

## Breyer's Wrong-Headed Opinion

In the June 28 ruling of the case *McDonald v. Chicago*—a ruling that will certainly annoy Obama and Attorney General Eric Holder—the Supreme Court voted 5–4 that a restrictive Chicago handgun ban is unconstitutional because it violates Second Amendment rights. (The ban also violates the Constitution of the State of Illinois, which declares that “...the right of the individual citizen to keep and bear arms shall not be infringed.” Mayor Richard M. Daley seems to believe that right belongs only to his personal bodyguards.)

Writing for the majority, Justice Samuel A. Alito stated, “It is clear that the Framers [of the U.S. Constitution] ...counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” Alito was careful to emphasize that the ruling is not a blanket approval of all gun ownership, and communities can certainly continue to prohibit convicted felons or the mentally ill from owning guns, and can continue to prohibit guns from certain locations. “We repeat those assurances here. Despite municipal respondents’ doomsday proclamations, [this decision] does not imperil every law regulating firearms.”

Interestingly, Justice Ruth Bader Ginsberg attended the Court session despite the death of her husband the day before; she was apparently eager to vote with the minority. Voting with Ginsberg in the minority are Justices Stephen G. Breyer, John Paul Stevens, and Sonia Sotomayor.

Writing for the minority, Breyer asks, “Given the empirical and local value-laden nature of the questions that lie at the heart of the issue, why, in a nation whose constitution foresees democratic decision-making, is it so fundamental a matter as to require taking that power from the people?” By “taking ...power from the people,” Breyer means that the Court ruling takes from the people the power to regulate gun ownership. But *regulating* gun ownership is not the same as *prohibiting* gun ownership—as the Chicago ordinance does. By siding with the City of Chicago, it is Breyer who is “taking ...power from the people.”

Breyer asks, “What is it here that the people did not know?” Breyer is arguing that in local matters, citizens have the knowledge and the right to vote democratically to define laws that reflect their values. Breyer’s “local values” argument is of course understood by most people, and is typically referred to with the term “community standards.” Members of a community might, for example, vote to prohibit taverns or pool halls or casinos in certain locations—or even altogether—and most people are willing to accept the majority opinion in such matters. But while members of a community have the right to impose such standards on others, the citizens certainly do *not* have the right to impose standards that eliminate individual rights granted by the U.S. Constitution—especially those articulated so clearly in the Bill of Rights.

It is worth noting that for liberal judges, “local values” are important only when used in support of leftist positions—such as gun control. In other issues, such as gay marriage, liberal judges ignore the local values of communities passing referenda on the issue and attempt to force the leftist agenda on them. In *McDonald v. Chicago*, the minority Justices are arguing that the community (Chicago) has a right to impose its standards (no private gun ownership) on everyone.

Breyer (and Stevens and Ginsberg and Sotomayor) should be asked, “If local values can be used to support a total prohibition of gun ownership—even though the right to bear arms is recognized by the U.S. Constitution—why can local values not be used to support a prohibition of gay marriage—which is *not* recognized in the U.S. Constitution?” Is a community permitted to impose its values with regard to the regulation of taverns, pool halls, and casinos, but not permitted to impose its values with regard to the acceptable definition of marriage?

Breyer and most liberals are clearly selective in their acceptance and imposition of “values.” In their view, a community can vote to prohibit Happy Meals because they encourage children to plead with weak-willed parents to buy fast food that may lead to obesity, but that same community dare not demand that a museum not display a crucifix in a jar of urine. In their view, a community can demand that an Armed Forces recruiting station not be permitted in town, but it dare not object to a gay pride parade where men and women in various stages of undress act out perverted forms of sex in front of bewildered children. In their view, *local* values are *liberal* values. (That generally means that there are very few of them.) Every other value is considered by them to be racist, sexist, homophobic, old-fashioned, dim-witted, closed-minded, or discriminatory.

Breyer asks “What is it that a judge knows better?” With this question Breyer is ridiculing the majority Justices, essentially commenting, “How dare Justice Alito and the others say that Chicagoans cannot impose their gun-control values on their entire community?” But the majority Justices are *not* arguing that they know better than the people. They are arguing that the U.S. Constitution knows better. They are arguing that communities have a right to agree to certain standards based on local values. *But* those communities are required to stop short of actions that conflict with the U.S. Constitution in general and the Bill of Rights in particular. Yes, residents of a community can collectively impose reasonable standards on everyone within that community. But while the community might agree that its taverns should not be allowed to remain open beyond three o’clock in the morning, the community cannot agree to take away the tavern owner’s First Amendment right to free speech.

If the citizens of Chicago (or their elected aldermen acting on their behalf) are allowed to abrogate the U.S. Constitution and ignore the Second Amendment, then the document serves no purpose. The United States would then no longer be a nation of laws; it would be a nation of mob rule—where the majority could vote away the rights of the minority. The purpose of the U.S. Constitution and its Bill of Rights is to define the limits of government and the individual rights that cannot be alienated. The U.S. Constitution does

not *grant* rights to the citizens; it *recognizes* rights that all people everywhere have (or should have).

The Court's minority argument is not only incorrect, it is an embarrassment. The ruling is also a warning to all Americans. *Four of the nine Justices do not believe that Chicago residents have a right to defend their lives and property by keeping a gun in their homes. Four of the nine Justices do not believe in the Second Amendment to the U.S. Constitution.* How many Justices do not believe in the First Amendment right to free speech?

Elena Kagan, Obama's choice to replace retiring Justice John Paul Stevens, would have voted with Breyer. That is reason alone for the Republicans in the U.S. Senate to filibuster her appointment to the Supreme Court. After all, it is far better to be called obstructionist by the leftist media now than to seat Kagan and then ultimately lose the right to say anything in response. The left is playing hardball, and the right would be wise to recognize that fact.

*Don Fredrick*

*June 28, 2010*

Note: It is worth reading *The Wall Street Journal's* praise of Justice Clarence Thomas for his brilliant contribution to the *McDonald v. Chicago* opinion. The *Journal* suggests it is Thomas's "finest hour." Find the article at:

<http://blogs.wsj.com/law/2010/06/28/is-his-gun-control-concurrence-justice-thomass-finest-hour/>