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BEARING THE BURDEN OF DENIAL: OBSERVATIONS OF LOWER COURT DECISIONS MISAPPLYING SUPREME COURT PRECEDENT IN SECOND AMENDMENT CASES

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I. INTRODUCTION

THE Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1] Until recently, the text of the Second Amendment has been subject to little judicial interpretation.[2] However, after the Supreme Court decided *Heller*[3] and *McDonald*,[4] lower courts have been presented with questions concerning the scope of the Second Amendment by litigants across the country, and there is no turning back.[5] Most notably, *Heller* failed to specify the level of scrutiny that lower courts should apply to claimed Second Amendment violations.[6] Indeed, in oral arguments for *Heller*, Chief Justice Roberts

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

2. The Court intentionally left open many questions on the Second Amendment's application in Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008) "since this case [is] this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."

3. Heller, 554 U.S. at 635 (The Supreme Court decided that that the Second Amendment guarantees an individual's right to possess firearms, but did not come close in "clarify[ing] the entire field.").

4. McDonald v. City of Chi., 130 S. Ct. 3020 (2010).

5. *See* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (describing the scope of the Second Amendment as a "vast *terra incognita*").

6. *See generally* Andrew Peace, Comment, *A Snowball's Chance in Heller: Why* Decastro's *Substantial Burden Standard is Unlikely to Survive*, 54 B.C. L. REV. E. SUPP. 175,

was particularly sensitive to a litigant's request of the Court to articulate a standard of review for Second Amendment challenges, "I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?"[7]

With respect to the meaning of the Second Amendment, commentators hold two very distinct and different views.[8] One side believes that the Second Amendment grants and protects only a collective right to bear arms in a military context,[9] while the opposing group believes that the Second Amendment grants and protects an individual's right to possess firearms.[10] However, that is not the only hotly contested debate surrounding the Second Amendment. With the sad and unfortunate news of school shootings and shootings in populated public areas across the country exacerbating contentious political debate on state and local governmental gun control laws,[11] the Supreme Court must further tailor the scope of the Second Amendment given that lower courts are floundering in their attempt to interpret the Court's holding in *Heller*. Indeed, there are as many judicial interpretations to Second Amendment applications as there are local variations in contemporary handgun carry laws.[12] For instance, state laws differ in whether a permit is required to carry a defensive handgun outside the home;[13] whether a permit is available on a shall-issue basis to all citizens not within a limited set of specific exclusions, or is instead vested in the discretion of state or local officials;[14] which places

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180–82 (2013); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 704, 737 (2012).

7. Transcript of Oral Argument at 44, Heller, 554 U.S. 570 (No. 07-290).

8. *See* Heller, 554 U.S. at 577 (2008).

9. "The 'collective rights' view asserts that the Amendment secures to states the right to continue to organize and maintain an armed militia of citizens, which could be mobilized into a military force for the defense of the nation in time of need." CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 1313 (Vicki Been et al. eds., 4th ed. 2013).

10. "The 'individual rights' view asserts that the Amendment ensures an individual's right to possess firearms for any number of reasons." *Id.*

11. Eric Tucker, *Police say 3 dead after shooting at Maryland mall*, YAHOO! NEWS (Jan. 25, 2014), http://news.yahoo.com/police-3-dead-shooting-maryland-mall-174420449.html; Christopher Spencer, *Purdue University Shooting Reopens Gun Control Debate*, LIBERTY VOICE (Jan. 21, 2014), http://guardianlv.com/2014/01/purdue-university-shooting-reopens-gun-control-debate/ (detailing the many tragic shootings that have occurred since 2011 and the focus politicians have shown towards these tragedies).

12. *See* Drake v. Filko, 724 F.3d 426, 440–41 (3d Cir. 2013) (Hardiman, J., dissenting) (noting that in 2013, thirty-one states allowed open carry of a handgun without a permit, twelve states allowed open with a permit, seven states disallowed open carrying of a firearm, and forty-four states allow concealed carry of a handgun with a permit, while a remaining four allowed it without permit).

13. *Compare* ARIZ. REV. STAT. ANN. § 13-3102, 13-3112 (2011) (allowing open or concealed carry of handguns without a permit, but also making available an optional permit), *with* MINN. STAT. § 624.714 (2011) (requiring a state-issued permit to lawfully carry a gun). Michael P. O'Shea, *Modeling The Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 592–93 [hereinafter "O'Shea"].

14. Compare MICH. COMP. LAWS ANN. § 28.425b(7) (2009) (stating that county concealed weapons licensing boards "shall issue" a carry permit to all applicants who meet stated requirements), with MASS. GEN. LAWS ch. 140, §§ 121, 131 (2007) (granting local

are off-limits for legal handgun carry;[15] and the foundational question of whether carrying weapons in public is legal at all.[16]

This comment will offer a background of Second Amendment jurisprudence, detail a few recent cases concerning the right to carry a weapon outside the home, and present a critical analysis of Second Amendment protection via those cases, ultimately concluding that the Second Amendment extends outside the home and includes carrying a firearm in the public domain.[17] While this conclusion will conflict with the numerous federal courts that have held that the Second Amendment is limited to the home,[18] holdings that are not shocking given the political maelstrom regarding gun control in the United States,[19] I will show that the "constitutional right of armed self-defense is broader than the right to only keep and bear a firearm in one's home"[20] because, while the need for self-defense is "most acute"[21] in the home, the need for self-defense is also acute in public.

II. SUPREME COURT CONSTRUCTION AND INTERPRETATION OF THE SECOND AMENDMENT

A. THE FIRST SHOT: *DISTRICT OF COLUMBIA V. HELLER*

A District of Columbia law criminalized carrying unregistered firearms and prohibited the registration of handguns.[22] Dick Heller, a special officer for the District of Columbia who was authorized to carry a handgun

officials broad discretion to issue permits only to individuals they deem "suitable"). *See* O'Shea *supra* note 13.

15. Compare KAN. STAT. ANN. § 75-7c10(a)(16) (West 2011) (prohibiting carry in places of worship) and N.C. GEN. STAT. § 14-269.3 (2009) (prohibiting permit holders from carrying firearms in any establishment where alcoholic beverages are sold and consumed), with OKLA. STAT. tit. 21, §§ 1272.1, 1277 (2011) (designating neither restaurants nor churches as a prohibited place for permit holders, though elementary schools and bars are prohibited). *See* O'Shea *supra* note 13.

16. *See* O'Shea, *supra* note 13.

17. "[t]he leap from Heller to a right to carry is modest: accounts of the broad and longstanding acceptance of open carry from common law through ratification and incorporation dot both *Heller* and *McDonald* like white stones on a forest floor." James Bishop, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 921–22 (2012).

18. Federal and state court opinions holding that the Second Amendment does not confer a right that extends beyond the home. *See* aff'd sub nom. Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012); Moore v. Madigan, 842 F. Supp. 2d 1092, 1102 (C.D. Ill. 2012), rev'd, Moore, 702 F.3d 933; Moreno v. N.Y.C. Police Dep't, No. 10-cv-6269, 2011 WL 2748652, at *3 (S.D.N.Y. May 7, 2011); Kachalsky v. Cacace, 817 F. Supp. 2d 235, 264–65 (S.D.N.Y. 2011); Gonzalez v. Vill. of W. Milwaukee, No. 09CV0384, 2010 WL 1904977, at *4 (E.D. Wis. May 11, 2010), aff'd in part, vacated as moot in part, 671 F.3d 649 (7th Cir. 2012); Commonwealth v. Perez, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011); Williams v. State, 10 A.3d 1167, 1169, 1177 (Md. 2011); Little v. United States, 989 A.2d 1096, 1101 (D.C. 2010).

19. United States v. Maciondaro, 638 F.3d 458, 475 (4th Cir. 2011) (Niemeyer, J., concurring).

20. *Moore*, 702 F.3d at 935.

21. *Heller*, 554 U.S. at 628.

22. *Id.* at 574–75.

at the Thurgood Marshall Judiciary Building, challenged the law.[23] He wished to keep a handgun at home, but the District of Columbia (hereinafter "the District") refused his application for a registration certificate.[24] As a result, Heller subsequently filed a lawsuit against the District, arguing that its laws prohibiting the carrying of a firearm in the home without a license, among other things, violated the Second Amendment.[25]

First, the U.S. Supreme Court, in a majority opinion authored by Justice Scalia, divided the Second Amendment, as would a grammar teacher, into its prefatory clause ("A well regulated Militia, being necessary to the security of a free State") and its operative clause ("the right of the people to keep and bear Arms").[26] Justice Scalia noted that "a prefatory clause does not limit or expand the scope of the operative clause," and that the Court's opinion "will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose."[27] He then parsed the Second Amendment into its main clauses in order to define the meaning of each clause, as reflected in subparts a, b, and c of this subheading.[28]

1. The Operative Clause

a. "Right of the People"

Justice Scalia stated that the first pivotal feature of the operative clause of the Second Amendment is that it codifies a "right of the people."[29] The Court, engaging in an intertextual interpretation, stated that the phrase "right of the people" appears in the Constitution and Bill of Rights, in the First Amendment's Assembly and Petition Clause, in the Fourth Amendment's Search and Seizure Clause, and in the Ninth Amendment.[30] The Court noted that "[a]ll three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body."[31] Notably, there are other areas of the Constitution that used the phrase "the people" with no reference to "rights," such as Section 2 of Article I and the Tenth Amendment.[32] Moreover, because "those provisions arguably refer to 'the people' acting collectively . . . they deal with the exercise or reservation of powers, not rights." Indeed, "nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right."[33] Expounding on this argument, the Court stated that "in all six other provisions of the Constitution that men-

23. *Id.* at 575.
24. *Id.*
25. *Id.* at 575–76.
26. *Id.* at 577.
27. *Id.* at 578.
28. *Id.* at 579–99.
29. *Id.* at 579.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 579–80.

tion 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset."[34] As a result, there is a vast difference with "the militia" in the prefatory clause because "the militia" in colonial America consisted of a subset of "the people"—male, able-bodied, and bound within a certain age group.[35]

b. "Keep and Bear Arms"

In this section of the opinion, the Court began with the object ("Arms") of the two verbs in the clause ("keep and bear").[36] To determine the usage of the term "Arms" at the time of the passage of the Second Amendment, the Court used different editions of dictionaries that would shed light on the meaning the Framers intended when they used "Arms."[37] It set out the various definitions that applied, stating that the term "Arms" has been applied consistently over history as "weapons that were not specifically designed for military use and were not employed in a military capacity."[38] This finding allowed it to quickly and summarily rebut the "frivolous" argument that "only those arms in existence in the eighteenth century are protected by the Second Amendment."[39] In quickly disposing of this disingenuous argument made by some on the "collective right" side of the debate, it stated that just as the First Amendment protects modern forms of communications (such as computer transmissions and telephone calls), and the Fourth Amendment applies to modern forms of search (such as using enhanced thermal technology as a substitute to a physical invasion), the Second Amendment extends to all objects that constitute bearable arms, even those not in existence at the time the Second Amendment was passed.[40]

Much like the previous section of the opinion, the grammar and dictionary lesson of an English class continued as the Court turned its attention to defining the clauses "keep arms" and "bear arms," utilizing the previously referenced dictionaries to determine their meanings.[41]

> Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons." The

34. *Id.* at 580.
35. *Id.* at 580–81.
36. *Id.* at 581.
37. *Id.* (Justice Scalia used the 1773 edition of Samuel Johnson's dictionary, the 1771 edition of Timothy Cunningham's legal dictionary, and Webster's early nineteenth Century American Dictionary of the English Language). Justice Scalia is known for his citations to a wide array of dictionaries from history, and one can imagine that the shelves of his library are filled with dictionaries from different time periods.
38. *Id.*
39. *Id.* at 582. Indeed, even Sanford Levinson, a noted liberal, has stated that it is a disingenuous argument that "Arms" is limited to muskets. *See generally* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 654–55 (1989).
40. *Heller*, 554 U.S. at 582.
41. *Id.*

> phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to 'keep Arms' as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses."[42]

The Court continued its citation to historical dictionaries in stating that, at the time of the founding of the Constitution, as well as in contemporary usage to "bear" has meant to "carry."[43] Moreover, the Court supplemented its historical sources with an excerpt from a present day opinion, citing a dissenting opinion by Justice Ginsburg.[44] Furthermore, while the phrase implies that the carrying of a weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.[45] The Court then concluded, based on its review of founding-era sources, that to "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia.[46]

c. Meaning of the Operative Clause

The Court then combined its previous analysis of the textual elements of the Second Amendment to find that the Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," stating that like the First and Fourth Amendments, the Second Amendment codified a pre-existing right.[47] To support this assertion, it transitioned from a grammar lesson to a history lesson, relying on English history much more so than American history.[48] It was this English history that informed the drafters of the Second Amendment, as it had long been understood to be that English right, which was clearly an individual right, that was the predecessor to the Second Amendment.[49] Indeed, Blackstone, whose work is credited as "the preeminent authority on English law," cited the arms provision of the Bill of Rights as one of the En-

42. *Id.*

43. *Id.* at 584.

44. *Id.* (In analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg wrote that "a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" Muscarello v. United States, 524 U.S. 125, 143 (J. Ginsburg, dissenting opinion) (quoting BLACK'S LAW DICTIONARY 214 (6th ed. 1998)).

45. Heller, 554 U.S. at 584.

46. *Id.* at 584. (Citing prominent examples of nine state constitutional provisions written in the eighteenth century and the first two decades of the nineteenth century, which spoke of a right of citizens to "bear arms in defense of themselves and the state.").

47. *Id.* at 592.

48. *Id.* at 592–95. Justice Scalia detailed the suppression of political dissidents by the Stuart Kings between the Restoration and the Glorious Revolution, which caused the English to seek and obtain assurance from William and Mary that the Protestants would not be disarmed and would have a right to keep arms for defensive purposes. *Id.*

49. *Id.* at 593.

glishmens' fundamental rights.[50] Furthermore, Blackstone said of the right to possess arms, it is the "natural right of resistance and self-preservation," and "the right of having and using arms for self-preservation and defence."[51]

In concluding the discussion of the Operative Clause of the Second Amendment, and moving to the Prefatory Clause, the Court stated that

> There 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. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.[52]

2. Prefatory Clause

a. "Well Regulated Militia"

As a reminder, the Prefatory Clause of the Second Amendment states that "A well regulated Militia, being necessary to the security of a free State . . . ."[53] Furthermore, in defining this clause, it is paramount to be mindful of a principle set forth by the Court in an opinion three-quarters of a century ago consistent with the definition of the clause at the time of the founding, namely that "the Militia comprised all males physically capable of acting in concert for the common defense."[54] Therefore, following *stare decisis*, the adjective describing the "Militia," "well regulated," means only that the "Militia" is subject to proper discipline and training.[55]

b. "Security of a Free State"

The Court again engaged in an intertextual Constitutional analysis by stating that "security of a free state" meant the security of the free country, despite the fact that the term "State" refers to individual states in other parts of the Constitution.[56] The Court reasoned that the phrase "security of a free state" was used as a term of art in 18th century political discussions, and that it most closely meant a free polity.[57] The argument that the "security of a free state" did not refer to the security of each of the several states is buttressed by the fact that "the other instances of 'state' in the Constitution are typically accompanied by modifiers making

50. *Id.* at 593–94.
51. *Id.* at 594.
52. *Id.* at 595 (internal citations omitted).
53. U.S. CONST. amend. II.
54. *Heller*, 554 U.S. at 595 (citing United States v. Miller, 307 U.S. 174, 179 (1939)).
55. *Id.* at 597.
56. *Id.*
57. *Id.*

clear that the reference is to the several States[58] . . . [and] the term 'foreign state' in Article I and Article III shows that the word 'state' did not have a single constitutional meaning."[59]

3. Connection Between Prefatory and Operative Clauses

Having methodically interpreted the definition of the Prefatory Clause and the Operative Clause in an exhaustive manner, the Court was finally prepared to decide whether the Second Amendment created an individual right to bear arms.[60] Referring to 18th century English history, the Court stated:

> once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.[61]

The Court then discussed the manner in which English history formed the intention of the framers of the Bill of Rights and the purpose of the right to bear arms.

> The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. Federalists responded that . . . such a force could never oppress the people. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down. It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia.[62]

Finally, the Court buttressed its conclusion by noting the following: (1) state adoption of Second Amendment analogues was a strong indicator of Congressional thought during the framing of the Bill of Rights;[63] (2) legal scholars at the time of the founding understood the Second Amendment to protect an individual right independent of the militia;[64] (3) 19th cen-

58. "Each state," "several states," "any state," "that state," "particular states," "one state," "no state." *Id.*
59. *Id.*
60. *Id.* at 598.
61. *Id.*
62. *Id.* at 598–99.
63. *Id.* at 601–03.
64. *Id.* at 605.

tury cases interpreting the Second Amendment unanimously supported an individual right to bear arms apart from the militia;[65] (4) during Post-Civil War Reconstruction, it was plainly the understanding of Congress that the right of free African-Americans to bear arms, just like any other free man, was "one of three 'indispensable' 'safeguards of liberty . . . under the Constitution, a man's 'right to bear arms for the defense of himself and family and his homestead;'"[66] (5) every late 19th century legal scholar has interpreted the Second Amendment to secure an individual right unconnected with militia service;[67] and (6) that the Court's previous holding in *United States v. Miller*[68] is consistent with and positively suggests that the Second Amendment confers an individual right to keep and bear arms and that the *Miller* court says only that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[69]

Similar to most constitutionally protected rights, the right to bear arms guaranteed by the Second Amendment is limited.[70] Indeed, the Court stated that the Second Amendment is limited to the sorts of weapons in common use at the time of the founding, supporting the prohibition on the carrying of "dangerous and unusual weapons," such as M-16 rifles and similar weapons.[71] Gun rights activists argued that weapons used in the military, such as the M-16, should be protected under the Second Amendment because these weapons would be used in a modern day militia.[72] However, the Court dismissed this argument by stating that "the fact that modern developments may have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."[73]

4. *Application of the Second Amendment to the Ban and Heller's Conclusion*

The Court summarized the D.C. law succinctly as a law that "totally bans handgun possession in the home [and] requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable."[74] The Court then noted that the right to defend one's self is central to the Second Amendment and, therefore, the hand-

65. *Id.* at 610.
66. *Id.* at 616 (citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866)).
67. *Id.*
68. 307 U.S. 174 (1939)
69. *Heller*, 554 U.S. at 614–626.
70. *Id.* at 626. The Court set place many examples of limitations on the Second Amendment for those interested, namely "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as school and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.*
71. *Id.* at 627.
72. *Id.*
73. *Id.* at 627–28.
74. *Id.* at 628.

gun ban amounted to a prohibition of an entire class of "arms" that Americans have chosen for the lawful purpose of self-defense, especially the highly critical right in defending one's self, family, and property.[75] The Court then went a step further when speaking about the handgun ban and stated that

> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.[76]

In conclusion, the Court stated that the District's ban on handgun possession in the home and its prohibition against rendering a lawful firearm in the home operable for the purpose of immediate self-defense violated the Second Amendment.[77] However, the Court intentionally left open many Second Amendment questions stating that "since this case [is] this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[78]

B. The Supreme Court's Application of the Second Amendment to the States: McDonald v. Chicago[79]

Not long after deciding *Heller*, the Court was tasked with deciding whether the Second Amendment applied to the states via incorporation through the Fourteenth Amendment's Due Process Clause.[80] In *McDonald v. Chicago*, Justice Alito, writing for the Court, quickly summarized the challenged laws as unconstitutional by stating that they were very similar to those presented to the Court in *Heller*.[81] The Supreme Court relied heavily on the central holding in *Heller*,[82] and the five-Justice majority held that the right of an individual to possess a firearm for self-defense was "fundamental to *our* scheme of ordered liberty" and "deeply

75. *Id.*
76. *Id.* at 629.
77. *Id.* at 635.
78. *Id.*
79. 130 S. Ct. 3020 (2010).
80. *Id.* at 3026.
81. *Id.* Noting that "Chicago enacted its handgun ban to protect its residents 'from the loss of property and injury or death from firearms.'" *Id.* (internal citations omitted).
82. "[O]ur Central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *Id.* at 3044.

rooted in this Nation's history and tradition,"[83] and therefore applied to the States.[84]

However, like many recent controversial opinions by the Supreme Court, the Justices could not agree on their reasoning. Justice Alito, whose majority opinion was joined by Chief Justice Roberts, Justice Scalia, and Justice Kennedy held that the Second Amendment right is a fundamental Constitutional right applied to the states through the Fourteenth Amendment's Due Process Clause.[85] Reading much like *Heller*, Justice Alito exhaustively chronicled American history before, during and subsequent to the drafting of the Constitution, citing to America's adoption of England's belief that "the right to keep and bear arms was 'one of the fundamental rights . . . .'"[86]

Justice Thomas concurred in *McDonald*, but argued that the Second Amendment right to bear arms was protected by a more straightforward analysis, namely the Fourteenth Amendment's dictate that no state may "abridge the privileges or immunities of the United States."[87] He reasoned that the public believed the Privileges or Immunities Clause explicitly protected enumerated rights in the Constitution, which included the Second Amendment's right to bear arms.[88] As a result, he concluded, the Privileges or Immunities Clause guarantees the right to keep and bear arms, because this right was understood to be a privilege of American citizenship.[89]

III. THE BACKBONE OF THE SECOND AMENDMENT: WHAT WE KNOW FROM *HELLER* AND *MCDONALD*

Heller struck down, as a violation of the Second Amendment, a federal jurisdiction's ban on handgun possession and its ban on keeping operable firearms in the home for self-defense.[90] Indeed, *Heller* recognized that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," and that the "*central component* of the right" is self-defense.[91] Subsequently, the Supreme Court in *McDonald* held that the Second Amendment fully applied against to States.[92] Neither opinion addressed whether the Second Amendment protects the right to carry a firearm outside the home, but it was explicitly stated by the Court that in the Second Amendment context, "individual

83. *Id.* at 3036 (emphasis in original) (internal citations and question marks omitted).
84. *Id.* at 3026.
85. *Id.* at 3046 ("[I]f a Bill of Rights guarantee is fundamental from an American perspective, then . . . that guarantee is fully binding on the States and thus *limits* . . . their ability to devise solutions to social problems that suit local needs and values.").
86. *Id.* at 3036 (citing *Heller*, 554 U.S. at 594).
87. *Id.* at 3058–60 (Thomas, J., concurring).
88. *Id.* at 3077.
89. *Id.*
90. Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008).
91. *Id.* at 592, 599 (emphasis in original).
92. *McDonald*, 130 S. Ct. at 3026.

self-defense . . . [is] at the heart of the amendment's protection."[93] The Court did not decide *Heller* by resorting to tiers of scrutiny and balancing tests, but rather decided the case by conducting an analysis of "both text and history."[94] In holding that the central component of the right to bear arms is for self-defense purposes, the Court "suggest[ed] that the right has application outside the home, since the need for self-defense commonly arises there."[95]

IV. ILLINOIS' HIGH COURT FOLLOWS THE SEVENTH CIRCUIT IN STRIKING DOWN CHICAGO'S SECOND ATTEMPT TO LIMIT THE SECOND AMENDMENT IN *PEOPLE V. AGUILAR*: THE RIGHT TO CARRY OUTSIDE THE HOME

A. Facts

A Chicago police officer witnessed a crowd of young men harassing and vandalizing passing vehicles during an evening patrol.[96] In particular, the officer noticed that Aguilar was holding the right side of his waist during the young men's activities.[97] The officer called for nearby colleagues to assist him in his surveillance and forthcoming pursuit of the teenagers.[98] After the young men walked into a backyard and noticed the police pursuing them, Aguilar yelled an expletive and dropped the firearm that he was holding in his hand.[99] Significantly, the serial number on the gun had been filed off and the gun held "three live rounds of ammunition."[100]

B. The Law in Question

Aguilar, who was 17 years old at the time he committed the charged offense,[101] was convicted under a Chicago firearm law that stated:

> (a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly: (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm; [and] . . . (3) One of the following factors is present: (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense; (d) . . . Aggravated unlawful use of a weapon is a Class 4 felony. . . .[102]

93. O'Shea, *supra* note 13, at 609.
94. *Heller*, 554 U.S. at 595.
95. O'Shea, *supra* note 13, at 610–11 (detailing robbery statistics that *less* than one in eight armed robberies occurs in the victim's home).
96. People v. Aguilar, 2 N.E.3d 321, 323 (2013).
97. *Id.* at 323.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 328.
102. *Id.* at 409 (quoting 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)).

C. The Illinois Supreme Court's Discussion and Holding

The Illinois Supreme Court was faced with holdings by its state appellate court and a holding by the Seventh Circuit which diverged on the constitutionality of the statute that Aguilar was found guilty of violating.[103] Indeed, these holdings conflicted directly with one another, as both courts differed in their interpretation of the same provisions of the same statute at issue in the case.[104] The Illinois Supreme Court chose to follow the interpretation offered by its counterparts on the federal courts over those of its fellow state justices.[105] The court correctly stated that "neither *Heller* nor *McDonald* expressly limits the [S]econd [A]mendment's protections to the home," and both decisions strongly suggest, if not outright confirm, that the Second Amendment extends beyond the home.[106] Furthermore, since "individual self-defense" is "the central component" of the Second Amendment,[107] then it would make little to no sense to judicially interpret the Second Amendment to restrict that right to one's home because "[c]onfrontations are not limited to the home."[108] To that end, the Supreme Court in *Heller* stated that "the right to have arms . . . was by the time of the founding understood to be an individual right protecting against *both public and private* violence."[109] Therefore, because the Chicago statute at issue categorically prohibited an individual from possessing a firearm for self-defense outside the home, it constituted a total statutory ban on a specifically enumerated constitutional right.[110] As a result, the statute at issue violated the Second Amendment right to keep and bear arms.[111]

That being said, the Illinois Supreme Court refused an invitation to further extend protection of the Second Amendment to minors and instead decided that "the Second Amendment is not unlimited. . . . [T]he right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[112] In so stating, it looked to multiple federal court opinions that previously stated that the possession of handguns by minors is conduct that falls outside the scope of the Second Amendment's protection.[113]

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103. *Compare* People v. Moore, 987 N.E.2d 442, 443 (Ill. App. Ct. 2013); People v. Montyce H., 959 N.E.2d 221, 222–23 (Ill. App. Ct. 2011); People v. Mimes, 953 N.E.2d 55, 59–60 (Ill. App. Ct. 2011) *with* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

104. *Aguilar*, 2 N.E.3d at 327.

105. *Id.*

106. *Id.*

107. Dist. of Columbia v. Heller, 554 U.S. 570, 599 (2008).

108. *Aguilar*, 2 N.E.3d. at 327 (citing *Moore*, 702 F.3d at 935–36).

109. *Heller*, 554 U.S. at 594 (emphasis added).

110. *Aguilar*, 2 N.E.3d at 328.

111. *Id.*

112. *Id.* at 328–29 (quoting *Heller*, 554 U.S. at 626).

113. *See* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, Explosives, 700 F.3d 185, 204 (5th Cir. 2012); United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009) (noting that the "right to keep arms in the founding period did not extend to juveniles"); Powell v. Tompkins, No. 12–10744–WGY, 2013 WL 765339, at *16 (D. Mass. Feb.28, 2013)).

V. *DRAKE V. FILKO*[114]—IT'S A JERSEY THING: THE THIRD CIRCUIT MISFIRES WHEN FACED WITH AN INDIVIDUAL'S RIGHT TO CARRY IN PUBLIC, AND NEW JERSEY'S "JUSTIFIABLE NEED" REQUIREMENT

The challengers[115] in *Drake v. Filko* sought and applied for permits to carry handguns in public for self-defense.[116] According to New Jersey's Handgun Permit Law ("Handgun Permit Law"), New Jersey citizens that desired a permit to carry a handgun in public were first required to apply to the chief police officer in their municipality or to the superintendent of the state police.[117] In determining whether to grant or deny a permit application, the Handgun Permit Law provides:

> No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in 2C:58–3c. [which included numerous criminal history, age and mental health requirements], that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun.[118]

Thus, for a law abiding citizen who is familiar with handguns and has reached the age of majority, the real impediment to obtaining a permit to carry a handgun in public is that he or she must show a "justifiable need."[119] "Justifiable need" was defined as "the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."[120] The challengers' applications were denied because the statutorily-appointed government officials determined that the challengers failed to exhibit "justifiable need."[121] As a result, the challengers sued for declaratory and injunctive relief, arguing that when a state requires a law-abiding citizen to show a "justifiable need" in order to be granted a permit to carry a handgun in public, it violates the Second Amendment, as applied to the states through the Fourteenth Amendment.

The court began by detailing *Heller* and *McDonald*, correctly stating that "the Second Amendment confers *upon individuals* a right to keep and bear arms for self-defense . . . [and] the Second Amendment right . . . applie[s] equally to the states through the Fourteenth Amendment."[122]

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114. 724 F.3d 426 (3d. Cir. 2013).

115. The challengers consisted of a group of sympathetic, responsible, and law-abiding individuals that included a reserve sheriff's deputy, a civilian FBI employee, an owner of a business that restocks ATM machines and carries large amounts of cash, and a victim of an interstate kidnapping victim. *Id.* at 443.

116. *Id.* at 429.

117. *Id.* at 428.

118. *Id.* at 428 (citing N.J.S.A. § 2C:58–4(c)) (emphasis added).

119. *See id.*

120. *Id.* (internal citation and quotation marks omitted).

121. *Id.* at 429.

122. *Id.* at 430 (citing *Heller* and *McDonald* and noting that outside the home, lower courts "encounter [a] 'vast terra incognita'").

The Third Circuit then stated that there is a percolating issue as to whether the right to bear arms extends outside the home.[123] In fact, to begin its discussion, the court recognized the same Seventh Circuit opinion from 2012 that the Illinois Supreme Court found so persuasive when it concluded that Second Amendment protection extended outside the home.[124] Nonetheless, the *Drake* court believed that the *Moore* court read *Heller* too broadly[125] because *Heller* only "struck down a single law that 'ran roughshod' over D.C. residents' individual right to possess usable handguns *in the home*."[126] This was the Third Circuit's first mistake in its analysis, which is exhaustively detailed in Part VI. While the *Drake* court refused to answer whether the right to bear arms for the purpose of self-defense extends beyond the home, because it was "not necessary to [its] conclusion," it assumed for its analysis of the "justifiable need" requirement that the Second Amendment did guarantee such a right.[127] While dicta, reading between the lines, the Court gave a strong indication that, if faced with this issue, it would follow the Fourth Circuit in holding that the core of the Second Amendment right does not extend beyond the home.[128] This would be in opposition to the Seventh Circuit.[129]

The court then followed other lower courts' analysis of Second Amendment claims after *Heller* and *McDonald*.[130] In the first step of the analysis, the court turned its attention to the *Heller* Court's precept that "certain longstanding regulations are 'exceptions' to the right to keep and bear arms, such that the conduct they regulate is not within the scope of the Second Amendment."[131] Seeing this "rule" as a guidepost, the court found that New Jersey's "justifiable need" requirement qualified as "longstanding," and therefore was a "presumptively lawful" regulation.[132] The court supported its conclusion by stating that the require-

123. *Id.* at 430 (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89 (2d. Cir. 2012); United States v. Masciondaro, 638 F.3d 458, 475 (4th Cir. 2011); United States v. Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010)).

124. *Id.* (noting that while *Heller* did not expressly state a constitutional right to carry arms in public for self-defense, it "implies such a right").

125. *Id.* at 431 (citing *Kachalsky*, 701 F.3d at 89 (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008))).

126. *Id.* at 430–31 (citing Moore v. Madigan, which stated that "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside)".

127. *Id.* at 431–32.

128. *Id.*

129. *See id.* at 430–31, 433. *Contra* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

130. *Id.* at 429. First, the court asks whether the challenged law imposes a burden on conduct protected by the Second Amendment. If it does not, the analysis is terminated. If it does, the law is then evaluated under traditional means-end scrutiny. If it passes that test, the law is constitutional; it if does not, it is unconstitutional. United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

131. *Id.* at 431–32 (referring to *Heller*'s statement that the Second Amendment does not disturb laws against preventing "firearms [possession] by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings and identified these regulatory measures as "presumptively lawful ones." *Heller*, 554 U.S. at 571, 571 n.26 (internal quotation marks omitted)).

132. *Id.* at 431–32.

ment had existed in New Jersey for ninety years and that many states had enacted similar regulatory schemes, including New Jersey's neighbor, New York, who has had a similar regulatory system in place for over a century.[133] Of particular importance to the court was the fact that the standards applied by the licensing officials in determining whether to grant or deny an application for a handgun permit were "clear and specific," had been codified in the law, and had been explained in numerous judicial opinions.[134] This was the Court's second mistake in the opinion.

Significantly, though the court did not need to address the second step of the analysis, it did so to determine the level of scrutiny that the law in question would be subject to, i.e., rational basis, intermediate scrutiny, or strict scrutiny.[135] This is not surprising, as the court continued its deep desire to opine on matters not required for its decision.[136]

As a well-known fact, the Supreme Court failed to articulate the appropriate standard of review for Second Amendment challenges, though it did state that rational basis scrutiny and Justice Breyer's interest-balancing approach were not appropriate.[137] In determining that intermediate scrutiny applied, the court stated that intermediate scrutiny[138] should apply because the law in question did not touch the "core" of the Second Amendment, which is the right to possess usable handguns *in the home* for self-defense.[139] Couching the "core" of the Second Amendment as "in the home" is the court's third mistake, because the need for self-defense necessarily extends beyond the home.[140]

Significantly, other federal courts have followed suit in regards to an application of this level of scrutiny by stating that heightened scrutiny is only applicable when gun regulations substantially burden the Second Amendment by inhibiting a law-abiding citizen's ability to possess a firearm for self-defense.[141] "By default then, if Second Amendment rights are 'only minimally affect[ed],' the statute 'is not subject to any form of heightened scrutiny.'"[142]

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133. *Id.* at 431–35.

134. *Id.* at 434–35.

135. *Id.* at 435–36.

136. *See* BLACK'S LAW DICTIONARY 1177 (9th ed. 2009) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

137. *See* Rostron, *supra* note 6, at 787.

138. Intermediate scrutiny for Second Amendment analysis does not require the government interest to be compelling, but it does require that the government's actual interest be more than just legitimate. United States v. Marzzarella, 614 F.3d 85, 97–98 (3d Cir. 2010). Under this standard, the government's actual interest must be significant, substantial, or important, and requires a reasonable or substantial fit. *Id.*; Woolard v. Gallagher, 712 F.3d 865, 878–79 (4th Cir. 2013).

139. *Drake*, 724 F.3d at 430–31.

140. *See* O'Shea, *supra* note 13, at 610–11 (explaining that crimes such as armed robberies overwhelmingly occur outside the home and necessarily implicate a citizen's right to defend themselves against such criminal attacks).

141. *See, e.g.*, Kampfer v. Cuomo, No. 6:13-cv-82 (GLS/ATB), 2014 WL 49961, at *5–6 (N.D.N.Y. Jan. 7, 2014).

142. *Id.* at *6.

Then, the court stated the obvious, that protecting its citizens is a "significant, substantial and important" government interest,[143] and addressed whether there is a "reasonable fit" between New Jersey's interest in safety and the means chosen to accomplish this goal (i.e., the Handgun Permit Law and its "justifiable need" requirement).[144] By passing this law, the legislative body of New Jersey believed that looking into the future, issuing permits to only those who can show "a justifiable need" would combat the dangers and risk to the public, as well as to the individuals carrying firearms.[145] However, there is no evidence that the New Jersey legislature relied on any evidence to support this feel-good objective.[146] Indeed, the court in this case was presented with a scintilla of evidence "to show how or why its legislators arrived at this predictive judgment."[147] Nevertheless, the court essentially said that New Jersey's failure to present any evidence to support its prediction on the future was "no big deal."[148] Allowing a state that has passed legislation that the court itself "assumes," for the purpose of its analysis, to be constitutional, to satisfy an intermediate standard of review (which requires a fairly close tailoring between the means and ends)[149] through Miss Cleo-type[150] prognostications was the court's fourth mistake in its analysis.

Judge Hardiman dissented and stated that the "justifiable need" requirement does in fact burden activity protected by the Second Amendment, because the Second Amendment applies outside the home.[151] Hardiman then detailed the diversity of state gun laws, distinguishing between open-carry and concealed carry jurisdictions as well as shall-issue and may-issue jurisdictions.[152] Hardiman stated that in jurisdictions such as New Jersey, local authorities statutorily have more discretion in deciding who to grant permission to carry a handgun, and "the general desire to defend one's self or property is insufficient" for a permit to be issued.[153] However, he noted that as a result of the Supreme Court's finding in *McDonald* that the Second Amendment applied to the states, "certain policy choices [of states are now] off the table."[154] Hardiman ultimately disagreed with the majority's reasoning and holding by concluding that "New Jersey's justifiable need requirement unconstitutionally burdens conduct protected by the Second Amendment as interpreted

143. *Drake*, 724 F.3d at 437.
144. *Id.*
145. *Id.*
146. *See id.*
147. *Id.*
148. *See id.* at 437–39.
149. The court stated that while there is "conflicting empirical evidence as to the relationship between public handgun carrying and public safety, this does not suggest . . . that the 'fit' is not 'reasonable.'" *Id.* at 439.
150. *Miss Cleo Commercial-Call Me Now!*, YOUTUBE (Feb. 22, 2011), http://www.youtube.com/watch?v=pWyHiV3l3MA.
151. *Drake*, 724 F.3d at 443–44 (Hardiman, J., dissenting).
152. *Id.* at 441–42.
153. *Id.* at 442.
154. *Id.* (quoting *Heller*, 554 U.S. 570, 636 (2008)).

in *Heller* and *McDonald*."[155]

VI. CORRECTING THE MISTAKES OF THE THIRD CIRCUIT AND APPROPRIATELY APPLYING THE SECOND AMENDMENT TO ACTIVITIES OUTSIDE THE HOME

With some help from Judge Hardiman, I will now address many of the mistakes in the majority's reasoning, each in turn, which allowed the majority to conclude that the Second Amendment does not extend outside the home, and to hold that "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense [is] a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee."[156]

A. The Right to Carry in Public Necessarily Follows from *Heller* and *McDonald*

The first mistake made by the court was its reasoning in finding that New Jersey's "justifiable need" requirement does not burden behavior protected by the Second Amendment because that right has no application beyond the home.[157] A correct reading of *Heller* and *McDonald* leads to the conclusion that the Second Amendment "is as important outside the home as inside."[158] Therefore, the court in *Moore v. Madigan* did not read the Second Amendment too broadly,[159] but rather interpreted it correctly.

In *Heller*, the Supreme Court undertook an extensive historical analysis to determine the meaning of the words used in the Second Amendment, "specifically focusing" on "keep" and "bear" as being two *separate* rights.[160] In defining those terms, the Court stated that to "keep arms" meant to "have weapons" and to "bear arms" meant to "wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person."[161] Indeed, the Third Circuit's interpretation of *Heller* that "bearing" arms means "keeping" arms within one's home is strikingly odd given the definitions that the Supreme Court assigned to these words in *Heller*.[162] Indeed, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage."[163] Moreover, if the Second Amendment is limited to the home, a right to "keep" arms (i.e. to simply "have weapons") would have been sufficient without

155. *Id.* at 458 (Hardiman, J. dissenting).
156. *Id.* at 440.
157. *Id.*
158. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir.2012).
159. *Drake*, 724 F.3d at 431.
160. *Id.* at 444 (Hardiman, J., dissenting) (citing Heller, 554 U.S. 570, 582–84 (2008)).
161. *Id.*
162. *Id.*
163. Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).

an explicit guarantee of the right to "bear" arms as well.[164] Therefore, the Second Amendment *must* extend outside the home, otherwise "bear" would be read out of the Constitution and the Second Amendment—a cumbersome interpretation.

To be sure, the most fundamental canons of construction forbid any interpretation that would discard this language as meaningless or surplus.[165] Indeed, reading out "bear" from the Second Amendment would not interpret the Second Amendment "as a whole," and would "render[ ] . . . sections . . . 'inconsistent, meaningless, or superfluous.'"[166] Furthermore, the Supreme Court in *Heller* stated that self-defense was the *central component* of the Second Amendment.[167] While the Court did state that the need for self-defense of one's person, family, and property was *most* acute in one's home,[168] it would be an incorrect inference to conclude that its statement means that there is not an acute need for self-defense outside the home.[169] Rather, the Court's statement most logically implies that "some form of the right applies where that need is not most acute."[170] "Were it otherwise, there would be no need for the modifier 'most.'"[171]

Moreover, "[i]f the Second Amendment right were confined to self-defense *in the home*, the Court [in *Heller*] would not have needed to express a reservation for 'sensitive places' outside the home."[172] Indeed, the Supreme Court stated that the right to keep and bear arms was "'an individual right protecting against both public and private violence,' such as in case of armed resistance against oppression by the Crown."[173] Moreover, hunting and engaging in a militia are activities that occur *outside* the home, and were activities protected by the Second Amendment at the time of the founding.[174] Therefore, the majority's conclusory analysis in determining that the correct interpretation of the Second Amendment is limited to the home is incorrect.

While I do not argue that the holding of *Heller* is explicitly broader than its factual backdrop, the conclusion that the Second Amendment extends outside the home necessarily follows from the Supreme Court's opinion. Indeed, it is one thing to extrapolate rather than interpolate, but

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164. *Id.*

165. *See* Wright v. United States, 302 U.S. 583, 588 (1938).

166. Woods v. Carey, 722 F.3d 1177, 1183 (9th Cir. 2013) (quoting United States v. Fiorillo, 186 F.3d 1136, 1153 (9th Cir. 1999) (internal quotation marks omitted).

167. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

168. *Id.*

169. *Moore*, 702 F.3d at 935.

170. United States v. Masciondaro, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., concurring).

171. Drake v. Filko, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting).

172. *Masciondaro*, 638 F.3d at 468 (Niemeyer, J., concurring) (emphasis in original).

173. *Drake*, 724 F.3d at 444 (citing Heller, 554 U.S. 570, 594 (2008)).

174. *Masciondaro*, 638 F.3d at 468 (Niemeyer, J., concurring) (citing Heller, 554 U.S. at 598–99).

there is only one correct way to read the Court's *explicit* words.[175] In this case, it is similar to a one-way street, rather than a four-corner intersection. Since the Court in *McDonald* described *Heller's* holding as encompassing a general right to self-defense, first by establishing the legal principle embodied in the Second Amendment and then by demonstrating and explaining how it was applied, the Court confirmed that the legal principle it set forth in *Heller* was not confined to the facts of that case.[176]

B. Presumptively Lawful Regulations with a Narrow Lense of Abstraction

The second mistake in the majority's analysis was its finding that the "justifiable need" requirement did not violate the Second Amendment because the New Jersey law was presumptively lawful as having been on the books for approximately ninety years.[177] When the Supreme Court in *Heller* listed presumptively lawful regulations it listed "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," though this list was not exhaustive.[178] Notably, longstanding state regulations were not included in this list. Even more damning to the majority's reasoning, however, is the fact that "[i]f the Second Amendment right were confined to self-defense in the home, the Court would not have even needed to express a reservation for 'sensitive places' outside of the home."[179] Furthermore, previous federal courts faced with Second Amendment challenges have "declined to find that regulations not mentioned in *Heller* fall within its 'longstandingness' exception without a clear historical pedigree.[180]

Additionally, in finding that New Jersey's "justifiable need" requirement was a longstanding exception, because some form of a "need" requirement has existed in New Jersey since 1924, the majority ignored the significant evolution that this New Jersey law had undergone since 1924.[181] Indeed, the law has been amended many times, and until 1966, it was legal in New Jersey to openly carry firearms without a permit; only concealed carry of firearms has been banned since 1924.[182] Hardiman detailed why, among other reasons, this fact was significant:

> This distinction is significant because courts have long distinguished between these two types of carry, holding that although a State may

175. In *Heller*, "[the Court] held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a . . . law that banned the possession of handguns in the home." McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

176. *Drake*, 724 F.3d at 445 (Hardiman, J., dissenting).

177. *Drake*, 724 F.3d at 431–35.

178. *Heller*, 554 U.S. at 626.

179. *Masciondaro*, 639 F.3d at 468 (Niemeyer, J., concurring).

180. *Drake*, 724 F.3d at 447 (Hardiman, J., dissenting) (citing to Heller v. Dist. of Columbia, 670 F.3d 1244, 1255 (D.C. Cir. 2011) (Heller II); United States v. Chester, 628 F.3d 673, 681 (4th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010)).

181. *Id.*

182. *Id.* at 447–49.

> prohibit the open *or* concealed carry of firearms, it may not ban *both* because a complete prohibition on public carry violates the Second Amendment and analogous state constitutional provisions.[183]

Hardiman then detailed multiple state court opinions from Alabama, Georgia, and Tennessee from the mid to late 1800's.[184]

Of significance was *Nunn v. State*, a Georgia Supreme Court opinion[185] that the Supreme Court relied upon in determining the historical meaning of the Second Amendment.[186] The Georgia high court in *Nunn* stated that a statute that prohibited the carrying of concealed pistols was unconstitutional because it also contained a prohibition on openly carrying concealed arms.[187] Notably, the *Heller* Court stated that the *Nunn* opinion "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause."[188] Therefore, the Third Circuit incorrectly relied upon historical precedent in holding that New Jersey's "justifiable need" requirement was a "longstanding" and "presumptively lawful" regulation and therefore did not violate the Second Amendment.[189]

Moreover, the majority arguably chose its level of abstraction too broadly in determining the "longstandingness" of the New Jersey handgun ban, reminiscent of Supreme Court justices disagreeing over the level of generality or specificity in defining whether certain rights have been traditionally protected under substantive due process.[190] The dissent points out that the majority is overly broad in its selection of laws to exhibit the longstanding tradition of New Jersey regulation of guns, because it chooses laws that have regulated public carrying of firearms, rather than examining "whether there is a longstanding tradition of laws that condition the issuance of permits on a showing of a greater need for self-defense than that which exists among the general public."[191] Notably, this type of generality in examining whether regulation is longstanding has been criticized by judges from other courts as inappropriate as well.[192] "Demonstrating that there has been a longstanding tradition of regulating the public carry of firearms tells us nothing about whether

183. *Id.* at 449.

184. *Id.*

185. Nunn v. State, 1 Ga. 243 (1846).

186. *Drake*, 724 F.3d at 449 (Hardiman, J., dissenting).

187. *Nunn*, 1 Ga. at 251.

188. *Heller*, 554 U.S. 570, 612 (2008).

189. *See Drake*, 724 F.3d at 440.

190. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997); Lawrence v. Texas, 539 U.S. 558 (2003); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006).

191. *Drake*, 724 F.3d at 451 (Hardiman, J., dissenting).

192. *See* Heller v. Dist. of Columbia, 670 F.3d 1244, 1294 (D.C. Cir. 2011) (Heller II) (Kavanaugh, J., dissenting) ("But to rely on those laws . . . is to conduct the *Heller* analysis at an inappropriately high level of generality—akin to saying that because the government traditionally could prohibit defamation, it can also prohibit speech criticizing government officials.").

New Jersey's justifiable need requirement . . . is longstanding."[193]

C. If the Government Regulation Doesn't Fit, You Can't Say It Does

Finally, in applying intermediate scrutiny to New Jersey's handgun ban, the majority chose the right standard, but did not in fact apply that standard, a reminder that a court can set out the proper standard but fail to correctly apply the standard to the law in question.[194]

In *Drake*, under the intermediate standard, New Jersey was required to show that the law in question (i.e., the means) reasonably fit the State's interest (i.e., the ends).[195] New Jersey's purpose in passing the "justifiable need" requirement was to reduce the misuse and accidental use of guns[196] and also limit the use of guns as much as possible.[197] This regulation is far too broad and all encompassing to be categorized as narrowly tailored in any sense of the word.

Surprisingly however, this is not the only court that has failed in applying intermediate scrutiny to Second Amendment claims.[198] For instance, "New Jersey presented no evidence as to how or why its interest in preventing misuse or accidental use of handguns is furthered by limiting possession to those who can show a greater need for self-defense than the typical citizen."[199] In showing the danger this presents, the dissent offers a great example to demonstrate "the absence of fit between the justifiable need requirement and reducing misuse or accidental use of handguns."[200] Indeed, the majority acknowledges this very fact, but nevertheless eschews it in deciding the present case.[201]

The majority not only concedes its failure to apply intermediate scrutiny but may in fact be applying rational basis scrutiny to the law in question. As a result, the majority runs dangerously close to violating the Supreme Court's statement in *Heller* that Second Amendment claims are *not* subject to mere rational basis scrutiny, because then "the Second Amendment would be redundant with the separate constitutional

193. *Drake*, 724 F.3d at 452 (Hardiman, J., dissenting).

194. For example, *see generally* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (holding that the Fifth Circuit failed to apply strict scrutiny, though it purportedly applied it to the Constitutional issue of the case).

195. *Drake*, 724 F.3d at 453 (Hardiman, J., dissenting).

196. *See id.*

197. Siccardi v. State, 284 A.2d 533, 540 (N.J. 1971).

198. "[Some] lower courts have . . . applied an impotent form of intermediate scrutiny that effectively gives lawmakers a blank check to override Second Amendment rights," because "public safety is always deemed an important interest," and courts give deference to the legislature's view that a "challenged law will advance public safety." *See* Petition for Writ of Certiorari for Plaintiff-Appellant, Nat'l Rifle Ass'n. v. McGraw, No. 12-10091 at 20 (Sept. 24, 2013) (referring to Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 714 F.3d 334 (5th Cir. 2013)).

199. *Drake*, 724 F.3d at 453 (Hardiman, J., dissenting).

200. *See id.* at 455.

201. *Id.* at 437.

prohibitions on irrational laws, and would have no effect."[202] While "States have considerable latitude to regulate the exercise of the [Second Amendment] in ways that will minimize that risk, . . . States may not seek to reduce the danger by curtailing the right itself."[203]

Moreover, while courts must accord substantial deference to the predictive judgments of state legislatures, States are not thereby "insulated from meaningful judicial review."[204] "Rather, [a court] must 'assure that, in formulating its judgments, the legislature has drawn reasonable inferences based on substantial evidence.'"[205] Therefore, the majority again shows its misunderstanding of the intermediate standard "[b]y deferring absolutely to the New Jersey legislature."[206]

VII. THE FOURTH CIRCUIT ALSO MISSES THE MARK ON MARYLAND'S "GOOD AND SUBSTANTIAL REASON" REQUIREMENT

In *Woolard v. Gallagher*, the Fourth Circuit reversed the district court's holding that Maryland's good and substantial reason requirement was unconstitutional.[207] Similar to the New Jersey regulation in *Drake*, the Maryland law required an individual to have a permit issued to them before the individual could carry, wear, or transport a firearm.[208] An individual could apply for a permit, which is issued by the state police, after a finding that the applicant was an adult with no criminal record, drug dependency, or violent tendencies.[209] However, in order to be granted a permit, the applicant must have a "good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger."[210] Furthermore, under the Maryland law there are four ways an applicant can satisfy the "good and substantial reason" requirement:

> (1) for business activities, either at the business owner's request or on behalf of an employee; (2) for regulated professions (security guard, private detective, armored car driver, and special police officer); (3) for "assumed risk" professions (e.g., judge, police officer, public defender, prosecutor, or correctional officer); and (4) for personal protection.[211]

Thus, there were ways to satisfy the requirement without an applicant having to show "personal protection." However, the challengers did not

202. *Heller*, 554 U.S. 570, 628 n.27 (2008).
203. *Drake*, 724 F.3d at 456 (Hardiman, J., dissenting).
204. *Heller II*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 666 (1994)).
205. *Id.*, 670 F.3d at 1259 (quoting *Turner*, 520 U.S. at 195).
206. *Drake*, 724 F.3d at 457 (Hardiman, J., dissenting).
207. Woolard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013).
208. *Id.* at 868–69.
209. *Id.* at 869.
210. MD. CODE ANN., CRIM. LAW § 4–203(b)(6).
211. *Woolard*, 712 F.3d at 869–70.

fall within these exceptions and therefore alleged that the "good and substantial reason" requirement for obtaining a handgun permit was violative of the Second Amendment.[212]

The court commenced its analysis by setting forth the mode of analysis that federal courts have manufactured for Second Amendment claims in the absence of guidance from the Supreme Court:[213]

> [t]he first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.[214]

As many courts have similarly done, the Fourth Circuit assumed, for the sake of argument, that the first requirement of the analysis was satisfied and moved immediately to answering whether the state's regulation was sufficiently tailored to its purpose.[215] Notably, the "reasonable fit" required by the court between the ends and the means was disproportionately low after assuming that the regulation fell within the scope of the Second Amendment's guarantee. The court stated: the test is satisfied if Maryland's interests are "substantially served by enforcement of the" good-and substantial reason requirement.[216] In fact, the court stated that Maryland had "clearly demonstrated that the good and substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public."[217]

The court showed tremendous deference, exhibiting rational basis scrutiny more so than intermediate scrutiny. As a result, the court incorrectly refused to accept the challengers' argument that the Maryland law requiring "good and substantial reason" functioned as a rationing system[218] designed to limit the number of handguns in Maryland, because even assuming that fewer guns results in less crime, a rationing system that burdens the exercise of a fundamental constitutional right by making the right more difficult to exercise cannot be considered reasonably adapted to a government interest, for that system burdens the right too broadly.[219]

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212. *Id.* at 870.

213. *Id.* at 874–75 (citing to 3rd Circuit, 4th Circuit, 5th Circuit, 6th Circuit, 7th Circuit, 10th Circuit, and D.C. Circuit opinions from 2010–2012).

214. *Id.* at 875 (quoting United States v. Chester, 628 F.3d 673 (4th Cir. 2010)) (alteration in original).

215. *Id.* at 876–78.

216. *Id.* at 878 (quoting United States v. Carter, 669 F.3d 411, 417 (4th Cir. 2012)).

217. *Id.* at 879.

218. *See id.* at 881.

219. *Id.* at 877–78.

The court rebutted this argument by stating that the right to be armed for self-defense at home is subject to strict scrutiny, while the right to be armed for self-defense outside one's home is subject to intermediate scrutiny.[220] However, imposing strict scrutiny as the standard for Second Amendment cases in the context of one's home is wholly without support, as the Supreme Court itself has refused to set forth a standard.[221] Rather, the Court explicitly stated that the law in *Heller* would fail under any standard.[222] Without a doubt, the drafters of the Second Amendment understood that this extremely powerful right to "keep and bear arms" may be used negligently, and that states would have relatively broad discretion in regulating the exercise of the right; that being said, a state cannot reduce the danger by curtailing the right itself.[223]

The *Woolard* court then referred to a recent Second Circuit opinion that addressed a similar statute, and found itself in agreement with its reasoning because the statute in question there and the law in question in *Woolard* both constituted "a more moderate approach" to protecting public safety and preventing crime than a wholesale ban on the public carrying of handguns.[224] However, a rationing system, no matter how "moderate" the approach is considered, violates the Second Amendment if law-abiding citizens are prevented from lawfully carrying a weapon in a public sphere where the need for self-defense measures is arguably at its peak.[225]

VIII. CONCLUSION: SECOND AMENDMENT PROTECTION EXTENDS TO BEARING ARMS IN PUBLIC

Heller and *McDonald* do not explicitly decide whether the individual right to bear arms, for self-defense purposes, extends beyond one's home and into the public sphere.[226] Significantly, "[g]un violence is an intractable problem throughout the United States."[227] Indeed, gun violence is front and center on many news reports, as it is occurring with more frequency in sensitive places such as schools.[228] Nevertheless, the documentation of misuse or abuse of firearms is not new.[229]

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220. *Id.* at 878.

221. During oral argument in *Heller*, Chief Justice Roberts even addressed the fact that no standard was being set forth by the Court: "I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?" Transcript of Oral Argument at 44, Heller, 554 U.S. 570 (No. 07-290).

222. Heller v. Dist. of Columbia, 554 U.S. 570, 628–29 (2008).

223. Drake v. Filko, 724 F.3d 426, 456 (3d Cir. 2013) (Hardiman, J., dissenting).

224. *Woolard*, 712 F.3d 865 at 880–81 (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 98–99 (2d. Cir. 2012)).

225. *See Drake*, 724 F.3d at 444 (Hardiman, J., dissenting).

226. *Id.* at 430 (majority opinion).

227. *Id.* at 457 (Hardiman, J., dissenting).

228. *See* Tucker, *supra* note 10; *Spencer*, *supra* note 10.

229. *Drake*, 724 F.3d at 456 (Hardiman, J., dissenting) (noting that those that drafted the Second Amendment were aware of the risk attendant to the right to bear arms under the Second Amendment).

Because the Supreme Court in *Heller* failed to specify the level of scrutiny required or offer much guidance to lower courts as to the application of the Second Amendment outside the home,[230] it has led to a deep split in the lower courts on both levels[231]—a split in which some courts are ignoring explicit Supreme Court language and failing to apply appropriate scrutiny to laws that burden explicit constitutional rights.

A clear reading of the Second Amendment's text, along with the Supreme Court's guidance in *Heller* and *McDonald,* leads to an inescapable conclusion: the right to bear arms under the Second Amendment extends outside the home. This conclusion is supported by *Heller*'s statement that the core of the Amendment is "self-defense,"[232] which is needed just as much outside the home as inside the home.[233] Furthermore, the right to possess a firearm outside the home is supported by the text of the Second Amendment, as interpreted in *Heller*, because it protects the right to "bear"—a right which extends beyond the home.[234] Stated succinctly, the core of the Second Amendment is the right to carry weapons for "self-defense," and while the need for self-defense is "most acute" in the home,[235] the need for self-defense is undoubtedly acute outside the home as well.

230. *See generally* Andrew Peace, Comment, *A Snowball's Chance in Heller: Why* Decastro's *Substantial Burden Standard is Unlikely to Survive*, 54 B.C. L. REV. E. SUPP. 175, 180-82 (2013); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 704, 737 (2012).

231. *See* Rostron, *supra* note 230, at 725–62.

232. *See* United States v. Masciondara, 638 F.3d 458, 468 (4th Cir. 2011) (Neimeyer, J., concurring).

233. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 609-10 (explaining that crimes such as armed robberies overwhelmingly occur outside the home and necessarily implicate a citizen's right to defense themselves against such criminal attacks).

234. *See Heller*, 554 U.S. 570, 584–92 (2008).

235. *Id.* at 628.