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March 20, 2012

Opinion No. 12-40

Constitutionality of Bill Limiting Property Owner's Prohibition of Firearms in Vehicles

QUESTION

Is Senate Bill 3002/House Bill 3560, 107th General Assembly, 2nd Sess. (2012) (hereinafter "SB3002") constitutionally defensible?

OPINION

Yes. While there is limited case law on this issue and a difference of opinion among commentators, two courts in other jurisdictions have upheld bills similar to SB3002 against constitutional challenges.

ANALYSIS

SB3002 proposes to prohibit "a business entity, or owner, manager, or legal possessor of real property, or public or private employer" from establishing, maintaining, or enforcing "a policy or rule that prohibits or has the effect of prohibiting a person's transportation or storage of a firearm or ammunition." SB3002, § 1(b). The prohibition would only apply when:

> (1) The firearm or ammunition:
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> > (A) Is kept from ordinary observation within the person's attended, privately-owned motor vehicle; or
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> > (B) Is kept from ordinary observation and locked within the trunk, glove box, or interior of the persons' privately owned motor vehicle or a container securely affixed to such vehicle; and
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> (2) The vehicle is operated or parked in a location where it is otherwise permitted to be.

Id. at § 1(b)(1). The bill expresses a legislative intent "to reinforce and protect the right of each citizen to lawfully transport and store firearms within his or her private motor vehicle for lawful purposes in any place where the vehicle is otherwise permitted to be," and by its terms, the bill "is to be liberally construed to effectuate this purpose." *Id.* at § 1(g).

As one Tennessee legislator has commented, SB3002 pits two important principles squarely against each other, the right to bear arms versus the right of an individual or business to control what occurs on their own private property. Bills similar to SB3002 have generated vigorous debate and much scholarly commentary. *Compare* Dayna B. Royal, *Take Your Gun To Work And Leave It In The Parking Lot: Why The OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 Fla. L. Rev. 475 (July 2009) (arguing such laws are not preempted by OHSA) *with* J. Blake Patton, Notes, *Pro-Gun Property Regulation: How The State of Oklahoma Controls the Property Rights of Employers Through Firearm Legislation*, 64 Okla. L. Rev. 81 (Fall 2011) *and* Esther Glazer-Esh, Note*, Florida's "Guns-at-Work" Law: Why It Has Employers Up In Arms And What the Florida Legislature Should Do About It*, 64 U. Miami L. Rev. 663 (January, 2010) (both articles suggesting these laws are constitutionally suspect on a number of grounds).

To date three courts in other jurisdictions have considered constitutional challenges to similar statutes enacted in those states, and the case law will in all probability continue to develop with the proliferation of these type statutes. Specifically, courts have addressed whether these statutes (1) violate the Supremacy Clause of Article VI of the United States Constitution because the issue is preempted by the Occupational Health and Safety Act of 1970, codified at 29 U.S.C. §§ 651 to 700 ("OHSA"), (2) constitute an unconstitutional taking without just compensation under the Fifth Amendment of the United States Constitution, and (3) violate the Due Process Clause of the Fourteenth Amendment of the Constitution. The courts that have addressed these issues as related to bills similar to SB3002 have to date found such bills constitutionally defensible against a challenge on any of these bases.[1]

Preemption

In *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009), the court considered whether OHSA preempted an Oklahoma statute that limited a property owner's ability to prohibit the transportation or storage of firearms in a locked motor vehicle on the owner's property. As the court observed, "[d]etermining whether Congress *intended* to preempt state law is the ultimate touchstone of preemption analysis." *Id*. at 1204 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992)) (emphasis added). The court noted that the statute "implicate[s] Oklahoma's police powers, an area traditionally controlled by the states." *Id*. at 1205. It went on to conclude that OSHA "has not indicated in *any* way that employers should prohibit firearms from company parking lots." *Id*. at 1206 (emphasis added). With no preemption by OSHA, the Tenth Circuit concluded that the Oklahoma statue did not violate the Supremacy Clause. *See also Florida Retail Federation, Inc. v. Att'y Gen. of Florida*, 576 F.Supp.2d 1281, 1297-99 (N.D. Fla. 2008) (concluding that OSHA did not preempt Florida's statute prohibiting a business owner from limiting the storage of firearms in vehicles by employees or customers on the owner's property).

[1] One court did determine that a statute similar to SB3002 enacted in Oklahoma was unconstitutional because it was preempted by OSHA's general provision codified at 29 U.S.C. § 654(a) requiring employers to furnish employees with a place of employment free of recognized hazards causing or likely to cause death or serious physical harm. *ConocoPhilips Co. v. Henry,* 520 F. Supp.2d 1282, 1329 (N.D. Okla. 2007), *rev'd sub nom., Ramsey Winch Inc. v. Henry,* 555 F. 3d 1199 (10th Cir. 2009). However, that finding was subsequently reversed on appeal by the Tenth Circuit Court of Appeals. *Ramsey Winch,* 555 F.3d at 1205-08.

Taking

The Tenth Circuit in *Ramsey Winch* likewise considered whether the Oklahoma statute constituted an unconstitutional taking without compensation, in violation of the Takings Clause of the Fifth Amendment. In finding no constitutional violation, the court rejected the challengers' argument that the statute effectively created an easement for individuals transporting firearms. The court reasoned that the statute is not a "per se taking," which requires a permanent physical occupation or invasion, but rather is simply a restriction on the use of private property. *Ramsey Winch*, 555 F.3d at 1208-09.

The court also rejected the challengers' argument that the statute was the functional equivalent of a taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which requires a weighing of (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id*. at 124. "In essence, *Penn Central* focuses on „the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Ramsey Winch*, 555 F.3d at 1210 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005)). The Tenth Circuit found that none of these factors weighed in favor of finding a functional taking. The only "economic impact" asserted was unstated and unquantified "costs linked to workplace violence." *Id*. at 1210. Furthermore, the statute did not interfere with investment-backed expectations, for "the „right to exclude others' is [not] so essential to the use or economic value of th[e] property that the state-authorized limitation of it amount[s] to a „taking.'" *Id*. (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980)).

Likewise, in *Florida Retail Association,* the court reasoned as follows why Florida's statute limiting a business owner's ability to prohibit guns from the vehicles of employees and customers does not constitute a taking:

> Nor does the statute effect a taking. The plaintiffs and their members—to the extent they are covered by the statute at all—may continue to operate their businesses or not at their own election, exactly as they could before the statute was adopted. They may continue to decide for themselves whether to provide parking for workers or customers. The statute does not affect the number, identity, or location of people or vehicles on the property, or the frequency of their coming and going. The only change the statute makes is that, if a business chooses to provide parking, the business may not keep guns from being secured in a vehicle. This is not a taking.

Florida Retail Association, 576 F.Supp.2d at 1289.

Substantive Due Process

A legislative act such as SB3002 "will withstand a substantive due process challenge if the government identifies a legitimate governmental interest that the legislative body could rationally conclude was served by the legislative act." *Parks Properties v. Maury County*, 70

S.W.3d 735, 744 (Tenn. Ct. App. 2001). The Supreme Court has "long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation." *Ramsey Winch,* 555 F.3d at 1210 (quoting *Lingle v. Chevron U.S.A., Inc.,* 528, 544 U.S.)(2005)).

In *Florida Retail Association,* the challengers argued that prohibiting business owners from limiting firearms from the vehicles on their property deprived the business owners of substantive due process in violation of the Fourteenth Amendment. The court reasoned that the Florida statute was rationally related to a legitimate governmental interest and, thus, did not violate due process, stating:

> The issue, then, is simply whether the substantive component of the Due Process Clause prohibits a state from requiring a business to allow guns in its parking lot in these circumstances.
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> An important part of the analysis of this issue is the factual question of the statute's likely real-world effect. The parties have joined issue on this, submitting competing expert affidavits and taking unyielding positions. The plaintiffs suggest that a gun in the parking lot will invariably increase the risk of an unlawful or accidental shooting with no offsetting benefit, because, they say, the gun will be available to an irate worker who may use it improperly but will never be available to an honest worker in time to be used defensively to successfully avert a crime. The defendants, in contrast, say a gun in the parking lot will have great benefit in averting crime and will never lead to the gun's improper use.
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> Common sense and human experience suggest the truth lies between these extremes. The statute will rarely make any difference at all but may sometimes cause a result that is positive, sometimes negative. The steps in the analysis that lead to this conclusion are as follows.
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> First, a gun stored in a vehicle in a parking lot while the gun owner is at work will almost always stay in the vehicle and affect nobody's safety one way or the other. The possibility that a gun may be in a vehicle will have little deterrent effect on others.
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> Second, some workers keep guns in their vehicles, and some do not. Some who keep guns in their vehicles—but surely not all—would comply with a directive from the business for which they work not to continue the practice. Of those who would abide a directive, many, perhaps most, do not have and will not obtain concealed-carry permits; the statute does not affect a business's right to ban their keeping of guns in their vehicles. The statute's only effect, therefore, will be on workers who have or who obtain concealed-carry permits, keep guns in their vehicles, and would abide a directive not to do so. The statute will affect the number of guns in the parking lot only at the margin.
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> Third, sometimes—though rarely—a worker with a gun in the vehicle will use it for lawful purposes to avert a crime. The plaintiffs say there will never be time to

> do this, but that is wrong for two reasons. Occasions for the lawful defensive use of a gun do not always arise in a split second; they sometimes develop over enough time to allow the retrieval of a gun from a parking lot, especially if the parking lot is close to the individual's work station, as it sometimes is. More importantly, a worker who keeps a gun in the vehicle while at work will have it while en route to and from his or her job, but a worker who parks in the company parking lot and complies with a rule prohibiting the keeping of a gun there will not. The worker with the gun may use it coming or going from work (or in his or her related travels) for lawful defensive purposes.
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> Fourth, a gun in the parking lot sometimes—though rarely—will be used by an irate worker to commit a crime that would not occur if the gun were not readily available. A worker who would do this would probably be among those least likely to abide a directive not to bring a gun on the property, but it may sometimes happen that a worker who would have abided a directive will nonetheless go ballistic. Also, a gun in the parking lot sometimes—though rarely—may be stolen and used to commit a crime that would not occur if the gun were not there.
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> These common sense conclusions might lead a reasonable legislator to conclude that allowing workers with concealed-carry permits to keep guns in business parking lots would have either a small net positive or small net negative effect on overall public safety. So a state legislature might reasonably choose to give such a worker a right to keep a gun in a vehicle in the parking lot. Or a legislature might reasonably choose to prohibit guns in the parking lot. Or a legislature might reasonably choose to leave it to the property owner to decide whether to allow or ban guns in the parking lot—precisely the approach the Florida Legislature took prior to July 1, 2008.
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> As of that date, the Legislature changed tack and adopted the statute allowing a worker with a concealed-carry permit to keep a gun in the vehicle while at work, with or without the permission of the business for which he or she works. This was within the Legislature's constitutional authority.

Florida Retail Association, 576 F. Supp.2d at 1290-91.

Similarily, SB3002 incorporates a legislative intent "to reinforce and protect the right of each citizen to lawfully transport and store firearms within his or her private motor vehicle for lawful purposes in any place where the vehicle is otherwise permitted to be." SB3002, § 1(g). Thus, like the Florida court, a Tennessee court could conclude that this legislative intent represents a legitmate state interest and SB3002 is rationally related to advancing this interest. *See also Ramsey Winch,* 555 F.3d at 1211 (the court reasoning that "[b]ecause we cannot say the Amendments have no reasonably conceivable rational basis, Plaintiffs' due process claim must fail.")

Accordingly, while the matter has been subject to limited court review, the decisions rendered to date indicate that SB3002 is constitutionally defensible against challenges of preemption by OHSA, unconstitutional taking, or violation of substantive due process standards.

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