Bracing for the Impact of Expanded Second Amendment Rights

Julie D. Cantor, M.D., J.D.

Otis McDonald thought he needed a gun. Not just any gun. Something more agile than his hunting shotguns. Something to deter the seedy element that had, over the years, infected his Chicago neighborhood with drugs and crime from threatening his life and breaking into his home yet again. He thought he needed a handgun. But city laws that effectively banned handgun possession by private citizens stood in his way.

Two years ago, McDonald agreed to be the lead plaintiff in a case orchestrated to challenge those laws as violations of the Second Amendment. The lawsuit began the very day the Supreme Court laid the constitutional groundwork for it in *District of Columbia v. Heller*, a decision it announced after a nearly 70-year hiatus from Second Amendment jurisprudence. In *Heller*, a five-to-four decision in which the justices split along familiar philosophical lines, the Court struck down a Washington, DC, ordinance that, among other things, banned handguns. It held that the Second Amendment includes the right of individuals to possess firearms, including handguns, at home for self-defense. But because *Heller* involved federal law, the case left open the question of whether the Second Amendment affects state and local government action. Most, but not all, of the Bill of Rights' protections do.

Number of U.S. Murders and Justifiable Homicides Committed with Handguns.*

Year	Handgun Deaths	
	Murder	Justifiable Homicide by Private Citizens
	number	
2004	7286	138
2005	7565	123
2006	7836	154
2007	7398	161
2008	6755	161

* Data are from *Crime in the United States, 2008*,[4] and do not include cases of nonnegligent manslaughter or unintentional or suicidal deaths caused by handguns.

We now have the answer. On June 28, in another five-to-four decision that mirrored the *Heller* voting, the Court held in *McDonald v. Chicago* that the Due Process Clause of the Fourteenth Amendment "incorporated" the right described in *Heller*. Over the past 50 years, the Court has used that clause to extend enumerated federal rights, and a plurality of justices followed that approach in this case. The "right to keep and bear arms for the purpose of self-defense" is now "fully applicable" to the states. The case shifts the constitutional landscape, and its five opinions — collectively clocking in at over 200 pages — illustrate sharp divisions in the justices' views of history, the judicial role, and constitutional law.

Justice Samuel Alito's plurality opinion, referencing a physician-assisted–suicide case, explained that the right described in *Heller* is "deeply rooted in this Nation's history and tradition"[1] and is "among those fundamental rights necessary to our system of ordered liberty." Justice Clarence Thomas's concurrence, which no other justice joined, argued that a different phrase within the Fourteenth Amendment, the Privileges or Immunities Clause, created the better analytic framework for deciding the scope of the right to keep and bear arms. Although McDonald and his fellow petitioners favored that approach, the plurality passed on the opportunity, which would have required disturbing a line of cases that dates to the post–Civil War period. (If the petitioners' goal was to convince the Court to revive that theory — and they devoted nearly their entire 72-page brief to arguing for it — they won the battle but lost the war.) Justices John Paul Stevens and Antonin Scalia wrote for themselves in dueling opinions. Justice Stevens's dissent, the coda to his career, offered a fluid view of "liberty" and suggested that a focus on "deeply rooted" rights was flawed, since it could sanction racist laws. And in a characteristically biting concurrence, Justice Scalia dismantled Justice Stevens's approach and lambasted certain "liberty" cases, such as those addressing abortion and gay rights, as unconstrained exercises in judicial lawmaking in which judges impose their moral values and, consequently, undercut democracy.

Justice Stephen Breyer, in an impassioned dissent that Justices Ruth Bader Ginsberg and Sonia Sotomayor joined, proffered a states'-rights view usually embraced by the Court's conservative wing and argued that *Heller* should be overturned, or at least not extended. In his view, the Court "should not look to history alone," especially in cases like this one, for which the historical record is mixed, in its decision making — it should "consider the basic values that underlie a constitutional provision and their contemporary significance" as well as "the relevant consequences and practical justifications" of a decision.

Like Justice Breyer, physicians are well aware that esoteric questions of constitutional law may have real-world implications. Gun violence is a major public health concern, resulting in more than 30,000 deaths and about twice as many injuries annually. The cost of gun violence is prohibitive. Scholars estimate that its yearly total tops $100 billion.[2] Handguns are particularly troubling. Research links their presence to substantially increased risks of suicide and homicide, especially for women living in abusive settings. And for children, "gun safety" is an oxymoron. To the extent that *McDonald* means more handguns, physicians have reason to be concerned. But any hysteria that this case inspires should, for the moment, be tempered.

In the aftermath of *Heller*, many in the public health community worried that the decision would unleash a torrent of guns on the public, bringing sudden, high spikes in rates of injury and death. Though it is too early to be completely reassured, dire predictions have not yet been realized. *Heller* did not create an unfettered right. As the Court explained in that opinion, it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Thus far, it has not given lower courts a license to annihilate gun-control laws; in the more than 200 post-*Heller* federal and state cases, courts have left the legal status quo largely intact.[3] Perhaps coincidentally, recent rates of violent crime have been at historic lows.

Conventional wisdom suggests that, even after *McDonald*, most gun-control laws will withstand

scrutiny. In the Court's view, its decision "does not imperil every law regulating firearms," and quoting *Heller*, it perceives no threat to "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.'" Total handgun bans will probably fall — and their effectiveness is uncertain in any event — but otherwise the impact of this sea change in constitutional law may be modest. Still, it will be years, even decades, before that conclusion is clear. And the possibility of more guns in homes, especially handguns, is troubling, as is the lack of guidance the Court's opinion offered to lower courts. For their part, physicians should remain vigilant and address gun issues, such as access and storage, with patients, especially those who may be suicidal, have survived domestic violence, or live with children. We can only hope that in hindsight, bleak post-*Heller*, post-*McDonald* forecasts will seem hyperbolic.

Otis McDonald has not won yet. A lower court will now decide whether the laws that thwarted him are constitutional. But *McDonald* is surely a foothold to victory. In all likelihood, he will get his gun. Ironically, that handgun may not be the panacea he seeks. It will not address the root causes of the drug- and gang-related crime plaguing his neighborhood. Its promise of safety may be illusory, and it may just increase the risks of homicide, suicide, and accidental injury and death of those who live in or, like his grandchildren, visit his home. It may also create legal problems. If he kills a neighborhood thug in self-defense, the odds that he will be held blameless are slim: in every year from 2004 through 2008, less than 2.5% of handgun-related killings by private citizens were deemed justifiable homicides (see table).[4] McDonald has, however, secured a measure of immortality; he will forever be associated with the case that bears his name.

That case marks another installment in high-minded constitutional debates. But we should not forget that the collateral damage from firearms, especially handguns, is breathtaking. In the face of staggering statistics about eminently avoidable gun-related harms, perhaps the wisest play for this newfound constitutional right is not to use it at all.

Disclosure forms provided by the author are available with the full text of this article at NEJM.org.

From Goldman Ismail Tomaselli Brennan & Baum, Santa Monica, CA, and the UCLA School of Law, Los Angeles.

This article (10.1056/NEJMp1006890) was published on June 30, 2010, at NEJM.org.

1. Washington v. Gluckberg, 521 U.S. 702, 721 (1997).
2. Cook PJ, Ludwig J. Gun violence: the real costs. New York: Oxford University Press, 2000.
3. Post-*Heller* litigation summary. San Francisco: Legal Community Against Violence, 2010. (Accessed June 30, 2010, at http://www.lcav.org/content/post-heller_summary.pdf.)
4. Crime in the United States, 2008. Washington, DC: Department of Justice, Federal Bureau of Investigation, 2009. (Accessed June 30, 2010, at http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/homicide.html.)