

# Supreme Court's Second Amendment Decision In *McDonald v. Chicago* Likely To Spawn Challenges to Local Firearms Laws

By Sayre Weaver

On the last day of its current term, the United States Supreme Court compounded the challenges faced by California local governments seeking to address gun violence in their communities. In *McDonald v. Chicago*, 561 U.S. \_\_\_, 130 S.Ct. 3020 (2010) a bare majority of the Court held for the first time, and contra to long-established precedent, that the right protected by the Second Amendment "is fully applicable" to state and local regulation of firearms.

*McDonald* is the "sequel" to *District of Columbia v. Heller*, 554 U.S. \_\_\_, 128 S.Ct. 2783 (2008), in which the Court held, also for the first time, and also contra to long-established precedent, that the Second Amendment "protects the right to keep and bear arms for the purpose of self-defense," and that a law "that banned the possession of handguns in the home" violates that right.<sup>1</sup> The *McDonald* opinion reiterated the *Heller* Court's assurance that the Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."<sup>2</sup> However, neither *Heller* nor *McDonald* clearly delineated how the lower courts should determine when a firearms regulation unconstitutionally invades that protected right. In short, as a practical matter, the *McDonald* decision virtually ensures a deluge of "gun rights" lawsuits challenging state and local firearms laws.

## THE PRE-HELLER LEGAL LANDSCAPE AND THE HELLER LITIGATION "TSUNAMI"

Prior to *Heller*, the Supreme Court had interpreted the Second Amendment as limited to firearms possession in connection with service in a "well-regulated militia."<sup>3,4</sup> In keeping with *U.S. v. Miller*, 307 U.S. 174 (1939), the lower courts established a substantial body of case law over the next seventy years, generally characterizing the protected right as "collective" and state militia-related. These cases rejected Second Amendment challenges by individuals to various firearms laws, including challenges to handgun possession bans.<sup>5</sup> In *Heller*, however, the Supreme Court wrenched the right to keep and bear arms from its militia moorings.

*Heller* involved a Second Amendment challenge by Dick Heller, a D.C. Special Police Officer, to the District of Columbia's longstanding handgun possession ban, and to its requirement that firearms in the home be stored unloaded and disassembled. *Heller* asserted that the right protected by the Second Amendment is an individual right, independent of any connection to service in the militia, and that the ban and the storage requirement violate that right.<sup>6</sup>

*Heller* lost his challenge in the trial court, but the U.S. Court of Appeals for the District of Columbia Circuit reversed, holding the challenged provisions violated *Heller's* Second Amendment right. The District petitioned for certiorari and the Supreme Court granted review. The case marked the first time the Supreme Court had considered the Second Amendment since its decision in *Miller*.

Turning its back on *Miller* and its progeny, the *Heller* Court agreed with Respondent *Heller*, declaring that individual self-defense is "the central component" of the Second Amendment right, not service in the state militia. The Court then held that the Second Amendment protects a law-abiding citizen's personal right to possess a handgun in the home where the "need for defense of self, family, and property is most acute" and struck down the District's handgun ban.<sup>7</sup> The Court also struck down the storage requirement, concluding that this provision effectively prevented an individual from using a stored firearm for self-defense.<sup>8</sup> This requirement had no express exception for self-defense and arguably had been interpreted in an earlier decision as forbidding D.C. residents from using firearms for self-defense.<sup>9</sup>

Interestingly, when remanding the case to the lower courts, the *Heller* Court stated: "Assuming that *Heller* is not disqualified from exercise of Second

Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in his home.”<sup>10</sup> This statement implies recognition by the Court that firearms registration and licensing laws are not per se unconstitutional under the Second Amendment.

The *Heller* decision left open more questions than it answered. The *Heller* Court cautioned that its holding should not “cast doubt” on certain “presumptively lawful regulatory measures” including “longstanding prohibitions” on firearms possession by felons and the mentally ill; laws prohibiting firearms in sensitive places such as schools and government buildings; and laws imposing conditions on the commercial sale of firearms.<sup>11</sup> The Court also specifically stated this list was not intended to be exhaustive, but did not explain how it derived the list, or how the Court and the lower courts might augment that list in the future.<sup>12</sup>

The Court also indicated that laws banning dangerous and unusual weapons and laws providing for safe storage of firearms would not offend the Second Amendment.<sup>13</sup> In addition, as noted above, the Court implied that firearms registration and licensing requirements do not per se offend the Second Amendment. At the other end of the spectrum, the Court made clear that bans on home possession of handguns do offend the Second Amendment. However, the Court did not give any further guidance to the lower courts, indicating instead that any further delineation of the right would be left to future litigation.<sup>14</sup>

The Court also refused to identify the standard of judicial review applicable to challenges under the Second Amendment. While making clear that the Court did not consider the rational basis test sufficiently rigorous, the Court declined to identify what level of scrutiny a court should apply to a firearms regulation that is not “presumptively valid.”<sup>15</sup> As one court and a number of commentators have pointed out, a strict scrutiny level of review is not consistent with the Court’s enunciation that certain regulations implicating the constitutional right are presumptively valid.<sup>16</sup>

If strict scrutiny is indeed off the table, that would seem to leave the

reasonableness test, the “undue burden” test, and intermediate scrutiny. State courts have used the reasonableness test in determining whether a firearms law offends a state constitution’s right to possess firearms.<sup>17</sup> However, the *Heller* Court implied that a higher level of scrutiny would be appropriate. The “undue burden” test is used in certain abortion and voting rights cases, and looks at whether the law at issue unduly burdens exercise of the “core right.”<sup>18</sup> Intermediate scrutiny requires a court to determine whether the challenged measure is substantially related to an important governmental interest.<sup>19</sup>

Hybrid versions of certain types of scrutiny might also be developed as the appropriate test. For example, in applying both strict scrutiny and intermediate scrutiny, some courts consider first whether the challenged measure directly burdens the “core right” that is constitutionally protected. If not, the regulation is upheld. If on the other hand the court determines the regulation directly burdens the core right, the court will then analyze the regulation under the level of scrutiny the court has determined applies. This hybrid approach has already been used by the United States District Court for the District of Columbia in evaluating and upholding the District’s Firearms Registration Amendment Act, adopted by the District in an effort to cure the constitutional infirmities of the ordinance struck down in *Heller*. Using that approach, the court concluded on summary judgment that the amended ordinance does not violate the Second Amendment.<sup>20</sup>

Another key issue the *Heller* Court did not reach is whether the right protected by the Second Amendment constrains state and local regulation, as well as federal regulation. Because the District is a federal enclave, the *Heller* Court did not need to decide, and did not decide this “incorporation” question.<sup>21</sup> As part of the original Bill of Rights, the Second Amendment right places no constraint on state and local firearms regulation unless and until the Court “incorporates” the right.<sup>22</sup>

The test the Court has developed for incorporation is the “selective incorporation” test, by which a right may be incorporated through the Due Process Clause of the Fourteenth Amendment if it is fundamental to ordered liberty and our system of

justice.<sup>23</sup> More than half a century before the Court decided *Miller*, the Court had specifically held that the Second Amendment constrains only Congress, not the states and their subdivisions.<sup>24</sup> However, these cases pre-dated the Court’s development of the selective incorporation doctrine.

The legal uncertainties left by *Heller* virtually invited a flood of litigation asserting Second Amendment violations. As Justice Stevens aptly described in his dissent in *McDonald*, the *Heller* decision immediately unleashed “a tsunami of legal uncertainty, and thus litigation.”<sup>25</sup> Challenges were brought to a vast array of firearms laws. By one count, in the first eighteen months after *Heller* was handed down, over 190 Second Amendment challenges were brought.<sup>26</sup> Among these were challenges to statutes prohibiting firearms possession by convicted felons (despite *Heller*’s admonition that such laws are presumptively valid); assorted challenges to firearms possession provisions by criminal defendants; and challenges to state and local laws requiring firearms registration, banning assault weapons, and prohibiting the unlicensed carrying of concealed weapons, even though the Court had not yet decided whether the Second Amendment right applies to states and their subdivisions.<sup>27</sup> One of the many post-*Heller* lawsuits was *McDonald*, filed on the day *Heller* was handed down, and challenging Chicago’s long time handgun possession ban.

#### THE MCDONALD LAWSUIT

The *McDonald* lawsuit challenged Chicago’s firearms registration ordinance under the Second Amendment, and claimed that the registration requirement, together with the prohibition on registration of handguns, effected a complete prohibition on possession of handguns in the home for self-defense. The trial court granted the City’s motion to dismiss, which urged that under controlling Supreme Court precedent, the Second Amendment right does not apply to states and local governments. The Seventh Circuit affirmed, noting that the earlier Supreme Court cases holding that the Second Amendment right constrains only Congress were binding on that court, and that the Supreme Court has made clear that the Supreme Court, and not the lower

courts, may reverse earlier Supreme Court decisions.<sup>28</sup>

The *McDonald* plaintiffs then petitioned the Supreme Court for certiorari and the Court granted the petition.<sup>29</sup> Petitioners' primary argument was that the Second Amendment right should be made applicable to the states and their subdivisions through the Privileges and Immunities Clause of the Fourteenth Amendment. This route to incorporation would have required the Court to overrule its decision in the *Slaughter-House Cases*. Petitioners argued alternatively that the right to keep and bear arms protected by the Second Amendment is a "fundamental right" and should be "incorporated" through the Due Process Clause of the Fourteenth Amendment.<sup>30</sup>

Justice Alito wrote the opinion of the Court. After reviewing the *Heller* decision and certain historical evidence, a majority of the Court (Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito) concluded that the right protected by the Second Amendment is "fundamental to our scheme of ordered liberty and system of justice."<sup>31</sup> However, only the Chief Justice, Justices Scalia, Kennedy, and Alito (a plurality of the Court), concluded that the right should therefore be incorporated against the states and local governments through the Due Process Clause.<sup>32</sup>

Justice Thomas wrote a separate opinion concurring in the judgment, but concluding that the right should be incorporated through the Privileges and Immunities Clause.<sup>33</sup> Justice Stevens dissented, concluding the right protected by the Second Amendment is not implicit in the "liberty" protected by the Due Process Clause.<sup>34</sup> Justice Breyer dissented, joined by Justices Ginsburg and Sotomayer, concluding that the Second Amendment right is not a fundamental right and therefore should not be made applicable to the states and local governments.<sup>35</sup>

#### WHENCE LOCAL FIREARMS LAWS AFTER *MCDONALD*?

Regardless of the route to incorporation, the Second Amendment individual right recognized in *Heller* has now been held to apply to state and local regulation of firearms, and it therefore "constrains" the scope of such

regulation. However, the *McDonald* decision did not expand the scope of the protected right. The *McDonald* Court also reiterated the admonitions in *Heller* that the protected right is not limitless, and also acknowledged again the "presumptively valid" categories of regulation identified in *Heller*.<sup>36</sup>

While the *McDonald* Court indicated that it viewed the challenged Chicago ordinance as functionally equivalent to the ordinance the Court struck down in *Heller*, the *McDonald* Court did not actually decide whether the Chicago handgun ban was unconstitutional. Instead, it remanded the case to the lower courts for further consideration in light of its incorporation holding. As a result, other than the incorporation issue, the questions left unanswered in *Heller*, remain unanswered after *McDonald*.

While *McDonald* was pending, a number of cases involving post-*Heller* challenges to state or local firearms regulations were stayed pending the outcome of *McDonald*. However, some courts chose to hear those challenges on the merits, and most upheld the challenged laws. These courts concluded that even if the Second Amendment right was to be incorporated, the challenged regulations did not violate the right recognized in *Heller*, that is, a law-abiding citizen's right to possess a handgun in the home for self-defense. The courts have also been inhospitable to challenges to federal firearms regulations by criminal defendants.<sup>37</sup>

The reviewing courts have not agreed on the proper level of scrutiny. Some have decided the challenge before them without deciding that issue. In many cases the courts have found the challenged regulation to be within one of the "presumptively valid" categories recognized in *Heller*, and others have found the challenged regulation sufficiently like one of the presumptively valid categories of regulation to treat the regulation as if it fell in that category.<sup>38</sup>

One of the cases stayed pending *McDonald* is *Nordyke v. King*, a challenge by a gun show operator to Alameda County's ordinance prohibiting firearms possession on County-owned open space property, such as county-owned parks, historic sites and the Fairgrounds. That stay has

been lifted and the Ninth Circuit has requested additional briefing in light of the *McDonald* decision, including on the applicable standard of review. One issue that court will face is whether government property such as the County fairgrounds should be treated as within the presumptively valid category of "sensitive places" regulation identified in *Heller*.<sup>39</sup>

In addition, post-*McDonald* challenges have already been filed. One of these is a challenge brought by the ACLU, representing a gun owner whose handguns and ammunition were confiscated by the Broward County, Florida Sheriff's Office after he threatened suicide. Plaintiff alleges he is entitled to have his handguns back for self-defense and withholding his handguns violates his right under the Second Amendment.<sup>40</sup>

#### SOME POST *MCDONALD* PRACTICAL TIPS FOR LOCAL GOVERNMENTS

Local governments in California may want to make an inventory of their local firearms and ammunition ordinances, and then assess the risks of Second Amendment challenges to these ordinances. To the extent a given ordinance regulates in an area that was recognized in *Heller* as "presumptively valid" the ordinance should be defensible on that basis. The courts reviewing post-*Heller* challenges have signaled that they may be willing to uphold a firearms law that regulates in an area akin to one of the "presumptively valid" categories. For example, a number of courts have rejected Second Amendment challenges to the federal law that prohibits firearms possession by persons convicted of misdemeanor domestic violence, a category akin to, but outside the convicted felon category identified in *Heller*. As a result, it may be useful to analyze a locale's firearms ordinances with each of the "presumptively valid" categories in mind.

Local governments with ordinances regulating firearms storage, or prohibiting the possession of certain types of firearms, may want to evaluate such ordinances in light of the *Heller* Court's decision to strike down the District's storage requirement because it provided no self-defense exception. California law recognizes "self-defense" as an affirmative defense that may be

raised to a criminal charge, and thus it is an exception implied in penal laws unless the law is a strict liability offense.<sup>41</sup> Assuming a given firearms ordinance is not a strict liability offense, or has not been applied as if self-defense is not an exception to it, the ordinance should not run afoul of this aspect of the *Heller* decision.

Because a higher standard of review than traditional rational basis review will apply to a post-*McDonald* challenge, it may be useful for cities and counties to know where to find studies and other materials that may assist them in defending firearms regulations in the event of a challenge. Justice Breyer's dissent in *McDonald* includes an appendix that lists many articles and studies that are useful resources. The appendix also cross-references to similar evidentiary data cited in Justice Breyer's lengthy dissent in the *Heller* case. Other useful resources may also be found through links on the Legal Community Against Violence web site ([www.lcav.org](http://www.lcav.org)).

Because any restriction on firearms possession or sale might be argued to burden the right to possess a handgun in the home for self-defense in some way, local governments should anticipate there will continue to be many lawsuits challenging a wide range of firearms laws. The good news is that so far, most challenged firearms laws are surviving post-*Heller* challenges. For risk assessment purposes, it will be helpful for local governments to stay current on the post-*Heller* and post-*McDonald* decisions.

The bad news for our cash-strapped local communities is that many post-*Heller* challenges have been or will be filed, even when the law at issue is plainly within one of the "presumptively valid" categories of firearms regulation recognized in *Heller*. In addition, many such lawsuits are likely to be pursued under theories that would entitle a prevailing plaintiff to recover attorney's fees.

Whether a litigant seeking attorneys' fees under the "private attorney general" theory has put the local government on notice of his grievance is a factor California courts consider in determining whether to award such fees. As a result, private litigants challenging California firearms ordinances usually send a letter to local

government threatening a lawsuit before actually filing such a challenge in court. These letters provide an opportunity for city attorneys and county counsels to evaluate risks and determine whether challenges to similar laws are now pending or have been litigated, and with what outcome.

Finally, because challenged firearms ordinances will be subject to some higher level of scrutiny than rational basis review, the legislative findings that may be needed to justify a given new firearms regulation will be of particular importance. Findings that are simply conclusions, but might survive a rational basis review, are likely insufficient in the post-*McDonald* era. Instead, legislative findings that cite to specific studies or other extrinsic facts providing some evidentiary support for that type of regulation should be included whenever possible.

To the extent feasible, it will also be helpful for the legislative findings to detail exactly what harms the legislative body seeks to address through the ordinance, why the legislative body has a significant, or better still, a compelling interest in addressing those harms, and why the ordinance is substantially related, or better still, narrowly related to addressing those harms. If the ordinance arguably regulates within an area "presumptively valid" under *Heller*, it will also be helpful if the findings explain why the legislative body has so found. In addition, facts showing why the ordinance cannot reasonably be expected to directly burden a law-abiding citizen's right to possess a handgun in the home for self-defense should be articulated in the findings whenever possible.

In appropriate circumstances, local governments might also want to consider whether to take the initiative in establishing the validity of a given firearms ordinance. For example, many California cities and counties have substantially similar ordinances regulating firearms dealers. A "threat to sue" letter to one jurisdiction, directed at its ordinance regulating firearms dealers, might present an opportunity for a group of jurisdictions with substantially similar ordinances, to bring a joint declaratory relief action, before any one of them is sued. That approach might result in cost-savings overall and enable these jurisdictions to share expertise.

So far the lower courts are addressing Second Amendment challenges with a fair degree of respect for exercise of the police power. This approach is consistent with the recognition in *Heller* and *McDonald* of a broad range of "presumptively valid" firearms regulations, and of the limited nature of the core right. However, it may be difficult for states and local governments to take much comfort from these facts. The plethora of post-*Heller* Second Amendment litigation demonstrates that individual litigants and "gun rights" groups such as the NRA and the Second Amendment Foundation will seek to establish a broader scope to the protected right. As a result, while the courts answer the questions left unanswered in *Heller* and *McDonald*, the goal of reducing gun violence in California's local communities will present new challenges and complexities.

#### ENDNOTES

1. *McDonald v. Chicago*, 562 U.S. \_\_\_, 130 S.Ct. 3020, 3025 (2010), summarizing the holding in *Heller*, 554 U.S. \_\_\_, 128 S.Ct. 2783 (2008).
2. *McDonald*, 130 S.Ct. 3020, 3047, internal quotations omitted.
3. *U.S. v. Miller*, 307 U.S. 174 (1939).
4. The Second Amendment provides: "A well regulated militia, being necessary to the securing of a free State, the right of the people to keep and bear Arms, shall not be infringed."
5. See for example *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), cert. denied 518 U.S. 912 (1996); but see *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the outlier decision, holding the Second Amendment protects an individual right.
6. *Heller*, 554 U.S. \_\_\_, 128 S.Ct. 2783, 2788-2789.
7. *Id.* at 2817-2818.
8. *Id.* at 2821-2822.
9. *Id.* at 2819 n.28.
10. *Id.* at 2822
11. *Id.* at 2816-2817.

12. *Id.* at 2817 n.26.
13. *Id.* at 2817.
14. *Id.* at 2821-2822. For articles by historians, judges and scholars criticizing the *Heller* decision and its mode of analysis, see the Breyer Dissent in *McDonald*, 130 S.Ct. at 3121-3122.
15. *Heller*, 128 S.Ct. at 2821-2822.
16. *U.S. v. Marzzarella*, 595 F.Supp.2d 596, 604 (W.D.Pa. 2009); Denis A. Henigan, *The Heller Paradox*, 56 U.C.L.A. L. Rev. 1171, 1197-98 (2009); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1379 (2009)
17. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686, 716-718 (2007).
18. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876, 878 (1992) (joint op. of O'Connor, Kennedy & Souter); *Burdick v. Takushi*, 504 U.S. 428, 434.
19. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).
20. *Heller v. District of Columbia*, \_\_\_ F.Supp.2d \_\_\_, 2010 WL 1140875, \*7, \*8 (D.D.C.); also see *U.S. v. Skoien*, \_\_\_ F.3d \_\_\_, (7th Cir. July 13, 2010), 2010 WL 2735747, \*3 (finding the challenged law, prohibiting firearms possession by persons convicted of misdemeanor, domestic violence, has important governmental objective and “logic and data establish a substantial relation between 922(g)(a) [challenged federal law] and this objective.”).
21. *Id.* at 2821.
22. *Barron v. City of Baltimore*, 32 U.S. 243, 7 Pet. 243 (1833).
23. *McDonald*, 562 U.S. \_\_\_, 130 S.Ct. at 3031.
24. *U.S. v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894).
25. *McDonald*, 130 S.Ct. at 3105.
26. *Id.*, n.30 referencing brief of amicus curiae Brady Center.
27. “*Post-Heller* Litigation Summary,” Legal Community Against Violence, <http://www.lcav.org/content/post-heller-summary.pdf> (last visited July 27, 2010), hereafter “*Post-Heller* Summary.”
28. *McDonald*, 130 S.Ct at 3027.
29. *Id.* at 3028.
30. *Id.*
31. *Id.* at 3025-3047.
32. *Id.* at 3059-3060.
33. *Id.* at 3059, Thomas, J. separately concurring.
34. *Id.* at 3099, Stevens, J. dissenting.
35. *Id.*, Breyer, J. joined by Ginsburg, J. and Sotomayer, J., dissenting.
36. *Id.* at 3047.
37. *Post-Heller* Summary.
38. *Id.*; see also *Heller v. District of Columbia*, \_\_\_ F.Supp. 2d \_\_\_, 2010 WL1140875, \_\_\_, \*4, \*5 (D.D.C.)(summarizing *Post-Heller* approaches to Second Amendment challenges).
39. *Post-Heller* Summary.
40. Linda Trischitta, “*ACLU Petitions Court to get Man’s Guns Returned from Broward Sheriff’s Office*,” South Florida Sun Sentinel, July 15, 2010, [http://articles.sun-sentinel.com/2010-07-15/news/fl-aclu-sues-for-seizedweapons-20100715\\_1\\_aclu-petitions-court-guns-sheriff/2](http://articles.sun-sentinel.com/2010-07-15/news/fl-aclu-sues-for-seizedweapons-20100715_1_aclu-petitions-court-guns-sheriff/2).
41. *People v. King*, 38 Cal.4th 617 (2006).