
THE WILD WEST: APPLICATION OF THE SECOND AMENDMENT’S INDIVIDUAL RIGHT TO CALIFORNIA FIREARM LEGISLATION

FORREST BROWN*

TABLE OF CONTENTS

INTRODUCTION	1204
I. A CONTEXTUAL HISTORY OF THE SECOND AMENDMENT	1207
A. EARLY ORIGINS OF THE INDIVIDUAL RIGHT TO BEAR ARMS	1207
B. EARLY SECOND AMENDMENT CASES.....	1209
C. THE <i>HELLER</i> DECISION	1210
D. INCORPORATION OF THE SECOND AMENDMENT.....	1212
II. THE UNRESOLVED QUESTIONS OF <i>HELLER</i>	1213
A. RATIONAL BASIS IN THE SECOND CIRCUIT.....	1214
B. A NEED FOR REFORM	1215
III. A PROPOSED FRAMEWORK.....	1216
A. RELEVANT LEVELS OF SCRUTINY	1216
B. LAWFUL PURPOSE	1218
C. SITUATIONAL CONTEXT.....	1219
D. LONGSTANDING PROHIBITIONS	1220
IV. CONCEALED CARRY IN CALIFORNIA.....	1221
A. INTRODUCTION.....	1221
B. THE <i>PERUTA</i> CASES AND THE CURRENT STATE OF	

*. Senior Submissions Editor, *Southern California Law Review*, Volume 92; J.D. 2019, University of Southern California Gould School of Law; B.A., Economics & Accounting 2015, University of California, Santa Barbara. My deepest appreciation goes to Professor Rebecca Brown for her guidance, the editors of the *Southern California Law Review* for all of their hard work, and my family and friends for their continued support.

AFFAIRS IN CALIFORNIA	1222
C. APPLICATION OF THE PROPOSED FRAMEWORK	1225
D. REVIEWING CALIFORNIA’S CURRENT LAW	1227
E. PROPOSED REFORM	1228
V. THE SAFETY FOR ALL ACT (PROPOSITION 63)	1229
A. THE ACT AND ITS PROVISIONS	1229
B. APPLICATION OF THE FRAMEWORK	1231
C. REVIEW UNDER THE APPLICABLE SCRUTINY	1232
CONCLUSION.....	1233

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 For over a century, the Second Amendment has caused controversy and debate between diametrically opposed factions—those who argue the amendment preserves a collective right held by states, and those who argue it protects an individual right of the people to bear arms.² And as if to add a spark to the proverbial powder keg, discussions about gun rights and gun control often take place in the wake of tragic mass shootings, such as the 2017 Las Vegas shooting.³

There is little argument that gun culture has always been a large and unique element of American society.⁴ Early America was a nation of frontiersmen, expanding into the unknown and battling Native Americans and wildlife.⁵ It is no surprise that the rifle was a critical, everyday tool for many Americans. Americans’ affinity for guns led to the development of superior weaponry, a factor that greatly aided them in the Revolutionary

1. U.S. CONST. amend. II.

2. George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *FORDHAM L. REV.* 2113, 2113 (2008). Some argue there is also a third approach, “the ‘sophisticated collective right’ model,” which is “functionally equivalent to the collective rights model.” *Id.* at 2133 (citation omitted).

3. The mass shooting that occurred on Las Vegas Boulevard on October 1, 2017 took fifty-eight lives and is one of the deadliest mass shooting in this country’s history. *See, e.g., Multiple Weapons Found in Las Vegas Gunman’s Hotel Room*, *N.Y. TIMES* (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/us/las-vegas-shooting.html>.

4. *See, e.g.,* Richard Hofstadter, *America as a Gun Culture*, *AM. HERITAGE* (Oct. 1970), <https://www.americanheritage.com/america-gun-culture>.

5. *Id.* (“It is very easy, in interpreting American history, to give the credit and the blame for almost everything to the frontier, and certainly this temptation is particularly strong where guns are concerned.”).

War.⁶ Even British troops were afraid of the average American hunter, thinking that “every such person [was] a complete [m]arksman.”⁷ Beyond the early origins of America, the lone gunman was romanticized in the American West during the late nineteenth century. As the saying goes, “Abe Lincoln may have freed all men, but Sam Colt made them equal.”⁸ Even after the end of the so-called “Wild West,” the era remains a cherished part of our collective American heritage.⁹

Today, gun culture and ownership remains a large part of American society. The Congressional Research Service estimates that there are just over 300 million firearms in America.¹⁰ According to a Gallup poll, 42% of Americans report having a gun in their home.¹¹ According to a poll by the Pew Research Center, 44% of Republicans and Republican independents, as well as and 20% of Democrats and Democratic independents, report gun ownership.¹² In California alone, gun sales have increased 250% between 2007 and 2017.¹³ An increase in sales occurred across *all* of the state’s counties during that time period.¹⁴ Los Angeles County, traditionally very liberal, saw a growth of 190%, and Sacramento County saw a staggering 406% growth.¹⁵

It seems, then, that despite what the talking heads say, America is not quite as divided as it would first appear,¹⁶ and indeed compromise can be

6. The Pennsylvania (or Kentucky) rifle was developed by German and Swiss immigrants in 1730 and was significantly more accurate than the British Brown Bess musket. J.R. Potts, *Kentucky Rifle (Deckard Rifle / Longrifle / Pennsylvania Rifle)*, MIL. FACTORY, https://www.militaryfactory.com/smallarms/detail.asp?smallarms_id=363 (last updated May 3, 2019) (“The . . . gunsmiths saw a need and made a rifle that fit the requirements of the frontiersman.”).

7. DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 351 (Vintage Books 1964).

8. *Colt Model 1892 Revolver*, SMITHSONIAN INST., <https://amhistory.si.edu/militaryhistory/collection/object.asp?ID=634> (last visited Aug. 22, 2019). This quote was used as a slogan by Colt after the Civil War, in reference to its revolving cylinder pistols. *See id.*

9. *See, e.g.,* Andy Rieber, *Cowboy Culture, Alive and Well*, WALL ST. J. (Feb. 10, 2015, 6:15 PM), <https://www.wsj.com/articles/cowboy-culture-alive-and-well-1423610106>.

10. WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, *GUN CONTROL LEGISLATION* 8 (2012), <https://fas.org/sgp/crs/misc/RL32842.pdf>.

11. *Guns*, GALLUP, <http://news.gallup.com/poll/1645/guns.aspx> (last visited Aug. 23, 2019).

12. Kim Parker et al., *The Demographics of Gun Ownership in the U.S.*, PEW RES. CTR. (June 22, 2017), <http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership>.

13. *Gun Sales in California*, CAL. DEP’T JUST.: OPENJUSTICE, <https://openjustice.doj.ca.gov/data-stories/2018/gun-sales-california> (last visited Aug. 23, 2019).

14. *Id.*

15. Phillip Reese, *Sacramento County Annual Gun Sales Increase 406 percent in Last 15 Years*, SACRAMENTO BEE, <https://www.sacbee.com/news/local/article107862467.html> (last updated Oct. 13, 2016, 6:04 PM).

16. *But see* Mark Joslyn & Donald P. Haider-Markel, *Gun Ownership Used to be Bipartisan. Not*

found throughout the history of gun legislation. Take, for example, *United States v. Miller*, which established that the Second Amendment does not protect every kind of weapon, upholding a ban on sawed-off shotguns.¹⁷ A more timely example can be seen with the endorsement of the effort to ban “bump stocks,” a device used in the 2017 Las Vegas shooting, by the National Rifle Association, a bastion of gun rights.¹⁸ There is no reason to believe that effective gun policy cannot be balanced against protection of the Second Amendment. The question is, how should courts look at potential legislation?

In its landmark *District of Columbia v. Heller* decision, the Supreme Court announced that the Second Amendment guarantees an individual right of the people to bear arms.¹⁹ Although *Heller* answered a long-standing question about the Second Amendment’s meaning, there remain issues to be settled. One of the most pressing—and the main topic of this Note—is the proper method of review and application of this individual right. Without guidance on these issues, several circuit courts have followed different approaches.²⁰ Although opportunities to provide some clarity have come before the Supreme Court, so far, it has denied certiorari.²¹

This Note will not opine on the merits of the individualist or collectivist approaches to the interpretation of the Second Amendment, as this question has been answered conclusively in *Heller*.²² Instead, this Note will provide a suggested framework for the application of this individual right to keep and bear arms, and will progress as follows. Part I will offer a contextual history of the Second Amendment. Part II will make the case for why clarity on this issue is so desperately needed and is punctuated by a discussion of the

Anymore., WASH. POST: MONKEY CAGE (May 9, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/09/gun-ownership-used-to-be-bipartisan-not-anymore/?utm_term=.771cdc757ee6 (explaining that there is a growing gap between Republican and Democrat levels of gun ownership).

17. See *United States v. Miller*, 307 U.S. 174, 177–83 (1939); see also *infra* Section I.B.

18. See, e.g., Elise Viebeck et al., *NRA Support for Restricting ‘Bump Stocks’ Reflects Impact of Las Vegas Massacre*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/powerpost/top-house-republicans-open-to-legislation-regulating-bump-stocks/2017/10/05/4580cb54-a9dc-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.f199ddb69840.

19. See *District of Columbia v. Heller*, 554 U.S. 570, 619–26 (2008). For further discussion on the *Heller* opinion, see *infra* Section I.C.

20. See *infra* Part II.

21. See *id.* Since the writing of this Note, however, the Supreme Court has granted certiorari for *New York State Rifle & Pistol Association v. City of New York*, 139 S. Ct. 939 (2019), a case that will review strict New York gun laws regulating the transport of firearms outside of the home. This will be the first Second Amendment case before the Supreme Court since 2010, and may give the Court a much needed opportunity to clarify its Second Amendment jurisprudence.

22. Accordingly, this Note will look at issues regarding the individual right to keep and bear arms.

Second Circuit's particularly troubling application of the right. Part III will offer a proposed framework that, if adopted by the Supreme Court, can resolve the questions posed in Part II. Part IV will apply the framework to California concealed carry regulations. Finally, Part V will apply the framework to a new California law that is likely to make its way to the Ninth Circuit soon, thus allowing the Supreme Court to clarify Second Amendment jurisprudence further.

I. A CONTEXTUAL HISTORY OF THE SECOND AMENDMENT

A. EARLY ORIGINS OF THE INDIVIDUAL RIGHT TO BEAR ARMS

The right to bear arms was not a new concept contemplated by the Second Amendment, but rather it existed long before the amendment's passage. Self-defense was a well-established right under Roman law, as was the right to bear arms.²³ English law also recognized a natural right to bear arms for self-defense, which was codified in the English Bill of Rights of 1689.²⁴ This document provided that "the Subjects which are Protestants may have arms for their Defence suitable to their Conditions"²⁵ It is well established that the Founding Fathers framed the Second Amendment based on their experiences with English law, and looked to the 1689 Bill of Rights for guidance.²⁶ In fact, James Madison thought that the right to bear arms in the 1689 Bill of Rights did not go far enough, and found the provision to be "highly restrictive."²⁷ At the time of the Constitution's ratification, Samuel Adams proposed a Second Amendment parallel at the Massachusetts Ratification Debates, which read: "[a]nd that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United

23. David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 108–17 (2007). Roman law is a good place to start an analysis of self-defense, as "it is still fair to say that Roman law comes closer than any other legal system to being the common heritage of all mankind." *Id.* at 108. Roman citizens were permitted to carry arms in accordance with their right to self-defense, though conquered peoples were not always afforded the same right. *Id.* at 111. After the collapse of the Western Roman Empire, the Byzantine Empire created a compilation of Roman law known as the *Corpus Juris*, which contained even more detailed provisions governing the right of self-defense. *Id.* at 112–17.

24. Bill of Rights 1688, 1 Will. & Mar. 2, c. 2 (Eng.), <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>. Please note that "[t]he Bill of Rights is assigned to the year 1688 on [legislation.gov.uk](http://www.legislation.gov.uk) (as it was previously in successive official editions of the revised statutes from which the online version is derived) although the Act received Royal Assent on 16th December 1689." *Id.*

25. *Id.*

26. See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 235–39 (1983) (discussing the impact of English law on the Second Amendment).

27. *Id.* at 237 n.144.

States . . . from keeping their own arms”²⁸ Moreover, when New Hampshire ratified the Constitution in 1788, a majority of the convention proposed a three-part bill of rights, including an amendment which read: “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.”²⁹ Finally, several state constitutions at the time of ratification also had provisions protecting a right to bear arms,³⁰ and many were very similar to the ultimately adopted Second Amendment.

During Ratification, there was much debate between the Federalists and the Antifederalists over the specific language of the Second Amendment.³¹ The principal goals of the drafters were threefold: (1) to protect the natural right of self-defense, (2) to allow the people to protect themselves against a tyrannical government, and (3) to allow for the creation of a well-regulated militia.³² However, “[t]he framers’ attempt to address all three in a single declarative sentence has contributed mightily to the subsequent confusion over the proper interpretation of the Second Amendment.”³³

This Note will focus on the Second Amendment’s right to self-defense, as this is the context in which *Heller* and many post-*Heller* cases have been decided. This is not to say that the other two goals are not equally valid. Even today, the right to organize a militia³⁴ to deter or rebel against a tyrannical government is important.³⁵ “The argument that an armed citizenry cannot hope to overthrow a modern military machine flies directly in the face of the history of partisan guerilla and civil wars in the twentieth century.”³⁶ Nevertheless, modern jurisprudence in cases such as *Heller* and *McDonald* focus much more predominantly on self-defense; likewise between 60%³⁷

28. Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131, 146–57 (1991) (citation omitted).

29. *Id.* at 148 (citation omitted).

30. *See, e.g.*, Kates, *supra* note 26, at 222.

31. *To Keep and Bear Arms*, HERITAGE.ORG, <https://www.heritage.org/constitution/#!/amendments/2/essays/142/to-keep-and-bear-arms> (last visited Mar. 4, 2018).

32. *See, e.g.*, David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 15 WM. & MARY BILL RTS. J. 1237, 1242 (2007) (book review).

33. Joyce Lee Malcolm, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 54 GEO. WASH. L. REV. 452, 466 (1986) (book review).

34. An interesting case is the modern National Guard, which is often equated with the colonial concept of a well-regulated militia. However, the National Guard does not seem to be similar to the kind of militia contemplated by the Second Amendment, as the President may take control of it during an “invasion,” a “rebellion,” or to otherwise properly “execute the laws of the United States.” 10 U.S.C. § 12406 (2018).

35. Kates, *supra* note 26, at 270 (“Perhaps more important, in a free country like our own, the issue is not really *overthrowing* a tyranny but *detering* its institution in the first place.”).

36. *Id.*

37. *Guns, supra* note 11.

and 67%³⁸ of American gun owners report that their primary purpose for owning a gun is self-defense. While the actual incidence of gun use in self-defense settings is not well tracked,³⁹ the cultural and historical importance of self-defense cannot be overlooked.

B. EARLY SECOND AMENDMENT CASES

*United States v. Cruikshank*⁴⁰ was one of the first Supreme Court cases to directly address the Second Amendment. In *Cruikshank*, a white mob was convicted of conspiring to deprive African Americans of, among other things, their right to bear arms.⁴¹ Although the Fourteenth Amendment had already been ratified in 1868, the Court declined to incorporate⁴² the Second Amendment, holding that “[t]he second amendment declares that it shall not be infringed, but this . . . means no more than it shall not be infringed by Congress.”⁴³ In 1886, the Supreme Court reaffirmed that the Second Amendment only applies to the federal government in *Presser v. Illinois*.⁴⁴

The next influential Second Amendment case would not occur until 1939 in *United States v. Miller*.⁴⁵ In *Miller*, the National Firearms Act was challenged as unconstitutional under the Second Amendment.⁴⁶ Under the National Firearms Act, it was prohibited to carry a sawed-off shotgun in interstate commerce without registering it.⁴⁷ The Court held that the act did not violate the Second Amendment because “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”⁴⁸ Some see *Miller* as having formally adopted the collective rights view of the Second Amendment, but

38. Parker et al., *supra* note 12.

39. The Congressional Research Service provides two possible findings, one estimating 62,200 uses of guns to defend from violent and property crimes and another estimating 2.5 million uses. KROUSE, *supra* note 10, at 13. One cause of this variance is the fact that law enforcement agencies do not collect data on the use of firearms in cases of self-defense. *Id.* Nevertheless, these numbers play well into the politics of guns. *The New York Times* cites 67,740 and claims that the NRA relies on the 2.5 million estimation. See Juliet Lapidus, Opinion, *Defensive Gun Use*, N.Y. TIMES (Apr. 15, 2013, 5:02 PM), <https://takingnote.blogs.nytimes.com/2013/04/15/defensive-gun-use>.

40. *United States v. Cruikshank*, 92 U.S. 542 (1876).

41. *Id.* at 548.

42. Incorporation is the process by which the Bill of Rights is applied to the states by way of the Fourteenth Amendment. See *Incorporation Doctrine*, WEX LEGAL DICTIONARY, https://www.law.com/ell.edu/wex/incorporation_doctrine (last visited Aug. 23, 2018).

43. *Cruikshank*, 92 U.S. at 553.

44. *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

45. *United States v. Miller*, 307 U.S. 174 (1939).

46. *See id.* at 183.

47. *Id.* at 177.

48. *Id.* at 178 (citation omitted).

this view would later be rejected by *Heller*.⁴⁹ Current Supreme Court precedent reads *Miller* as merely holding that the Second Amendment's individual right is not unlimited.⁵⁰

C. THE *HELLER* DECISION⁵¹

The Supreme Court's landmark decision in *District of Columbia v. Heller* was a major development in Second Amendment jurisprudence. *Heller* surrounded a challenge to a law passed by the District of Columbia, which "totally ban[ne]d handgun possession in the home."⁵² Discussing the law, the Court noted that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."⁵³ Writing for the majority, Justice Scalia began with an extensive discussion of the Second Amendment's grammatical construction, splitting it into an operative clause and a prefatory clause.⁵⁴ Beginning first with the operative clause, the Court concluded that there was "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."⁵⁵ Turning to the prefatory clause, the Court concluded that "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."⁵⁶ Instead, the fear that the federal government would eliminate the citizens' militia was merely the

49. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 636–723 (2008); *Second Amendment*, LEGAL INFO. INST.: WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/second_amendment (last visited Mar. 3, 2018).

50. *Heller*, 554 U.S. at 621–23.

51. As discussed *supra* note 22 and in the accompanying text, this Note will not undergo an analysis on the merits of the collective or individualist approach. Accordingly, it will also forgo an in-depth analysis of the dissenting opinion of *Heller*. This Section provides a brief overview of the majority opinion, upon which the rest of this Note will build.

52. *Heller*, 554 U.S. at 628. The challenged law also included a requirement to keep long guns disassembled or disabled while within the home. *Id.* However, this requirement is not necessary to clarify *Heller*'s holding, and in fact the Court spends very little time discussing it.

53. *Id.* at 629.

54. *Id.* at 576–77. The operative clause of the Second Amendment is defined as "the right of the people to keep and bear Arms shall not be infringed," while the prefatory clause deals with a discussion of the value of militias. *Id.*

55. *Id.* at 595. This conclusion was based on two textual and historical observations. First the Court compared the clause's use of "the people" to references to "the people" in the First, Fourth, and Ninth Amendments, which "unambiguously refer to individual rights, not 'collective' rights . . ." *Id.* at 579. Second, Justice Scalia engaged in a lengthy back-and-forth with Justice Stevens regarding the meaning of "to keep and bear Arms." *Id.* at 581–92. Based on this evidence, the Court concludes that the Second Amendment merely recognized a pre-existing individual right to bear arms. *Id.* at 592.

56. *Id.* at 599.

reason that the pre-existing right to bear arms was codified.⁵⁷

Finally, the Court turned to a discussion of whether previous precedent foreclosed the finding of an individual right.⁵⁸ The Court paid special attention to the three cases discussed in Section I.B.⁵⁹ Turning first to *Cruikshank*, the Court noted that, although the case declined to incorporate the Second Amendment, the right protected was individual in nature.⁶⁰ *Presser*, the Court reasoned, “said nothing about the Second Amendment’s meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.”⁶¹

Heller’s relationship with *Miller* is more complicated, however. The rule announced in *Heller* has two principal elements that were applied to the challenged handgun ban. First is the guaranteed individual right to keep and bear arms for a lawful purpose.⁶² Second are the limitations of that individual right.⁶³ The Court observed that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”⁶⁴ Interpreting its previous *Miller* decision, the Court concluded that the Second Amendment only extends protection to weapons that are typically possessed by law-abiding citizens for lawful purposes.⁶⁵ Further, the Court reasoned that the individual right would not override certain longstanding prohibitions, including banning the purchase of weapons by the mentally ill, or prohibiting possession in schools and government buildings.⁶⁶

Applying these twin goals to the case at hand, the Court found the handgun ban unconstitutional.⁶⁷ The Court identified self-defense as

57. *Id.* It is well established that the right to bear arms already existed long before the Second Amendment was ratified. *See, e.g., id.* at 602–03; *see also supra* Section I.A. The argument that the codification was prompted by a fear of government abuse can find support in excerpts from the 1788 Ratification Debates. *Heller*, 554 U.S. at 598–99. While the Antifederalists feared that the government could disband the militia if the amendment were not included, the Federalists argued that the government would not have that right even without the Second Amendment. *Id.* “The debate with respect to the right to keep and bear arms . . . was not over whether it was desirable (all agreed that it was) . . .” *Id.* at 598.

58. *See id.* at 619–26.

59. *See id.*; *see also supra* Section I.B.

60. *Heller*, 554 U.S. at 619–20.

61. *Id.* at 621.

62. *Id.* at 592.

63. *Id.* at 626.

64. *Id.*

65. *Id.* at 625. Justice Scalia construed *Miller* to narrowly hold that a sawed-off shotgun was not the kind of weapon that would be ordinarily used for lawful purposes, nor was it suited for militia or military service. *Id.*

66. *Id.* at 626–27.

67. *Id.* at 629.

“central” to the Second Amendment’s individual right, and noted that the handgun “is overwhelmingly chosen by American society for that lawful purpose.”⁶⁸ The Court also noted that “[t]he prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”⁶⁹ More concisely, the handgun ban interfered with a principal purpose of the right to bear arms and did so in a setting in which that purpose is most needed. As will be seen in Part III, this particular line of analysis will play a central role in the proposed framework.

Despite the *Heller* Court’s in-depth analysis of the Second Amendment, there is a critical tool that the opinion does not give us—a method of application for the individual right to bear arms. The majority in *Heller* declined to define a particular level of scrutiny for lower courts to follow.⁷⁰ It is this gap that this Note seeks to help fill in Part III.

D. INCORPORATION OF THE SECOND AMENDMENT

The next important case for Second Amendment jurisprudence came two years after *Heller* when the Supreme Court decided *McDonald v. City of Chicago*.⁷¹ *McDonald* involved a challenge to a law that banned handguns, similar to the law initially challenged in *Heller*.⁷² Although the challenged law directly contradicted *Heller* by banning handguns within the home, its proponents argued for its Constitutionality because the Second Amendment’s individual right is not applicable to state governments.⁷³ Much like Justice Scalia’s *Heller* opinion, Justice Alito began the opinion with a lengthy historical analysis.⁷⁴ The Court then set out to determine

68. *Id.* at 628; *see also* Parker et al., *supra* note 12.

69. *Heller*, 554 U.S. at 628. This language makes it clear that Second Amendment protections are strongest in the home but has led to considerable debate as to their application outside of the home. The importance of location with regard to self-defense will be discussed further *infra*.

70. *Id.* at 633. In fact, Justice Breyer’s dissenting opinion chastises the majority for declining to do so. *Id.* In an interesting rebuttal, Justice Scalia explains that this is to be expected, as it would be unreasonable for the Court to settle every Second Amendment question in its first major case on the subject. *Id.* at 635. This comment is punctuated with examples of the Supreme Court tacking decades, or even more than a century, to formally announce the proper frameworks for other aspects of the Bill of Rights, such as the First Amendment. *Id.* at 635.

71. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

72. *Id.* at 750. The challenged law forbade the possession of guns without a registration certificate, and then prohibited the registration of most handguns. *Id.*

73. *Id.* The key difference between the law in *Heller* and *McDonald* was that the District of Columbia is federally administered, unlike the State of Illinois. This allowed the *Heller* Court to decide the case without reaching the issue of incorporation. Because of this, Chicago passed a very similar law, using the argument that the Second Amendment did not apply to states.

74. *See id.* at 755–67. While the Court’s earlier decisions in *Cruikshank* and *Presser* clearly stated that the Second Amendment did not apply to state governments, they did not attempt to analyze the

“whether the Second Amendment right to keep and bear arms is incorporated into the concept of due process.”⁷⁵

Ultimately, the Court noted that “[u]nless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”⁷⁶ Taking this into consideration, the *McDonald* Court held that the “Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”⁷⁷ Going forward, *McDonald*’s ruling means that all state gun legislation has to live up to the same Constitutional standard as federal legislation.

II. THE UNRESOLVED QUESTIONS OF *HELLER*

Heller drastically changed the legal landscape of the Second Amendment, sending many courts back to the drawing board. It is clear that the Supreme Court viewed self-defense as the central core of the Second Amendment, and that the right to bear arms is fundamental.⁷⁸ What is not clear, however, is what level of scrutiny courts should apply *Heller*⁷⁹ or, even more crucial, what factors should be taken into account in doing so.⁸⁰

In their 2017 article *The Federal Circuits’ Second Amendment Doctrines*, David Kopel and Joseph Greenlee “examined every post-*Heller* circuit case, including the unpublished ones.”⁸¹ Most of these cases used some variation of intermediate or strict scrutiny, using a variety of different

amendment in light of the Fourteenth Amendment. *Id.* at 759. “In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights.” *Id.* at 759 (citation omitted).

75. *Id.* at 767.

76. *Id.* at 791 (citation omitted).

77. *Id.*

78. *See, e.g., id.* 780 (commenting that the right to bear arms is not a second class right).

79. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“[O]ne should not expect [this case] to clarify the entire field . . . [T]here will be time enough to expand upon the historical justifications for the exceptions we have mentioned if and when these exceptions come before us.”).

80. As will be discussed *infra* Sections II.A–B, the different circuit courts are not in total alignment regarding the particular factors that are considered. For example, the Fourth Circuit distinguishes between laws regarding use in the home versus in public, while the Ninth Circuit considers the manner of use as opposed to banning possession. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 *St. Louis L.J.* 193, 262–64, 297–98 (2017). Virtually all circuits do agree, however, that a law’s effect on self-defense should be considered—though disagreements remain over to what extent. *Id.* at 298.

81. *Id.* at 196.

factors to determine which level to apply,⁸² any of which could plausibly be adopted by the Supreme Court in a future case. One particular approach, however, does not fit with the others and is worth noting—the approach taken by the Second Circuit.

A. RATIONAL BASIS IN THE SECOND CIRCUIT

The most radical Second Amendment framework of the post-*Heller* era is the approach taken by the Second Circuit. This perhaps comes as no surprise, as New York—a state in which the Second Circuit sits—has a reputation for tough gun laws.⁸³ The Second Circuit’s framework is particularly troubling because of its willingness to use rational basis scrutiny.⁸⁴ A rational basis review is the most forgiving standard of review to legislatures, “generally used in cases where no fundamental rights . . . are at issue.”⁸⁵ To pass muster under rational basis review, a law must: (1) have a legitimate state interest and (2) have a rational connection to that interest.⁸⁶

The Second Circuit began its precedent of using rational basis review in *United States v. Decastro*, in which it held that a prohibition on bringing guns into New York that were purchased out of state did “not substantially burden” Second Amendment rights.⁸⁷ Accordingly, the court declined to review the law under heightened scrutiny, and instead applied rational basis scrutiny.⁸⁸ The Second Circuit reiterated its position in *New York State Rifle and Pistol Association v. Cuomo*, in which it announced two factors to consider in reviewing gun control laws.⁸⁹ The first was “how close the law comes to the core of the Second Amendment right,” and the second was “the severity of the law’s burden on the right.”⁹⁰ According to the *Cuomo* court, only laws implicating one of these two factors are subject to heightened scrutiny.

82. *Id.*

83. See *Gun Laws in the US, State by State – Interactive*, THE GUARDIAN (Jan. 16, 2013, 1:38 PM), <https://www.theguardian.com/world/interactive/2013/jan/15/gun-laws-united-states> [hereinafter *Gun Laws in the US*] (providing a tool that allows readers to compare gun laws from one state to another).

84. Kopel & Greenlee, *supra* note 80, at 288. The Second Circuit’s particular version of intermediate scrutiny has also been sharply criticized as “specially unfavorable . . .” *Id.*

85. *Rational Basis Test*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/rational_basis_test (last visited Aug. 23, 2019).

86. *Id.*

87. See *United States v. Decastro*, 682 F.3d 160, 161, 168 (2d Cir. 2012).

88. *Id.* at 164–65.

89. *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 258 (2d Cir. 2015); see also Kopel & Greenlee, *supra* note 80, at 289.

90. *Cuomo*, 804 F.3d at 258 (citation omitted).

The primary problem with the Second Circuit's approach is that the Supreme Court expressly refuted it in *Heller*. In no uncertain terms, the *Heller* Court held the following:

Obviously, [rational basis scrutiny] can not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment . . . would have no effect.⁹¹

The Second Circuit reasoned that *Heller* rejected a rational basis examination for only “the type of regulation challenged there.”⁹² The Second Circuit further wrote that “this Court and our sister Circuits have suggested that heightened scrutiny is not always appropriate.”⁹³ This is puzzling, as the use of rational basis scrutiny has been expressly rejected by the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits.⁹⁴

Apart from being rejected by the Supreme Court and the vast majority of the circuit courts, the rational basis approach has procedural deficiencies that should rule it out of contention. As discussed above, a law need only be rationally related to a legitimate state purpose to be upheld on a rational basis standard. It is hard to imagine any legislation *failing* to be upheld under rational basis review,⁹⁵ as preventing gun violence will always be a legitimate state interest. As stated in *Heller* and quoted above, “the Second Amendment . . . would have no effect.”⁹⁶

B. A NEED FOR REFORM

There is a clear and present need for the Supreme Court to offer clarification to the circuit courts on the application of the Second

91. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citation omitted).

92. *Cuomo*, 804 F.3d at 258.

93. *Id.*

94. For various circuit court opinions rejecting rational basis scrutiny on similar facts, see *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1141 (10th Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012); *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011); *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *see also* Kopel & Greenlee, *supra* note 80, at 274 n.486 (providing a thorough collection of relevant cases).

95. Kopel and Greenlee suggest that even under the Second Circuit's particular form of intermediate scrutiny, “the government will always win when it litigates competently.” Kopel & Greenlee, *supra* note 80, at 295.

96. *Heller*, 554 U.S. at 628 n.27.

Amendment's individual right to keep and bear arms. The ability to opine on the Second Amendment's scope was placed before the Supreme Court in *Shew v. Malloy*⁹⁷ and *Peruta v. County of San Diego*,⁹⁸ though in both cases certiorari was denied. Dissenting from the Court's denial of certiorari in *Peruta*, Justice Thomas pointed to a "distressing trend" of treating the Second Amendment as a "disfavored right."⁹⁹ On the need to resolve these types of Second Amendment questions, Justice Thomas wrote:

The Court has not heard argument in a Second Amendment case in over seven years—since March 2, 2010, in [*McDonald*]. Since that time, we have heard argument in, for example, roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment¹⁰⁰

III. A PROPOSED FRAMEWORK

This Part proposes a framework for applying *Heller* and *McDonald* to future cases. Much like the *Heller* decision, the framework will draw upon historical precedent. It will take the three core considerations from *Heller* and *McDonald* into account—the purpose being restricted, the setting in which the restriction takes place, and any longstanding limitations on the right to bear arms.

A. RELEVANT LEVELS OF SCRUTINY

Before addressing the three core considerations of the framework, it is necessary to first discuss the relevant levels of scrutiny that will ultimately be used. As discussed in Part II, rational basis review is not appropriate for laws implicating the Second Amendment. The proposed framework will thus

97. See *Shew v. Malloy*, 136 S. Ct. 2486 (2016). Hearing *Shew* would have allowed the Supreme Court to clarify the inapplicability of rational basis review.

98. See *Peruta v. California*, 137 S. Ct. 1995 (2017). Hearing *Peruta* would have allowed the Supreme Court to better define the scope of the Second Amendment. In the Ninth Circuit's *en banc* rehearing of *Peruta*, it glossed over the question of whether the Second Amendment guaranteed the right to carry arms in public in some way. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) ("The Second Amendment may or may not protect, to some degree, a right . . . to carry firearms in public. But the existence . . . and the scope of such a right, are separate from and independent of the question presented here."). In his dissent from the Supreme Court's subsequent denial of certiorari, Justice Thomas commented that "[t]he en banc court's decision to limit its review . . . to concealed carry—as opposed to the more general right to public carry—was untenable." *Peruta*, 137 S. Ct. at 1997 (Thomas, J. dissenting).

99. *Id.* at 1999.

100. *Id.* (citation omitted).

rely on either intermediate or strict scrutiny.

Intermediate scrutiny is, as the name implies, a form of scrutiny that falls between rational basis and strict. For a statute to pass intermediate scrutiny, it must: (1) further an important governmental interest and (2) be substantially related to that interest.¹⁰¹ While intermediate scrutiny is typically used when a statute implicates a protected class, it may be used for certain fundamental rights, chiefly in certain First Amendment cases.¹⁰² For example, courts have used intermediate scrutiny for statutes regulating the mass media, commercial speech, and political and charitable contributions.¹⁰³

Strict scrutiny, the highest standard of review, is applied to statutes that implicate fundamental rights, especially those rights guaranteed by the Bill of Rights.¹⁰⁴ For a statute to pass such a review, it must: (1) further a compelling governmental interest, (2) be narrowly tailored to achieve such interest, *and* (3) be the least restrictive means for achieving such interest.¹⁰⁵ The least restrictive means requirement is what differentiates strict scrutiny from intermediate scrutiny, and what makes it significantly more difficult for a statute to pass muster.

Because the Second Amendment is an individual and fundamental right protected by the Bill of Rights, it seems most likely that strict scrutiny is the most appropriate way to review gun legislation. However, while the First Amendment is also a fundamental right, there are situations in which courts have determined that intermediate scrutiny is more appropriate. “[I]ntermediate scrutiny cases are by definition cases where the Court has concluded that strict scrutiny should *not* apply because of some combination of the lower value of protected speech . . . , the strong social interests at stake . . . , or simply lessened concerns about governmental misconduct”¹⁰⁶ Drawing upon the First Amendment’s overwhelmingly richer body of case law, parallels between the two fundamental rights seem evident. With regard to scrutiny, the right to bear arms may also have certain limited circumstances under which an intermediate review is appropriate. As

101. *Intermediate Scrutiny*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Aug. 23, 2019).

102. *Id.*

103. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2017 U. ILL. L. REV. 783, 788–800.

104. *Strict Scrutiny*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/strict_scrutiny (last visited Aug. 23, 2019).

105. *Id.*

106. Bhagwat, *supra* note 103, at 824.

Justice Kennedy wrote, “[s]trict scrutiny must not be ‘strict in theory, but fatal in fact.’ But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact.”¹⁰⁷ The framework laid out below will provide a potential means for courts to determine which scrutiny is appropriate for any given law or regulation.

B. LAWFUL PURPOSE

The first factor to be taken into account is the lawful purpose that is being affected by the statute. That is—in what way does the statute restrict a person’s lawful use of arms? The use must be legal—it is clear that the government may restrict the use of firearms to rob a bank. The “core” right protected by the Second Amendment is the right to self-defense. This was acknowledged in both *Heller* and *McDonald*.¹⁰⁸ The central importance of self-defense and the right to defend others to the right to bear arms is also supported by historical precedent.¹⁰⁹ Although defense is at the heart of the right to bear arms, it is not the only important lawful purpose for which arms can be used.¹¹⁰ Hunting is another lawful use of arms that is rooted in historical precedent. Finally, there is a longstanding tradition of the use of arms recreationally both for necessary practice and for sport.¹¹¹

The lawful purpose being restricted is a not a dispositive factor, and cannot alone necessitate strict or intermediate scrutiny. To arrive at a final determination, a court must continue to analyze the remaining two factors. However, *Heller* tells us in no uncertain terms that self-defense is a critical use of the right to bear arms, and accordingly, laws implicating that use make good candidates for strict scrutiny. Because we do not have the same level of clarity with respect to the relative importance of the other lawful uses described in this Section, it will be necessary to rely more heavily on the next two factors.

107. See *Fisher v. Univ. of Tex.*, 570 U.S. 297, 314 (2013) (citations omitted).

108. See *supra* Section I.C.

109. See *supra* Section I.A.

110. Although recent Supreme Court decisions have turned predominantly on defense of the self, the ability of the citizenry to defend the nation from tyranny was also a chief goal of the Second Amendment.

111. The proper use of arms for both hunting and self-defense are highly technical skills that require a great deal of practice to achieve proficiency. Furthermore, shooting for sport has a long tradition, and today there are fifteen shooting events in the Olympic Games. See Scott McDonald, *Your Comprehensive Guide to the 15 Olympic Shooting Events*, TEAM USA (Apr. 15, 2016, 3:09 PM), <https://www.teamusa.org/News/2016/April/15/Your-Comprehensive-Guide-To-The-15-Olympic-Shooting-Events>.

C. SITUATIONAL CONTEXT

The second factor that should be taken into account is the full situational context in which the challenged lawful purpose is being restricted. For example, the *Heller* Court was clear to point out that the D.C. law affected an individual's ability to defend oneself *in the home*.¹¹² The Court also suggests that self-defense in the home may be more protected than self-defense in public.¹¹³ In addition to the Court's discussion of rights within the home versus rights in public, the Court explicitly identifies schools and government buildings as places where gun rights may not be as strongly protected.¹¹⁴ Because the lawful purpose above is dispositive, the context in which a law affects the use of arms can add additional weight to tilt the scales in favor of either strict or intermediate scrutiny.

When the context of a law affects a lawful purpose in the private realm, we can gain some clarity from *Heller*. First, any law that implicates the right of self-defense in the home will undoubtedly be subject to strict scrutiny, unless there is a particular longstanding prohibition with respect to the specific law, for example, a ban on dangerous and unusual weapons.¹¹⁵

However, when the context moves from one's own home to the private property of another, the story changes. In these cases, such as in restaurants and shops, the individual right to bear arms carries less weight, and a statute codifying private landholders' right to prohibit others from possessing guns on their property should be subject to intermediate scrutiny. These laws will be almost universally upheld. Such statutes exist today in even the most pro-gun states, including, for example, Arizona, a state that recognizes a Constitutional right to carry concealed firearms in public without a permit.¹¹⁶

The question of self-defense in the public realm, however, is a more complicated one that is not answered conclusively by *Heller*. *Heller* does tell us that the use of arms for self-defense in schools and government buildings may be restricted, and consequently, such laws should typically be reviewed under intermediate scrutiny. But what about on the streets? Can the relative safety of a neighborhood be taken into consideration for the public carrying

112. "The prohibition extends, moreover, to the home, where the needs for defense of self, family, and property is most acute." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

113. While the Court never directly stated this proposition, it can be implied by the importance the Court places on the fact that the D.C. law's affect was predominantly in the home.

114. "[N]othing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . ." *Id.* at 626.

115. This remains true even if other suitable weapons remain available.

116. This is true even in Arizona, a very gun-friendly state. *See Gun Laws in the US, supra* note 83.

of arms?¹¹⁷ This is a hotly contested question. Without a federal law on the books, states have taken drastically different views. Most of California, for example, constructively prohibits the carrying of arms in public by requiring a specific reason for doing so, while noting that self-defense alone does not qualify as a reason absent a showing of a particularized threat.¹¹⁸ Some states, such as Nevada and Utah, allow citizens to obtain a permit after taking classes, passing exams, or both.¹¹⁹ States like Florida and Arizona recognize a Constitutional right to carry arms for self-defense, and no license is required.¹²⁰

While most of this contextual discussion thus far has focused on the core right of self-defense, it is not the only right that can vary with context. The use of arms for hunting, for example, should be well-protected on lands suitable for hunting. Laws restricting hunting on school property, around government buildings, or in urban areas, however, do not harm a person's right to hunt, and thus are more suitable for intermediate scrutiny. This is similar to recreational shooting. Courts should look at laws restricting the recreational use of arms on shooting ranges or on designated federal lands with significantly higher scrutiny than laws prohibiting recreational shooting in Times Square.

D. LONGSTANDING PROHIBITIONS

The third and final factor of the framework is the recognition of "longstanding prohibitions." One such prohibition is the ability of states to restrict the possession of "dangerous and unusual weapons."¹²¹ For example, when *Miller* upheld the ban on sawed-off shotguns, the Court noted that "certainly it is not within judicial notice that this weapon . . . could contribute to the common defense."¹²² The *Heller* Court noted that *Miller* held "only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as

117. *McDonald* asked this same question of unsafe Chicago neighborhoods. *McDonald v. City of Chicago*, 561 U.S. 742, 751 (2010).

118. See *Concealed Carry*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry> (last visited Aug. 23, 2019).

119. *Id.*

120. *Id.*

121. *Heller* recognized that such a restriction is supported by the historical tradition of prohibiting the carrying of such weapons. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

122. *United States v. Miller*, 307 U.S. 174, 178 (1939) (citation omitted). Although the *Miller* decision was made before *Heller* adopted the individual right to bear arms, the *Heller* Court notes that "*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.'" *Heller*, 554 U.S. at 627 (citation omitted).

short-barreled shotguns.”¹²³ Laws under this longstanding prohibition tie in with the first factor of the proposed framework, the lawful purpose. Courts should review a statute regulating a weapon that is typically not used for a lawful purpose under intermediate scrutiny.¹²⁴ Another recognized longstanding prohibition is the prohibition of the possession of firearms by felons and the mentally ill.¹²⁵ A statute prohibiting such possession will be subject to intermediate scrutiny, and, depending on the statute’s specific provisions, will likely be upheld.

IV. CONCEALED CARRY IN CALIFORNIA

A. INTRODUCTION

This Part will address California’s concealed weapon laws and their related case history, and apply the proposed framework of Part III to these laws. Although the Supreme Court missed an opportunity to refine Second Amendment doctrine in its denial of certiorari in *Peruta*, a concealed weapon case is likely to come before the Court again, and a review of California’s law in this area will offer a helpful illustration of the framework.

The issue of concealed weapons permits has moved to the forefront of gun legislation debate. As discussed in Part II, the issue of bearing arms for self-defense in public was not clearly answered by *Heller*. This lack of clarity is evidenced by the wide array of different state laws on the issue. Some states, commonly referred to as “constitutional carry” states, allow citizens to carry concealed firearms without a license.¹²⁶ Others, known as “shall issue” states, have regulations for the issuance of a concealed carry permit but are required to issue one if the candidate meets all of the requirements.¹²⁷ “may issue” states also have regulations for the issuance of permits but are not required to issue them, even if the candidate meets all of the requirements.¹²⁸ Finally, while there are technically no “no issue” states,

123. *Id.* at 625. This reading of *Miller* fits with *Heller*’s individual right to bear arms.

124. Although beyond the scope of this Note, this prohibition will be a key factor in the review of assault rifle bans and regulation. *Heller* acknowledges that “weapons that are most useful in military service—M-16 rifles and the like—may be banned” *Id.* at 627. Fittingly, it does not seem as though a fully automatic weapon like an M-16 would be commonly used by law-abiding citizens for lawful purposes. Such weapons have been banned since 1986. However, semiautomatic civilian versions of these rifles, commonly known as “assault rifles” or “black guns,” do have certain legal uses, and are commonly used for hunting and recreational activities.

125. *Id.* at 627.

126. See *Concealed Carry*, *supra* note 118.

127. *Id.*

128. *Id.*

parts of certain states (including California) effectively operate as no-issue states.¹²⁹

While there is nothing particularly out of the ordinary about laws varying from state to state on a gun control issue, the issue of concealed weapons becomes more complicated with the hodgepodge system of reciprocity between the states. Many states, such as Arizona, Ohio, and Tennessee will honor a concealed weapons permit from any other state.¹³⁰ Many others, such as Texas and Nevada will honor permits from certain states, but not all states that issue such permits.¹³¹ A minority of states, including California and New York, will not honor permits from *any* state.¹³² While some argue that this is an appropriate exercise of state's rights, others argue that it is a violation of the Dormant Commerce Clause,¹³³ akin to one state refusing to accept another state's driver license.

B. THE *PERUTA*¹³⁴ CASES AND THE CURRENT STATE OF AFFAIRS IN CALIFORNIA

California's laws concerning concealed carry are a mixed bag. Permits in California are issued on a county or city basis and may be issued by such county's sheriff or such city's chief of police.¹³⁵ Most of the requirements for the issuance of a permit are both reasonable and to be expected. Applicants must be "of good moral character,"¹³⁶ must reside or work within the county or city of issuance,¹³⁷ and must complete a training course as further described in the code.¹³⁸ It seems clear that none of these

129. *See id.*

130. *See Concealed Carry Permit Reciprocity Maps*, USA CARRY, https://www.usacarry.com/concealed_carry_permit_reciprocity_maps.html (last visited Aug. 23, 2018).

131. *Id.*

132. *Id.*

133. "The 'Dormant Commerce Clause' refers to the prohibition, implicit in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce." *Commerce Clause*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/commerce_clause (last visited Aug. 23, 2019).

134. This Part will refer to the original Ninth Circuit opinion as *Peruta I* and the *en banc* rehearing as *Peruta II* for clarity. Where such a distinction is not necessary, the cases will jointly be referred to as *Peruta*. A brief overview of both cases will prove helpful to the contextual analysis of the proposed framework.

135. CAL. PENAL CODE §§ 26150, 26155 (West 2019).

136. *Id.* § 26150(a)(1).

137. *Id.* § 26150(a)(3).

138. *Id.* § 26150(a)(4). The required training is described in § 26165, and requires training not to exceed sixteen hours and "shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm." *Id.* § 26165(a). The issuing authority may also require up to a twenty-four-hour community college course, but only if required for all license applicants. *Id.* § 26165.

requirements should run into any Constitutional trouble, even if analyzed under strict scrutiny. California law hits its first potential snag, however, when it comes to the so-called “good cause” requirement. California law requires that a permit applicant show that “[g]ood cause exists for the issuance of the license.”¹³⁹ The various counties of California can generally be broken up into three groups based on their interpretation of this requirement. The majority of California counties accept a general need for self-defense as a sufficient cause for the issuance of a permit.¹⁴⁰ Others may require a heightened showing of the need to carry a weapon. Some counties, however, state that self-defense does not qualify as a good cause under the code. Such counties include two of the usual suspects—Los Angeles and San Francisco.¹⁴¹ The implication of self-defense will play a significant role in the application of the proposed framework discussed below.

The good cause requirement of the California licensing scheme was challenged in *Peruta* and has had a storied path through the judicial system. On appeal from the District Court for the Southern District of California, the Ninth Circuit initially declared the good cause requirement to be unconstitutional.¹⁴² In the lengthy *Peruta I* opinion, the Ninth Circuit followed in the footsteps of *Heller* and undertook an in-depth analysis of the historical precedent for and against the regulation of carrying concealed weapons.¹⁴³ Although the court acknowledged that “[i]t doesn’t take a lawyer to see that straightforward application of the rule in *Heller* will not dispose of this case,”¹⁴⁴ it “is just as apparent that . . . ‘the Supreme Court’s approach . . . points in a general direction.’”¹⁴⁵ Along these lines, the court pointed to several passages from *Heller* and *McDonald* that it felt supported the notion that the Second Amendment protected at least some form of public carry rights. First, the court noted that the Second Amendment protects “the right to ‘protect [] [oneself] against both *public* and private violence,’ thus extending the right in some form to wherever a person could become exposed

139. *Id.* § 26150(a)(2).

140. *See, e.g.*, VENTURA CTY. SHERIFF’S OFFICE, LICENSE TO CARRY WEAPONS POLICY, <https://s29762.pcdn.co/wp-content/uploads/2019/05/CCW-Application-Packet-5-20-19.pdf> (last visited Aug. 23, 2018).

141. *See, e.g.*, L.A. CTY. SHERIFF’S OFFICE, CONCEALED WEAPON LICENSING POLICY, <http://shq.lasdnews.net/content/uoa/SHQ/ConcealedWeaponLicensePolicy.pdf> (last visited Aug. 23, 2019); S.F. POLICE DEP’T, CCW LICENSING POLICY, <https://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/25869-CCWLicensingPolicy%5B1%5D.pdf> (last visited Aug. 23, 2019).

142. *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1179 (2014). This holding was later reversed in an *en banc* rehearing, discussed *infra* text accompanying notes 152–58.

143. *Id.* at 1155–66.

144. *Id.* at 1150.

145. *Id.* (alteration in original) (citation omitted).

to public or private violence.”¹⁴⁶ Second, the court pointed to *Heller*’s “clarifying that the need for the right is ‘most acute’ in the home, thus implying that the right exists outside the home, though the need is not always as ‘acute.’”¹⁴⁷ Finally, the court argued that *Heller*’s claim that laws banning the carrying of weapons in schools and government buildings would have “go[ne] without saying” had the right been “restricted to the home.”¹⁴⁸

Having first concluded that the Second Amendment protects at least some right to self-defense outside of the home, the *Peruta I* court went on to hold that San Diego County’s requirement for a cause other than self-defense violated that right.¹⁴⁹ “In California, the only way that the typical responsible, law-abiding citizen can carry a weapon in public for the lawful purpose of self-defense is with a concealed-carry permit. And, in San Diego County, that option has been taken off the table.”¹⁵⁰ Most importantly, for the application of the proposed framework, the court noted that:

D.C.’s complete ban on handguns in the home amounted to a destruction of the right precisely because it matched in severity the kinds of complete carry prohibitions confronted (and struck down) in *Nunn* and *Andrews*. These, in turn, resemble the severe restrictions in effect in San Diego County, where the open or concealed carriage of a gun, loaded or not, is forbidden. *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.¹⁵¹

After the Ninth Circuit’s *Peruta I* decision, the case was reheard *en banc* in *Peruta II*. In *Peruta II*, the court reversed the *Peruta I* decision, holding broadly that “the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.”¹⁵²

In *Peruta II*, the court also undertook a lengthy historical analysis of the right to keep concealed weapons, impressively starting with an English regulation from 1299 in which King Edward I directed his sheriffs to prohibit anyone from “going armed within the realm without the king’s special license.”¹⁵³ The court soon turned to several nineteenth-century Second

146. *Id.* at 1153 (alterations in original) (citation omitted).

147. *Id.* (citations omitted).

148. *Id.*

149. *Id.* at 1179.

150. *Id.* at 1169.

151. *Id.* at 1170.

152. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (2014).

153. *Id.* at 929 (quoting 4 CALENDAR OF THE CLOSE ROLLS, EDWARD I, 1296–1302, at 318 (H.C.

Amendment cases which upheld bans on the concealed carry of weapons.¹⁵⁴ It argued that *McDonald*'s finding that the Fourteenth Amendment applied to the Second Amendment was based "in substantial part" on its understanding that a "clear majority" of states in 1868 recognized the right to bear arms as fundamental.¹⁵⁵ The court then reasoned by analogy that, because all states after 1849 understood the right to bear arms to not include the right to carry concealed weapons, the right is not protected by the Second Amendment.¹⁵⁶ Accordingly, the court concludes that "any prohibition or restriction a state may choose to impose on concealed carry . . . is necessarily allowed by the [Second] Amendment."¹⁵⁷ Importantly, however, the court acknowledged that "[t]here may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and [the court] d[id] not answer it here."¹⁵⁸ Just as with the justified block quote from *Peruta I* above, this acknowledgment will play a significant role in the later analysis of the law.

With the competing interpretations of *Peruta I* and *Peruta II*, the dispute surrounding California's concealed carry law seemed like an excellent opportunity for the Supreme Court to address the issue of *Heller*'s extension into the public sphere or create a general approach to Second Amendment cases, or both. Ultimately, the Supreme Court denied certiorari.¹⁵⁹

C. APPLICATION OF THE PROPOSED FRAMEWORK

This Section will apply the proposed framework of Part III to California's concealed carry law, specifically the good cause requirement that was challenged in *Peruta*. As discussed in Sections III.B–.D, the relevant components to analyze will be the lawful purpose affected, the context in which it is affected, and whether any longstanding prohibitions are present.

Starting first with the lawful purpose being regulated, it is clear that, in the case of concealed weapons, the lawful purpose for carrying a weapon is for self-defense or the defense of others. This is confirmed by both *Peruta I* and *Peruta II*, in which both courts acknowledged the centrality of self-

Maxwell-Lyte ed., 1906) (1299)).

154. *Id.* at 933–36.

155. *Id.* at 928.

156. *Id.* at 936.

157. *Id.* at 939.

158. *Id.*

159. *Peruta v. California*, 137 S. Ct. 1995 (2017).

defense to the carrying of weapons in public. Both *Heller* and the proposed framework place heavy weight on the right to self-defense, tipping the scales in favor of the application of strict scrutiny. However, since the law in this case concerns self-defense outside of the home, the importance of the lawful purpose is less acute.¹⁶⁰ As the *Peruta I* court commented, it doesn't take a lawyer to see that this case does not fall into *Heller*'s bright-line rule, and further analysis must be undertaken.

The framework now moves to an analysis of the context in which self-defense is being affected. Starting from the above, the importance of self-defense in public is less acute than it is in the home. However, a careful reading of *Heller* and *McDonald* hints that, although yet to be touched on by the Supreme Court, there is at least some protection of the right to bear arms outside of the home. While *Peruta I* and *Peruta II* came to different conclusions regarding the right to carry concealed arms, both courts acknowledged that there may be some right to carry arms openly in public. Putting concealed weapons aside, the argument in favor of open carry can be supported by historical precedent, specifically in *Nunn v. State*,¹⁶¹ which is referenced by both *Peruta* and *Heller*. In *Nunn*, the Georgia Supreme Court held that the legislature could prohibit the carrying of concealed weapons, but could *not* prohibit the open carrying of weapons.¹⁶² Though various courts have shied away from addressing the issue of open carry, it is critical to address the *entire* context of a law's effect on the relevant lawful purpose. Generally, California does not permit the open carry of firearms, loaded or unloaded.¹⁶³ Accordingly, the only way that a Californian can exercise his or her "less acute" right to self-defense outside of the home is through obtaining a concealed carry permit. Because the good cause requirement effectively eliminates this sole avenue of exercise in many counties, the law has a great effect on the lawful purpose of self-defense. Subject to any longstanding prohibitions, the law should be reviewed under strict scrutiny. It is important to note that if California had a less restrictive means of carrying arms openly, the aggregate effect of the good cause requirement on the right would be significantly reduced, and the law would be properly analyzed under an intermediate scrutiny approach.

160. This is acknowledged by *Heller* and *Peruta I*.

161. *Nunn v. State*, 1 Ga. 243 (1846).

162. *See id.* at 251.

163. Until 2011, California did allow the open carry of unloaded firearms. *See* Patrick McGreevy & Nicholas Riccardi, *Brown Bans Open Carrying of Handguns*, L.A. TIMES (Oct. 10, 2011, 12:00 AM), <http://articles.latimes.com/2011/oct/10/local/la-me-brown-guns-20111011>. However, this right was eliminated in 2012, soon after the right became commonly known to the public. *Id.* Had this law still been in effect, the outcome of the framework may have been different.

Finally, the framework requires a consideration of whether any longstanding prohibitions apply to the context or lawful purpose. In California, a longstanding prohibition on either the concealed carrying of arms or on the restriction of the carrying of concealed arms would be relevant to the analysis. As evidenced by the lengthy historical analysis of *Peruta II*, there is no longstanding prohibition on a state's ability to regulate concealed weapons. In fact, the court pointed out that most, if not all, states had prohibited concealed arms in some form by 1849.¹⁶⁴

This longstanding tradition of *regulating* concealed weapons, however, does not constitute a longstanding *prohibition* on carrying concealed weapons. Even the earliest example used by the *Peruta II* court allows for a licensing scheme under which King Edward I could issue a special license. Because neither the carry of nor the regulation of concealed weapons are subject to the type of longstanding prohibition contemplated by *Heller*, this final factor does not have any bearing on the result of the framework.

The proposed framework suggests that California's concealed weapons law should be reviewed under strict scrutiny. This is not to say that all laws regulating the concealed carry of arms should be reviewed under strict scrutiny. Section IV.D will undertake a strict scrutiny review. Next, Section IV.E will discuss certain steps the California legislature could take to reform its licensing scheme to avoid such a review of the good cause requirement and to help ensure that a reviewing court would use intermediate scrutiny instead.

D. REVIEWING CALIFORNIA'S CURRENT LAW

Under strict scrutiny, California's good cause requirement likely fails. To succeed in a Constitutional challenge under strict scrutiny, a statute must further a compelling government interest, be narrowly tailored to achieve that interest, and be the least restrictive way of doing so. It is clear that the regulation of lethal weapons of any kind serves a variety of compelling governmental interests, including promoting public safety. Assuming that this first requirement is already satisfied, the remainder of this analysis will focus on the requirements that the law is narrowly tailored and use the least restrictive means to fulfill the compelling interest.

164. *Peruta v. Cty. Of San Diego*, 824 F.3d 919, 936 (2014). Examples by the Court include: *State v. Reid*, 1 Ala. 612 (1840) (upholding an Alabama statute prohibiting concealed knives and deadly weapons); *Nunn v. State*, 1 Ga. 243 (1846) (upholding a Georgia ban on concealed weapons, but striking down a ban on openly carried weapons); and *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (upholding an Indiana statute prohibiting concealed weapons). *Peruta*, 824 F.3d at 933–35.

The question of whether the good cause requirement is narrowly tailored to promote general public welfare can be argued on both sides. On the most fundamental level, a law prohibiting citizens from carrying weapons is unlikely to prohibit criminals from carrying weapons. It is hard to imagine a bank robber giving up on a heist because it would be illegal for him to carry his firearm into the bank. There is also some evidence of a significantly lower incidence of crime among those who legally carry firearms,¹⁶⁵ though, as *Peruta II* points out, this could be a result of the strict requirements that some states impose on carrying arms.¹⁶⁶ If it is correct that those who legally carry firearms have a significantly lower rate of crime, perhaps more guns, not less, would better serve the government's interest. If, on the other hand, this reduction in crime is an effect of states' stringent licensing requirements, perhaps laws restricting concealed carry will better serve these interests. Because of these competing arguments, the narrowly tailored requirement alone is not enough to conclusively uphold or strike down the law.

The sticking point of California's good cause requirement arises most prominently when analyzing whether the law uses the least restrictive means possible to achieve its goal. As stated earlier, the primary purposes of restricting the ability of civilians to carry concealed firearms are to advance public safety and reduce gun violence. The current good cause law in some California counties effectively serves as an outright ban on concealed carry. This almost by definition cannot be the *least* restrictive means of achieving public safety and a reduction in gun violence. Clearly, it is well within California's right to restrict who may or may not carry concealed firearms. A constructive ban on such behavior, however, should fail under a strict scrutiny review. This is not to say that California's law could never pass Constitutional muster; it may survive an intermediate review. The next Section will discuss steps that California could take to have its good cause requirement reviewed under intermediate scrutiny.

E. PROPOSED REFORM

California's good cause requirements are unlikely to be upheld if strict scrutiny is applied. However, most laws restricting concealed carry should *not* be reviewed with strict scrutiny. As discussed earlier, it is clear that there

165. See, e.g., Aaron Bandler, *Report: Concealed Carry Permit Holders Are the Most Law-Abiding People in the Country*, THE DAILY WIRE (Aug. 10, 2016), <https://www.dailywire.com/news/8255/report-concealed-carry-permit-holders-are-most-law-aaron-bandler>.

166. *Peruta*, 824 F.3d at 943.

is no historical precedent for restricting a state's ability to regulate concealed weapons. Quite the contrary, many states throughout history have done so, and today's widespread acceptance of concealed carry is a relatively new phenomenon. What necessitated that California's law be subject to strict scrutiny was the blanket prohibition on open carry. However, some sort of carry outside of the home may be protected. If California adopted a less restrictive licensing regime for open carry, there would be no need to assess the good cause requirement under strict scrutiny pursuant to the proposed framework. Under intermediate scrutiny, the good cause requirement stands a good chance of being upheld. The most significant factor leading to the law being struck down under strict scrutiny was the requirement that the law uses the least restrictive means. Under an intermediate scrutiny review, there is no such requirement, and the case would come down to whether or not the law was narrowly tailored enough. While there are arguments on both sides of this issue, keeping in mind that there is no real historical precedent for concealed firearms, it is likely that the law would be upheld.¹⁶⁷

V. THE SAFETY FOR ALL ACT (PROPOSITION 63)

A. THE ACT AND ITS PROVISIONS

The Safety for All Act of 2016 was placed on the California ballot as Proposition 63.¹⁶⁸ The law passed by a vote of 63% in favor.¹⁶⁹ The language of the Act states several purposes and intents, including "implement[ing] reasonable and common-sense reforms to make California's gun safety laws the toughest in the nation while still safeguarding the Second Amendment . . ."¹⁷⁰ The law has many provisions, but the two most relevant to this Note are the ban on high-capacity magazines and the major changes to ammunition purchases. The retroactive high-capacity magazine provision of the law has already been challenged in court¹⁷¹ and is currently subject to a temporary restraining order.¹⁷²

The sweeping changes to ammunition transactions, however, offer a

167. As can be seen in the Supreme Court's rulings in *Heller* and *McDonald*, historical precedent is an exceedingly important element of the Court's analysis.

168. The Safety for All Act of 2016, Cal. Proposition 63, at 164 (2016), http://www.ss.ca.gov/elections/bp_nov04/prop_63_text_of_proposed_law.pdf [hereinafter Prop. 63].

169. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 8, 2016 GENERAL ELECTION, <https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf> (last visited Aug. 24, 2019).

170. Prop. 63, *supra* note 168, at 164.

171. *See Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1109–10 (S.D. Cal. 2017).

172. *Id.*

good opportunity to apply the framework to a new law. In the Act's¹⁷³ preamble, it states its intention "[t]o ensure that those who buy ammunition in California—just like those who buy firearms—are subject to background checks."¹⁷⁴ Section 8 of the Act deals with these changes, which come in two principal forms. First, the Act implements restrictions and new procedures for the purchase of ammunition. Starting on January 1, 2018, all ammunition must be purchased in a face-to-face transaction from a licensed California ammunition vendor, and ammunition may only be ordered over the internet if it is delivered first to a licensed vendor.¹⁷⁵ For transfers of ammunition between parties that are not licensed vendors, the ammunition must first be delivered by the seller to a licensed vendor, and then the vendor can deliver it to the buyer.¹⁷⁶ Of the exceptions to this general rule, the only one worth noting is the exemption for transfers between spouses or immediate family members.¹⁷⁷ Unsurprisingly, whenever a licensed vendor is required to act as an intermediary, it is entitled to "charge the purchaser an administrative fee . . . in an amount to be set by the Department of Justice . . ."¹⁷⁸ Finally, the Act blocks the purchase of ammunition from states other than California, unless the ammunition is first sent to a licensed California vendor.¹⁷⁹ Violation of in-state ammunition transfer rules constitutes a misdemeanor, while a first offence of violating out-of-state ammunition transfer rules constitutes an infraction.¹⁸⁰

Second, the Act sets up two licensing regimes—one for citizens wishing to purchase ammunition and one for the licensing of California ammunition

173. For the rest of this Section, the ammunition provisions of the Safety for All Act will be collectively referred to as "the Act." Any analysis of "the Act" will refer solely to these provisions, unless otherwise stated.

174. Prop. 63, *supra* note 168, at 164.

175. *Id.* at 169 (amending CAL. PENAL CODE § 30312(a)(1), (b)).

176. *Id.* (amending CAL. PENAL CODE § 30312(a)(2)).

177. *Id.* at 170 (amending CAL. PENAL CODE § 30312(c)(10)). Other exceptions include various peace officers and law enforcement personnel, "exempted federal firearm licensees," importers and manufacturers of ammunition, and certain licensed collectors. CAL. PENAL CODE § 30312(c)(4) (West 2019). These are not particularly relevant to average citizens, and many of them require even more stringent licensing regimes. One exception worth noting is an individual who obtains ammunition on a shooting range, so long as they do not remove the ammo from the shooting range. *Id.* § 30312(c)(9).

178. Prop. 63, *supra* note 168, at 169 (amending CAL. PENAL CODE § 30312(b)). The amount of this administrative fee, which is added to "any applicable fees" that may also be charged under the Act, is not set forth in the Act. *Id.*

179. Prop. 63, *supra* note 168, at 170 (adding CAL. PENAL CODE § 30314(a)). There are also exemptions for this prohibition, many of which are similar or the same to the exceptions seen above for ammunition transfers. CAL. PENAL CODE § 30314(b). Similar to above, there is an exemption for out-of-state ammunition acquired by spouses or immediate family members. *Id.* § 30314(b)(6).

180. Prop. 63, *supra* note 168, at 170 (adding CAL. PENAL CODE § 30314(c)).

vendors. Article 4 of the Act covers the licenses for individuals and takes effect on January 1, 2019.¹⁸¹ All individuals wishing to purchase ammunition will be required to apply for a license which will be valid for four years.¹⁸² The Act states that the license *shall* be issued so long as: (1) the applicant is eighteen years or older, (2) the applicant is not prohibited from owning ammunition under state or federal law, and (3) the applicant pays a fee.¹⁸³ Article 5 of the Act describes the licensing requirements for ammunition vendors, which are valid for one year.¹⁸⁴ Vendors will also be required to pay an unspecified fee to the Department of Justice.¹⁸⁵

B. APPLICATION OF THE FRAMEWORK

The first step in applying the framework to the ammunition provisions of the Safety for All Act is to determine the lawful purpose being restricted by the Act. Here, the restrictions on ammunition purchases broadly affect almost any use of firearms, including, most importantly, self-defense within the home. Other lawful purposes that are affected include hunting and recreational shooting.¹⁸⁶ Firearms serve no useful purpose in self-defense or any other use without ammunition and would be more effective as paperweights. Further, the Act does not restrict ammunition purchases less within the home than it does outside of the home. Therefore, the Act may fall into *Heller*'s bright-line rule against restricting the use of firearms for self-defense within the home.

Next, turning to the entire context of the legislation, the Act also raises some issues. Because ammunition is necessary for the operation of firearms, the Act affects their use in almost every context. In the context of self-defense, tougher ammunition regulations make it harder and more expensive to use firearms to protect oneself. In the context of hunting, more expensive ammunition makes it more costly to hunt game. While the Act made some

181. *Id.* at 172. Please note that the Act's proposed provisions to California Penal Code section 30370 do not match those that are currently in place. *Compare id.*, with CAL. PENAL CODE § 30370. This Note discusses the proposed provisions from Proposition 63.

182. Prop. 63, *supra* note 168, at 172.

183. *Id.* at 172. The license also may be revoked for any reason that would have blocked the original issuance of a license. *Id.* The fee under the Act is "a reasonable fee not to exceed fifty dollars." *Id.* The fee is subject to adjustment for inflation. *Id.*

184. *Id.* at 173 (adding CAL. PENAL CODE § 30385(b)).

185. *Id.* at 173 (adding CAL. PENAL CODE § 30390(a)).

186. It is important to note, however, that there is a minor exception to certain aspects of the Act when it comes to recreational shooting. As discussed *supra*, the Act permits recreational shooters to purchase or receive ammunition at a shooting range, so long as the ammunition is not removed from the premises at any time. CAL. PENAL. CODE § 30312(c).

some minor concessions when it comes to recreational shooting, in the end, the Act will have a much more profound effect on law-abiding citizens than it will on criminals or the mentally ill. While an average Californian would not risk breaking the law to purchase illegal ammunition, criminals and mentally ill individuals planning mass-shootings would be much more likely to do so. At this time, there is no way to tell for sure the magnitude of these effects or how much harder or costly the Act will make ammunition purchases, because these aspects of the Act have yet to take effect. Nevertheless, considering the wider implications of the Act, the entire context portion of the framework weighs very heavily in favor of strict scrutiny.

Finally, the framework must take consideration of any longstanding prohibitions. While background checks for gun purchases have been around for quite some time, background checks for ammunition purchases are a relatively new concept. Therefore, for the purposes of the Act, this factor is not particularly helpful.

As such the framework suggests that the ammunition purchase and licensing provisions of California's Safety for All Act would be best reviewed under strict scrutiny, should they be brought before a court. The next Section will apply this level of scrutiny to the Act to determine the likely result.

C. REVIEW UNDER THE APPLICABLE SCRUTINY

The first element of the strict scrutiny test is whether the regulation serves a compelling government interest. As with almost all firearm legislation, the Act almost certainly does. Several compelling government interests can be served by such legislation, including promoting public safety and reducing crime.

The Act must then be narrowly tailored to achieve its interest. A licensing regime is unlikely to prevent criminals from gaining access to ammunition illegally. With states like Nevada and Arizona just a short drive away from much of California, criminals will have little problem purchasing out-of-state ammunition with a very low risk of being caught. Even if people are caught crossing the border with illegal ammunition, the first offense for this crime only results in an infraction. The same logic can apply to stopping the mass-shooting epidemic in the United States. An ammunition license may prevent a mentally ill individual from purchasing ammunition at the local gun store, and prevent a pure crime of opportunity. However, many mass-shootings are carefully premeditated, and a perpetrator could just as

easily cross the border to buy ammunition. The most profound effect of the Act will be on the average, law-abiding Californian, who will have to pay for a license and then pay authorized dealers to do the paperwork for ammunition purchases. A much more effective and narrowly tailored way to reduce gun crimes would be to regulate the firearms themselves. Ammunition alone is not useful without a firearm. Because there are already licensing and background check regimes in place for the purchase of firearms, it would be more effective and cost-efficient to expand these programs, especially considering that implementing the ammunition background check system is projected to cost approximately twenty-five million dollars.¹⁸⁷

The final question of a strict scrutiny review is whether the Act is the least restrictive means to achieve its goal. Here, the Act does not succeed. As stated above, a much less restrictive way to achieve the many positive goals of firearm legislation would be to regulate the firearms themselves. The restrictions on ammunition feel more like a “workaround” on making gun ownership more complicated than a freestanding regulation.

CONCLUSION

Second Amendment jurisprudence has undoubtedly come a long way since its passage in 1791. First, the Supreme Court answered the longstanding question of whether the Second Amendment protects an individual or collective right, caused by the Second Amendment’s ambiguous and somewhat bizarre wording. Second, the Court incorporated the Amendment to state governments through the Fourteenth Amendment, adding it to a long list of other amendments in the Bill of Rights. Supreme Court precedent also seems to imply that the right to bear arms is a fundamental one. This can be seen by the way that the Court speaks about the Second Amendment, both in its holdings and in its dicta. A natural right to self-defense seems to drive many of the Supreme Court’s decisions.

Therefore, why has the Court taken so long to develop Second Amendment precedent? The Court has continued to deny certiorari on Second Amendment circuit splits and laws that seemingly violate the precedent of *Heller* and *McDonald*. While nobody can know for sure, one plausible explanation is political forces. As discussed in this Note’s introduction, gun rights and regulation are highly political and controversial

187. *Id.* § 30371(a) (appropriating funds “for the start-up costs of implementing, operating, and enforcing” these provisions).

issues today. A politically divided Court may rather deny certiorari on cases like *Peruta* than risk an unfavorable ruling.¹⁸⁸

Politics aside, one open issue that this Note has attempted to provide an answer to is the question of what level of scrutiny courts should apply to Second Amendment cases. As discussed in Part II, the various circuit courts have taken a variety of approaches, many of which could be appropriately adopted by the Court. This is, of course, with the notable exception of the Second Circuit's use of rational basis scrutiny. Much like with the First Amendment, there may be certain situations in which intermediate scrutiny is more appropriate than strict scrutiny, which has been called "strict in theory but fatal in fact."¹⁸⁹ Some gun control laws are beneficial and should not fail simply because of the review standard. It is equally evident, however, that an intermediate review is often not appropriate for such a fundamental right. The question, then, is how to decide between the two.

This Note's proposed framework tries to align three core elements of the *Heller* decision and use them to formulate a method by which a court can determine the proper level of scrutiny to apply. These elements are: (1) the lawful purpose being affected, (2) the context in which it is being affected, and (3) longstanding prohibitions. By weighing these three factors, the proposed framework hopes to offer guidance to courts making such a decisions.

If the Supreme Court ever ends up hearing a case on the Safety for All Act discussed in Part V, it could do any number of things. It could give formal guidance for the appropriate level of scrutiny and how to determine the proper level if there is more than one appropriate level. Alternatively, the Court could issue an extremely narrow ruling on the ammunition provisions of the Act based on an entirely different set of factors, leaving the issue of review for another day. In today's politically charged climate, it unfortunately seems likely that the Court may deny certiorari again, leaving California's laws in place.

188. Sure enough, after the appointment of Justices Gorsuch and Kavanaugh, the Court granted certiorari on the first new Second Amendment case since *McDonald*, which involves New York laws on the transportation of firearms. See *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 139 S. Ct. 939 (2019).

189. See, e.g., *Fisher v. Univ. of Tex.*, 570 U.S. 297, 314 (2013) (citation omitted).