ADDRESSING THE SUPREME COURT'S "CONSTITUTIONAL ORPHAN": DETERMINING THE SCOPE OF THE SECOND AMENDMENT IN PUBLIC, ALONG WITH ITS NEED TO BE REGULATED

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I. INTRODUCTION

Part of what makes the United States of America "the land of the free" is the first ten amendments to its Constitution: The Bill of Rights.

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The Founding Fathers understood that all people are born with certain inalienable rights. That is, certain rights which the government does not innately grant to the people, nor take away. Rather, the people are deserving of these rights by their mere presence on Earth.[1]

However, no right can be truly unlimited. Take, for example, the Freedom of Speech Clause of the First Amendment.[2] Although the right of free speech is protected by the First Amendment, it does not protect one who wishes to use speech to spread damaging defamatory statements about another person.[3] Likewise, the Establishment Clause of the First Amendment,[4] does not prohibit the government from making any law which may have a disparaging effect on people of a certain religion.[5] Thus, the following questions must always be asked: Where do we draw the line? How far do our constitutional rights extend under the Bill of Rights?

This Note will focus on the Second Amendment.[6] First, it will take a brief look into some of the key pieces of pre-nineteenth century English history regarding the legality of the possession of firearms. Then, with regard to the what rights are protected under this amendment, this Note will discuss the following topics: (a) Was this right ever intended for individuals, or was it only intended for members of the armed forces? (b) If a right for individuals to possess a firearm exists, *where* does that right exist? Only in the home? Outside the home as well? (c) If it does exist outside the home as well, *how* may a carrier go about the carry of a firearm? Must the weapon be open, concealed, or either? These questions have been left

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1 *See Equal and Inalienable Rights*, DOCUMENTS OF FREEDOM, https://www.docsoffreedom.org/student/readings/equal-and-inalienable-rights (last visited Oct. 16, 2018) ("The American Founders, however, argued that people have rights regardless of whether they are able to put them into practice. This is why they called these rights 'natural.' They are part of what it means to be a person.").

2 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

3 *See Is Slander Protected by the First Amendment?*, LAW DICTIONARY, https://thelawdictionary.org/article/slander-protected-first-amendment/ (last visited Oct. 16, 2018).

4 *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

5 *See, e.g.*, Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("[We] have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (internal quotations and citations omitted).

6 U.S. CONST. amend. II ("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.").

unanswered by the Supreme Court for too long, prompting Justice Thomas to refer to the Second Amendment as "[the] Court's constitutional orphan."[7]

After a discussion of what rights are protected by the Constitution, the next questions that must be answered are as follows: What are some of the arguments for robust or feeble gun control? How should legislatures throughout the country go about regulating firearm ownership? How are we to know which methods would be effective?

II. DETERMINING THE SCOPE OF THE SECOND AMENDMENT OUTSIDE THE HOME

A. Pre-Nineteenth Century English Carry Laws

In their most recent landmark Second Amendment case, *District of Columbia v. Heller*, the Supreme Court opted to consider the pre-Second Amendment English history of gun laws in determining the founders' intent regarding the scope of the amendment.[8] As the Court said, "[w]e look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."[9] Meaning, by knowing what was considered by the Founders to be reasonable and unreasonable restrictions on the possession of firearms, we can have a better idea of the scope of the right protected by the Second Amendment. For the purposes of this Note, the following is a very brief discussion of a couple of the basic pieces of relevant history.

The earliest English law limiting the possession of firearms to explore is the 1328 Statute of the Northampton.[10] English gun regulation statutes throughout subsequent centuries all stem from this statute.[11] It reads, in relevant part, as follows:

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7 Silvester v. Becerra, 138 S.Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

8 *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

9 *Id.* at 592 (emphasis in original); *see also* United States v. Cruikshank, 92 U.S. 542, 591 (1876) ("This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . .").

10 2 Edw. 3, c. 3 (1328) (Eng.).

11 *See* Peruta v. Cty. of San Diego, 824 F.3d 919, 930 (9th Cir. 2016) ("The Statute of Northampton would become the foundation for firearms regulation in England for the next several centuries.").

> [No] Man great nor small, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them . . . be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure.[12]

The statute clearly regulated the possession of weapons in the public sphere. What is not as clear, however, is the extent to which the statute intended to regulate. Some argue that the statute was intended to be a broad restriction on the carrying of firearms in public to preserve the peace.[13] On the other hand, some Second Amendment scholars contend that the statute was not prohibiting the mere act of carrying a firearm in public; it only prohibited carrying a firearm in a manner that would threaten and disturb the peace.[14]

The next important part of English law, which must be recognized whenever discussing the scope of the Second Amendment, is the parallel provision in the 1689 English Bill of Rights, which reads as follows: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[15] This right, and whatever it included, is most indicative of what the Founders meant to protect with the Second Amendment.[16]

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12 *Id.* at 930.

13 *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 8 (2012) ("A textual reading of the Statute supports a broad prohibition on the public carrying of arms to prevent public injury, crime, and breaches of the peace.").

14 *See id.* ("In contrast, a number of Second Amendment commentators claim the Statute of Northampton cannot be interpreted in this light. For instance, David B. Kopel and Clayton Cramer claim the Statute requires 'arms carrying with the specific intent of terrorizing the public.' David T. Hardy similarly deduces the Statute stands for the punishment of dangerous conduct, not the act itself. He believes the 'key to the offense was not so much the nature of the arm, as the specific intent to cause terror.' Also, Eugene Volokh claims the Statute must be understood 'as covering only those circumstances where carrying of arms was unusual and therefore terrifying.'").

15 1 W. & M., c. 2, § 7.

16 District of Columbia v. Heller, 554 U.S. 570, 593 ("This right has long been understood to be the predecessor to our Second Amendment."); *see* E. DUMBAULD,

One caveat, though. The Ninth Circuit has stated that, "[w]hile English law is certainly relevant to [a Second Amendment] historical inquiry," it is certainly not the end-all and be-all when determining the exact intent of the Founders with regards to the scope of the Second Amendment.[17]

B. The Second Amendment

In 1791, a few years after the ratification of the Constitution, the states ratified the Bill of Rights, which make up the first ten amendments of the Constitution.

Perhaps the single most important thing to keep in mind whenever discussing these amendments is the following excerpt from the Supreme Court's 120+ year-old opinion in *Robertson v. Baldwin*:[18] "The law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors . . . ."[19]

The text of the Second Amendment states the following: "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."[20]

Obviously, this prohibits Congress from making a federal law which would "infringe" upon the rights of those who are protected from "keeping and bearing arms." What about the states? May they enact a law which violates the Second Amendment? This question was answered by the Supreme Court in *McDonald v. City of Chicago, Illinois*.[21] There, the majority of the Court held that Section 1 of the

THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 51 (1957); W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (1825).

17 Young v. Hawaii, 896 F.3d 1044, 1065 (9th Cir. 2018) ("While English law is certainly relevant to our historical inquiry . . . our aim here is not merely to discover the rights of the English. Indeed, there is a scholarly consensus that the 1689 English right to have arms was less protective than its American counterpart.") (emphasis and citations omitted).

18 Robertson v. Baldwin, 165 U.S. 275 (1897).

19 *Id.* at 281.

20 U.S. CONST. amend. II.

21 *See* McDonald v. City of Chicago, 561 U.S. 742 (2010).

Fourteenth Amendment [22] incorporates the Second Amendment against the States.[23]

C. The Purpose of the Second Amendment

One can easily understand why most of the Bill of Rights is in the Constitution of the United States. However, the purpose of the Second Amendment is not as obvious. Why, according to the Founding Fathers, is a right to keep and bear arms as important as the right to free speech? What would happen already if this right did not exist?

The Supreme Court spoke on this question in *Heller*.[24] There, the Court explained that there is one primary fear of what can potentially happen in a country which did not recognize this right: government tyranny.[25] As the Court put it, history had taught the Founders "that the way tyrants had eliminated a militia consisting of able-bodied men was . . . simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents."[26] A history of such conduct by the government in England is precisely why the 1689 English Bill of Rights included this right.[27]

To someone living in our day and age in the United States of America, the concept of a tyrannical American government is a very difficult scenario to envision ever happening. The checks and balances of our federal government, along with the limited enumerated powers which the constitution provides the federal government, make it highly unlikely. Nevertheless, since it is technically possible for such a scenario to occur, the people need to be able to protect themselves. More of a difficulty, however, is the following question: How in the world would citizens and their guns be able to take on the federal army and their military-grade weaponry, resources, and planes? Although they obviously would not be able to, the Supreme Court did not find this fact to be dispositive:

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22 U.S. CONST. amend. XIV, § 1 (" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

23 *See McDonald*, 561 U.S. at 791 ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment . . . .").

24 *See* District of Columbia v. Heller, 554 U.S. 570, 570 (2008).

25 *Id.* at 598.

26 *Id.*

27 *Id.* ("This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights."); *see id.* at 592-95, (discussing some of this history in England and in the American colonies.).

> It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the [purpose of the right] and the protected right cannot change our interpretation of the right.[28]

This paragraph demonstrates a fundamental concept in constitutional interpretation and application: textualism and originalism. Specifically, one the job of the Supreme Court is to interpret what the true meaning of the Constitution was at the time it was written.[29] Doing otherwise would give the Supreme Court legislative power, which it does not possess.[30]

With this in mind, prevention of government tyranny alone is not even considered by the Supreme Court to be the primary rationale behind the right protected by the Second Amendment. Rather, the "central component" of the right is the natural right of self-defense.[31]

D. The Scope of the Second Amendment in Supreme Court Jurisprudence

1. Introduction

Being that we now know the purpose of the Second Amendment, the next question to tackle is the following: What is the scope of the Amendment? Of the entire Constitution, the one-sentence Second Amendment is perhaps the most difficult to decipher. The use of

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28 *Id.* at 627-28.

29 *See* Enrique Schaerer, *Justice Scalia and the Proper Role of a Judge*, THE FEDERALIST SOCIETY (Mar. 7, 2016), https://fedsoc.org/commentary/blog-posts/justice-scalia-and-the-proper-role-of-a-judge ("*Textualism*, as its name suggests, looks for the meaning of a law in the text of the law itself. A key part of this process is *originalism*, which ascribes to that text the meaning it has borne since the time it was adopted. In other words, it gives effect to the original meaning of the text, rather than a new meaning that may shift unpredictably, even radically, over time.").

30 *See id.* ("[O]riginalism is an essential ingredient in this democratic recipe because, when judges give laws a new meaning, the laws are changed; and changing law, like adopting law in the first place is the function of the political branches of government, not the judicial branch.").

31 *See Heller*, 554 U.S. at 599.

multiple commas makes it is difficult to determine both whom is protected by this right, and what this right protects.[32]

The typical layperson would probably assume that over 200 years of history would have produced numerous Supreme Court decisions to serve as guidelines for the scope of the Second Amendment. However, prior to 2008, this could not be farther from the truth. No Supreme Court opinion has ever definitely decided whether the Second Amendment guarantees an individual the right to own a firearm, and, to the extent that it may guarantee this right, what the limits of that right are—both of which would seem to be rudimentary issues in the Second Amendment.[33]

2. An Individual Right in the Home: The *Heller* Decision

However, this changed in 2008 with the landmark decision of the Supreme Court in *District of Columbia v. Heller*.[34] The statute that was being challenged was a District of Columbia statute which effectively banned the carrying of handguns outright, even via registration and in the home. It required that any firearms which one wished to keep in the home needed to be registered; furthermore, it required for the firearm to be "unloaded and disassembled or bound by a trigger lock."[35] The Plaintiff asserted that this was a violation of the Second Amendment, as it infringed upon his right to "functional[ly]" use his firearm within the home for self-defense.[36] The Court agreed, and held that: (1) the Second Amendment protects an individual's right to own a firearm; and (2) this right certainly applies to a handgun or firearm which is kept in the home.[37]

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32 *See generally* Eric Black*, The Second Amendment Is a Mess*, MINNPOST (Apr. 16, 2013), https://www.minnpost.com/eric-black-ink/2013/04/second-amendment-mess/.

33 *See* Iyen Acosta, *Doe v. Wilmington Housing Authority: The Common Area Caveat as a Paradigmatic Balance Between Tenant Safety and Second Amendment Rights*, 62 CATH. U. L. REV. 1113, 1113-14 (2013) ("The gun rights debate is a staple of American culture, yet lack of guidance by the Supreme Court has left the scope of the Second Amendment unsettled. Until recently, the Second Amendment was conspicuously absent from the Supreme Court docket. Prior to the Supreme Court's recent decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the Court had not addressed the Second Amendment's range of protection since the late nineteenth century, when its holdings were limited at best.").

34 *See* Heller, 554 U.S. at 570.

35 *Heller*, 554 U.S. at 574-75.

36 *Heller*, 554 U.S. at 575-76.

37 *See Heller*, 554 U.S. at 635 ("In sum we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of

How did the Court get to this conclusion? First, the Court had to answer the question of *whose* right to keep and bear arms the Second Amendment aims to protect. To this question, there are two very differing views: one camp believes that the amendment only protects a right for those who are serving in the armed forces; the other—including the majority in the *Heller* decision—believes that the Amendment is protecting an individual right to keep and bear arms.[38]

To support this holding, the Court first explained that the Amendment can be divided into two parts: (a) "A well regulated Militia, being necessary to the security of a free State" being the "prefatory clause"—that is, it states the "purpose" of the Amendment;[39] and (b) "the right of the people to keep and bear Arms, shall not be infringed" being the "operative clause."[40] In other words, "[t]he Amendment could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'"[41]

What difference does it make if a provision is "prefatory" or "operative"? Citing 19th century English treatises,[42] the Court explained the following:

> [A]part from the clarifying function, a prefatory clause does limit or expand the scope of the operative clause . . . . It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.[43]

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immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.").

38 *See Heller*, 554 U.S. at 577 ("The two sides in this case set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service . . . . Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.") (citations omitted).

39 *Id.*

40 *Id.*

41 *Id.*

42 F. DWARRIS, A GENERAL TREATISE ON STATUTES 268-269 (P. Potter ed. 1871); T. SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42-45 (2d ed. 1874); J. BISHOP, COMMENTARIES ON WRITTEN LAWS AND THEIR INTERPRETATION, § 51, p. 49 (1882) (quoting Rex v. Marks, (1802) 102 Eng. Rep. 557, 560.

43 *Heller*, 554 U.S. at 578.

Put simply: although the prefatory clause exists to give the reader an understanding of why the amendment or law was enacted, it does not convey the complete scope of the amendment or law. The Court first focused on the beginning of the operative clause: "the right of the people."[44] The dissent was of the opinion that "the people," refers only to those people whom are using the arms in militia service.[45] The majority disagreed. They held that, similar to the use of the words "the people" as used in the First[46] and Fourth[47] Amendments, which refer to an individual right, the use of the words "the people"—as used in the Second Amendment— is in reference to an individual right.[48]

Next, the Court turned its attention to the following part of the operative clause, which tells us what right those "people" have: "to keep and bear arms."[49] First, citing to an "important" 18th century legal dictionary, the Court dictated that the proper legal definition of the word "arms" is "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another," and that "[t]he term [refers] . . . to weapons that [are] not specifically designed for military use and [are] not employed in a military capacity."[50] This does not only refer to arms that were in existence at the time of the enactment of the Second Amendment.[51]

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44 *Id.* ("[W]hile we will begin out textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.").

45 *Id.* at 646 (Stevens, J., dissenting) ("As used in the Second Amendment, the words 'the people' do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.").

46 U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

47 U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

48 *Heller*, 554 U.S. at 579 ("All 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.").

49 *Heller*, 554 U.S. at 581 ("We move now from the holder of the right—'the people'—to the substance of the right: "to keep and bear arms.").

50 *Heller*, 554 U.S. at 581.

51 *See Heller*, 554 U.S. at 582 ("We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") (citations omitted).

Subsequently, the Court defined the phrases "keep" and "bear" arms. By once again citing to English treatises from the founding era, the Court explained that "'keep arms' was simply a common way of referring to possessing arms, for militiamen and everyone else."[52] In regard to "bear" arms, the Court demonstrated that the actual meaning of the phrase simply means to "carry" arms, which applies to anyone, not just to those carrying the arms while serving in the militia. The Court displayed support of this interpretation from nine Second-Amendment-analogous provisions in State constitutions, which clearly state that the right to bear arms is for: defense of both one's personal self and the State.[53] Furthermore, the Court showed that "Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right . . . as a recognition of the natural right of defense," which "he called the law of 'self-preservation.'"[54]

Thus, the Court went on to hold that the operative clause "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[55] The Court went on to say why this textual interpretation was certainly the correct one:

> This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.' As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1876), '[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."[56]

As discussed earlier in this Note, *supra* p. 5-6, one of the motives of the Framers in including this right to keep and bear arms was the prevention of potential government tyranny. History had shown as

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52 *Heller*, 554 U.S. at 583.

53 *See Heller*, 554 U.S. at 585 (citing provisions from the Pennsylvania, Vermont, Kentucky, Ohio, Indiana, Mississippi, Connecticut, Alabama, and Missouri constitutions which all clearly grant the right to bear arms for individuals to protect themselves).

54 *Heller*, 554 U.S. at 585 (quoting 2 *Collected Works of James Wilson* 1142, and n. x (K. Hall & M. Hall eds.2007)).

55 *Heller*, 554 U.S. at 592.

56 *Id.*

such. The Court showed how English Monarchs pre-1689 had used the disarming of potential political opponents to be able to prevent any uprisings,[57] and that this was the reason for the right to "have Arms"[58] to be included in the 1689 English Bill of Rights, which "has long been understood to be the predecessor to our Second Amendment."[59] This right of the English "was clearly an individual right, having nothing to do with service in a militia."[60] This form of tyranny actually occurred in the American colonies under King George III in the 1760's and 1770's, and numerous articles from that time referred to this as an infraction against their rights as Englishmen to arms for self-defense. The Court provided this fact as additional proof that the individual right of self-defense against government tyranny was a significant reason behind the Amendment.[61]

Thus, the Court decided that there is "no doubt . . . that the Second Amendment conferred an individual right to keep and bear arms."[62] The Court then moved on to the prefatory clause to determine if/how it supports this interpretation of the operative clause.[63]

First, the Court had to determine what "a well regulated militia" means. In reality, the Court had already explained what the "militia" was in the 1939 case, *United States v. Miller*.[64] There, the Court said that "the Militia comprised all males physically capable of acting in concert for the common defense."[65] That is, the militia is *not* the federally-created army or navy; rather, as Webster's Dictionary defines it, it is "the whole body of able-bodied male citizens declared by law as being subject to call to military service."[66] The *Heller* Court proved as such from the language of Article I of the Constitution.[67]

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57 *Id.*

58 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441 ("That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by law.").

59 *Heller*, 554 U.S. at 593.

60 *Heller,* 554 U.S. at 593.

61 *Heller*, 554 U.S. at 594.

62 *Heller*, 554 U.S. at 595..

63 *Id.* ("Before turning to the limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.")

64 United States v. Miller, 307 U.S. 174 (1939).

65 *Miller*, 307 U.S. at 179.

66 *Militia*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/militia.

67 *See Heller*, 554 U.S. at 596 ("Unlike the armies and navies, which Congress is given the power to create, the militia is assumed by Article I already to be *in existence*. Congress is given the power to 'provide for calling forth the Militia,' § 8,

As for "well regulated," the Court simply stated that it "implies nothing more than the imposition of proper discipline and training."[68]

However, how is such a militia "necessary to the security of a free State"?[69] Furthermore, what "State" is the constitution referring to? The *Heller* Court answered those questions as well. Here, the Court held, "free State" does not refer to the several States. Rather, it refers to a "free country" in general.[70] In regard to how the militia is "necessary to the security of a free State," the Court gave three reasons: (1) it helps repel invasions and suppress insurrections; (2) it creates less of a need for a large army; and (3) "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."[71]

Previously, the Court had shown that the actual right—that is, the one protected by the operative clause—was the natural individual right to self-defense. However how does this match up with the words of the prefatory clause? If that were the case, shouldn't the prefatory clause read, something like, "The right to defend one's self, being an inalienable human right, the right of the people etc."?

A small introduction to the Court's answer to this question: The Constitution obviously was not meant to include every single individual right or freedom that exists, and which developed throughout the English common law.[72] It is not a human rights book.

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cl. 15; and the power not to create, but to 'organiz[e]' it ¾and not to organize 'a' militia, which is what one would expect if the militia were to be a federal creation, but to organize 'the' militia, connoting a body already in existence, *ibid.*, cl. 16.") (internal parenthetical omitted).

68 *Heller*, 554 U.S. at 597.

69 *See* U.S. CONST. amend. II ("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.").

70 *Heller*, 554 U.S., at 597; *see* Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1, 6 (2007) ("'State' simply meant country; and 'free' almost always meant free from despotism, rather than from some other country, and never from some larger entity in a federal structure. That is how the phrase was used in the sources that the Framers read. And there is no reason to think that the Framers departed from this well-established meaning and used the phrase to mean something different from what it meant to Blackstone, Montesquieu, the Continental Congress, Madison, Adams, or others.").

71 *Heller*, 554 U.S. at 598.

72 For example, there is no explicit right in the United States constitution which dictates that all people are presumed innocent until proven guilty. The true source for this right in the United States comes from the Supreme Court case of Coffin v. United States 156 U.S. 432 (1895). However, this right is explicitly enumerated in the constitutions of Canada, Columbia, France, Iran, Italy, Romania, Russia, South Africa, and New Zealand; *see* Wikipedia, *Presumption of Innocence*, https://en.wikipedia.org/wiki/Presumption_of_innocence (describing the history,

All the rights which it enumerates are really inalienable human rights, which the Constitution does not *grant* to us. Rather, the Framers included the rights it felt were of the utmost importance in the ultimate goal of ensuring that the government would never be able to infringe on the rights of the people; their explicit inclusion in the Constitution a way of ensuring such.[73] With this being said, we can now understand what the *Heller* Court meant when it proceeded to state the following:

> 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. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution . . . . [In sum,] self-defense had little to do with the right's *codification*; it was the *central component* of the right itself.[74]

As an obvious indicator of this being the true meaning of the Second Amendment, the Court posed the following question: If one were to say that the Second Amendment is only protecting the right of those in the federally-organized militia to keep and bear arms, then how would that prevent government tyranny? Wouldn't the federal government just be able to disband the organized militia and impose their will on whomever they pleased?[75]

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meaning, and fundamental right of the presumption of innocence) (as of Oct. 24, 2018). For other examples, *see* Austin Cline, *Basic Rights Not Listed in the Constitution*, THOUGHT CO., https://www.thoughtco.com/basic-rights-not-spelled-out-in-the-constitution-249643 (last updated Aug. 6, 2018).

73 *See* Mike Maharrey, *You Don't Have "Constitutional Rights." You Have Rights.*, TENTH AMENDMENT CENTER (Dec. 13, 2011), https://tenthamendmentcenter.com/2011/12/13/you-dont-have-constitutional-rights/ ("Many framers considered a Bill of Rights unnecessary. They argued that the nature of the Constitution rendered it redundant. The Constitution itself only grants the government specified powers. Since the Constitution extends the federal government no power to establish a national religion, they argued that it wasn't necessary to specifically prohibit it. But others felt it necessary to make explicit certain government limitations, to better protect the liberties of the people. The preamble to the Bill of Rights clarifies its purpose.").

74 *Heller*, 554 U.S., at 599.

75 *Id.* at 599-600.

In addition, the Court found support for their interpretation from four Second Amendment analogous rights which appear in various State constitutions from the founding era. For example, the state constitutions of Pennsylvania[76] and Vermont[77] clearly showed as such; those of North Carolina[78] and Massachusetts[79] are not as clear, but nevertheless seeming to imply the same.[80]

Thus, the Court established that the Second Amendment protects an individual's right to possess a firearm in their home from government infringement. Therefore, they held that the District of Columbia's outright ban on handgun possession, even in the home, to be unconstitutional (as not all handguns fall outside the scope of the Second Amendment; see below).[81] The requirement to keep lawful guns in the home inoperable was deemed unconstitutional,[82] as that would make the guns practically useless in a real-life situation, including self-defense.[83]

3. What Level of Scrutiny?

Another important point from the *Heller* is the standard of review that judges should be giving to Second Amendment cases. The dissent called for an "interest-balancing inquiry" test whenever a court analyzed a statute, which may be in violation of the Second Amendment.[84] However, the majority vehemently disagreed. They

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76 *See* PA. DECLARATION OF RIGHTS OF 1776 § XIII ("That the people have a right to bear arms for the defence of themselves and the state . . . .").

77 *See* VT. CONST. ch. 1, art. XVI ("That the people have a right to bear arms for the defence of themselves and the State . . . .").

78 *See* N.C. DECLARATION OF RIGHTS OF 1776, § XVII ("That the people have a right to bear arms, for the defence of the State . . . .") (demonstrating how the Court interpreted the word "State" here to be referring to the public protecting themselves at large; not to state-organized militia service).

79 *See* MASS. CONST. art. XVII ("The people have a right to keep and to bear arms for the common defence . . . .") (Demonstrating how the Massachusetts Supreme Court interpreted this to be referring to the public protecting themselves at large – not to state-organized militia service).

80 *Heller*, 554 U.S. at 601.

81 *Heller*, 554 U.S. at 635 ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment…").

82 *Id.*

83 *See Heller*, 554 U.S. at 630. ("[The statute] makes it impossible for citizens to use them for the core purpose of self-defense and is hence unconstitutional.").

84 *Heller*, 554 U.S. . at 689-90, (Breyer, J. dissenting). ("I would simply adopt such an interest-balancing inquiry . . . [which] asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion t the statute's salutary effects upon other important governmental interests.").

argued that the same way they would never apply this "interest-balancing" approach to First Amendment free speech issues, they cannot do so here. Rather, once a right is enumerated in the Constitution, it is binding and cannot be touched by the government. As the Court put it, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[85] The Court ended up leaving this question open for another day.[86]

4. The Obvious Limitations

Although the Second Amendment certainly protects an individual's right to possess a firearm in the home, what limitations are there to this right? Obviously, not all constitutional rights are unlimited.[87] The Supreme Court has spoken on what they feel are some of the obvious and important limitations.[88]

One important limitation is the limitation on *whom* this right applies to. Citing to "longstanding prohibitions" since the Founding Era, the *Heller* Court held that the Second Amendment certainly does not protect possession of firearms by felons or those whom are mentally ill; it does not forbid laws which prohibit the carrying of weapons in certain "sensitive places," like schools or government buildings; nor does it forbid laws which create conditions on the commercial sale of weapons.[89] All in all, the right can be said to only apply to typical "law-abiding citizens" who only use them "for lawful purposes."[90]

The next question is, *what* weapons are protected by the Second Amendment. Almost eighty years ago, the Supreme Court in *Miller*[91] seemed to decide that only weapons, which were "in common use at

85 *Heller*, 554 U.S. at 634-35.

86 Further discussion on this topic is beyond the scope of the purposes of this Note. For additional information on this subject, *see* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L. J. 193, 274-313 (2017).

87 *See, e.g.*, *supra* page 1; *Heller,* 554 U.S. at 636 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

88 However, the Court did not provide historical justifications for all of the exceptions it listed. It instead stated that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Heller*, 554 U.S. at 635. R 4, 4.1.

89 *Heller*, 554 U.S. at 626-27 ("We identify these presumptively lawful regulatory measures only as examples; our list does purport to be exhaustive.").

90 *Heller*, 554 U.S. at 625.

91 *Miller*, 307 U.S. at 179 (1939).

the time" of the enactment of the Second Amendment, are protected. Thus, the *Heller* Court held that "dangerous and unusual" weapons are not protected by the Second Amendment either.[92] This holding is sensible, as such weapons are obviously not necessary for self-defense. Their presence in society would be frightening to people and have, therefore, customarily been prohibited by the States.[93]

E. The Carry of Arms in Public

1. The Big Question Left Unresolved by *Heller*

By its own admission, considering that it was the Supreme Court's "first in-depth examination of the Second Amendment," *Heller* was not intended to provide the entire scope and applicability of the Second Amendment.[94] Since it was only really presented with the issue of whether the Amendment protects an individual right to possess a firearm in the home, that was all the decision answered.

However, aside from the 2010 case, *McDonald v. City of Chicago*[95]—which incorporated the Second Amendment as binding against the States[96]—the Supreme Court has not granted certiorari to one Second Amendment case. Thus, the many questions left open by *Heller* remain.[97] For the purposes of this Note, we will focus on one

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92 *Heller*, 554 U.S. at 627.

93 *See, e.g.*, State v. Langford, 10 N.C. 381, 383 (1824) ("[I]t seems certain there may be an affray when there is no actual violence: as when a man arms himself with dangerous and unusual weapons, in such a manner as will natural cause terror to the people; which is said always to have been an offence at common law . . . ."); O'Neill v. State, 16 Ala. 65, 67 (1849) ("It is probable . . . that if persons arms themselves with deadly or unusual weapons for the purpose of an affray . . . they may be guilty . . . without coming to actual blows.") (citation omitted).

94 *See Heller*, 554 U.S. at 635 ("[The dissent" chides us for leaving so many applications of the right to bear arms in doubt . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, on should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.").

95 *McDonald*, 561 U.S. at 742.

96 *See McDonald*, 561 U.S. at 742 ("Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States . . . . We therefore hold that the . . . Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

97 This has prompted disappointment from Justice Thomas in particular. *See, e.g.*, Silvester v. Becerra, 138 S.Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this

glaring question in particular: the carry of firearms in public. Once *Heller* established that an individual right to possess a firearm in the home exists, this automatically becomes the next question that must be resolved. However, this is not a singular question. Rather, it branches out into two distinct categories: Open Carry and Concealed Carry.

2. The Post-*Heller* Dispute Amongst the Circuits

Although this question has not yet reached the Supreme Court, it has reached the various United States Circuit Courts of Appeals a number of times. Of course, they have all reached various conclusions as well.

When this question first reached the First Circuit in 2012,[98] it refused to answer the question at all, calling it "a vast *terra incognita*."[99] More recently, the First Circuit has acknowledged that *Heller* certainly implies that a right exists outside the home, but that this right is not included in the "core" of the Second Amendment.[100]

Most Circuits have not decided definitively on this issue. The Fourth Circuit did not definitively decide whether or not the right even exists outside the home; however, for the purposes of the case before it, it "merely assume[d] that the *Heller* right exists outside the home."[101] Likewise, the Third Circuit[102] did not decide either way, but did "recognize that the Second Amendment's individual right to bear arms *may* have some application beyond the home.[103]

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area, the Second Amendment is a disfavored right in this Court . . . . I do not believe we should be in the business of choosing which constitutional rights are *really worth* insisting upon . . . .) (citation and internal quotations omitted) (emphasis in original).

98 Hightower v. City of Boston, 693 F.3d 61 (1st Cir. 2012).

99 *Hightower*, 693 F.3d at 74 ("[W]e should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home . . . the whole matter is a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.") (internal quotations and citations omitted).

100 Gould v. Morgan, 907 F.3d 659, 672 (1st Cir. 2018) ("To sum up, we hold that . . . [p]ublic carriage of firearms for self-defense falls outside the perimeter of this core right.").

101 Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); *Gould,* 907 F.3d at 876 ("[W]e merely assume that the *Heller* right exists outside the home.").

102 Drake v. Filko, 724 F.3d 426 (3d Cir. 2013).

103 *Drake*, 724 F.3d. at 431 (emphasis in original).

The Second Circuit[104] was a little more definitive in its holding that the right has "*some* application" outside the home. [105] Nevertheless, it did say that only possession in the home—but not outside of the home—constitutes a *core* right of the Amendment.[106]

However, a few Circuits have definitively decided that although the *Heller* decision itself was only in regard to a right within the home, a rational reading of *Heller* indicates the logical conclusion that the right extends outside of the home as well. The first example of this came in Judge Posner's decision in the 2012 Seventh Circuit case of *Moore v. Madigan*.[107] His first argument was a textual one:

> The right to "bear" as distinct from the right to "keep" arms is unlikely to refer to the home. To speak of "bearing" arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.[108]

His next argument demonstrated the historical and common-sense rationale that there is just as much of a need for self-defense in public as there is in the home:

> [A] right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. Suppose one lived in what was then the wild west—the Ohio Valley for example (for until the Louisiana Purchase the Mississippi River was the western boundary of the United States), where there were hostile Indians. One would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed . . . .

104 Kachalsky v. City of Westchester, 701 F.3d 81 (2d Cir. 2012).

105 *See Kachalsky*, 701 F.3d. at 89 ("[*Heller*] suggests . . .that the Amendment must have *some* application in the . . . context of the public possession of firearms.") (emphasis in original).

106 *See Kachalsky*, 701 F.3d. at 94 ("The proper cause requirement falls outside the core Second Amendment protections identified in *Heller*. New York's licensing scheme affects the ability to carry handguns only *in public*, while the District of Columbia's ban applied *in the home* . . . . This is a critical difference.").

107 Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

108 *Moore*, 702 F.3d at 936.

> Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference. To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.[109]

With respect to the claim that the applicability of the Second Amendment outside the home is "a vast *terra incognita*,"[110] Judge Posner argued that it "has been opened to judicial exploration by *Heller* and *McDonald*," and therefore "[t]here is no turning back by the lower federal courts."[111] The court in those two cases invalidated an Illinois law, which generally prohibited any form of carry outside the home. In a similar vein, the D.C. Circuit[112] recently held that the right of a member of the general public to carry "falls within the core of the Second Amendment's protections."[113]

The D.C. Circuit and Seventh Circuit seem to make no distinction between Open Carry and Concealed Carry.

3. The Ninth Circuit's Recent Approach

However, only one Circuit has definitively decided on the constitutionality of both Open and Concealed Carry: The Ninth Circuit. In two recent cases, *Peruta v. County of San Diego*[114] and

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109 *Moore*, 702 F.3d at 936-37.

110 *See Hightower*, 693 F.3d at 74.

111 *Moore*, 702 F3d at 942.

112 Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017).

113 *Wren*, 864 F.3d at 661 ("[W]e conclude: the individual right to carry common firearms beyond the home for self-defense even in densely populated areas, even for those lacking special self-defense falls within the core of the Second Amendment's protections.").

114 *Peruta*, 824 F.3d at 919.

Young v. Hawaii,[115] the Ninth Circuit set a clear standard and distinction between the two. As will be discussed below, the Supreme Court should adopt the Ninth Circuit's standard, as its standard is the most compliant with *Heller*.

The *Peruta* case involved California statutes.[116] Put simply, the statutes have the following effects: a general prohibition to the typical person from any form of public carry, whether open or concealed; it allows the granting of a license for concealed carry for those who show "good cause"; and it completely prohibits open carry, barring few exceptions.[117] The plaintiffs contested that the County Sherriffs' interpretation of "good cause" was an unconstitutional block on his Second Amendment right to concealed carry.[118]

A three-judge panel of the Ninth Circuit[119] decided that the plaintiff was challenging—and that they should therefore review—not only California's concealed carry policy, but rather "the constitutionality of [California's] entire [statutory] scheme."[120] The majority of that court held that the average, law-abiding citizen must have access either to open carry or concealed carry. Thus, since open carry was basically generally prohibited, and the "good cause" requirement of the county did not grant access to the typical citizen to obtain a concealed carry license,[121] the "good cause" policy of the county was an infringement on the Second Amendment.[122]

After granting the government's petition for rehearing en banc, the Ninth Circuit[123] reversed. Importantly, however, they only dealt with the question of concealed carry, as that was all the "[p]laintiffs challenge[d]."[124] It left the question of open carry open for another day.[125]

As the Court in *Heller* did, the court here used the English history of concealed carry as its primary guide. Its extensive research into treatises from the founding and pre-founding era, showed that "when

115 Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018). It should be noted that, as of the publication date of this note, this case was ordered to be reheard en banc. *See* Young v. Hawaii, 915 F. 3d 681 (9th Cir. 2019).

116 *Peruta*, 824 F.3d at 919.

117 *See* Cal. Penal Code §§ 25850, 26150, 26155, 26160, 26350 (Deering 2019).

118 *Peruta*, 742 F.3d at 924.

119 *Id.* at 1144.

120 *Id.* at 1171.

121 *Id.* at 1169.

122 *Id.* at 1179.

123 *Id.* at 919.

124 *Id.* at 927.

125 *Id.*

our Second Amendment was adopted, English law had for centuries consistently prohibited carrying concealed arms in public," including after the enactment of the English Bill of Rights.[126] The court also found support from various early and mid-nineteenth century State court cases.[127]

Most importantly, the court pointed out that "the United States Supreme Court unambiguously stated in 1897 that the protection of the Second Amendment does not extend to 'the carrying of concealed weapons.'" [128] Thus, the *Peruta* court held "that the Second Amendment right . . . does not include, in any degree, the right of a member of the general public to carry concealed firearms in public."[129]

When the court left open the question of open carry in public, it was bound to come back at some point. That point came in 2018, with the case of *Young v. Hawaii*,[130] where the Ninth Circuit "pick[ed] up where [*Peruta*] left off."[131]

The state statute in question allowed for open-carry licenses to only be granted "[w]here the urgency or the need has been sufficiently indicated," and only to those whom, *inter alia*, are "of good moral character," and are "engaged in the protection of life and property."[132]

The majority set the tone early in its opinion as to which way it would go when it stated: "Of course, we remain ever mindful not to treat the Second Amendment any differently from other individual constitutional rights."[133] Their first line of reasoning was to look to the text. Similar to the reasoning of the *Moore* court, they put a heavy emphasis on the fact that the Amendment protects a right to "bear" separate from a right to "keep," which heavily implies a right to carry a firearm for self-defense even in public. [134] The court also

126 *Id.* at 932.

127 *See id.* at 933-39.

128 *Id. at* at 939 (quoting Robertson v. Baldwin, 165 U.S. 275, 282, 17 S.Ct. 326 (1897)).

129 *Id.* at 939

130 *Young*, 896 F.3d at 1044.

131 *Id.* at 1050.

132 HAW. REV. STAT. § 134-9(a).

133 *Young*, 896 F.3d 1051 (9th Cir. 2018).

134 *See id.* at 1052 ("To 'bear,' [*Heller*] explained, means to 'wear' or to '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.' . . . The prospect of confrontation is, of course, not limited to one's dwelling.") (citations omitted).

demonstrated a strong argument about how the *Heller* and *McDonald* opinions "point toward th[is] conclusion":[135]

> *Heller* and *McDonald* suggest a similar understanding of "bear." *Heller* described the "inherent right of self-defense" as "most acute" within the home, implying that the right exists, perhaps less acutely, outside the home. *McDonald* similarly described the right as "most notabl[e] within the home, implying the rights exists, perhaps less notably, outside the home. *Heller* also identified "laws forbidding the carry of firearms in sensitive places such as schools and government buildings" as presumptively lawful. Why bother clarifying the definition of sensitive public places if the Second Amendment did not apply, at all, to *any* public place?[136]

As the *Heller* Court did, the Ninth Circuit went on to discuss how the potential right to open carry correlates with: "the writings of important founding-era legal scholars;"[137] "nineteenth century judicial interpretations of the right to bear arms;"[138] and "the legislative scene following the Civil War,"[139] concluding that "[t]he right to bear arms must include, at the least, the right to carry a firearm openly for self-defense."[140] Additionally, the court went to lengths to demonstrate how the American analogues and application of the Statute of Northampton never prohibited more than terrorizing conduct or the carry of unusual weapons.[141]

Thus, the *Young* court held that "[b]ecause [the Hawaii statute] restricts Young in exercising such right to carry a firearm openly, it burdens conduct protected by the Second Amendment."[142] The court called this a "core" right of the Amendment.[143]

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135 *Id.* at 1053.

136 *Id.* at 1044 (citations omitted).

137 *See id.* at 1053-54.

138 *See id.* at 1054-59.

139 *See id.* at 1059-61.

140 *Id.* at 1061.

141 *See id.* at 1063-68.

142 *Id.* at 1068.

143 *See id.* at 1070 ("[W]e reject a cramped reading of the Second Amendment that renders to 'keep' and to 'bear' unequal guarantees. *Heller* and *McDonald* describe the core purpose of the Second Amendment as self-defense, and 'bear' effectuates such core purpose of self-defense in public.").

In sum, taking *Peruta* and *Young* together, the Ninth Circuit's current approach holds that the Second Amendment protects an individual right to carry firearms openly for the purpose of self-defense (and that this is a "core" right), while concealed carry for this purpose is not protected by the Constitution.

F. Analysis

Reading the *Heller* and *McDonald* opinions, there is no doubt that the Second Amendment protects a right to carry weapons outside of the home for the purpose of self-defense. The arguments displayed above from the *Moore* and *Young* decisions arise from a basic reading of the Supreme Court's decisions.

However, what form of carry should be reasonably said to be protected by the Second Amendment? If the Court were to take upon themselves a Second Amendment case in the near future, I would suggest adopting the *Young* and *Peruta* approach for a number of reasons.

As the *Peruta* decision clearly demonstrated, judicial and legislative history throughout the last few centuries advocated for the limitation on the ability of individuals to carry concealed weapons—and for good reason. Assuming that the primary purpose of the Second Amendment is to protect each individual's natural right to self-defense, why should one need to conceal the weapon?[144] On the contrary, when a potential attacker sees that the individual is openly carrying a weapon, that in and of itself may be enough of a deterrent.[145] The purpose of the Amendment is ultimately for defense, not merely to provide people with weapons.

Aside from concealed carry not being *necessary*, it may be said that it brings about more dangerous and unlawful activity than open carry. One who is about to commit a crime in public is obviously much more likely to want their weapon concealed until the last moment. It

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144 *See, e.g.*, Nunn v. State, 1 Ga. 243, 251 (1846) ("[S]o far as [the statute in question] seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defense, or of his constitutional right to keep and bear arms.") (*emphasis* in original).

145 *See* Larry Pratt, *Open Carry Deters Crime*, U.S. NEWS & WORLD REPORT (Apr. 25, 2012, 4:08 PM), https://www.usnews.com/debate-club/should-people-be-allowed-to-carry-guns-openly/open-carry-deters-crime ("A 1985 Department of Justice survey of incarcerated felons reported that 57 percent of the felons polled agreed that 'criminals are more worried about meeting an armed victim than they are about running into the police.' Researcher Gary Kleck found that 92 percent of criminal attacks are deterred when a gun is merely shown (or, rarely, a warning shot fired).").

is therefore hard to imagine that the Founders intended for the "self-defense amendment" to protect this form of carry.

Of course, contrary arguments can be made as well. Proponents of concealed carry, rather than open carry, point to the fact that a society in which open carry exists, creates a more chilling atmosphere.[146] However, the answer to this is that societal norms are dictated based upon custom. There will always be a number of people who choose not to carry a firearm, for whatever reason. Nevertheless, the normalization of seeing people carry open firearms, the less of a social stigma around the idea will exist.[147]

III. GUN CONTROL: A GOOD IDEA?

A. Introduction

Whether or not the Second Amendment applies outside the home, and whether or not a right outside of the home consists of open or concealed carry, one thing is certain: *Heller* clearly held that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[148] Rather, the legislatures have the power (and probably the duty) to regulate gun ownership in a safe manner consistent with the constitutional right of Americans.

However, one of the most heated debates in the United States today is the gun control debate. The unfortunate occurrences of mass shootings always prompt the reignition of the debate. It is something that both sides of the debate argue about vigorously, and usually

146 *See The Pros and Cons of Open Carry*, FIREARMS LEGAL PROTECTION (Mar. 19, 2018), https://firearmslegal.com/the-pros-and-cons-of-open-carry/ ("Open carry causes undue alarm . . . . In addition to this fear, panic, and even outright confrontation has taken place with those who carry openly and the general public. Consider a scenario where there has been a shooting and the police show up and see five people with open guns. How well will that go?").

147 *See* CJ Grisham, *A Gun Owner Speaks: My Case for Open Carry*, THE DAILY BEAST (Jun. 12, 2014, 5:45 AM), https://www.thedailybeast.com/a-gun-owner-speaks-my-case-for-open-carry ("As part of our mission, we have worked hard to remove the stigma of guns in society. Beginning at a young age, our children are inundated with educational propaganda proclaiming that guns are bad. Night after night, the media furthers this narrative by sensationalizing the worst aspects of humanity. The entertainment industry relies on hype and inaccurate stereotypes of gun owners. The gun control lobby engages in emotional brainwashing to further its attempts at disarming the American people. Open carry has been proven to deter crime, which is why we believe it is so important.").

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

emotionally.[149] The reason is simple: proponents of gun control feel as though gun advocates are avoiding a simple and reasonable solution to end gun violence just because they want to keep their guns.[150] At the same time, gun advocates feel that the other side is missing the point and fighting a pointless battle, while infringing on their right to protect themselves as law-abiding citizens.

B. The Common Arguments

One of the common arguments that opponents of gun control assert is that, ultimately, guns do not kill people on their own—it is the shooter who kills. The same way we do not ban kitchen knives because of their potential to kill, we should not be heavily regulating what the Founders believed to be an inalienable right. However, gun control advocates respond to this by asking "so what?" Ultimately, if something can be done that will help prevent future attacks, it should be done.[151]

The next, and perhaps strongest, argument that opponents of gun control possess is simply that gun control would not accomplish what its proponents believe it will. That is, the only people who will follow the laws, are law-abiding citizens who would not be the type of people that are committing crimes anyway. The effect would be one that provides law-abiding citizens who wish to protect themselves and their familie less access to the ability to obtain that protection, while criminals would continue to access guns.[152] Currently, there are simply too many guns in the United States, making it impossible to

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149 *See* J. Peder Zane, *Gun Control Debates Require Rational Minds*, THE NEWS & OBSERVER (Feb. 27, 2018, 9:41 AM), https://www.newsobserver.com/opinion/op-ed/article202345179.html.

150 *See, e.g.*, Jon Margolis, *Margolis: Relax, Gun Owners, No One is Coming For Your Weapons*, VTDIGGER (Feb. 24, 2020), https://vtdigger.org/2020/02/24/margolis-relax-gun-owners-nobody-is-coming-for-your-weapons/ ("Thus they are convinced that the rather mild bill before the House Judiciary Committee…is merely a prelude to taking away everybody's guns.").

151 *See* Michael Shammas, *It's Time to Retire The 'Guns Don't Kill People – People Kill People' Argument. Guns DO Kill People.*, HUFFINGTON POST (last updated Oct. 13, 2017), https://www.huffingtonpost.com/entry/its-time-to-retire-the-guns-dont-kill-people-people_us_59e0f6d4e4b09e31db975887.

152 *See* Tyler Yzaguirre, *The Left Only Want to Hurt Law-Abiding Gun Owners*, THE WASHINGTON EXAMINER (May 27, 2018, 12:00 AM), https://www.washingtonexaminer.com/opinion/the-left-only-want-to-hurt-law-abiding-gun-owners; Amber Athey, *Dan Bongino: Gun Laws Only Affect Law Abiding People*, THE DAILY CALLER (Mar. 2, 2018, 9:00 PM), https://dailycaller.com/2018/03/02/dan-bongino-gun-control-law-abiding/.

get rid of them all.[153] Therefore, we should not unreasonably infringe on the rights of those who wish to protect themselves in a reasonable and lawful manner. While this is a strong argument, proponents of gun control ultimately feel that laws cannot be made based on an assumption as to who will or will not follow them. If a certain law will causally help attain a certain purpose, that is all that must be factored into deciding whether to pursue it.[154]

In a similar vein, opponents of gun control argue that even if it were the case that criminals would have a hard time getting guns, they would still be able to carry out crimes in a variety of other ways. No one becomes a criminal because they see a gun; the gun is just a channel which the criminal uses to commit a crime. While many would admit that this argument is not a rational one at face value (for killing with a gun is certainly one of the easiest ways to kill someone, so we may as well eliminate it as a means), the point of the argument is as follows: Do not infringe on my right to protect myself in order to try to accomplish something, which likely won't be accomplished anyway. Had the Founders not believed for the right to keep and bear arms to be an inalienable right, that would be one thing. But an inalienable right should be treated as such.

C. The Government-Backed Data—Or Lack Thereof

All of this leads to the following questions: Do stricter gun regulations causally lead to less gun violence? Or, to the contrary, does the arming of law-abiding citizens with guns causally lead to less gun violence? More specifically, what policies can be put in place to prevent gun violence in a way that will actually work, and at the same time will not infringe on our constitutional right to keep and bear arms?

Most people would respond to these questions by asking as follows: If gun violence is such an important issue, why does the

153 *See* Laura MacInnis, *U.S. Most Armed Country with 90 Guns per 100 People*, REUTERS (Aug. 28, 2007), https://www.reuters.com/article/us-world-firearms/u-s-most-armed-country-with-90-guns-per-100-people-idUSL2834893820070828.

154 *See* Josh Sager, *Refuting Anti-Gun Control Arguments*, THE PROGRESSIVE CYNIC (Jan. 2012), https://theprogressivecynic.com/debunking-right-wing-talking-points/refuting-gun-enthusiasts-anti-gun-control-arguments/ ("This argument is probably the best one in the arsenal of the gun enthusiast, but it . . . is not really a good reason to obstruct gun control. If laws are irrelevant because criminals will simply ignore them, then there is no purpose for any laws and no potential for a safe society.").

government not provide funding for research and studies to answer these questions? That would seem to be the reasonable thing to do.

In the early 1990s, the US Centers for Disease Control and Prevention ("CDC") heavily invested monetary and other resources toward such studies.[155] A 1993 study revealed that the existence of a firearm in a home, increased the likelihood of a homicide in that home.[156] After some National Rifle Association ("NRA") lobbying,[157] Congress placed the following language—known as the Dickey Amendment—in the 1996 spending bill: "[N]one of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control."[158]

Why would Congress pass the Dickey Amendment? Taking the NRA's stance, the government felt that the research being conducted by the CDC was ultimately biased and political in order to achieve strong gun control—while using a government agency as cover.[159] Additionally, it was argued that under no circumstances should taxpayer money be spent on any political agendas with which many Americans disagree.[160]

This March 2018 spending bill granted the CDC more leeway in potentially pursuing gun violence research. The current bill states the following: "While appropriations language prohibits the CDC and

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155 Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Discussion*, AM. J. PUBLIC HEALTH (Jul. 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5993413/.

156 *Id.* The study was conducted by a team headed by Arthur Kellerman. It was published in the New England Medical Journal. *See* Kellerman et al., *Gun ownership as a risk factor for homicide in the home.*, N. ENGL. J. MED. (Oct. 1993), https://www.ncbi.nlm.nih.gov/pubmed/8371731/.

157 *Id*.

158 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208 (1996).

159 *See* Micah Rate, *NRA Explains its Position on Dickey Amendment, Gun Violence Research*, BEARING ARMS (Mar. 22, 2018, 3:00 PM), https://bearingarms.com/micah-r/2018/03/22/nra-reiterates-its-position-on-dickey-amendment-gun-violence-research/; Chris Cox, *Why We Can't Trust the CDC with Gun Research*, POLITICO (Dec. 9, 2015, 6:01 AM), https://www.politico.com/agenda/story/2015/12/why-we-cant-trust-the-cdc-with-gun-research-000340 ("Government-funded research was openly biased in the 1990s. CDC officials unabashedly supported gun bans and poured millions of dollars into 'research' that was, in fact, advocacy. One of the lead researchers employed in the CDC's effort was quoted, stating 'We're going to systematically build the case that owning firearms causes deaths.' Another researcher said he envisioned a long-term campaign 'to convince Americans that guns are, first and foremost, a public health menace.'").

160 *See* Rate, *supra* note 159.

other agencies from using appropriated funding to advocate or promote gun control, the Secretary of Health and Human Services has stated the CDC has the authority to conduct research on the causes of gun violence."[161]

All Americans—regardless of which "side of the aisle" they align themselves—should welcome such research. Even the most avid gun-control opponents do not want any innocent people harmed—they just want any potential legislation and/or regulation to be done in a constitutional, minimally invasive, and effective manner.[162] Proper research into gun violence throughout the country would allow Congress (and all State legislatures) to pass proper legislation.

While this scenario is seemingly perfect, there remains ample reason to be skeptical. Ultimately, the issue of the researchers' political affiliations getting in the way of an unbiased outcome is a big problem. Again, the entire purpose of the Dickey Amendment is to prevent the CDC from reaching a "predetermined" result. If the research is skewed, it is pointless.

Nevertheless, the CDC should move forward with the research. Whether or not the research would be trustworthy can be for Congress to decide. The first step is getting data for the government to work with. While some conservative politicians will likely reject the CDC's research, bipartisan acceptance is not an impossibility. However, there is an issue with studies related to gun violence in general. As Politico columnist Chris Cox put it:

> Statistics and data linked to firearm-related violence are complex, and frequently skewed by those who oppose gun ownership. Firearm research generally speaks only to the alleged possible risks associated with gun ownership, never to the benefits that law-abiding gun owners provide to society as a whole. It frequently finds only one option: More gun control, which plenty of respected researchers have found to be ineffective.[163]

Many studies have been done in this area. However, all studies have potential for biased interpretation. The researchers can "conveniently" only speak to certain groups; or they can present certain data as causal outcomes of a certain situation, when in reality

161 Consolidated Appropriations Act, Pub. L. No. 115-141 (2018).

162 *See* Cox, *supra* note 159.

163 Cox, *supra* note 159.

they were merely in correlation. With that being said, the government needs to conduct studies in this ever-important area, as discussed above. Without them, we have no way of ever coming to a true resolution on this issue.

IV. CONCLUSION

The Supreme Court did a great service to the American people with the *Heller* and *McDonald* decisions, as those cases laid out the foundations for Second Amendment jurisprudence. However, more Supreme Court decisions need to come. It has been too long. The question of carry in public needs to be answered by the Court. At the next opportunity, the Court should adhere to what Justice Thomas has been pleading for a number of years: As a constitutional right, the Second Amendment should be given the opportunity to be interpreted further by the Court.[164]

In regard to what outcomes the Court should come to: The Ninth Circuit standard from *Peruta* and *Young*—which together deem only open carry to be constitutionally protected—seem to be the most in line with *Heller* and with judicial and legislative history from the last few centuries. Circuits that have combined open and concealed carry together—either by deeming both of them constitutionally-protected or not constitutionally-protected—do not seem to align with the *Heller* opinion.

Finally, it is vital that more legitimate research be done on the issue of gun violence in this country. The only way to achieve fair and constitutional legislation is for the legislators to be provided with accurate data. The new 2018 spending bill allows for the CDC to conduct such research. The CDC should certainly do so in a non-partisan fashion. This may not be possible, but that will be for the legislators to decide.

The Second Amendment, like the rest of the Bill of Rights, is a vital part of the "American Dream." Ensuring that it is properly applied and regulated in a constitutional manner must be of upmost

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164 *See, e.g.*, Silvester v. Becerra, 138 S.Ct. 945 (Mem) (2018) (Thomas, J., dissenting from denial of certiorari) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court . . . . I do not believe we should be in the business of choosing which constitutional rights are *really worth* insisting upon . . . .) (citation and internal quotations omitted) (emphasis in original).

importance. It cannot just continue to be regarded as "a disfavored right."[165]

165 *Silvester*, 138 S.Ct. at 945.