

The Court's New Term – A Second Shot at the Second Amendment

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The U.S. Supreme Court began its new Term with a bang, agreeing to hear a gun control case that brings the question that *District of Columbia v. Heller* left hanging squarely within the Court's sights.

By way of a quick review, the Court's 5-4 ruling last year in *Heller*, 128 S.Ct. 2783 (2008), addressed the validity of a gun ban imposed by the District of Columbia. The Court ruled that an "inherent right" to individual self-defense was central to the Second Amendment, and the District's total ban on handguns amounted to an unconstitutional prohibition. However, because the District of Columbia is not a state, the ruling did not necessarily condemn state and local government laws that implemented similar handgun bans. Since *Heller*, several circuit courts of appeal have dealt with the issue.

The U.S. Court of Appeals for the Ninth Circuit, in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), addressing a county ordinance that prohibited the possession of firearms on county property, concluded that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment and applied it against the states and local governments. However, in July, the Ninth Circuit voted to rehear the case en banc. Oral arguments took place in late September, with a decision still pending. In another case, the U.S. Court of Appeals for the Second Circuit, in *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3015 (June 26, 2009) (No. 08-1592), held that, based on earlier Supreme Court cases, the "Second Amendment applies only to limitations the federal government seeks to impose" on the right to keep and bear arms, adding that, where Court precedents had a direct application in a case, yet appeared to rest on reasons rejected in some other line of decisions, the Courts of Appeals should follow the case which directly controlled, leaving to the Supreme Court the prerogative of overruling its own decisions. This reasoning was echoed by the Seventh Circuit in *National Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2008), upholding handgun ban ordinances enacted by two Illinois municipalities on the basis that the Second Amendment was not applicable to municipalities, the subordinate bodies of the state. The court found that existing Supreme Court precedents on the issue of incorporation were still binding, adding that, "[t]hus far neither the third nor the seventh amendment has been applied to the states – nor has the grand jury clause of the fifth amendment or the excessive bail clause of the eighth. How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict."

We all moved a step closer to knowing the answer recently, with Court agreeing to hear the appeal from the Seventh Circuit ruling, now titled *McDonald et al. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3691, 78 U.S.L.W. 3013 (U.S. Sept. 30, 2009) (No. 08-1521). The question for the Supreme Court is whether the Second Amendment is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home. The case has a more than ideological tie to *Heller*, as the lawsuit was filed by Alan Gura, the attorney who argued the *Heller* case. According to the *Washington Post*, Mr. Gura states the Chicago ordinance is "identical" to the District law struck down as unconstitutional in *Heller*.

Another echo from the previous Term is this Term's case on government speech and the Establishment Clause, picking up where the Court left off in *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (Feb. 25, 2009). *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *cert. granted, Salazar v. Buono*, 129 S.Ct. 1313 (U.S. Feb. 23, 2009) (No. 08-472) is the first Establishment Clause case to be decided by the Court under Chief Justice Roberts. It involves a challenge to a private display – a cross – erected as a memorial to fallen service members by the Veterans of Foreign Wars (VFW) in 1934. The cross was placed in a remote area within a national park, the Mojave National Preserve. The district court ruled that the cross violated the Establishment Clause and permanently enjoined the federal government from permitting the display. Subsequently, Congress enacted legislation authorizing the Department of the Interior to transfer the plot on which the cross was located to the VFW, in exchange for a parcel of equal value, with the government retaining a reversionary interest if the land ceased to be used for a war memorial (without requiring that the memorial be a cross). However, after the land exchange, the Ninth Circuit held that the government continued impermissibly to endorse religion despite the transfer, and enjoined the purported cure: "Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve – like a donut hole with the cross atop it – will do nothing to minimize the impermissible governmental endorsement." The ruling squarely contradicted two Seventh Circuit opinions holding that

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Times, http://legaltimes.typepad.com/blt/2009/08/first-local-government-seeks-voting-rights-bailout-bailout-post-supreme-court-ruling.html.
25. Others echoed the prediction that the number of bailout suits would increase at the local government level. "By widening the escape hatch for localities in its extraordinary ruling, the Supreme Court may have launched a town-by-town movement that may release localities that have chafed for years under the law's strict rules; every time a covered jurisdiction wanted to move a polling place from one school to another, it needed Justice Department approval. Now, if they can show they've been adhering to the law for 10 years, they're home free." Tony Mauro, *Can the Voting Rights Act Survive Another Challenge?* National Law Journal, June 29, 2009, accessible at http://www.nlj.com.
26. 129 S. Ct. at 2512.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 2512-13.
31. *Id.* at 2512.
32. *Id.*
33. *Id.* at 2511, citing H.R.Rep. No. 109-478, p. 12 (2006).
34. *Id.*
35. *Id.* at 2512.
36. *Id.* at 2511.
37. *Id.*
38. David S. Broder, *For Obama, Court Cases that Matter*, Washington Post, July 02, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103024_pf.html.
39. 129 S. Ct. 2658 (2009).
40. Ricci v. DeStefano, 554 F. Supp.2d 142 (D. Conn. 2006).
41. 530 F.3d 87 (2d Cir. 2008).
42. 129 S.Ct. at 2664-65.
43. *Id.* at 2681.
44. *Id.* at 2664-65.
45. David S. Broder, *supra* note 38. ML

Federal

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viewpoint of states and localities. The brief will argue that there is no clear statement in SORNA that Congress intended such a broad preemption of state sex offender law and administration, that SORNA imposes expensive unfunded mandates on states and localities, and that SORNA violates important federalism principles.

Notes

1. Carr v. United States, 551 F.3d 578 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3610 (U.S. Sept. 30, 2009) (No. 08-1301).
2. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 249-109, 120 Stat. 590 (2006).
3. This includes, but not limited to, national databases, law enforcement, all jurisdictions where the sex offender resides or is an employee/student, any school in each area where the sex offender resides, social service entities, and any volunteer organizations in which contact with minors may occur.
4. Justice Policy Institute, *What will It Cost States to Comply with the Sex Offender Registration and Notification Act*, at http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf. *See also*, Virginia Department of Planning and Budget, 2008 Fiscal Impact Statement, (Richmond, VA: Department of Planning and Budget, 2008).
5. Office of the Attorney General, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8891 (Feb. 28, 2007).
6. The final guidelines were released in June 2008. Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030 (July 2, 2008).
7. U.S. v. Juvenile Male, 581 F.3d 977 (9th Cir. 2009).
8. *Id.* at 979.
9. U.S. v. Cain, 583 F.3d 408 (6th Cir. 2009); U.S. v. Hatcher, 560 F.3d 222 (4th Cir. 2009).
10. Edward Byrne Memorial Justice Assistant Grant Program, 42 U.S.C. § 3750 (2006). ML

Supreme Court

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absent "unusual circumstances," a sale of real property was an effective way for a public body to end its inappropriate endorsement of religion. What made it more interesting was that, according to one source, "the preserve [was] riddled with private inholdings," being an estimated 1,000 private landowners with 1,800 plots of land.

The Supreme Court agreed to hear the appeal and, apart from the issue of standing, must decide when a message ceases to be a government message, and whether the Ninth Circuit erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands. During the October 07 oral argument, the issue of whether the cross was an impermissible display on government land was not before the Court. Instead, the Court focused on the legal issues associated with the injunctions before dealing with the merits, with Chief Justice Roberts asking one of the most relevant questions: "I'm just kind of curious, why is this cross put up – you know, in the middle of nowhere?"(The answer was that the man who originally put up the cross was apparently a miner and homesteader when the land was owned by the Bureau of Land Management). Counsel for Frank Buono, the individual challenging the government action, maintained that the "totality of the circumstances," including "the government's asserted purpose to make sure that the cross remains up, the government's favoritism of the same parties," and its retention of the reversionary interest, added up to a continuing government endorsement of religion and an Establishment Clause violation.

The Court's decision is pending. ML

Inside Canada

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constraints, and represented a bona fide exercise of discretion. That policy did not differentiate between sidewalks and sidewalks that had been repaired, and there was no reason to hold the City to a different standard of inspection and maintenance for just the sites that had been worked on and restored by a contractor. Even if the policy did not apply, there was no evidence that the City had been negligent. Although there was a "small difference in elevation" that may have been a "minimal hazard," "[a] municipality cannot provide a perfectly smooth surface on its sidewalks. Such a standard would be inordi-

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