



LCAV's Analysis of *Nordyke v. King*

I. Introduction

A. Summary of Decision

In *Nordyke v. King*, the Nordykes, owners of a business promoting gun shows in California, challenged an Alameda County ordinance prohibiting the possession of firearms or ammunition on County property. On April 20, 2009, the Ninth Circuit Court of Appeals upheld the ordinance, rejecting the Nordykes' Second Amendment, First Amendment, and equal protection claims.¹ However, the Ninth Circuit also became the first federal court to hold, in the wake of the United States Supreme Court's decision in *Heller*, that the Second Amendment is incorporated to apply against state and local governments through the Fourteenth Amendment. Without incorporation, the Second Amendment only limits the power of the federal government.

B. Implications of *Nordyke*

The court's ruling on the merits – that the County ordinance does not violate the individual right guaranteed by the Second Amendment – is a very positive result, and the opinion contains useful language emphasizing *Heller*'s limited scope. The *Nordyke* court reiterated that the core of the Second Amendment right is limited to “the ability of individuals to defend themselves in their homes with usable firearms.” Additionally, the court's remarks about government's valid role in protecting congregations of “great numbers of defenseless people” could be used to support a wide variety of firearms laws, including those relating to the possession of concealed weapons. The opinion also helps clarify First Amendment jurisprudence in this area.

At the same time, the *Nordyke* decision is a departure from Supreme Court and Ninth Circuit case law that has consistently held that the Second Amendment does not apply to the states. The Supreme Court explicitly avoided addressing incorporation in *Heller*, although language in that case suggests that the Second Amendment is a fundamental right. Still, it is surprising that the *Nordyke* court engaged in an incorporation analysis at all, given its conclusion that the ordinance withstood a Second Amendment challenge. Other post-*Heller* courts have upheld state statutes without definitively resolving the incorporation question, holding that the statutes survive Second Amendment challenges regardless of whether the Amendment is incorporated or not.²

¹ *Nordyke v. King*, No. 07-15763 (9th Cir. filed April 20, 2009).

² See, e.g., *People v. Flores*, 86 Cal. Rptr. 3d 804 (Cal. Ct. App. 2008); *State v. Hunter*, 195 P.3d 556 (Wash. Ct. App. 2008). Other courts have deferred to circuit and Supreme Court precedent to leave the incorporation issue to the Supreme Court. The Second Circuit, for example, recently dismissed a Second Amendment challenge to a New York state law on the basis that *Heller* did not invalidate the “longstanding principle” that the Amendment was not incorporated. *Maloney v. Cuomo*, 554 F.3d 56 (2d. Cir. 2009). Quoting circuit precedent, the court reasoned that “[w]here, as here, a Supreme Court precedent ‘has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.’”

Ultimately, *Nordyke*'s problems highlight the deficiencies in *Heller*, including the Supreme Court's over-reliance on a selective and ultimately unpersuasive reading of Second Amendment history, its failure to articulate a standard of review for Second Amendment legal challenges and its cursory reference to several categories of presumptively lawful regulations. Incorporation exacerbates these problems by exposing a vast array of state and local firearm laws to Second Amendment challenges.

The Nordykes have not announced whether they will seek rehearing of this decision by either the Ninth Circuit en banc or the United States Supreme Court. The County has done an outstanding job defending the ordinance during the nine-year course of this difficult litigation, which spawned several published decisions, each upholding the ordinance.³

A detailed discussion of the *Nordyke* decision follows.

II. The *Nordyke* Court's Ruling

A. *Heller* Overruled Ninth Circuit Precedent Holding that the Second Amendment was a Collective Right

The court began by addressing the Nordykes' argument that *Heller* compelled the court to grant them leave to amend their complaint to revive their Second Amendment claim, which had been rejected by the Ninth Circuit in a prior decision. The court summarily concluded that *Heller* "squarely overruled" the Ninth Circuit's previous decision in *Hickman v. Block*,⁴ that the Second Amendment protected only a collective right to bear arms, by recognizing an individual right to bear arms.

B. The Second Amendment is Incorporated Through Fourteenth Amendment Substantive Due Process

1. Supreme Court Precedent Precluded Only Two of the Three Forms of Application

With the *Hickman* question resolved, "the second obstacle facing the Nordykes" was whether the Second Amendment applied against state and local regulations. The court observed that *Heller* left open whether the Second Amendment applied to the states through the Fourteenth Amendment, and that three possible avenues for application existed: 1) direct application; 2) incorporation through the Fourteenth Amendment's Privileges or Immunities Clause; or 3) "selective" incorporation through the Fourteenth Amendment's Due Process Clause. The court concluded that the Supreme Court's nineteenth century cases rejecting application of the Second Amendment, *United States v. Cruikshank*⁵ and *Presser v. Illinois*⁶, held that the Second

³ See *Nordyke v. King (Nordyke I)*, 229 F.3d 1266 (9th Cir. 2000); *Nordyke v. King (Nordyke II)*, 44 P.3d 133, 138 (Cal. 2002); *Nordyke v. King, (Nordyke III)*, 319 F.3d 1185, 1188 (9th Cir. 2003).

⁴ 81 F.3d 98 (9th Cir. 1996).

⁵ 92 U.S. 542 (1875).

⁶ 116 U.S. 252 (1886).

Amendment could not be applied directly or incorporated through the Privileges or Immunities Clause.⁷

While both *Cruikshank* and *Presser* clearly state that the Second Amendment applies only to limit Congressional actions, the *Nordyke* court observed that neither of these cases evaluated whether the Second Amendment ought to be incorporated through the Due Process Clause, as both cases predated the development of the selective incorporation doctrine. Contrary to lower courts' widespread reliance upon these cases to reject Second Amendment incorporation arguments, the *Nordyke* court concluded that incorporation of the Second Amendment through due process remained potentially viable because there was "no Supreme Court precedent directly on point."

2. *Fresno Rifle Did Not Preclude Selective Incorporation Through the Due Process Clause*

The court next tackled its previous decision in *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*,⁸ in which a Ninth Circuit panel concluded that "[u]ntil such time as *Cruikshank* and *Presser* are overturned, the Second Amendment limits only federal action." While the County argued that this holding precluded incorporation, the Nordykes countered that *Fresno Rifle* had only raised (and ultimately rejected) arguments tied to direct application and incorporation under the Privileges and Immunities Clause, and had not reached selective incorporation under the Due Process Clause.

The court agreed with the Nordykes, citing two reasons for finding that the *Fresno Rifle* decision had not reached the question of whether the Second Amendment is selectively incorporated. First, *Fresno Rifle* relied upon *Cruikshank* and *Presser*, neither of which had addressed selective incorporation through the Due Process Clause. Second, examining the history of the *Fresno Rifle* litigation, the court found that neither party in that case had raised a selective incorporation argument.

With *Fresno Rifle* distinguished, the *Nordyke* court found no circuit precedent to prevent the court from examining the selective incorporation issue, which it viewed essentially as a matter of first impression.

3. *The Right to Bear Arms is a Fundamental Right*

Under the "selective incorporation" doctrine, a right is incorporated if it is "so fundamental that the Due Process clause guarantees it." The court noted the Supreme Court's formulation in *Duncan v. Louisiana*⁹ that whether a right is fundamental is a question of "whether...a procedure is necessary to an Anglo-American regime of ordered liberty." The *Nordyke* court noted the

⁷ Under the *Slaughter-House Cases*, the Privileges and Immunities Clause only protected the rights that derive from the Constitution of the federal government, not general civil rights that exist independent of (and existed prior to) citizenship. Because the Second Amendment protects a right that existed prior to the Constitution (like the First and Fourth Amendments), the court concluded, it could not be incorporated through the Privileges or Immunities Clause.

⁸ 965 F.2d 723 (9th Cir. 1992).

⁹ 391 U.S. 145 (1968).

Supreme Court’s formulation of the fundamental rights inquiry outside of the incorporation area, which held that “only those institutions and rights ‘deeply rooted in this Nation’s history and tradition’ can be fundamental rights protected by substantive due process.”

Extensively citing *Heller*’s historical analysis, the court remarked that “language throughout *Heller* suggests that the right is fundamental.” The court highlighted the parallels between *Heller*’s discussion of the history of the right to bear arms and the historical analysis of jury trials employed in *Duncan* (in which the Supreme Court held that the jury trial right was fundamental). Following a lengthy and selective examination of Blackstone, colonial texts, comments from the Founding Fathers, state constitutions, and post-Civil War materials, the court concluded that “powerful evidence” demonstrated “that the right to bear arms is deeply rooted in the history and tradition of the Republic, a right Americans considered fundamental at the Founding and thereafter.” The County argued that the English common law tradition did not recognize an individual right to possess a firearm, but the court deemed this contrary to *Heller*’s reading of history.

C. The County’s Ordinance Does Not Violate the Second Amendment

1. The Ordinance Does Not Meaningfully Burden the Right to Possess Firearms in the Home for Self-Defense

The Nordykes argued that the County’s ordinance indirectly burdened the right to bear arms for self-defense purposes by effectively eliminating gun shows and making it “more difficult to purchase guns.” Noting that *Heller* had not outlined a standard of review for laws implicating the Second Amendment, the court concluded that, “*Heller* tells us that the Second Amendment’s guarantee revolves around armed self-defense. If laws make such self-defense impossible in the most crucial place — the home — by rendering firearms useless, then they violate the Constitution.”

The court distinguished between government interference in exercising a constitutionally protected right and a government’s decision not to encourage or facilitate exercise of the right, citing holdings in its abortion cases which upheld regulations that limited access to abortion services. Thus, “although the Second Amendment...protects a right to keep and bear arms for individual self-defense, it does not contain an entitlement to bring guns onto government property.” As a result, the court concluded that “the Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it.”

2. The Ordinance Regulates Possession in Sensitive Places

The court also agreed with the County’s argument that *Heller* gave particular approval to laws prohibiting the possession of firearms in sensitive places such as schools and government buildings. Although *Heller* did not articulate a definition of a “sensitive place,” the *Nordyke* court observed that both schools and government buildings shared the common characteristics of being “important to government functioning” and being places where possession of firearms could harm “great numbers of defenseless people.” Therefore, although the County’s ordinance

prohibited possession in parks, recreational areas, historic sites, parking lots and the County fairground, it was not, as the Nordykes argued, overbroad. Rather, all of these (save parking lots¹⁰) were “gathering places where large numbers of people might congregate.”

D. The Court Rejected the Nordykes’ Additional Arguments

1. The County’s Ordinance Does Not Violate the First Amendment As Applied to the Nordykes

The court proceeded to examine the Nordykes’ First Amendment claim, which alleged that as applied to them, the ordinance impermissibly burdened their right to free speech. Because the County did not challenge whether the possession of firearms at a gun show involved protected speech, the court assumed that protected speech was implicated without deciding the point.¹¹ Still, a question existed as to what level of scrutiny was appropriate. If the ordinance was directed at suppressing free speech — as the Nordykes claimed, arguing that it was aimed at silencing the “gun culture” — it would merit strict scrutiny. The court found, instead, that the ordinance was unrelated to the suppression of speech — targeted at “gun violence, not gun culture” — and therefore ought to be evaluated under the multifactor *United States v. O’Brien*¹² standard. The court observed that the County had presented “a perfectly plausible purpose for the Ordinance: the reduction of gun violence on County property.”

Applying the *O’Brien* factors, the court found that the ordinance was within the County’s power to enact, could further the County’s interest in promoting public safety, was unrelated to the suppression of speech, and was no greater than necessary to prevent the danger of firearm possession on County property. As a result, the court held, the ordinance did not violate the First Amendment.

2. The County’s Ordinance Does Not Violate Equal Protection

The Nordykes alleged that the ordinance’s exceptions for firearm possession in theatrical productions violated equal protection. This exception had been motivated in part by the concerns of representatives from the Scottish Games, a group that reenacts historical military battles. The court dismissed this claim based on the Nordykes’ failure to identify a “control group,” a similarly situated group of people who were treated differently under the ordinance. The Scottish Games, for example, were “a very different kettle of fish from the Nordykes and their gun shows.”

E. Judge Gould’s Concurring Opinion

In a brief concurring opinion, Judge Gould offered additional thoughts on “the policies underlying the selective incorporation decision.” Judge Gould emphasized that, “the right to

¹⁰ The court’s distinction of parking lots from the other areas is strange, given that great numbers of people surely do gather in parking lots before and after events on County property.

¹¹ Although the County did not challenge the point, whether possession of firearms at gun shows implicate protected speech seems to be, at the least, a highly contestable point.

¹² 391 U.S. 367 (1968).

bear arms is a bulwark against external invasion,” noting that “a lawfully armed populace adds a measure of security for all of us and makes it less likely that a band of terrorists could make headway in an attack on any community before more professional forces arrived.” According to Judge Gould, the right also protects against the possibility “that even our own government could degenerate into tyranny.” Still, the judge recognized that the Second Amendment’s incorporation was “not inconsistent with the reasonable regulation of weaponry,” both in the types of arms available for in-home self-defense and in “reasonable regulation of rifles and handguns.”