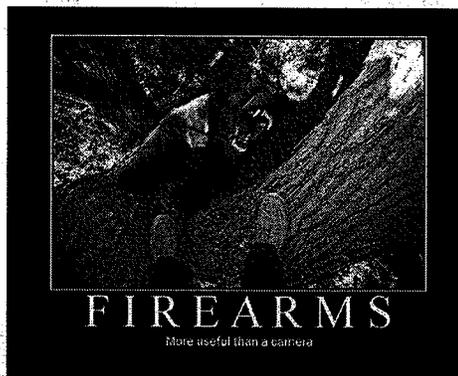


A Second Look at the Second Amendment

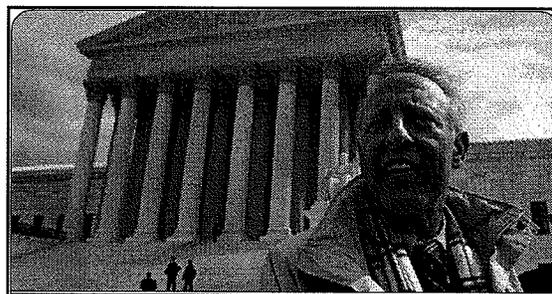
Richard A. Coad
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From Our Clients' Cold Dead Hands!

"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."

So What's Going on With the Second Amendment?



District of Columbia v. Heller
United States Supreme Court, 2008.

D.C. Handgun Ban

- Prohibits possession of handguns – anywhere, anytime
 - Can't carry an unregistered firearm of any kind
 - Registration of handguns is prohibited
 - No person may carry a handgun without a license, but the chief of police may issue licenses for 10 year periods.
- Must keep lawfully owned firearms unloaded and dissembled or bound by trigger lock unless located in a place of business or being used for lawful recreational activities.

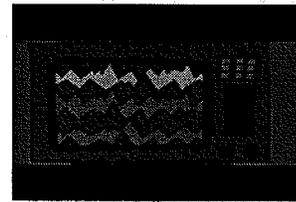
Dick Heller

- Special police officer authorized to carry handgun while on duty at Federal Judicial Center
- Applied to registration certificate for handgun at home
- District Refused
- He filed suit



It is Justice Scalia!

History of the Second Amendment



Heller's Key Holdings

- 2nd Amendment guarantees "the individual right to possess and carry weapons in case of confrontation"
- "Bear" means "carry"
- "Bear arms" refers to carrying for confrontation
- The Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense.

Heller's Key Holdings cont.

- But, it specifically rejected the dissent's proposed "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests'"
- It also made clear that rational basis is not the standard

What Heller Did NOT Do

- Court declined to establish a level of scrutiny against which to test laws affecting the individual right
- Did not decide whether 2nd Amendment was enforceable against state and local laws

Heller's Explicit Qualifications

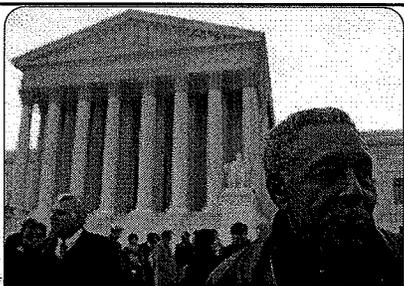
- Not an unlimited right
- Recognized that a majority of 19th century courts held prohibitions on carrying concealed weapons were lawful under the 2nd Amendment or state analogues
- Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings ..."

United States v. Hayes (2009)

- Issue: whether federal law prohibiting persons convicted of a misdemeanor crime of domestic violence from possessing firearms required a "domestic relationship" as an element of the underlying offense.
- Court (7-2) decided that a domestic relationship need not be an element of the crime, thereby expanding the reach of the Violence Against Women Act; effectively reducing the number of people who can lawfully possess firearms
- So what?

United States v. Hayes (2009)

- Neither the majority nor the dissent even mentioned *Heller* or the import of the Second Amendment
- Lesson: if you're the wrong kind of man (a man who engages in domestic abuse) the Second Amendment and *Heller* are silent to protect a constitutional right.



McDonald v. Chicago

United States Supreme Court, 2010.

Chicago and other Municipal Handgun Bans

- Like the District of Columbia, Chicago and Oak Park had laws effectively banning handgun possession.
- Unlike the District of Columbia, Chicago and Oak Park's laws were not federal laws.

Otis McDonald

- Otis McDonald is in his late seventies
- lives in a high-crime neighborhood.
- community activist involved with alternative policing strategies, and his efforts to improve his neighborhood subjected him to violent threats from drug dealers.



McDonald's Key Holdings

- The right to bear arms is a fundamental right
- 2nd Amendment is incorporated against the states through the due process clause of the 14th Amendment

Incorporation and the 14th Amendment

- Affects Substantive Right
 - The Fourteenth Amendment protects the rights to personal security and personal liberty from state violation. *Griswold v. Connecticut*, 381 U.S. 479 (1965)

What McDonald Did NOT Do

- As in *Heller*, the Court declined to establish a level of scrutiny
- Instead, it said that the Chicago gun ban would not pass under any level of scrutiny
- But, substantive rights are analyzed under some form of heightened scrutiny, not under a rational basis test.

The Big Unknown

- What is the standard of Review?
 - Not rational basis

Chicago After McDonald

- Chicago passed a law allowing possession of firearms within the city if:
 - Resident obtains a Chicago Firearms Permit
 - Permit requires resident to obtain an affidavit signed by a firearms instructor showing that the applicant has completed a firearm training and safety course which includes four hours of classroom instruction and one hour of firing range training.
 - Same law prohibits the operation of any firing ranges within the City's borders

Other Federal Cases in the Wake of *Heller* and *McDonald*

- *United States v. Skoien* (7th Cir. 2010)
 - Challenge to the Constitutionality of Section 922(g)(9) in light of *Heller*
 - Government conceded: "some form of strong showing (intermediate scrutiny) is essential and that S. 922(g)(9) is valid only if substantially related to an important government interest."
 - Court: "we need not get more deeply into the levels of scrutiny quagmire . . ."
 - Court held: preventing armed mayhem is an important government objective AND data establish a substantial relation between 922(g)(9) and this objective.

Other Federal Cases in the Wake of *Heller* and *McDonald*

- *United States v. Williams* (7th Cir. 2010)
 - As applied Challenge to the Constitutionality of Section 922(g)(1) in b/c it infringed on right to possess firearms for self-defense (*Heller*)
 - Court used intermediate scrutiny w/o "determining that it would be the precise test applicable to all challenges to gun restrictions."

Other Federal Cases in the Wake of *Heller* and *McDonald*

- *United States v. Williams* (7th Cir. 2010) Cont.
 - Court held: preventing armed mayhem is an important government objective AND preventing felons like Williams from possessing guns is substantially related to that objective.
 - Why?
 - Because Williams had been convicted of felony robbery during which he beat the victim so badly that the victim required 65 stitches to be made whole.

Other Federal Cases in the Wake of *Heller* and *McDonald*

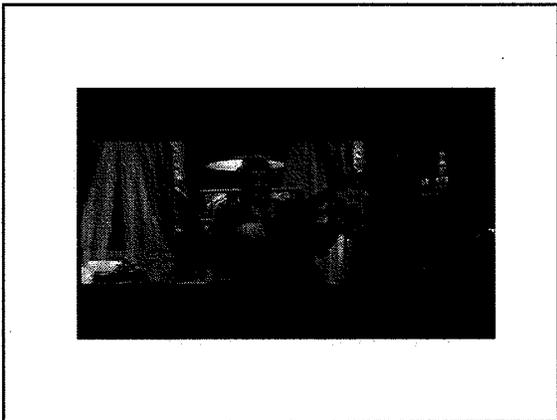
- *United States v. Williams* (7th Cir. 2010) Cont.
 - Court noted: "we recognize that Section 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent . . ."
 - Pick your client wisely!

Other Federal Cases in the Wake of *Heller* and *McDonald*

- *United States v. Yancey* (7th Cir. 2010)
 - Challenge to the Constitutionality of Section 922(g)(3), which makes it a felony for a person who is "an unlawful user of or addicted to any controlled substance" to possess a gun.
 - Court used intermediate scrutiny but reserving question whether a different firearm regulation might require a different approach
 - Court held: "habitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms."

Other Federal Cases in the Wake of *Heller* and *McDonald*

- *United States v. Morsette* (9th Cir. 2010)
 - In a case involving assault with a deadly weapon, defendant wanted jury instruction that "in the home, the need for self-defense and property defense is most acute" because of *Heller* and *McDonald*.
 - Court affirmed, holding that the ordinary instruction which required the jury to assess the reasonableness of the use of force under the circumstances (of defendant being in his own home)



Article I, Section 25 of the Wisconsin Constitution

"The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

- November, 1998

Wis. STAT. Section 941.23

"Carrying Concealed Weapon. Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor."

What 941.23 Does.

- Prohibits carrying of concealed weapon regardless of the circumstances
- Reaches unloaded firearms as well as loaded ones
- Applies to any weapon within an individual's reach
- Person must know the weapon is present

Harmonizing Article I, Section 25 and CCW

- *State v. Hamdan & State v. Cole* (2003)
- Key holdings
 - Right to bear arms is a fundamental right
 - Nonetheless, no strict or intermediate scrutiny
 - Means more than rational basis, but less than intermediate
 - Court creates a reasonableness standard

Hamdan's Reasonableness Test

- Must secure affirmative answers to:
 - Under the circumstances, did the interest in concealing the weapon to facilitate exercise of right to keep and bear arms substantially outweigh the state's interest in enforcing CCW?
 - Was weapon concealed because concealment was the only reasonable means under the circumstances to exercise right?

Hamdan's Reasonableness Test cont.

- Must raise before trial
- Court must resolve before trial
- Affirmative answers requires conclusion that state's enforcement of CCW was unreasonable and unconstitutional impairment of the right to keep and bear arms.
- State may counter defendant's showing by proving at trial that defendant had an *unlawful purpose* in concealment.

What does Hamdan's Test look like in fact?

- *Cole*:
 - Passenger in a traffic stop in Milwaukee. Officer saw him conceal item in glove box. Found marijuana in pocket and a loaded .380 pistol in the box, and a loaded .45 semi-auto pistol under driver's seat.
 - Claimed gun was for protection.
 - CCW not unreasonable.

What does Hamdan's Test look like?

- *Hamdan*:
 - Owned Capitol Foods in Milwaukee.
 - Store in high crime area (3 homicides, 24 robberies, 28 aggravated batteries in that year).
 - Store was target of 4 armed robberies; 2 fatal shootings from 1993-1999.
 - On one occasion a perp held gun to Hamdan's head and pulled trigger; misfire. Hamdan lived.
 - Another occasion, Hamdan struggled w/ armed perp; Hamdan shot and killed robber.

What does Hamdan's Test look like?

- *State v. Fisher*
 - Tavern owner in Black River Falls. Loaded gun kept in car. Pulled over on his way to McDonald's. Charged w/ CCW.
 - Kept gun for security b/c transports large amounts of cash.
- *Court*:
 - Right to bear arms is at apex in:
 - 1) Home, and
 - 2) Business
 - Not so strong elsewhere
 - State's interest is particularly high in cars
 - Need extraordinary circumstances for carrying in

Hamdan's Reasonableness Test cont.

- *State v. Vegas*; Milwaukee County Case No. 07 CM 687
 - Agreed with Vegas that CCW unconstitutional as applied to him.
 - Pizza delivery man; robbed at gunpoint; shot one of the robbers; called police.
 - Vegas was a victim of more than one prior armed robbery while delivering pizzas

As Applied Challenges

- Assessed considering the facts of the instant case, not hypothetical facts in other situations
- Fact driven! Consider: Black River Falls v. Capitol Foods or pizza delivery in Milwaukee

Facial Challenges

- Must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional
- Cole's facial challenge failed; circuit court did not address in *Vegas*
- Facial challenges based upon Art I, Section 25 are DOA

Hamdan is NOT Compatible w/ Heller

- *Hamdan's* interest balancing test is exactly what the Supreme Court holds is unacceptable.
- So what is the standard?
 - Argue for strict scrutiny
 - At worst, intermediate scrutiny
 - It must be something more rigorous

Attack WI's CCW with the 2nd Amendment and *Heller* and *McDonald*

- See *State v. Joshua D. Schultz*, Clark County Case No. 10-CM-138 (October 12, 2010).
- Court held CCW law unconstitutional on its face and overly broad: Second Amendment is a fundamental right under the Fourteenth Amendment, and is not to be abridged by any state law.
- "guns, and concealed carry of them, makes citizens safer."

The 2nd Amendment is Your Ally

- Use it rather than relying on Art. I, Section 25
- Argue for heightened scrutiny
- Facial and as applied challenges
 - Facial: more narrowly tailored. See e.g. *Minnesota Citizen's Personal Protection Act of 2003 and 2005*, MINN. STAT. Section 624.714 (2006).
 - Analogize 1st Amendment Facial Challenges – overbroad reach

Challenge WI Felon in Possession Law

- Wis. STAT. Section 941.29 restricts all felons from possessing a firearm; even non-violent felons categorically exempt in federal statute
- Overbreadth challenge
 - Unlike in *Williams*, make sure your client wasn't convicted of a violent felony
 - Contrast with federal statute
 - Argue strict scrutiny as applied to your client

Challenge Other WI Laws

- Wis. STAT. Section 167.31(2)(b) restricts possession of firearm in vehicle unless unloaded and encased
- Wis. STAT. Section 941.29(1)(c),(d), and (e) restrict persons with mental illness from possessing firearms. Shifts burden to show no longer danger to public
- Wis. STAT. Section 941.24 bans switchblade knives

Challenge Other WI Laws

- WIS. STAT. Section 941.295 restricts all persons from possessing an electric weapon (felony)
- WIS. STAT. Section 939.63 provides for penalty enhancements (as much as five years) if commit a crime while possessing weapon...includes constructive possession

The Second Amendment is Your Ally

- Unconstitutional As Applied and Facial; even a Constitutional Avoidance argument
- Use as leverage; DA's will be very unfamiliar with this tack – make them uncomfortable
- The U.S. Supreme Court is just beginning to define parameters of 2nd Amendment
- Use it!