Legally Speaking

Chicago

By Karen MacNutt, Contributing Editor

McDonald v. Chicago is one of the closest watched cases that the United States Supreme Court has heard in the last twenty years. It involves a challenge to the City of Chicago's restrictive firearms laws. From the time the High Court said it would review the case, lawyers and courts across the country watched to see what the Court would do. The Second Amendment is the last of the great civil rights in the Bill of Rights to be addressed by the Court. Each time the Court was asked to uphold the Bill of Rights, someone would predict that violence would reign if the government were not allowed to ignore the basic civil rights set out in the federal constitution. Each prediction of disaster has been wrong.

The frustrating thing about writing for *Women & Guns* is that articles are written almost two months before publication. When there is breaking news, especially if we do not know the end of the story, it is hard to write on the subject. By the time you read this article, you will probably know the outcome of the *McDonald* case. As this article is being written, I do not know the outcome.

The best I can do is to explain 1) how our federal system works, 2) how gun laws are impacted by federalism and 3) why *McDonald* is important.

All Americans live under two governments, one state and one federal. Each of these governments can pass laws. We have to comply with the laws of both governments even when they are in conflict. For example, Massachusetts has a number of crimes that the state considers to be misdemeanors. Under state law, someone convicted of one of these crimes still may get a license to own a gun. The federal government, however, considers these crimes to be felonies and prohibits people convicted of them from being in possession of a gun. That means someone could have a state license to own a gun, be in full compliance with state law, but still be prosecuted under federal law.

The easiest way to understand the problem is through our history. The United States was not always one nation. At least fifteen of the states started off as totally independent nations. Excluding the Native American nations, at least five European nations ruled portions of what is today the United States. Our original union was a confederation not unlike the modern European Union.

Each of our states has their own constitutions and laws. Massachusetts still operates under its 1780 constitution, making it the oldest written constitution still in use in the world. For the most part, it is the state constitutions and laws that directly impact our daily lives. Our present federal constitution came into being in 1789. It, for the first time, gave Congress the power to tax, regulate trade, and pass laws that impacted directly on its citizens. By this change, the confederation of states which waged the American Revolution, became one nation of united states. Some people in the 1790s feared that the new United States government (our federal government) would have too much power. They feared it might use that power to destroy the liberties which had been secured by the American Revolution.

The American Revolution was not just a war of colonial independence. It was fought for what, at the time, was a very radical idea. That is, that government is the creation of the people and is responsible to the people. The founding fathers believed that basic human rights were God given. Although government might have the physical power to infringe on those rights, it did not have the legitimate authority to do so. Under the philosophical concept of "natural law," governments could violate law. When a government did that, it was the right of the people to alter or abolish the government. For most of our history, the United States has been able to institutionalize violent revolution into peaceful revolution through the election process.

Important to this new philosophy of government, was the con-

cept that all people should be equal in the eyes of the law whether they were high government officials or ditch diggers.

Americans rejected the idea that there was a born class of rulers, or nobility, whose function it was to tell the rest of the population how to run their lives. Many in Europe thought the American experiment would fail because they believed that common people were incapable of making intelligent choices and ruling classes were needed to make all the decisions. That philosophical battle still rages today between those who say, "We will tell you what to eat, what you can smoke, and how you will run your life," and those who say, "When did government ever run anything well? I have the right to make those decisions for myself."

Some of our founders feared that a strong central government would interfere with the God given rights of the people. They insisted that a Bill of Rights be added to the federal constitution setting out those essential human, or natural rights, that our founders thought needed to be protected from abuse by the federal government. These were not rights created by the federal constitution. These were pre-existing rights that the our founders wanted to make sure were not violated by the new government.

The first two rights that the federal government was prohibited from interfering with were: freedom to criticize the government (freedom of speech and press); and the right to be armed against oppression. Citizens were expected to look to their own state constitutions for protection of those rights from interference by the state government. This was the order of things until the American Civil War.

At the conclusion of the Civil War, large numbers of black Americans were given full United States citizenship. Some states, however, were unwilling to recognize these new United States citizens as citizens of the individual states where they resided.

The 14th Amendment to the Constitution was passed to address that problem. It states:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The 14th Amendment was intended to protect black Americans from state laws restricting their freedom. It was not uncommon for blacks to be disarmed by local officials and then subjected to mob violence. One early federal case brought under the 14th Amendment was *United States v. Cruikshank* in 1876. *Cruikshank* side stepped the issue of racial violence in the South by stating, among other things, that: 1) Congress could not pass laws interfering with things that it was prohibited from interfering with; 2) the 14th Amendment prohibited states from passing laws that impacted on rights unique to United States citizens (such as the right to travel among the states); but, the 14th Amendment did not allow the federal government to pass laws protecting those rights which existed prior to the adoption of the federal constitution (that is those rights set out in the Bill of Rights). As to such rights, individuals had to look to the state governments for protection. Interestingly enough, the *Cruikshank* case linked the First and Second Amendments indicating the same argument applied to both.

Over the years, the Supreme Court began overturning state laws that impacted on certain "fundamental" rights. The First Amendment was one of the first parts of the Bill of Rights to be "incorporated" into the 14th Amendment thus justifying the federal courts in striking down state laws that interfered with free expression. Some people now argue that the expansion of the First Amendment did not endanger public safety but that the expansion of the Second Amendment does. Those people ignore history.

At the turn of the 20th century, America was racked with political violence. It was the ABCs: Anarchists, Bolsheviks, and Communists, who preached the violent overthrow of the government. There was violent labor unrest mixed with waves of immigration from central Europe and Negro Americans moving into northern factory cities in search of work. Words preceded riots, bombings and political violence. These same events gave rise to early gun restrictions in cities such as New York, Boston, and Chicago. Words, however, motivated the violence. Even today, our most serious enemy is not any one foreign nation. It is those radicals who convince people to kill their neighbors in the name of religion.

Over the last hundred years, the Supreme Court gradually held that the 14th Amendment protected those provisions of the Bill of Rights that are essential to our concept of liberty. The Second Amendment is one of the few provisions of the Bill of Rights that the Supreme Court has not, until recently, given much attention to.

Before the summer of 2008, those factions of our society who distrust the common people, developed a theory which justified banning guns. They claimed that the

Second Amendment to the United States Constitution was not an individual right but only guaranteed states the right to have an armed National Guard.

Over the last twenty years, the expansion of the right to carry a concealed handgun has not resulted in the blood bath that was predicted by the those who dislike guns. Evidence suggests just the contrary. In Washington, DC, after guns were banned, crime went up. In other areas where gun licenses were freely given to all who were qualified, crimes against people went down.

In the 2008 case of *District of Columbia v. Heller*, the United States Supreme Court, ruled that the Second Amendment protected an individual right to have arms. The Court struck down a Washington, DC, law that prohibited people from having handguns in their own homes for self-defense. Although the Court indicated that it thought the Second Amendment protected a fundamental right, the decision was narrow. It only applied to federal action. Because the government of Washington, DC, is a federal instrumentality, it is the very government that the Bill of Rights was originally intended to restrict. If Heller goes no further, it is important because it makes it clear that the Second Amendment secures an individual, and not a collective, right. *Heller* left open the question of whether or not the Second Amendment would restrict state or local laws.

Now the question is: does the 14th Amendment prevent states from interfering with a citizen's federal right to possess a handgun in his or her own home for self defense? That is what the Chicago case will determine. Wording in the Heller case seems to indicate that the Court will apply the Second Amendment to the states. Of what good would the Second Amendment be to protect one's federal right of self defense if a state or municipality could legislate the right away?

If the Supreme Court strikes down Chicago's ordinance preventing citizens from lawfully owning guns in their own homes, it will not be the end of the gun control debate. Indeed, no matter what the Court does, the debate will go on.

What has changed, and will continue to change, is the nature of the debate. You have no "right" to drive an automobile on the highways of this great country. It is a privilege. Because of that, states and cities can place all sorts of restrictions on driving. The only limit on the "police" power of local government over driver's licenses is that the exercise of power cannot be arbitrary or capricious. Before *Heller*, the arbitrary and capricious standard was the one most often applied to gun laws.

Owning a gun, however, is a constitutional right. If it is treated as other constitutional rights, government will need to show a compelling state interest in placing restrictions on that right. Laws restricting minors are valid, as are laws reasonably restricting places where guns can be carried. All licensing will not disappear. It is reasonable to expect citizens to produce some proof of who they are when they purchase a gun. States with discretionary licensing, however, will have trouble. A citizen should not be forced to justify why he or she wants to own a gun. Ownership can not be restricted to the wealthy and politically connected. Citizens should be entitled to a hearing before being indefinitely stripped of the right to own a gun. They should have the right to travel interstate, a right of United States citizenship, with a gun. Laws that are simply harassment, laws that can not be shown to have any meaningful purpose other than to discourage people from owning guns along with taxes directed at gun ownership, would all be subject to challenge.

These issues are yet to be worked out through the legislatures or courts. As we go forward to define the Second Amendment, it is important to take baby steps so as to not create a lot of bad case law. The question will be, "What is reasonable regulation?" Those who dislike guns think that total bans are reasonable. The evidence does not support their obsessive fear of common people having guns. Those who believe in gun ownership must stay politically involved, must continue to educate those who lack knowledge of guns, and must continue to accept the responsibility of good citizenship that gun ownership requires.

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