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## PERUTA, THE HOME-BOUND SECOND AMENDMENT, AND FRACTAL ORIGINALISM

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Second Amendment disputes used to cleave along one dimension: collective versus individual rights. No more. Ever since a majority of the Justices of the United States Supreme Court broke in favor of individual rights in *District of Columbia v. Heller*<sup>1</sup> and *McDonald v. City of Chicago*,<sup>2</sup> tremendous litigation pressure has fragmented Second Amendment theory and doctrine. The pressure is unlikely to ease soon. Motivated parties, well-financed advocacy organizations, and the prospect of attorneys' fees guarantee that every question of who, what, where, when, and why concerning the right to keep and bear arms is going to be asked, and will demand an answer.

Currently, the most pressing doctrinal question splitting the circuits, at the broadest level of generality, is whether the Second Amendment right to keep and bear arms extends beyond the home. The Ninth Circuit recently has entered that debate. In *Peruta v. County of San Diego*,<sup>3</sup> a divided three-judge panel of the Ninth Circuit held that the Second Amendment is not home-bound. Judge O'Scannlain, writing for the majority, held that the Second Amendment scope includes a right to carry firearms for confrontation in the streets. The state of California has sought en banc review. Petitions for certiorari are pending in similar cases. It is likely we will see a Supreme Court resolution to this issue in the next few years.

At that point, the Supreme Court must mend not only doctrinal splits — does the Second Amendment extend beyond the home? — but also methodological ones — how is a court even to answer that question? To date, most judges have been methodologically pluralist: relying on some combination of history, precedent, empirical data, pragmatism, and judicial deference to reach their conclusions. These judges typically use history only for evaluating the threshold issue of whether the Second Amendment is implicated at all. Tailoring the right is the place for tiers of scrutiny, for empirical data, for weighing of interests, for pragmatics.

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<sup>1</sup> 554 U.S. 570 (2008).

<sup>2</sup> 130 S. Ct. 3020 (2010).

<sup>3</sup> 742 F.3d 1144 (9th Cir. 2014).

But a few judges, untroubled by stare decisis and emboldened by errant passages in *Heller* and *McDonald*, have rejected such eclectic methods. To them, tiers of scrutiny are suspect; empirics are irrelevant. Instead, these judges have attempted to produce what no judge has yet achieved: the perfectly originalist opinion, one in which the judge applies originalism to every facet of decisionmaking — fractal originalism, as it were.

*Peruta* is just such an attempt at fractal originalism. Judge O’Scannlain’s opinion is a sixty-plus page tour-de-force, a lower court example of what Professor Lawrence Rosenthal has described as “Originalism in Practice.”<sup>4</sup> Nevertheless, *Peruta* is just as likely to be seen as confirming how difficult fractal originalism is to achieve at the lower court level, and how many other judicial values — among them neutrality, restraint, and administrability — must be sacrificed in the pursuit.

*Peruta* concerned a challenge to San Diego County’s “good cause” requirement for concealed carry.<sup>5</sup> Because California state law generally forbids persons to openly carry firearms, this meant that the only way a person could publicly carry a firearm in San Diego County was to comply with the good cause permitting system. *Peruta* sued the County, arguing that the good cause requirement, when evaluated in light of California’s restrictions, violated the Second Amendment.

Judge O’Scannlain reframed the question before the court as whether the Second Amendment’s word “bear” encompasses bearing arms for confrontation beyond the home, and whether California’s regulation, in combination with San Diego County’s, violated that right. (As Judge Thomas noted in dissent, this is a tendentious move, certainly not one that adherents of judicial restraint would countenance.) To construe the word “bear,” Judge O’Scannlain mined, in a way not typically seen in lower-court opinions, the extensive eighteenth and nineteenth century historical materials on public carry.

What the court did with this history was revealing. The court recognized that some of this precedent did not fit with *Heller*’s conclusion that the Second Amendment had codified a pre-existing right to self-defense.<sup>6</sup> Trimming was therefore in order. With a nod toward George Orwell, the majority candidly judged that while all historical

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<sup>4</sup> Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1244 (2012) (quipping that “authentically originalist adjudication is something like the Loch Ness Monster — much discussed, but rarely encountered”).

<sup>5</sup> As reported in *Peruta*, San Diego County’s good cause requirement was an individualized determination, looking for factors that distinguished the applicant’s risk of confrontation from the risk of the general populace. A bare assertion of concern for one’s personal safety did not alone constitute good cause. *Peruta*, 742 F.3d at 1148.

<sup>6</sup> *Id.* at 1155 (“[T]he right is, and has always been, oriented to the end of self-defense. Any contrary interpretation of the right, whether propounded in 1791 or just last week, is error.”) (citation omitted).

cases are “equally relevant” to determine meaning, “some cases are more equal than others.”<sup>7</sup> And so the majority proceeded to chop historical authority into categories: In the first category were “authorities that understand bearing arms for self-defense to be an individual right.” In the second category were “authorities that understand bearing arms for a purpose *other than* self-defense to be an individual right.” In the third category were “authorities that understand bearing arms not to be an individual right at all.”<sup>8</sup>

Those cases in the third category — those that centered upon a collective or militia-rights interpretation of the Second Amendment — were entitled to no weight, those in the second were given marginal weight, and those in first category were fully valued. Having weighted the history in this fashion, the majority then concluded that “bear,” when combined with the strict lexical meaning, clearly meant a right to bear arms for confrontation out of doors. San Diego County’s regulation, combined with California’s restrictions, had all but destroyed this right, and the law could not stand.

Professor Lawrence Solum has argued that what distinguishes originalism from non-originalism is originalism’s premise that, at a minimum, one may objectively ascertain the semantic meaning of the Constitution’s words, fixed at the time of their ratification.<sup>9</sup> You produce dictionaries; you produce pamphlets; you produce cases. This is a factual investigation, and it is falsifiable. If Solum’s description of originalism is true, then *Peruta*’s discounting large swaths of historical evidence based on a decision (*Heller*) that post-dates ratification by over two centuries is a strange way to do originalism. No linguist would stack the deck this way.

*Peruta*’s treatment of the militia-centered precedent seems capricious in light of the way other judges and advocates with originalist credentials have used the same precedent. For example, Second Amendment litigants, and some judges, have pointed to the militia to argue that restrictions on firearms for eighteen-year-olds are unconstitutional today, because eighteen-year-olds would have been able to bear weapons as militia members in 1791. (Recent litigation in the Fifth Circuit considered this point.<sup>10</sup>) Furthermore, some Second

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<sup>7</sup> *Id.* (citing GEORGE ORWELL, *ANIMAL FARM* 118 (2009) (1945)).

<sup>8</sup> *Id.* at 1156.

<sup>9</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 456–57, 467 (2013).

<sup>10</sup> See *Nat’l Rifle Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 339 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (“History and tradition yield proof that 18- to 20-year olds had full Second Amendment rights. Eighteen year olds were required by the 1792 Militia Act to be available for service, and militia members were required to furnish their own weapons; therefore, eighteen year olds must have been allowed to ‘keep’ firearms for personal use.”).

Amendment advocates point to militia-centered precedent as evidence that private access to extremely powerful firearms is constitutionally protected because of their similarity to weapons that would have been employed in militia service.<sup>11</sup> Either the historical precedent focused on a militia-centered right is evidence of original understanding for all purposes, or it is irrelevant. It cannot be selectively probative; or at least, it cannot be selectively probative and still be considered a neutral criterion for decisionmaking. *Peruta*'s engagement with the Reconstruction evidence for the right to public carry is also problematic. *Peruta* cites Reconstruction lawmakers and executive officials for the proposition that the right to bear arms meant the right to bear them outdoors. The central character of these arguments is that blacks had been denied the ability to carry weapons on the basis of race, therefore public carry must be a right of all citizens, regardless of race. Here, *Peruta*, like *Heller* and *McDonald*, entertained the "gun control is racist" thesis that enjoys moderate political appeal and strong historical support. Professors Clayton Cramer, Nicholas Johnson, Ray Diamond, and Stephen Halbrook have demonstrated convincingly that gun regulation has been used to racist ends.<sup>12</sup>

But so has the *lack* of gun regulation. Conspicuously absent from *Peruta*'s citations are the numerous regulations on public carry that were intended to *prevent* confrontations by armed citizens. Authorities passed these laws to preserve the peace in general, and to prevent slaughter of freedmen and their supporters in particular. For example, *Peruta* cites Union General Daniel Sickles's Order No. 1 as supporting the right of freedmen to carry arms openly. *Peruta* does not cite Sickles's Order No. 7, issued just a few months later, which prohibited "[o]rganizations of white or colored persons bearing arms, or intend[ing] to be armed" unless they were members of the military or militia.<sup>13</sup> (One wonders if Order No. 1 did not necessitate Order No. 7.)

When law enforcement arrested Klan members for carrying firearms to terrorize their fellow citizens, Klan members responded that they were simply exercising a superior, *traditional*, God-given right to

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<sup>11</sup> See Brief Amicus Curiae of Gun Owners of America, Inc. et al. in Support of Appellants and Reversal at 24–26, *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036) (arguing that "assault rifles" and "high-capacity magazines" are protected because they are "reasonably related" to weapons employed in the militia).

<sup>12</sup> E.g. Clayton E. Cramer, *The Racist Roots of Gun Control*, 42 KAN. J.L. & PUB. POL'Y 17 (1995); NICHOLAS J. JOHNSON, *NEGROES AND THE GUN* (2014); Robert J. Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population": *Firearms Regulation and Racial Disparity — The Redeemed South's Legacy to a National Jurisprudence*, 70 CHI-KENT L. REV. 1307 (1995); STEPHEN P. HALBROOK, *SECURING CIVIL RIGHTS* (2010).

<sup>13</sup> 1 WALTER L. FLEMING, *DOCUMENTARY HISTORY OF RECONSTRUCTION* 211 (1906) (reprinting sections I and III of General Order No. 7).

arm for self-defense.<sup>14</sup> Little in *Peruta* addresses what Professors Saul Cornell and Carole Emberton have documented as the complex and divided attitudes of Reconstruction America toward the public carrying of firearms<sup>15</sup> — an ambivalence that can be traced back to the founding era and before.<sup>16</sup> Instead, there is a distressingly familiar manner in which blacks are exhibited to make a point, and then hurried out of sight. Yes, the history of gun control is besmirched by racism. So too is the history of gun bearing. This sullied history demands a more nuanced treatment than any court has offered so far.

In Judge O’Scannlain’s defense, he is a circuit court judge. He has to decide something. Reconciling the indeterminate history and the contextual ambiguities of “bear” with the reasoning of *Heller* and *McDonald* is one way to discharge his duty. In fact, to the extent that *Peruta* disregards conflicting historical authorities on the basis of what the Supreme Court *says* that precedent means, *Peruta* at least is employing *some* theory of precedent — an issue that continues to stymie originalist theorists. (Whether this theory is in fact an originalist theory of precedent, I leave to others.)

But in its effort to achieve fractal originalism, *Peruta* exposes the fissures between the demands of the method and the operation of a hierarchical judiciary. If you can’t credit linguistic or historical data when that data conflicts with the implications of Supreme Court reasoning, then lower court opinions will tend to replicate any error in the Supreme Court reasoning. This may be perfectly acceptable in a hierarchical system of judging, but it stands as a serious institutional constraint on originalism as a methodology for anyone other than the nine Justices at the top of the pyramid. Why work to make a historical record, if any history that conflicts with a prior Supreme Court ruling is not probative? As Professor Thomas Merrill has noted, originalism must be practiced by judges and lawyers with resource constraints and human limitations.<sup>17</sup> This does not mean that historical methods are a vanity, but it does counsel care in crafting rules of decision — even historically indicated ones — at a level of abstraction that permits judges to judge, litigants to litigate, and governments to govern.

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<sup>14</sup> See Proceedings in the Ku Klux Trials at Columbia, S.C. in the United States Circuit Court, November Term, 1871, at 425–26 (Benn Pitman & Louis Freeland Post eds., 1872).

<sup>15</sup> See, e.g., Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1724 & n.146 (2012); Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL’Y REV. 615, 621–22 (2006).

<sup>16</sup> See, e.g., Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 107–14 (2013); Cornell, *supra* note 15, at 1707–14.

<sup>17</sup> Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 281 (2005) (“Originalism . . . if it is to be done well, requires a skill set that is beyond the ken of most lawyers and judges.”)