

The Record

Opinion

Sun. 08.01.10

Op-Ed: Throwing the book at gun laws

Sunday, August 1, 2010

LAST UPDATED: FRIDAY JULY 30, 2010, 4:34 PM

BY DANIEL SCHMUTTER

THE RECORD

Daniel Schmutter is a litigation attorney focusing on environmental, commercial real estate and business law. He represented Jews for the Preservation of Firearms Ownership as amicus curiae before the U.S. Supreme Court in both the Heller and McDonald cases and currently represents the Association of New Jersey Rifle and Pistol Clubs in its challenge to New Jersey's one-gun-a-month law.

THE constitutional rights of New Jersey gun owners may finally have their day in court after the recent decision of the U.S. Supreme Court in *McDonald v. City of Chicago*.



LANCE THEROUX / THE RECORD

On June 28, the court decided an important follow-up ruling to the landmark 2008 decision in *District of Columbia v. Heller*, in which the court ruled that the Second Amendment guarantees an individual right to keep and bear arms. In *Heller*, the court concluded that the District of Columbia handgun ban could not be reconciled with the basic right of law-abiding individuals to defend themselves and their families in their homes.

The *Heller* case only addressed the application of the Second Amendment to federal law and federal enclaves. Now, in *McDonald*, the court ruled that the Second Amendment right to keep and bear arms is a fundamental right that extends fully to state and local laws as well.

The court ruled that the right to keep and bear arms, guaranteed by the Second Amendment, is on par with all other fundamental constitutional rights that constrain the scope of state and local law.

At issue was Chicago's law, which largely bans all handgun possession within that city – a law very similar to the handgun ban that was invalidated in the Heller case.

What it means for New Jersey

Since the McDonald case was decided, there has been much speculation by commentators about what the ruling means for other gun control laws around the country. Certainly there has been such speculation here in New Jersey, which has perhaps the strictest gun laws in the nation.

Some gun control advocates have declared that the McDonald case (and the Heller case before it) will not affect most laws currently in place because they simply constitute “reasonable regulation” of the purchase and possession of guns. However, nowhere in either Heller or McDonald did the Supreme Court rule that so-called “reasonable” laws are valid under the Second Amendment.

Accordingly, anyone who defends a law claiming that it is “reasonable” is not stating any legal standard or offering any basis upon which to judge whether such a law would survive a legal challenge.

As it turns out, New Jersey gun law offers fertile ground for challenge, not merely because the state has such strict laws but because New Jersey law is exceedingly aggressive toward the law-abiding gun owner.

New Jersey's regulatory scheme is highly unusual in that it approaches gun control by categorically banning guns and then carving out extremely limited exceptions to the prohibitions.

Thus, for example, possession of handguns is generally prohibited unless the possession falls within certain narrowly defined exemptions, such as possession inside one's home or place of business.

This has two main effects. First, it shifts the burden of proving lawful possession to the gun owner. Second, it keeps the circumstances under which one may lawfully possess a handgun very narrow.

Regulation of books?

Imagine the absurdity of such a scheme for regulating the possession of books: Possession of books is banned, except that one may possess books in one's home or place of business. It is difficult to imagine such a law passing muster under the First Amendment – not

because it does not allow us to read books – it does. In fact, such a law allows us to read all sorts of books.

Rather, such an approach to books is inconceivable because we do not approach fundamental rights in this manner. We do not box fundamental rights into tight corners and require that people shoehorn themselves into a cubby in order to exercise them.

As with handgun possession in New Jersey, a book possession law of this type would place the burden of proof on the book owner to prove that he falls within one of the exceptions or face time in prison.

If it is lawful to possess a book in one's home, does that mean it is lawful to read a book while sitting on one's porch? How about in one's backyard? These questions sound absurd, but they are precisely the questions New Jersey gun owners face every day because New Jersey gun law treats gun owners as criminals unless they can show that they are not.

Limiting the use of guns

New Jersey courts have made it clear that gun laws are to be interpreted and applied as unfavorably as possible against the gun owner. In a 1973 case, *State v. Valentine*, the court declared: "The overriding philosophy of our Legislature is to limit the use of guns as much as possible."

Similarly, in a 1996 case, *State v. Pelleteri*, the court declared: "When dealing with guns, the citizen acts at his peril."

The New Jersey Legislature must face the reality that the gun owner and the book owner alike must be treated with equal constitutional dignity. After *McDonald*, we now see that the emperor has no clothes.

New Jersey gun law is upside down, and if the New Jersey Legislature does not fundamentally reform its scheme of regulating guns, the courts will likely do it for them.