

To Keep and Bear Arms: An Individual or Collective Right?

Shawn Healy

Resident Scholar

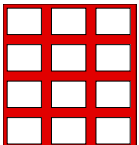
McCormick Foundation Civics Program

To Keep & Bear Arms

An Individual or Collective Right?

Overview: To Keep and Bear Arms

1. Historical evolution of gun rights and interpretation of the Second Amendment
 - *A Well-Regulated Militia*
 - “The Peculiar Story of *U.S. v. Miller*”
 - *Out of Range*
2. Gun Control on Trial: *DC v. Heller*
3. *McDonald v. Chicago* and the contemporary implications of the *Heller* decision



Historical Evolution of Gun Rights: *A Well Regulated Militia*

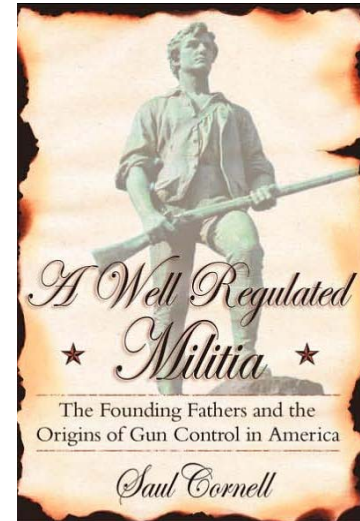
Saul Cornell, Ohio State University

- Original conception of the Second Amendment neither an individual nor a collective right, but a civic one.

- Citizens had a legal obligation to arm themselves with a musket and to be deployed at a moment's notice in defense of their community, state, and eventually, the nation

- First use of the right to keep and bear arms centered on fears of government disarmament, not for purposes of self-defense

- While modern gun control proponents usually advocate federal control, the theory of a collective right is actually rooted within “radical states’ rights ideology”



A Well Regulated Militia

Colonial Underpinnings

- English Declaration of Rights: “The subjects...may have arms for their defense”
- A standing army during colonial times was considered a form of tyranny, with citizen militias the lofty alternative
- The British deployed the former and disarmed the latter
- A majority of Revolutionary era state constitutions had obligations to serve in the state militia, but no mention of the right to keep and bear arms
- The right of self-defense became a matter of common and not constitutional law

Whence Lawes and Liberties might not again
be in danger of being subverted Upon which
Said Petition having been accordingly " " "
most and thereupon the said Lords Spiritual
and Temporall and Commons pursuant to their
respective Letters and Warrants being now " "
assembled in a full and free Representation of a
free Nation taking into their most serious " "
consideration the said petition for attaining
the said petition did in the first place (as " "
their Obedience in this case have usually done)
for the maintaining and asserting their antient
Rights and Liberties Declare that the pretended
power of suspending of Lawes or the Execution of
Lawes by Regall Authority without Consent of
Parliament is illegal That the pretended power
of dispensing with Lawes or the Execution of
Lawes by Regall Authority as it hath been " "
assumed and exercised of late is illegal That
the Commission for setting the said Court of
Exchequer for Extraordinary Causes and all
other Commissions and Courts of like nature
are illegal and void That levying money
for or to the use of the Crown by pretence of
prelative without Assent of Parliament for
four years or in other manner than the same
is or shall be granted is illegal That if it
the rights of the Subjects to petition the King
and all Commissions and pretexts for such
petitions are illegal That the raising or
keeping a standing Army within the Kingdom
in time of Peace without Consent of
Parliament is against Law That the Subjects
which are Protestants may have Armes for their
defence suitable to their Conditions and as
allowed by Law That Election of Members of
Parliament ought to be free That the Freedoms

A Well Regulated Militia

Virginia Declaration of Rights

“That a well regulated militia, composed of a body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in times of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.”



George Mason

A Well Regulated Militia

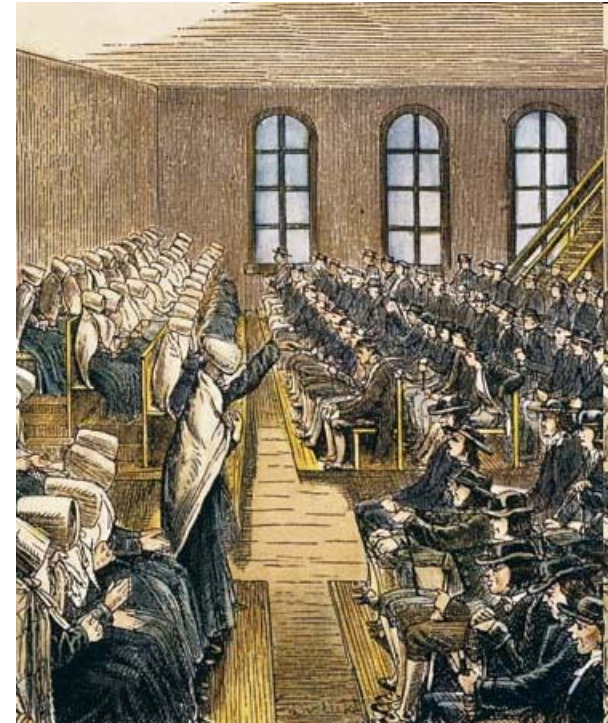
Other State Constitutions

- Quakers in Pennsylvania were religious pacifists, and won an exemption from the civic obligation to bear arms.

- Massachusetts added the word “keep” to the mix, writing, “The people have a right to keep and bear arms for the common defense.”

- This referred to a civic obligation to provide one’s own weaponry.

- States, including Virginia, made distinctions between arms used for militia duty and those used for personal matters like self-defense and hunting.



A Well Regulated Militia

Shay's Rebellion

- First test of militias in context of right to keep and bear arms in post-Revolutionary era
- Revolutionary War vets from Western Massachusetts considered themselves minutemen
- Governor called the state militia, but many of its members joined Shay's ranks
 - Is the militia a creation of citizens or their government?
- Continental Congress responds by equipping an army, quells the rebellion
- Spurred growing movement to reform the Articles



Daniel Shays

A Well Regulated Militia

Constitutional Convention

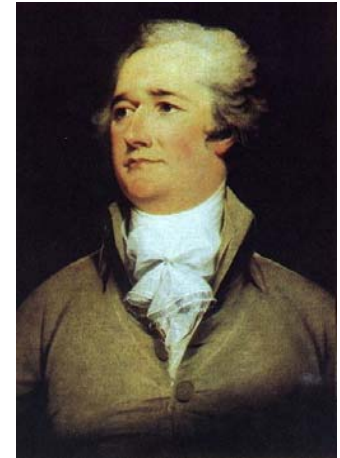
- Debate over the effectiveness of state militias carried over into the convention.
 - Some delegates pushed for European model of a professional standing army
- Article I, Section 8, Clause 16: “The Congress shall have the power to...provide for organizing, arming, and disciplining the militia and for governing such part of them that may be employed in the service of the United States, reserving to the states respectively, and the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.”
 - Militia a creature of both federal and state governments



A Well Regulated Militia

Anti-Federalist Opposition to Constitution

- Fear of federal control over state militias
- In the *Federalist Papers*, *Publius* shot down Antifederalist claims about the effectiveness of state militias, then proceeded to use the theory of checks and balances to negate fears of federal usurpation (*Federalist* 46)
- At the Virginia ratifying convention, the Constitution's supporters emphasized the fact that Congress would be composed of members of individual states and therefore would not trample upon the rights of their state militias



Alexander Hamilton

A Well Regulated Militia

The Dissent of the Pennsylvania Minority



7. That the *people have a right to bear arms for the defense of themselves and their own state*, or the United States, or for the purpose of *killing game*; and *no law shall be passed for disarming the people* or any of them, unless for crimes committed, or real danger of public injury from individuals; and as *standing armies in the time of peace are dangerous to liberty*, they ought not to be kept up: and that the *military shall be kept under strict subordination to and be governed by the civil powers*.

8. The inhabitants of the several states shall have *liberty to fowl and hunt* in seasonable times...

11. That the *power of organizing, arming and disciplining the militia...remain with the individual states*, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time only as such state shall agree.

A Well Regulated Militia

The Bill of Rights

- Seen as necessary to broker compromise with anti-federalists and broaden support for Constitution
- James Madison guided various amendment proposals from state ratifying conventions through the First Congress
- Madison's initial formulation of the Second Amendment read:

The right of the people to keep and bear arms shall not be infringed; and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.



A Well Regulated Militia

Uniform Militia Act of 1792

- Membership defined as all “free able bodied white male” citizens between the ages of 18 and 45
- Burden of arming the militia on individual citizens and the states
- The *Calling Forth Act* specified that the President held the power to call forth the militia, but Congress reserved the authority to create the necessary legal mechanisms



A Well Regulated Militia

Whiskey Rebellion

- Tax on whiskey fell hard on farmers in Western Pennsylvania, who united and saw themselves as the embodiment of a citizen militia
- The concept of militia nullification is born here
- Eventually rejected by state's governor, who called upon the state militia to crush the rebellion
- Its members were eventually tried for treason, and though they plead their innocence, they did not invoke their 2nd Amendment rights
- Defining the parameters of recruitment and use of state militias would stand as a recurring debate through the antebellum period



A Well Regulated Militia

Early Gun Control Measures

- In response to perceptions of high levels of violence, states adopted the first restrictions on the possession and ownership of firearms, spawning a reciprocal gun rights ideology
- *Kentucky* was the first to limit possession of concealed weapons in 1813; *Louisiana* banned them in their entirety
- Most of these early laws implemented time, place, and manner restrictions on gun ownership and possession
- State constitutions proceeded to expand upon the gun rights implications of the 2nd Amendment

- *Mississippi* (1819): “to bear arms in defense of himself and the state”

- *Maine* (1820): “every citizen has a right to keep and bear arms for the common defense”

- *Missouri* (1820): “their (the people’s) right to keep and bear arms in defense of themselves and the state cannot be questioned”



A Well Regulated Militia

Early Court Challenges

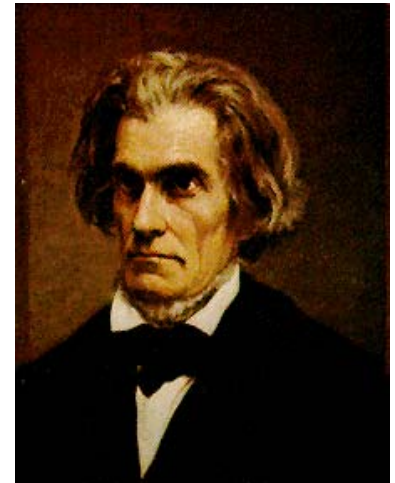
- Kentucky case, *Bliss v. Commonwealth* (1822), challenged the state's concealed weapons ban.
 - the law was overturned by the state supreme court
 - the legislature proceeded to amend the state constitution to allow the state legislature to ban concealed weapons
- Tennessee case, *Aymette v. State* (1840), involved a state law banning bowie knives
 - court ruled that only those weapons associated with militia service were explicitly protected by the state constitution
- Arkansas case, *State v. Buzzard* (1842), placed the right to regulate arms firmly within the state's police power
 - recognized competing tensions between civic and individual right models, but rejected that the latter was imbedded in either the state constitution or the Bill of Rights



A Well Regulated Militia

Emergence of Competing Theories

- Abolitionists: 2nd Amendment went beyond individual right to self-defense, but also enabled revolution
 - severed right from militia service for first time
- States' Rights: Interpretation rooted in Nullification Crisis of late 1820's
 - constitutional right of resistance
- 1845-1855: 6 states revised their constitutions, and the civic and individual rights interpretations of the right to keep and bear arms faced off
 - Texas (1836): "Every citizen shall have the right to bear arms in defense of himself and the state."
- The 2nd Amendment was in a state of legal flux at mid-century...

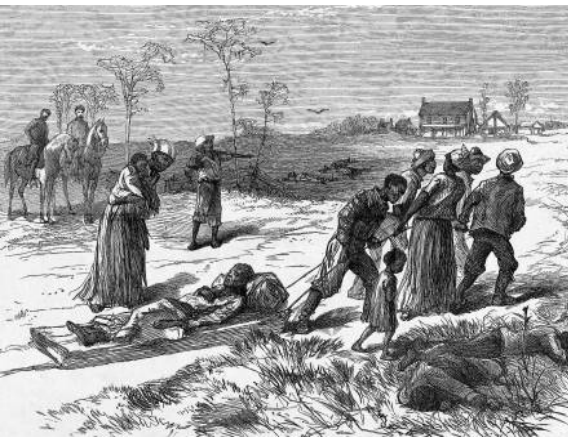


John C. Calhoun

A Well Regulated Militia

Reconstruction and a New Paradigm

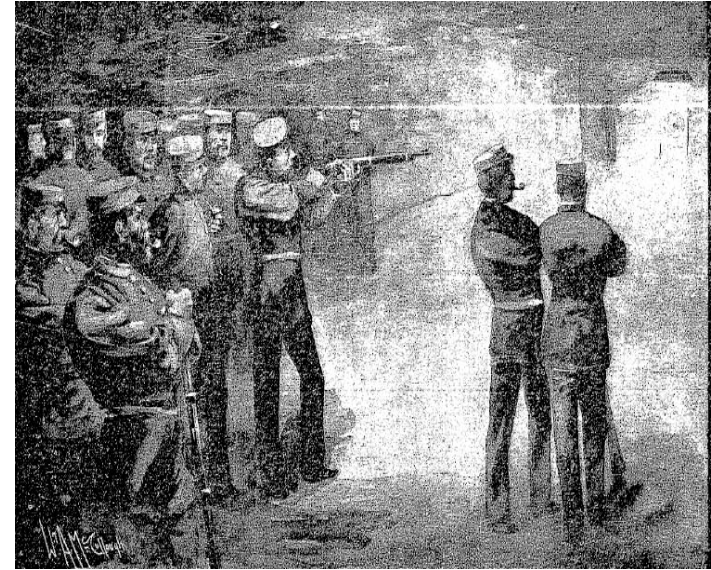
- Ku Klux Klan Act enabled the prosecution of criminal conspiracies against the civil rights of citizens
 - 2nd Amendment violations, and specifically the disarming black militia members, among the charges
- *U.S. v. Cruikshank* (1875):
 - Involved criminal charges stemming from the Colfax Massacre in Louisiana, where more than 100 blacks were killed as they defended a local courthouse
 - The Supreme Court rejected both the civic and individual rights interpretations, siding with the more narrow states' rights view, to guard individual state militias against disarmament



A Well Regulated Militia

Presser v. Illinois (1886)

- German civic association marched and engaged in military training, and Chicago chapter marched in Chicago streets on horseback with swords and rifles
- Illinois responded by outlawing German-American clubs, specifically if they “associate themselves together as a military company or organization, or to drill or parade with arms”
- Presser sought recourse in 2nd Amendment, and was denied for two reasons
 1. The 2nd Amendment was not incorporated by the 14th Amendment
 2. Laws like that passed in Illinois do not infringe upon the 2nd Amendment—allowing states to outlaw citizen militias such as these



A Well Regulated Militia

Seeds of the Modern Debate

- Sullivan law (1911) passed in New York requiring licenses for gun ownership and restricting possession in homes and businesses
- Collective Rights interpretation is born
 - Harvard Law Review* (1914) article by Maine Chief Justice Lucillus Emory
 - cited societal changes as impetus for new theory, including more deadly weapons, higher homicide rates, and the rise of a “criminal class”
 - read 2nd Amendment narrowly through the preamble on the heels of the creation of the National Guard, which he considered the equivalent of revolutionary era militias
 - “The right guaranteed is not so much to the individual for his private quarrels or feuds as to the people collectively for the common defense against a common enemy, foreign or domestic.”
 - The Second Amendment is not a barrier to gun regulation
 - Diluted the previous connection to federalism of the Reconstruction era



“Big Tim” Sullivan

The Peculiar Story of *United States v. Miller* (1939)

Brian L. Frye, NYU Journal of Law & Liberty

- National Firearms Act of 1934 taxed the manufacture, sale and transfer of sawed-off shotguns, machine guns, and silencers. Sought to limit this class of weapons.
- Defendants, Jack Miller and Frank Layton, charged with transporting sawed-off shotguns across state lines.
- Narrow ruling: “Essentially, it held that the Second Amendment permits Congress to tax firearms used by criminals”



- “On its face, *Miller* does not clearly adopt either theory (collective or individual) of the Second Amendment”
- District judge likely colluded with the government to make *Miller* a test case
- Justice McReynolds wrote for a unanimous majority, 8-0
- The Federal Firearms Act (1938) followed, requiring a tax on the transfer of pistols plus mandatory registration

Justice McReynolds

A Well Regulated Militia

Gun Control Act of 1968

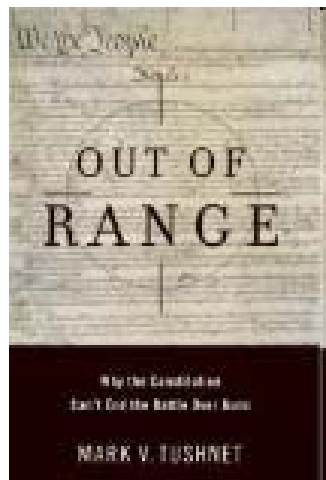
- Passed in aftermath of Kennedy assassination
- Licensing for gun dealers, manufacturers, and importers
 - Lee Harvey Oswald purchased his deadly weapon from an out-of-state dealer
 - the so-called “gun show loophole” surfaced here
- Created categories to whom they could not sell, including non-residents of the dealers’ states, felons, minors, fugitives, users of illegal drugs and those who have renounced their citizenship
- Imported weapons must have a recognizable “sporting purpose”



Interpretation of the 2nd Amendment: *Out of Range*

Mark Tushnet, Harvard School of Law

- No definitive answer in searching for the meaning of the Second Amendment
- Individual and collective rights interpretations in “close balance”
- Debate must be considered in the context of related policies
 - Gun control proponents lose most battles, but if the debate is shifted to the problems associated with gun violence, they might enjoy more success
- Debate peppered with poor arguments on each side of the aisle
 - liberals are wrong to dismiss the 2nd Amendment as a pre-Constitutional right to rebel against government tyranny
 - conservatives rely excessively on originalism, ignore the other aspects of constitutional debates



Out of Range

Individual Rights Model

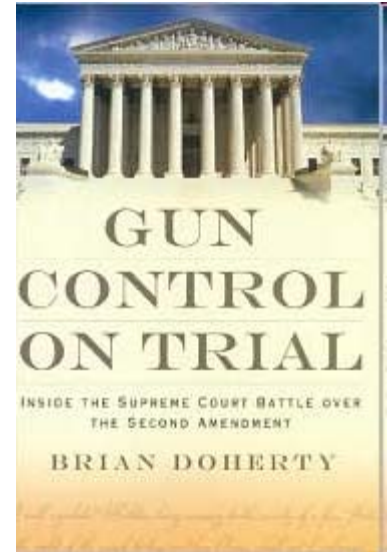
- Purest form: an individual right subjected to limited forms of government regulation
- Citizen militia: not the national guard, but an individual right in the context of the original meaning of universal militia service
- Citizen-related: right to self-defense in light of government's failure to protect the populace; calls government restrictions limiting gun usage into question
- Assumption that 2nd Amendment is part of the Bill of Rights, and is therefore equal to other provisions like freedom of speech
- Expressed in Bush-era legal memo produced by Office of Legal Council: "The Second Amendment secures a right of individuals generally, not a right of state or of persons serving in militias"



D.C. v. Heller: Gun Control on Trial

Brian Doherty, Cato Institute

- 2001 case, *U.S. v. Emerson*, decided in the 5th District Court of Appeals, ruled that the 2nd Amendment was an individual right
- Heller case actually began as *D.C. v. Parker*
 - “Rainbow coalition of plaintiffs”
 - two black women
 - one gay white male
 - two straight white males
 - one straight white female
 - a bureaucrat, a think tank lawyer, an IT specialist, a community activist, a lawyer, and a real estate investor
- Case first filed in DC Circuit on February 10, 2003



Gun Control on Trial

Dick Heller

- Only plaintiff left by the time the case reached the Supreme Court—others did not survive standing challenge
 - physically attempted to register a gun he owned, but did not store at his home in the district
- Most stereotypical gun rights enthusiast of the six
- Trained and licensed special police officer for the District of Columbia—technically employed by a private firm
- Victorious in the DC Circuit Court of Appeals on March 9, 2007 with a 2-1 decision among a three-judge panel—request for re-hearing denied that May



Richard Heller

Gun Control on Trial

Heller to the High Court

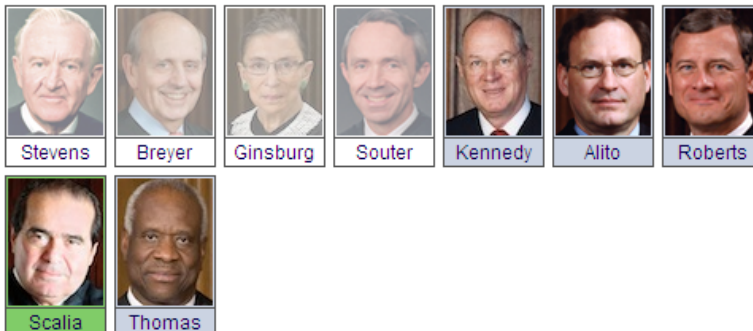
- Petition for certiorari filed by DC on September 4, 2007, and on November 20 of the same year, the Supreme Court agreed to take the case
- Oral arguments held on March 18, 2009, and opinion issued on June 26, 2008
- Heller was represented by a team of lawyers, but Alan Gura, often referred to as “boy wonder,” led the way throughout the five-year slog toward victory
- Opposed by Walter Dellinger, who came on to the case only in January 2008, making his third appearance before the Court *that year*



Gun Control on Trial

Heller to the High Court

- Question: Whether provisions of the D.C. Code generally barring the registration of handguns, prohibiting carrying a pistol without a license, and requiring all lawful firearms to be kept unloaded and either disassembled or trigger locked violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?
- Ruling: Yes. In a 5-4 decision, the Court held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self- defense within the home.



Full Opinion by Justice Antonin Scalia

McDonald v. Chicago and the contemporary implications of the *Heller* decision

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Americans giving — and fickle
The principle is ages old: Love thy neighbor. But the outpouring of donations for the victims of Haiti's earthquake shows how 21st-century technology has accentuated the heartfelt, if fleeting generosity of Americans. More than ever, the charity is instant and intimate. Through TV and newspaper images, a Chicagoan can look into the eyes of an orphan in Port-au-Prince, text digits into her phone and have \$10 on the way to the Red Cross in mere seconds. Defying the recession, the giving for Haiti is likely the largest immediate response by Americans to an international disaster in history, charities say. Yet, even as the generosity shows the best side of Americans, the groups already are brainstorming ways to keep the money flowing once TV camera crews have left Haiti — and its years-long reconstruction effort. **PAGE 7**

CHICAGOLAND

Daley denies suicide link
A mayoral aide scheduled a meeting with the Chicago school board president about the credit card probe for the day Michael Scott, above, was found dead. **PAGE 16**

WEATHER


THE PUBLIC FACE OF GUN RIGHTS



The Supreme Court will decide the legality of the city's handgun ban in *McDonald v. City of Chicago*. This is Otis McDonald.

By Colleen Mastony | TRIBUNE REPORTER

From behind the wheel of his hulking GMC Suburban, 76-year-old Otis McDonald leads a crime-themed tour of his Morgan Park neighborhood. He points to the yellow brick bungalow he says is a haven for drug dealers. Down the street is the alley where five years ago he saw a teenager pull out a gun and take aim at a passing car.

Around the corner, he gestures to the weed-bitten roadside where three thugs once threatened his life.

"I know every day that I come out in the streets, the youngsters will shoot me as quick as they will a policeman," says McDonald, a trim man with a mustache and closely cropped gray hair. "They'll shoot a policeman as quick as they will any of their young gangbangers."

To defend himself, McDonald says, he needs a handgun. So, in April of 2008, the retired maintenance engineer agreed to serve as the lead plaintiff in a lawsuit challenging Chicago's 26-year-old handgun ban. Soon after, he walked into the Chicago Police Department and, as his attorneys had directed, applied for a .22-caliber Beretta pistol, setting the lawsuit into motion. When that case is argued before the U.S. Supreme Court on March 2, McDonald will become the public face of one of the most important Second Amendment cases in the nation's history.

Amid the clamor of the gun-rights debate, McDonald presents a strongly sympathetic figure: an elderly man who wants a gun to protect himself from the hoodlums preying upon his neighborhood. But the story of McDonald and his lawsuit is more complicated than its broad outlines might suggest. McDonald and three co-plaintiffs were carefully recruited by gun-rights groups attempting to shift the public perception of the Second Amendment as a white, rural Republican issue. McDonald, a Democrat and longtime hunter, jokes that he was chosen as

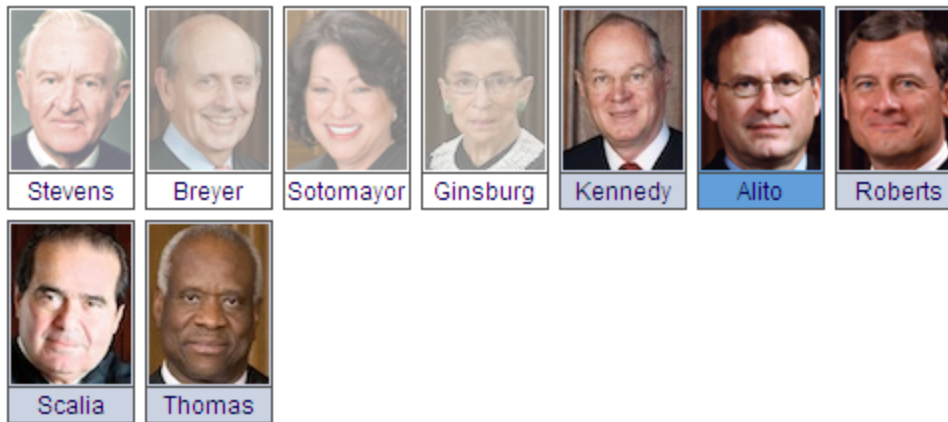
ROBERT R.
MCCORMICK
FOUNDATION

McDonald v. Chicago and the contemporary implications of the *Heller* decision

- Post-*Heller* challenges to local gun laws in Chicago and Oak Park
 - Rejected at the District Level on December 4, 2008, and consolidated upon appeal
 - Appeal also rejected by a three-judge panel of Republican appointees, on the grounds that the “Supreme Court has rebuffed requests to apply the Second Amendment to the states.”
 - US Supreme Court granted cert to *McDonald v. Chicago* on September 30, 2009
 - Question: “Whether the 2nd Amendment right to keep and bear arms is incorporated as against the states by the 14th Amendment’s Privileges and Immunities Clause or Due Process Clause.”
- In another case at the federal appellate level, *Nordyke v. King*, the 9th Circuit Court of Appeals incorporated the 2nd Amendment, but let stand an Alameda County (CA) firearms prohibition

McDonald v. Chicago decision

- Question: Does the Second Amendment apply to the states because it is incorporated by the Fourteenth Amendment's Privileges and Immunities or Due Process clauses and thereby made applicable to the states?
- Ruling: The Supreme Court reversed the Seventh Circuit, holding that the Fourteenth Amendment makes the Second Amendment right to keep and bear arms for the purpose of self-defense applicable to the states.



Judgment of the Court by Justice Samuel A. Alito, Jr.

To Keep and Bear Arms: An Individual or Collective Right? Questions?

To Keep & Bear Arms

An Individual or Collective Right?