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April 11, 2104

# Does the Second Amendment Protect Firearms Commerce?

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## DOES THE SECOND AMENDMENT PROTECT FIREARMS COMMERCE?

*David B. Kopel\**

The First Amendment protects both book buyers and booksellers. Does the Second Amendment protect only people who buy guns, or does it also protect people who sell guns? Though this question has divided the federal courts, the answer is quite clear: operating a business that provides Second Amendment services is protected by the Second Amendment. *District of Columbia v. Heller*<sup>1</sup> teaches that regulation of how firearms are commercially sold enjoys a presumption of constitutionality, which does not extend to prohibitions of firearms sales.

In the lower federal courts, there is a developing split about whether firearms sellers have Second Amendment rights which the courts are bound to respect. Seventh Circuit courts view firearms sellers like booksellers — as holders of constitutional rights. While gun sellers are subject to much stricter regulation than are booksellers, they are both protected by the Bill of Rights. Conversely, in the courts of the Fourth Circuit, gun sellers have no Second Amendment rights.

*Brown v. Board of Education*<sup>2</sup> was not exactly a popular decision among some state and local governments, and among some lower court judges. The same is true of *Heller*. One form of resistance to *Heller* has been to read the opinion in the narrowest possible way, excluding from Second Amendment protection many normal activities involving firearms. One such form of resistance is the claim that the Second Amendment does not apply to gun sales.

By this theory, because the Second Amendment is an individual right to have arms for self-defense, the Second Amendment does not apply to corporations that provide services to gun owners, such as selling them guns. Likewise, since the Second Amendment is a right to have a gun for self-defense, the Second Amendment has nothing to do with anyone who sells or gives away a firearm.

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<sup>1</sup> 554 U.S. 570 (2008).

<sup>2</sup> 349 U.S. 294 (1955).

The leading exponent of this theory was the Fourth Circuit panel in *United States v. Chafin*,<sup>3</sup> which stated there is nothing “that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual’s right to *sell* a firearm.”<sup>4</sup> The *Chafin* holding is not binding precedent, since the decision was unpublished. Nevertheless, a federal district court in West Virginia adopted and followed *Chafin*’s rule.<sup>5</sup>

Likewise, in *Montana Shooting Sports Association v. Holder*,<sup>6</sup> a federal district court stated (albeit in dicta), “*Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation . . . .”<sup>7</sup>

The Northern District of Illinois took the contrary position in earlier this year in *Illinois Association of Firearms Retailers v. City of Chicago*.<sup>8</sup> In 2010, a few days after the Supreme Court ruled in *McDonald v. City of Chicago*<sup>9</sup> that Chicago could not ban handguns,<sup>10</sup> the Chicago City Council repealed the handgun ban and enacted a replacement ordinance that, inter alia, outlawed all gun stores within the city.

The district court ruled that the gun store ban violated the Second Amendment.<sup>11</sup> The court explained that the plaintiff association of firearms retailers had standing (derivative of the standing that a member firearms retailer would have) to raise Second Amendment claims.<sup>12</sup> The court determined that Chicago’s ordinance went “too far in outright banning legal buyers and legal dealers from engaging in lawful acquisitions and lawful sales of firearms,”<sup>13</sup> and the court struck down the ban on all firearms transfers in the city. Mayor Emanuel chose not to appeal.

Two other cases within the Seventh Circuit also have addressed the question of whether firearms corporations have Second Amendment rights. One of these cases challenged another feature of Chicago’s post-*McDonald* ordinance, the prohibition of all firing ranges within city limits. (The ordinance also required that anyone who wanted a

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<sup>3</sup> 423 F. App’x 342 (4th Cir. 2011).

<sup>4</sup> *Id.* at 344.

<sup>5</sup> *United States v. Conrad*, 923 F. Supp. 2d 843, 852 (W.D. Va. 2013).

<sup>6</sup> No. CV-09-147-DWM-JCL, 2010 WL 3926029 (D. Mont. Aug. 31, 2010) (opinion of Lynch, M.J.), *adopted by* 2010 WL 3909431 (D. Mont. Sept. 29, 2010).

<sup>7</sup> *Id.* at \*21.

<sup>8</sup> 961 F. Supp. 2d 928 (N.D. Ill. 2014).

<sup>9</sup> 130 S. Ct. 3020 (2010).

<sup>10</sup> *Id.* at 3026.

<sup>11</sup> *Ill. Ass’n of Firearms Retailers*, 961 F. Supp. 2d at 946–47.

<sup>12</sup> *Id.* at 931 n.3.

<sup>13</sup> *Id.* at 930.

gun permit had to receive live fire instruction at a firing range.) The other addressed a Chicago suburb's ordinance that required a license to sell firearms.

In the first case, *Ezell v. City of Chicago*,<sup>14</sup> Action Target — a corporation that designs, builds, and equips firing ranges — challenged the firing range ban.<sup>15</sup> The City argued that Action Target had no standing because the Second Amendment is solely an individual right.<sup>16</sup>

The Seventh Circuit did not agree: “Action Target, as a supplier of firing-range facilities, is harmed by the firing-range ban and is also permitted to ‘act[] as [an] advocate[] of the rights of third parties who seek access to’ its services.”<sup>17</sup> So at the least, corporations in the firearms business had third-party standing on behalf of individuals who wanted to use their services. Moving beyond standing, the court sided with the corporate plaintiff, holding that it was entitled to a preliminary injunction enjoining enforcement of the firing range ban.<sup>18</sup>

Two years later, the Northern District of Illinois applied *Ezell* in a case involving a Chicago suburb's obstruction of the opening of a gun store. In *Kole v. Village of Norridge*,<sup>19</sup> the court announced that it did not need to decide whether gun stores had Second Amendment rights; *Ezell* plainly ruled that such stores could assert the Second Amendment rights of their customers.<sup>20</sup>

Meanwhile, the Tenth Circuit has interpreted *Ezell* broadly, favorably citing it and describing it as a case showing “that an inhibition on a person's ability to perform work constitutes an injury-in-fact.”<sup>21</sup>

One of the most-cited post-*Heller* cases has been *United States v. Marzzarella*,<sup>22</sup> in which the Third Circuit upheld under intermediate scrutiny the federal statute prohibiting possession of a handgun with an obliterated serial number.<sup>23</sup> The Third Circuit stated:

Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment under this reading. *Heller* endorsed “laws imposing conditions and qualifications on the commercial sale of firearms.” 128 S. Ct. at 2817. In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow

<sup>14</sup> 651 F.3d 684 (7th Cir. 2011).

<sup>15</sup> *Id.* at 692.

<sup>16</sup> *Id.* at 696.

<sup>17</sup> *Id.* (alteration in original) (quoting *Craig v. Boren*, 429 U.S. 190, 195 (1976)).

<sup>18</sup> *Id.* at 711.

<sup>19</sup> 941 F. Supp. 2d 933 (N.D. Ill. 2013).

<sup>20</sup> *Id.* at 945 (“[E]ven if the Second Amendment does not protect the sale of firearms directly, [firearms dealers] can still pursue a claim that the Agreement and Revised Ordinance infringe their customers' personal right to keep and bear arms.”).

<sup>21</sup> *Kerr v. Hickenlooper*, No. 12-1445, 2014 WL 889445, at \*3 (10th Cir. Mar. 7, 2014).

<sup>22</sup> 614 F.3d 85 (3d Cir. 2010).

<sup>23</sup> *Id.* at 87.

that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.<sup>24</sup>

The final case involving the Second Amendment rights of gun stores and other gun businesses was *Teixeira v. County of Alameda*,<sup>25</sup> wherein the Northern District of California upheld a zoning regulation that prohibited gun stores in a location where the plaintiffs wished to operate a gun store.<sup>26</sup> The court pointed out that *Heller* had established a presumption in favor of the validity of conditions and qualifications for the commercial sale of arms. Based on the facts of the particular case, the court declined to “decide what level of constitutional scrutiny to apply to the (as yet unarticulated) right to sell or purchase guns because as a threshold matter, there are simply no allegations sufficient to rebut the presumption of validity established in *Heller*.”<sup>27</sup> In other words, the gun store owners had Second Amendment rights, but they lost on the merits given *Heller*’s presumption in favor of the kind of gun controls that applied to the storeowners.

Precedents involving other constitutional rights show that businesses that provide constitutionally related services have standing in their own right to challenge statutes that injure them. For example, in *Planned Parenthood v. Danforth*,<sup>28</sup> abortion providers were held to have standing to challenge a statute that criminalized some of the ways in which they provided abortion services.<sup>29</sup> They did not need to invoke the third-party abortion rights of their patients. Indeed, it has long been observed, including by Justice Harry Blackmun, that the rights of *doctors* were central to *Roe v. Wade*.<sup>30</sup>

Likewise, in *American Booksellers Association v. Hudnut*,<sup>31</sup> booksellers themselves successfully brought a First Amendment challenge to an Indianapolis ordinance that criminalized their sale of what the ordinance called “pornography.”<sup>32</sup> The booksellers did not need to

<sup>24</sup> *Id.* at 92 n.8.

<sup>25</sup> No. C 12-03288 SI, 2013 WL 707043 (N.D. Cal. Feb. 26, 2013).

<sup>26</sup> *Id.* at \*6.

<sup>27</sup> *Id.*

<sup>28</sup> 428 U.S. 52 (1976).

<sup>29</sup> *Id.* at 62.

<sup>30</sup> 410 U.S. 113, 163 (1973) (“[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”); see also Ronald D. Rotunda, *On Deep Background 41 Years Later: Roe v. Wade*, CHICAGO TRIBUTE, Jan. 22, 2014, [http://articles.chicagotribune.com/2014-01-22/opinion/ct-perspec-blackmun-0122-20140122\\_1\\_blackmun-roe-v-chief-justice-burger](http://articles.chicagotribune.com/2014-01-22/opinion/ct-perspec-blackmun-0122-20140122_1_blackmun-roe-v-chief-justice-burger), archived at <http://perma.cc/Z5WE-V27A> (“*Roe* ‘protected the woman’s right, *with the physician*, to get an abortion.’ Blackmun emphasized the italicized phrase with his voice. He spoke of the case as a doctor’s rights case, not a woman’s right case. . . . [T]he right was the right of the physician, whom Blackmun assumed was male.” (quoting a 1994 interview with Justice Blackmun)).

<sup>31</sup> 771 F.2d 323 (7th Cir. 1985).

<sup>32</sup> *Id.* at 325.

rely on the customers' rights as book buyers, but instead asserted their own First Amendment rights. The Supreme Court summarily affirmed the decision.<sup>33</sup>

On the merits, the abortion doctor plaintiffs in *Planned Parenthood* were partially successful, and the bookseller plaintiffs in *American Booksellers Association* were completely successful. The key point is that these providers of constitutionally protected goods and services had constitutional rights, and their particular claims were entitled to be tested under the strict standards that apply to restrictions on constitutional rights.

Besides invoking their own rights, businesses can also raise the third-party constitutional rights of their customers. For example, the beer vendor in *Craig v. Boren*<sup>34</sup> could raise the equal protection rights of its customers against a state law that set different drinking ages based on sex.<sup>35</sup> The principle goes back to *Pierce v. Society of Sisters*<sup>36</sup> in 1925, where the owners of religious schools had standing to raise the constitutional rights of their students and families, successfully bringing a Fourteenth Amendment challenge against a state law that forbade all private K-12 schools.<sup>37</sup>

In terms of the original meaning of the Second Amendment, the right to engage in firearms commerce is clear. It is one of the most important reasons why America's political dispute with Great Britain turned into an armed revolution.

In the fall of 1774, King George III embargoed all imports of firearms and ammunition into the thirteen colonies.<sup>38</sup> The Americans treated the embargo on firearms commerce as evidence of plain intent to enslave America, and the Americans redoubled their efforts to engage in firearms commerce. For example, the Patriots in South Carolina were led by the "General Committee," which declared: "[B]y the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them."<sup>39</sup> Writes one early-nineteenth-century historian, "[I]t was therefore recommended, to all persons, to provide themselves immediately, with at least twelve and a half rounds of powder, with a proportionate quantity of bullets."<sup>40</sup>

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<sup>33</sup> *Hudnut v. Am. Booksellers Ass'n*, 475 U.S. 1001 (1986).

<sup>34</sup> 429 U.S. 190 (1976).

<sup>35</sup> *Id.* at 195.

<sup>36</sup> 268 U.S. 510 (1925).

<sup>37</sup> *Id.* at 534-36.

<sup>38</sup> 5 Acts Privy Council 401, reprinted in *CONNECTICUT COURANT*, Dec. 19, 1774, at 3.

<sup>39</sup> 1 JOHN DRAYTON, *MEMOIRS OF THE AMERICAN REVOLUTION AS RELATING TO THE STATE OF SOUTH CAROLINA* 166 (Applewood Books 1969) (1821) (internal quotation mark omitted), available at <https://archive.org/details/memoirsofamerica12moul>.

<sup>40</sup> *Id.*

The British and the Americans agreed that the reimposition of London's rule in the United States required the prohibition of the fire-arms business. In 1777, with British victory seemingly within grasp, Colonial Undersecretary William Knox drafted a plan entitled *What Is Fit to Be Done with America?* To prevent any future rebellions, Knox planned that the Church of England be established as the official religion throughout America; that Parliament have power to tax America domestically (although there were no Americans in Parliament); and that a hereditary aristocracy be created in America. Another part of the plan was that "the Arms of all the People should be taken away . . . nor should any Foundery or manufactory of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence."<sup>41</sup>

The opposite of *What Is Fit to Be Done with America?* is the Constitution of the United States of America. No national religion.<sup>42</sup> The tax power solely in the hands of a representative Congress.<sup>43</sup> No titles of nobility.<sup>44</sup> And a guarantee of the right to buy, sell, and manufacture arms.<sup>45</sup>

The Supreme Court's decision in *Heller* comported with the Constitution's original meaning. The *Heller* Court provided a list of "longstanding" laws which were said to be presumptively (not conclusively) constitutional.<sup>46</sup> The inclusion of each item on the list, as an exception to the right to keep and bear arms, provides guidance about the scope of the right itself.

First, the Court affirmed that "felons and the mentally ill" are exceptions to the general rule that individual Americans have a right to possess arms.<sup>47</sup> This exception only makes sense if the general rule is valid. After all, if no one has a right to possess arms, then there is no need for a special rule that felons and the mentally ill may be barred from possessing arms.

The second presumptively constitutional exception to the right to keep and bear arms is in favor of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."<sup>48</sup> This exception proves another rule: Americans have a general right to carry firearms. If the Second Amendment only applied to the keeping

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<sup>41</sup> Leland J. Bellot ed., *William Knox Asks What is Fit to be Done with America?*, in SOURCES OF AMERICAN INDEPENDENCE 140, 176 (Howard H. Peckham ed., 1978).

<sup>42</sup> U.S. CONST. amend. I.

<sup>43</sup> *Id.* art. I, § 7, cl. 1; *id.* § 8, cl. 1.

<sup>44</sup> *Id.* art. I, § 9, cl. 8; *id.* § 10, cl. 1.

<sup>45</sup> *Id.* amend. II.

<sup>46</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

<sup>47</sup> *Id.* at 626.

<sup>48</sup> *Id.*

of arms at home, and not to the bearing of arms in public places, then there would be no need to specify the exception for carrying arms in “sensitive places.”

The third *Heller* exception is “laws imposing conditions and qualifications on the commercial sale of arms.”<sup>49</sup> Once again, the exception proves the rule. There is a right to the commercial sale of arms, but it is a right that may be regulated by “conditions and qualifications.”<sup>50</sup> As to the noncommercial sale of firearms (e.g., between members of a hunting club), there is no presumption in favor of statutes that restrict this form of the exercise of Second Amendment rights. The same is true for gifts or loans of firearms, since they are not a “sale.”

Also, *Heller* approvingly cited<sup>51</sup> the 1871 Tennessee case *Andrews v. State*,<sup>52</sup> which explained that “[t]he right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms.”<sup>53</sup>

The *Heller* rule — that there is a qualified right to the commercial sale of arms — does not utterly forbid statutes governing non-commercial sales, gifts, or loans; but those statutes enjoy no presumption of constitutionality. They would have to be proven constitutional under some form of heightened scrutiny.

Under the original meaning of the Second Amendment, the *Heller* Court was correct to recognize that commerce in arms is part of the Second Amendment right. The Fourth Circuit’s bare assertion in *Chafin* that there is nothing in the original meaning about firearms commerce demonstrates only that the Fourth Circuit was unaware of that history.

Moreover, the text of the Second Amendment point to the necessity of commerce in arms. The Second Amendment aims to provide the conditions for “[a] well regulated Militia.”<sup>54</sup> State and federal militia statutes of the period were unanimous in requiring all persons subject to militia service<sup>55</sup> to provide themselves with specified types of rifles,

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<sup>49</sup> *Id.* at 626–27.

<sup>50</sup> Federal law has long defined what constitutes being “engaged in the business” of dealing firearms. 18 U.S.C. § 921(a)(21)(C) (2012) (“[A] person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms . . .”). A person who is “engaged in the business,” but who does not have a federal firearms license, is guilty of a federal felony every time he sells a firearm. *Id.* §§ 922(a)(1), 924.

<sup>51</sup> See *Heller*, 554 U.S. at 608, 614, 629.

<sup>52</sup> 50 Tenn. (3 Heisk.) 165 (1871).

<sup>53</sup> *Id.* at 178.

<sup>54</sup> U.S. CONST. amend. II.

<sup>55</sup> Typically, able-bodied free males at least 16 or 18 years old, and no more than 45 to 60 years old, depending on the statute.



muskets, or handguns. In late eighteenth-century America (like at every other period in American history), firearms were not like apple pies, which a typical family could make at home. Firearms were like books or newspapers: they were items of commerce that were nearly impossible to produce without specialized equipment and skill. In order for the militia to be armed, it was necessary that there be thriving business in the commercial manufacture and sale of firearms.

The right to engage in the commercial sale of arms is subject to presumptively constitutional regulation, and even for private non-commercial sales the right is not necessarily absolute. The right to commerce in firearms was one of the rights at issue during the American Revolution, and it is a right guaranteed by the Second Amendment, as the Supreme Court described in *Heller*.