

GUNS, INCORPORATED



Kristin Myles, Michelle Friedland, Aimee Feinberg, and Miriam Seifter

In one of its last decisions of the 2009 Term, the Supreme Court ruled in *McDonald v. City of Chicago* that the Second Amendment right to bear arms applies to states and localities. That means that state and local gun regulations are, for the first time, subject to federal constitutional scrutiny. The vote count followed what many viewed as a predictable political lineup: the five more conservative justices sided with gun rights groups, while the four more liberal justices sided with gun control groups. But this seemingly traditional lineup was untraditional in an important respect: unlike most constitutional cases, where the more liberal members read the Constitution broadly to protect individuals against state regulation of their personal freedoms and the conservative members decry what they see as an expansionist view of the Constitution, the roles in this case were reversed. In *McDonald*, the five more conservative justices held that the Fourteenth Amendment encompassed a new right, and the four more liberal justices would have held that it did not. This role reversal, at first blush, might appear to be an abandonment of constitutional principles in favor of a preferred political result. But the way each side reached its decision looks less like a role reversal than the cynics might say.

McDonald's Roots: District of Columbia v. Heller

The seeds of *McDonald* were planted two years ago when the Court decided *District of Columbia v. Heller*. In that case, the Court held, in a 5–4 decision, that the Second Amendment right to keep and bear arms protected an individual right to self-defense, separate and apart from participation in the militia. Before *Heller*, the Second Amendment had been viewed widely as

protecting only a right to have a gun when an individual was called up to fight in the militia—something that didn't have a lot of meaning in today's post-musket era. In *Heller*, the Court found that the Second Amendment right is far broader and that it protects the right to have a gun for self-defense in the home.

But *Heller* left open an important question: whether this Second Amendment right constrained states as well as the federal government. Because the defen-

dant in *Heller* was the District of Columbia, a federal enclave, the Court did not need to address the “incorporation” question—that is, whether the Second Amendment was “incorporated” or applied against the states through the Fourteenth Amendment. But the *Heller* Court foreshadowed the result in *McDonald*. In a footnote, the Court in *Heller* explicitly noted that an 1876 decision ruling that the Second Amendment did *not* apply to the states had not taken into account the Court’s more modern approach to the incorporation question—with the implication, of course, that the 1876 ruling was a mere relic of the past.

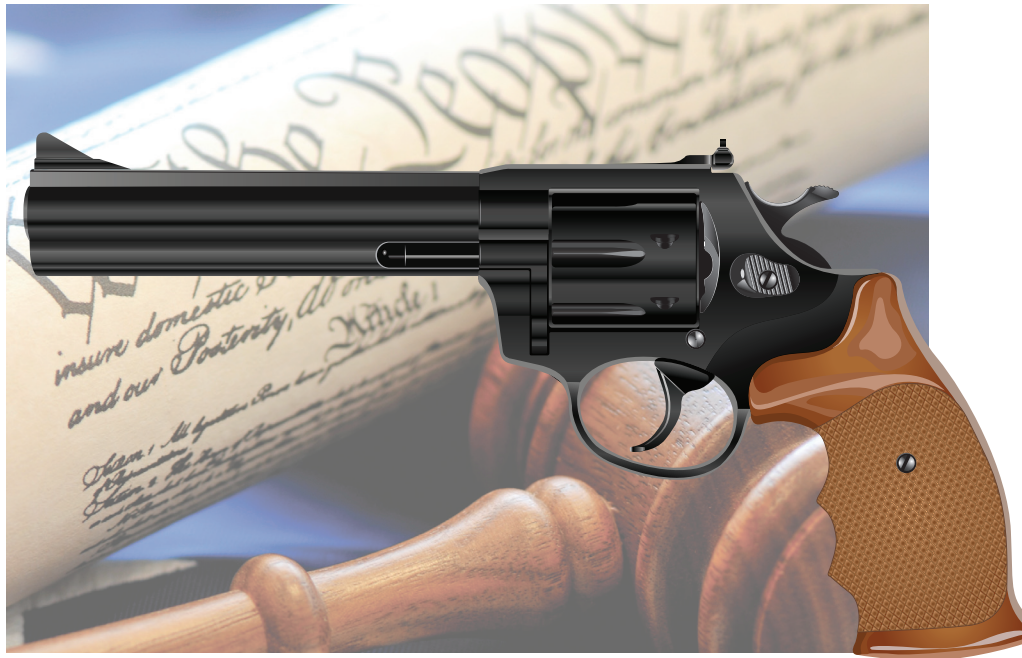
The *McDonald* Decision

McDonald addressed a challenge to municipal ordinances in the City of Chicago and the Village of Oak Park, Illinois, both of which effectively banned residents from possessing a handgun. Since *Heller* already had decided that the Second Amendment forbids bans on handguns in the home, the key question in *McDonald* was whether the Second Amendment applied to Chicago and Oak Park at all.

The answer to this question turned on whether the Second Amendment applies to the states and their subdivisions. Since the adoption of the Fourteenth Amendment, the Court gradually has applied most of the provisions of the Bill of Rights to the states. While it might seem unthinkable today that states and localities would not have to respect the First Amendment right to free speech or the Fourth Amendment right against unreasonable searches and seizures, these and other provisions of the Bill of Rights were held to apply to the states only through a decades-long process of “selective incorporation” through which the Court looked at each individual provision of the Bill of Rights and decided whether the right was part of the Fourteenth Amendment’s due process guarantee. The Court has used a number of different verbal formula-

tions, but the modern standard it has used asks essentially whether the right in question is “fundamental to ordered liberty.”

Over the decades, the Court has held that nearly every provision of the Bill of Rights applies to the states. Before *McDonald*, only six provisions of the Bill of Rights had not been incorporated: the Second Amendment, the Third Amendment prohibition against quartering soldiers, the Fifth Amendment requirement of a grand jury indictment, the Sixth Amendment requirement of a unanimous jury verdict, the Seventh Amend-



ment guarantee of a jury in civil cases, and the Eighth Amendment prohibition against excessive fines.

McDonald took the Second Amendment off this list. The *McDonald* Court held that the Second Amendment right to have guns for self-defense is indeed fundamental to American notions of ordered liberty because it is deeply rooted in our nation’s history and traditions. In so finding, the Court looked at the historical record from before and at the founding (such as Blackstone, the 1689 English Bill of Rights, and the ratification debates) through the post–Civil War era (such as Reconstruction-era statutes). Based on its

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reading of this history, the Court plurality found that the right to bear arms for self-defense is part of our historical fabric and therefore incorporated through the Fourteenth Amendment due process clause.

This view won only four votes. Justice Samuel A. Alito wrote the plurality decision, in which Chief Justice John G. Roberts and Justices Antonin G. Scalia and Anthony M. Kennedy joined. The fifth vote to hold that the Second Amendment applied to the states came from Justice Clarence Thomas, who took a completely different route to that outcome. For Justice Thomas, the Fourteenth Amendment due process clause protects only *procedural* rights, meaning the right to some type of process before the government can deprive an individual of life, liberty, or property. But, Justice Thomas concluded, a separate provision of the Fourteenth Amendment—the privileges or immunities clause—requires states to respect an individual's right to bear arms for self-defense purposes. In some late-nineteenth-century cases, the Court had read the privileges or immunities clause to protect only a very few rights. Justice Thomas concluded that these precedents were wrong and should be overruled.

Both Justice John Paul Stevens and Justice Stephen G. Breyer wrote dissenting opinions. Justice Stevens concluded that *McDonald* was not about incorporation as much as substantive due process. For him, the question was not whether the Second Amendment applies to the states through the incorporation doctrine, but rather whether the right to keep a gun of one's choice is a fundamental liberty interest that the due process clause protects. Justice Stevens concluded that it was not.

Justice Breyer's dissent, joined by Justice Ruth Bader Ginsburg and Justice Sonia Sotomayor, expressed continued disagreement with *Heller*, noting that numerous historians and scholars have found *Heller's* reading of the history of the Second Amendment deeply flawed. But even taking *Heller* on its own terms, Justice Breyer concluded, the Second Amendment should not be incorporated against the states because the right to private self-defense does not further broader constitutional objectives such as protecting the interests of minorities or supporting the democratic process.

The Lineup

From a purely political perspective, the vote lineup in *McDonald* seems unremarkable. The five more conservative justices sided with the gun rights position, while the more liberal justices sided with the gun control position. And these politics, many cynics would say, led to an extraordinary role reversal when it comes to reading the Constitution.

In expanding gun rights, the more conservative justices ruled that the due process clause—the provision of the Constitution that, much to many conservatives' dismay, has been read to protect unenumerated rights such as a right to abortion and a right to engage in same-sex sexual relations—was broad enough to incorporate another right—albeit one provided for elsewhere in the Bill of Rights. And on top of that, the more conservative justices brushed aside federalism concerns to hold that states, the laboratories of democracy, could no longer experiment with gun laws in the ways they saw fit.

On the other hand, the more liberal justices would have ruled that the due process clause, which they generally view as flexible enough to cover privacy rights nowhere mentioned in the text of the Constitution, was not broad enough to cover a right that the Constitution specifically discusses. And, when it comes to guns, the liberal justices would have held that federalism concerns are important enough to allow states to continue to regulate, free from a federal constitutional straightjacket.

But the justices' writings show a more nuanced approach, on both sides. While the conservative plurality held that the due process clause protected a “new” right, it did so in a way that narrowly defined what the due process clause covers. For the plurality, the only real consideration in deciding whether a right is “fundamental” is history—not evolving contemporary understandings, not broader constitutional values, and not any international consensus. That suggests that the range of individual rights that the Constitution protects is essentially fixed from the outset. And that means, of course, that rights that reflect more contemporary social norms would not be protected.

Conversely, in concluding that gun rights are not fundamental, the more liberal justices rejected this narrow view of the due process clause. For them, the due process clause incorporated more modern notions of liberty and equality and was flexible enough to cover rights that may affect a person's ability to participate equally in society, but not rights that lack such contemporary importance.

The Consequences

Other than the 214 pages of writings on the meaning of the Fourteenth Amendment, what will *McDonald*'s legacy be? One seems clear: much more litigation. After *Heller*, courts saw hundreds of challenges to gun restrictions, often brought by criminal defendants challenging gun-related charges on Second Amendment grounds. *McDonald* opened these floodgates even wider by making clear that not only the federal government, but also every state and city in the country must abide by the Second Amendment's limits.

McDonald also did nothing to address many of the questions that *Heller* left unanswered—most importantly, what standards courts should apply to figure out whether a gun regulation will pass constitutional muster. *McDonald* repeated *Heller*'s admonition that the Court did not intend to cast doubt on longstanding regulations such as statutes prohibiting felons and those with mental illness from possessing firearms, laws banning guns from sensitive places such as schools and government buildings, and regulations imposing conditions and qualifications on the sale of arms. But beyond that, the Court has remained largely silent, leaving litigants and lower courts to develop Second Amendment standards on their own.

The City of Chicago's experience is a case in point. Immediately after the Court handed down *McDonald*, the city enacted a new gun ordinance. Five days after the city council's vote, a federal lawsuit was filed.

Another big question mark left open after *McDonald* involves the fate of the few provisions of the Bill of Rights that remain unincorporated. More specifically, will the Court's willingness to reverse earlier precedent and rule that a previously unincorporated right is now

incorporated embolden litigants to challenge long-held assumptions that the last unincorporated holdouts apply only to the federal government?

Although federal court dockets are unlikely to be flooded with challenges over the quartering of soldiers, two very significant provisions of the Bill of Rights remain unincorporated: the Seventh Amendment right to a civil jury and the Fifth Amendment right to proceed by grand jury indictment. In decisions dating back to the late nineteenth and early twentieth centuries, the Court has held that neither of these provisions applies to the states. *McDonald* did not address whether these longstanding decisions remain good law, but it specifically noted (twice) that these rulings long predate the Court's era of selective incorporation—perhaps an invitation that those past decisions could be revisited. The very same opinion, however, may have effectively rescinded the invitation: in other passages, *McDonald* also said (twice) that all provisions of the Bill of Rights that protect fundamental American rights apply to the states—"unless considerations of *stare decisis* counsel otherwise."

Only time will tell whether the Court will reconsider its past decisions and decide that states must comply with grand jury and civil jury requirements. But if state courts are soon tangled up in grand jury proceedings and civil jury trials in even the smallest of matters, one might fairly say that it all started with *McDonald*.

Disclosure: In *Heller* and *McDonald*, Munger, Tolles & Olson LLP filed amicus briefs on behalf of clients supporting the District of Columbia and the City of Chicago, respectively.

Kristin Linsley Myles, Michelle Friedland, Aimee Feinberg, and Miriam Seifter are litigators at Munger, Tolles & Olson LLP in San Francisco and all clerked at the Supreme Court—for Justices Antonin Scalia, Sandra Day O'Connor, Stephen Breyer, and Ruth Bader Ginsburg, respectively. Kristin Myles also currently serves as a Special Master in South Carolina v. North Carolina, Orig. No. 138.