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Second-Guessing the Second Amendment: *Peruta v. County of San Diego* and the
Quest for the Second Amendment's Meaning

INTRODUCTION: In *Peruta v. County of San Diego*, the Ninth Circuit considered the constitutionality of San Diego County's permitting scheme for concealed handguns. California bans its residents from openly, or visibly, carrying handguns. California also restricts concealed carriage through a permitting scheme, allowing certain persons to obtain a permit upon showing "good cause." Edward Peruta ("Peruta") applied for a concealed-carry permit in San Diego County ("County"), citing self-defense as his good cause. The County subsequently denied Peruta's application, reasoning that self-defense was never good cause.

Peruta sued the County for violating his Second Amendment rights by denying his access to a handgun for self-defense. The District Court granted the County's summary judgment motion, holding that the County's "interest in public safety" trumped any constitutional violations. On appeal, the Ninth Circuit reversed the District Court, relying on the Supreme Court's analysis in *District of Columbia v. Heller*. Thus, the Ninth Circuit invalidated the County's permitting scheme, and functionally struck down California's "good cause" requirement.

BACKGROUND: The Second Amendment provides: "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.” The Supreme Court heard few cases on the scope of the Second Amendment until its landmark decision in *Heller*.

In *Heller*, the Court struck the District of Columbia’s handgun ban, as the ban violated the Second Amendment. The Court reasoned that the Second Amendment enshrined a broad right to self-defense, particularly in one’s home. The *Heller* Court grounded this interpretation in an historical analysis, and expressly rejected an approach that weighed legislative interests. In dissent, Justice Stevens criticized the majority’s Second Amendment interpretation as oversimplified.

Two years later the Court incorporated the *Heller* interpretation of the Second Amendment against the states through the Fourteenth Amendment in *McDonald v. City of Chicago*. Litigation commenced against many states’ handgun regulations as a result of *McDonald*. These challenges arose primarily in “may-issue” states, which granted considerable discretion to authorities that issued concealed-carry permits.

The first suit challenged a New York statute, which required “proper cause” for applicants to receive a permit. In *Kachalsky v. County of Westchester*, the Second Circuit upheld this statute, concluding that while New York burdened its citizens’ rights, its substantial interest in public safety justified its burden. Furthermore, the *Kachalsky* Court determined that “the [Second] Amendment must have some application in . . . public possession of firearms.” Likewise, the Court filled a void left open by *Heller*, applying a deferential, intermediate scrutiny approach.

The Third and Fourth Circuits employed similar analyses. In *Woollard v. Gallagher*, the Fourth Circuit upheld a Maryland statute, which required a “good and substantial reason” for a concealed handgun permit. Likewise, in *Drake v. Filko*, the Third Circuit upheld a similar New Jersey statute that required a “justifiable need” for a permit. Both Courts applied intermediate scrutiny and deferred to legislative fact findings, ignoring rigorous historical examinations.

The Seventh Circuit, however, reasoned quite differently from its sister circuits. In *Moore v. Madigan*, the Court struck Illinois’s ban on publicly carrying handguns. In contrast to the analysis in *Woollard* and *Drake*, the Seventh Circuit employed an historical analysis and declined using a tiered-scrutiny approach. Thus, *Peruta* entered into the jurisprudential landscape with an extant circuit split and conflicting analytical approaches.

COURT’S ANALYSIS: In reaching its decision, the Ninth Circuit majority engaged in a two-part analysis. First, the Court found that the Second Amendment encompassed self-defense outside the home. Employing an historical analysis, the Court looked at three, general Second-Amendment areas: (1) the original, textual and public understanding, (2) antebellum legal precedent, and (3) post-bellum developments.

First, the Court found the text and public understanding of the Second Amendment to codify a right to self-defense outside the home. Going beyond dictionary definitions of “keep” and “bear,” the Court used historical context to undergird its interpretation. The Court then looked to early nineteenth-century

public understanding, which demonstrably supported its interpretation of the Second Amendment.

Second, the Ninth Circuit looked to the relevant legal precedent. Significantly, the Court discarded any case that did not comport with the *Heller* understanding of the Second Amendment. Using a wealth of antebellum case law, the Court supported its Second Amendment interpretation, noting that “the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home.”

Finally, the Court surveyed the post-Civil War developments to the Second Amendment. Focusing on the legislative history of the Fourteenth Amendment and late nineteenth-century legal scholars’ treatment of the right to bear arms, the majority concluded that its interpretation was correct. In regards to conflicting authorities, the Court reasoned that such were not valid interpretations of the Second Amendment under *Heller*.

With a historical context in place, the Court then turned to the County’s burden of the Amendment. The Court concluded that the County’s permitting scheme destroyed the right to public carriage for typical residents. Because the County destroyed the right, the Court deemed intermediate scrutiny unnecessary to its analysis. Furthermore, the Court read *Heller* to “require . . . some form of carry for self-defense outside the home.” Thus, because California statutorily banned open carriage, and the County functionally banned concealed carriage, the County’s scheme was unconstitutional.

Peruta also displayed the competing analytical approaches among the Circuit Courts. In dicta, the Ninth Circuit majority criticized its sister circuits for misreading *Heller* and ignoring historical analyses. It further criticized those Circuits' applications of intermediate scrutiny, noting their deference to state legislatures.

Conversely, the *Peruta* dissent critiqued the majority for its broad-ranging analysis. First, the dissent criticized the majority for not answering the narrow question of whether the Second Amendment encompassed concealed public carriage. Analyzing several historical sources, the dissent concluded that history was squarely against concealed public carriage. Second, the dissent called for a framework similar to the Second, Third, and Fourth Circuits, envisioning a deferential, intermediate scrutiny, under which the County could justify its burden.

EVALUATION: The *Peruta* majority's analysis comported closely to *Heller*. While its burden analysis was well-reasoned and persuasive, its historical examination was superfluous and circular. In short, the majority reached the correct decision but employed questionable logic in reaching it.

First, the majority's historical inquiry simply repeated the *Heller* analysis. The majority questioned whether the right of self-defense extended outside the home. However, the Supreme Court already answered this question in *Heller*, finding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." Thus, the *Peruta* majority's historical exegesis replicated *Heller*, focusing on the content of the right, instead of the scope. The

dissent correctly criticized the majority for mischaracterizing this question. While the dissent overstated its own historical ubiquity, the majority greatly oversimplified its own analysis by not inquiring into whether the Second Amendment encompassed concealed public carriage.

Second, the majority retroactively applied the *Heller* Court's Second Amendment interpretation. This circular logic discounted any legal precedent and post-bellum legal commentary that conflicted with the majority's view. This approach is faulty for two reasons. First, it assumes the *Heller* majority was unequivocally correct in its historical interpretation. But as both the *Peruta* dissent and Justice Stevens's *Heller* dissent noted, such was not the case. Second, under such an approach, the *Peruta* majority ostensibly would discount any conflicting authority. Thus, its analysis is considerably weak because it did not address any of the dissent's historical counterpoints.

Whereas the majority's historical inquiry was fragile, its burden analysis was spot-on. First, the majority properly focused on the destruction of the right. With a population of over 38 million, California grants concealed-carry permits to only 35,000 residents. Because California has no centralized permitting scheme, its counties can restrict permits beyond what the California legislature envisioned. While not a ban on public carriage, California counties largely destroy almost every residents' access to public carriage. The *Peruta* majority, thus, correctly assessed the County's burden as a destruction.

Second, the Court properly refused to apply a deferential, intermediate scrutiny test. The majority characterized this test as an interest-balancing inquiry, which *Heller* expressly rejected. Indeed, the dissent and other Circuit Courts fell into the trap of weighing legislative interests under the guise of intermediate scrutiny. Furthermore, the majority also avoided a high degree of deference to the County. Again, the dissent and other Circuits misapplied intermediate scrutiny by deferring to governmental interests, akin to the lowest tier of scrutiny. Federal courts would not apply this same deference to almost any other fundamental right. Thus, the majority correctly avoided this test.

Policy-wise, the *Peruta* decision's implications are potentially enormous. While not technically overruling California's public carriage scheme, the Court stressed that California must allow either open or concealed carriage. The Court's functional striking of the good-cause requirement, thus, means that more than 20 million Californians could be eligible for permits. This dramatic upshot could occur in three ways: (1) California abandons its good-cause requirement, thus making concealed carriage more accessible; (2) California quashes its ban on open carriage, thus enabling visible handgun carrying; or (3) California employs a mix of both methods. Adding still more uncertainty, the *Peruta* decision will first have to withstand an en banc rehearing.

CONCLUSION: While imperfect, the *Peruta* decision correctly applied the Supreme Court's analysis in *Heller*. The majority struggled with providing much insight with its historical inquiry, essentially reiterating the *Heller* Court's own

examination. Still, the majority incisively characterized the County's permitting scheme as a destruction, and avoided using an interest-balancing inquiry. If upheld, the decision could have wide-ranging implications for the nation's most populous state. Such could signal a clear shift toward a broad interpretation of the Second Amendment.