

Incorporation of the 2nd Amendment

By:

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This week the Supreme Court in *McDonald v. Chicago* held that the 2nd Amendment to the U.S. Constitution applies to the individual States. This case has been a long time coming and is a great victory for gun owners across the country. Along with the *Heller* decision from 2008 it is now settled law that we as individuals have a fundamental individual right to keep and bear arms that neither the Federal government nor the State government may ignore.

When the Constitution was first ratified the Bill of Rights was only applied to the Federal government, however, over time that changed. With passage of the 14th Amendment there arose two methods that would incorporate fundamental rights to the states; the Privileges and Immunities clause and the Due Process clause. The Court in *McDonald* briefly discussed the Privileges and Immunities clause eventually deciding not to pursue that route and to leave the prior case law with regards to that issue stand. Turning to the Due Process clause (which holds that States shall not deprive one of life, liberty or property without due process of law) Justice Alito writing for the Court held that the right to keep and bear arms is a fundamental right deserving of incorporation.

When the courts look to the Due Process clause it analyzes whether the right at issue is so fundamental to Ordered Liberty that it falls within the Due Process clause. It is with that standard in mind that the Court determined the 2nd Amendment does apply to the individual States. Alluding to the recent *Heller* decision Justice Alito stated that “self-defense is a basic right” and that handguns are the most common self-defense weapon. Going through an extensive historical analysis the Court determined that, in fact, the right to keep and bear arms is fundamental to Ordered Liberty in the United States and, therefore, is incorporated against the States by virtue of the Due Process clause.

Writing in his usual eloquence, Justice Scalia in his concurring opinion addressed many arguments raised in the dissent by Justice Stevens. Justice Scalia notes that “[Justice Stevens] describes as an important tool for guiding judicial discretion [as] sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society.” Of course no one knows what that sensitivity is supposed to mean as Scalia further comments, “I cannot say whether that sensitivity will really guide judges because I have no idea what it is. Is it some sixth sense instilled in judges when they ascend to the bench?” Scalia, shows how truly flawed the dissents arguments are in that they fail to point toward any real legal framework of constitutional interpretation.

This decision is of paramount importance to our fundamental right that keeps our government in check. Now that it is settled law that we have an individual right that cannot be abridged by the Federal or State government the only remaining issue is under what standard should courts decide if a gun law is unconstitutional. There is currently pending just such a case in the 7th circuit.

It is more important than ever that we as gun owners across Ohio fully support organizations such as Ohioans for Concealed Carry and the National Rifle Association. If we are going to keep our liberties we must vest our time, energy and resources to the cause.