

By: Veronica Rose, Chief Analyst

You asked for a summary of *McDonald v. Chicago* (561 U.S._(2010)), in which the U.S. Supreme Court considered whether the 2nd Amendment right to carry firearms applies to states. To help understand the court's ruling in *McDonald*, we also include a summary of the Court's ruling in *District of Columbia v. Heller* (128 S.Ct. 2783 (2008)).

SUMMARY

McDonald v. Chicago involved a 2nd Amendment challenge to a Chicago ordinance that essentially banned private handgun ownership in the city.

In 2008, a divided Supreme Court, in *District of Columbia v. Heller* , struck down similar District of Columbia legislation on the grounds that it violated an individual's 2nd Amendment right to keep and bear firearms for lawful uses such as self-defense in one's home. But the Court declined to say whether this 2nd Amendment right applies to the states and local governments and not just the District of Columbia, which is under federal jurisdiction. The Court answered this question in *McDonald.*

In a five-four split decision, the *McDonald* Court held that an individual's right to keep and bear arms is incorporated and applicable to the states through the 14th Amendment's Due Process Clause. Writing for the majority, Justice Alito observed: “It is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty” (p. 31). “The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States.” In a separate concurring opinion, Justice Thomas wrote that the 2nd Amendment is fully applicable to states because the right to keep and bear arms is guaranteed by the 14th Amendment as a privilege of American citizenship.

The Court did not rule on the constitutionality of the gun ban, deciding instead to reverse and remand the case for additional proceedings. However, the courts decision on the 2nd Amendment makes it clear that such bans are unconstitutional. But, as it held in *Heller*, the Court reiterated in *McDonald* that the 2nd Amendment only protects a right to possess a firearm in the home for lawful uses such as self-defense. It stressed that some firearm regulation is constitutionally permissible and the 2nd Amendment right to possess firearms is not unlimited. It does not guarantee a right to possess any firearm, anywhere, and for any purpose.

The dissenting judges argued that the right to own guns was not "fundamental" and therefore states and localities should be free to regulate or even ban them. They said the *Heller* decision on which the Court relied heavily was incorrect and even if correct, they would not have extended its applicability to states.

HELLER

In *Heller*, the U.S. Supreme Court answered a long-standing constitutional question about whether the right to "keep and bear arms" is an individual right unconnected to service in the militia or a collective right that applies only to state-regulated militias.

Majority Opinion

By a five to four margin, the Court held that the 2nd Amendment protects an individual right to possess firearms for lawful use, such as self-defense, *in the home* (emphasis ours). Accordingly, it struck down as unconstitutional provisions of a Washington D.C. law that (1) effectively banned possession of handguns by non-law enforcement officials and (2) required lawfully owned firearms to be kept unloaded, disassembled, or locked when not located at a business place or being used for lawful recreational activities.

According to the Court, the ban on handgun possession in the home amounted to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Similarly, the requirement that any firearm in a home be disassembled or locked made "it impossible for citizens to use arms for the core lawful purpose of self-defense." These laws were unconstitutional "under any of the standards of scrutiny the Court has applied to enumerated constitutional rights." But the Court did not cite a specific standard in making its determination, and it rejected the interest-balancing standard, proposed by Justice Breyer, and a "rational basis" standard.

The 2nd Amendment right to keep and bear firearms is not absolute and a wide range of gun control laws remain "presumptively lawful," according to the Court. These include laws that (1) prohibit carrying concealed weapons, (2) prohibit gun possession by felons or the mentally ill, (3) prohibit carrying firearms in sensitive places such as schools and government buildings, (4) impose "conditions and qualifications on the commercial sale of arms," (5) prohibit "dangerous and unusual weapons," and (6) regulate firearm storage to prevent accidents.

Justice Scalia wrote the majority opinion. He was joined by Justices Alito, Kennedy, Roberts, and Thomas.

Dissenting Opinions

Justices Stevens and Breyer filed separate dissenting opinions. Stevens asserted that the 2nd Amendment (1) protects the individual right to bear arms only in the context of military service and (2) does not limit government's authority to regulate civilian use or possession of firearms. He described the majority's individual-right holding as “strained and unpersuasive;” its conclusion, “overwrought and novel.” Stevens was joined in his dissent by Justices Breyer, Ginsberg, and Souter.

In his dissent, Breyer argued that even if the 2nd Amendment, in addition to militia-related purposes, protects an individual's right of self-defense, that assumption should be the beginning of the constitutional inquiry, not the end. Breyer contended that there are no purely logical or conceptual ways to determine the constitutionality of gun control laws, such as the District's law. Thus, a sounder approach would be a “balancing test” that focuses on “practicalities” to determine what gun control laws would be consistent with the 2nd Amendment even if it is interpreted as protecting a “wholly separate interest in individual self-defense.” Breyer concluded that under a balancing test that takes into

account the extensive evidence of gun crime and gun violence in urban areas, the District's gun law would be constitutionally permissible. Breyer was joined in his dissent by Justices Ginsberg, Souter, and Stevens.

For a more complete discussion of *Heller*, see OLR Report 2008-R-0578.htm.

MCDONALD

The Chicago ordinance challenged in *McDonald* prohibits a person from possessing “any firearm unless such person is the holder of a valid registration certificate for such firearm” (Chicago, Ill., Municipal Code § 8-20-040(a)(2009)). But the code prohibits registration of most handguns (Chicago, Ill., Municipal Code § 8-20-050(c)(2009)). It thus effectively bans handgun possession by almost all private citizens who live in the city. The ordinances are substantively similar to the ones the Court struck down in *Heller*, holding that the 2nd Amendment protects the right to keep and bear arms for the purpose of self-defense.

After *Heller,* some Chicago residents, some of whom had been crime victims, filed a federal suit against the city. They alleged that the handgun ban left them exposed to criminals and sought a declaration that the ban and several related Chicago ordinances violated the 2nd and 14th Amendments. The city countered that the ordinances were constitutional because the 2nd Amendment did not apply to states. Citing Supreme Court precedent that had upheld Chicago handgun laws as legal and noting that *Heller* had explicitly refrained from saying whether the 2nd Amendment applied to the states, the federal district court rejected plaintiffs' arguments and the Seventh Circuit Court of Appeals affirmed. The petitioners then asked the Supreme Court to hear their case.

The central question before the Court, in *McDonald*, was whether the right to bear arms was a fundamental right protected by the constitution and therefore applicable to the states. The Court held that the 2nd Amendment's guarantee of an individual right to bear arms applies to state and local gun control laws. Four members of the majority said the 2nd Amendment was applicable because it was “incorporated” in the 14th Amendment's Due Process Clause, which guarantees that the states may not “deprive any person of life, liberty, or property, without due process of law.” In a separate concurring opinion, Justice Thomas said the right to keep and bear arms was more correctly located in the 14th Amendment's Privileges or

Immunities Clause, which prohibits states from making laws that abridge the privileges or immunities of U.S. citizens. The Court did not explicitly rule on the constitutionality on the gun ban, deciding instead to reverse and remand the case for further proceedings.

Justice Alito's Opinion

Justice Alito wrote the majority opinion and was joined, for the most part, by Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas. Justices Thomas and Scalia wrote separate concurring opinions.

Justice Alito framed the case as an issue of due process incorporation, i.e., whether the 2nd Amendment is incorporated in and applies to states through the 14th Amendment's Due Process Clause (*slip op.*, p. 10). The 14th Amendment states in part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law." The first clause is generally referred to as the "privileges and immunities" clause; the latter, the "due process" clause. Over the past century, the Supreme Court has interpreted the Due Process Clause to "selectively incorporate various rights." Incorporation of certain Bill of Rights provisions into the 14th Amendment's due process guarantee, make these rights enforceable against the states and not just the federal government.

After reviewing various tests and standards that the Court has used in the past to apply the Bill of Rights' protections to the states through incorporation, Alito concluded that the appropriate test is whether "a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty. . . [and] deeply rooted in the country's history and tradition" (*ibid*, p. 19).

Drawing largely on the historical record and the fact that the majority of states include the right to bear arms in their constitutions, Alito determined that "self defense" is a fundamental right and central component of the 2nd Amendment, and the right to own a handgun is part of this basic right to self-defense. Alito draws on *Heller* for much of the support behind his reasoning (*ibid,* pp. 21-26). According to him:

Self-defense is a basic right, recognized by many legal systems from ancient times to the present day and in *Heller,* we held that individual self-defense is the "*central component*" of the Second Amendment right. . . . [and that] this right applies to handguns because they are 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family'. . . *Heller* makes it clear that this right is 'deeply rooted in this Nation's history and tradition'. . . . It cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner (*ibid*, pp. 19-20 and 33).

After a detailed review of post-Civil War politics and legislation, Alito concluded that "It is clear that the Framers and ratifiers of the fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty" (*ibid*, p. 31).

Alito rejected dissenting arguments that the prevalence of handgun restrictions in numerous countries shows that an individual right to bear arms is not fundamental, as several provisions in the Bill or Rights previously applied to the states have no counterpart in many European countries. He similarly rejected public safety arguments noting that "the

right to keep and bear arms is not the only constitutional right that has controversial public safety implications" (*ibid*, p. 36). He acknowledged that the decision "will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated" (*ibid*, p. 44). As the Court pointed out in *Heller*, Alito reiterated that not all laws regulating firearms are invalid. According to Alito:

> It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms 'is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose'. . . .We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill', 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms'. . . . We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms (*ibid*, pp. 39-40).

Justice Scalia's Concurring Opinion

Justice Scalia joined the Court's opinion but wrote a separate concurring opinion basically to respond to some of the points in Justice Stevens' dissent (*slip op.*, pp. 1-15). He concluded that Stevens' approach "would not eliminate, but multiply, the hard questions courts must confront, since he would not replace history with moral philosophy, but would have courts consider both" (*ibid*, p. 15). In a detailed point-by-point refutation of Stevens' arguments, he said it is Stevens' approach, not the Court's, that endangers democracy.

Justice Thomas' Concurring Opinion

In a separate concurring opinion, Justice Thomas agreed that the 2nd Amendment right to keep and bear arms fully applies to the states but suggested "a more straightforward path to this conclusion, one that is more faithful to the 14th Amendment's text and history, namely, the 14th Amendment's Privileges and Immunities Clause." After examining the history and purpose of the 14th Amendment, including the Privileges or Immunities Clause, Thomas concluded that the Due Process Clause, which speaks only to "process," cannot impose the type of substantive restraint on state legislation that the Court asserts (*slip op.*, p. 1). "I cannot accept a theory of constitutional interpretation that rests on such tenuous footing," Thomas wrote.

Focusing on the constitution's text, Thomas said the constitution clearly intended to protect citizens' right of self defense and economic liberty. And "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause" (*ibid,* p. 1).

Thomas said the Privileges or Immunities Clause "establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them" (*ibid*, p. 47). "In my view," he wrote:

> the record makes plain. . . that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right

necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery (*ibid*, p. 55).

Justice Stevens' Dissenting Opinion

In a separate dissenting opinion, Justice Stevens noted that the "Framers did not write the Second Amendment in order to protect a private right of armed self defense." Further, Stevens wrote, "by its terms, the Second Amendment does not apply to the States; read properly, it does not even apply to individuals outside of the militia context" (*slip op.*, p. 56). And "even if the 14th Amendment protects a basic individual right to self defense, it is a long way from this 'proposition' to the conclusion that a city may not ban handguns," Stevens wrote (*ibid*, p. 34).

Stevens framed the question as a substantive due process issue *(ibid,* p. 4). He supported the notion of substantive due process for protecting rights through the 14th Amendment, but argued that when confronted with a substantive due process claim, the Court should consider if the practice in question violates "values implicit in the concept of ordered liberty." Otherwise, the claim is unsuitable for substantive due process (*ibid*, pp. 14-15). And the question, as Stevens saw it, was "whether the interest in keeping in the home a firearm of one's choosing. . . is one that is 'comprised within the term liberty' in the Fourteenth Amendment" (*ibid*, p. 34). He contends that *Heller* shed no light on the meaning of the Due Process Clause. "Our decisions construing that clause to render various procedural guarantees in the Bill of Rights enforceable against the states likewise tell us little about the meaning of the word liberty in the Clause or about the scope of its protection of nonprocedural rights," Stevens wrote (*ibid*, pp. 3-4).

Stevens criticized the majority's reliance upon historical roots of a right to own and carry a handgun and argued for a more modern, contextual approach. He said that:

To the extent that the Court's opinion could be read to imply that the historical pedigree of a right is the exclusive or dispositive determinant of the status under the Due Process Clause, the opinion is seriously mistaken (*ibid*, p. 17).

Stevens pointed out that a rigid historical approach is flawed for several reasons, including the fact that (1) "substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms" (*ibid*, p. 17); (2) "a rigid historical methodology is unfaithful to the Constitution's command" (*ibid*, p. 19); and (3) "the liberty safeguarded in the 14th Amendment is not merely preservative in nature but rather is a dynamic concept" (*ibid*, p. 17).

But "[e]ven if the 14th Amendment protects a basic individual right to self defense, it is a long way from this 'proposition' to the conclusion that a city may not ban handguns" Stevens wrote (*ibid*, p. 34). And it does not mean that one can choose any means one wants for his or her defense. To Stevens, (1) "a handgun has a fundamentally ambivalent relationship to liberty," in that it can be used for self defense but it "can also be used to facilitate death and destruction and thereby to destabilize ordered liberty" (*ibid*, p. 35-36); and (2) "the right to possess a firearm of one's choosing is different form the liberty interests [the Court] recognized under the Due Process Clause. . . .It does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality" (*ibid*, pp. 37-38).

Stevens rejected the majority's constitutional view that a right enforceable against the federal government, if applied to the states, must be applied in full. He argued that "elementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold state governments to different standards than the Federal Government in certain areas" (*ibid*, p. 10). And "the rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights" (*ibid,* p. 9). He noted that a long history of local firearm regulations shows how the democratic process can tailor gun laws to local conditions without undermining liberty. But even apart from the states' long history of firearms regulation and its location at the core of their police powers, "[t]his is a quintessential area in which federalism ought to be allowed to flourish without this court's meddling" Stevens wrote (*ibid*, p. 47).

Stevens decried the cost the decision would impose on society. According to him:

> The costs of federal courts imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States' core police powers. . . . When one legal standard must prevail across dozens of jurisdictions with disparate needs and customs, courts will often settle on a relaxed standard. This watering-down risk is particularly acute when we move beyond the narrow realm of criminal procedure and into the relatively vast domain of substantive rights. So long as the requirements of
>
> fundamental fairness are always and everywhere respected, it is not clear that greater liberty results from the jot-for-jot application of a provision of the Bill of Rights to the States (*ibid*, p. 13).

Stevens concluded by saying that the decision:

. . . invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established. The plurality's assurance that "incorporation does not imperil every law regulating firearms" provides only modest comfort. For it is also an admission of just how many different types of regulations are potentially implicated. . . . (*ibid*, p. 49).

Justice Breyer's Dissenting Opinion

In his dissenting opinion, joined by Justices Ginsburg and Sotomayor, Justice Breyer disagreed with the majority that the right to possess a handgun is a fundamental right deserving "federal constitutional protection from state regulation" (*slip op.*, at p. 1). He said he could find no justification for "interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the states to the Federal government" (*ibid*, pp. 1 & 2).

Focusing on the "text, history and underlying rationale of the Second Amendment," Breyer, like Stevens, concluded that:

the Framers did not write the Second Amendment in order to protect a private right of armed self defense. There has been, and is, no consensus that the right is, or was, "fundamental." No broader constitutional interest or principle supports legal treatment of that right as fundamental. To the contrary, broader constitutional concerns of an

institutional nature argue strongly against that treatment. . . [and] "nothing in 18th, 19th, 20th, or 21st century history shows a consensus that the right to private armed self-defense. . .is deeply rooted in this nation's history or tradition or is otherwise fundamental" (*ibid*, p. 31).

Breyer added that there is no popular consensus that the self defense right in *Heller* is fundamental (*ibid*, p. 9). But even if one takes "*Heller* as a given, the Fourteenth Amendment does not incorporate the right to keep and bear arms for purposes of private self defense" (*ibid,* p. 6).

Breyer said the majority based its conclusion almost exclusively on its reading of history and to do so to incorporate a right under the 14th Amendment is both wrong and dangerous because history is often unclear about the answers (*ibid*, p. 6). Further, he wrote, "the important factors that favor incorporation in other instances—e.g., the protection of broader constitutional objectives—are not present here. The upshot is that all factors militate against incorporation—with the possible exception of historical factors" (*ibid*, p. 18). He said the Court should not look at history alone but other factors, such as the (1) basic values that underlie a constitutional provision and their contemporary significance and (2) relevant consequences and practical justifications that might or might not, warrant removing an important question from the democratic decision making process (*ibid*, p. 5).

Breyer contended that firearm regulation should best be left to states, not just because the debate over handgun regulation was so divided and inconclusive, but also because incorporation of the 2nd Amendment infringed on a long tradition of the exercise of local authority to regulate firearms. He said that the majority's decision to incorporate the private self-defense right in *Heller* would "work a significant disruption in the constitutional allocation of decisionmaking authority, thereby interfering with the Constitution's ability to further its objectives" (*ibid*, p. 10). He made the following points to support this claim.

1. "Private gun regulation is the quintessential exercise of a state's police power. . .and the Court has long recognized that the Constitution grants the States special authority to enact laws pursuant to the power" (*ibid*, p. 11).

2. "Determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislators are better able than courts to make" (*ibid,* p. 11).

3. ". . .states and local communities have historically differed about the need for gun regulation as well as about its proper level" (*ibid,* pp. 16-17).

4. "Although incorporation of any right removes decisions from the democratic process, the incorporation of this particular right does so without strong offsetting justification (*ibid*, p. 17).

Breyer considered the numerous scholars and historians that have criticized *Heller* and argued against extending the applicability of *Heller* because of its uncertain historical foundations.

VR:ts