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United States v. McCane: Judge Tymkovich Questions *Heller*'s Disarming Dicta

I. INTRODUCTION

Just how far does the Supreme Court's recent holding in *District of Columbia v. Heller*[1] go to protect what it deems to be the individual right to bear arms for self-defense? In *Heller*, the Court states that "nothing in our opinions should be taken to cast doubt on longstanding prohibitions on the possession by felons."[2] The Tenth Circuit recently challenged this now famous dictum in *United States v. McCane*,[3] in which the criminal defendant, charged with being a felon in possession of a handgun, asserted that *Heller*'s individual right to bear arms invalidated the constitutional basis of the felon dispossession law.

Though McCane's conviction was upheld, the concurring opinion of Judge Tymkovich illustrates a growing scholarly and judicial dissatisfaction with *Heller*'s ostensibly unprincipled exceptions. This Note addresses both the holding in *McCane* and the broader question of whether the exceptions articulated in *Heller* can be sustained in light of the Court's recognition of an individual right to bear arms.

II. BACKGROUND

A. Facts

On the evening of April 18, 2007, Officer Aaron Ulmann, of the Oklahoma City Police Department, observed Markice Lavert McCane, a convicted felon, straddling two eastbound lanes of a four-lane highway in Oklahoma City.[4] The officer followed McCane for three city blocks before stopping McCane for violating state traffic law and because the officer suspected McCane was intoxicated.[5]

Upon approaching the vehicle, the officer asked McCane for his

1. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).
2. *Id.* at 2816–17.
3. United States v. McCane, 573 F.3d 1037 (10th Cir. 2009).
4. *Id.* at 1039.
5. *Id.*

license and insurance information, whereupon McCane informed the officer that he was driving under a suspended license.[6] The officer then requested that McCane accompany him to his patrol car. McCane complied with the officer's request.[7] Upon exiting the vehicle, McCane was subjected to a pat-down search and was then placed in the back seat of the patrol car.[8] McCane's driver's-side door remained open for the duration of the stop.[9]

With McCane in the back of the patrol car, the officer performed a records check, confirming that McCane's license was suspended and that the car he was driving was not registered to him.[10] The officer arrested McCane, placed him in handcuffs, and summoned a towing service to tow the vehicle.[11] He then returned to the car and asked McCane's passenger, Joseph Carr, to accompany him back to the patrol car. The officer then searched the car.[12]

In the pocket of the driver's-side door, hidden underneath a rag, the officer found a .25 caliber pistol with seven rounds of ammunition in the magazine.[13] The officer brought the weapon to the patrol car to secure it, and, upon seeing the gun, McCane said, "I forgot that was even there."[14] The officer then advised McCane of his *Miranda* rights[15] and transported him to the police station for booking.[16] While in police custody, McCane declined to make any further statement.[17] The officer cited McCane for driving with a suspended license and for straddling lane lines.[18] McCane was then charged under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm.[19]

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
16. *McCane*, 573 F.3d at 1039.
17. United States v. McCane, No. CR-07-286-C, 2008 WL 2740926, at *1 (W.D. Okla. July 10, 2008) ("Defendant said that he understood his rights, but he refused to waive his right to counsel and to talk to the officer about the incident.").
18. *Id.*
19. *McCane*, 573 F.3d at 1040. 18 U.S.C. § 922(g)(1) states:
(g) It shall be unlawful for any person—(1) who has been convicted in

B. Procedural History

McCane sought to suppress both his inculpatory statement ("I forgot that was even there") and the gun.[20] He began by arguing that Officer Ulmann's traffic stop violated the Fourth Amendment and therefore any evidence from that stop was inadmissible.[21] The argument proceeded as follows: In *United States v. Botero-Ospina*,[22] the Tenth Circuit adopted the rule that "a traffic stop is valid under the Fourth Amendment if . . . based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a . . . violation . . . is occurring."[23] Further, under the Supreme Court's decision *Terry v. Ohio*,[24] the reasonableness of McCane's stop must be (1) "justified at its inception" and (2) "reasonably related in scope to the circumstances which justified the interference in the first place."[25] McCane claimed that road construction at the time of his traffic stop warranted deviation from his lane.[26] He further argued that the statutory prohibition against departure from one's lane in Oklahoma grants the driver a degree of discretion, allowing drivers to depart from their lane when reason and safety require them to do so.[27] In short, McCane argued that "rather than being a careless, reckless driver [McCane] was being most careful and prudent."[28] McCane claimed that because he was driving in a

> any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

20. *McCane*, 573 F.3d at 1040.

21. Defendant's Brief in Support of Motion to Suppress at 11, *McCane*, 2008 WL 2740926 (W.D. Okla. July 10, 2008) (No. CR-07-286-C), 2008 WL 6807798.

22. United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995).

23. *Id.*; *see* Defendant's Brief in Support of Motion to Suppress, *supra* note 21, at 8.

24. Terry v. Ohio, 392 U.S. 1 (1968).

25. *Id.* at 20.

26. Defendant's Brief in Support of Motion to Suppress, *supra* note 21, at 2 ("The officer claimed that the basis for the stop was straddling the eastbound center lane line for three blocks. This 'alleged offense' by the officer's description occurred in the construction areas which affected the lane position of every driver.").

27. *Id.* at 6; *see also* OKLA. STAT. ANN. tit. 47, § 11-309(1) (West 2009) ("A vehicle shall be driven *as nearly as practicable* entirely within a single lane.") (emphasis added).

28. Defendant's Brief in Support of Motion to Suppress, *supra* note 21, at 11. In support of this proposition, McCane cited a Tenth Circuit decision interpreting an almost identical Utah law. In *Unites States v. Gregory*, the Tenth Circuit stated, "We do not find that an isolated incident of a vehicle crossing into the emergency lane of a roadway is a violation of

reasonable manner and in compliance with the law, the traffic stop was not justified at inception, and thus violated McCane's Fourth Amendment rights.

McCane likewise sought to suppress his statement, "I forgot that was even there," by claiming that the statement was involuntary and coerced.[29] McCane noted that the government is prohibited from using any coerced statement against him.[30] In order to determine whether a statement is coerced, courts must consider "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[31] McCane contended that because the officer placed McCane in a squad car and then presented McCane with the gun prior to reading him his *Miranda* rights, the officer had elicited McCane's statement through "[s]ubtle psychological isolation coercion."[32] Because the officer elicited this statement in such an ostensibly insidious form of coercion, the statement, argued McCane, ought not to be admitted.

District Judge Robin J. Cauthron issued the court's decision on July 10, 2008, upholding in every particular the government's charges against McCane.[33] With regard to McCane's contention that his statement was psychologically coerced, Judge Cauthron stated that "[h]aving heard and considered the parties' evidence, it is clear that the government has met its burden of showing that Defendant's statement was voluntary."[34] She credited Officer Ulmann's testimony that McCane "spontaneously uttered this statement in the absence of questioning" and concluded that "[u]nder the totality of the circumstances, Defendant's statement was not the result of coercion."[35]

The court likewise dismissed McCane's contention that the traffic stop violated the Fourth Amendment stating, "it is clear that Officer Ulman had an objectively reasonable, articulable suspicion to

Utah law. . . . [T]he statute requires only that the vehicle remain entirely in a single lane 'as nearly as practical.'" 79 F.3d 973, 978 (10th Cir. 1996).

29. Defendant's Brief in Support of Jackson-Denno Hearing at 3, United States v. McCane, 2008 WL 2740926 (W.D. Okla. July 10, 2008) (No. CR-07-286-C), 2008 WL 6807799.

30. *Id.*; *see* Mincey v. Arizona, 437 U.S. 385, 398 (1977).

31. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

32. Defendant's Brief in Support of Jackson-Denno Hearing, *supra* note 29, at 2.

33. *McCane*, 2008 WL 2740926, at *1–*4.

34. *Id.* at *2.

35. *Id.*

undertake a traffic stop."[36] As to McCane's claims that road construction necessitated his lane deviation, Judge Cauthron observed that "Officer Ulman, who has extensive experience with the area of Oklahoma City where Defendant was pulled over, testified that while currently there are road construction zones on N.E. 23rd Street, there was not construction underway in this area on the night of April 18, 2007."[37]

As to the officer's warrantless search of McCane's car, the court observed that the search "did not violate the Fourth Amendment, as it was a search incident to lawful arrest."[38] Under the "longstanding" search incident to lawful arrest ("SILA") exception, "the government is entitled to a contemporaneous reasonable search which may extend to objects under the arrestee's immediate control."[39] Further, this exception applies to "containers found within an arrested defendant's vehicle as well as the passenger compartment."[40] Importantly, under the then prevailing Fourth Amendment regime of *New York v. Belton*,[41] officers were permitted to rely upon the SILA exception, even after a suspect had been restrained.[42] Thus, because McCane's statement was not viewed as having been coerced, because the officer had an articulable reason to pull McCane over, and because the search of McCane's car was lawful under the then prevailing understanding of the SILA exception, McCane's statement and the gun and ammunition found by Officer Ulmann were admitted into evidence; McCane was convicted under 18 U.S.C. § 922(g)(1).[43] McCane then appealed to the United States Court of Appeals for the Tenth Circuit.

36. *Id*. at *3.

37. *Id*.

38. *Id*. at *4.

39. *Id*. (citing Malone v. Crouse, 380 F.2d 741, 744 (10th Cir. 1967)).

40. *Id*. (citing New York v. Belton, 453 U.S. 454, 460–61 (1981)).

41. 453 U.S. 454 (1981).

42. *McCane*, 2008 WL 2740926, at *4 (citing United States v. Brothers, 438 F.3d 1068, 1073 (10th Cir. 2006) (holding that the *Belton* rule applied when the search was conducted within a few minutes of the defendant's lawful arrest and the defendant had not yet been removed from the scene)).

43. Judge Cauthron's decision did not address McCane's contention that the element of movement through "interstate commerce" had not been established. *See McCane*, 2008 WL 2740926. Presumably the judge found the evidence presented by the government to be sufficient. *See* Government's Response to Defendant's Motion to Quash and Dismiss Indictment, *McCane*, 2008 WL 2740926 (No. CR-07-286-C), 2008 WL 6807800 (6807798 is the Defendant's Motion).

C. Interim Decisions

Significant to the trial court's determination of the admissibility of evidence against McCane was the determination at trial that a warrantless search of a suspect's car conducted while the suspect was handcuffed in the back of a patrol car was subject to the SILA exception. Of course, it goes without saying that the constitutional validity of 18 U.S.C. § 922(g)(1) was likewise essential for upholding McCane's conviction. While McCane's conviction was up for appeal, the United States Supreme Court issued two opinions that called into question both of the propositions above.

1. Arizona v. Gant[44]

The first of these was *Arizona v. Gant*,[45] in which the Supreme Court reexamined its holding in *New York v. Belton*.[46] In *Belton*, the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[47] The Court applied this rule despite the fact that the defendants had been removed from the car and could not possibly have reached within the car to tamper with evidence.[48]

The *Gant* Court further refined the rule introduced in *Belton*. Like McCane, Gant was secured in a police patrol car prior to the police conducting a search of his vehicle.[49] The officers then searched Gant's car, finding both a gun and bag of cocaine.[50] The Supreme Court invalidated this search, stating that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[51] Thus, because Gant was not within reaching distance of the passenger compartment during the

44. 129 S. Ct. 1710 (2009).
45. *Id.*
46. 453 U.S. 454 (1981).
47. *Id.* at 460.
48. *Id.* at 456.
49. *Gant*, 129 S. Ct. at 1715.
50. *Id.*
51. *Id.* at 1723.

search, and because the evidence searched for was not related to Gant's arrest, the search of the passenger compartment violated the Fourth Amendment.[52]

2. District of Columbia v. Heller[53]

In *District of Columbia v. Heller*,[54] the Supreme Court struck down several District of Columbia statutes generally prohibiting the possession of handguns and requiring that lawfully owned firearms be "unloaded and disassembled or bound by a trigger lock or similar device" unless they are being used for recreation or are in a place of business.[55] The Court ruled that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[56] In so doing, the Court abandoned a longstanding rationale of the Second Amendment as a "collective" right. The Court stated that "[n]owhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right."[57] The Court further stated, "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not."[58]

Among those limits upon the individual right to bear arms sustained by the Court, albeit in dicta, is the prohibition on firearm possession by felons. Perhaps anticipating that the recognition of an individual right to bear arms would create a sea-change in Second Amendment jurisprudence, the *Heller* Court stated that nothing in its "opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[59]

52. *See id.* at 1723–24.
53. 128 S. Ct. 2783 (2008).
54. *Id.*
55. *Id.* at 2783 (quoting D.C. CODE § 7-2507.02 (2001) (quotation marks omitted)).
56. *Id.* at 2821–22.
57. *Id.* at 2790.
58. *Id.* at 2799.
59. *Id.* at 2816–17.

III. *MCCANE* IN THE TENTH CIRCUIT

In light of the decisions above, McCane argued on appeal that his conviction could no longer be constitutionally sustained. He argued that "it would be improper to give less relief to Markice McCane than to Rodney Gant,"[60] noting that "[i]n essence once the individual is handcuffed in the back of the police car it appears any justification to conduct a search incident to arrest has ceased to exist."[61] McCane contended that, because under *Gant* a constitutional violation had occurred, the evidence obtained through this violation ought to have been excluded in light of the exclusionary rule.

McCane further argued that the Supreme Court's complete repudiation of the "collective right" understanding of the Second Amendment in *Heller*, and its recognition of the individual right to bear arms in self-defense, necessarily calls into question the constitutional validity of 18 U.S.C. § 922(g)(1).[62] He stated:

> [I]t is important to stress the nature of the right being asserted herein as a Constitutional right, which exists innately, which is merely recited in, not provided by the Second Amendment. Moreover, the language of the Second Amendment clearly states this right "shall not be infringed." This is an absolute prohibition, clear in both language and meaning, leav[ing] no ambiguity to be resolved.[63]

A. The Majority Opinion

The Tenth Circuit upheld the McCane conviction in every particular. In response to McCane's characterization of the *Gant* ruling and the exclusionary rule, the Tenth Circuit observed that "[t]he Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, but contains no provision expressly precluding the use of evidence obtained in violation of its

60. Supplemental Response Brief of Defendant-Appellant at 12, United States v. McCane, 573 F.3d 1037 (10th Cir. 2009) (No. 08-6235), 2009 WL 1433750.

61. Supplemental Brief of Defendant-Appellant at 9, *McCane*, 573 F.3d 1037 (No. 08-6235), 2009 WL 1388417.

62. Amended Brief of Defendant-Appellant at 24–25, *McCane*, 573 F.3d 1037 (No. 08-6235), 2009 WL 108600.

63. *Id.* at 28.

commands."[64] The court relied on the Supreme Court's holding in *United States v. Leon*, which created the "good-faith" exception to the exclusionary rule in which courts decline "to apply the exclusionary rule when police reasonably and in good faith relied upon a warrant subsequently declared invalid."[65] Thus, the court "decline[d] to apply the exclusionary rule when law enforcement officers act in objectively reasonable reliance upon the settled case law."[66]

The court likewise made short work of McCane's invitation to call into question the validity of 18 U.S.C. § 922(g)(1). In response to McCane's insistence that the dispossession law could not be constitutionally sustained in light of *Heller*, the Tenth Circuit merely responded by recapitulating the *Heller* dictum: "[N]othing in our opinion" said the *Heller* Court, "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[67]

B. Judge Tymkovich's Concurrence

Judge Tymkovich wrote a separate concurrence, unwilling to let a felony dispossession case pass by without observing the difficulty created by *Heller*'s dicta. He cited two reasons for drafting a concurrence: "The first is to note, given the undeveloped history of felon dispossession laws, the possible tension between *Heller*'s dictum and its underlying holding. The second reason is to express concern that the dictum inhibits lower courts from exploring the contours of *Heller* and its application to firearm restrictions."[68]

As to the first concern, Judge Tymkovich observed that "the felon dispossession dictum may lack the 'longstanding' historical basis that *Heller* ascribes to it."[69] Though several scholars, cited by Judge Tymkovich, had argued that felony dispossession laws have a long and distinguished history,[70] recent scholarship suggests that this

64. *McCane*, 573 F.3d at 1042 (quoting Herring v. United States, 129 S. Ct. 695, 699 (2009) (internal quotation marks omitted)).

65. *Id*. (citing United States v. Leon, 468 U.S. 897, 922 (1984)).

66. *Id*. at 1045.

67. District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008).

68. *McCane*, 573 F.3d at 1047–48 (Tymkovich, J., concurring).

69. *Id*. at 1048.

70. *See* Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 203, 266 (1983).

historical characterization of such laws is incorrect.[71] Judge Tymkovich continues, observing that "[t]his uncertain historical evidence is problematic in light of *Heller*'s Second Amendment interpretation. Central to the Court's holding are a detailed textual analysis and a comprehensive review of the Second Amendment's meaning at the time of its adoption."[72]

Next, Judge Tymkovich addresses his concern that the Supreme Court's "summary treatment of felon dispossession in dictum forecloses the possibility of a more sophisticated interpretation of § 922(g)(1)'s scope."[73] Though Judge Tymkovich does not say so, this is particularly true in the Tenth Circuit where the court considers itself "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."[74]

Left unencumbered by what Judge Tymkovich refers to as "*deus ex machina* dicta," the lower courts may have been able to address other questions unanswered by the *Heller* decision (e.g., whether individual gun ownership for the purpose of self-defense should be elevated to a fundamental individual right, to what level of constitutional scrutiny will laws regulating such ownership be subjected, etc.).[75] This question has already sparked serious scholarly debate.[76]

Finally, Judge Tymkovich observes that *Heller* has, at least tacitly, undermined the holding of at least one Tenth Circuit opinion. In *United States v. Baer*,[77] the Tenth Circuit observed that

71. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 709–10, 714 (2009); *id.* at 698–713 (comprehensively reviewing the history of state and federal dispossession laws); Adam Winkler, Heller*'s Catch 22*, 56 UCLA L. REV. 1551, 1561, 1563 (2009).

72. *McCane*, 573 F.3d at 1048 (Tymkovich, J., concurring).

73. *Id.* at 1049.

74. Surefoot LC v. Sure Foot Corp., 531 F.3d 1236, 1243 (10th Cir. 2008) (quoting Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996)).

75. *McCane*, 573 F.3d at 1049–50 ("[T]he existence of on-point dicta regarding various regulations short-circuits at least some of the analysis and refinement that would otherwise take place in the lower courts.").

76. Judge Tymkovich cites the following articles as illustrative: Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1379–82 (2009); Marshall, *supra* note 71, at 728–31; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).

77. 235 F.3d 561, 564 (10th Cir. 2000).

"the circuits have consistently upheld the constitutionality of federal weapons regulations like section 922(g) absent evidence that they in any way affect the maintenance of a well regulated militia."[78] If 18 U.S.C. 922(g)(1) can only be upheld in light of a "collective right" view of gun ownership like the one discredited in *Heller*, then the governing rationale for the law in several circuits may have been severely undermined.

V. ANALYSIS

Upholding the admission of evidence against McCane, even in light of the Supreme Court's subsequent holding in *Gant* rendering the circumstances of Officer Ulmann's search unconstitutional, seems uncontroversial in light of the good faith exception to the exclusionary rule. Nothing in the facts of this case suggests that the officer's actions were taken in anything but "objectively reasonable reliance upon the settled case law,"[79] thus placing his actions squarely within the good faith exception. Of greater interest in this case is Judge Tymkovich's concurrence, which illustrates the growing judicial and scholarly dissatisfaction with *Heller*'s sweeping dicta protecting 18 U.S.C. § 922(g)(1) from review.

A. Uneven Application: Violent v. Non-Violent Felons

Perhaps no one will lament Markice McCane's inability to own a gun. The trial court credited statements by the government that McCane was a "multi-convicted felon and former gang member."[80] Judge Tymkovich observed that "[e]very individual right has exceptions, of course, and the application of § 922(g) to a violent felon such as Mr. McCane would appear appropriate under any Second Amendment reading."[81] For this reason, even if the Tenth Circuit were to ignore the dicta of the Supreme Court and question the validity of § 922(g) in light of *Heller*, the present case is undoubtedly an improper vehicle for doing so.

The concern with the felon dispossession law is not rooted in a scholarly and judicial desire to see greater armament of violent

78. *Id.*

79. *McCane*, 573 F.3d at 1044.

80. United States v. McCane, No. CR-07-286-C, 2008 WL 2740926, at *1 (W.D. Okla. July 10, 2008).

81. *McCane*, 573 F.3d at 1049.

criminals. Rather, the *Heller* dicta comes under fire because 18 U.S.C. § 922(g)(1) encompasses "non-violent felons as well, permanently restricting their Second Amendment right to self-defense."[82] The over-inclusiveness of 18 U.S.C. § 922(g)(1) is thrown into stark relief by examining the circumstances in which criminals with a proven propensity to use firearms irresponsibly are shielded from the statute's lifelong ownership ban.

> Consider first the case of nonviolent felons. Why would we think that a tax evader, an embezzler, or someone who bribed a public official would be more likely to commit acts of gun violence? . . . And even with respect to violent criminals, the exception is sweepingly broad. . . . [Further], there is the problem of gun misconduct that does not rise to the level of a felony, such as recklessly firing a gun into the air, or leaving a loaded firearm in a location easily accessible to a child. These offenders have demonstrated a prior misuse of firearms, but are not prohibited from future possession.[83]

In light of *Heller*'s recognition of an individual right to bear arms in self-defense, the application of § 922 seems uneven, as it vitiates the self-protection right of those who pose no greater apparent or empirically quantified risk of gun violence than non-felons, while allowing those with a propensity to misuse firearms to own them without impediment.

B. Orbiter Dictum

Having identified this apparent unevenness, Judge Tymkovich laments his and any other court's ability to call into question the *Heller* dictum. Quoting Professor Lawson, Judge Tymkovich agrees that "[a]lthough [*Heller*'s] exceptions are dicta, they are dicta of the strongest sort."[84] As Judge Tymkovich notes, the *Heller* dictum is particularly strong because it "is recent and not enfeebled by later statements."[85]

The *McCane* case thus illustrates a salient feature of Tenth Circuit jurisprudence, i.e., the extraordinary deference the court gives to Supreme Court dicta. Though other circuits treat Supreme

82. *Id.*

83. Larson, *supra* note 76, at 1380–81.

84. *McCane*, 573 F.3d at 1049 (quoting Larson, *supra* note 76, at 1372).

85. *Id.* at 1047 (quoting Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996)).

Court dicta as persuasive authority,[86] the Tenth Circuit's view is fairly sweeping: "[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings."[87] Perhaps for this reason, Judge Tymkovich observes that "a number of commentators have considered and proposed . . . the proper level of constitutional scrutiny,"[88] without articulating a view on what the proper level of constitutional scrutiny should be. Though there seems little question that *McCane* is an improper vehicle for exploring the boundaries of the *Heller* dictum, it has nevertheless invited criticism that may have been enhanced by a clear statement—the first such statement by a federal appellate judge—as to what level of constitutional scrutiny the right to bear arms for personal self-defense merits. Judicial economy strongly favors a deferential posture to Supreme Court dicta, preventing unnecessary challenges to the settled views of the court. However, if Justice Scalia's *Heller* dictum must enjoy repose from lower court criticism, it must do so in direct contradiction of Scalia's prior statements. "Dictum settles nothing," said Justice Scalia, "even in the court that utters it."[89]

C. Constitutional Scrutiny

Judge Tymkovich cites several scholars who have articulated views on the level of constitutional scrutiny that restrictions on the right to bear arms, post-*Heller*, ought to enjoy.[90] The mode of analysis in these papers has been to consider what level of scrutiny would allow the *Heller* exceptions, while at the same time making the District of Columbia handgun ban unconstitutional. However, several of these scholarly efforts have focused not simply on determining what the appropriate standard of review is, but on

86. Branigan v. Bateman (*In re* Bateman), 515 F.3d 272, 282 (4th Cir. 2008) ("We are mindful that dicta of the U.S. Supreme Court, *although non-binding*, should have considerable persuasive value in the inferior courts.") (internal quotation marks omitted) (emphasis added); Official Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003) ("Although the Committee is doubtless correct that the Supreme Court's dicta are not binding on us, we do not view it lightly.").

87. Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996).

88. *McCane*, 573 F.3d at 1049.

89. Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 352 n.12 (2005).

90. *See* Larson, *supra* note 76, at 1379–82; Marshall, *supra* note 71, at 709–10, 714; Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 82–84 (2009); Volokh, *supra* note 76.

"reverse engineer[ing]" what standard the *Heller* court applied to both the individual gun right and its exceptions.[91] At bottom, the standard explored by these scholars was one in which the handgun ban would be struck down while its exceptions, like the felon dispossession law, would be upheld. This approach, while preserving both the holding and dicta of *Heller*, seems unnecessary. The *Heller* Court stated that "the Second Amendment conferred an individual right to keep and bear arms" and compared this right to the First Amendment right of freedom of speech.[92] The Court further acknowledged that "[t]he Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns . . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[93] Because the *Heller* Court elevates the Second Amendment to the level of an individual right, it seems logical to conclude that laws restricting that right ought be subjected to a heightened level of scrutiny. This notion seems consistent with the suggestion of footnote four of the Supreme Court's holding in *United States v. Carolene Products*, which states that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the *first ten Amendments.*"[94] If, for example, strict scrutiny were to operate upon laws regulating gun ownership and use, then such regulations would have to be (1) narrowly tailored in order to (2) serve a compelling government interest. While there is little question that keeping guns out of the hands of criminals in order to ensure public safety is a compelling government interest, there is likewise little question that the absolute ban on felon gun possession sweeps in non-violent felons unlikely to misuse firearms, and excludes misdemeanants whose prior convictions have already demonstrated their willingness to use firearms dangerously.[95] Consequently, the holding of *Heller* may, as Judge Tymkovich suggests, call into question the validity of the statutes supported by the *Heller* dictum. If gun ownership is to be protected as an individual right and not a collective right, then the

91. Larson, *supra* note 76, at 1372.

92. District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008).

93. *Id*. at 2822.

94. 304 U.S. 144, 153 n.4 (1938) (emphasis added).

95. Larson, *supra* note 76, at 1380–82.

laws regulating gun ownership may have to be retooled to better conform to *Heller*'s core holding.

VI. CONCLUSION

The recognition of an individual right to bear arms in the Second Amendment represents a dramatic departure from a long-held view that the Second Amendment creates a collective right. Enshrining the Second Amendment as an individual right and not a collective right may ultimately necessitate reevaluation of the rationales supporting the lawful regulation of gun ownership and use.

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