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Trevor Shaw

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THE CONSTITUTIONALITY OF REGULATIONS AND BANS ON THE SECOND AMENDMENT

Trevor Shaw

I. INTRODUCTION

The 9th Circuit decided to overturn a local California county zoning ordinance that was infringing upon a citizen's Second Amendment right to own and operate a gun store.¹ The ordinance stated that any store that sold firearms or operated as a firing range needed to be 500 feet away from the front door of the shop to the front door of school zones, government buildings, residential areas, and other stores that sell firearms.² The owners of Valley Guns & Ammo found a place located in Alameda County, just outside the radius and began working on acquiring the property and renovating it into their gun store and firing range.³ During this time period, the county came by and informed the owners that they could not operate their gun store at the building because their store would be located inside the disqualifying radius.⁴ The building that was to be used had only one door, and the owners had measured the distance from the front door to the nearest disqualifying property's front door at 532 feet away.⁵ The court declined to address the factual issue of the county improperly measuring the distance, and instead determined the constitutionality of a zoning ordinance that regulates the Second Amendment.⁶

The owners of the store appealed the zoning violation, claiming that they were outside the radius as described by the statute.⁷ The county measured from the exterior wall of the store to the nearest "residential property line rather from door to door," putting the property 54 feet too close to the clos-

1. *Teixeira v. County of Alameda*, 822 F.3d 1047, 1051 (9th Cir. 2016).

2. *Id.* at 1050.

3. *Id.*

4. *Id.* ("[T]he 500-foot zoning requirement was to be measured from the closest door of the proposed business location to the front door of any disqualifying property").

5. *Id.*

6. *Id.* at 1051.

7. *Id.*

est disqualifying property marker.⁸ Once the case reached the 9th Circuit, the court overturned the lower court's decision, holding that the ordinance as read and interpreted by the lower court was a violation of the storeowner's Second Amendment rights.⁹ The court recognized the importance of protecting one's fundamental rights from an overbearing government ordinance.¹⁰ This ruling gained a great deal of criticism from the public and the fellow judges, especially in the dissent which claimed that this was not a Second Amendment claim, but merely a zoning issue made to look like a Second Amendment claim.¹¹

II. BACKGROUND

A. History of the Second Amendment

The Second Amendment is one of the core principles rooted in the Constitution, and has been a widely debated subject in recent years.¹² The right to bear arms was laid out during the founding of this country when the Bill of Rights was ratified.¹³ The Second Amendment is viewed primarily in two ways: 1. That it is a collective right, meaning that this right is limited, and is available to protect against "overreaching by the national government."¹⁴ The collective right standpoint views the Second Amendment as a right that applies to the states, and somewhat as to the individuals, in the sense that they are afforded this right so long as they are enlisted in the state militia to prevent a tyrannical government from taking over.¹⁵ 2. The Second Amendment is an individual right, which makes it a broader right for one to possess a firearm.¹⁶ When viewing the Second Amendment as an individualistic right, proponents look to the portion of the Second Amendment that states, "...the right of the people to keep and bear Arms, shall not be infringed."¹⁷ This viewpoint focuses on the fact that the Second Amendment is a right that cannot be taken away, and that it applies not just to the states,

8. *Id.*

9. *Id.* at 1063.

10. *Id.* at 1055. (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1977)).

11. *Id.* at 1064.

12. Cameron Desmond, *From Cities to Schoolyards: the Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1046 (2008) (The discussion of the Second Amendment, mainly about whether it is an individual right or a collective right).

13. *McDonald V. Chicago*, 561 U.S. 742 at 769. (stating that the Second Amendment is a fundamental right that was established when the United States was founded).

14. Desmond, *supra* note 12, at 1047.

15. *Id.*

16. *Id.*

17. *Id.*

but to the individual people as well.

Today, the landmark case that controls the issue of selling firearms is *Heller v. District of Columbia*, where the court's decision made clear that the Second Amendment was an individualized right.¹⁸ In coming to this conclusion, the court relied upon the language of the First, Fourth, and Ninth Amendments, where the language used makes those rights individual rights, and since the Second Amendment uses the same language, the court views it as an individual right.¹⁹ The court in *Heller* looked to the language of the Second Amendment and determined that the phrases “to keep and bear arms”²⁰ and “a well-regulated militia”,²¹ allowed U.S. citizens to partake in the use of a firearm in the home, and the commercial sale of firearms.²² The decision in *Heller* made it clear that the language of the Second Amendment states that we as citizens of the United States are given the ability to partake in the purchasing and selling of firearms.²³ This is not without restrictions though; the court did not conclude that the right to engage in the sale of firearms was to be unregulated.²⁴ It has been a longstanding tradition that there are to be some prohibitions on carrying a firearm in a “sensitive area” and who is allowed to own a firearm.²⁵

B. Post Heller Decisions and their effect on government regulations

The decision in *Heller* left open the question of whether the Second Amendment applies to the states through the Fourteenth Amendment Due Process Clause.²⁶ The case of *McDonald v. City of Chicago* dealt with the issue of whether a city ordinance prohibiting firearms was constitutional under the Second Amendment.²⁷ The Supreme Court held that the Due Pro-

18. David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L.REV. 230 (2014) (The court's ruling in *Heller*, protected the rights of a business to “provide Second Amendment services. . . regulation of how firearms are commercially sold enjoy a presumption of constitutionality, which does not extend to prohibitions of firearms sales.”).

19. *Heller v. District of Columbia*, 554 U.S.570, 579-80 (2008) (The use of the phrase “right of the people” in the first and fourth amendments as well as the second, refers to the people being able to exercise their rights individually instead of collectively).

20. U.S. CONST Amend. II.

21. *Id.*

22. *Heller*, 554 U.S. at 628, 631.

23. Kopel, *supra* note 18, at 237.

24. *Heller*, 554 U.S. at 626-27.

25. *Id.* (Certain people are not allowed to own a firearm such as, felons and the mentally ill. There are also certain areas where one is prohibited from carrying a firearm “such as schools and government buildings”).

26. *McDonald v. City of Chicago*, 561 U.S. 742, 758-59 (7th Cir. 2010).

27. *Id.* at 750 (Chicago claimed that the Second Amendment did not apply to it be-

cess Clause encompasses the Second Amendment and as such applies to the states, which renders ordinances outlawing firearms unconstitutional.²⁸

After the Supreme Court's decision in *McDonald* to strike down the city of Chicago's ordinance, the city council met and came up with another ordinance to replace the one that the Supreme Court struck down.²⁹ The new code prohibited the use of a firearm outside of a home, the sale of firearms, and limited the number of functional firearms a citizen may have.³⁰ The new code also employed a rigorous process in order to obtain a permit for a firearm³¹ and prohibited "all shooting galleries, firearm ranges, or any other place where firearms are discharged."³² When the Supreme Court looked at the ban on firing ranges, it held that the right to "possess firearms"³³ includes the ability to use those firearms and "maintain proficiency."³⁴ The Supreme Court overruled the district court's decision and determined that the ban on firing ranges was unconstitutionally infringing upon citizens' Second Amendment rights.³⁵

B. Standard of Review for 2nd amendment claims

One of the issues surrounding any Second Amendment challenge is the standard of review that the court uses to determine the constitutionality of the claim.³⁶ The ruling in *Heller* made clear that the right to sell firearms is a qualified right, and because the court left open the question of the standard of review, we must look to what other courts have decided on this issue.³⁷ While *Heller* did not set forth the standard of scrutiny necessary for

cause the Bill of Rights is only applicable to the federal government, and not the states).

28. *Id.* at 791.

29. *Ezell v. City of Chicago*, 651 F.3d 684, 690 (7th Cir. 2011).

30. *Id.*

31. *Id.* (Must be 21 years old in order to apply for a permit, all firearms must have a registration certificate, if under between 18 and 20 must have a parent or guardian's written consent, and they must also have a permit).

32. *Id.*

33. *Id.* at 704.

34. *Id.* (The right to bear arms would not hold much weight if those that were allowed to exercise that right were not able to practice and train with those firearms).

35. *Id.* at 711.

36. *Heller v. District of Columbia*, 554 U.S. 570, 634 (declining to set a standard of review for Second Amendment claims).

37. *Kopel*, *supra* note 18, at 232-33, 236; *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) ("[I]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." (*quoting* *Heller v. District of Columbia*, 554 U.S.570, 628 (2008))).

Second Amendment claims, other courts have decided to use a heightened form of scrutiny.³⁸ The court in *United States v. Chovan*, held that the appropriate level of scrutiny is determined by a two-part test.³⁹ First, the court looks to see if “the challenged law burdens conduct protected by the Second Amendment” then, “if so, directs courts to apply an appropriate level of scrutiny.”⁴⁰ This test leads us to using an intermediate level of scrutiny in determining the validity of any regulation revolving around the Second Amendment.⁴¹ Using this heightened form of scrutiny puts the burden on the government to show that the statute/regulation/ordinance is a reasonable means of achieving their goal.⁴²

III. ANALYSIS

A. How the zoning ordinances can equate to a ban on Second Amendment rights

The court’s ruling in *Teixeira* is one that secures a fundamental right we have as citizens, the right to bear arms, and stops an overbearing government from preventing citizens from exercising that right.⁴³ The zoning ordinance in *Teixeira*⁴⁴ forces gun store owners to be able use only specific parcels of land which, if there are none available, equates to a ban of gun stores.⁴⁵ For future regulations on gun control, it is imperative that the local governments authorizing these ordinances and zoning laws be required to show that the regulation is substantially related to the government’s interest.⁴⁶

When a business is providing a constitutionally protected service, they are afforded the right to challenge those ordinances that negatively impact their business.⁴⁷ Since the Supreme Court has determined that the Second Amendment is an individual right, when evaluating a violation of one’s

38. *Chovan*, 735 F.3d at 1137.

39. *Id.* at 1136.

40. *Id.*

41. *Teixiera v. County of Alameda*, 822 F.3d 1047, 1058-60 (9th Cir. 2016).

42. *United States v. Chovan*, 735 F.3d at 1139 (“(1) The government’s stated objective to be significant, substantial, or important; and (2) A reasonable fit between the challenged regulation and the asserted objective.” (*citing* U.S. v. Chester, 628 F.3d 673, 683 (4th Cir. 2010))); see also *Ezell*, 631 U.S. at 706.

43. *See Teixeira*, 822 F.3d at 1054.

44. *Id.*

45. *Id.*

46. *Chovan*, 735 F.3d at 1139 (Forcing zoning regulations to be substantially related to the prevention of gun control is necessary in order for the ordinance to be legal).

47. *Kopel*, *supra* note 18, at 233-234.

rights, it is analogous to look at how the court decided other cases involving fundamental rights.⁴⁸ This is exactly what the 7th circuit did; they equated the protections afforded to the first amendment to a bookstore selling pornography to a local gun ban.⁴⁹ When we look at these cases involving prohibitions of people being able to exercise their rights, the test of intermediate scrutiny is the most efficient form the government has to evaluate the constitutionality of statutes restricting our Second Amendment rights.⁵⁰

B. The future for commercial sale of firearms

As more regulations for gun control come up, we must be cautious in presuming that these regulations are constitutionally valid; they must be heavily scrutinized.⁵¹ The left leaning ideology regarding the Second Amendment has revolved around regulating the Second Amendment because they view it as a collective right, and their proposals are coming dangerously close to an effective ban on one of our fundamental rights.⁵² This view point focuses on the fact that this right belongs to the states, and only in the individual aspect that those in the military are allowed Second Amendment rights.⁵³ Were we to apply the collective rights approach, this would allow for almost any regulation on firearms to be passed, thus infringing upon our right to bear arms.⁵⁴ The majority of courts have determined that the Second Amendment is an individual right and applies to the people, not the states.⁵⁵ The Supreme Court has repeatedly stated that the Second Amendment is an individual right, which makes bans upon gun stores and firing ranges unconstitutional.⁵⁶

The rule that came down from *Heller* did not outlaw statutes that regulate the commercial sale of arms, but did establish that any regulation that acts as a ban against a citizen exercising their Second Amendment right was unconstitutional.⁵⁷ *Heller's* ruling does not revoke the longstanding traditions of preventing “felons and the mentally ill” from purchasing a firearm, or that there are sensitive areas where firearms should not be allowed.⁵⁸ These

48. *Id.*

49. *Ezell*, 651 F.3d at 708.

50. *Chovan*, 735 F.3d at 1139.

51. *Teixiera v. County of Alameda*, 822 F.3d 1047 (9th Cir. 2016); *Kopel*, *supra* note 18, at 237

52. *Desmond*, *supra* note 12, at 1047.

53. *Id.*

54. *Id.*

55. *McDonald v. City of Chi.*, 561 U.S. 742, 806 (2010) (citing *D.C. v. Heller*, 554 U.S. 570 (2008)).

56. *See supra* notes 31-32.

57. *Kopel*, *supra* note 18, at 236 (“There is a right to the commercial sale of arms, but it is a right that may be regulated by ‘conditions and qualifications’”).

58. *Id.* at 235-36.

exceptions to the Second Amendment prove that we as American citizens have a “general right to carry firearms,” and because of this, preventing the sale of firearms would be unconstitutional.⁵⁹ In *Teixeira*, the court used the reasoning from *Heller* to establish the right for gun stores to commercially sell firearms, and the right for people to maintain a proficiency in the use of a firearm.⁶⁰

C. How to Analyze Future Second Amendment Cases

The Supreme Court stated in *Heller* that they were to leave open the question of what the standard of review should be for a Second Amendment right issue.⁶¹ Cases following *Heller* have determined that there must be something higher than just a rational basis test, that this fundamental right must be given a heightened form of scrutiny.⁶² While the Supreme Court has still not given an answer as to the standard of review, the reasoning of *Chovan, Ill. Ass’n of Firearms Retailers, McDonald, Ezell, and Teixeira* should be enough to persuade the court to come down with an intermediate level of scrutiny.⁶³ The decision in *Chovan*, equated the Second Amendment’s scrutiny to that of the First Amendment, being that we must look closely at “the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”⁶⁴ In each of these cases the courts apply a heightened level of scrutiny for the Second Amendment, based in large part to the specific language of the amendments.⁶⁵

The Supreme Court will likely face a case revolving around the issue of regulating firearm sales and rights through zoning ordinances, and when they do they must view it similarly to that of a person exercising their First Amendment rights.⁶⁶ When looking at ordinances like the ones in *Teixeira* and *Ezell*, where they essentially say that this right can be exercised else-

59. *Id.*

60. *Teixeira v. Cty of Alameda*, 822 F.3d 1047, 1063 (9th Cir. 2016) (“[T]he County has failed to justify the burden it has placed on the right of law-abiding citizens to purchase guns.”).

61. *See supra* notes 34, 36.

62. *See supra* note 35.

63. *United States v Chovan*, 737 F.3d 1127 (9th Cir. 2013); *Teixeria*, 822 F.3d 1047; *McDonald v. City of Chi.*, 561 U.S. 742 (2010).

64. *Chovan*, 737 F.3d at 1138 (citing *United States v. Chester*, 628 F.3d at 682; *United States v. Marzazarella*, 614 F.3d 89, 96-97 (3rd Cir. 2010)).

65. *See generally Chovan*, 737 F.3d 1127; *Ill. Ass’n of Firearms Retailers v. City of Chi.*, 961 F. Supp. 2d 928 (Ill. Dist. Ct. N. Dist. 2014); *McDonald v. City of Chi.*, 561 U.S. 742 (2010); *Ezell v. City of Chi.*, 651 F.3d 684 (7th Cir. 2011); *Teixeira*, 822 F.3d 1047.

66. *Ezell*, 651 F.3d at 697.

where so it does not need to be exercised within a specified area.⁶⁷ Were we to apply this thinking to the first amendment and prevent citizens from exercising that right in a city upon the sole factor being that they can go somewhere else and exercise that right, we would be effectively banning a preexisting right.⁶⁸ There seems to be a split amongst the circuit courts, because some have declined to address the issue of a standard of review for Second Amendment cases, while others have taken this issue head on in cases like *Chovan*, *Teixeira*, and *Chester*. While the lower courts have not come to a consensus as to what the standard of review should be, the cases that have addressed the issue should provide significant persuasion to the Supreme Court to make a final ruling on zoning regulations involving the Second Amendment.⁶⁹

IV. CONCLUSION

The decision in *Teixeira* follows the lead of the Supreme Court and other jurisdictions who have concluded that the Second Amendment is in fact an individual right, and cannot be taken away from the people.⁷⁰ One of the key ideas that this case points out, and many other jurisdictions have reiterated, is that in order to exercise one's Second Amendment right they must be allowed to enjoy that right through commerce.⁷¹ *Teixeira* affirms what other courts have already stated; the Second Amendment is not a "second-class right," but one of the fundamental rights given to us through the Bill of Rights.⁷² While the Supreme Court still has several issues it needs to address in regards to the Second Amendment, they have determined that the commerce of firearms is a right that cannot be taken away.⁷³

67. *Id.* (The zoning law in Chicago prevented citizens from exercising their right in the city based on the idea that they could go elsewhere and exercise that right).

68. *Id.*

69. *See generally* *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047 (9th Cir. 2016).

70. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *see also* *Ezell*, 651 F.3d at 690.

71. *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1055 (9th Cir. 2016) ("One cannot truly enjoy a constitutionally protected right when the State is permitted to snuff out the means by which he exercises it; one cannot keep arms when the State prevents him from purchasing them."); *See also* *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 938 (N.D. Ill. 2014) ("The ban on gun sales and transfers prevents Chicagoans from fulfilling, within the limits of Chicago, the *most fundamental* prerequisite of legal gun ownership—that of simple acquisition.").

72. *Teixeira*, 822 F.3d at 1063 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)) ("The right of law abiding citizens to keep and to bear arms is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.'").

73. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008).