



Virginia Gun Laws and the U.S. Supreme Court

Introduction

The U.S. Supreme Court ruled 5-4 on June 28, 2010, that Second Amendment gun rights extend to the States and to municipalities. The case, *McDonald v. City of Chicago*, challenged laws in Chicago and Oak Park, Illinois that banned handguns within the cities. Two years ago, in *District of Columbia v. Heller*, the Supreme Court found unconstitutional a similar city law banning handguns, but that ruling was limited to Washington DC, which falls under federal law instead of state law.

Justice Alito, writing for the majority in *McDonald*, analyzed the competing theories behind the incorporation of the Bill of Rights to conclude that Second Amendment right to self defense applies to state and local laws. The gun rights examined in *McDonald* are substantially similar to those in the DC case; both decisions conclude that a law banning handguns infringes on the right to self-defense.

Analysis

Heller and McDonald U.S. Supreme Court cases:

District of Columbia v. Heller and *McDonald v. City of Chicago* are appropriately analyzed as a pair of cases with related holdings. *Heller* first established that the Second Amendment protects the right to keep and bear arms “for the core lawful purpose of self-defense,” and thus a law prohibiting handguns is unconstitutional. *130 S. Ct. at 3023*. Writing for the majority in *Heller*, Justice Scalia analyzes the wording and history of the clauses in the Second Amendment to reach his conclusion that there is an individual right to carry weapons “in case of confrontation.” *128 S. Ct. at 2797*. Scalia finds that the militia was the purpose behind the second amendment, but not the sole reason for preserving the right. *Id. at 2801*. “Americans valued the ancient right,” he explains, “[and they] most undoubtedly thought it even more important for self-defense and hunting.” *Id.* The right applies to modern weapons that were not available at the time the Constitution was written. *Id. at 2791-92*. Finding that handguns are a “class of arms. . . overwhelmingly chosen by the American society for [the] lawful purpose” of self-defense, the Court affirms the unconstitutionality of D.C.’s handgun ban. *Id. at 2817*.

Because Washington, D.C. is governed by federal law, *Heller* left the question open of whether this same right applies to the states. *McDonald* applies the due process clause of the Fourteenth Amendment to analyze this question and finds that the same rights apply to the states. *130 S. Ct. at 3028-36, 3044-48*. As such, the substantive firearms rights that are delineated in *Heller* are applied to the states via the decision in *McDonald*.

While the *Heller* decision prohibits an outright ban on handguns, it explicitly allows many of the “longstanding prohibitions” regulating firearms. *128 S. Ct. at 2817*. Justice Scalia states:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [N]othing 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.

In the *McDonald* opinion, Justice Alito, writing for the majority, makes it clear that these “longstanding regulatory measures” remain in effect for the states just as they do within the federal jurisdiction. *130 S. Ct. 3047*.

Virginia Statutes:

Virginia gun laws fall into three basic categories: (1) statutes that criminalize certain guns and prohibit some people from owning guns, (2) enabling statutes that allow or limit localities’ ability to regulate guns, and (3) statewide regulations of firearms. Virginia’s criminal statutes largely serve to prohibit certain classes of people from possessing firearms and to further penalize violent crimes when committed with a firearm. See, e.g., *Va. Code § 18.2-308.2 (2010)* (prohibiting possession of a firearm by a convicted felon); *Va. Code § 18.2-53.1. (2004)* (establishing a separate and distinct felony charge for committing a felony with a firearm). Criminal statutes also minimally regulate types

of firearms. For example, it is a class 2 felony to possess a machine gun in perpetration or attempted perpetration of a crime of violence. *Va. Code § 18.2-289 (1975)*.

Virginia's laws regarding localities and guns allow local governments limited authority to regulate firearms within their jurisdiction. Counties and cities can prohibit hunting with a firearm within 100 yards of a highway and counties, cities, and towns can prohibit hunting within 100 yards of a school. *Va. Code §§ 29.1-526, 29.1-527 (1989, 1987)*; see also *Va. Code § 15.2-1209.1* (permitting counties to pass an ordinance making it unlawful to carry loaded rifles or shotguns on highways). In a more general enabling statute, Virginia counties are permitted to pass ordinances to prohibit discharging firearms "in any areas... so heavily populated as to make such conduct dangerous to the inhabitants thereof." *Va. Code § 15.2-1209 (2004)*. Localities are not permitted to pass any ordinances related to the "the purchase, possession, transfer, ownership, carrying, storage or transporting of firearms, ammunition, or components or combination thereof" unless it is specifically authorized by another statute. *Va. Code § 15.2-915 (2009)*.

Virginia laws also provide statewide regulations on the ownership and sales of firearms. Most of these regulations are criminal statutes, making it a crime to violate the firearm provisions in the Code. Virginia regulates where firearms cannot be carried or fired. *Va. Code § 18.2-308.1 (2007)* (banning firearms in schools), *Va. Code § 18.2-287.01 (2007)* (making it illegal to carry a weapon in an air carrier airport terminal), *Va. Code § 18.2-283.1 (2007)* (forbidding weapons in courthouses), *Va. Code § 18.2-286 (1994)* (prohibiting shooting from a firearm in or across a street), *Va. Code § 18.2-280 (2005)* (providing criminal sanctions for willfully discharging a firearm in public places). The Code delineates a standard of care in owning and operating firearms. *Va. Code § 18.2-56.1 (2010)* (criminalizing the reckless handling of a firearm), *Va. Code § 18.2-280 (2005)* (making it illegal to hunt with a firearm while intoxicated). Virginia also regulates the transfer and record maintenance for firearms. *Va. Code § 18.2-108.1 (1998)* (making it illegal to knowingly buy a stolen firearm), *Va. Code § 18.2-308:2* (criminalizing the sale of firearms to persons knowingly prohibited from possessing firearms), *Va. Code § 18.2-308.2:2 (2009)* (setting forth requirements for dealers to conduct background checks before the sale of a firearm), *Va. Code § 18.2-311.1 (1975)* (prohibiting the alteration or removal of serial codes on firearms).

Virginia's once-a-month rule

Virginia law also regulates the frequency in which a person can buy a handgun. Section 18.2-308.2:2(P) of the Virginia Code prohibits non-dealers from buying more than one handgun in a 30 day period unless the gun is an antique, the purchaser is affiliated with law enforcement, or extra permitting measures are applied for and approved. *Va. Code §§ 18.2-308.2:2(P)(1-3) (2009)*. Challenges are expected against this portion of the statute because it is similar to the same prohibitions that were struck down in *Heller* and in *McDonald*.

The Second Amendment right that the Supreme Court affirms in *Heller* and *McDonald* is not limited to the right to own handguns. Rather, handguns are viewed in the broader context of self-defense. The Court holds that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." *McDonald*, 130 S. Ct. at 3023. The need for self-defense, explains Justice Scalia in *Heller*, "is most acute" at home. *Id. quoting Heller*, 128 S. Ct. at 2783. Applying the basic right of self-defense at home to the law in question, the Court concluded that "this right applies to handguns because they are 'the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family.'" *Id. quoting Heller*, 128 S. Ct. at 2783.

The distinction between the right to self-defense and the right to own handguns is an important line to draw when analyzing a potential challenge to Virginia's once-a-month rule. Virginia permits handgun owners to buy multiple handguns, but merely regulates the timing of those acquisitions. Furthermore, Virginia law allows a non-dealer to purchase multiple handguns in a 30 day period if he/she submits an application to the Virginia Department of State Police along with the Firearm Sales Report already required by the Bureau of Alcohol, Tobacco and Firearms. *Va. Code § 18.2-308.2:2(P)(1) (2009)*.

To successfully argue a challenge to the Virginia law, a litigant would need to convince the federal judiciary that an application process to purchase more than one handgun in a 30 day period infringes on his or her Second Amendment right to self-defense in the home. It is difficult to understand how multiple handguns, as opposed to just one handgun, aid in one's self-defense, much less multiple handguns purchased without a special application within days of each other. Based on the minimal regulations in Virginia law regarding the purchase of multiple handguns, it is unlikely that this statute will be overturned

in the interest of Second Amendment self-defense rights in the home.

Conclusion

Comparing the Supreme Court's holdings on permissible firearm regulations and Virginia's laws governing firearms yields the conclusion that Virginia law is well within Constitutional bounds on firearms issues. Virginia's minimal regulations do not infringe on handgun ownership nor do they affect citizens' rights to self defense. Furthermore, Virginia does not allow localities to ban firearms from local government buildings, a firearm regulation explicitly allowed by both of the Supreme Court decisions. With minimal state-wide regulations and sparse enabling statutes for localities, Virginia will likely avoid a successful challenge to any of its current firearms legislation.

If you would like to suggest topics for future publications, contact Mark Flynn at P.O. Box 12164, Richmond, VA 23241, 804/523-8525, mflynn@vml.org