



2017

## Gun Rights or Gun Control? How California's Waiting Period Law Can Pave the Way to Increased Regulation

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### Recommended Citation

Natasha Tran, Comment, Gun Rights or Gun Control? How California's Waiting Period Law Can Pave the Way to Increased Regulation, 50 Loy. L.A. L. Rev. 883 (2017).

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### Cover Page Footnote

J.D. Candidate, May 2018, Loyola Law School, Los Angeles; B.A., Political Science, University of Houston. Thank you to Professor Aaron Caplan for providing his guidance and time. Special thanks to Michaela Goldstein for the amazing support and feedback she provided throughout the writing process as well as the members of the Loyola of Los Angeles Law Review for their hard work. Lastly, I would like to thank Professor Gary Craig and my LLS family for always believing in me and supporting me from day one.

# GUN RIGHTS OR GUN CONTROL? HOW CALIFORNIA'S WAITING PERIOD LAW CAN PAVE THE WAY TO INCREASED REGULATION

Natasha Tran\*

*The Second Amendment: "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."<sup>1</sup>*

## I. INTRODUCTION

On January 6, 2017, two men gathered at a vigil in Pasadena, California to honor a man who had been fatally shot in the exact spot months before.<sup>2</sup> Suddenly, gunfire erupted from a passing car, killing the two men.<sup>3</sup> Only a few hours later, gunshots were again fired, causing another man located near the same area to suffer a gunshot wound to his thigh.<sup>4</sup> On January 12, 2017, four men were shot outside of a home in Salinas, California, resulting in two deaths and two transportations to the hospital.<sup>5</sup> On January 14, 2017, a man died from a gunshot wound received from an accidental shooting at a shooting range in Corona, California.<sup>6</sup> On January 20, 2017, four

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

2. Brian Day, *2 Men Fatally Shot at Pasadena Vigil Identified*, SAN GABRIEL VALLEY TRIB. (Jan. 8, 2017, 12:09 PM), <http://www.pasadenastarnews.com/general-news/20170108/2-men-fatally-shot-at-pasadena-vigil-identified>.

3. *Id.*

4. *Id.*

5. Chelcey Adami, *Victims ID'd in Sunrise Street Shooting*, CALIFORNIAN (Jan. 17, 2017, 2:42 PM), <http://www.thecalifornian.com/story/news/my-safety/2017/01/17/victims-idd-sunrise-street-shooting/96687672/>.

6. Gail Wesson, *Man Killed in Accidental Shooting at Raahauge Range is Identified*, PRESS ENTERPRISE (Jan. 16, 2017, 2:55 AM), <http://www.pe.com/articles/shooting-823246-jan-corona.html>.

people, including a 16-year old boy, and a dog were shot and wounded in southeast Fresno, California outside of a house by a gunman with no apparent motive.<sup>7</sup>

In recent news, gun rights advocates have great reason to rejoice, as President Donald Trump quietly signed a bill that revoked one of former President Barack Obama's gun regulations.<sup>8</sup> The regulation made it more difficult for people with mental illnesses to purchase guns by adding "people receiving Social Security checks for mental illnesses and people deemed unfit to handle their own financial affairs to the national background check database."<sup>9</sup> With President Trump's signing of the bill, people with mental illness will find it much easier to purchase guns.

Gun rights and gun control have been hotly debated issues since the Supreme Court's historical decision in *D.C. v. Heller*.<sup>10</sup> After *Heller* established that the Second Amendment right was an individual right, as opposed to a collective militia right, that was "not unlimited,"<sup>11</sup> gun rights advocates have continuously challenged various local and state government gun regulations in an attempt to expand the scope of their Second Amendment right.<sup>12</sup> At the same time, the state of California has not hesitated to churn out new gun regulations in an attempt to outline the parameters of gun regulations to be within the boundaries of the Second Amendment.<sup>13</sup>

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7. Jim Guy, *Police: 4 People Shot in Southeast Fresno*, FRESNO BEE (Jan. 20, 2017, 2:12 PM), <http://www.fresnobee.com/news/local/crime/article127778104.html>.

8. Ali Vitali, *Trump Signs Bill Revoking Obama-Era Gun Checks for People with Mental Illnesses*, NBC NEWS (Feb. 28, 2017, 8:39 PM), <http://www.nbcnews.com/news/us-news/trump-signs-bill-revoking-obama-era-gun-checks-people-mental-n727221> (last visited Aug. 25, 2017).

9. *Id.*; see also <http://www.nydailynews.com/news/politics/trump-signed-bill-making-easier-mentally-ill-guns-article-1.2985698> (explaining that "Obama's rule . . . would have ultimately added more than 75,000 names to the [national gun background check] database, according to the NRA.").

10. 554 U.S. 570 (2008).

11. *Id.* at 595.

12. See *People v. James*, 174 Cal. App. 4th 662 (2009) (concluding California's bans on semiautomatic weapons and .50 BMG rifles did not offend the Second Amendment because weapons were outside scope of Second Amendment protection); see also *People v. Zondorak*, 220 Cal. App. 4th 829 (2013) (holding Assault Weapons Control Act's ban on semi-automatic rifles did not violate an individual's Second Amendment rights because the weapon was sufficiently "dangerous and unusual" to fall outside the protection of the Second Amendment).

13. See generally CAL. PENAL CODE § 30342 (West 2016) (ammunition vendor license required for vendors selling more than 500 rounds of ammunition in any 30-day period); CAL. PENAL CODE § 30800(a) (West 2012) (stating possession of any assault weapon or of any .50 BMG rifle is a public nuisance); CAL. PENAL CODE § 32625 (West 2012) (regulating the possession of machine guns).

Although gun ownership in the United States has consistently fallen since its peak in 1993, “gun purchases, as measured by FBI firearm background checks, are at historic highs.”<sup>14</sup> The disparate trend suggests that the rise in gun purchases is primarily driven by gun owners stocking up, rather than by people purchasing their first gun.<sup>15</sup> The Washington Post conducted an analysis in 2015, finding that the average American gun owner now owns approximately eight firearms.<sup>16</sup>

This Comment will discuss how *Silvester v. Harris*<sup>17</sup> can further impact the gun control movement by paving the way towards increased regulation of gun ownership and purchasing. Part II briefly discusses the significance of the United States Supreme Court’s *Heller* decision, which defined the Second Amendment as an individual right to keep and bear arms. Part III sets out the facts and holding in *Silvester v. Harris*. Part IV examines how the current trend is to apply intermediate scrutiny as the standard of review for Second Amendment cases, but explains how it may not be the most appropriate standard for gun regulations. Part IV then argues that the gun industry should be regulated to the same extent as marriage and abortion.

## II. HISTORICAL AND LEGAL BACKGROUND

### A. D.C. v. Heller: *The Second Amendment Redefined*

Before the Supreme Court decided *Heller*, most courts interpreted the Second Amendment to have no other effect except to restrict the powers of Congress from infringing on an individual’s right to bear arms within service in the Militia.<sup>18</sup>

Based on this interpretation, the District of Columbia (“D.C.”) generally prohibited the possession of handguns and the registration

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14. Christopher Ingraham, *American Gun Ownership Drops to Lowest in Nearly 40 Years*, THE WASH. POST (June 29, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/06/29/american-gun-ownership-is-now-at-a-30-year-low/?utm\\_term=.4ea63d2eebba](https://www.washingtonpost.com/news/wonk/wp/2016/06/29/american-gun-ownership-is-now-at-a-30-year-low/?utm_term=.4ea63d2eebba).

15. *Id.*

16. *Id.*

17. 843 F.3d 816 (9th Cir. 2016).

18. See *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004), *rev’d and remanded*, 478 F.3d 370 (D.C. Cir. 2007), *aff’d sub nom.* D.C. v. *Heller*, 554 U.S. 570 (2008); see also *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997).

of handguns.<sup>19</sup> D.C. citizens were prohibited from carrying a handgun without a license and penalized if found carrying an unregistered firearm.<sup>20</sup> Additionally, D.C. required that its citizens keep their lawfully owned firearms “‘unloaded and disassembled or bound by a trigger lock or similar device’ unless they are located in a place of business or are being used for lawful recreational activities.”<sup>21</sup> D.C.’s gun control regulations were intended as crime-control measures, focusing on the presence of handguns in high-crime urban areas where handguns represented a serious problem.<sup>22</sup>

Dick Heller was a D.C. police officer authorized to carry a handgun while on duty.<sup>23</sup> He did not assert any type of membership in the D.C. Militia.<sup>24</sup> However, Heller wished to possess a handgun at home and applied for a registration certificate, which was subsequently denied by the D.C. Police Department because Heller failed to show that his desire to possess a gun in his home had a “reasonable relationship to the preservation or efficiency of a well-regulated Militia.”<sup>25</sup> Heller then filed suit against D.C. to permanently enjoin D.C.’s gun control laws, alleging they violated the Second Amendment.<sup>26</sup> The District Court dismissed Heller’s complaint, but the Eleventh Circuit Court of Appeals reversed and held the Second Amendment protected an individual’s right to possess firearms and that D.C.’s gun control regulations violated that right.<sup>27</sup> D.C. appealed and the United States Supreme Court granted certiorari.<sup>28</sup>

In *Heller*, the Court held that the Second Amendment conferred an individual right to keep and bear arms in the home for purposes of self-defense.<sup>29</sup> *Heller* was notable because this was the first case to hold that the Second Amendment protects an individual’s right to possess a firearm, unconnected with militia service, for traditionally

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19. D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).

20. *Id.*; *Heller*, 554 U.S. at 574–75.

21. *Heller*, 554 U.S. at 575.

22. *Id.* at 681–82.

23. *Id.* at 575.

24. *Parker*, 311 F. Supp. 2d at 103.

25. *Id.* at 105 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)).

26. *Heller*, 554 U.S. at 575–76.

27. *Id.* at 576.

28. *Id.*

29. *Id.* at 595, 635.

lawful purposes, such as self-defense within the home.<sup>30</sup> Although Justice Scalia’s monumental majority opinion failed to establish a gun regulation standard of review for future courts, he rejected the proposal of rational basis review.<sup>31</sup> Additionally, Justice Scalia rejected Justice Breyer’s interest-balancing standard of review, thus signaling that courts must at least apply intermediate scrutiny.<sup>32</sup> Rather, Justice Scalia’s majority opinion only established that the individual right guaranteed by the Second Amendment “is not unlimited.”<sup>33</sup> The individual right “[is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>34</sup>

### *B. Intermediate Scrutiny: The “Appropriate” Standard of Review*

After *Heller*, the Ninth Circuit and a majority of its sister circuits opted to not establish an official standard of review for Second Amendment cases, but instead discerned and adopted a two-step inquiry.<sup>35</sup> First, the court asks whether the challenged regulation burdens conduct protected by the Second Amendment “based on a historical understanding of the scope of the right.”<sup>36</sup> Second, if the challenged law is within the scope of the Second Amendment, the court proceeds to determine the appropriate level of scrutiny to apply.<sup>37</sup>

#### 1. Step One: Whether the Regulation Burdens Second Amendment Conduct Based on a Historical Understanding

The first step that courts must take in determining whether a gun regulation is constitutionally valid is asking whether the challenged regulation burdens conduct protected by the Second Amendment “based on a historical understanding of the scope of the [Second Amendment] right.”<sup>38</sup> In this inquiry, a court examines whether the challenged regulation falls within the limited category of historically

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30. *See Heller*, 554 U.S. at 592, 595, 636.

31. *Id.* at 628 n.27; *Silvester v. Harris*, 843 F.3d 816, 820 (9th Cir. 2016).

32. *Heller*, 554 U.S. at 634–35.

33. *Id.* at 626.

34. *Id.*

35. *Silvester*, 843 F.3d at 820–21.

36. *Id.* at 821 (quoting *Heller*, 554 U.S. at 625).

37. *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citing *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

38. *Id.*

recognized “presumptively lawful regulatory measures,” which were identified in *Heller*,<sup>39</sup> or whether the challenged law falls within a category of longstanding prohibitions “that have been historically unprotected” as proven by historical evidence.<sup>40</sup> In other words, if there is a law that restricts conduct, can be traced to the founding era, and is historically understood to fall outside of the Second Amendment’s scope, the challenged law may be upheld without further analysis.<sup>41</sup>

Additionally, if the challenged law is considered a “presumptively lawful regulatory measure,” as identified in *Heller*, the law may presumably be upheld.<sup>42</sup> Alternatively, if the challenged law restricts conduct and is within the historical scope of the Second Amendment, the law is subject to Second Amendment protection and a court then proceeds to the second step of the inquiry to determine the appropriate level of scrutiny to apply to evaluate the challenged law.<sup>43</sup>

## 2. Step Two: What Level of Scrutiny to Apply

If the challenged law is within the scope of the Second Amendment, the court must then determine the appropriate level of scrutiny to apply.<sup>44</sup> When determining the applicable level of scrutiny, “the court must consider: (1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on that right.”<sup>45</sup> For example, “a law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny.”<sup>46</sup> However, a law that does not implicate a core Second Amendment right or does not place a substantial burden on the Second Amendment right warrants

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39. *Silvester*, 843 F.3d at 821; see *Heller*, 554 U.S. at 626–27 (explaining that the decision should not cast doubt on “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding carrying firearms in sensitive places such as school and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,” or laws prohibiting the carrying of “dangerous and unusual weapons.”).

40. *Jackson*, 746 F.3d at 960 (citing *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011)).

41. *Silvester*, 843 F.3d at 821.

42. *Id.*

43. *Id.*

44. *Id.*; see also *Jackson*, 746 F.3d at 960.

45. *Silvester*, 843 F.3d at 821.

46. *Id.*



intermediate scrutiny.<sup>47</sup> In *Heller*, the District of Columbia’s ban on handgun possession imposed such a severe restriction on the fundamental right of self-defense of the home, a core Second Amendment right, that it was considered unconstitutional under *any* level of scrutiny.<sup>48</sup>

Although there remains room for argument when determining the standard of review in the two-step inquiry, “there is [] near unanimity in the post-*Heller* case law” that the Ninth Circuit and its sister circuits “clearly favor[] the application of intermediate scrutiny in evaluating the constitutionality of firearms regulations, so long as the regulation burdens to some extent conduct protected by the Second Amendment.”<sup>49</sup>

A challenged regulation passes intermediate scrutiny if: (1) the government’s stated objective is significant, substantial, or important, and; (2) the challenged regulation is substantially related to the asserted objective.<sup>50</sup>

With that brief introduction of the two-step inquiry most circuits have applied in Second Amendment cases, we will now turn to the central case, *Silvester v. Harris*.

### III. STATEMENT OF THE CASE

#### *A. Factual Background and Purpose of California’s Waiting Period Law*

Plaintiffs Jeff Silvester, Brandon Combs, The Calguns Foundation, Inc., and The Second Amendment Foundation, Inc. (collectively, “plaintiffs”) brought suit against the State of California, alleging that California’s statutes that require a ten-day waiting period between the purchase and delivery of a firearm violated the Second Amendment as applied to “subsequent purchasers.”<sup>51</sup> “Subsequent purchasers” refers to three classes of individuals, all of whom likely already possess a gun.<sup>52</sup> The first class of subsequent purchasers refers to individuals with firearms listed on a database, the Automated Firearms System (“AFS”), which is used by law

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47. *Id.* (citing *Jackson*, 746 F.3d at 961).

48. *D.C. v. Heller*, 554 U.S. 570, 628–29 (2008).

49. *Silvester*, 843 F.3d at 823.

50. *Id.* at 821–22 (citing *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013)).

51. *Id.* at 818.

52. *Id.* at 825.

enforcement to identify individuals who may possess a firearm.<sup>53</sup> The second class of subsequent purchasers refers to individuals who possess a valid license to carry a concealed weapon.<sup>54</sup> The third class of subsequent purchasers refers to individuals identified in the AFS who possess a certificate of eligibility, which confirms a person's eligibility to lawfully possess and/or purchase firearms under state and federal law.<sup>55</sup> The subsequent purchasers challenged California's 10-day waiting period law ("WPL") because they did not want to wait an additional ten days before taking possession of their newly purchased firearm.<sup>56</sup>

The California Legislature enacted its ten-day WPL for two reasons: (1) to allow sufficient time for law enforcement to complete an extensive background check, and; (2) to provide a "cooling off" period, during which weapon purchasers may reconsider if they are contemplating an impulsive act of violence or self-harm.<sup>57</sup> The Legislature was mainly concerned with the impulsive use of handguns as a threat to public safety, and thus intended to prevent immediate access to handguns to discourage impulsive purchasers.<sup>58</sup>

### *B. Procedural Posture*

Although Plaintiffs did not allege they were denied their firearms after purchasing them, they challenged the application of California's ten-day WPL as applied to subsequent purchasers, arguing that they should not have to wait for ten days after passing an initial background check.<sup>59</sup> The district court applied intermediate scrutiny after finding that California's WPL burdened, to some extent, Plaintiffs' Second Amendment rights.<sup>60</sup> The district court ruled in favor of Plaintiffs, and agreed that waiting the required ten days between the time of their firearm purchase and the receipt of the firearm violated their Second Amendment rights.<sup>61</sup>

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53. *Id.*

54. *Id.*

55. *Id.* at 825–26.

56. *Id.* at 825.

57. *Id.* at 823.

58. *Id.*

59. *Id.* at 818–19.

60. *Silvester v. Harris*, 41 F. Supp. 3d 927, 963–64 (E.D. Cal. 2014), *rev'd and remanded*, 843 F.3d 816 (9th Cir. 2016).

61. *Harris*, 843 F.3d at 819.

The district court rejected California's argument that the ten-day WPL "cooling off" period was justified as a safety precaution for all firearms purchasers, new or subsequent, because "there was no 'reasonable fit' between the waiting period and California's safety objective."<sup>62</sup> The court reasoned that if a subsequent purchaser already owned a gun, then the purchaser could use that gun to commit impulsive acts of violence or self-harm rather than purchase another for that specific purpose.<sup>63</sup> The district court also rejected California's argument that a waiting period was a "presumptively lawful regulatory measure[]," as described by the Supreme Court in *Heller*.<sup>64</sup>

California then appealed to the Ninth Circuit Court of Appeals (the "Ninth Circuit") and persuaded the Ninth Circuit to reverse and remand the matter for judgment in favor of the state.<sup>65</sup>

### C. *Holding and Reasoning*

After applying an intermediate scrutiny analysis, the Ninth Circuit held California's ten-day WPL did not violate the Plaintiffs' Second Amendment rights because the WPL was a reasonable precaution for all purchasers, new or subsequent.<sup>66</sup> The Court ended its analysis there and decided it need not determine whether the WPL was sufficiently longstanding to be presumed lawful, per the standard laid out in *Heller*.<sup>67</sup>

The Ninth Circuit began by providing legal background on the Second Amendment, starting with the most significant source: *Heller*. The court then transitioned to discuss its own Second Amendment precedents post-*Heller*, which paved the way for intermediate scrutiny to be the unofficial standard of review for gun regulations.<sup>68</sup>

In *United States v. Chovan*,<sup>69</sup> the Ninth Circuit, for the first time, applied intermediate scrutiny in a Second Amendment case.<sup>70</sup> In

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62. *Id.* at 826.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 826–27.

68. *Id.* at 823.

69. 735 F.3d 1127 (9th Cir. 2013).

70. *Id.* at 1136.

*Chovan*, the challenged regulation prohibited domestic violence misdemeanants from possessing firearms.<sup>71</sup> The court held that the regulation did not implicate a core Second Amendment right but did place a substantial burden on a citizen's right to possess and carry a firearm for self-defense, which triggered intermediate scrutiny.<sup>72</sup> The court then held that the challenged regulation passed intermediate scrutiny because the prohibition was substantially related to the important government interest of preventing domestic gun violence.<sup>73</sup>

After *Chovan*, the Ninth Circuit continued to consistently apply intermediate scrutiny as the standard of review for Second Amendment gun regulation cases.<sup>74</sup> Further, the Ninth Circuit's sister circuits have also consistently applied intermediate scrutiny when evaluating gun regulations.<sup>75</sup>

When evaluating gun regulations, lower courts around the nation are attempting to balance citizens' fundamental Second Amendment rights against the states' significant interests in public safety and uniformity. Recent trends demonstrate that intermediate scrutiny has become the appropriate standard of review for Second Amendment cases, which provides for broad uniformity.<sup>76</sup>

However, the scope of the Second Amendment has not been clearly defined by the Supreme Court, leaving the states free to test

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71. *Id.* at 1130.

72. *Id.* at 1138.

73. *Id.* at 1141.

74. *See* Jackson v. City and County of San Francisco, 746 F.3d 953, 958–60 (9th Cir. 2014) (applying intermediate scrutiny when evaluating a city ordinance that required a person's handgun in residence to be stored in locked container or disabled with trigger lock when not carried on person); Fyock v. Sunnysvale, 779 F.3d 991, 994–99 (9th Cir. 2015) (applying intermediate scrutiny when evaluating city ordinance that restricted possession of large-capacity magazines); *see also* Peruta v. County of San Diego, 824 F.3d 919, 945 (9th Cir. 2016) (Graber, J., concurring) (stating that even if challenged regulation was within scope of Second Amendment, regulation would have survived intermediate scrutiny).

75. *See* Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012) (applying intermediate scrutiny when evaluating New York law that restricted individual's ability to carry firearms in public); United States v. Meze-Rodriguez, 798 F.3d 664 (7th Cir. 2015) (applying intermediate scrutiny when evaluating Wisconsin gun regulation that prohibited aliens illegally or unlawfully in the United States from possessing firearms); GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318 (11th Cir. 2015) (applying intermediate scrutiny when evaluating Georgia regulation that prohibited possession of loaded firearms and ammunition on government-owned property); Bonidy v. U.S. Postal Serv., 790 F.3d 1121 (10th Cir. 2015) (applying intermediate scrutiny when evaluating Colorado U.S. Postal Service's ("USPS") regulation prohibiting storage and carrying of firearms on USPS property).

76. *See* Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016).

its boundaries by persistently passing laws and regulations in an attempt to see how much of the gun industry they can regulate.

#### IV. ANALYSIS

Although the Second Amendment confers an individual right to keep and bear arms for the purposes of self-defense, firearms are inherently dangerous and can be obtained relatively easily. As such, local and state governments should have the right to extensively regulate an individual's ability to obtain, possess, and sell firearms, similarly to how states can regulate an individual's right to marry and right to obtain an abortion.

##### *A. Rational Basis Plus: The More Appropriate Standard of Review*

Perhaps the more conducive approach to legislating and evaluating gun regulations would be to afford greater deference to local and state governments. Local and state governments are in a much better position to legislate gun regulations, particularly according to city or local statistics or developments. Intermediate scrutiny, however, leaves too much room for argument and provides less predictability and guidance as a standard of review for future gun regulations. Therefore, the more appropriate standard of review for Second Amendment gun regulation cases is rational basis *plus*, as it affords greater deference to local and state governments, but still leaves room for gun rights advocates to debate whether a city or state gun regulation may have gone too far.<sup>77</sup> Under rational basis *plus*, the local or state government must demonstrate a legitimate interest or objective for its challenged regulation, and the challenged regulation has to be rationally related to the legitimate government objective. However, a court does not necessarily have to believe the local or state government's alleged objective if it finds the challenged law lacks a rational relationship to the government's objective, and thus has discretion to reject a local or state government's alleged objective.<sup>78</sup>

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77. *See generally* Romer v. Evans, 517 U.S. 620, 631–33 (1996) (finding an amendment to the state constitution failed rational basis scrutiny by being too broad and too narrow at the same time, signifying that the standard of review applied may have been a slightly heightened version of rational basis).

78. *Id.* at 632.

### B. *Lethality of Firearms*

Firearms are designed to maim and kill with bullets, and thus are inherently dangerous and lethal.<sup>79</sup> However, despite the well-known lethality of firearms, the process of purchasing and legally owning a firearm in California and most other states is not very difficult. The California Department of Justice (“DOJ”) states, “[p]urchasers of handguns must provide proof of California residency, . . . and either (1) possess a Handgun Safety Certificate (HSC) plus successfully complete a safety demonstration with their recently purchased handgun or (2) qualify for an HSC exception.”<sup>80</sup> The California DOJ also states, “there is no limit to the number of handguns” that an individual may own, but he or she is “limited to purchasing no more than one handgun in any 30-day period.”<sup>81</sup>

Conceal carry permits are also relatively easy to obtain, as evidenced by a California resident who explained in detail the process of obtaining a concealed carry permit. On January 28, 2015, George Thompson wrote, “the process was very smooth and actually a lot of fun,” and even described some of the steps as “very fast” and “easy.”<sup>82</sup>

### C. *Should Firearms Be Easier to Obtain Than a Marriage or Abortion?*

Firearms and concealed carry permits should not be “very fast” or “easy” to obtain. The Second Amendment gives an individual the right to keep and bear arms, but as Justice Scalia expressly noted in *Heller*, the right is not unlimited.<sup>83</sup> As with other fundamental rights, the Second Amendment right to bear arms should be limited in some circumstances. For example, individuals have a constitutional right to privacy and a fundamental liberty interest in marriage, family

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79. See generally 18 U.S.C. § 921(3) (2006).

80. *Frequently Asked Questions*, STATE OF CAL. DEP’T OF JUST., <https://oag.ca.gov/firearms/pubfaqs#3> (last visited Aug. 25, 2017).

81. *Id.*

82. George Thompson, *Concealed Carry in California; a Look at the Process of Obtaining a Permit*, CONCEALED NATION (June 10, 2015, 3:18 PM) <http://concealednation.org/2015/01/concealed-carry-in-california-a-look-at-the-process-of-obtaining-a-permit/>.

83. *D.C. v. Heller*, 554 U.S. 570, 595 (2008).

planning, and procreation, but both are subject to numerous local, state, and federal government regulations.<sup>84</sup>

The Supreme Court's landmark decision in *Roe v. Wade* held that an individual's constitutional right of personal privacy extended to a woman's decision to terminate her pregnancy, but was subject to state regulations and limitations when justified by a compelling state interest such as safeguarding health, maintaining medical standards, and protecting potential life.<sup>85</sup> As a result, abortion is heavily regulated due to its inherently unique nature involving the termination of a pregnancy and its physical and mental impact on individuals who have abortions.

Moreover, in *Griswold v. Connecticut*, the Court held that the right to marriage and sexual intimacy was "a right of privacy older than the Bill of Rights," and subject to state regulation as long as it does not sweep unnecessarily broadly and thereby invade the area of protected freedoms.<sup>86</sup>

Both cases demonstrate how an individual's constitutional right of privacy and fundamental liberty interest in marriage can exist alongside heavy state regulations. Firearms should be treated similarly, due to firearms' shared characteristics with marriage and abortion. Many states require couples desiring to marry to obtain a marriage license, to have a solemnization ceremony, to get a blood test, to cohabitate, to wait a certain period of time, or a combination of these requirements.<sup>87</sup> As for abortions, many states have required

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84. See generally *Roe v. Wade*, 410 U.S. 113 (1973); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Turner v. Safley*, 482 U.S. 78 (1987) (finding the right to marry is a fundamental right but is subject to substantial restrictions as a result of incarceration).

85. *Roe*, 410 U.S. at 153–54.

86. *Griswold*, 381 U.S. at 485–86; see also *Loving v. Virginia*, 388 U.S. 1 (1967); *Lawrence v. Texas*, 539 U.S. 558 (2003).

87. See *California Marriage - General Information*, CAL. DEP'T OF PUB. HEALTH (Aug. 25, 2017), <https://www.cdph.ca.gov/Programs/CHSI/Pages/California-Marriage-License-General-Information.aspx>; *Marriage Licenses*, JEFF FINE, CLERK OF THE SUPERIOR COURT, MARICOPA COUNTY, ARIZONA (Jan. 19, 2019) <http://clerkofcourt.maricopa.gov/marlic.asp> (requiring a marriage license to be issued prior to a ceremony taking place); *Marriage Licenses*, JEFF DANA DEBEAUVOIR, TRAVIS COUNTY CLERK, TEXAS (Jan. 19, 2019) <https://www.traviscountyclerk.org/eclerk/Content.do?code=R.27> (requiring a 72-hour waiting period between the time a marriage license is obtained and the marriage ceremony, and a pre-marital education course to obtain a marriage license); *Marriage License Requirements for Yellowstone County, Montana*, YELLOWSTONE COUNTY, MT (Jan. 19, 2019) [http://www.co.yellowstone.mt.gov/clerk\\_court/marriage.asp](http://www.co.yellowstone.mt.gov/clerk_court/marriage.asp) (requiring all brides under the age of 50 to provide proof of a Rubella blood test or a doctor's statement regarding sterilization for a marriage license).

a woman seeking an abortion to give informed consent, to meet with the performing or referring physician at least 24 hours prior to the abortion, to undergo an ultrasound before obtaining an abortion, to obtain informed consent from one parent if a minor is seeking an abortion, or a combination of these requirements.<sup>88</sup>

The purpose behind many of the regulations on marriage and abortion is to provide time for people to avoid impulsive decisions, make an informed decision, and reconfirm that they want to be wed or end a pregnancy. This policy rationale for marriage and abortion regulation is echoed in California's WPL, which provides firearm purchasers a "cooling off" period as a precautionary measure, in case they contemplate self-harm or an impulsive violent act.<sup>89</sup>

However, there should be additional measures and safeguards in place for the process of purchasing and owning a firearm. Merely requiring proof of state residency, a Firearm Safety Certificate, and a brief waiting period is not reflective of the seriousness and severity of a firearm's destructive potential.

Local and state governments should heavily regulate peoples' eligibility and ability to obtain a firearm. Under a rational basis plus standard of review, public safety will always be a legitimate government objective; thus, the main issue that will arise is whether the challenged local or state regulation is rationally related to public safety. However, as mentioned above, if the challenged regulation implicates a core Second Amendment right and severely burdens that right, such as an individual's right to self-defense of the home, the regulation would warrant strict scrutiny.

#### IV. CONCLUSION

To marry in California, the California Department of Public Health generally requires: that the two parties not already be married; that they bring valid picture identification to the County Clerk's

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88. See, e.g., *Casey v. Planned Parenthood of Southeastern Pa.*, 14 F.3d 848, 853 (3d Cir. 1994) (describing the restrictions imposed by the Pennsylvania Abortion Control Act of 1982); see also *State Facts About Abortion: Alabama*, GUTTMACHER INST., <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-alabama> (listing numerous restrictions on abortion in effect in Alabama as of July 1, 2017); cf. *State Facts About Abortion: California*, GUTTMACHER INST., <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-california> (noting that as of April 1, 2017, "California does not have any of the major types of abortion restrictions—such as waiting periods, mandated parental involvement or limitations on publicly funded abortions—often found in other states.").

89. *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016).



Office to apply for a marriage license; that they provide the specific date of their last marriage and how it ended, if applicable; that they have a marriage officiant and witness be physically present with the two parties together in the same location for the marriage to be performed, and; that they get married within 90 days of the marriage license's date of issuance.<sup>90</sup>

To obtain an abortion in California, counties differ in requirements, but generally a pregnant adult woman or minor is required to find a clinic or health care provider that provides abortion services, to take a pregnancy test, to speak with a trained staff person about all of the available options alongside abortion, to have a pelvic exam, to possibly have an ultrasound, and to take certain medications given by the performing physician.<sup>91</sup>

To purchase and own a firearm in California, purchasers need only provide proof of California residency, and either possess a Handgun Safety Certificate and successfully complete a safety demonstration with their recently purchased handgun, or qualify for a Handgun Safety Certificate exemption.<sup>92</sup>

Firearms are inherently dangerous and can kill instantaneously, yet individuals can obtain firearms with relative ease in most states, including California. It should not be easier or just as easy for a person to purchase a firearm as it is to marry or obtain an abortion. Similar to the requirements set forth for marriage and abortion, individuals should be required to make an informed decision when purchasing and owning firearms by taking firearm safety and training classes or possibly speaking with mental health professionals to check his or her mental status prior to obtaining the purchased firearm. Firearms should be heavily regulated like marriage and abortion, if not more, and thus, the federal government should afford great deference to local and state governments to regulate the process for firearm ownership and purchasing.

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90. See *California Marriage License, Registration and Marriage Ceremony Information*, CAL. DEP'T OF PUB. HEALTH (Apr. 27, 2017), <https://www.cdph.ca.gov/Programs/CHSI/Pages/Marriage-License-Information.aspx>.

91. *Abortion Services in Los Angeles, CA*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/health-center/california/los-angeles/90003/dorothy-hecht-health-center-2465-90070/abortion> (last visited Mar. 19, 2017).

92. *Frequently Asked Questions*, STATE OF CAL. DEP'T OF JUST., <https://oag.ca.gov/firearms/pubfaqs#3> (last visited Aug. 25, 2017).

Furthermore, although the Ninth Circuit adopted intermediate scrutiny as the appropriate standard of review for evaluating gun regulations in *Silvester v. Harris*, the more appropriate standard of review is rational basis plus. Under a rational basis plus standard, local and state governments are afforded more deference in their gun regulations, while courts have discretion to reject a local or state government's objective if the rational relationship to the challenged regulation is lacking.

The scope of the Second Amendment has yet to be clearly defined by the United States Supreme Court. However, the Ninth Circuit's decision in *Silvester v. Harris* to uphold California's waiting period law demonstrates great promise for future gun regulations, as each time a challenged firearm regulation is upheld, it helps to outline the parameters of firearm regulations within the boundaries of the Second Amendment.