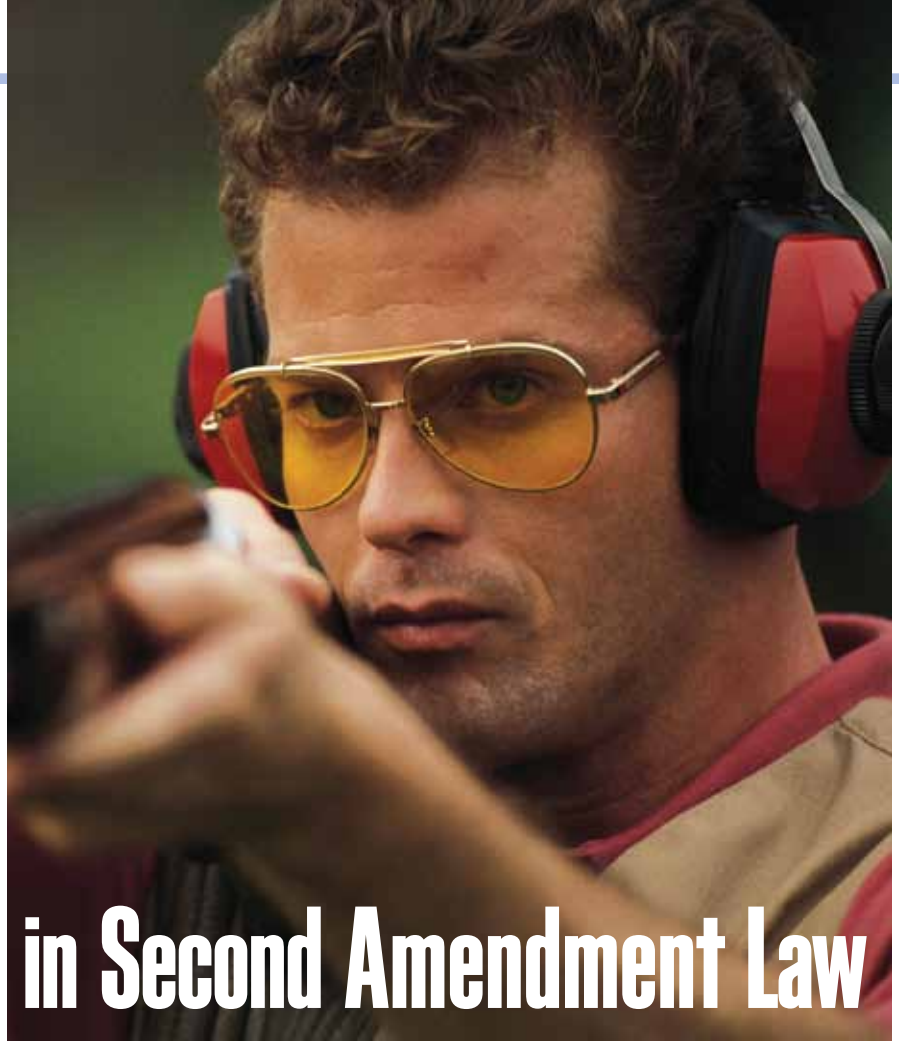
Dan M. Peterson
and Stephen P. Halbrook



A Revolution in Second Amendment Law

Recent Supreme Court decisions have given new life to the right of citizens to keep and bear arms.

It is no exaggeration to say that in the past four years Second Amendment jurisprudence has been radically transformed. In all of our constitutional history, no provision of the Bill of Rights has undergone such a rapid and profound revolution in its interpretation.

Decisions by the lower federal courts over the past fifty years had nearly killed off any enforceable right to keep and bear arms under the federal Constitution. But reports of the death of that right were premature. Two decisions by the United States Supreme Court – *District of Columbia v. Heller*[1] in 2008 and *McDonald v. City of Chicago*[2] in 2010 – have restored it to vibrant life.

Until recently, Supreme Court precedent on the right to keep and bear arms was sketchy. Several decisions by the Supreme Court in the late nineteenth century discussed the Second Amendment, most notably *United States v. Cruikshank* and *Presser v. Illinois*.[3] Those cases affirmed the then prevailing rule that the Second Amendment, like other provisions of the Bill of Rights, operated only as a limitation on the federal government, not on the states.

The only substantive Second Amendment decision by the Supreme Court in the twentieth century was the enigmatic *Miller* case decided in 1939.[4] That decision held that a federal statute which banned interstate transport of a short-barreled shotgun without registering it and paying a $200 tax, absent any evidence in the record that the arm had militia utility, did not violate the Second Amendment.

The opinion was based on an incomplete record, and was rendered without briefing or oral argument on behalf of the defendant. The reasoning in *Miller*

was obscure, and for decades thereafter both pro- and anti-Second Amendment forces cited portions of the opinion as supporting their respective – and opposite – positions.

Although *Miller* resolved little, the Supreme Court remained silent on the Second Amendment for the rest of the century, except for passing references in a few cases.[5]

During that interval, the lower federal courts relied principally on two doctrines to deprive the Second Amendment of any meaningful effect. First, following the Supreme Court's pronouncements in *Cruikshank* and *Presser*, many courts continued to hold that state laws restricting the possession, carry, or use of firearms could not be challenged under the Second Amendment.[6] During the mid-twentieth century, the modern process of "selective incorporation," which applied the First Amendment, the Fourth Amendment, and most other provisions of the Bill of Rights to the states, had vastly altered the constitutional landscape. Nevertheless, without action by the Supreme Court, many federal courts declined to "incorporate" the Second Amendment to apply against the states.

The second doctrine used to nullify the force of the Second Amendment was the "collective right" theory. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The "collective right" theory seized on the prefatory "militia" language to insist that the Second Amendment was a right held by the people collectively, *i.e.*, by the states, and was limited to protection of militia-related activities. The ostensible corollary was that citizens had no individual right enforceable in the courts to keep and bear arms for non-militia purposes.[7]

In the recent *Heller* and *McDonald* decisions, both of these doctrines were blown out of the water by the Supreme Court. In *Heller*, the Court held that the second part of the Second Amendment – stating that "the right of the people to keep and bear Arms, shall not be infringed" – is the operative clause. The case was brought by a resident of Washington, D.C., who wished to possess a handgun for self-protection at home. At that time, D.C. law imposed a complete ban on civilian possession of handguns, other than a few that were grandfathered, and all firearms had to be stored in an inoperable condition.

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Heller dismantled the "collective right" theory, held that an individual has a constitutional right to possess a handgun in the home for purposes of self-defense, and struck down the requirement that the gun be stored in an inoperable condition. The Court did not make findings regarding the extent of the right outside the home because that issue was not presented by the case. Regarding the types of weapons protected by the Second Amendment, the Court noted that the right extends to arms "typically possessed by law abiding citizens for lawful purposes," including handguns.[8]

Significantly, the Court declined to employ any sort of "interest-balancing" test to determine the law's constitutionality, as Justice Breyer had advocated in his dissent. Justice Scalia's opinion for the 5-4 majority noted that the right to keep and bear arms cannot be balanced away:

> The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.[9]

Whether the Second Amendment is "outmoded" in light of changing societal conditions might be debatable, the Court noted. But it affirmed that one thing is not debatable: "it is not the role of this Court to pronounce the Second Amendment extinct."[10]

The District of Columbia is a federal enclave, not a state. So, the question that was immediately presented in *Heller's* wake was whether this individual, enforceable right to keep and bear arms applies only to restrictions imposed by federal law, or to state and local firearms laws as well. It did not take long to find out.

Like the District of Columbia, the City of Chicago had an almost complete ban on handguns. Chicago's ordinance was challenged immediately after *Heller*. In *McDonald v. City of Chicago*, the only question presented to the Supreme Court was whether the Second Amendment applies to the states by incorporation through the Fourteenth Amendment. In 2010, the Supreme Court held that it does, thus opening up state and local laws to Second Amendment challenges.[11]

The Supreme Court has now elevated a constitutional protection that was nearly moribund to a vital right on a par with other provisions of the Bill of Rights. When some respondents in the *McDonald* case suggested "that the Second Amendment should be singled out for special – and specially unfavorable –

treatment," the Court replied succinctly: "We reject that suggestion."[12]

Although strongly affirming the existence of the right, and clarifying some aspects of its applicability, *Heller* and *McDonald* have left open many issues for later decision. Lower courts are grappling with those issues now, but it will be years before they are resolved.

A fundamental, unresolved question is the level of constitutional scrutiny – *e.g.*, strict scrutiny, intermediate scrutiny, or rational basis review – to be applied to restrictions on the right to arms. *Heller* rejected rational basis review[13] and, as noted, also rejected Justice Breyer's proposed "interest balancing" method, which is equivalent to intermediate scrutiny.[14] It suggested that D.C.'s law infringed so deeply on the core Second Amendment right that it should be struck down categorically, observing that, "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights," D.C.'s ban on handguns in the home "would fail constitutional muster."[15]

The *McDonald* opinion described the right to keep and bear arms as "fundamental" so many times that it is difficult to count them. Under traditional analyses, that would mean that any direct infringements on Second Amendment rights should be subject to "strict scrutiny."[16]

Since *Heller*, however, several federal Courts of Appeals have applied only intermediate scrutiny in Second Amendment challenges.[17] An instructive contrast is provided by a recent Third Circuit case and an even more recent Seventh Circuit case.

In *United States v. Marzzarella*,[18] the defendant was convicted of possessing a handgun with a serial number that had been obliterated in violation of 18 U.S.C. § 922(k). The Third Circuit could not conclude that "possession of unmarked firearms in the home is excluded from the right to bear arms" and, accordingly, addressed the level of constitutional scrutiny to be applied.[19]

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The Court observed that "unmarked firearms are functionally no different from marked firearms."[20] So, unlike D.C.'s handgun ban in Heller, § 922(k) "leaves a person free to possess any otherwise lawful firearm he chooses – so long as it bears its original serial number."[21] Because "§ 922(k) was neither designed to nor has the effect of prohibiting the possession of any class of firearm," the Court believed that the proper standard was intermediate scrutiny.[22]

In *Ezell v. City of Chicago*,[23] by contrast, the Seventh Circuit applied a more exacting standard of review, akin to strict scrutiny, in a follow-up challenge to Chicago's firearms ordinances. Four days after *McDonald* was decided, Chicago enacted a new ordinance that did not ban all possession of handguns, but made firearms ownership difficult, expensive, and legally perilous. Among numerous other requirements and restrictions, the new ordinance required training at a gun range in order to possess a firearm. At the same time, it prohibited all gun ranges within the city.

After observing that broad firearms prohibitions are probably categorically unconstitutional, the Seventh Circuit stated that " a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end."[24] Chicago's range ban "prohibits the 'law-abiding, responsible citizens' of Chicago from engaging in target practice in the controlled environment of a firing range."[25] The Court described this as "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense."[26]

Accordingly, the Seventh Circuit directed that the ban on ranges be enjoined, along with several other ordinance provisions that effectively prevented the right to possess and discharge firearms outside the home for purposes of maintaining proficiency and satisfying the range training requirement.

A passage in *Heller* that was no doubt designed to soothe potential critics of that decision has instead led to significant uncertainties. *Heller* offered the reassuring comment that:

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[27]

The Court remarked in a footnote that such prohibitions were "presumptively lawful."[28]

There has been a tendency by some courts to analogize very dissimilar facts to the "presumptively lawful" prohibitions described in *Heller*, thus greatly expanding the scope of those prohibitions. Unsurprisingly, lower courts since *Heller*, including the Third Circuit, have upheld laws banning possession of firearms by felons.[29] But does that mean

that individuals can be stripped of their Second Amendment rights because they have committed a simple misdemeanor? Some courts, reasoning by analogy, think so.[30] Is a private driveway analogous to "sensitive places such as schools and government buildings?" At least one court believes it is and that carrying a firearm can accordingly be banned in the driveway of a private home.[31]

And what does "presumptively lawful" mean? Does it mean that conduct subject to such prohibitions is outside the scope of the Second Amendment altogether? That there is a rebuttable presumption of constitutionality? Or does it simply mean that the Supreme Court was predicting that such provisions may be upheld after appropriate constitutional scrutiny?

Another area of major uncertainty is the scope of the right. Does the right to bear arms extend outside the home? To "bear arms" means to "carry" them. The plain meaning of the language of the Second Amendment thus protects a right to carry arms outside the home. Nevertheless, quite a few lower court decisions have limited *Heller* to its facts and have refused to recognize any Second Amendment right to bear arms outside the four walls of a person's dwelling.[32] Some courts have specifically stated that they will not recognize such a right absent Supreme Court direction to do so.

Notably, the Third Circuit has hinted in dictum that the Second Amendment "must" protect other rights which can only be exercised outside the home, such as hunting, and bearing arms "as a bulwark against potential government oppression."[33]

Requirements to register firearms, and the prerequisites for registration, may also receive a fresh look in some jurisdictions. After *Heller* was decided, D.C. amended its laws to impose more stringent registration requirements on all firearms. These were challenged in a follow up lawsuit dubbed *Heller II*. The D.C. Circuit upheld some of the provisions, but remanded the case for consideration of the constitutionality of other provisions.

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The Court upheld the basic requirement that handguns be registered, but found that provisions relating to registration of long guns were "novel," not "longstanding," and needed to be examined as to their constitutionality.[35] The D.C. Circuit also found that certain registration provisions that applied both to handguns and long guns were "novel," such as the requirement that applicants demonstrate knowledge of D.C. gun laws, a vision test, training requirements, a ban on registering more than one pistol every 30 days, a three-year registration renewal requirement, ballistic tests on pistols, and other provisions.[36] It therefore remanded for further proceedings on those requirements as well.

The interplay between the Second Amendment and state constitutional provisions protecting the right to keep and bear arms will likely be the subject of future jurisprudence. State constitutions can certainly provide greater protection for that right than exists under federal constitutional law. Delaware has a unique history in this regard.

The Delaware constitutional convention in 1791 considered three proposals to include a written guarantee of the right to keep and bear arms in Delaware's revised constitution. A select committee reported a detailed declaration of rights which included the following guarantee, taken directly from the Pennsylvania Declaration of Rights: "The right of the citizens to bear arms in defence of themselves, and the state, shall not be questioned."[37]

However, during the Revolution, Whigs had been disarmed by Tories, and Tories in turn disarmed by Whigs (convention member Richard Bassett, a Tory, had himself been disarmed).[38] There were also allegations that two other members had encouraged their followers to carry guns at the Sussex County election in 1787.[39]

Thus, although there was little disagreement about confirming an individual right to bear arms in self-defense, there was considerable uneasiness on the part of convention members about groups of armed men who might purport to act "in defense of the state" (such as during elections). Despite several attempts, the convention therefore could not agree on the language to be used to define the right, and the amended constitution was adopted in 1792 without inclusion of a specific guarantee.[40]

In 1986 and 1987, both houses of the legislature passed an amendment to the Bill of Rights by a two-thirds majority, thereby adding an express right to keep and bear arms to the Delaware Constitution. It reads: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use."[41]

This is among the broader formulations of the right that appear in state constitutions, and in particular it clearly does not limit exercise of the right to the home, as some courts suggest about the Second Amendment. Should future case law limit the federal right under the Second Amendment, it is possible that

citizens of Delaware could have a stronger right to be armed than residents of many other states.

If anything is certain about the rapidly developing subject of the federal and state rights to keep and bear arms, it is that uncertainty will persist. Second Amendment jurisprudence promises to continue to be one of the most dynamic areas of constitutional law for years to come. ◆

FOOTNOTES

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

2. *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

3. *United States v. Cruikshank*, 92 U. S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); see also *Miller v. Texas*, 153 U.S. 535 (1894).

4. *United States v. Miller*, 307 U.S. 174 (1939).

5. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950).

6. See, e.g., *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269 (7th Cir. 1982) (argument that Second Amendment protects against state encroachments "borders on the frivolous"); *Fresno Rifle and Pistol Club v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

7. Decisions from the federal Courts of Appeals adopting some version of the collective right theory, or denying individuals any Second Amendment protection for private use or possession of firearms, are cited in Justice Stevens' dissent in *Heller*, 554 U.S. at 638 n.2. In a thoroughly researched opinion prior to *Heller*, the Fifth Circuit rejected the collective right theory, and held that the Second Amendment protects an individually enforceable right to possess arms for non-militia purposes. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

8. *Heller*, 554 U.S. at 625.

9. *Id.* at 634.

10. *Id.* at 636.

11. The plurality opinion stated that the Second Amendment was incorporated through the Due Process Clause of the Fourteenth Amendment. Justice Thomas, concurring, opined that it applied to the states through the Privileges or Immunities Clause.

12. *McDonald*, 130 S.Ct. at 3043.

13. *Heller*, 554 U.S at 628 n.27.

14. *Id.* at 634-35, 689-91.

15. *Id.* at 628-29.

16. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973).

17. *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010) (individual convicted of misdemeanor crime of domestic violence); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (drug addict); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) (person subject to domestic violence protective order).

18. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

19. *Id.* at 95.

20. *Id.* at 94.

21. *Id.* at 97.

22. *Id.*

23. *Ezell v. City of Chicago*, 651 F.3d. 684 (7th Cir. 2011).

24. *Id.* at 708.

25. *Id.*

26. *Id.*

27. *Heller*, 554 U.S. at 626-27.

28. *Id.* at 626-27 n. 26.

29. *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011); *see also, e.g., United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010).

30. *People v. Delacy*, 122 Cal. Rptr.3d 216 (Cal. Ct. App. 2011), *cert. denied* 2012 WL 117549 (U.S. Jan. 17, 2012).

31. *People v. Yarbrough*, 86 Cal. Rptr.3d 674 (Cal. Ct. App. 2008).

32. *See, e.g., Williams v. State*, 10 A.3d 1167 (Md. 2011), *cert. denied* 2011 WL 4530130 (U.S. Oct. 3, 2011); *Masciandaro v. United States*, 638 F.3d 458 (4th Cir. 2011), *cert. denied* 2011 WL 2516854 (U.S. Nov. 28, 2011).

33. *Marzzarella*, 614 F.3d at 92 (citing *Heller*). The Second Amendment rights recognized in *Ezell* also involved conduct outside the home.

34. *Heller v. District of Columbia*, No. 10-7036, 2011 WL 4551558, at *16 (D.C. Cir. Oct. 4, 2011) ("*Heller II*").

35. *Id.* at *7.

36. *Id.* at *8.

37. *Minutes of the Convention of the Delaware State*, 22 (Dec. 17, 1791); see also Pennsylvania Declaration of Rights, Art. XXI (1790).

38. Harold B. Hancock, *The Loyalists of Revolutionary Delaware* (Newark: University of Delaware Press, 1977), 48-50.

39. *Documentary History of the Ratification of the Constitution*, Merill Jensen ed. (Madison: State Historical Society of Wisconsin, 1976), vol. 3, at 62, 97.

40. A detailed discussion of the 1791 convention and political concerns at that time relating to the right to keep and bear arms is contained in Stephen P. Halbrook, *The Founders' Second Amendment* 295-98 (2008).

41. Del. Const. Art. I, § 20.

