

8-26-2018

Second Amendment Challenges: What Level of Constitutional Scrutiny Applies?

C M. Timpson

Golden Gate University School of Law, lawreview@ggu.edu

Follow this and additional works at: https://digitalcommons.law.ggu.edu/ggu_law_review_blog



Part of the [Second Amendment Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Timpson, C M., "Second Amendment Challenges: What Level of Constitutional Scrutiny Applies?" (2018). *GGU Law Review Blog*. 54.

https://digitalcommons.law.ggu.edu/ggu_law_review_blog/54

This Blog Post is brought to you for free and open access by the Student Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in GGU Law Review Blog by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

SECOND AMENDMENT CHALLENGES: WHAT LEVEL OF CONSTITUTIONAL SCRUTINY APPLIES?

PUBLISHED ON *August 26, 2018* by *cmtimpson*



Las Vegas, Parkland, Santa Fe, these three places and many more bring up a variety of emotions in people because of the tragic mass shooting events that have occurred over the last year. Lately it seems every other day we get a notification of something gun related. Whether it's news of another fatal shooting spree or a new law being passed, guns and people's rights under the Second Amendment are being talked about on a near daily basis. Additionally, incidences of gun violence increase and guns negatively affect more people every year (<http://www.gunviolencearchive.org>). Proponents of the Second Amendment stand firm in their belief that there should be little to no restrictions on a person's ability to obtain and maintain ownership of a gun. Others believe there should be some limitations on the right to "keep and bear arms." In *District of Columbia v. Heller* (<http://www.scotusblog.com/wp-content/uploads/2008/06/07-290.pdf>), the Supreme Court upheld a person's individual right to bear arms for lawful purposes. In *Heller*, the Court also refused to apply rational basis review to challenges of laws that impact a person's enumerated rights such as the guarantee against double jeopardy, right to counsel and right to bear arms.

The question still remains as to what level of constitutional scrutiny is appropriate when a person's right to sell, rather than bear, arms is limited. This question was most recently addressed in *Teixeira v. County of Alameda* (<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/10/10/13-17132.pdf>). In *Teixeira*, an Alameda County ordinance required any business selling firearms to be at least five-hundred feet from: schools, day cares, any business selling liquor, other gun stores, and residential districts. Petitioners, John Teixeira, Steve Nobriga, and Gary Gamaza (collectively "Teixeira" or "Petitioners") sought to open a firearms store that was four-hundred fifty feet from the nearest residential property. Petitioners challenged the county zoning ordinance as a violation of their Second Amendment rights. Teixeira was ultimately granted a variance from the Alameda County zoning ordinance and his application for a

Conditional Use Permit for his firearms store was approved. In granting Teixeira's application, the Zoning Board concluded that a gun shop at the proposed location would not be detrimental to the public welfare and warranted a variance in light of the physical buffer created by a major highway between the proposed site and the nearest residential district. The Zoning Board also determined that there was a public need for a licensed firearms retailer in the neighborhood.



Unfortunately, after the board granted Teixeira his permit, the San Lorenzo Village Homes Association challenged the ruling and the county revoked Teixeira's permit. Petitioners were unable to find another suitable property in the County of Alameda and could not open their full-service firearms store. Teixeira challenged the board's revocation in federal court claiming violations of "due process, equal protection and Second Amendment" rights of him and "his prospective customers." A motion to dismiss for failure to state a claim was granted in favor of Alameda County without prejudice on the original complaint; and again denied but with prejudice on the amended complaint.

The Ninth Circuit issued a three-judge panel (<http://cdn.ca9.uscourts.gov/datastore/opinions/2016/05/16/13-17132.pdf>), opinion affirming the dismissal of the equal protection claim, but reversed the Second Amendment claim dismissal. On review en banc (<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/10/10/13-17132.pdf>), the Ninth Circuit upheld the District Court's dismissal of all claims. In its opinion the Ninth Circuit ultimately held that Teixeira's Second Amendment rights were not infringed. Further, the Ninth Circuit held, among other things, that the Second Amendment does not protect a person's right to sell guns. In coming to this conclusion, the Ninth Circuit relied on the two-step approach in U.S. v Chovan (<https://casetext.com/case/united-states-v-chovan>). Under this two-step approach, the court must ask "whether the challenged law burdens conduct protected by the Second Amendment," and if so, we then determine the 'appropriate level of scrutiny.'" Here, the Ninth Circuit (<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/10/10/13-17132.pdf>) concluded that the Second Amendment "does not independently protect a proprietor's right to sell firearms" and therefore by concluding the ordinance did not burden a protected Second Amendment right, the court avoided determining which level of scrutiny applied in this case. Circuit Judge Tallman generally concurred in the majority opinion, but faulted the majority in his dissent for "dismiss[ing] the constitutional challenge as applied to Teixeira." Similarly, Circuit Judge Bea dissented

from the majority in all respects, including their “short-circuit” analysis of the constitutional challenge. Both Tallman and Bea’s dissents highlight that the Second Amendment challenge brought by *Teixeira* is at the very least subject to rebuttal and should not have been simply dismissed outright. The two dissenting judges fault the majority because the majority avoided *Teixeira*’s constitutional claim by stating the Second Amendment does not protect a party’s right to sell arms, only a right to keep and bear arms and thus avoiding whether or not the ordinance’s constitutionality is subject to heightened constitutional scrutiny.

The Supreme Court has not explicitly stated which level of constitutional scrutiny applies to Second Amendment challenges. On January 8, 2018, after the Ninth Circuit denied *Teixeira*’s claim, *Teixeira* filed a Petition for Certiorari (https://www.supremecourt.gov/DocketPDF/17/17-982/27049/20180108155329987_1%20teixeira%20brief.pdf). *Teixeira* argued in his petition that despite *Heller*’s clear ruling that rational basis should not apply in cases regarding the Second Amendment, there are at least two circuits that are still ready and willing to employ rational basis analysis: the Second and Ninth Circuits. Under the Second (<https://caselaw.findlaw.com/us-2nd-circuit/1602105.html>), and Ninth (<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/10/10/13-17132.pdf>) Circuits’ reasoning, rational basis review is appropriate as long as the law being challenged does not “substantially burden” Second Amendment rights. The remaining Circuits, *Teixeira* argues, have all accepted that Second Amendment challenges are subject to some form of “heightened” scrutiny, although the Circuits do not all agree on what level of heightened scrutiny applies. The Circuits are also conflicted on whether the level of heightened scrutiny should depend on the nature of the Second Amendment challenge. This split among the circuits necessitates a clear ruling by the Supreme Court so the circuits have better guidance on how to approach Second Amendment challenges. Unfortunately, better guidance for Second Amendment challenges will not be given through *Teixeira*. The Supreme Court denied *Teixeira*’s petition on May 14, 2018.



What level of scrutiny applies is important in Second Amendment challenges, especially in light of the increase in gun violence. If the Court were to decide rational basis is the appropriate level of scrutiny, then virtually all laws passed would be upheld because rational basis is such a low standard to meet. This would allow less access to guns across the board because laws limiting the rights of people to sell firearms would likely be upheld. Further, if the Court decided that a heightened level of scrutiny such as intermediate or strict scrutiny applies, then laws would be struck down more often and individual’s access to firearms would increase.

Whether or not the Supreme Court agrees that Second Amendment challenges outside the scope of merely bearing arms are subject to rational basis review, intermediate scrutiny or some other form of heightened scrutiny is something we will have to wait for. Since the Supreme Court denied certiorari in *Teixeira* (<http://www.scotusblog.com/case-files/cases/teixeira-v-alameda-county-california/>), we will have to wait to get a clear decision from the Supreme Court on what level of scrutiny the circuits should apply to Second Amendment challenges. Due to the recent increase in gun violence throughout the country, state and local governments, as well as many individuals and groups, are all trying to determine what measures can be taken to protect the lives of innocent people from the mass shooting tragedies that have affected far too many families. If the Supreme Court does not establish a better precedent for courts to use going forward, courts of all levels will be bogged down with cases involving the Second Amendment. With this seemingly imminent and without a clear precedent, each court will rule in its own manner, and in turn will lead to more cases attempting to get on the Supreme Court docket for clarification. In any event, there is so much conflicting case law throughout the circuit courts that it would likely benefit everyone if the Supreme Court were to set, once and for all, a clearer standard to follow when it comes to Second Amendment challenges. The next time a case challenging the Second Amendment arises the Supreme Court should use that opportunity to set a clear precedent for Second Amendment challenges going forward.

CATEGORIES GGU LAW REVIEW

Blog at WordPress.com.