Legally Speaking

Chicago Continued

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"Hog Butcher for the World,
Tool Maker, Stacker of Wheat,
Player with Railroads and the Nation's Freight Handler;
Stormy, husky, brawling, City of the Big Shoulders;
They tell me you are wicked and I believe them, for I have seen your painted women under the gas lamps luring the farm boys.
They tell me you are crooked and I answer: Yes, it is true I have seen the gunman kill and go free to kill again. . . ."

("Chicago," poem by Walter Whitman, 1916; Revised for 2010)

They tell me honest citizens can't have a gun and the Court answered: Yes, it was true, but it is true no longer...

They tell me you are corrupt and the Court answered: the Second Amendment..."protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials"

(Samuel J. Alito, Unites States Supreme Court, 2010).

On June 28th, the United States Supreme Court announced its decision in *McDonald v. Chicago,* a case that challenged Chicago's repressive gun laws based on the 2008 *Heller v. District of Columbia* case. It was the first time the high court struck down a state or local law based upon the Second Amendment. A deeply divided Court ruled that not only does the Second Amendment protect an individual's right to keep and bear arms from the federal government, it also protects it from infringement by state and local governments.

The *Heller* and *McDonald* cases involved laws that made the private ownership of handguns almost impossible. The majority opinion in *Heller* ran 64 pages. The dissenting opinion was 90 pages. *Heller* was remarkable for its length, and for its accurate summary of both sides of the gun control argument.

Justice Scalia, writing for the Court in *Heller,* stated that the Second Amendment "...guarantee[s] the individual right to possess and carry weapons in case of confrontation..."

In his dissent, Justice Stevens argued that even if the Second Amendment guaranteed an individual right, government should be able to impose "reasonable restrictions." Given the special circumstances in Washington, DC, Stevens thought a handgun ban was reasonable. Stevens did not identify DC's special circumstances. The most obvious special circumstance is that the city's residents are mostly black but that is not a factor to base policy on in the United States.

Rejecting Stevens' argument, the Court stated, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." The majority implied that Second Amendment rights should be treated the same as other Constitutional rights. The Court rejected the idea that the right to keep and bear arms should be subject to a balancing test or a "reasonable" restriction test.

Those who do not favor gun ownership continued to talk about a "balancing" test for gun restrictions. They correctly noted that the *Heller* case involved federal law and owning a gun in your own home. Because the Bill of Rights was passed to restrict Congress, they said, it would not prevent state restrictions on guns. After *Heller,* the lower federal courts divided between those who applied Heller against the states and those who would not.

That set the stage for *McDonald's* challenge to Chicago's handgun laws. The main questions were: 1. Does the Second Amendment limit state actions; and 2. What standard (called the standard of review) should be used to determine the legality of state gun laws?

In *McDonald v Chicago,* the Supreme Court held that the Second Amendment restricts state action and the standard of review for gun laws is the same as it is for any other Constitutional right.

The 45-page opinion of the Court, written by Justice Alito, ended with a statement of why the Second Amendment restricts state action by application of the 14th

Amendment. The 14th Amendment has five sections. Only the first section is important to the Court's decision. Part one, clause one of the 14th Amendment says "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...." Clause two says, "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."

Court decisions in the last half of the 19th century gave a very narrow reading to the "privileges or immunities" section of the 14th Amendment saying that the privileges and immunities referred to were only those created by the Constitution, not the civil rights in the Bill of Rights. Those rights predated the Constitution. The "due process" clause, on the other hand, has gradually been expanded to impose most of the Bill of Rights against the states. Before holding that the Bill of Rights can invalidate state law, the Court must find that a particular right is "fundamental" to our sense of ordered liberty.

The *McDonald* Court refused to expand the "privileges and immunities" clause; but, it held that the Second Amendment "is fully applicable to the States" through the due process clause of the 14th Amendment. "[T]he right," they said, "to keep and bear arms is fundamental to our scheme of ordered liberty."

The majority opinion again rejected the argument that there should be a "balancing test" when reviewing gun laws and held that the right to keep and bear arms will be treated like every other fundamental right in the Constitution.

The *McDonald* opinion is now the standard by which all laws impacting gun ownership will be judged. Lower courts that fail to apply that standard risk being over turned.

Generally fundamental rights can only be limited when there is a compelling state interest, or a clear and present danger to the public. Broad prohibitions based on a feeling that safety might be improved, have been struck down as having a "chilling" effect on the exercise of Constitutional rights. Constitutional rights cannot be singled out for taxation. You do not have to justify a need to exercise them. All citizens have equal opportunity to enjoy them.

Although the *McDonald* case was about keeping a gun in your own home, the Court's repeated use of the term "keep and bear" arms is a good indication that the Court will expand its opinion to carrying a gun outside of the home. Because the Court relates the right to have arms to the right of self defense, the anti-gun position that people should only be able to have guns for hunting and target shooting, will not stand up. All ready local laws with discriminatory impact are under attack. Civil rights are for everyone, not just the wealthy, politically powerful and famous.

In both *Heller* and *McDonald* the Court cautioned that its rulings will not invalidate all gun laws. Laws that kept guns from felons and mentally incompetent people, laws restricting the carrying of guns in sensitive places, and laws imposing conditions on the commercial sale of guns are the types of laws that would probably be found valid if they are fairly applied. Fairness in application will be a major point in challenges to gun laws.

The majority opinion in *McDonald* was supported by a 15 page concurring opinion by Scalia and 56 page opinion by Justice Thomas. Stevens wrote a 57 page dissent and Justice Breyer wrote a 31 page dissent. In total, *McDonald* is a mammoth 214-page opinion, mostly reviewing the history of the 14th Amendment.

There was an undercurrent of irritation in the majority opinion directed at those who ignored the Heller opinion. The Court noted that Chicago's crime rate went up after it enacted gun prohibition, that the Second Amendment protected the rights of minorities from violence, and that it protected the rights of all citizens whose public safety needs "are not being met" by local government. The majority agreed with the dissenting justices that *McDonald* case will limit local governments' "experimentation" with ways of addressing crime. But, the Court said, all of the great civil rights limit the police powers of government. The enumeration of a right in the Bill of Rights takes out of the hands of Government the power to decide on a case-by-case basis whether the right is really worth insisting upon.

Scalia's opinion was directed at Stevens' dissenting opinion. It is a classic example of how one learned gentleman criticizes another. Scalia said Stevens' theories are "at war with reason." Scalia debunked the underlying elitism of the dissenting opinions with heavy sarcasm. He stated that the claim by the dissent that interpretive pluralism [being able to apply different standards to different rights] "would reduce courts' ability to impose their will on the ignorant masses, is not merely naive, but absurd." Scalia clearly rejected the position of the dissenting justices who thought the Court should be able to interpret out of existence rights it disagrees with while creating "rights" without regard to the Constitution.

Thomas' concurring opinion is compelling. Although the majority rejected his argument to use the "privileges and immunities" clause to apply Second Amendment rights on the states, his logic was faultless. His graphic descriptions of lo-

cal government's refusal to protect black citizens from mob violence after the Civil War, however, provides a chilling example of why we need the Second Amendment. In light of Thomas' opinion, Justice Breyer's statement that he sees "nothing in the Second Amendment's text, history or underlying rational that could warrant characterizing it as 'fundamental'..." is myopic in the extreme. It was all but an endorsement of government's power to ignore the rights of those its disliked to the point of condoning lynching. Thomas was correct to say the Supreme Court should repudiate the cases from the second half of the 19th century which rationalized the federal government's turning its back on organized violence against black Americans.

Although the stated reason for the Second Amendment was fear of a standing army, the paramilitary organizations we call "police departments" did not exist in their modern form in 1789. It makes no difference if the rights of the people are trampled by a rogue military or police department, a corrupt or inefficient civil administration, or some manmade or natural disaster. If government fails in its obligation to protect the rights of the people, the Second Amendment allows the people to protect themselves.

It is no accident that those cities with strict gun laws tend to have corrupt governments and crime. Who, being disarmed, would willingly testify against some violent gang member while his fellow gang members sit in the court room watching? Who, being disarmed, would willingly go against a corrupt police chief or mayor knowing the physical safety of his or her family is at the mercy of those very officials they are trying to remove?

Chicago, like Washington, DC, is attempting to make cosmetic changes to its anti-gun laws to avoid complying with the Constitution. This sense of elitism, this disrespect for the law, this disrespect for the people is the very reason these cities have problems with crime. With a scene reminiscent of public officials in the Deep South when told they had to desegregate the public schools, Chicago is defiant of the federal courts. Although the city can frustrate challenges to their ordinances by making frequent changes in the law, they are playing a dangerous game.

Chicago's mayor has made statements indicating an intent not to comply with the Supreme Court ruling. What he fails to understand is that the rules have changed. Having its law struck down is the least of the City's problems. If the Mayor and aldermen are not careful, they could be criminally cited for conspiracy to violate civil rights. A conspiracy only requires two or more people to unite for an illegal purpose. People hurt by their actions do not have to wait for the US Attorney's office to act. They can file a private legal action for denial of a civil right under color of state law under U.S.C. Title 42, Sections 1983 and 1984. Those civil actions allow the awarding of damages and legal fees to the winning party. The individuals charged, not the city, become personally liable.

As long as the five justices who made up the majority opinion in *McDonald* stay on the Court, there is likely to be little tolerance for those who try to ignore or circumvent the *Heller* or *McDonald* cases.

For the man in the street, changes driven by *Heller* and *McDonald* will be slow. Current laws must be obeyed until and unless they are struck down by some court. Many gun laws will survive being challenged. Laws that have undefined licensing standards, laws that fail to recognize out of state licenses, laws intended to keep guns from honest citizens, will not pass Constitutional muster.

The argument, however, is no longer, "Prove to us that you need a gun," it is now, "Prove to the Courts that there is a compelling state interest in keeping me from having a gun." More than ever, the burden is on good citizens to show that common men and women are responsible enough to govern themselves. Gunowners still have to meet the anti- gun arguments. They still have to educate the public. They must still be engaged in the political process. If even one judge that voted with the majority is replaced with an anti- gun judge, things could change.