CONSTITUTIONAL LAW — SECOND AMENDMENT — NINTH CIRCUIT HOLDS THAT CONCEALED CARRY IS NOT PROTECTED BY THE SECOND AMENDMENT — *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc).*

In light of the Supreme Court's decision in *District of Columbia v. Heller*,[1] lower courts have had to determine the scope of the Second Amendment's revitalized guarantee of an individual right to bear arms.[2] The majority in *Heller* did not exhaustively define the types of conduct and groups of individuals protected by the Second Amendment "right of the people,"[3] and the circuit courts have grappled with the issue in the context of laws regulating the carrying of concealed firearms in public ("concealed carry").[4] California, for one, generally prohibits concealed carry without a license,[5] and licenses are given only upon a showing of "good cause."[6] Recently, in *Peruta v. County of San Diego*,[7] the Ninth Circuit, sitting en banc, upheld a "good cause" policy that required permit applicants to show exceptional need for self-defense, holding that concealed carry of a firearm in public is not in any way protected by the Second Amendment.[8] Despite providing a detailed analysis of Second Amendment history within its narrow framing of the question presented, the court did not fully explain why it chose to frame the issue narrowly. The challenge of issue framing mirrors similar difficulties in other doctrinal contexts, and courts will be hard pressed to avoid it in future Second Amendment cases.

California law regulates both open carry and concealed carry of firearms in public.[9] With some exceptions, open carry is generally

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* The author worked for Bancroft PLLC during the time a petition for full court rehearing was filed after the en banc decision, but the author did not participate in drafting that petition.

1 554 U.S. 570, 592 (2008) (holding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons").

2 *See, e.g.*, Drake v. Filko, 724 F.3d 426, 434 (3d Cir. 2013) (holding that a "justifiable need" requirement for bearing arms in public did not regulate conduct protected by the Second Amendment (quoting N.J. STAT. ANN. § 2C:58-4(c) (West 2016))); Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) (describing the scope of the Second Amendment's protection outside the home as the "vast '*terra incognita*'" (quoting United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011))).

3 U.S. CONST. amend. II ("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.").

4 *See, e.g.*, Peterson v. Martinez, 707 F.3d 1197, 1211 (10th Cir. 2013) (holding the Second Amendment does not protect concealed carry).

5 *See* CAL. PENAL CODE § 25400 (2012). The statute does provide for some exceptions. *See infra* note 10.

6 PENAL § 26150(a)(2).

7 824 F.3d 919 (9th Cir. 2016) (en banc).

8 *See id.* at 939.

9 *See* PENAL §§ 25400, 25850, 26350.

prohibited.[10] A person applying for a concealed-carry license must, among other things, show that "[g]ood cause exists for issuance of the license."[11] Counties are free to define what constitutes "good cause,"[12] and San Diego and Yolo Counties, among others, require a documented showing of necessity.[13] Edward Peruta, a San Diego resident, was refused a concealed-carry license under this policy.[14] He filed suit with four other San Diego residents against the County and the sheriff of San Diego, alleging that the concealed-carry policy violated their Second Amendment rights.[15] Adam Richards, a resident of Yolo County, challenged his county's policy on identical grounds.[16] The district courts in both cases upheld the policies under the Second Amendment, granting summary judgment for the counties.[17]

The Ninth Circuit reversed in Peruta's case. Following *Heller*'s special emphasis on history in determining the scope of the right,[18] Judge O'Scannlain[19] examined textual, historical, and precedential evidence to conclude that the Second Amendment does indeed protect bearing arms for self-defense in public.[20] He then argued that the regulatory scheme in California not only burdens, but also practically destroys the right; thus, as in *Heller*, the restriction in question would fail

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[10] *See id.* §§ 25850, 26350. Open carry is permitted in one's residence, *see id.* § 26055, one's place of business, *see id.* § 26035, in the face of an imminent threat to person or property, *see id.* § 26045, at target ranges, *see id.* § 26005, and for peace officers, *see id.* § 25900.

[11] *See id.* § 26150.

[12] *See id.* § 26160.

[13] *Peruta*, 824 F.3d at 926–27. A general desire or need for self-defense is insufficient to satisfy "good cause" under these policies. *See id.* at 924.

[14] *See id.* at 924; *see also* Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1109 (S.D. Cal. 2010).

[15] *See* Peruta v. County of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014). The four other San Diego County residents were either denied a concealed-carry license or discouraged from applying for one. *See Peruta*, 758 F. Supp. 2d at 1109.

[16] *See* Richards v. Prieto, 560 F. App'x 681, 682 (9th Cir. 2014).

[17] *See id.*; *Peruta*, 758 F. Supp. 2d at 1109.

[18] The Ninth Circuit has interpreted the *Heller* majority as employing a two-step approach to Second Amendment claims, *see* Jackson v. City & County of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014), the first of which "consult[s] 'both text and history'" to determine whether the restricted conduct falls within the purview of the right to keep and bear arms in the first place, *Peruta*, 742 F.3d at 1150 (quoting District of Columbia v. Heller, 554 U.S. 570, 595 (2008)). If it does, the Ninth Circuit understands *Heller*'s second step to require applying a level of scrutiny to the challenged law. *See id.* at 1167–68. Not all circuits emphasize the historical inquiry of part one of the two-part test. *See* Tyler v. Hillsdale Cty. Sheriff's Dep't, 873 F.3d 678, 702 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment) (criticizing the majority for "giving little more than a nod to the originalist inquiry").

[19] Judge O'Scannlain was joined by Judge Callahan.

[20] *See Peruta*, 742 F.3d at 1150–66. Judge O'Scannlain felt constrained to give varying weight to Founding-era case law depending on whether each case aligned with *Heller*'s holding that the Second Amendment enshrines an individual right. *See id.* at 1155–60.

any form of heightened scrutiny.[21] While the Second Amendment may not protect concealed carry in a vacuum, it "does require that the states permit *some form* of carry for self-defense outside the home."[22] The County policy in conjunction with the California statutory scheme, Judge O'Scannlain averred, worked a "near-total prohibition on bearing [arms]."[23]

After consolidating and rehearing Peruta's and Richards's cases en banc, however, the Ninth Circuit affirmed the judgments of the district courts. Writing for the court, Judge Fletcher[24] explained that the question facing the court was only "whether the Second Amendment protects, in any degree, the ability to carry concealed firearms in public."[25] Drawing on *Heller*'s methodology (as had the panel opinions), the court looked to four different periods of history to settle the relationship between the Second Amendment and concealed carry.[26] Throughout these periods, courts nearly uniformly upheld restrictions and even outright bans on concealed carry.[27] Judge Fletcher concluded that because the Second Amendment did not protect the concealed carry of firearms, it was unnecessary to reach the issue of whether the right to bear arms extended outside the home.[28] The court rejected the principal dissent's argument that, in conjunction with California's de facto ban on open carry, the counties' policies violated the plaintiffs'

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[21] *See id.* at 1167–70 (*"Heller* teaches that a near-total prohibition on keeping arms (Heller) is hardly better than a near-total prohibition on bearing them (this case), and vice versa. Both go too far." *Id.* at 1170.). Under heightened scrutiny, the government must show more than simply that a rational basis exists for a law; intermediate scrutiny requires the law to be "substantially related" to "important governmental objectives," *see* Craig v. Boren, 429 U.S. 190, 197 (1976), while strict scrutiny mandates the restriction be "narrowly tailored" to meet a "compelling" interest, *see* Boos v. Barry, 485 U.S. 312, 329 (1988). *See* Eric Heinze, *The Logic of Standards of Review in Constitutional Cases: A Deontic Analysis*, 28 VT. L. REV. 121, 129, 134 (2003) (discussing levels of scrutiny).

[22] *Peruta*, 742 F.3d at 1172.

[23] *Id.* at 1170. Chief Judge Thomas dissented. Based on the history and case law of the Second Amendment, Chief Judge Thomas concluded that concealed carry has never been within the Amendment's scope. *Id.* at 1182–90 (Thomas, C.J., dissenting). He argued that if carrying concealed weapons is outside the Second Amendment's scope, it is irrelevant that other, protected forms of carry may also be restricted. *See id.* at 1194. The Ninth Circuit later held that the panel opinion in *Peruta* dictated an identical outcome in the *Richards* appeal. *See* Richards v. Prieto, 560 F. App'x 681, 682 (9th Cir. 2014).

[24] Judge Fletcher was joined by Chief Judge Thomas and Judges Pregerson, McKeown, Paez, Bea, and Owens.

[25] *Peruta*, 824 F.3d at 927.

[26] Judge Fletcher looked at the right to bear arms in England, *see id.* at 929–32, the right to bear arms in the colonies, *see id.* at 933, pre–Fourteenth Amendment U.S. history, *see id.* at 933–36, and post–Fourteenth Amendment U.S. history, *see id.* at 936–39.

[27] *See id.* at 939. The principal outlier striking down a concealed-carry restriction under a state analogue to the Second Amendment was quickly overruled by state amendment. *See id.* at 935–36 (discussing Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822)).

[28] *See id.* at 939.

Second Amendment right to bear arms outside the home. Even if the Second Amendment right were to extend outside the home, and even granting for the sake of argument that California's open-carry provisions are unconstitutional, Judge Fletcher argued, it does not follow that the counties' concealed-carry provisions are also unlawful.[29] This is because the historical evidence squarely shows that the Second Amendment does not protect concealed carry; it is improper to bring clearly unprotected rights under protection simply because other protected rights are being infringed.[30]

Judge Callahan wrote the principal dissent.[31] Citing language in *Heller* and *McDonald v. City of Chicago*[32] and surveying the Second Amendment's history, Judge Callahan argued that the right to bear arms extends outside the home.[33] Evaluating the counties' policies in light of California's heavy restrictions on open carry, Judge Callahan found that they "obliterate the Second Amendment's right to bear a firearm in some manner in public for self-defense."[34] Critiquing the majority opinion, the dissent argued that the court's failure to consider the statutory context — California's open-carry prohibitions — deviated from the Supreme Court's prior approach to broadly defined fundamental rights in *Griswold v. Connecticut*,[35] *Lawrence v. Texas*,[36] and *Obergefell v. Hodges*[37] and was "over-simplistic."[38] States must ac-

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[29] *See id.* at 941–42.

[30] *See id.* Judge Graber concurred, and was joined by Chief Judge Thomas and Judge McKeown. She wrote separately to argue that even if the Second Amendment did protect concealed carry, the policies in question would survive intermediate scrutiny. *Id.* at 942 (Graber, J., concurring). The concurrence cited evidence that prevalence of concealed carry can be accompanied by increased violence, and argued that where such evidence is contested, deference to the legislative branch is appropriate. *See id.* at 943–45. That evidence was contested by Judge Silverman in his dissent. *See id.* at 957 (Silverman, J., dissenting).

[31] Judge Callahan was joined in full by Judge Bea. Judge Silverman joined in all but Part IV (expressing concern about equal protection and unlawful prior restraint implications), and Judge N.R. Smith joined in all but section II.B (concluding the policy is unconstitutional rather than appropriate for remand).

[32] 561 U.S. 742 (2010) (holding the Second Amendment right to bear arms applies against the states via the Fourteenth Amendment).

[33] *See Peruta*, 824 F.3d at 946–49 (Callahan, J., dissenting).

[34] *Id.* at 951.

[35] 381 U.S. 479 (1965) (striking down restrictions on contraception as a violation of the fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment).

[36] 539 U.S. 558 (2003) (holding homosexual intimacy is protected by the Fourteenth Amendment's Due Process Clause).

[37] 135 S. Ct. 2584 (2015) (holding that both the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect the right of same-sex couples to marry).

[38] *Peruta*, 824 F.3d at 953 (Callahan, J., dissenting) ("[T]he question in *Obergefell* was not whether the plaintiffs have a right to same-sex marriage, the question was whether the states' limitation of marriage to a man and woman violated the right to marry. The question in *Griswold* was not whether there was a constitutional right to use birth control, but rather whether the state's prohibition on birth control violated a person's right to marital privacy.").

commodate the right to bear arms in public for self-defense, and both open-carry and concealed-carry policies allow them to do so.[39]

Judge Silverman and Judge N. Randy Smith each wrote their own dissents.[40] The former argued that the counties' policies would fail under any form of heightened scrutiny.[41] The latter argued that because of divergent framings of the issue of the case, the members of the court were talking past each other.[42] Further, remand was the appropriate disposition because the district court heard the case before California's open-carry laws assumed their strict current form.[43]

What divides the majority from the dissents is, in essence, a dispute over how to frame the issue presented to the court. Although the majority used history to argue that concealed carry is unprotected, it relied on a narrow framing of the legal issue to do so. That approach was firmly adopted yet given little support by the court both when describing the plaintiffs' challenge up front and later in its historical analysis. Characterizing the question presented by a given claim is a difficult task in many contexts, but it is a problem that is likely to recur in Second Amendment cases.

As Judge Smith highlighted, two divergent views of how to understand the issue before the court were at work in *Peruta*. The majority viewed the challenge to the counties' policies as implicating a putative right to concealed carry, without reference to any other form of bearing arms.[44] Under this view (the "narrow framing" of the issue), the court needed only to conduct the historical analysis *Heller* requires to answer one question: does the Second Amendment protect a right to concealed carry in public? The principal dissent argued that the question before the court should be characterized with reference to the whole of California's regulatory scheme, in keeping with "the prescribed method for evaluating and protecting broad constitutional guarantees."[45] In other words, the question presented in the dissent's view was not about concealed carry per se, but rather was whether the Second Amendment permits prohibitions on the conduct of concealed carry where virtually all other forms of public carry are prohibited (the "broad framing" of the issue).[46] How one frames the issue dictates the

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[39] *See id.* at 954–55.

[40] Judge Silverman was joined by Judge Bea, while Judge N.R. Smith wrote for himself only.

[41] *See Peruta*, 824 F.3d at 956–58 (Silverman, J., dissenting). Judge Silverman asserted that though the counties had a compelling interest in preventing gun violence, evidence in the record was lacking to show that preventing otherwise qualified applicants from obtaining licenses increased gun violence. *See id.* at 957.

[42] *See id.* at 958 (N.R. Smith, J., dissenting).

[43] *See id.* at 959–60.

[44] *See id.* at 927 (majority opinion).

[45] *Id.* at 946 (Callahan, J., dissenting).

[46] *See id.*

conclusions that follow from consulting "text and history" as *Heller* requires[47]: when that framing differs, each side's arguments from history become like "two ships passing in the night."[48] A narrow framing begets a narrow historical inquiry, whereas a court looking at the larger context will evaluate the history of concealed carry contextually as well.

The majority asserted the narrow framing at the outset of the opinion but did not sufficiently defend its view. That the plaintiffs formally challenged only the county policies regulating concealed carry was sufficient for the majority to conclude that the putative right to bear arms in public was irrelevant.[49] The plaintiffs "base[d] their argument on the entirety of California's statutory scheme," yet the court chose to examine concealed carry in isolation, with little explanation.[50] Built into this choice is the premise that other unchallenged statutory elements cannot impact the court's inquiry regarding the challenged policy here, which, in so many words, is the narrow framing itself. For the majority, even if the Second Amendment protects a right to bear arms outside the home, and regardless of how expansive that right could be, it would not affect the outcome of the case.[51] This strict cabining of concealed-carry conduct from all other forms of potentially protected conduct affirmed the narrow framing of the question presented, but the court did not support its characterization at this point.

The court's historical conclusions and subsequent disagreement with the dissent also rely heavily on the premise of narrow framing. The court walked through four periods of history and found a near-universal pattern of the existence and upholding of restrictions on concealed carry.[52] It inferred from this evidence a categorical rule that the Second Amendment cannot protect that type of conduct.[53] This inference is incomplete, however, if the broad framing is correct. For example, colonial-era decisions by the New Jersey and Massachusetts

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47 District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

48 *Peruta*, 824 F.3d at 958 (N.R. Smith, J., dissenting).

49 *Id.* at 927 (majority opinion) ("Because Plaintiffs challenge only policies governing concealed carry, we reach only the question whether the Second Amendment protects, in any degree, the ability to carry concealed firearms in public.").

50 *Id.* When considering a similar claim, the Tenth Circuit cited to precedent directing the court to look at the "*challenged* law," over and against the plaintiff's description of his own claim. Peterson v. Martinez, 707 F.3d 1197, 1208 (10th Cir. 2013) (quoting United States v. Reese, 627 F.3d 792, 800 (10th Cir. 2010) (emphasis added)). If the *Peruta* majority relied on a similarly formalistic view, it gave no such justification for it in the opinion.

51 *Peruta*, 824 F.3d at 927 ("[T]he existence *vel non* of such a right, and the scope of such a right, are separate from and independent of the question presented here.").

52 *See id.* at 929–39.

53 *See id.* at 939 ("We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.").

Bay legislatures outlawing concealed weapons[54] could be understood in context alongside the other ways in which individuals may have been permitted to bear arms outside the home. If the dissent is right about the pedigree of broad framing, these laws can be read as the normal pattern for Second Amendment interaction with concealed carry where the right to bear arms in public is otherwise provided for.[55] The majority's narrow framing forecloses this view from the outset. If the legal question of concealed carrying is cabined from all other potential carrying rights, then the state of other carrying rights in the historical evidence is likewise irrelevant.[56] Here, the majority's historical conclusions imply a strong affirmation of the narrow framing but leave that premise undefended.

Properly characterizing the right claimed and the question before the court is a difficult task and is not at all unique to Second Amendment cases. A related challenge arises when approaching putative fundamental rights in the substantive due process context. One approach, advocated by Justice Scalia in his *Michael H. v. Gerald D.*[57] opinion, is to begin with the most specific description of the asserted right possible, and look to history to see whether such a right has been protected.[58] If no on-point history exists, a court should increase the level of generality and look again.[59] The trouble with this approach, as argued by Professors Laurence Tribe and Michael Dorf, is that it is difficult to find value-neutral ways to navigate which characteristics of the claimed right remain at the next level of generality, and which are jettisoned.[60] The conflict in *Peruta* is a more acute example of this

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[54] *See id.* at 933 (discussing these examples).

[55] James Bishop has termed this view of the Second Amendment's scope the "'alternative outlet' doctrine," the idea that the manner of carry constitutionally protected is unspecified and that states banning one form of carry "must offer the alternative." James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 918 (2012). Bishop identifies Judge O'Scannlain's panel opinion as a novel adoption of the alternative outlet doctrine by a court. *See id.* at 918–19.

[56] It is possible to reject Bishop's (and thereby the dissent's) alternative outlet view using history without relying on a narrow framing. Jonathan Meltzer argues not only *that* concealed-carry restrictions have been historically upheld, but also the reason *why* they have been upheld is because concealed carry was considered categorically unfit for self-defense. *See* Jonathan Meltzer, Note, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1525–28 (2014). The *Peruta* court did not provide any similar explanation for why the historical prohibitions were categorical in nature.

[57] 491 U.S. 110 (1989).

[58] *See id.* at 127 n.6 (opinion of Scalia, J.) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

[59] *See id.*

[60] *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058–59, 1092–93 (1990); *see also* Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 155–57 (2015) (discussing both Justice Scalia's approach and Tribe and Dorf's critique).

kind of difficulty because the two sides disagreed from the outset about what — if any — contextual facts were legally relevant to the plaintiffs' challenge. It is no accident that the dissent cites *Obergefell*, *Griswold*, and *Lawrence* to bolster its broad view of the right at issue.[61] Rather than settle the matter, however, these analogies illustrate the difficulty of issue framing because the proper characterization of the asserted liberty interest was hotly contested in those contexts as well.[62] Whether to include the existence of other restrictions within the analysis of Second Amendment challenges is a category of question that is hard to answer, and one that is not unique to gun rights.

Although it appears in other areas of the law, the question of how to characterize the issue at hand is especially likely to be a recurring difficulty in Second Amendment challenges. At times suggested to be the "Triumph of Originalism,"[63] *Heller* looked to "both text and history" of the Second Amendment to determine the scope of the right to bear arms.[64] Lower courts are required to follow this model and have done so with varying results.[65] As *Peruta* bears out, a court's characterization of the issue it must decide influences how it will evaluate the historical record. Thus, given the priority placed on historical analysis in Second Amendment cases, it is likely that this question will loom large in future decisions.

The circuits are still split over the scope of the Second Amendment, that key question left open by *Heller*.[66] While it is possible for courts to differ in their interpretation of history and in their reading of *Heller* itself, *Peruta* is a detailed illustration that fundamental disagreements can stem from divergent characterizations of the questions that courts need to answer. Articulating reasons for how to frame issues presented is a difficult task, but one that courts determining the scope of the right to bear arms will not easily be able to avoid: when it comes to the scope of the Second Amendment, wherever *Heller* leads, the difficulty of issue framing is likely to follow.

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[61] *Peruta*, 824 F.3d at 952–53 (Callahan, J., dissenting).

[62] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2619 (2015) (Roberts, C.J., dissenting) ("[T]he 'right to marry' cases . . . say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here."); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (rejecting the view that the issue before the Court in homosexual intimacy cases was "whether there is a fundamental right to engage in consensual sodomy").

[63] Linda Greenhouse, *3 Defining Opinions*, N.Y. TIMES (July 13, 2008), http://www.nytimes.com/2008/07/13/weekinreview/13greebox.html [https://perma.cc/9SDU-52LA].

[64] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[65] *See* Justine E. Johnson-Makuch, Note, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 FORDHAM L. REV. 2757, 2775–79 (2015).

[66] *Compare* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (holding the Second Amendment right extends outside of the home), *with* Peterson v. Martinez, 707 F.3d 1197, 1210 (10th Cir. 2013) (holding that it does not).