



Heller . . . Britt . . . What's Next for Gun Laws?

Author : Jeff Welty

Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [Britt](#), [firearms](#), [guns](#), [Heller](#), [mcdonald](#), [second amendment](#)

Date : November 19, 2009

We've seen several significant cases concerning gun laws in the past few years. The two biggest, of course, are *District of Columbia v. Heller*, 554 U.S. ____ (2008), in which the United States Supreme Court struck down the District of Columbia's ban on handgun possession as inconsistent with the Second Amendment, and *Britt v. North Carolina*, discussed in [this prior post](#), in which the North Carolina Supreme Court ruled, under the state constitution's analogue to the Second Amendment, that a particular convicted felon, whose single, non-violent conviction was many years in the past, could not be prohibited from possessing a gun.

More changes may be afoot in this area, and lawyers on both sides should be aware of the legal landscape. For starters, the United States Supreme Court will hear, this Term, *McDonald v. Chicago*, a case that asks whether the Second Amendment applies to the states, either through selective incorporation under the Fourteenth Amendment's due process guarantee or (more radically) because selective incorporation is wrong and all of the bill of rights apply to the states. This question wasn't relevant in *Heller*, because the District of Columbia is a federal jurisdiction, but it's a critical question because if the Second Amendment only applies to the federal government, the practical importance of *Heller* will be quite limited. A brief discussion of *McDonald* is [here](#); a gun rights group's website about the case, with links to some briefs, is [here](#). I don't think that a date has been set yet for the argument, but it looks like it won't be until February, at least, based on the briefing schedule. If the Court rules that the Second Amendment applies to the states, that will open the door to Second Amendment challenges to an array of state and local firearm regulations.

An example of the type of litigation that we might see post-*McDonald* at the state level is the Seventh Circuit's recent decision in *United States v. Skoien*. The defendant in that case was convicted of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9). He appealed, arguing that his motion to dismiss the indictment under *Heller* should have been granted. The Seventh Circuit remanded the case for further consideration by the district court. It slapped the prosecution's wrist in this passage, which gives a flavor of how seriously the court views the defendant's claim:

The government has approached this case as though all it had to do to defend the constitutionality of § 922(g)(9) is invoke *Heller's* language about certain "presumptively lawful" gun regulations—notably, felon-dispossession laws. Not so. *Heller* held that the Second Amendment secures an individual natural right to possess firearms for self-defense; the opinion's reference to exceptions cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights. Although *Heller* did not settle on a standard of review, it plainly ruled out the deferential rationalbasis test; this leaves either strict scrutiny or some form of "intermediate" review. On the facts of this case, we hold that intermediate scrutiny applies.

Again, if the Second Amendment applies to the states, we can expect to see similar arguments in state courts. (Or maybe we should be seeing them now, under *Britt*.) For example, what about the requirement that people who are subject to a domestic violence protective order surrender their firearms, under G.S. 50B-3.1? Farther afield, what of gun laws such as the prohibition against weapons at parades and similar events, under G.S. 14-277.2? What of municipal ordinances prohibiting high-capacity firearms, e.g., Durham County Code of Ordinances § 17-71, or the display of certain handguns, e.g., Chapel Hill Code of Ordinances § 11-134? Suffice it to say, *Heller*, *Britt*, and *McDonald* -- however it comes out -- will be reshaping the legal landscape regarding firearms for years to come.