McDONALD v. CITY OF CHICAGO
130 Sup. Ct. 3020 (2010)

Justice Alito announced the Judgment of the Court.

Two years ago, in District of Columbia v. Heller, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. Chicago and Oak Park have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We hold that the Second Amendment right is applicable to the States.

II

The Bill of Rights originally applied only to the Federal Government. The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system. In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. The Court used different formulations in describing the boundaries of due process. For example, the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in Palko v. Connecticut, 302 U.S. 319, 325 (1937), the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." In some cases decided during this era the Court "can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection." Duncan v. Louisiana, 391 U. S. 145, 149, n. 14 (1968). The Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause.

An alternative theory was championed by Justice Black. This theory held that §1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation." The decisions during this time made it clear that the governing standard is not whether any "civilized system [can] be imagined that would not accord the particular protection." Duncan, 391 U. S., at 149, n. 14. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice. The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. Only a handful of the Bill of Rights protections remain unincorporated.

III

We now turn to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, Duncan, 391 U. S. at 149, or whether this right is "deeply rooted in this Nation's history and tradition."

Our decision in Heller points unmistakably to the answer. In Heller, we held that individual self-defense is "the central component" of the Second Amendment right. Explaining that "the need for defense of self, family, and property is most acute" in the home, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense."

Heller makes it clear that this right is "deeply rooted in this Nation's history and tradition." Heller explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen." Blackstone's assessment was shared by the American colonists.

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights. "During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights--the fear that the National Government would disarm the universal militia--had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.

After the Civil War, many of the African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them. The 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental. The Civil Rights Act of 1866 similarly sought to protect the right of all citizens to keep and bear arms.

Congress, however, ultimately deemed these legislative remedies insufficient. Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Evidence from the period following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms.

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

IV

Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless stare decisis counsels otherwise, that guarantee is fully binding on the States and thus limits their ability to devise solutions to social problems that suit local needs.

It is important to keep in mind that Heller, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a

right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." We made it clear in Heller that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "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." We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle. In Heller, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. A provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller.

Justice Stevens, dissenting

When confronted with a substantive due process claim, we must ask whether the allegedly unlawful practice violates values "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U. S. 319, 325 (1937).

Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. Historical and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the "'traditions and conscience of our people'" are critical variables.

The Court errs both in its interpretation of Palko and in its suggestion that later cases rendered Palko's methodology defunct. Duncan limited its discussion to "particular procedural safeguard[s]" in the Bill of Rights relating to "criminal processes;" it did not purport to set a standard for other types of liberty interests. When the Court has used the Due Process Clause to recognize rights distinct from the trial context--rights relating to the primary conduct of free individuals--Justice Cardozo's test has been our guide. The right to free speech, for instance, has been safeguarded from state infringement because it is "essential to free government" and "to the maintenance of democratic institutions"--that is, because the right to free speech is implicit in the concept of ordered liberty. While the verbal formula has varied, the Court has largely been consistent in its liberty-based approach to substantive interests outside of the adjudicatory system. As the question before us indisputably concerns such an interest, the answer cannot be found in a granular inspection of state constitutions or congressional debates.

More fundamentally, a rigid historical methodology is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.

No, the liberty safeguarded by the Fourteenth Amendment is not merely preservative in nature but rather is a "dynamic concept." Its dynamism provides a central means through which the Framers enabled the Constitution to "endure for ages to come," McCulloch v. Maryland, 4 Wheat. 316, 415 (1819), a central example of how they "wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live." The judge who would outsource the interpretation of "liberty" to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality.

The question we must decide is whether the interest in keeping in the home a firearm is one that is "comprised within the term liberty" in the Fourteenth Amendment. I am ultimately persuaded that a better reading of our case law supports the city of Chicago. A number of factors, taken together, lead me to this conclusion.

First, firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. Hence, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty.

Second, the right to possess a firearm of one's choosing is different in kind from the liberty interests we have recognized under the Due Process Clause. It does not appear to be the case that the ability to own a handgun is critical to leading a life of autonomy, dignity, or political equality. Petitioners' claim is not the kind of substantive interest, accordingly, on which a uniform, judicially enforced national standard is presumptively appropriate.

Third, the experience of other advanced democracies undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty. Many of these countries place restrictions on the possession, use, and carriage of firearms far more onerous than the restrictions found in this Nation.

Fourth, the Second Amendment differs in kind from the Amendments that surround it, as announced by its peculiar opening clause. It was the States, not private persons, on whose immediate behalf the Second Amendment was adopted. The Second Amendment, in other words, "is a federalism provision." It is directed at preserving the autonomy of the sovereign States, and its logic therefore "resists" incorporation by a federal court against the States.

Fifth, the States have a long and unbroken history of regulating firearms. The idea that States may place substantial restrictions on the right to keep and bear arms is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right. From the early days of the Republic to the present day, States and municipalities have placed extensive licensing requirements on firearm acquisition, restricted the public carriage of weapons, and banned altogether the possession of especially dangerous weapons, including handguns.

Finally, this is a quintessential area in which federalism ought to be allowed to flourish without this Court's meddling. Across the Nation, States and localities vary significantly in the patterns and problems of gun violence they face, as well as in the traditions and cultures of lawful

gun use they claim. Given that relevant background conditions diverge so much, the Court ought to pay particular heed to state and local legislatures' "right to experiment." It "is more in keeping ... with our status as a court in a federal system," under these circumstances, "to avoid imposing a single solution ... from the top down."

Petitioners have given us no reason to believe that the interest in keeping and bearing arms entails any special need for judicial lawmaking, or that federal judges are more qualified to craft appropriate rules than the people's elected representatives. Having failed to show why their asserted interest is intrinsic to the concept of ordered liberty or vulnerable to maltreatment in the political arena, they have failed to show why "the word liberty in the Fourteenth Amendment" should be "held to prevent the natural outcome of a dominant opinion" about how to deal with the problem of handgun violence in the city of Chicago.

For the reasons set out above, I cannot accept either the methodology the Court employs or the conclusions it draws.

Justice Breyer, with whom Justice Ginsburg and Justice Sotomayor join, dissenting.

Two years ago, in District of Columbia v. Heller, 554 U. S. ___ (2008), the Court rejected the pre-existing judicial consensus that the Second Amendment was primarily concerned with the need to maintain a "well regulated Militia." The Court asserted that "individual self defense ... was the central component of the right itself." The Court based its conclusions almost exclusively upon its reading of history. Since Heller, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed.

In my view, taking Heller as a given, the Fourteenth Amendment does not incorporate the Second Amendment right to keep and bear arms for purposes of private self-defense. Under this Court's precedents, to incorporate the private self-defense right the majority must show that the right is, e.g., "fundamental to the American scheme of justice." And this it fails to do.

The majority here, like that in Heller, relies almost exclusively upon history to make the necessary showing. But to do so for incorporation purposes is both wrong and dangerous. Accordingly, this Court, in considering an incorporation question, has never stated that the historical status of a right is the only relevant consideration.

I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently "fundamental" to remove it from the political process in every State. I would include among those factors the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims, including its division of powers among different governmental institutions (and the people as well).

How do these considerations apply here? For one thing, there is no popular consensus that the private self-defense right is fundamental. Every State regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation. Moreover, there is no reason here to believe that incorporation of the private self-defense right will further any other or

broader constitutional objective. Unlike the First Amendment's rights of free speech, free press, assembly, and petition, the private self-defense right does not comprise a necessary part of the democratic process. Unlike the First Amendment's religious protections, the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair treatment at the hands of a majority.

Finally, incorporation of the right will work a significant disruption in the constitutional allocation of decisionmaking authority. First, the incorporation of the right recognized in Heller would amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government.

Second, determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make. Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic? Where are different kinds of weapons likely needed? Does time-of-day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders? Prior alcohol abusers? As the questions suggest, state and local gun regulation can become highly complex. At the same time, there is no institutional need to send judges off on this "mission-almost-impossible." Legislators are far better suited than judges to uncover facts and to understand their relevance. And legislators, unlike Article III judges, can be held democratically responsible for their conclusions.

Third, the ability of States to reflect local preferences and conditions--key virtues of federalism--here has particular importance. The incidence of gun ownership varies substantially as between crowded cities and uncongested rural communities, as well as among different geographic regions. The nature of gun violence also varies. It is thus unsurprising that States and local communities have historically differed about the need for gun regulation.

Fourth, although incorporation of any right removes decisions from the democratic process, the incorporation of this particular right does so without strong offsetting justification. Given the empirical and local value-laden nature of the questions that lie at the heart of the issue, why, in a Nation whose Constitution foresees democratic decisionmaking, is it so fundamental a matter as to require taking that power from the people? What is it that a judge knows better?

In sum, the police power, the need for local decisionmaking, the desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation. At the same time, the important factors that favor incorporation in other instances are not present here. The upshot is that all factors militate against incorporation--with the possible exception of historical factors. Moreover, nothing in 18th-, 19th-, 20th-, or 21st-century history shows a consensus that the right to private armed self-defense is "deeply rooted in this Nation's history or tradition" or is otherwise "fundamental."