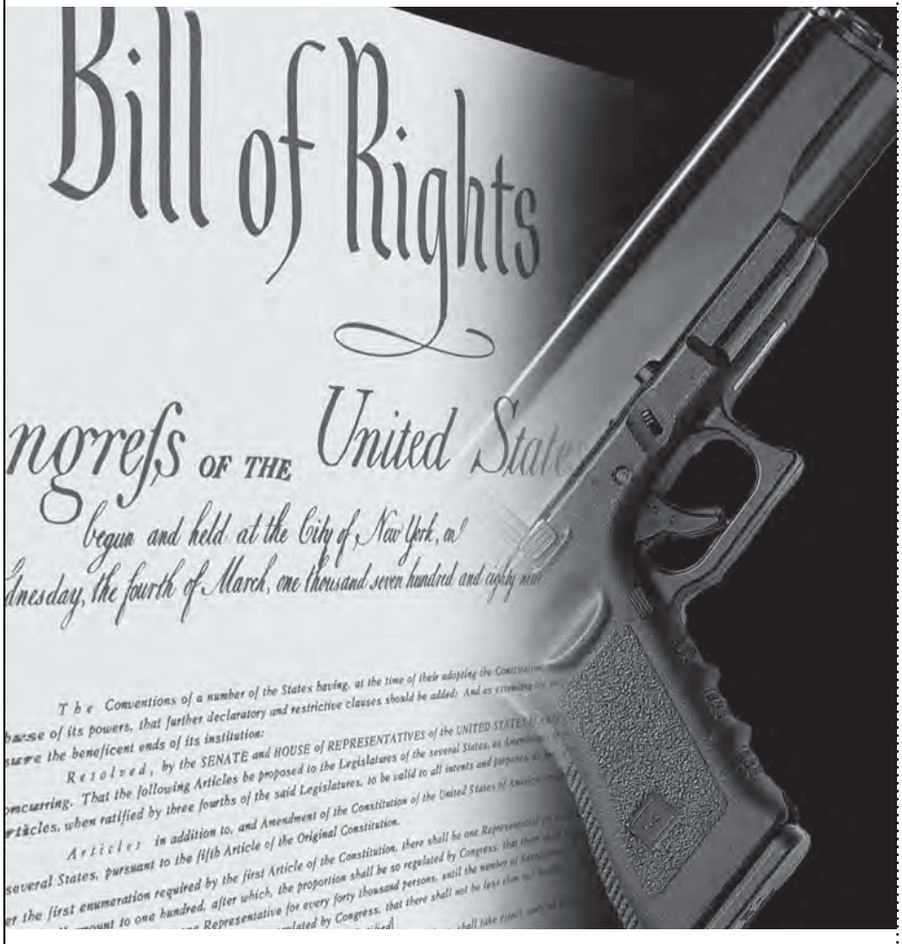
Second Amendment Plumbing After *McDonald*

by Lawrence Rosenthal



It took two landmark decisions to reach the end of the beginning. In *District of Columbia v. Heller*,[1] the United States Supreme Court, adopting what it characterized as "the original understanding of the Second Amendment,"[2] held that the Second Amendment secures an individual right to keep and bear arms against the federal government. In *McDonald v. City of Chicago*,[3] the Court concluded that, by virtue of the Fourteenth Amendment, the Second Amendment right to keep and bear arms is enforceable against state and local governments.[4] Now, the more prosaic but perhaps more important work begins. It is time to start putting the doctrinal "plumbing" in place.[5]

The most important piece of plumbing likely to be installed is the standard of scrutiny to be applied to gun-control laws challenged under the Second Amendment. This is no small matter. As one leading Second Amendment scholar has observed, given the many difficulties in assessing the efficacy of gun-control laws, it is enormously difficult to produce empirical support for gun-control regulations. Therefore, a rigorous form of strict scrutiny, requiring the government to demonstrate that a challenged regulation is the essential means for achieving a compelling governmental interest, would likely be the death knell for most gun-control laws.[6]

The Supreme Court has not yet offered much guidance. In *Heller*, although it invalidated a District of Columbia ban on handguns and its requirement that all firearms in a home remain unloaded and inoperable,[7] the Court refused to decide what type of justification is required for firearms regulation, although it did reject a test limited to ascertaining whether a challenged regulation lacks a rational basis, as well as Justice Breyer's interest-balancing test.[8] In *McDonald*, the Court was silent on the Second Amendment standard of scrutiny, with a four-justice plurality adding only that Fourteenth Amendment standards for state and local gun-control laws are no different than those applied to the federal government under the Second Amendment.[9]

A Review of *Heller*

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."[10] In *Heller*, the Court then relied on framing-era sources to define the term "arms" as "all firearms in common civilian use";[11] the right to "keep" arms as the right to "possess" them;[12] and the right to "bear" arms as the right to "carry[] for a particular purpose—confrontation."[13] The Second Amendment provides that these rights "shall not be infringed." According to perhaps the leading framing-era dictionary, Noah Webster's 1828 *American Dictionary of the English Language*, "in fringed" meant "[b]roken, violated, transgressed,"[14] which seems to support a vigorous conception of an individual right to possess and carry firearms.[15] Moreover, in *Heller*, the Court did not define the right in terms limited to those who carry for purposes of legitimate self-defense; instead, it explained that the term includes "the carrying of the weapon... for the purpose of 'offensive or defensive action,'"[16] adopting a definition of "carry" originally used in connection with a federal statute that enhances sentences for anyone who "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm."[17] Thus, it seems that even the criminally-minded have a right to "bear" arms.

Yet, when it considered whether the District of Columbia's handgun ban ran afoul of the Second Amendment, the Court found that textualism offered little assistance, perhaps recognizing that the term "infringed" is ambiguous as applied

to a law that permits the District's residents to possess some types of "arms" but not others. Instead of relying on framing-era definitions of the term "infringed," the Court wrote that "[t]he handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for a lawful purpose," and "extends, moreover, into the home, where the need for defense of self, family, and property is most acute."[18] It added that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down."[19] Handguns, the Court wrote, are considered "the quintessential self-defense weapon."[20] The Court also characterized a number of firearms regulations as "presumptively lawful,"[21] including "prohibitions on carrying concealed weapons," and "prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as government buildings...."[22]

Commentators have suggested that the Court took a categorical approach in which "core" Second Amendment interests receive something close to absolute protection, while more penumbral interests are subject to greater regulation.[23] Still, it is far from clear how to go about determining whether a challenged regulation implicates only penumbral interests. Framing-era practice appears to be of little help. Not only did the Court claim no historical support for a core-and-penumbra approach, but it acknowledged that there was little framing-era support for firearms regulation aside from laws addressing gunpowder storage and the discharge of firearms.[24] Nevertheless, the Court treated some regulations that lack support in framing-era practice as presumptively lawful. Prohibitions on carrying concealed weapons, for example, did not emerge until the 1820s and 1830s in response to a surge in violent crime.[25] Prohibitions on the possession of firearms by convicted felons were uncommon until the twentieth century, when they emerged in response to a crime wave that followed the First World War.[26]

"Presumptively Lawful"

At first blush, it is difficult to square *Heller*'s dicta regarding presumptively lawful firearms regulation with its approach to the original meaning of the Second Amendment. After all, in the operative clause, the only term that could be thought to support a regulation of the right to "carry" "in case of confrontation" is the term "infringed," and, as we have seen, that term, at least as a matter of its framing-era meaning, does not appear to allow regulatory power over the right to bear arms. There is, however, a textual basis for regulatory authority—the Second Amendment's preamble; in particular, its reference to "[a] well regulated militia."

Prohibitions on carrying concealed weapons, for example, did not emerge until the 1820s and 1830s in response to a surge in violent crime.

In *Heller*, the Court explained that the original meaning of the term "militia" was not the members of a formal military organization, but, rather, "the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[27] The Court, therefore, concluded that the original meaning of the term included all those "physically capable of acting in concert for the common defense,"[28] rather than being limited to "the organized militia."[29] As for the adjective "well-regulated," the Court wrote that it "implies nothing more than the imposition of proper discipline and training."[30] But one must pause to consider the interaction between noun and adjective. If the militia includes everyone capable of bearing arms, even if not part of an organized militia, and the government may subject this unorganized "militia" to "proper training and discipline," then the preamble envisions comprehensive regulation of all who possess and carry firearms, not merely those in formal military or paramilitary organizations. After all, the word "militia" appears only once in the Second Amendment, and if it includes all those who are capable of bearing arms (even if not part of an organized military organization), then this same group is subject to regulatory authority. Accordingly, the regulatory power envisioned in the preamble extends to the whole of the populace capable of exercising Second Amendment rights. Moreover, *Heller* adds that the preamble is properly consulted to clarify the meaning of the Second Amendment's operative clause.[31]

Accordingly, the Second Amendment, construed in light of the preamble, recognizes a general regulatory power over the possession and carrying of firearms. For this reason, it is appropriate to construe the term "infringed" in the Second Amendment's operative clause in a manner that preserves the regulatory power acknowledged in the preamble. This approach, in turn, does a great deal to explain the basis for the Court characterizing as "presumptively lawful," regulations that would otherwise seem to "infringe" the right to "possess" firearms or "carry in case of confrontation," such as laws forbidding the "concealed carry" of firearms.

To be sure, one could argue that regulatory power under the Second Amendment is limited to the eighteenth-century regulations extant at the time of the Second Amendment's ratification, but that rationale is not only inconsistent with *Heller*'s dicta, but also fails to take adequate account of *McDonald*. There, a majority of the Court concluded that the Second Amendment must be understood as it had come to be regarded at the time of the Fourteenth Amendment's ratification.[32] By then, of course, there was the widespread acceptance of prohibitions on concealed carrying of firearms, as *Heller* acknowledged.[33] It follows that by the ratification of the Fourteenth Amendment,

continued on page 8

Lawrence Rosenthal is a professor of law at Chapman University School of Law. The author represented the U.S. Conference of Mayors as amicus curiae in support of affirmance in *McDonald v. City of Chicago*. The views expressed herein are his alone and should not be attributed to the Conference or any of its members. A different version of this article appeared online in the *Northwestern University Law Review Colloquy*.

Plumbing After *McDonald* *continued from page 7*

it was understood that under the Second Amendment, regulatory powers were not static, and could expand in response to felt exigencies such as the crime wave in the 1820s and 1830s that produced the first concealed carry prohibitions in America.

Thus, even though the Court rejected an interest-balancing test in *Heller*,[34] a point reiterated in the four-justice plurality opinion in *McDonald*,[35] the historical acceptance of concealed-carry prohibitions cannot be explained by anything other than this very type of interest-balancing—an approach that does not require the kind of compelling empirical evidence of necessity that the strict scrutiny test demands. Despite *Heller*, interest-balancing may be inescapable in Second Amendment jurisprudence. To avoid the need to repudiate what seems like a clear statement to the contrary in *Heller*, the Court may have utilized a different form of words, such as an undue burden test or embracing "intermediate" scrutiny, but, in practical operation, its approach is likely to be little different.[36] No other provision of the Bill of Rights contains the type of textual acknowledgement of governmental regulatory power found in the Second Amendment. It would be anomalous for the Court to recognize less regulatory power with respect to Second Amendment rights than is generally acknowledged with respect to the rest of the Bill of Rights.[37]

Defending Gun Restrictions: Preliminary Observations

Even granting that substantial regulatory power will be recognized under some version of an undue burden or interest-balancing test, counsel defending firearms regulations must still develop a sufficiently strong defense of the efficacy of the challenged regulation to withstand some form of intermediate scrutiny. For empirical evidence of the efficacy of a firearms regulation, one would do well to consult the example of the City of New York.[38] New York had violent crime rates typical of other large cities in 1990, but over the succeeding decade, it achieved crime declines about double of those in the rest of the country, and which outperformed each of the Nation's 15 largest cities.[39] There is much evidence that this decline was the result of an escalation in "stop-and-frisk" tactics associated with enforcement of New York's tough gun-control laws.[40] For example, one study of drug subcultures in New York concluded that aggressive policing in the 1990s, in particular stop-and-frisk tactics that focused on discovering concealed handguns, reduced crime by disrupting open-air drug sales.[41] Another researcher concluded that "the result of persistent stop, frisk, and arrests meant that young men thought twice before carrying their guns. ... That guns were not immediately accessible during routine confrontations was a frequently cited explanation for the reduction in murder in the mid-1990s."[42]

New York had violent crime rates typical of other large cities in 1990, but over the succeeding decade, it achieved crime declines about double of those in the rest of the country, and which outperformed each of the Nation's 15 largest cities.

New York's gun-control laws are indeed tough: state law prohibits the possession of a handgun without a license and generally requires that handguns be kept only within the licensee's home or place of business, except for those engaged in law enforcement.[43] In New York City, an additional permit must be obtained.[44] The issuance of permits in New York City is highly discretionary, and the applicant must face some extraordinary personal danger that requires him or her to carry a handgun.[45] Further, New York authorities rarely exercise their discretion in favor of issuing permits for handguns;[46] for this reason, New York has been characterized as maintaining a virtual ban on handguns.[47] This legal regime greatly enhances stop-and-frisk authority: since individuals are rarely permitted to carry guns, when a law enforcement officer perceives some reasonable indication that an individual is carrying a firearm, a stop-and-frisk is permissible under the Fourth Amendment because the officer reasonably believes that a crime is underway.[48] Indeed, the available data indicates that that weapons searches are by far the most important basis for stop-and-frisks in New York.[49] Thus, a regulatory regime nearly as rigorous as that invalidated in *Heller*, when coupled with aggressive stop-and-frisk tactics, has the best record in the country when it comes to reducing violent crime.

Moreover, increasing the authority of the police to engage in stop-and-frisk tactics may not be the only means by which New York's gun control laws contribute to the success of its policing tactics. Because it is difficult to legally purchase a handgun in New York, it may be the case that stop-and-frisk tactics are especially effective because of the difficulty in replacing handguns seized by the police.[50] For example, the available empirical evidence, though limited, suggests that the wages of gang "foot soldiers" are not much higher than those of individuals employed in legitimate, low-skilled labor markets.[51] Thus, even modest increases in the price of handguns may have a significant inhibitory effect on gang crime. Although there is no study of New York gun markets on this point, a study of Chicago found that its handgun ban dramatically increased the difficulty of obtaining handguns, even for potential offenders in high-crime communities.[52] It may well be that, when applicable gun-control laws raise the cost and difficulty of replacing guns seized by the authorities, offenders are less likely to carry them in public places where they are vulnerable to stop-and-frisk tactics. When it is illegal to carry rifles and other non-concealable firearms in public, in turn, the risk of violent confrontation is reduced.

Conclusion

As mentioned, the Supreme Court's two rulings leave many unanswered questions. Although there is reason to believe that gun control laws will not have to clear

the hurdle of strict scrutiny, an empirical defense of their efficacy will still be required. On that score, defense counsel would be well advised to look to the example of New York.

Notes

1. 128 S. Ct. 2783 (2008).
2. *Id.* at 2788.
3. 130 S. Ct. 3020 (2010).
4. *Id.* at 3050 (plurality opinion) (relying on the Due Process Clause); *Id.* at 3077-88 (Thomas, J., concurring in part and concurring in the judgment) (relying on the Privileges or Immunities Clause).
5. For the source of the metaphor, see Stuart Banner, *The Second Amendment So Far*, 117 HARV. L. REV. 898, 907-08 (2004).
6. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1465-68 (2009).
7. 128 S. Ct. at 2817-19.
8. *Id.* at 2817 n.27, 2821.
9. 130 S. Ct. at 3048 (plurality opinion). Justice Thomas' separate opinion suggests this symmetry as well, see id. at 3083 (Thomas, J., concurring in part and concurring in the judgment), although he left open the question whether noncitizens may assert Second Amendment rights against state and local governments, *see id.* at 3083 n.19.
10. U.S. CONST. amend. II.
11. 128 S. Ct. at 2791-92, 2817.
12. *Id.* at 2792.
13. *Id.* at 2793.
14. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 110 (1828).
15. *See, e.g.*, STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 328-30 (2008); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U.L. REV. 1359, 1404-09 (1998).
16. 128 S. Ct. at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1999) (Ginsburg, J., dissenting)).
17. 18 U.S.C. § 924(c)(1) (2006).
18. 128 S. Ct. at 2817.
19. *Id.* at 2818.
20. *Id.*
21. *Id.* at 2817 n.26.
22. *Id.* at 2816-17.
23. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Jurisprudence*, 84 N.Y.U. L. REV. 375, 404-10 (2009); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U.L. REV. 923, 976-77 (2009).
24. 128 S. Ct. at 2819-21.
25. *See, e.g.*, Saul Cornell, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 138-44 (2000); Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 581-85 (2006).
26. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698-728 (2009).
27. 128 S. Ct. at 2817.
28. *Id.* at 2799.
29. *Id.* at 2800.
30. *Id.*
31. *Id.* at 2789-90.
32. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3038-42 (2010).
33. *See* 128 S. Ct. at 2816.
34. *Id.* at 2821.
35. 130 S. Ct. at 3050.
36. In the most extensive discussion of the issue to date at the appellate level, the Seventh Circuit recently held that the Second Amendment requires a form of intermediate scrutiny requiring that a challenged regulation be substantially related to a an important governmental objective. *See* United States v. Skoien, No. 08-3770, 2010 WL 2735747 ** at * 4 (7th Cir. July 13, 2010) (en banc). I have previously advocated an "undue burden" test. *See* Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 79-84 (2009).
37. For a discussion that considers the appropriate standard of scrutiny for the Second Amendment in light of those employed for other provisions in the Bill of Rights, see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 693-700 (2007).
38. Although most jurisdictions will not have detailed data available as in New York, if they adopt a similar regulatory regime, courts are likely to consider data from elsewhere to demonstrate the efficacy of such regulation. The Supreme Court has taken this approach in First Amendment litigation, for example. *See, e.g.*, City of Renton v. Playtime Theatres, Inc, 475 U.S. 41, 50-52 (1986).
39. *See* Rosenthal, *supra* note 36, at 25-26.
40. *See id.* at 26-44.
41. *See* Bruce D. Johnson, Andrew Golub & Eloise Dunlop, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, *in* THE CRIME DROP IN AMERICA 164, 185-89 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006).
42. Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 BRIT. J. CRIMINOLOGY 531, 546 (1999).
43. *See* N.Y. Penal Laws § 400.2 (McKinney 2007).
44. *See id.* § 400.6.
45. *See* RULES OF THE CITY OF N.Y. tit. 38, § 5-03 (2007).
46. *See, e.g.*, David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. MICH. ST. U. DET. C.L. 171, 176-77.
47. *See, e.g.*, Jesse Matthew Ruhl, Arthur L. Rizer III, Mikel J. Wier, *Gun Control: Targeting Rationality in a Loaded Debate*, 13 KAN. J. L & PUB. POL'Y 413, 449-50 (2004).
48. *See* Rosenthal, *supra* note 36, at 37-38.
49. *See id.* at 39-40.
50. *See* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 157-58 (2006).
51. *See, e.g.*, PHILIPPE BOURGEOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO 91-105 (1995); FELIX M. PADILLA, THE GANG AS AN AMERICAN ENTERPRISE 97-117, 169-74 (1993); John M. Hagedorn, *Homeboys, Dope Fiends, Legits, and New Jacks*, 32 CRIMINOLOGY 197, 202-04 (1995); Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q. J. ECON. 755, 756, 770-75 (2000).
52. *See* Philip J. Cook et al., *Underground Gun Markets*, 117 ECON. J. F588 (2007). ML