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A Second Amendment Quartet

Heller and *McDonald* in the Lower Courts

INTRODUCTION

In the two years since the United States Supreme Court decided *McDonald v. City of Chicago*,¹ and the four years since the Court decided *District of Columbia v. Heller*,² lower federal and state courts have faced a flood of challenges to existing gun regulations and have attempted the daunting task of extrapolating the right declared in *Heller* and *McDonald*—for citizens to possess a gun in the home for self-defense—to circumstances not considered by the Court. This process has inevitably produced conflicting opinions in the lower courts, with several notable opinions coming just this year from federal district courts in Maryland and Massachusetts.

The *Maryland Law Review*, in this quartet of responses to Second Amendment opinions in the lower courts, considers several decisions that built on *Heller* and *McDonald* to find gun rights in new places. In *Woollard v. Sheridan*,³ Judge Benson Everett Legg of the United States District Court for the District of Maryland held that Maryland’s handgun carry law, which requires an individual to show a “good and substantial” reason to obtain a permit for carrying a gun in public, was unconstitutional.⁴ Applying intermediate scrutiny, Judge Legg found that Maryland’s handgun permitting scheme was not reasonably adapted to a substantial governmental interest. Acknowledging that public safety is a substantial interest, the court held the permitting scheme to be a “rationing system” aimed at reducing the total number of firearms carried in public, but without doing so in a logical manner sufficiently tailored to the public safety goal.⁵ “[T]he right to bear arms,” Judge Legg concluded, “is not limited to the home.”⁶

1. 130 S. Ct. 3020 (2010).

2. 554 U.S. 570 (2008).

3. Civil No. L-10-2068, 2012 WL 695674 (D. Md. Mar. 2, 2012).

4. *Id.* at *1.

5. *Id.* at *10.

6. *Id.* at *7.

Other courts have reached different conclusions. In *Moore v. Madigan*, a Central District of Illinois judge found that Illinois' law that criminalized carrying or possessing a handgun outside the home was, in fact, constitutional.⁷ The court found that the right recognized in *Heller* and *McDonald* was a narrow one—"the right of law-abiding, responsible citizens to use arms in defense of hearth and home"⁸—and that this right did not extend outside of the home.⁹ A federal district court in New Jersey reached a similar finding in upholding a New Jersey public carry law.¹⁰

Meanwhile, a District of Massachusetts court examined whether the Second Amendment right extended to non-citizens.¹¹ Noting that the *McDonald* plurality incorporated the right to apply against the states under the Fourteenth Amendment's Due Process Clause, which by its text applies to "any person,"¹² the court held that lawful permanent residents have a Second Amendment right to bear arms.¹³ But, as Professor David S. Cohen points out in his contribution to this set of essays, only four members of the Court approved of incorporation through due process (Chief Justice Roberts and Justices Alito, Kennedy, and Scalia).¹⁴ Justice Thomas, who provided the crucial fifth vote for incorporation in *McDonald*, relied on the Privileges or Immunities Clause of the Fourteenth Amendment,¹⁵ which only applies to "citizens of the United States."¹⁶ That means there was no majority on the Court to incorporate the right to bear arms for non-citizens.

Cohen therefore suggests that the District of Massachusetts court erred in its holding, and that the court instead should have interpreted *McDonald* by looking to the Court's narrowest possible holding on the issue facing the Massachusetts court.¹⁷ In this case, the narrowest possible holding would have been one that incorporates the Second Amendment right for citizens only.¹⁸

7. No. 11-cv-03134, 2012 WL 344760 (C.D. Ill. Feb. 3, 2012).

8. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

9. *Moore*, 2012 WL 344760, at *1.

10. *Piszczatoski v. Filko*, Civ. No. 10-06110 (WHW), 2012 WL 104917 (D.N.J. Jan. 12, 2012).

11. *Fletcher v. Haas*, No. 11-10644-DPW, 2012 WL 1071713 (D. Mass. Mar. 30, 2012).

12. U.S. CONST. amend. XIV.

13. *Fletcher*, 2012 WL 1071713, at *8, *13.

14. David S. Cohen, *McDonald's Paradoxical Legacy: State Restrictions of Non-citizens' Gun Rights*, 71 MD. L. REV. 1219 (2012).

15. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring).

16. U.S. CONST. amend. IV.

17. Cohen, *supra* note 14, at 1220, 1227.

18. *Id.* at 1228.

Professor Richard C. Boldt argues that Judge Legg's opinion in *Woollard* is out of step with the Burkean minimalist approach of *Heller*.¹⁹ The *Heller* and *McDonald* Courts, Boldt writes, "signaled an intention to go slowly and to build up the law with considerable regard for well-established policies and practices, plausibly including regulations governing the issuance of handgun carry permits."²⁰ In finding a Second Amendment right to bear arms outside the home, Judge Legg chose a more aggressive path, ignoring the cautionary signals provided by the Court in *Heller* and *McDonald*.²¹

Sounding a similar note, Dennis A. Henigan, in his contribution to this quartet, considers the Fourth Circuit case *United States v. Masciandaro*,²² suggesting that it provided a way forward for Judge Legg in *Woollard*.²³ In *Masciandaro*, the United States Court of Appeals for the Fourth Circuit upheld a conviction for possessing a loaded handgun in a motor vehicle in a national park.²⁴ Writing for the court, Judge J. Harvie Wilkinson III urged caution in expanding the right to bear arms beyond what the Supreme Court allowed in *Heller* and *McDonald*. "This is serious business," Judge Wilkinson wrote.²⁵ "We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-fetched to think the *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square."²⁶

Henigan writes that Judge Legg ignored the guidance of *Masciandaro*, misread *Heller*, and underestimated the threat posed by firearms carried in public—and the state's significant public safety interest in minimizing guns in public.²⁷ While guns in the home are largely a threat to one's family and friends, guns carried in public "constitute a threat to a far greater universe of individuals, including law enforcement officers, random passersby, and other private citizens," Henigan writes. "The risk from an individual's decision to car-

19. Richard C. Boldt, *Decisional Minimalism and the Judicial Evaluation of Gun Regulations*, 71 MD. L. REV. 1177, 1178–79 (2012).

20. *Id.* at 1184.

21. *Id.* at 1187.

22. 638 F.3d 458 (4th Cir. 2011).

23. Dennis A. Henigan, *The Woollard Decision and the Lessons of the Trayvon Martin Tragedy*, 71 MD. L. REV. 1188 (2012).

24. *Masciandaro*, 638 F.3d at 460.

25. *Id.* at 475.

26. *Id.* at 475–76.

27. Henigan, *supra* note 23, at 1188, 1191.

ry a gun in public is borne almost entirely by persons who had no say in that decision and, if the carrying is concealed, no knowledge of the decision.”²⁸

John R. Lott, Jr., in his contribution to this issue, argues that the risks of allowing the public carry of guns have been exaggerated and misunderstood.²⁹ Lott notes that for gun regulations to be valid, they must survive either strict or intermediate scrutiny. He argues that while the governmental interest of public safety is certainly compelling, laws that strictly regulate the carrying of guns are not sufficiently tailored to that public safety purpose.³⁰ Citing studies of his own and others, Lott concludes, “[V]iolent crime falls after right-to-carry laws are adopted, with bigger drops the longer the right-to-carry laws are in effect.”³¹ Further, he reports, the higher the percentage of a state’s population with carry permits, the more crime will fall from its pre-carry levels.³² In Maryland, Lott says, this means that if Judge Legg’s ruling stands, it will soon become a non-issue.³³

Our hope is that these pieces will contribute to the public discussion over gun regulations—a discussion that was reshaped by *Heller* and *McDonald* and remains in its infancy. As cases like *Woollard* move through the court system, the scope of the Second Amendment right will come into focus and some of the questions presented in this symposium will be answered. But with an issue as fraught and grave as guns, the debate is sure to continue.

STEPHEN KIEHL

28. *Id.* at 1200.

29. John R. Lott, Jr., *What a Balancing Test Will Show for Right-to-Carry Laws*, 71 MD. L. REV. 1205 (2012).

30. *Id.* at 1206.

31. *Id.* at 1212.

32. *Id.*

33. *Id.* at 1218.