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## THE SECOND AMENDMENT AS A NORMAL RIGHT

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On February 13, 2014, just in time for Valentine’s Day, the Ninth Circuit expressed its love for constitutional order by firing an arrow through the heart of California’s arbitrary handgun carry licensing scheme. The court’s decision in *Peruta v. County of San Diego*<sup>1</sup> effectively struck down the Golden State’s requirement that individuals wishing to carry a handgun in public for self-defense demonstrate “good cause”<sup>2</sup> to exercise what is, in fact, a fundamental constitutional right.<sup>3</sup>

Not surprisingly, *Peruta* sparked significant debate. Forty-four states already allow responsible adults to carry handguns for self-defense, openly or concealed, absent some specific reason to disarm them. But California — America’s media and cultural capital<sup>4</sup> and home to over a tenth of the nation’s population — stands as a significant outlier. The court all but invited certiorari review relating to the publicly contentious topic of carrying handguns for self-defense, punctuating its historical exegesis of the right to bear arms with pointed criticism of Second, Third, and Fourth Circuit opinions that had upheld substantially identical “proper cause,” “justifiable need,” and “good and substantial reason” requirements, respectively.<sup>5</sup> Instead, the Ninth Circuit followed the Seventh Circuit, which had struck down Illinois’ prohibition on the carrying of defensive handguns.<sup>6</sup>

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\* Member, Gura & Possessky, PLLC. Argued *District of Columbia v. Heller*, 554 U.S. 570 (2008) & *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Georgetown University, J.D. 1995; Cornell University, B.A., 1992.

<sup>1</sup> 742 F.3d 1144 (9th Cir. 2014). On the morning that *Peruta* was argued, the author argued a related case before the same panel, challenging the “good cause” requirement on its face and as applied by Yolo County, California, Sheriff Ed Prieto. *Richards v. Prieto*, No. 11-16255, 2014 U.S. App. LEXIS 4146 (9th Cir. Mar. 5, 2014). Following *Peruta*, the panel struck down Yolo County’s policy as well. *Id.*

<sup>2</sup> CAL. PENAL CODE § 26150(a)(2) (West 2012).

<sup>3</sup> *Peruta*’s majority denied that it had struck down the state law, which tasks each licensing authority — a county sheriff of municipal police department — with the business of defining “good cause.” Cal. Penal Code §§ 26160, 26202. The case, per the majority, concerned only San Diego County Sheriff William Gore’s policy rendering an interest in self-defense insufficient “good cause.” *Peruta*, 742 F.3d at 1173 & n.19. But it is difficult to imagine what would effectively remain of the statutory “good cause” requirement, as a check on licensing, were licensing authorities obligated to accept the constitutional self-defense interest as “good cause.”

<sup>4</sup> Sorry, New York.

<sup>5</sup> *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *petition for cert. filed sub nom. Drake v. Jerejian*, 2014 WL 117970 (U.S. Jan. 9, 2014) (No. 13-827); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012).

<sup>6</sup> *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

To be sure, *Peruta* fully deserves the attention it has attracted for its handling of the handgun carry issue. Were it notable for nothing else, the case would still stand as a landmark opinion. But *Peruta* may prove vastly more consequential than whatever impact it may have on an individual's ability to carry handguns as a precaution against violent crime. *Peruta*'s methodology is the real story. Contrary to the prevailing approach, the Ninth Circuit took seriously the question of what conduct the Framers understood the Second Amendment to protect. It did not, as have other courts, second-guess the Framers by refusing to question modern political outcomes.

The *Heller*<sup>7</sup> majority and Justice Thomas's decisive *McDonald*<sup>8</sup> concurrence concerned themselves primarily with the constitutional text's original public meaning in light of established American tradition. In *Heller*, text and history pointed to the Second Amendment's codification of an individual right to bear arms, the central purpose of which, *Heller* declared repeatedly, is self-defense.<sup>9</sup> Accordingly, *Heller* stridently rejected Justice Breyer's interest-balancing approach.<sup>10</sup> Washington, D.C.'s armed home self-defense ban could not survive a constitutional right securing the self-defense interest in arms, and since handguns are "arms," neither could the city's handgun ban.

But just as the struggle for racial equality did not end with *Brown v. Board of Education*,<sup>11</sup> the effort to establish the Second Amendment as a normal part of the Bill of Rights was never going to unfurl a "Mission Accomplished" banner just because the Supreme Court declared that the Second Amendment was a fundamental individual right on par with the others. Many lower court judges have simply not reconciled themselves to *Heller* and *McDonald*, and can be counted upon to resist rather than implement these decisions. Reviewing the lower courts' post-*Heller* Second Amendment output, Professor Allen Rostron, a former Brady Center Senior Staff Attorney, had good reason to crow that "Justice Breyer's approach" — a dissenting view on today's Supreme Court — "appears headed for an unexpected triumph."<sup>12</sup> "[T]he lower court decisions and the analytical approach that has begun to crystallize in them reflect Justice Breyer's sentiments about Second Amendment claims far more than those of Justice Scalia

<sup>7</sup> District of Columbia v. Heller, 554 U.S. 570 (2008).

<sup>8</sup> McDonald v. City of Chicago, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring).

<sup>9</sup> 554 U.S. at 599, 628, 630.

<sup>10</sup> *Id.* at 634–35.

<sup>11</sup> 347 U.S. 483 (1954).

<sup>12</sup> Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012).

or the other members of the Court who formed the majorities in *Heller* and *McDonald*.<sup>13</sup>

This approach typically takes the form of a two-step rubber-stamping process. At step one, courts ask whether the gun regulation at issue implicates conduct protected by the Second Amendment. Unlike the searching historical inquiry in *Heller*, however, this examination often trades in assumptions and vague generalities,<sup>14</sup> lest courts define the contours of a meaningful right. The individual, fundamental right interest having been reduced to a cipher, if it survives at all, may then be overcome by application of means-ends scrutiny in the second step, invariably alleged to be “intermediate scrutiny.” But this is not the sort of robust intermediate scrutiny seen in other contexts, where the government carries the burden of proving a substantial fit between an important interest and the regulation at issue.<sup>15</sup> Rather, the interest-balancing analysis often asks whether the right is a good idea, places the burden upon the challenger, and affords absolute deference to legislative judgment.

Since Justice Breyer (and Solicitor General Clement, who advanced the argument in *Heller*) believed that, notwithstanding an enumerated individual right, the “intermediate scrutiny” approach could sustain even Washington, D.C.’s extreme laws, it is no surprise that just about any law may be constitutional under this approach. And until *Peruta*, cases upholding the police’s discretion to bar individuals from carrying defensive handguns supplied the best (though by no means the only) examples of this “judicial review” in action.

The Third Circuit supplied a great example of how far off the rails a “step one” analysis may veer when history is given short shrift. Upholding New Jersey’s requirement that handgun carry applicants demonstrate “justifiable need” to exercise their Second Amendment rights,<sup>16</sup> a panel majority held that carrying a handgun for self-defense “fall[s] outside the scope of the Second Amendment’s guarantee.”<sup>17</sup> Even though *Heller* had expressly held that to “bear arms,” as used in the Second Amendment, is to “carry” arms for the purpose of self-

<sup>13</sup> *Id.* at 756.

<sup>14</sup> *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013) (“We need not resolve the first question.”); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“[W]e merely assume that the *Heller* right exists.”); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (“[T]he Amendment must have *some* application . . . . Our analysis proceeds on this assumption.”); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“We need not resolve that [first] question.”); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (“We have no reason to expound on where the *Heller* right may or may not apply outside the home.”).

<sup>15</sup> *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989).

<sup>16</sup> N.J. STAT. ANN. § 2C:58-4(c) (West 2013).

<sup>17</sup> *Drake v. Filko*, 724 F.3d 426, 434 (3d Cir. 2013), *petition for cert. filed sub nom. Drake v. Jerejian*, 2014 WL 117970 (U.S. Jan. 9, 2014) (No. 13–827).

defense in case of confrontation,<sup>18</sup> the Third Circuit rejected an appeal to “text, history, tradition, and precedent,” stating that “we are not inclined to address this contention [that the Second Amendment guarantees a right to publicly carry arms for defense] by engaging in a round of full-blown historical analysis.”<sup>19</sup>

Rather, the majority determined that the “justifiable need” standard is a “longstanding regulation that enjoys presumptive constitutionality,”<sup>20</sup> because New York had required “proper cause” to carry a handgun since 1913, and New Jersey’s “justifiable need” standard had antecedents dating to 1924.<sup>21</sup> In other words, because the law is incompatible with the concept of a constitutional right, the constitutional right must not exist, for the law’s enactment proves that no such right was historically understood. Of course, *Heller*’s language regarding “longstanding regulations” shaping the scope of Second Amendment rights refers to regulations *known to the Framers*: “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.”<sup>22</sup>

The Second Circuit offered a leading example of the misuse of interest balancing, under the second of the popular “two-step” analysis, even where a court concedes that a challenged provision implicates Second Amendment rights. That court upheld New York’s widespread prohibition of the right to bear arms, under the guise of demanding “proper cause” for its exercise,<sup>23</sup> by offering that “substantial deference to the predictive judgments of [the legislature] is warranted.”<sup>24</sup> The state had averred that the right, albeit “fundamental,” was essentially a social evil to be afforded only to select individuals who could prove a need for their rights. That was good enough for the Second Circuit: “It is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments.”<sup>25</sup> The burden would, in any event, fall upon individuals seeking to exercise the right, not the government. Quoting Chief Justice Roberts’s opinion in the *Obamacare* case, the court quipped: “Proper respect for a coordinate branch of government requires that we strike down [legislation] only if the lack

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<sup>18</sup> *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

<sup>19</sup> *Drake*, 724 F.3d at 431.

<sup>20</sup> *Id.* at 434.

<sup>21</sup> *Id.* at 432–34.

<sup>22</sup> *Heller*, 554 U.S. at 634–35.

<sup>23</sup> N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2013).

<sup>24</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)).

<sup>25</sup> *Id.* at 99.

of constitutional authority to pass [the] act in question is *clearly demonstrated*.”<sup>26</sup>

It is unfathomable that these federal appellate courts would apply this sort of logic in weighing protection of other constitutionally protected rights. In conducting a step one historical inquiry, the Third Circuit would never adopt the “it was the law in the twentieth century therefore it is constitutional” approach to, for example, the abortion right; but abortion is, among some segments of our society, favored highly relative to the right to bear arms.

Similarly, no court would tell an accused individual seeking counsel under the Sixth Amendment, or a person vindicating her right to speak under the First Amendment, that she must “clearly demonstrate” that the legislative judgment in denying her those rights absent the police’s determination of true need is misguided, and that in any event, “it’s not our job” to second-guess the government’s decisions regarding who deserves counsel and who is allowed to speak. As the Supreme Court long ago declared, 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 an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.”<sup>27</sup> The Second Circuit has condemned ordinances restricting speech “on the basis of [official] views as to health, safety, welfare, comfort, convenience, and order,”<sup>28</sup> or the “welfare and benefit of the people of and visitors to the city.”<sup>29</sup>

Suppose a state were to prohibit abortion at 20 weeks of gestation absent a doctor’s certificate of “medical emergency,” invoking “documented risks to women’s health and the strong medical evidence that unborn children feel pain during an abortion at that gestational age.”<sup>30</sup> In a world where *Kachalsky*-style “scrutiny” applied to the abortion right, it simply wouldn’t be the courts’ job to second-guess a legislature’s regulatory oversight of the medical profession in the important interests of patient safety and prevention of cruelty. Yet when Arizona enacted just this law, the Ninth Circuit wasted no time striking it down:

Allowing a *physician* to decide if abortion is medically necessary is not the same as allowing a *woman* to decide whether to carry her own pregnancy to term. Moreover,

<sup>26</sup> *Id.* at 100–01 (alterations in original) (emphasis added) (quoting Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012)) (internal quotation marks omitted).

<sup>27</sup> Staub v. City of Baxley, 355 U.S. 313, 322 (1958).

<sup>28</sup> Charette v. Town of Oyster Bay, 159 F.3d 749, 755 (2d Cir. 1998).

<sup>29</sup> 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1156 n.1, 1159 (2d Cir. 1974).

<sup>30</sup> Ariz. H.B. 2036 § 9(B)(1), (2012), available at <http://www.azleg.gov/legtext/50leg/2r/bills/hb2036s.pdf>, archived at <http://perma.cc/KA77-TMQ8>.

regulations involve limitations as to the mode and manner of abortion, not preclusion of the choice to terminate a pregnancy altogether.<sup>31</sup>

The court properly made quick work of the theory that a fundamental right is not infringed when everyone is free to exercise it upon proving need.<sup>32</sup> “The presence of a medical exception does not make an otherwise impermissible prohibition constitutional. The adequacy of the medical exception has no bearing on whether the prohibition is permissible in the first place.”<sup>33</sup> Regardless of what the legislature may earnestly believe to be required in the interests of health and safety, the Supreme Court has guaranteed a woman’s *right* to terminate pregnancy until viability.<sup>34</sup> “The twenty-week law is unconstitutional because it bans abortion at a pre-viability stage of pregnancy; no health exception, no matter how broad, could save it.”<sup>35</sup>

*Heller* and *McDonald* leave no doubt that the Second Amendment must operate similarly, as a normal constitutional right. Yet reviewing the extraordinary deference some courts afford the political branches in Second Amendment cases, Professor Rostron maintains that judges have not “improperly set out to follow dissenting views rather than those of the Supreme Court’s majority” in *Heller*.<sup>36</sup> Rather, “conscientiously trying to implement the Supreme Court’s instructions” has “inevitably”<sup>37</sup> led judges to, well, write decisions that sound an awful lot like Justice Breyer’s dissents, citing the same precedents and taking the same analytical approaches rejected by the majority.

Perhaps in some cases a studied commitment to atheism leads one to the priesthood, but judges doubtless understand the advantage of Justice Breyer’s approach in sanctioning just about any result they would like to reach. Dispensing with the constraints of text and history, and deferring absolutely to *legislative* “judgment” overcomes any constitutional “right.” And lower court judges are probably aware, as are the rest of us, of the Supreme Court’s lamentable drift to pronounce more than police, its docket diminishing markedly in recent years.<sup>38</sup> Some courts, notably the Seventh Circuit, take seriously the Second Amendment and have enforced it conscientiously, consistent

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<sup>31</sup> *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013).

<sup>32</sup> *Id.* at 1227.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1227–28.

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

<sup>36</sup> Rostron, *supra* note 12, at 756.

<sup>37</sup> *Id.*

<sup>38</sup> See generally Ryan J. Owens and David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

with the Supreme Court's precedent,<sup>39</sup> but that approach has needed reinforcement.

Enter the Ninth Circuit. To be sure, that court had earlier adopted the two-step framework,<sup>40</sup> but it had not yet shown it to be a rubber stamp. And in *Peruta*, the “anything goes” constitutionalism of other courts found no purchase. No shortcuts would be taken at step one. “[W]e must fully understand the historical scope of the right before we can determine whether and to what extent the [challenged] policy burdens the right or whether it goes even further and ‘amounts to a destruction of the right’ altogether.”<sup>41</sup> “Understanding the scope of the right is not just necessary, it is key to our analysis.”<sup>42</sup> It is impossible to look past the Ninth Circuit's homework and assume that blithe assertions of legislative judgments, or a smattering of recent enactments may overcome the significant historical right at issue in *Peruta*.

And there, blissfully, *Peruta*'s analysis ends. Means-ends balancing of any kind, of the defined right against the regulatory interest or worse still, of the various competing interests that might inform a debate on the right's recognition, are ruled out. “[T]here is, of course, an alternative approach for the most severe cases — the approach used in *Heller* itself. . . . A law effecting a ‘*destruction* of the right’ rather than merely *burdening* it is, after all, an infringement under any light.”<sup>43</sup> If individuals enjoy a right to carry handguns for self-defense, then however that right might be regulated, the Sheriff cannot pick and choose only a select handful of people who may do so.

*Peruta*'s methodology is far from radical. In a constitutional case, the court should try to understand, rather than merely guess at, what the Constitution actually requires. And while there may be room for doctrines of construction, a law that is flatly incompatible with a constitutional guarantee must fall. These concepts pervade *Heller*, and they reflect the manner in which courts generally approach constitutional questions. *Peruta*'s call for a course correction cannot be ignored. If the Second Amendment is to be treated like a normal part of the Bill of Rights, the Ninth Circuit has helped restore the path.

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<sup>39</sup> See *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

<sup>40</sup> See *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

<sup>41</sup> *Peruta v. County of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014), (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)).

<sup>42</sup> *Id.* at 1167.

<sup>43</sup> *Id.* at 1168 (quoting *Heller*, 554 U.S. at 629).