



The State of Heller

The burning question arising from the Heller case is whether the courts will find that the Second Amendment applies to the states. The recent Ninth Circuit Court decision in the *Nordyke* case points to

“YES.”

by DAVE KOPEL

Does the Second Amendment apply to state and local governments? The Supreme Court has not definitively ruled, but in *Nordyke v. King*, decided just before this issue of America's 1st Freedom went to press, the Ninth Circuit Court of Appeals ruled that the Second Amendment does bind state and local governments. The Ninth Circuit covers the nine westernmost states, including California.

Most laymen, and quite a few lawyers, too, are surprised to find out that the Bill of Rights does not automatically apply to state and local governments. There's a long and complicated history behind this, but here's the bottom line:

All of the provisions of the Bill of Rights are direct restrictions on the federal government. Likewise, directly limited is an entity whose powers exist only because they were granted from the federal government. For example, under the Constitution, the federal government is in charge of the District of Columbia. The D.C. Council's powers exist solely because Congress delegated to the Council some of Congress' authority over the District.

As the *D.C. v. Heller* case recently affirmed, the Second Amendment prohibits the federal government, and federal entities such as D.C., from banning handguns for self-defense.

As Justice Scalia's opinion in *Heller* stated, the decision did not resolve the separate question of whether the Second Amendment applies to state and local governments. The Fourteenth Amendment, enacted during Reconstruction, provides: "... nor shall any State deprive any person of life, liberty, or property, without due process of law"

Under modern Supreme Court doctrine, the Fourteenth Amendment's "due process" clause protects both "procedural" and "substantive" due process. Procedural due process involves the fairness of how the government acted; for example, before the government took away someone's driver's license, did the person have an opportunity to present his side of the story to a neutral decision-maker?

Substantive due process involves what the government did. And some things that a government might do would involve an unjust deprivation of constitutional liberty, even if the procedures were fair. Suppose a state passed a law that said, "Anyone who reads a book criticizing the state's governor will be imprisoned for one year." And also suppose that for prosecutions under the law, there were all the usual procedural protections: that is, a defendant had a right to a jury trial; the defendant could cross-examine prosecution witnesses; the prosecution had to prove beyond a reasonable doubt that the defendant really had read the book; and so on. Even with all the procedural protections in place (procedural due process), the law would be a violation of the Fourteenth Amendment because there are just some ways in which a government may never deprive a person of liberty (substantive due process).

How does this affect the Bill of Rights? The Supreme Court has ruled that some, but not all, of the provisions of the Bill of Rights are "incorporated" in the Fourteenth Amendment's due process clause. The incorporated provisions of the Bill of Rights are thereby made enforceable against state governments. They're also enforceable against local governments, since local governments' powers are derived from the state.

Most of the Supreme Court's cases on Fourteenth Amendment incorporation were decided between the 1930s and the 1960s. By the time the court was done, almost all of the provisions in the Bill of Rights had been incorporated, except: the Second Amendment right to arms; the Third Amendment right not to have soldiers quartered in one's home; and the Fifth Amendment right to a grand jury indictment before being prosecuted. Also incorporated, of course, is the Tenth Amendment, which affirms that the people and the states retain powers not granted to the federal government.

So once *Heller* definitively affirmed that the Second Amendment protects the individual rights of ordinary citizens, the next question was whether the Second Amendment applies to state and local governments. There are some old cases from the 19th century suggesting that it does not, but those involved another provision of the Fourteenth Amendment (the "privileges or immunities" clause), not the due process clause.

Some state trial courts in Massachusetts, Missouri and New York have already treated the Second Amendment as applicable to the states. But other courts have disagreed. Based on the Supreme Court's articulated standards for "selective incorporation" into the Fourteenth Amendment, the argument for incorporating the Second Amendment is very strong, as George Mason University law professor Nelson Lund explained in a recent issue of the *Syracuse Law Review*. ([The article is available here](#). Click the word "Download" which appears above the article title.)

However, the question will not be definitively resolved until the U.S. Supreme Court issues a decision. From the pro-rights perspective, the sooner the Supreme Court takes a Second Amendment incorporation case, the better, since President Barack Obama's Supreme Court nominees are unlikely to look favorably on the Second Amendment.

Nordyke v. King might be the case that the high court takes. The "King" in *Nordyke v. King* is Alameda County, Calif., Supervisor Mary King. She authored a 1999 ordinance that banned firearms on all county property. She wrote to the county attorney that she had "been trying to get rid of gun shows on county property" for "about three years." She was, she wrote, angered by "spineless people hiding behind the Constitution."

At a press conference touting the ban, King declared that the county government should no longer "provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism."

The Nordyke family, which promotes gun shows throughout California, sued. Their lead lawyer is Donald Kilmer, a California attorney with extensive experience in gun law cases. He has been assisted by Don Kates, a Washington state lawyer with a very long and eminent record of Second Amendment scholarship and litigation. After many twists and turns, the *Nordyke* case was argued before a three-judge panel of the Ninth Circuit in January 2009.

The panel consisted of Circuit Judges Arthur L. Alarcón (appointed by President Carter in 1979), Diarmuid F. O’Scannlain (Reagan, 1986) and Ronald M. Gould (Clinton, 1999).

An amicus (friend of the court) brief on behalf of the NRA and the California Rifle & Pistol Association was filed by Chuck Michel of California and Stephen Halbrook of Virginia.

On April 20, the three-judge panel issued a unanimous decision written by Judge O’Scannlain: the Second Amendment applies to state and local governments. But, the court ruled, the ban on county property is not a violation of the Second Amendment. ([The decision is available here.](#))

Applying the Supreme Court test for selective incorporation, the Ninth Circuit examined whether the right to arms was “necessary to an Anglo-American regime of ordered liberty.” The panel noted the parallels between the right to arms and the Sixth Amendment right to a jury trial in criminal cases—a right that has already been incorporated. Both were protected by the 1689 English Declaration of Right; the preeminent English legal scholar William Blackstone extolled both rights; in the years before the American Revolution, the colonists vehemently protested British interference with both rights.

Thus, the Ninth Circuit concluded that the Second Amendment is, in the words of the Supreme Court test, “deeply rooted in this Nation’s history and tradition.” The court noted that the tradition continued in the early republic, when legal scholars affirmed the importance of the right to arms, and many new state constitutions protected that right.

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When Congress voted for the Fourteenth Amendment after the Civil War, congressmen repeatedly stated their intent to stop Southern governments from interfering with the Second Amendment rights of freedmen. The Ninth Circuit cited Stephen Halbrook’s excellent book on the topic, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*.

Judge Gould joined in the majority opinion, and also wrote a short concurrence elaborating the importance of the Second Amendment to national security:

“The right to bear arms is a bulwark against external invasion. We should not be overconfident that oceans on our east and west coasts alone can preserve security. We recently saw in the case of the terrorist attack on Mumbai that terrorists may enter a country covertly by ocean routes, landing in small craft and then assembling to wreak havoc. That we have a lawfully armed populace adds a measure of security for all of us and makes it less likely that a band of terrorists could make headway in an attack on any community before more professional forces arrived. Second, the right to bear arms is a protection against the possibility that even our own government could degenerate into tyranny, and though this may seem unlikely, this possibility should be guarded against with individual diligence.”

But all three judges agreed that the Alameda County ordinance did not violate the Second Amendment. Even though the ordinance, by banning gun shows, made it more difficult or expensive to acquire guns, this fact in itself did not show an infringement of the Second Amendment, which the Ninth Circuit (quoting *Heller*) described as primarily involving the right to armed defense in the home.

Second, *Heller* had said that guns could be banned from “sensitive places,” such as schools or government buildings. The Ninth Circuit stated that the county property, as a whole, could be considered a “sensitive place,” since it was part of county government functioning, and since large numbers of people gathered at the county fairgrounds.

The county, having won the case (in that its ordinance was upheld), cannot appeal to the Supreme Court, but the Nordykes can. The Supreme Court might take the case in order to issue a definitive national ruling on incorporation, and perhaps also to clarify the scope of the “sensitive places” exception. Or the Supreme Court could reject the petition, and let lower courts continue to wrestle with *Heller*’s meaning. If that happens, the Supreme Court might choose to resolve the issue in another case—such as the cases challenging D.C.-style handgun bans in Chicago and Oak Park, Illinois, both filed by the NRA right after the *Heller* decision was handed down. Those cases are now before the Seventh Circuit U.S. Court of Appeals, partially consolidated for appeal with another Chicago case filed by the Second Amendment Foundation. (Top Second Amendment scholar and attorney Stephen Halbrook represents the NRA in the Illinois cases, while *Heller* case winner Alan Gura represents SAF.)

Nordyke is especially important to California residents. Most of the states in the Ninth Circuit already have a state constitutional right to arms—Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. So *Nordyke*’s legal effect there will probably be relatively small. But California is one of the few states that doesn’t have a state amendment on the right to arms. Now, thanks to *Nordyke*, the good citizens of California finally have a written guarantee of that precious right.

As *Nordyke* itself shows, judges may still be willing to uphold a variety of laws inspired by anti-rights bigots. Nevertheless, *Nordyke* is a significant victory for the Second Amendment. Donald Kilmer, Don Kates and the Nordyke family have done a great service to the sacred cause of freedom.