

Written by Craig Fields
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In a vitally-important gun rights case decided June 28, the U.S. Supreme Court extended the reach of the Second Amendment beyond the federal government to apply also to states, counties, and cities. Gun Owners of America and Gun Owners Foundation filed a scholarly amicus brief in this case, urging the Court to protect all U.S. citizens against any government infringement of the Second Amendment.

Two years ago the Supreme Court decided in *District of Columbia v. Heller* that the Second Amendment to the United States Constitution was violated by a District of Columbia handgun ban. Today, the Court ruled in

McDonald v. Chicago

that a look-a-like Chicago ban violated the Fourteenth Amendment. By so ruling, the Court held that the right to keep and bear arms secured to an American citizen living in the nation's capital was equally secured to that citizen in the nation's third largest city.

The *McDonald* opinion spent 45 pages reviewing the right to keep and bear arms -- its history, its importance to Americans as the chief safeguard against tyrannical government, and even its significance to the newly freed slaves who were previously being disarmed and abused by southern officials in the mid-to-late-1800s. While gun banners are making a big-to-do about the three sentences of *dicta* in the opinion which seem to provide them a little wiggle room for some types of gun control in the future, the truth is that they only got three sentences in 45 pages! That would be like celebrating a beautiful field goal in a 70-3 loss in the Super Bowl. It ignores the fact that every single one of their arguments were smacked down by the Court.

Gun Owners of America and Gun Owners Foundation join with other gun rights organizations and advocates to celebrate this next great victory after *Heller*; yet, the joy of the victory is tempered by the closeness of the vote — five to four in both cases — as well as the tenuous grounds on which *McDonald* was decided. It appears clear that eternal vigilance will be the price of defending the Second Amendment, as future threats are already forming against our gun rights.

In our amicus brief, GOA/GOF, along with a number of local gun rights organizations and other

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constitutionally-minded friends, urged the Court to base its decision upon Section 1 of the Fourteenth Amendment that prohibits any “State [to] make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Four of the five majority justices declined this invitation, preferring to rely on the Court’s Fourteenth Amendment due process “incorporation” doctrine — an artificial legal doctrine created by federal judges to expand their own power over the states. Only Justice Clarence Thomas agreed with us — that, as a matter of textual and historic fidelity, the due process guarantee was a weak reed upon which to rest so important a right that could be overturned if more anti-gun justices are confirmed to the High Court.

In a stirring opinion — jam-packed with textual and historical analysis — Justice Thomas recounted the freedman’s struggle after the civil war to arm himself against a lawless tyranny that threatened his family’s liberty and property, demonstrating conclusively that the Second Amendment right was among those precious “privileges or immunities” that were now secured to him as a “citizen of the United States” — by the express text of the Fourteenth Amendment.

While Justice Thomas’s four majority colleagues never disagreed with any of his textual and historical analysis, they nevertheless preferred to rest their ruling not on any constitutional text, but on “well established ... case law that most of the provisions of the Bill of Rights apply full force to ... the States” and that, like those rights, the Second Amendment right to keep and bear arms was “fundamental to *our* scheme of ordered liberty” and “deeply rooted in the Nation’s history and tradition” — whatever that may mean to any given justice.

Significantly, neither of the two dissenting justices — Stevens and Breyer — made any attempt whatsoever to attack Justice Thomas’s careful and thorough analysis. Rather, they took aim at the majority use of the Court’s “incorporation” doctrine. To be sure, Justice Scalia, in a brilliant concurring opinion, tore to shreds Justice Stevens’ reinterpretation of the Court’s incorporation formulas, and Justice Alito made short shrift of Justice Breyer’s revisionist views, but the fact remains that a single change on the personnel of the Court can tip the balance against a vigorous Second Amendment right, or one that is susceptible to erosion, or even downright reversal.

While no legal grounds, including anchoring the Second Amendment in the constitutional text of the privileges or immunities clause, can guarantee against future assault by lawless justices, grounding our right to keep and bear arms in the Court’s evolving “case law,” rather than in the original, written Constitution itself, opens the door more widely to justices who are committed to a “living” Constitution that changes with changing times.

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Symbolic of the truth that the battle to defend the Second Amendment in the courts continues was the fact that on the same day that the Court handed down its *McDonald* decision, the Senate Judiciary Committee opened its hearings on President Obama's nomination of Elena Kagan to the United States Supreme Court. Although the Kagan nomination, if approved, would not immediately change the line-up on

Heller

and

McDonald

— as she would replace the consistently anti-gun Justice Stevens — the presence of any foe of the Second Amendment on the Court should be of utmost concern to all gun owners.

Gun Owners of America has been invited by the Senate Judiciary Committee to testify on the Kagan nomination. In preparing that testimony, our lawyers have discovered significant information indicating that Ms. Kagan's Second Amendment views are guided by emotion, not reason, nor predilection or principle, nor court precedent ... and certainly not the constitutional text. We are thus urging our members to oppose this nomination by writing, e-mailing and telephoning their Senators not to approve an appointment that would place our Second Amendment rights in even greater doubt.

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