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Concealed Carry: Can Heller's Handgun Leave the Home?

Joseph Gonnella

COMMENTS

CONCEALED CARRY: CAN *HELLER*'S HANDGUN LEAVE THE HOME?

I. INTRODUCTION

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1]

On February 13, 2014, the Ninth Circuit ruled that San Diego County's interpretation of the "good cause" requirement for a concealed weapon license "impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense."[2]

Second Amendment jurisprudence is widely considered to be in its infancy.[3] It was only in 2008 that the United States Supreme Court, in *District of Columbia v. Heller*, decided for the first time that the Second Amendment affords an individual right to bear arms not limited to militia purposes.[4] The Court held that individuals have a constitutional right to carry a handgun in their homes for the purpose of self-defense.[5] Two years after *Heller*, in *McDonald v. Chicago*,[6] the Court applied *Heller*'s newly-defined individual right to the states via selective incorporation.[7] However, the Supreme Court has not

1. U.S. CONST. amend. II.
2. Peruta v. County of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014).
3. Nordyke v. King, 644 F.3d 776, 789 (9th Cir. 2011).
4. District of Columbia v. Heller, 554 U.S. 570 (2008).
5. *Id.*
6. 561 U.S. 742 (2010).
7. *Id.* at 767–80. The Bill of Rights originally applied only to the federal government. *Id.* at 754. Selective incorporation applies a constitutional right equally to state and local governments by way of the liberty interest in the

further clarified *Heller* or articulated the proper framework, in the form of means-end scrutiny or some other standard of review, lower courts should apply in Second Amendment cases.[8] Thus, the impact of *Heller* beyond the boundaries of the home remains unsettled. This comment proposes a post-*Heller* analytical framework for courts to apply in Second Amendment cases. Moreover, this comment uses the recent challenge to San Diego County's interpretation of the "good cause" requirement for a concealed weapons permit (CCW)[9] as a vehicle to demonstrate the application of that proposed framework.

The debate over the place of guns in our society is ongoing. In light of recent decisions, it appears the debate will continue.[10] Specifically, after *Heller*, the issues lower courts must address are (1) the scope of the right to keep and bear arms, and (2) acceptable limitations on that right. The answer must lie between the States' inherent police powers[11] and the Second Amendment, which confers an individual right to keep and bear arms.[12]

Fourteenth Amendment's due process clause. The incorporation analysis asks whether the activity is "implicit in the concept of ordered liberty," a phrase coined by Justice Cardozo in *Palko v. Connecticut*. 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969). To be incorporated, a right must be fundamental, defined as "deeply rooted in this Nation's history and tradition." McDonald v. Chicago, 561 U.S. 742, 767 (2010).

8. Peruta v. County of San Diego, 742 F.3d 1144, 1150 (9th Cir. 2014).

9. Many jurisdictions require a CCW license or permit for individuals to carry a loaded, concealed weapon. Requirements vary widely by state and county. Although the term CCW is broader than its acronym suggests and includes general licensing or permitting to carry a concealed weapon, usually, the "weapon" is a revolver or semiautomatic handgun. *See generally Attorney General: Frequently Asked Questions*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, https://oag.ca.gov/firearms/pubfaqs (last visited March 22, 2014) (explaining CCW and basic firearms laws).

10. *Compare* Drake v. Filko, 724 F.3d 426 (3rd Cir. 2013), Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013), and Kachalsky v. Westchester, 701 F.3d 81 (2nd Cir. 2012) *with* District of Columbia v. Heller, 554 U.S. 570 (2008), and *Peruta*, 742 F.3d 1144.

11. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This reserved right is the State's police power to pass laws promoting the general welfare of its people. 16 AM. JUR. 2D *Constitutional Law* § 346 (1969).

12. *Heller*, 554 U.S. at 595.

The efficacy of gun control is similarly unsettled, in terms of both the empirical data and public opinion.[13] Gun violence—especially handgun violence—is a serious problem in today's society. However, the *Heller* Court acknowledged the Constitution "takes certain policy choices off the table."[14] Furthermore, determining prudent gun control policy is unnecessary and generally irrelevant to how the courts should approach their analyses.[15] Put simply, Second Amendment jurisprudence is—by definition—a legal issue. The judiciary is required to conduct a legal analysis of the Second Amendment, and not a public policy debate of the good and evil of firearms. State and local legislatures, on behalf of their constituents, rightly evaluate gun control policy considerations,[16] while the judiciary rightly evaluates the constitutionality of legislation.[17] Accordingly, this comment is limited to a discussion of current Second Amendment law.

II. *HELLER* HITS THE ROAD: *PERUTA V. COUNTY OF SAN DIEGO*

Edward Peruta, a resident of San Diego, California, applied for a license to carry a concealed handgun.[18] To obtain a CCW in

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13. *Compare About Gun Violence*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, http://www.bradycampaign.org/about-gun-violence (last visited March 22, 2014) (finding generally that fewer guns and more gun laws reduce instances of gun violence), *with* JOHN LOTT, MORE GUNS LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (Univ. of Chi. Press, 1st ed., 1998) (finding that "shall issue" CCW states have lower rates of violent crime).

14. *Heller*, 554 U.S. at 636.

15. Judge Easterbrook articulated this position during oral argument in a Seventh Circuit case about a City of Chicago handgun ordinance. He asked counsel, "You think the outcome of this case turns on whether John Lott is right in more guns, less crime?" Then, answering his own rhetorical question, responded, "I can't imagine that as a subject of constitutional adjudication." Transcript of Oral Argument, NRA v. Chicago, 646 F.3d 992 (7th Cir. 2011) (No. 08-4241), 2009 WL 1556531(referring to LOTT, *supra* note 13).

16. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (noting that a sovereign state is a "laboratory [of federalism]" where it can conduct "social and economic experiments") (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

17. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

18. Peruta v. County of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014).

California, an individual must apply in the city or county in which he or she resides and show, among other things, that "[g]ood cause exists for issuance of the license."[19] San Diego County's CCW policy defined "good cause" as "a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way."[20] San Diego County required applicants "to demonstrate and elaborate good cause," and did not recognize concern for personal safety alone as "good cause."[21]

Peruta claimed self-defense and personal protection as his required "good cause" justification on his CCW application.[22] He believed he and his wife were at risk of violent criminal attacks due to the nature of his work, which required him to travel to remote and sometimes high-crime areas, and because he carried large sums of cash and valuables.[23] The County denied his application,[24] based on a lack of supporting documentation.[25]

Following the denial, Peruta filed a complaint in the District Court for the Southern District of California alleging Second and Fourteenth Amendment violations.[26] Specifically, Peruta claimed the County's denial infringed on his right to bear arms, travel, equal protection,[27] and due process.[28]

The court granted the County's motion for summary judgment, holding that the "good cause" policy was constitutional under

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19. CAL. PENAL CODE §§ 26150(a)(2), 26155(a)(2).

20. *Peruta*, 742 F.3d 1148.

21. *Id.*

22. *Id.*

23. First Amended Complaint ¶¶ 8–11, Peruta v. County of San Diego, 758 F. Supp. 2d 1106 (S.D. Cal. 2010) (No. 09cv2371), 2011 WL 10663415 [hereinafter Peruta FAC].

24. Although the County contested Peruta's claim of residency in San Diego County, it based the denial on a lack of documented "good cause." The County did not cite moral character and training requirements as factors in the denial. Appellee's Brief at 7, Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014) (No. 10-56971), 2011 WL 3689122, at *7 [hereinafter San Diego Brief].

25. Peruta FAC, *supra* note 23, ¶ 16.

26. *Id.* ¶¶ 90–99.

27. Peruta alleged that the County's "good cause" and residency policies "are an abuse of discretion, subjective, inherently prone to abuse, and results in the unequal treatment of similarly situated individuals applying for a CCW." *Id.* ¶ 93.

28. *Id.* ¶¶ 111–26, 139–41.

intermediate scrutiny, thereby disposing of all claims.[29] Peruta subsequently filed an appeal in the Ninth Circuit. On appeal, the court addressed two threshold issues that could have defeated Peruta's challenge at an early procedural phase.[30] First, what is the reach of *Heller*? Second, what right does Peruta assert?

First, the parties disagreed as to the breadth of *Heller*. The County argued the case stands for no more than possession of a loaded handgun in the *home*, noting that *Heller* explicitly recognized the "right of law-abiding, responsible citizens to use arms in defense of *hearth and home*."[31] Adopting such a narrow interpretation of the Court's ruling would be fatal to Peruta's challenge and indeed to almost any CCW challenge.[32] In contrast, Peruta argued *Heller*—or a logical extension of it—establishes the right to carry weapons in case of confrontation.[33] Further, Peruta argued that though *Heller* recognized the need for self-defense is most "acute" in the home, the right does not end at the home's threshold.[34] Embracing Peruta's broader view would enable Peruta and similar public CCW cases to remain viable constitutional challenges to handgun restrictions.

The second inquiry went to the purported right being invoked. The County framed Peruta's challenge as asserting a right to "bear a loaded, concealed firearm in public places."[35] Adopting the County's classification of the asserted right would insulate the County's

29. Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010).

30. In denying the County's earlier motion to dismiss, the district court found that Peruta did have a valid Second Amendment claim. If the district court had found that Peruta's claim was not within the scope of the Second Amendment, it would have dismissed the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

31. San Diego Brief, *supra* note 24, at 9.

32. Interpreting the individual right recognized in *Heller* as limited to the home would not place constitutional restrictions on CCW laws or interpretations of those laws. CCW, by definition, is a "beyond the home" issue.

33. Appellants' Opening Brief at 11, Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014) (No. 10-56971), 2011 WL 2130660, at *22 [hereinafter Peruta Brief].

34. *Id.* at *10.

35. San Diego Brief, *supra* note 24, at *9.

discretionary policy.[36] In contrast, Peruta asserted a right to armed self-defense with a handgun, in the *manner* desired by the legislature.[37] In California, the approved *manner* is concealed carry with the proper license.[38] Case law, even post-*Heller*, overwhelmingly supports the proposition that the concealed carrying of weapons is subject to restriction and outright bans.[39] However, whether *Heller* protected Peruta's more modest classification was still undecided.

Adopting Peruta's arguments on these two threshold issues would mean he was asserting a protected Second Amendment right. Agreeing with Peruta, the Ninth Circuit found that Peruta was asserting a right to bear arms within the meaning of the Second Amendment.[40] The court then turned to the next question—whether the County's interpretation of the "good cause" requirement infringed on that right. This analysis necessarily begins with *Heller*, as it was the first and only case to expressly recognize the individual Second Amendment right.[41]

III. THE *HELLER* REGIME

Heller remains the only substantive authority on the newly clarified *individual* Second Amendment right to keep and bear arms. *McDonald* merely applied *Heller* to the states via selective incorporation. Thus, lower courts reviewing Second Amendment issues of first impression, such as CCW regulation, should adhere to the Supreme Court's reasoning from *Heller*, because it most

36. There is no constitutional or common law basis conveying a blanket right to carry loaded, concealed weapons in all public places. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008). Further, *Heller* reiterated similar "longstanding prohibitions" on firearms were not being overturned. *Id.*

37. *See* Peruta Brief, *supra* note 33, at *9.

38. *See* CAL. PENAL CODE § 25655 (West 2012).

39. *See, e.g.*, People v. Flores, 86 Cal. Rptr. 3d 804, 807 (Cal. Ct. App. 2009); People v. Yarbrough, 86 Cal. Rptr. 3d 674, 681–82 (Cal. Ct. App. 2009). These cases were decided after *Heller* but before California banned open carry.

40. Peruta v. County of San Diego, 742 F.3d 1144, 1166 (9th Cir. 2014).

41. While *McDonald* is somewhat instructive, it primarily incorporates *Heller*, adding little as far as analytical framework to apply in Second Amendment cases. McDonald v. Chicago, 561 U.S. 742 (2010).

accurately predicts how the Supreme Court will review *any* novel Second Amendment case.[42]

Before *Heller*, the District of Columbia's statutory scheme generally banned people from possessing handguns in public places and in the home;[43] it did not allow people to carry unregistered firearms and handguns could not be registered.[44] A separate law required a license to carry a handgun, the issuance of which was governed by a discretionary "may-issue" process for one year periods.[45] Additionally, the law required that firearms be "unloaded and disassembled or bound by a trigger lock or similar device," unless the firearm was in a place of business or being used in a lawful recreational activity.[46] Read together, the District of Columbia's statutory scheme effectively prohibited carrying handguns.[47] Notably, the District of Columbia did not provide an exception for possession or use in the home, even for self defense.[48]

District of Columbia resident and special police officer Dick Heller, was denied a license to keep a handgun in his home, despite being authorized to carry a handgun as an armed guard of a judiciary building.[49] Based on that denial, Heller filed a lawsuit in the district

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42. To echo Justice Scalia's warning before announcing the Court's opinion, "this summary . . . will state little more than the conclusions . . . to check its validity [against the dissents' contrary claims,] you will have to read some 154 pages of opinions." Opinion Announcement at 2:12, District of Columbia v. Heller, 554 U.S. 570 (2008), *available at* http://www.oyez.org/cases/2000-2009/2007/2007_07_290.

43. District of Columbia v. Heller, 554 U.S. 570, 574 (2008).

44. *Id.* at 574–75.

45. *Id.* at 575.

46. *Id.* "Lawfully owned" firearms included registered long guns such as rifles and shotguns. *Id.*

47. *Id.* at 574–76.

48. Using a handgun for self-defense in the home would necessarily violate each of the three handgun provisions discussed: carrying the unregistered handgun—because they cannot be registered; having the handgun assembled or unlocked—because the gun must be loaded and operational to fire; and likely the licensing provision—unless the Chief of Police grants permission. *Id.* at 574-75. The fact that legitimate self-defense situations would likely not be prosecuted or would be given a favorable judicial construction does not excuse an unconstitutional law. Parker v. District of Columbia, 478 F.3d 370, 401 (D.C. Cir. 2007).

49. *Heller*, 554 U.S. 575. The basis for the denial is not mentioned in the complaint, 2003 WL 42057551, or in the Court's opinion.

court challenging all three handgun restrictions on Second Amendment grounds.[50] The district court granted the District of Columbia's motion to dismiss.[51] Heller appealed to the Court of Appeals for the District of Columbia Circuit, which reversed, and the United States Supreme Court granted certiorari.[52]

A. The Supreme Court's Heller *Analysis*

In a five to four decision, the Supreme Court held that the Second Amendment confers an individual right to possess a firearm for the purpose of self-defense within the home.[53] The majority's interpretation of the Second Amendment can be divided into three general parts: (1) the text of the Second Amendment;[54] (2) the drafters' intent;[55] and (3) the contemporaneous and subsequent understanding of the right—the history.[56]

The text provides the greatest source of debate for Second Amendment interpretation—particularly, the words "militia" and "people." The text has two parts: the prefatory clause and the operative clause. The prefatory clause, which states "[a] well-regulated Militia, being necessary to the security of a free State," seemingly contradicts the operative clause, which identifies who possesses the right. The operative clause recognizes the right of the "people," a term of art referring to a "class of persons who are part of a national community."[57] Acknowledging this contradiction, the Court adopted the presumption proffered by *amici* that the prefatory clause explains the purpose of the Amendment but does not limit or expand the scope of the right.[58]

The Court then examined the phrase "to keep and bear arms" to determine whether it was consistent with an individual right. First,

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50. *Id.*
51. *Id.* at 576.
52. *Id.*
53. *Id.* at 589.
54. *Id.* at 577–600.
55. *Id.* at 600–05.
56. *Id.* at 605–09.
57. *Id.* at 579–80 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).
58. *Id.* at 577, 580–81.

Justice Scalia's review of non-legal founding era sources indicated that the phrase was not limited to military contexts.[59] Likewise, leading English jurist Sir William Blackstone's commentaries did not support such an interpretation.[60] In addition, Justice Scalia cited a recent Supreme Court opinion wherein Justice Ginsburg equated the term "bear arms" with a non-militia meaning.[61] Specifically, Justice Ginsburg recognized the term to include being "armed and ready for offensive or defensive action in a case of conflict with another."[62]

Next, the Court explained that the phrase "shall not be infringed," indicates that the Second Amendment "codified a *pre-existing* right," which provides additional textual support for the proposition that the Second Amendment affords an individual right.[63] The history of this pre-existing right provides substantial guidance on the scope of the individual right to bear arms as it was understood in the founding era, and more specifically, in 1791.[64] Modern Second Amendment jurisprudence must rely on the historical understanding when applying

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59. *Id.* at 581–92.

60. The Court relied heavily on Blackstone for its historical analysis of the preexisting—it existed in England—right to bear arms. *Id.* at 594–99, 606–10, 626–27.

61. *Id.* at 584 (citing Muscarello v. United States, 524 U.S. 125, 143 (1998)). That the expansive definition of "bear arms" in *Muscarello* came from *Heller*'s dissenting Justice Ginsburg is ironic, to say the least. The irony was not lost on Justice Scalia, who concluded, "We think that Justice Ginsburg accurately captured the natural meaning of 'bear arms.'" *Id.* at 584.

62. *Id.* (citing *Muscarello*, 524 U.S. at 143). Such an expansive definition supports the proposition that *Heller* does not stand for limiting the Second Amendment to the home because this construction is only logical if conflict (and the need for defensive action) were also limited to the home. The potential need for self-defense is not so limited.

63. *Id.* at 592. The opinion also interpreted the terms "well-regulated Militia" and "Security of a Free State." *Id.* at 597. "Well-regulated" was understood to mean "proper discipline and training," and the Court rejected the narrow view of "Militia" as government-regulated military forces. *Id.* at 595–97. "State," is used in the broad sense of a "free polity," and does not refer to each of the several States. *Id.* at 597–98.

64. *Id.* at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

the Second Amendment in contemporary cases challenging gun laws.[65]

The Court proceeded to discuss the historical understanding of the Second Amendment, beginning in 17th Century England through the ratification of the United States Constitution and Bill of Rights.[66] The Court acknowledged the English Bill of Rights arms provisions as the "predecessor" to the Second Amendment.[67] In 17th Century England, the King's militia subdued political opponents of the Stuart Kings through disarmament.[68] In response, the subsequent English Bill of Rights assured that Protestants would have the right to keep arms for self-defense.[69] In light of this historical backdrop, early Americans understood self-defense as necessary to "'repel force by force [when] the intervention of society in his behalf, may be too late to prevent an injury.'"[70] The Court continued its discussion of the Second Amendment's interpretation throughout American history from ratification era commentary,[71] antebellum case law,[72] post-civil war

65. *See id.* at 576 ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning"). *Id.* (quoting United States v. Sprague, 282 U.S. 716, 731). *See also* 16 AM. JUR. 2D *Constitutional Law* § 62 (2014) ("When interpreting a constitutional provision, a court examines its purpose and intent, and by reviewing the history of the constitution and its amendments, the court endeavors to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances." (quoting State v. Johanson (*In re State*), 932 A.2d 848, 853 (N.H. 2007)).

66. *Heller*, 554 U.S. at 592–95, 598–605.

67. *Id.* at 593.

68. *Id.* at 592–93.

69. *Id.* The right applied only to Protestants but was given to them as individuals, not as military members, which reinforces that self-defense was an *individual* right. *Id.* at 593.

70. *Id.* at 595 (quoting 1 Blackstone's Commentaries 145–46 n.42 (1803).

71. *Id.* at 605–10.

72. *Id.* at 610–14 (reaffirming that the Second Amendment articulates a right to self-defense, in contemplation of and in continuity with the preexisting English right). "The right of the whole people . . . and not militia only . . . shall not be *infringed* . . . . [O]riginally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688 . . . ." *Id.* at 613 (citing Nunn v. State, 1 Ga. 243, 251 (1846)).

legislation and commentary,[73] and recent case law.[74] Each period's interpretation supported the Court's initial presumption that the Second Amendment confers an individual right.

Finally, having determined that the Second Amendment confers an individual right to bear arms for self-defense, the Court turned to the challenged handgun laws.[75] The question was whether the laws impermissibly infringed upon that right. First, the Court reasoned that "[t]he handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[76] The Court emphasized that Americans particularly prefer handguns for protection of the home and family.[77]

Recognizing that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be borne as to render them wholly useless for the purpose of defence, [is] clearly unconstitutional," the Court proceeded to strike down the registration and trigger lock requirements.[78] The Court noted that a ban on handguns in the home for self-defense would fail "any of the standards of scrutiny that we have applied to enumerated constitutional rights," because they amounted to a categorical ban on the use of handguns for the lawful purpose of self-defense.[79] Ultimately, the Court ordered the District of Columbia to issue Heller a license to carry his handgun in his home.[80]

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73. *Id.* at 614–19.

74. *Id.* at 619–25. The majority concluded that the Court's previous decision in *United States v. Miller*, 307 U.S. 174 (1939), upholding certain gun laws did not contradict its *Heller* decision.

75. *Id.* at 628.

76. *Id.* at 628. The opinion went on to discuss why handguns are the "quintessential self-defense weapon," including the fact that they are lighter than long guns (rifles or shotguns) and require little upper body strength to lift and aim. *Id.* at 629.

77. *Id.* at 628–29. The word "family" indicates the individual right to bear arms for self-defense is not limited to within the home. *See* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2235 (1996) (noting that "ordinary rules of textual construction suggest that interpretations that produce surplusage should be avoided").

78. *Heller*, 554 U.S. 629 (quoting State v. Reid, 1 Ala. 612, 616-17 (1840)).

79. *Id.* at 628–30.

80. *Id.* at 635.

B. Full Choke: Lower Courts Struggle to Interpret Heller

Considering the undeveloped state of the Supreme Court's Second Amendment jurisprudence, the lower courts must embrace their role to "flush [sic] out the law and to decide upon cases as a matter of first impression."[81] As the Supreme Court anticipated, lower courts have struggled to interpret *Heller*'s identification of the "home" as a place "where the need for defense of self, family, and property is most acute."[82] As a result, many courts have interpreted *Heller* as limiting the right to inside the home.[83] However, a plain reading of the text suggests circumstances exist where the need for self-defense is less acute than in the home, yet still protected by the Second Amendment.[84] While *Heller* does not confer a blanket right to carry a gun for self-defense, *Heller* does not foreclose that possibility because the issue remains open and undecided by the Supreme Court.[85] The lower courts must engage in essentially a "predictive exercise" on matters of first impression.[86] The fact that a Supreme Court holding does not cover certain conduct does not mean it is unprotected if the issue has never been decided.[87] Courts should adopt the Supreme Court's analysis to review similar cases, and decide how it would decide "the ultimate question."[88] Similarly, courts should not assume "open issues," such as CCW are unprotected Second Amendment

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81. Transcript of Oral Argument (*argued* May 26, 2009), NRA v. Chicago, 646 F.3d 992 (7th Cir. 2011) (No. 08-4241), 2009 WL 1556531 [hereinafter Gura Oral Argument].

82. The circuit conflict exemplifies this disagreement over whether "home" operates as a limitation on *Heller*'s holding. *See infra* Part VI.A.

83. *See, e.g.*, Kachalsky v. Westchester, 701 F.3d 81 (2nd Cir. 2012); Drake v. Filko, 724 F.3d 426 (3rd Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

84. The Court's recognition of self-defense in the home as protected conduct should not be understood to disallow self-defense outside of the home. The Majority acknowledged it left these types of questions undecided. *See* District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

85. *See generally* Gura Oral Argument, *supra* note 81, at 1 (arguing that the Supreme Court's reasoning should be adopted by the Court of Appeals to decide an untested selective incorporation theory).

86. *Id.*

87. *Id.*

88. *Id.*

conduct. Rather, lower courts should attempt to resolve these open issues as they anticipate the Supreme Court would if it were hearing the same case.[89]

IV. PERUTA APPEALS

The Ninth Circuit relied heavily on *Heller* in analyzing Peruta's challenge to San Diego County's CCW policy.[90] First, as discussed above, the court interpreted the breadth of *Heller*, to determine whether lawfully carrying a weapon outside the home for individual self-defense was a protected Second Amendment activity. After finding it protected, the court had to decide if the County impermissibly infringed upon Peruta's Second Amendment right when it denied him a CCW pursuant to its "good cause" policy requirement. To that end, a comprehensive understanding of California gun laws is needed. This section will proceed with an overview of California law, summarize the Ninth Circuit's *Peruta* opinion, and examine the impact of that decision.

A. California CCW Law

In California, it is generally unlawful to carry a concealable[91] firearm in public.[92] Violations are punishable as misdemeanors.[93]

89. Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982) (noting "constitutional law is very largely a prediction of how the Supreme Court will decide particular issues when presented to it for decision").

90. *See infra* Part IV.B.

91. A "concealable" firearm is one with a barrel less than 16 inches long. CAL. PENAL CODE § 16530 (West 2012). As a practical matter, the definition encompasses handguns—semiautomatics and revolvers. Short-barreled shotguns and rifles may also be "concealable," but are already expressly prohibited. *Id.* § 33210.

92. *Id.* § 25400.

93. *Id.* § 25400(c)(5)–(7). Violations with enumerated aggravating circumstances (*e.g.*, involving a stolen firearm or gang activity) are punishable as felonies. *Id.* § 25400(c)(1)–(4). The scope of this comment is limited to otherwise law abiding citizens attempting to carry in compliance with the California regulatory scheme.

While there are a variety of narrow exceptions,[94] the more traditional "exception" is obtaining a license.

California is a "may-issue" state—an issuing agency has discretion to grant or deny a CCW license.[95] Generally, the County Sheriff processes applications;[96] however, processing may be delegated to the police department of an incorporated city.[97] To be granted a license, the applicant must be a resident or employed in the county, complete a training course, have good moral character, and demonstrate "good cause."[98] On appeal, Peruta did not challenge the statutory requirement of "good cause;" rather he challenged the County policy that rejected self-defense as satisfactory "good cause" absent a documented threat.[99]

The County defined "good cause" as "a set of circumstances that distinguish the applicant from other members of the general public and causes him or her to be placed in harm's way."[100] Generalized fear for one's personal safety was not, standing alone, considered

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94. Retired policemen may carry a concealable weapon in public, CAL. PENAL CODE § 25455 (West 2012), as may licensed hunters and fishermen while engaged in the activity. CAL. PENAL CODE § 25640. This also includes "going to or returning from" hunting or fishing. *Id.* There is no case on point, but, presumably this means walking to and from the field (not driving to or from a fishing or hunting location). Concealable weapons may also be carried to or from a target range. *Id.* § 25540. A "reasonable belief of grave danger" is another exception under section 25600, however, this exception does not excuse a violation immediately preceding such danger. Peruta v. County of San Diego, 742 F.3d 1144, 1147 n.1 (9th Cir. 2014) (noting that "where the fleeing victim would obtain a gun during that interval is apparently left to Providence.").

95. PENAL § 26150. This discretion is implicit because there are no objective standards of "good cause" and the issuing authority *may* issue.

96. *Id.*

97. *See License & Registration Division*, SAN DIEGO COUNTY SHERIFF'S DEPARTMENT, http://www.sdsheriff.net/licensing.html (last visited Dec. 14, 2014).

98. *Id.* Additionally, applicants must not otherwise be prohibited from owning or possessing a firearm (*e.g.* have a felony conviction, be subject to a restraining order, or be determined mentally ill). *See Firearms Prohibiting Categories,* CALIFORNIA DEPARTMENT OF JUSTICE, BUREAU OF FIREARMS, http://oag.ca.gov/sites/all/files/pdfs/firearms/forms/prohibcatmisd.pdf (last visited Feb. 22, 2014).

99. Peruta Brief, *supra* note 33, at *8.

100. *Peruta*, 742 F.3d at 1148.

"good cause."[101] The County required applicants citing personal protection as their justification for CCW to show "documented threats, restraining orders, and other related situations where an applicant can demonstrate that he or she is a specific target presently at risk of harm."[102] Peruta's application was denied for lack of sufficient documentation of "good cause."[103]

B. The Ninth Circuit Weighs In

The Ninth Circuit issued the *Peruta v. County of San Diego* opinion on February 13, 2014.[104] The court first determined whether a law-abiding citizen's ability to carry a gun outside the home for self-defense fell within the scope of the Second Amendment.[105] To answer this question, the court, much like the Supreme Court did in *Heller*, looked to the text of the Second Amendment and "original public understanding" to determine the scope of the right,[106] by examining: founding era treatises; 19th Century case law; and post-Civil War legislation and legal commentary.[107] Of these discussions, the court's methodology regarding 19th Century cases appears to be the most influential on its ultimate conclusion.[108] Specifically, the

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101. *Id.*

102. San Diego Brief, *supra* note 24, at *7.

103. *Id.*

104. *Peruta*, 742 F.3d 1144.

105. *Id.* at 1150.

106. Original public understanding was crucial to the court's determination of the scope of the right:

> Understanding the scope of the right is not just necessary, it is key to our analysis. For if self-defense outside the home is part of the core right to "bear arms" and the California regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-end scrutiny can justify San Diego County's policy.

Id. at 1167. If a law-abiding citizen's ability to carry a gun outside the home for self-defense is a core right, then the only way to implement a complete ban on that activity is by constitutional amendment. *See id.* ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.") (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

107. *Id.* at 1150–67.

108. *See id.* at 1155–56.

court organized cases into three distinct categories, in order of importance: "(1) authorities that understand bearing arms for self-defense to be an individual right, (2) authorities that understand bearing arms for a purpose *other than* self-defense to be an individual right, and (3) authorities that understand bearing arms not to be an individual right at all."[109] In interpreting the original understanding of the right to keep and bear arms, the court gave the most importance to category one, which identifies the right consistent with the ruling in *Heller*.[110] Category two cases, which do not closely mirror *Heller*'s premise were given less weight.[111] Category three cases, were expressly rejected by *Heller,* and given no weight.[112] The court concluded its comprehensive historical review by holding that the phrase "bear arms" includes the right to carry an operable handgun outside the home for the lawful purpose of self-defense.[113]

Next, the court found that the San Diego County Sheriff's policy burdened the Second Amendment right, and that the burden was severe.[114] Similar to *Heller*'s handgun ban inside the home, the court found San Diego County's restrictions *outside* the home amounted to a near prohibition.[115] In reaching this conclusion, the court considered the policy in conjunction with California's ban on open carry, which left no lawful manner of carry for self-defense.[116] The Ninth Circuit did not hold that may-issue policies are *per se* invalid.[117] Rather an open carry *or* a may-issue regime that recognizes self-defense as "good cause" would satisfy the Second Amendment.[118] Because the court found a *Heller*-like "near-total prohibition on bearing arms," it found the policy unconstitutional without applying any level of

109. *Id.*
110. *Id.* at 1156–57.
111. *Id.* at 1157–60.
112. *Id.* at 1160.
113. *Id.* at 1166.
114. *Id.* at 1168–70.
115. *Id.* at 1170.
116. *Id.* at 1172.
117. *Id.*
118. *See id.* ("To be clear, we are not holding that the Second Amendment requires the states to permit concealed carry. But the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home.").

scrutiny.[119] However, the court implied that the policy would fail any level of heightened scrutiny because it lacks narrow tailoring.[120]

C. The Fallout: Practically and Procedurally

Technically, *Peruta* does not disturb California law on CCW. The opinion makes clear that only the San Diego County Sheriff's *interpretation* of good cause is unconstitutional.[121] However, the State of California's interest in intervention demonstrates that this "technicality" has the practical effect of substantially invalidating California's CCW law.[122] Post-*Peruta*, all counties are required to recognize general self-defense as good cause.[123] The end result is California's transformation from a "may-issue" to a "shall-issue" state.[124]

While the Ninth Circuit's *Peruta* decision is a major victory for gun rights advocates, its finality is uncertain. The court has denied the

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119. *Id.* at 1170, 1175.

120. *See id.* at 1175–78.

121. *Id.* at 1489.

122. Interview with Peruta's Counsel Paul Neuharth, The Law Office of Paul Neuharth, Jr. APC, in San Diego, Cal. (Feb. 18, 2014).

123. *Id.*

124. CCW licensing in most states is either "shall-issue" or "may-issue". In both systems, the applicant must pass standard, objective requirements such as a background check, a "qualification shoot" for firearms proficiency and accuracy, and a safety course. May-issue states have discretionary permit systems giving the County Sheriff or local police department discretion to implement the state's statutory CCW scheme, often in the form of a "good cause" or character determination. This is in addition to the standard requirements. A shall-issue state allows no such discretionary determination; if the applicant meets the standard requirements, the issuing authority "shall issue" the permit. Jim Cleary & Emily Shapiro, *The Effects of "Shall-Issue" Concealed-Carry Licensing Laws: A Literature Review*, Information Brief, Minnesota House of Representatives, Research Department (Feb. 1999), http://www.house.leg.state.mn.us/hrd/pubs/concarry.pdf (last visited Mar. 23, 2014). Accordingly, permits are easier to obtain in shall-issue states. A small number of states do not allow CCW at all, while others do not require any licensing, colloquially called "Constitutional Carry." Douglas Little, *Arizona Constitutional Carry and the "Law of Unintended Consequences,"* EXAMINER (Apr. 16, 2010), http://www.examiner.com/article/arizona-constitutional-carry-and-the-law-of-unintended-consequences.

State's motion to intervene,[125] and San Diego County and Sheriff Bill Gore have announced they will not seek a rehearing or further review, and will comply with the Ninth Circuit ruling once it is finalized.[126] However, it remains to be seen if the State will seek Supreme Court review of its intervention in an attempt to revisit the merits of this case.[127] Regardless of the importance of *Peruta* to San Diegans and the Ninth Circuit, a final disposition does not change the opinion's continuing validity as a proposed standard when the CCW issue ultimately reaches the Supreme Court.[128]

V. POSSIBLE JUDICIAL STANDARDS

Lower courts have implemented a variety of analytical approaches to the open issue of the proper judicial standard for CCW laws. This confusion stems not only from what *Heller* left open, but also in deciphering its holding from *dicta.* Regardless, even the Court's *dicta* in the "predictive exercise" [129] on matters of first impression may be the most useful guidance in determining the proper standard. Because the Supreme Court has not identified a standard for CCW cases, this section will focus on the merits of the various proposed standards. Aside from a *sui generis Heller* approach, these standards are discussed, generally, from the strictest—a standard that is most difficult for a law to withstand, to the most deferential—a standard that is easiest for the government to satisfy. The discussion will not discount possible theories and cases that may have little precedential value or negative subsequent history.

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125. Peruta v. County of San Diego, No. 10-56971, 2014 WL 5839792, (9th Cir. Nov. 12, 2014).

126. News Release, *Letter from Bill Gore, San Diego County Sheriff, to the County Board of Supervisors* (Feb. 21, 2014) http://apps.sdsheriff.net/press/default.aspx (last visited Feb. 22, 2014) (on file with author).

127. The *Peruta* panel noted non-parties cannot seek rehearing *en banc. Peruta*, 2014 WL 5839792, at *1. Presumably, the State would need the Supreme Court to reverse on the intervention issue. Only then could it request rehearing, or challenge another adverse decision on the merits by the *en banc* panel to the Supreme Court.

128. Because the CCW question is an open issue, the Supreme Court may find the opinion instructive regardless of its precedential value.

129. Gura Oral Argument, *supra* note 81.

A. Prior Restraint

Under prior restraint, a law that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official" is unconstitutional.[130] Borrowing from First Amendment jurisprudence, the plaintiff in *Richards v. County of Yolo* urged prior restraint as the proper standard for determining the validity of California's discretionary CCW law.[131] The court declined to apply this "traditional First Amendment analysis."[132]

This standard is an attractive option because it does not require the court to apply a certain level of scrutiny. Thus, courts could strike down overly burdensome gun laws while abstaining from the establishment of an "interest-balancing" standard associated with traditional levels of means-end scrutiny. This would be consistent with the *Heller* majority's rejection of such an "interest-balancing inquiry."[133]

B. Strict Scrutiny

To withstand strict scrutiny, a law must be "narrowly tailored to promote a compelling Government interest."[134] This highest standard of "means end scrutiny"[135] has been described as "'strict' in theory

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130. Staub v. City of Baxley, 355 U.S. 313, 322 (1958). Plaintiff-Appellant's Brief at *37, Richards v. Prieto, 560 Fed. Appx. 681 (9th Cir. 2014) (No. 11-16255), 2011 WL 9535599.

131. 821 F. Supp. 2d 1169, 1175–76 (E.D. Cal. 2011), *rev'd sub nom.* Richards v. Prieto, 560 Fed. Appx. 681 (9th Cir. 2009).

132. *Id.* The plaintiff in *Drake v. Filko* made the same argument, which the Third Circuit rejected. 724 F.3d 426, 435 (3rd Cir. 2013).

133. *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

134. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

135. United States v. Lopez, 514 U.S. 549, 606 (1995) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)). *Carolene* footnote four is widely considered one of the most famous in the history of constitutional law. *See, e.g.*, Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163 (2004); *see also* Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (calling footnote 4 "the most celebrated footnote in constitutional law"). The highly influential dicta

and fatal in fact."[136] Although the "fatal" effect of administering strict scrutiny has been called into question,[137] it is undoubtedly an extremely high burden for the government to meet.[138] Thus, strict scrutiny was favored by Peruta and disfavored by the County.[139]

Courts generally apply strict scrutiny to laws that interfere with fundamental constitutional rights.[140] The Supreme Court in *McDonald* decided that the Second Amendment *does* confer a fundamental right.[141] Thus, the argument for applying strict scrutiny to a challenged CCW policy is strong.[142] However, such a determination depends on whether CCW for self-defense falls within the scope of the Second Amendment right.

In *Peruta* the County advanced Justice Breyer's *Heller* dissent, [143] arguing that the majority's recognition of the continuing validity of

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introduced the idea of multilevel means-end scrutiny, now central to modern constitutional analysis whereby fundamental rights (including incorporated constitutional amendments) and suspect class distinctions receive heightened judicial scrutiny. Powell, *supra* at 1088. The Second Amendment is the most recent to be incorporated, applying the landmark *Heller* decision to state and local governments. *See* McDonald v. Chicago, 561 U.S. 742 (2010).

136. Gerald Gunther, *In search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

137. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, (2006) (using empirical data to suggest that the "strict scrutiny myth" overstates the lethality of the standard); *see also* Adarand Constr., Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

138. This is because under strict scrutiny, the law loses its presumption of validity. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

139. San Diego Brief, *supra* note 24, at 13; Peruta Brief, *supra* note 33, at 18–19.

140. *San Antonio*, 411 U.S. at 16; b*ut see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empiracal Analysis of Strict Scrutiny in Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (arguing that not all fundamental rights trigger an equally protective level of strict scrutiny).

141. McDonald v. Chicago, 561 U.S. 742, 778.

142. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

143. Justice Breyer noted that:

> Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." But the majority implicitly, and appropriately, rejects that suggestion by broadly

longstanding prohibitions implicitly rejected strict scrutiny.[144] The County contended the court should not adopt a standard that would invalidate these longstanding prohibitions,[145] which the *Heller* majority went so far as to characterize as "presumptively lawful."[146] Additionally, although not argued by the County in great depth, presumptive constitutionality identifies with lower levels of scrutiny rather than heightened scrutiny. [147]

The County's argument, however, cannot preclude the application of strict scrutiny to Second Amendment cases. The theory that the Supreme Court *implicitly* rejected strict scrutiny cannot supplant the fact it *expressly* stated otherwise.[148] Moreover, the Court did not reject strict scrutiny, it unambiguously declined to "clarify the entire field" by endorsing any level of scrutiny at all.[149]

C. Nordyke *Substantial Burden*

In *Nordyke v. King*, the Ninth Circuit addressed a challenge to a ban on gun shows at fairgrounds on county property.[150] Relying on First Amendment and abortion cases, the Ninth Circuit applied a substantial burden analysis to the Second Amendment challenge.[151] As applied in *Nordyke*, the adapted substantial burden inquiry asked whether the gun show restriction left "reasonable alternative means

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> approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear.

Id. at 688 (Breyer, J., dissenting).

144. San Diego Brief, *supra* note 24, at *13.

145. *See id.*

146. *Heller*, 554 U.S. 626 n.26.

147. *See* San Diego Brief, *supra* note 24, at *19.

148. *See Heller*, 554 U.S. 634–35 (responding to criticism of leaving the standard of review unanswered and deciding it will defer that decision to a future case).

149. *Id.*

150. Nordyke v. King, 644 F.3d 776 (9th Cir. 2011), *vacated*, 681 F.3d 1041 (9th Cir. 2012).

151. *Id.* at 784–86.

for obtaining firearms sufficient for self-defense purposes."[152] The court ultimately upheld the law after the State conceded, at oral argument, that it would allow gun shows on the fairgrounds if sellers "tethered" firearms to a large object (similar to cell phones in an electronics store).[153]

The *Nordyke* panel articulated a two-part test. First, whether the law imposes a substantial burden on the exercise of the Second Amendment right; if so, the court will apply heightened scrutiny.[154] The Court declined, however, to identify the appropriate level of heightened scrutiny.[155] Second, if the law *is* a substantial burden, the court will ask whether it constitutes an undue burden or if "reasonable alternative means" to exercise the right are available.[156] Undue burden and "reasonable alternative means" are considered distinct factors, but they operate as one; if a law leaves "reasonable alternative means" to exercise the right, then the law cannot amount to an undue burden.[157] Therefore, laws that amount to a substantial but not an undue burden, are constitutional if they can withstand a heightened level of scrutiny.

An important part of assessing the burden is identifying alternative options for carrying a handgun. Prior to 2012, a longstanding alternative to concealed carry in California was unloaded open carry ("UOC").[158] UOC was available when the *Peruta*

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152. *Id.* at 787.

153. *Id.* at 786 n.9.

154. *Id.* at 786.

155. *Id.* at 786 n.9.

156. *Id.* Here, the court borrowed from First Amendment doctrines like time, place, and manner restrictions on content neutral speech.

157. *See id.*

158. The open carrying or unconcealed carrying of a handgun was not a crime in California until 2012, when Penal Code section 26350 became effective. *See* Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1115-17 (S.D. Cal. 2010) ("nothing in [California Penal Code] section 12031 restricts the open carry of unloaded firearms and ammunition ready for instant loading."). Unloaded open carry was widely criticized by gun rights advocates and gun control advocates alike. The enforcement of the *unloaded* provision wasted police resources, which required an officer to verify a firearm is unloaded by inspecting the chamber and magazine. *See, e.g., ABC News Covers Open Carry in Livermore CA.* http://www.youtube.com/watch?v=fJVpCMyMKWU (last visited March, 22, 2014) (showing law enforcement officers performing an "e-check" ensuring compliance

complaint was filed. California law allowed the open carry—in a belt holster or otherwise visible holster—of an *unloaded* handgun.[159] California also permitted the carrying of a loaded magazine[160] or speedloader[161] available for immediate loading. The parties' briefs discussed, at length, the availability of UOC as a mitigating factor giving citizens a viable alternative to carrying concealed and loaded.[162] By the time the Ninth Circuit decided *Peruta,* however, UOC had been banned,[163] undermining the State's position. Thus, an alternative manner of carry no longer mitigated any Second Amendment burden caused by the County's CCW policy. The remaining issue became one of determining the proper standard of review or means-end scrutiny to apply.[164] The *Nordyke* substantial burden test remains a viable standard for all may-issue states, but state laws offering minimal alternatives for carry face a higher likelihood of invalidation.

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with the unloaded requirement pursuant to Penal Code section 12031(e)). The "e-checks" are considered wasteful as a crime prevention consideration because UOC was the preferred method of non-violent political activists, whereas, criminals generally prefer to carry weapons loaded and concealed. It also had the potential to escalate into hostile police encounters, frightening the public and harming the perception of lawful gun owners. *See, e.g., id.*

159. California did not expressly recognize open carry; rather, it was permissible by operation of the two relevant Penal Code sections. Section 12031 prohibited carrying loaded firearms, and section 25400 prohibited concealed firearms. *See* CAL. PENAL CODE § 12031 (West 2010) (repealed 2012); CAL. PENAL CODE § 25400 (West 2012). As a result, unloaded and unconcealed firearms could be lawfully carried.

160. *See id.* The pistol could then be loaded when the statutory exception for reasonable belief of grave danger is met. CAL. PENAL CODE § 12031 (j)(1) (West 2010).

161. A speedloader is a device commonly associated with revolvers which allows the simultaneous loading of multiple rounds of ammunition to fill the entire cylinder at once. Because revolvers cannot accept detachable magazines like semiautomatic handguns, speedloaders reduce loading time that would otherwise be performed one round at a time.

162. San Diego Brief, *supra* note 24, at 11–12; Peruta Brief, *supra* note 33, at 14, 16–17.

163. Penal Code section 26350, which became effective January 1, 2012, made the open carry of an unloaded firearm unlawful.

164. Appellants Citation of Supplemental Authority Rule 28(j) Letter re: California Assembly Bill No. 144, Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. Feb. 13, 2014) (No. 10-56971).

D. Intermediate Scrutiny

"To survive intermediate scrutiny, the challenged provision must be substantially related to the achievement of important government interests."[165] This standard appears to be the middle ground between the parties' positions in *Peruta*. Indeed, the district court relied on this standard when it decided on the issues presented.[166] However, both parties agreed it was not the appropriate standard to apply, and the briefs addressed it only in the alternative.[167]

On appeal, the County contended that courts should not apply a standard higher than intermediate scrutiny, acknowledging that post-*Heller* courts have repeatedly applied intermediate rather than strict scrutiny.[168] The County relied on various Second Amendment cases that rejected strict scrutiny, for example: one involved a law making it a crime for a felon to possess a firearm,[169] and the other a law making it a crime to knowingly possess a gun with an obliterated serial number.[170] In both cases, the defendants were charged with a crime for conduct that occurred inside a home.[171] The County argued that the home deserves heightened constitutional protection, but that CCW outside the home should not have an equivalent or higher standard.[172] That analysis was flawed, however, because its reasoning applied factual scenarios explicitly rejected in *Heller* as outside the scope of the Second Amendment right. Specifically, the County's analysis focused on laws targeted at felons and individuals obliterating serial numbers, analogizing them to Peruta's asserted right to armed self-

165. San Diego Brief, *supra* note 24, at *14 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

166. Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1115–17 (S.D. Cal. 2010).

167. San Diego Brief, *supra* note 24, at *14–*15; Peruta Brief, *supra* note 33, at *44–*45.

168. San Diego Brief, *supra* note 24, at *15.

169. United States v. Miller, 604 F. Supp. 2d 1162 (W.D. Tenn. 2009).

170. United States v. Marzzarella, 595 F. Supp. 2d 596 (W.D. Pa. 2009).

171. The County seemingly broadens *Heller*'s mandate as protecting "firearm possession in the home." This selectively generous definition leads to perverse results, whereby serial number obliteration (a presumptively unlawful purpose) in the home would receive more Second Amendment protection than self-defense (a presumptively lawful purpose) occurring outside the home.

172. San Diego Brief, *supra* note 24, at *15.

defense. The cases cited by the County are the type of prohibition contemplated by *Heller* as presumptively lawful. *Heller* clarified the Court was not disturbing what was already clear: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . [or] carrying of firearms in sensitive places such as schools."[173] Peruta's case—and any case worthy of review—should concern a law-abiding citizen's desire for armed self-defense beyond the home, which is arguably within the right as it was understood in 1791.

E. Rational Basis

The highly deferential rational basis review rarely impedes implementation of "legislative policy judgments."[174] Laws enacted under a State's general police powers are presumptively constitutional and will not be invalidated as long as the law is reasonably related to a legitimate governmental interest.[175]

Although the Supreme Court in *Heller* did not mandate a certain level of scrutiny for Second Amendment cases, it did remove rational basis review from consideration as too low a standard for an enumerated constitutional right.[176] Therefore, the recurring State argument calling for rational basis review appears facially incompatible with the mandate of *Heller*. Still, whether rational basis review could be used depends on the threshold question of whether the targeted activity is within the scope of the Second Amendment. Therefore, the State does not argue that rational basis review is appropriate for certain Second Amendment activities, but rather that some conduct, such as public CCW, falls entirely outside the scope of the Second Amendment right.

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173. District of Columbia v. Heller, 554 U.S. 570, 626 (2008). Similarly, it is unlikely the Court's decision should "cast doubt" on presumptively lawful prohibitions on the obliteration of serial numbers.

174. *See* United States v. Lopez, 514 U.S. 549, 606 (1995).

175. 16 AM. JUR. 2D *Constitutional Law* § 347 (1969).

176. *Heller*, 554 U.S. at 628 n.27 ("If 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.").

F. Reasonableness Review

A restriction will withstand reasonableness review if it "is a reasonable exercise of the State's inherent police powers."[177] Though similar, it is distinct from rational basis review, and is considered an appropriate standard where the "core right" in question remains available to the people through reasonable means.[178] Courts have applied this standard in First Amendment cases,[179] where the court's speech jurisprudence distinguishes between political and commercial speech. Similarly, the Supreme Court recently distinguished self-defense as a core Second Amendment right.[180]

As a policy matter, state and local legislatures, governments closest to the people, are better equipped to make public safety determinations than the judiciary.[181] In *Peruta*, the County cited *Turner* for the proposition that substantial deference should be given to the legislature in exercising its police powers.[182] While this standard may be acceptable in some Second Amendment applications, CCW cases invoke the "core right" of self-defense identified in *Heller*. Therefore, like rational basis review, the Supreme Court would likely consider reasonableness review an unacceptable standard to CCW cases implicating self-defense.[183]

VI. THE SUPREME COURT SHOULD APPLY A "TIERED-*HELLER*" FRAMEWORK TO A CCW CASE

When the Supreme Court decides its next Second Amendment case, and if it must determine a standard or level of scrutiny, it should use what this comment proposes as the "Tiered-*Heller*" approach. This standard would expressly adopt what was left unanswered, yet implicit in *Heller*.

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177. San Diego Brief, *supra* note 24, at 15.

178. *Id.*

179. Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

180. *See Heller*, 554 U.S. at 635–36. Whether this "core right" extends to activities such as hunting and sporting applications is yet to be determined.

181. *See* San Diego Brief, *supra* note 24, at 16.

182. *Id.* (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).

183. *See Heller*, 554 U.S. at 628 n.27.

In *Heller*, the Court applied a two-step approach familiar to constitutional law. The first step determined whether the individual right to bear arms for self defense was a protected Second Amendment activity.[184] Second, the Court weighed the effect of the challenged gun laws on that activity to determine the extent of the burden.[185] Finding that the challenged gun laws amounted to a near-complete ban, the Court struck down the laws because they impermissibly infringed on Second Amendment rights. The Court did not apply any level of means-end scrutiny.[186]

When a challenged law does not amount to a complete or near-complete ban, the "Tiered-*Heller*" approach adds the next logical step in determining the challenged law's validity. This third step requires the Court to determine the severity of the burden and assign a corresponding level of judicial scrutiny (tiers). More burdensome laws will exact higher levels of scrutiny than those that only incidentally affect Second Amendment rights.[187]

This "Tiered-*Heller*" would follow basic constitutional avoidance principles,[188] facilitate decisions on the narrowest grounds possible,[189]

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184. *Id.* at 576–626.

185. *Id.* at 626–35.

186. This approach was substantially followed in *Peruta*. Peruta v. County of San Diego, 742 F.3d 1144, 1149, 1167 (9th Cir. 2014). This section does little more than give it a name, "Tiered-*Heller*," and suggest the next step if protected Second Amendment conduct is restricted but not completely prohibited.

187. The word burden here has no connection to the undue burden or substantial burden principles of constitutional law. However, the term "level of infringement" is an unacceptable term because it conflicts with the text of the Second Amendment commanding "the right to keep and bear arms, *shall not* be infringed." U.S. CONST. amend. II (emphasis added). A natural reading provides that the right shall not be infringed *at all*. This is not to say there can be no restrictions or laws on firearms. Simply, laws that regulate guns and still pass constitutional muster do not *infringe* on the right.

188. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (quoting Burton v. United States, 196 U.S. 283, 295 (1904)). With this approach, the Court could exercise judicial restraint while still addressing laws that are most likely in violation of *Heller*.

189. A systematic tiered approach only requires the Court to proceed with its analysis if the previous step is satisfied. In contrast, an "interest-balancing" approach that weighs a comprehensive yet unidentified set of factors was admonished by the *Heller* majority. *See* District of Columbia v. Heller, 554 U.S.

and provide clarity and redress for the most severe burdens on protected Second Amendment conduct[190]

A. The Supreme Court Should Hear a Peruta*-Like Case*

Post-*Peruta*, the appellate circuits courts are split on the issue of whether the Second Amendment protects a law-abiding citizen's ability to bear arms outside the home for the lawful purpose of self-defense.[191] The "pro-gun" circuits are the Seventh and Ninth Circuits. In *Moore*, the Seventh Circuit struck down an Illinois gun law broadly prohibiting public carrying of handguns.[192] There, the court favored a broad interpretation of *Heller* and concluded that the right to armed self-defense was not limited to within the home.[193] The State's petition for rehearing was denied and the State did not seek further review.[194] As discussed at length herein, the Ninth Circuit in *Peruta* held that San Diego County's policy rejecting a general desire for self-defense as "good cause" required to obtain a CCW license was unconstitutional.

The "pro-state" circuits include the Second,[195] Third,[196] and Fourth Circuits.[197] The Second Circuit in *Kachalsky* upheld a CCW requirement for particularized good cause under intermediate scrutiny.[198] The Third Circuit in *Drake* upheld a New Jersey CCW law requiring "justifiable need" on the basis that the right to carry a concealed weapon in public for self-defense fell outside the scope of

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570, 634–35 (2008). Such an approach is inherently subjective and would further the confusion signified by the current circuit court split.

190. To achieve this, the Supreme Court should continue to hear only Second Amendment cases that resemble categorical bans or similarly severe restrictions. *See, e.g.*, McDonald v. Chicago, 561 U.S. 742, 750 (2010); *Heller*, 554 U.S. 570. In both *Heller* and *McDonald*, the Court found a "near categorical ban" on possession of handguns.

191. Peruta v. County of San Diego, 742 F.3d 1144, 1173 (9th Cir. 2014).

192. Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

193. *Id.* at 935–36.

194. Moore v. Madigan, 708 F.3d 901, 902 (7th Cir. 2013).

195. Kachalsky v. County of Westchester, 701 F.3d 81 (2nd Cir. 2012).

196. Drake v. Filko, 724 F.3d 426, 429 (3rd Cir. 2013).

197. Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

198. *Kachalsky*, 701 F.3d at 81, 96–97.

the Second Amendment.[199] The *Drake* court also noted that even if such a right was within the scope of the Second Amendment, intermediate scrutiny is the proper standard, and the standard was satisfied.[200] Finally, the Fourth Circuit in *Woollard* upheld a State's conditioning of permit issuance on proof of "good and substantial reason" under intermediate scrutiny.[201]

To date, the Supreme Court has consistently declined to grant certiorari on a CCW case.[202] As a result, the issue remains unsettled. It is important to note that *Kachalsky* predated *Moore*'s creation of a circuit conflict, however, the Supreme Court denied certiorari in *Woollard* despite this existing conflict.[203] Most recently, a writ of certiorari was denied in *Drake*[204] following additional briefing noting that *Peruta* "deepens the circuit splits."[205]

*B. Applying "Tiered-*Heller*" to a* Peruta*-Like Case*

This section applies—step by step—the proposed analysis in a *Peruta*-like factual scenario. First, the court must determine if the asserted right is protected Second Amendment conduct. Second, the court should determine if the law amounts to a complete prohibition on that protected conduct, as it found in *Heller*. If it does, the law is struck down and the analysis ends here. If the challenged law reaches the third level, the court determines the extent of the burden on the protected conduct. The court then applies an appropriate level of scrutiny corresponding to the severity of the burden. Like *Heller*,

199. *Drake*, 724 F.3d at 426, 429.

200. *Id.* at 430.

201. *Woollard*, 712 F.3d at 876.

202. The Court has avoided CCW-related plaintiff's requests for review, denying petitions for writ of certiorari in both *Kachalsky* and *Woollard*. *Kachalsky*, 701 F.3d 81, *cert. denied*, 133 S. Ct. 1806 (2013); *Woollard,* 712 F.3d 865, *cert. denied*, 134 S. Ct. 422 (2013).

203. *See generally Kachalsky*, 701 F.3d 81; *Woollard*, 712 F.3d 865; Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012); Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. Feb. 13, 2014).

204. Drake v. Filko, 724 F.3d 426 (3rd Cir. 2013), *petition for cert. denied sub nom.*, Drake v. Jerejian, 134 S. Ct. 2134 (2014).

205. Supplemental Brief for Petitioners at 1, Drake v. Filko, 724 F.3d 426 (3d Cir. 2013) (No. 13-827), 2014 WL 787210, at *1.

each step should be considered within the historical context of the Second Amendment, beginning with the founding era.

1. Scope of the Right

The Second Amendment analysis necessarily begins with a threshold assessment as to whether the conduct or activity in question is within the scope of the right to keep and bear arms. The only data point for guidance on this assessment is *Heller*'s command that the scope of the right includes carrying a handgun in the home for lawful self-defense.[206] As such, courts should rely on both the holding and reasoning of *Heller* to determine whether the right extends to issues like public CCW. *Heller*'s reasoning dictates that a historical analysis is required for cases of first impression.[207] Thus, courts should look to contemporaneous and post-ratification case law for assistance. Additionally, courts conducting this assessment should adopt the Ninth Circuit approach and disregard cases premised on the idea that the Second Amendment does not confer an individual right.

2. Complete Prohibition

Once the court has assessed the scope of the right to bear arms, it should determine whether the identified Second Amendment activity is entirely or almost entirely prohibited. This methodology mirrors *Heller* exactly.[208] Still further, like in *Heller*, the standard should be applied practically so as not to elevate form over substance.[209] Finding a categorical ban would invalidate the County's requirement of particularized good cause. The Ninth Circuit's analysis ended at this step because it found that the "good cause" policy requirement amounted to a near-complete ban.

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

207. The part of the court's opinion that "explains the court's rationale . . . is part of the holding" and is *not* mere *dicta*. *See* United States v. Bloom, 149 F.3d 649, 653 (7th Cir. 1998), *abrogated on other grounds by* Ryan v. United States, 688 F.3d 845 (7th Cir. 2012).

208. *See Heller*, 554 U.S. 628–29 (2008).

209. *See id.* at 629 ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.").

3. *Tiered Level of Scrutiny Relative to Severity of Burden*

The third step assigns a judicial standard according to how severely a law burdens the right to keep and bear arms.[210] This step is seemingly implicit from *Heller*'s *dicta*, and should be adopted by the Court.[211] Although this final step is discussed as a new "step," as a practical matter, *Heller* used this theory because the District of Columbia's handgun restrictions were found to be the most severe infringement possible—a complete ban.[212] Therefore, the Court gave the law the most severe treatment, by completely invalidating it as unconstitutional.[213]

Where the restriction falls short of a complete ban, courts should consider whether the restricted Second Amendment activity is part of the "core right." Core rights should be presumptively subject to heightened levels of scrutiny.[214] The Government would have to satisfy a very high standard when the core right of self-defense is implicated.[215] In contrast, a gun store owner using the Second Amendment to further his commercial purpose would not be asserting a recognized core right, thus there would be no presumption of heightened scrutiny.

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210. This section will use levels of scrutiny, means-end scrutiny, standard of review, and judicial standard interchangeably. The proposed Tiered-*Heller* standard is relevant primarily for the process to be used rather than the judicial standard ultimately applied to Second Amendment cases. Accordingly, these standards are not necessarily constrained to traditional means-end scrutiny such as strict scrutiny or intermediate scrutiny (Second Amendment jurisprudence is minimally constrained beyond the Court's *Heller* and *McDonald* decisions). The Court may determine other standards are appropriate as part of the regressive hierarchical scheme that ranges from complete prohibition to incidental burden. However, as a practical matter the Court would and should be hesitant to stray from its "traditionally expressed levels [of scrutiny]" for an "interest balancing" approach. *See Heller*, 554 U.S. 634.

211. *See id.* at 634–35. By categorizing the District of Columbia's handgun laws as a practical ban, the court assigned the ultimate heightened level of judicial scrutiny—invalidation.

212. *Id.* at 628.

213. *Id.* at 635.

214. *Id.* at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

215. *Id.* at 630 (requiring a handgun to be stored inoperable eliminates the "core lawful purpose of self-defense").

This Tiered-*Heller* approach may lack a concrete standard and leave its application in doubt. Like many constitutional issues, this approach is subject to criticism that it is overly subjective and wanting of a meaningful test to apply. However, courts are familiar with administering varying levels of scrutiny and in fact routinely do so.[216] Like other areas of constitutional law, the court need only match the government restriction to a preexisting judicial standard. This is similar to a preliminary determination of whether a right is fundamental for the corresponding presumption of strict scrutiny.[217] This framework is the superior standard used among the five circuits to address the CCW issue.

VII. CONCLUSION

A may-issue CCW case is ideal for Supreme Court review and clarification of *Heller*. However, it may be unlikely the state or local governments will file a petition for certiorari to the same Court that decided *Heller* and *McDonald*.[218] Indeed, the State did not seek further review (beyond a petition for rehearing) following a "pro-gun" opinion in *Moore*. Despite various states' hesitancy, a nationwide right to CCW in public may offend mainstream sensibilities and be perceived as a favorable case for states to seek Supreme Court review. In accordance with this proposed standard, the Court should continue to hear only cases that appear to be categorical bans. Doing so leaves unanswered, "middle of the road" cases that burden but do not ban protected Second Amendment conduct. Importantly, the Court's denial of certiorari in *Peruta* bears no weight on the proper analysis; it simply leaves unanswered questions unanswered.[219]

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216. In existing First Amendment jurisprudence, the Supreme Court has recognized "courts must apply categories such as 'government speech,' 'public forums,' 'limited public forums,' and 'nonpublic forums' with an eye toward their purposes." Pleasant Grove City v. Summum, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).

217. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

218. Interview with Peruta's Counsel Paul Neuharth, The Law Office of Paul Neuharth, Jr. APC, in San Diego, Cal. (Feb. 18, 2014). The County has already decided not to seek further review of the Ninth Circuit decision. *See* Gore, *supra* note 126, at 1.

219. Until the Court addresses the Second Amendment again, lower courts similarly should apply a heavy dose of *Heller* as the starting point for analysis.

The *Heller* dissent criticized the majority for leaving other Second Amendment applications unanswered.[220] The CCW issue in *Peruta* is just one example of an unanswered application of the Second Amendment. The *Heller* majority justified its restraint by acknowledging "there will be time enough to expound [its historical analysis] . . . if and when those ['unanswered questions'] come before us."[221] The time has come for the Court to answer the CCW question posed by *Peruta* and similar cases.[222] And if the Court takes the opportunity to review a CCW case, and is thereby required to apply a given level of scrutiny,[223] it should choose the tiered-*Heller* approach.

Gun law challenges implicating unsettled law require a complete historical analysis to determine whether the restricted activity falls within the scope of Second Amendment protection.[224] The Ninth Circuit rejected any proffered analyses lacking a foundation in American history because they go "against the analysis of the Second Amendment's scope employed in *Heller* and *McDonald*; those cases made clear that the scope of the Second Amendment right depends not on post-twentieth century developments, but instead on the understanding of the right that predominated from the time of ratification through the nineteenth century."[225]

Adopting a Tiered-*Heller* standard allows the Court to defer the decision on a level of scrutiny. The Court should first continue to define the outer contours of the Second Amendment by deciding what conduct is or is not within its scope. Next, the Court should determine which restrictions on conduct within the scope of the right amount to a ban and "total destruction of the right." This would require the Court to fully develop self-defense related jurisprudence, including deciding the CCW question, in the remaining "may-issue" states. This saves

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220. *Heller*, 554 U.S. 720 (Breyer, J., dissenting) (arguing that the majority opinion is too ambiguous and leaves open the issue of which self-defense confrontations and which weapons are protected by the Second Amendment).

221. *Id.* at 635.

222. In any event, it is unlikely the Court will be able to avoid the CCW question for another two hundred years as it did with the individual right or militia right question in *Heller*.

223. That is, if the Court determines an activity is protected by the Second Amendment, and the restriction amounts to something less than a complete ban.

224. Peruta v. County of San Diego, 742 F.3d 1144, 1173–75 (9th Cir. 2014).

225. *Id.* at 1174 n.21.

for a later day the implementation of the final step—addressing restrictions or burdens that amount to something less than an absolute prohibition on protected conduct (meaning within the scope) and then applying an appropriate level of scrutiny.[226]

The various statutory exceptions could not save the San Diego policy from classification as near complete prohibition on public self-defense.[227] Because the legislature has determined CCW is the approved manner of carry in California, it should allow CCW for the legal and constitutionally recognized purpose of self-defense. Like *Heller*, the finding of a categorical ban ends the inquiry. The Court should require recognition of self-defense as good cause, and bring an end to discretionary licensing of a constitutional right.

> Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable,

226. The level of protection for Second Amendment conduct other than self-defense is undecided, such as for: commercial purposes (private security, gun stores), sport, hunting, and collecting. *See Heller*, 554 U.S. 599. Despite the Antifederalist fears of disarmament by the government, Americans during the founding era thought the Second Amendment was "even more important for self-defense and hunting." *Id.* Additionally, because historical analysis is required, consideration of possession and training in contemplation of opposing government tyranny may be viewed as a core right within the original understanding given the historical backdrop of the founding era. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

227. Despite several CCW exceptions, such as for retired police officers and hunters or anglers while in the field, the County's application of the state CCW scheme has the practical effect of a ban for the majority of its citizens. *Heller*'s command that the Second Amendment is an individual right means the question is not whether *some* people qualify to exercise the right under an exception, but rather, "whether it allows the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense." Peruta v. County of San Diego, 742 F.3d 1144, 1169 (9th Cir. 2014).

but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[228]

Joseph A. Gonnella[*]

228. District of Columbia. v. Heller, 554 U.S. 570, 636 (2008).

* J.D. Candidate 2015, California Western School of Law; B.S. Business Administration 2012, California State Polytechnic University, Pomona. Thank you to Professor Glenn Smith for supervising this comment; the entire Law Review staff; and Dr. Kevin Farmer for encouraging my application to law school and constant mentorship. A special thank you to my family for their constant support, especially Brittany Gonnella for making law school possible.