District of Columbia v Heller:

The Death Knell For Illinois Handgun Bans?

By Christopher Keleher

District of Columbia v Heller marked the first time the U.S. Supreme Court upheld the Second Amendment right of an individual to own a firearm.[1] In *Heller*, the Court struck the District of Columbia's ordinance that banned possession of handguns and mandated all registered firearms be kept unloaded and locked.

Heller was a headline-grabbing decision. Commentators plundered the thesaurus for adjectives capturing the gravity of the situation. Politicians sought to make themselves heard above the clamor, lauding or lambasting the ruling as they saw fit.

Stripping away the superlatives and pejoratives, the case does answer significant Constitutional questions. But what the Court left for another day is critical. *Heller* is a gold-plated invitation for those seeking to invalidate firearm restrictions. The handgun ordinances in Illinois make it the next front in the gun control battle.

The Second Amendment provides as follows: "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."[2] Before *Heller*, the Supreme Court had last interpreted the Second Amendment in 1939. In assessing the constitutionality of the District's ordinance, the *Heller* Court determined the Second Amendment guarantees an individual's right to own a firearm and not the collective right of a state to maintain a militia.

Underlying the spectacle of *Heller* is the impact the decision will have in Illinois. The Land of Lincoln is the sole state with municipalities that forbid inhabitants from owning a handgun. Many of these restrictions resemble those struck in *Heller*. Thus, the Court's interpretation of the Second Amendment as protecting an individual right to possess arms renders the ordinances in Illinois ripe for challenge.

Even before *Heller* was decided, the case's import on Chicago and its environs was clear. Robert Levy, co-counsel for the *Parker* plaintiffs, promised that a favorable Supreme Court ruling meant "Chicago would be the logical follow-up."[3] The reverberations of *Heller* were felt immediately as

1. *District of Columbia v Heller*, 2008 WL 2520816 (US Sup Ct).
2. US Const Amend II.
3. 478 F3d 370; James Oliphant, *DC Gun Case May Hit Chicago*, Chicago Tribune, September 5, 2007, available at http://californiaccw.org/posts/list/4391.page.

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Some municipalities in Illinois ban the ownership of handguns. The U.S. Supreme Court's robust reading of the right to keep and bear arms places these ordinances in peril.

challenges to the ban in Chicago were filed within minutes of the ruling.

The conflict between the Supreme Court's Second Amendment interpretation and the handgun bans in Illinois is clear. *Heller* has set the stage for a contentious clash that will begin in a Chicago courtroom and invariably end in the United States Supreme Court. This article examines the *Heller* decision, considers firearm restrictions in Illinois, and concludes that in light of *Heller*, the municipal gun bans in Illinois will be difficult to sustain.

The D.C. gun ordinance

In 1976, the Washington, D.C. Council passed a bill restricting residents from possessing handguns.[4] The proliferation of gun violence prompted the D.C. Council to enact the strictest regulatory scheme in the nation.[5] The ordinance required all firearms to be registered.

However, the District prohibited registration certificates for handguns not registered before September 24, 1976.[6] Licensed firearms were subject to additional restrictions. Each firearm had to be unloaded and disassembled or bound by a trigger lock.[7] The District further prohibited moving lawfully owned handguns within one's own home without a permit.[8]

Violations of these provisions were punishable by a $1,000 fine or one year's imprisonment.[9] A second offense carried a $5,000 fine or five years' imprisonment.[10]

4. Meg Smith, *A History of Gun Control,* Washington Post, March 11, 2007, at C04.

5. Rept On Bill No 1-164, Committee on the Judiciary and Criminal Law, April 21, 1976.

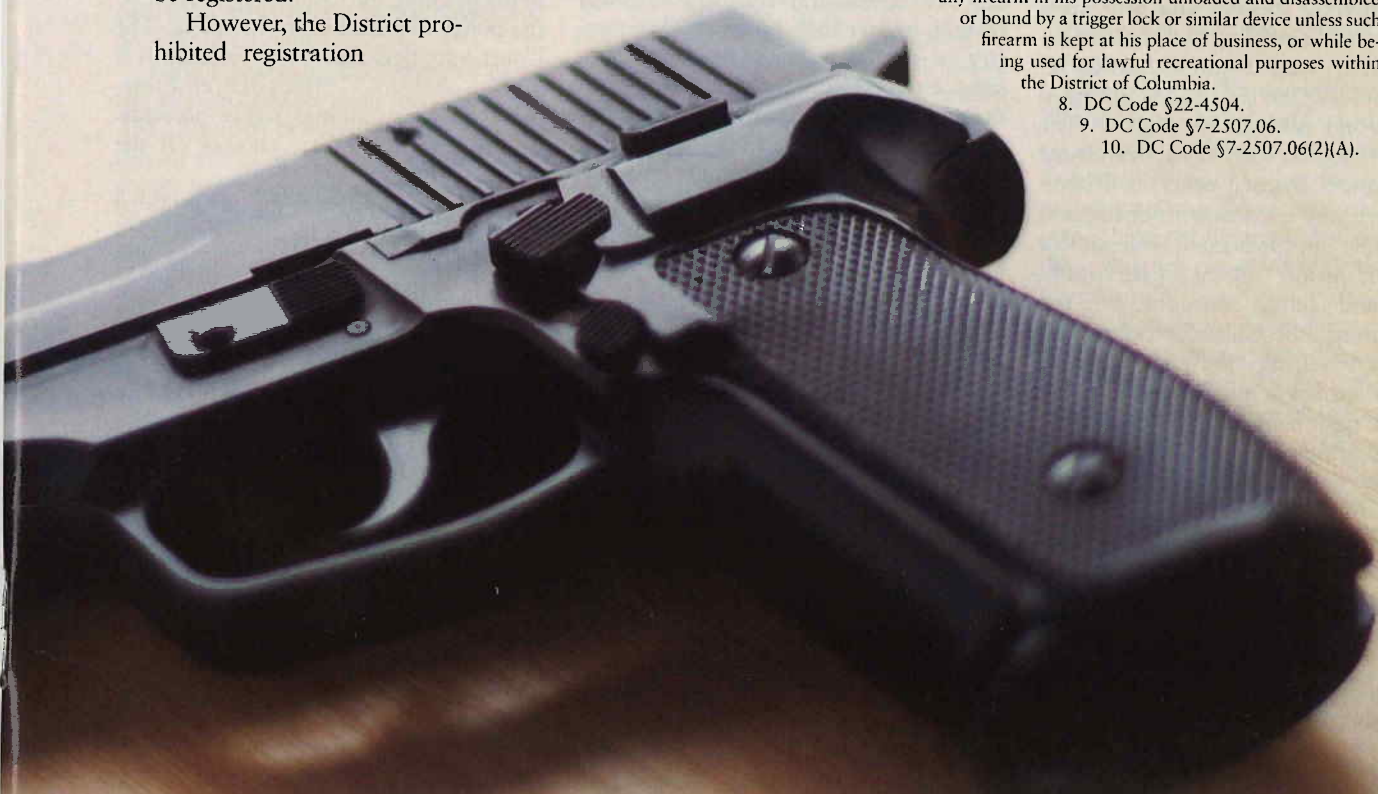
6. DC Code §7-2502.02(a)(4) provides [a] registration certificate shall not be issued for a...(4) [p]istol not validly registered to the current registrant in the District prior to September 24, 1976. "Pistol means any firearm originally designed to be fired by use of a single hand." DC Code §7-2501.01(12).

7. DC Code §7-2507.02 states each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

8. DC Code §22-4504.

9. DC Code §7-2507.06.

10. DC Code §7-2507.06(2)(A).



These regulations remained unaltered when they were challenged in 2003. Dick Heller carried a handgun while on duty as a District of Columbia Special Police Officer at the Federal Judicial Center. But when he applied for a handgun registration certificate, the city denied his request.

Heller and five others sued the District. The plaintiffs averred that the city's enforcement of laws banning the "possession of handguns and functional firearms within the home, forbidding otherwise lawful self-defense usage of arms, and forbidding the movement of a handgun on an individual's property," violated their Second Amendment rights.[11]

The District of Columbia filed a motion to dismiss, arguing the Second Amendment did not protect an individual right but rather a collective right held by the states. This reading paralleled the rationale of virtually every federal court that had grappled with the question. The United States District Court for the District of Columbia held there was no individual right to keep and bear arms and granted the motion to dismiss.[12]

The D.C. Circuit Court of Appeals reversed, holding the restrictions infringed upon Second Amendment rights.[13] The court determined such rights warranted the vigilance afforded other civil liberties. There was no reason to distinguish "the people" in the Second Amendment from "the people" in the First, Fourth, Ninth, and Tenth Amendments. The court rejected the collective right interpretation, asserting "the plain meaning of 'keep' strikes a mortal blow to the collective right theory."[14]

Through this prism, the D.C. Circuit struck the challenged provisions. Such an embrace of the individual right reading contravened decades of Second Amendment jurisprudence, including seventh circuit and Illinois Supreme Court case law. The D.C. Circuit's decision was the entreaty for the Supreme Court's first foray into the Second Amendment debate in almost 70 years.

The Supreme Court speaks

Granting certiorari, the Court waded into the morass of the gun debate. The Court had not entertained a Second Amendment challenge since its 1939 decision in *United States v Miller*.[15] In *Miller*, the Court held the Second Amendment encompassed the right to keep and bear arms with a reasonable relationship to the preservation of a militia.

The key inquiry was whether a weapon had "some reasonable relationship to the preservation or efficiency of a well regulated militia."[16] The Court offered scant rationale for its reasoning, and both sides of the Second Amendment debate claim *Miller* as their own. The opaque nature of *Miller* coupled with the longevity of its silence on the subject presented the *Heller* Court with an unprecedented tabula rasa.

The Court voted 5-4 to affirm the D.C Circuit's ruling striking the District's ordinance. The split fell along ideological lines. Justice Scalia wrote the opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Stevens dissented, joined by Justices Breyer, Souter, and Ginsburg.

Illinois is the only state with municipalities that forbid inhabitants from owning a handgun. Many of these restrictions resemble those struck in *Heller*.

The justices delved deep into the historical underpinnings of the right to keep and bear arms, drawing from historical texts to bolster their positions. The paucity of precedent mandated that both sides interpret the Second Amendment through the orginalism theory of interpretation. Indeed, the bulk of the opinions were devoted to discerning how firearms were viewed in the colonial milieu. The lack of unequivocal evidence of the Framer's intent on the right to keep and bear arms gave plausibility to the assertions of both sides.

The Court determined the operative clause of the Second Amendment – "the right of the people to keep and bear Arms, shall not be infringed" – controlled. It explained that the clause referred to a pre-existing right of individuals to possess firearms. This individual right was tied to the natural right of self-defense: "[t]he inherent right of self-defense has been central to the Second Amendment right."[17]

The District's ordinance ran afoul of such axioms. "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[18] While the Court noted firearms could be regulated, certain restrictions were nonstarters, including "the absolute prohibition of handguns held and used for self-defense in the home."[19]

The Court rejected the notion that permitting the possession of other firearms absolved the proscription of handguns. The Court extolled the self defense virtues of handguns over long guns: "[i]t is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police."[20]

While self defense was a central theme of the opinion, the Court was sensitive to the policy implications of its ruling. The Court admitted that "gun violence is a serious problem," "[b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[21]

Refusing to unleash an unrestrained right to possess a gun, the Court conditioned its decision: "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, or laws imposing conditions and qualifications on the commercial sale of arms."[22] This unambiguous language provides states and cities with substantial license to continue enacting common sense fire-

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11. Plaintiff's Complaint at 4, 2003 WL 24057551.
12. *Parker v District of Columbia*, 311 F Supp 2d 103, 109 (DDC 2004).
13. *Parker v District of Columbia*, 478 F3d 370, 376 (DC Cir 2007). On appeal to the Supreme Court, the case became *District of Columbia v Heller* because the DC Circuit found lead plaintiff Shelly Parker lacked standing.
14. Id at 386.
15. 307 US 174 (1939).
16. Id at 178.
17. *Heller*, 2008 WL 2520816 *29.
18. Id.
19. Id at *33.
20. Id at *29.
21. Id at *33.
22. Id at *28.

arm restrictions. It will be the focal point of suits contesting the constitutionality of municipal bans in Illinois.

Heller involved the Second Amendment's impact on federal laws and those of federal enclaves, namely, the District of Columbia. Whether the Second Amendment is "incorporated" against states via the Fourteenth Amendment was left open by the Court.[23] Thus, the Second Amendment's applicability to municipal gun bans in Illinois will be adjudicated in the coming months.

Future litigation will flesh out the true scope of the rights guaranteed by the Second Amendment and the level of scrutiny applied. The municipal handgun bans in Illinois will serve these purposes.

Regulating firearms in Illinois

The Illinois Constitution permits an individual right to keep and bear arms. Section 22 of the Constitution provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."[24] The inherent conflict is transparent, as the provision articulates a police power and an individual right.

Illinois bears the distinction of being the least hospitable state for gun rights. The disparity between Illinois and the rest of the country is embodied by the state's lack of concealed carry privileges and the multiple municipalities banning handgun possession in one's abode.

As their namesake suggests, concealed carry laws permit individuals to carry loaded firearms in public. Forty-eight states maintain concealed carry. Of those 48 states, 40 mandate that officials may not arbitrarily deny a concealed-carry application. This system is described as "shall-issue."[25] The other eight States have "may issue" processes in which licenses are granted upon the showing of a compelling need.[26]

Wisconsin and Illinois, along with the District of Columbia, do not permit concealed carry.[27] Illinois' unique stature is not for want of trying. Governor Jim Edgar vetoed legislation that would have authorized concealed carry in 1993.

Illinois' lack of concealed carry privileges has enabled municipal handgun bans to endure. Additionally, there is no state preemption of firearm laws, engendering an environment for local restrictions.[28] Municipalities in northern Illinois embraced this authority, with Morton Grove leading the way. In 1981, Morton Grove prohibited the ownership of handguns, mandating that "[n]o person shall possess, in the Village...[a]ny handgun, unless the same has been rendered permanently inoperative."[29] Morton Grove's ban lacked a grandfather clause and thus marked the first time a jurisdiction instituted a complete ban on handguns.

Morton Grove's groundbreaking ban drew national attention and the inevitable lawsuits, with challenges in state and federal court. The United States District Court for the Northern District of Illinois upheld the ordinance because it did not outlaw all firearms.[30] The United States Court of Appeals for the Seventh Circuit affirmed.[31]

The appellate court resolved the conflict of the Illinois constitutional provision by scrutinizing its commentary. The constitutional debates revealed the two opposing principles of the provision gave the legislature the ability to ban types of firearms while still respecting the basic right to possess a firearm. The court cited the delegates' approval of banning specific firearms. it also emphasized the deference given to a municipality's police power.[32]

The challengers fared no better invoking the United States Constitution. The court cited Supreme Court precedent holding the Second Amendment did not apply to the states. Attempts to circumvent this precedent were deemed to be without merit as the seventh circuit concluded "the second amendment does not apply to the states."[33]

The Illinois Supreme Court reached the same conclusion in *Kalodimos v Village of Morton Grove*.[34] It affirmed the lower courts that had upheld the handgun ban as a valid exercise of police power.

Similarly to the seventh circuit, the Illinois Supreme Court relied on the constitutional debates surrounding the firearm provision. Citing the comments of delegates approving the prohibition of some classes of firearms, the court found the ordinance complied with the Illinois Constitution.

The *Kalodimos* court devoted negligible attention to the Second Amendment, summarily asserting, "[t]he right to arms guaranteed by the Federal Constitution has never been thought to be an individual right."[35] The court concluded the ban was a permissible exercise of Morton Grove's home rule and police powers.

Morton Grove's litigation success was

The NRA and ISRA lawsuits

The following challenges to Illinois municipal handgun ordinances were filed in federal court immediately after the Heller *ruling.*

- *Illinois Rifle Association, et al., v City of Chicago, et al.*, No 1:08-cv-3645 (U.S. District Court, Northern District of Illinois, filed June 26, 2008).
- *National Rifle Association, et al., v City of Evanston, et al.*, No 1:08-cv-3693 (U.S. District Court, Northern District of Illinois, filed June 27, 2008).
- *National Rifle Association, et al., v Village of Morton Grove, et al.*, No 1:08-cv-3694 (U.S. District Court, Northern District of Illinois, filed June 27, 2008).
- *National Rifle Association, et al., v Village of Oak Park, et al.*, No 1:08-cv-3696 (U.S. District Court, Northern District of Illinois, filed June 27, 2008).
- *National Rifle Association, et al., v City of Chicago, et al.*, No 1:08-cv-3697 (U.S. District Court, Northern District of Illinois, filed June 27, 2008).

23. Id at *25, FN23.
24. IL Const Art 1, §22.
25. David McDowall, Colin Loftin, and Brian Wiersema, *Easing Concealed Firearms Laws: Effects On Homicide In Three States*. 86 J Crim L & Criminology 193, 194-95 (1995).
26. Id at 194-95.
27. http://www.handgunlaw.us/.
28. *Quilici v Morton Grove*, 695 F2d 261 (7th Cir 1982).
29. Morton Grove, Ill, Code §81-11 (enacted June 8, 1981).
30. *Quilici v Village of Morton Grove*, 532 F Supp 1169 (ND Ill 1981).
31. *Quilici*, 695 F2d at 264.
32. Id at 266.
33. Id at 270.
34. 103 Ill 2d 483, 470 NE2d 266 (1984).
35. Id at 509, 470 NE2d at 278.

the catalyst for other cities to enact similar ordinances. Remarkably, the restrictions would not be replicated outside of Illinois.[36]

Evanston banned handguns in 1982.[37] Chicago Mayor Jane Byrne approved a handgun registration freeze in 1982.[38] The City of Chicago prohibits the registration and possession of handguns unless registered before March 30, 1982.[39]

> **The Second Amendment is one of the few Bill of Rights provisions not incorporated through the Fourteenth Amendment. *Heller* left the question open.**

Those handguns that are registered are subject to additional restrictions mandating they possess a trigger lock and "load indicator device that provides warning to potential users."[40]

Oak Park banned handgun ownership in 1984.[41] In 1989, Wilmette and Winnetka instituted handgun bans.[42] Highland Park prohibits handguns, unless the resident has obtained a permit from the police.[43] The handgun bans native to northern Illinois have survived due to the confluence of the collective right interpretation of the Second Amendment, the police power element of the state constitutional provision, and the determination the Second Amendment does not apply to state or local governments. *Heller* represents a seismic shift in these dynamics.

The aftermath of *Heller*

While Illinois case law on the Second Amendment is clear, *Heller* undermines this jurisprudence. The ordinances of Chicago and its surrounding towns parallel the District of Columbia's ban, as they forbid their inhabitants from owning a handgun. Beyond that, the handgun bans in some municipalities do not include a grandfather clause for those guns obtained before the regulation's passage, as did the District's ordinance.

Sensing these vulnerabilities, the Illinois State Rifle Association fired the opening salvo minutes after *Heller* was issued.[44] Along with four Chicago residents, the group filed suit in the Northern District of Illinois seeking to invalidate Chicago's ban.[45]

The National Rifle Association filed a separate suit seeking the repeal of prohibitions in Chicago, Evanston, Morton Grove and Oak Park.[46] The village of Morton Grove, home to the nation's first outright ban on handguns, saw the writing on the wall. Village Manager Joe Wade explained, "we're going to propose an ordinance that would eliminate the possession-of-handgun ban within the village."[47] Wilmette suspended enforcement of its 19-year-old ordinance banning handgun possession.[48]

Chicago Mayor Richard M. Daley refused to capitulate. He decried the "very frightening decision" and vowed to fight any challenge.[49]

The focus of litigation involving the municipal gun bans will be twofold. The first issue is whether the right to keep and bear arms should be incorporated into the Fourteenth Amendment to apply against the states. The Second Amendment is one of the few Bill of Rights provisions not incorporated through the Fourteenth Amendment. In *United States v Cruikshank*, the Court held that the Second Amendment constrained the federal government but was inapplicable to state and local governments.[50]

The *Heller* Court declined to resolve this anachronism. However, it suggested the viability of *Cruikshank* was dubious: "we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."[51]

In *Quilici v Morton Grove*, the seventh circuit described such precedent as "the law of the land and we are bound by it."[52] Thus, the merits of Chicago's ordinance may not be touched if lower courts deem state and local governments unrestrained by the Second Amendment.

While incorporation under the "privileges and immunities" clause of the Fourteenth Amendment may be a persuasive argument, lower courts are unlikely to take the bait. No lower court entertaining this question has found incorporation, and even in light of *Heller's* individual right reading, no court will do so because only the high court may rule the Second Amendment is incorporated.

Courts will eventually reach the merits of the restrictions. Municipalities face a difficult task distinguishing the District's ordinance from their own. Self-defense was a critical component of *Heller's* rationale. The handgun bans in Illinois appear to inhibit the ability to defend oneself as defined by the Supreme Court. *Heller* instructs that an individual right reading would protect possessing a handgun in a home.

The kindred nature of the District's ordinance and the bans in Illinois leave those municipalities in an intractable spot. Removing the individual versus collective paradigm from the discussion will elevate the policy considerations embroiled in the Second Amendment. The policy realm may be where the municipalities of Chicagoland make their last stand.

The fallout from *Heller* has been immediate in Illinois. While *Heller* does not forbid all municipal firearm regulations, outright handgun bans appear outside their ambit. Thus, the Supreme Court's

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36. San Francisco voters approved a ban on handgun possession in 2005, but a court struck the ban down because state law preempted the ordinance. Bob Egelko and Charlie Goodyear, *San Francisco Judge invalidates Prop. H handgun ban*, San Francisco Chronicle B-1, June 13, 2006. Available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/13/SFGUN.TMP.
37. Evanston, Ill, Code §9-8-2 (2005).
38. Mun Code Chi (Ill) §8-20-010 (2006).
39. Mun Code Chi (Ill) §8-20-040 (2006).
40. Mun Code Chi (Ill) §8-20-050 (2006).
41. Oak Park Village, Ill, Code §§27-1-1, 27-1-2, 27-2-1 (1994).
42. Wilmette Ill Code §12-24(b) (2005); Winnetka Ill Code §9.12.020 (2006).
43. Highland Park Code §134.003 (2006).
44. Azam Ahmed, *NRA sues Chicago, 3 suburbs to repeal their firearms bans*, Chicago Tribune, June 27, 2008, available at http://www.chicagotribune.com/news/nationworld/chi-nra-gun-suits-both-jun28,0,2928807.story.
45. *McDonald v City of Chicago*, Case No 1:2008 cv 03645 (ND Ill 2008).
46. Id.
47. Libby Lewis, *NRA Eyes More Targets After DC Gun-Ban Win*, http://www.npr.org/templates/story/story.php?storyId=92008363.
48. 5 NBC News, *Wilmette Suspends Local Handgun Ban*, 6/27/08, http://www.nbc5.com/news/16729972/detail.html.
49. James Oliphant and Jeff Coen, *Daley vows to fight for Chicago's gun ban*, Chicago Tribune, June 26, 2008 available at http://www.chicagotribune.com/news/nationworld/chi-chicago-gun-banjun27,0,832835.story.
50. 92 US 542, 551 (1876).
51. *Heller*, 2008 WL 2520816 *25, FN23.
52. *Quilici*, 695 F2d at 270.

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tive recollection of observers to an event, accounting for substantial differences in their accounts. The more we learn about human memory and eyewitness identification, the more we realize that there are inherent human limitations to the search for truth that we must recognize but accept as part of the justice system. Most crimes do not include forensic evidence and must depend upon witness testimony. At most, experts can only warn the jury about some misconceptions that may surround their review of the evidence.

Finally, the bailiff informed the judge that the parties were all in court and the jury was waiting in the jury room. Reviewing all the relevant factors once more, Judge Justice scratched a few notes and went into the courtroom to render the decision. The expert witness would be allowed to testify about some areas but not others.

Ironically, Judge Justice's ruling, based on his view of the law and facts, could be different than the one other judges might make in the same circumstances, and yet all could be legally correct... a kind of *Rashomon* effect in judicial decision-making. ■

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Second Amendment pronouncement may dismantle a fixture of numerous Illinois municipalities.

Conclusion

Heller is but an opening chapter of modern day Second Amendment jurisprudence. While the decision addressed a fundamental question, it did not provide an expansive answer. The parameters of the right to keep and bear arms will be defined in the coming years.

The municipal handgun bans in Illinois evoke a wide range of opinions. From scorn to salvation, the strident views exemplify the contentious nature of gun control. Regardless of one's position on the propriety of handgun bans, one thing is certain: the municipality bans in Illinois will be the vehicle by which the Supreme Court expounds on the right to keep and bear arms.

In prior cases concerning the constitutionality of firearm restrictions in Illinois, challengers were stymied by courts' adherence to the collective right interpretation. *Heller* has turned the tables, putting local governments on the defensive. The resemblance of the municipal bans in Illinois to the District's ordinance may ultimately be their downfall. ■

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ment over the principal's property who die before the principal risk having the value of the principal's property included in their own estates for federal estate tax purposes.

Do agents need lawyers?

Certainly, powers of attorney are subject to abuse by agents. It's hard to blame honest and well-meaning agents, though, for feeling themselves abused, in turn, where their duties end up being unexpectedly difficult, time-consuming, and protracted, and are accompanied by criticism and liability and little, if any, compensation (for more about agents and compensation, see LawPulse at page 389).

Park Ridge attorney James Mulvaney, who spent many years as in-house counsel for a large Loop bank, offers a lawyerly solution that doesn't involve redrafting the power of attorney statute: He'd like to see agents as well as principals represented by separate counsel during the drafting stage of the agencies.

Counsel would then advise those considering agreeing to serve as agents of the full extent of their duties and liabilities, and principals and agents could negotiate those duties as well as compensation for the agents at arms' length, before the onset of disability for the principal. "Attorneys can use their brains and be the problem-solvers they're trained to be," Mulvaney advocates. ■