

2-12-2015

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### Recommended Citation

Ryan Notarangelo, *Carrying the Second Amendment Outside of the Home: A Critique of the Third Circuit's Decision in Drake v. Filko*, 64 Cath. U. L. Rev. 235 (2015).

Available at: <http://scholarship.law.edu/lawreview/vol64/iss1/12>

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# Carrying the Second Amendment Outside of the Home: A Critique of the Third Circuit's Decision in *Drake v. Filko*

## **Cover Page Footnote**

J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law. The author is grateful to the Catholic University Law Review for their wonderful work preparing this paper for publication.

## CARRYING THE SECOND AMENDMENT OUTSIDE OF THE HOME: A CRITIQUE OF THE THIRD CIRCUIT’S DECISION IN *DRAKE V. FILKO*

Ryan Notarangelo<sup>+</sup>

“The great object is, that every man be armed. . . . Every one who is able may have a gun.”<sup>1</sup> Today, some Americans might attribute these words to powerful pro-gun lobby organizations like the National Rifle Association (NRA).<sup>2</sup> However, Patrick Henry, a colonial statesman, revolutionary colonel, and the first governor of Virginia, said them over two centuries ago.<sup>3</sup> Undoubtedly, events such as the horrific gun massacres in Aurora, Colorado and Newtown, Connecticut,<sup>4</sup> the failed Manchin-Toomey Senate proposal on federal gun regulations,<sup>5</sup> and the acquittal of George Zimmerman<sup>6</sup> illustrate America’s

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1. Patrick Henry, The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 2, 1788), in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* 386 (Jonathan Elliot ed., 2d ed. 1836).

2. See Brian Palmer, *Why Is the NRA So Powerful? How the Gun Lobby Leverages Modest Resources into Outsized Influence*, SLATE (Dec. 18, 2012, 3:33 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2012/06/eric\\_holder\\_charged\\_with\\_contempt\\_how\\_did\\_the\\_nra\\_swing\\_the\\_votes\\_of\\_so\\_many\\_democrats\\_.html](http://www.slate.com/articles/news_and_politics/explainer/2012/06/eric_holder_charged_with_contempt_how_did_the_nra_swing_the_votes_of_so_many_democrats_.html) (discussing the NRA’s founding and influence in the United States).

3. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 74 (2d ed. 1994).

4. See Keith Coffman, *Colorado Wrestles with Gun Control One Year After Theater Shooting*, CHICAGO TRIBUNE (July 20, 2013), [http://articles.chicagotribune.com/2013-07-20/news/sns-rt-us-usa-denver-shooting-20130720\\_1\\_colorado-movie-theater-theater-shooting-james-holmes](http://articles.chicagotribune.com/2013-07-20/news/sns-rt-us-usa-denver-shooting-20130720_1_colorado-movie-theater-theater-shooting-james-holmes) (noting that Colorado passed stricter gun regulations after the Aurora shooting); see also *20 Children Among Dead in Connecticut School Massacre*, CBC NEWS (Dec. 14, 2012, 10:58 AM), <http://www.cbc.ca/news/world/20-children-among-dead-in-connecticut-school-massacre-1.1134782> (reporting the massacre at Sandy Hook Elementary School, which left twenty children dead).

5. See Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN (Apr. 18, 2013, 11:02 AM), <http://www.cnn.com/2013/04/17/politics/senate-guns-vote>. The Senate also reviewed a ban on assault weapons, but none of the regulations mustered enough political support on either side. See, e.g., Jennifer Steinhauer, *Party-Line Vote in Senate Panel for Ban on Assault Weapons*, N.Y. TIMES (Mar. 14, 2013), [http://www.nytimes.com/2013/03/15/us/politics/panel-approves-reinstatement-of-assault-weapons-ban.html?ref=guncontrol&\\_r=1&](http://www.nytimes.com/2013/03/15/us/politics/panel-approves-reinstatement-of-assault-weapons-ban.html?ref=guncontrol&_r=1&) (noting that, although an assault weapons ban was passed in committee, it was extremely unlikely to be passed by the whole Congress); see also *US Gun Debate: Guns in Number*, BBC NEWS (Jan. 16, 2013, 2:09 PM), <http://www.bbc.co.uk/news/world-us-canada-20759139> (listing President Obama’s wide-ranging gun control proposals).

6. Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty of Murder in Trayvon Martin’s Death*, CNN (July 14, 2013, 11:50 AM), <http://www.cnn.com/2013/07/13/justice/>

continuous struggle for harmony between workable gun regulations and the preservation of gun rights.<sup>7</sup> At the center of this emotionally charged controversy is the Second Amendment of the U.S. Constitution.

The Second Amendment provides 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.”<sup>8</sup> In *District of Columbia v. Heller*,<sup>9</sup> the Supreme Court of the United States attempted to clarify, in part, the meaning of the Second Amendment.<sup>10</sup> Limited by the facts of *Heller*, the Court held that the

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zimmerman-trial/. After Zimmerman’s trial and acquittal, some Americans pushed for a national debate on gun control, violence, and the Second Amendment with particular focus on stand-your-ground laws. The Editorial Board, Editorial, *Lax Gun Laws vs. Trayvon Martin’s Life: Our View*, USA TODAY (July 16, 2013, 8:33 PM), <http://www.usatoday.com/story/opinion/2013/07/16/trayvon-martin-george-zimmerman-gun-laws-editorials-debates/2523159/> (arguing that stand-your-ground laws and less stringent gun laws are the result of absurd gun lobbying). Thousands rallied across the United States against such laws. Tom Watkins, *Nationwide Rallies Demand ‘Justice for Trayvon’*, CNN (July 20, 2013, 8:04 PM), <http://www.cnn.com/2013/07/20/us/trayvon-day/index.html>.

7. See Jaime Fuller, *It’s Been 20 Years Since the Brady Bill Passed. Here Are 11 Ways Gun Politics Have Changed*, WASH. POST (Feb. 28, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/02/28/its-been-20-years-since-the-brady-law-passed-how-have-gun-politics-changed/> (noting that in 2013, forty-eight percent of Americans thought it was more important to protect gun rights than to regulate gun ownership); see also Taylor Kate Brown, *What’s Behind Growing Gun Rights Support in the US?*, BBC NEWS (Dec. 16, 2014, 5:42 PM), <http://www.bbc.com/news/magazine-30485978> (finding that support for gun rights increased again in 2014 from 2013). Even Starbucks steamed into the frothy gun debate: “The coffee chain Starbucks has asked its customers in the US to stop bringing guns into its outlets.” See *Starbucks Asks Customers Not to Bring Guns into Outlets*, BBC NEWS (Sept. 18, 2013, 5:44 AM), <http://www.bbc.co.uk/news/business-24142085>; see also *Chipotle Asks Customers Not to Bring Guns into Restaurants*, BBC NEWS (May 20, 2014, 11:43 AM), <http://www.bbc.com/news/world-us-canada-27492193> (resulting from an incident in Texas, where several customers brought assault-like rifles into Chipotle restaurants).

Political discussions on the gun debate are sometimes career-ending, too. During a recent recall election in Colorado, the president of the state senate was ousted after supporting stricter gun regulations. See *Colorado Voters Sack Gun-Control Democrats*, BBC NEWS (Sept. 11, 2013, 12:32 PM), <http://www.bbc.co.uk/news/world-us-canada-24055400>.

8. U.S. CONST. amend. II.

9. 554 U.S. 570 (2008).

10. *Id.* at 592 (stating the Second Amendment confers the right to carry a firearm for protection). The confusion surrounded the right’s scope. Two schools of interpretation, one supporting the individual right to bear arms and the other supporting the collective right, claimed to unlock the true meaning of the Second Amendment’s twenty-seven words. See DAVID C. WILLIAMS, *THE MYSTIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 15 (2003); see also Margaret E. Sprunger, Comment, *D.C. As a Breeding Ground for the Next Second Amendment Test Case: The Conflict Within the U.S. Attorney’s Office*, 53 CATH. U. L. REV. 577, 581–83 (2004) (discussing the two schools of Second Amendment interpretation). However, a third school viewed the Second Amendment as a civic duty rather than an individual or collective right. See, e.g., 1 GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT xv (Robert Cottrol ed., 1993). The individual rights school interpreted the Second Amendment as securing an

Second Amendment protected an individual's right to keep and bear arms for self-defense inside the home.<sup>11</sup> Two years later, in 2010, the Supreme Court further held that the Fourteenth Amendment incorporated to the states the Second Amendment right to keep and bear arms for self-defense.<sup>12</sup> After *Heller*, the Second Amendment unequivocally protects a right to bear arms for self-defense inside the home. However, as the U.S. Court of Appeals for the Seventh Circuit stated: “[T]he Supreme Court has not yet addressed the question whether the Second Amendment creates a right of self-defense outside the home.”<sup>13</sup>

According to *Heller*, the scope of the Second Amendment is determined by its historical origins and its plain language.<sup>14</sup> The history of the right to bear arms originated within the context of the English Civil War and its aftermath.<sup>15</sup> Shortly after the English Civil War, the English Parliament secured the English Bill of Rights.<sup>16</sup> In that charter, the Parliament stated that certain subjects of the Crown had the right to armed self-defense.<sup>17</sup> However, in colonial America armed self-defense was more pressing a need than in England because Native Americans and other European countries threatened the colonists' security.<sup>18</sup>

Eventually, the notion of armed self-defense for protection from hostile Native Americans transitioned to armed self-preservation from a tyrannical

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individual right to bear and keep arms, while the collective right school read the Amendment to protect the right to bear and keep arms only for militia use. WILLIAMS, *supra*, at 15–16.

11. *Heller*, 554 U.S. at 635.

12. *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3026 (2010) (“[W]e hold that the Second Amendment right is fully applicable to the States.”).

13. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012); *see also* Iyen Acosta, Note, *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, 1136 (2013) (discussing the courts' reluctance to make a determination regarding extending Second Amendment rights outside the home, because the Supreme Court did not make that determination in *Heller*).

14. *Heller*, 554 U.S. at 595 (noting that these two considerations decide the scope of the right to bear arms).

15. *Id.* at 591–95; *see* ROBERT J. SPITZER, *THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER THE LAW* 13–14 (2001) (discussing the history of the right to bear arms); *see also* Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53, 58–59 (1967) (same).

16. *Heller*, 554 U.S. at 593; SPITZER, *supra* note 15, at 14 (stating that the English Bill of Rights was enacted as a reaction to James II's rule).

17. *Heller*, 554 U.S. at 593–94; *see also* STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 11 (2008) (“[T]he English Bill of Rights of 1689, declared certain ‘true, ancient and indubitable rights,’ including: ‘That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law.’”); SPITZER, *supra* note 15, at 14–15 (stating that the English Bill of Rights law regarding the right to bear arms applied “only to nobility, wealthy landowners, and members of the militia executing their duty to defend the country”).

18. SPITZER, *supra* note 15, at 13 (acknowledging that the colonies faced a multitude of varying threats during the seventeenth and eighteenth centuries).

government.<sup>19</sup> The colonists were successful in the Revolutionary War because, in part, most owned private arms.<sup>20</sup> After the Revolutionary War, Americans feared that the new federal government would take away their rights in the same manner as the previous government.<sup>21</sup> The Framers, seeking to preserve individual rights, ratified the American Bill of Rights, thereby enshrining the right to bear and keep arms for self-defense.<sup>22</sup>

Though preserved centuries ago, this right to keep and bear arms was not well understood in pre-*Heller* America.<sup>23</sup> In fact, *Heller* elucidated the Second Amendment's meaning and held that, at its core, the Second Amendment protected an individual's right to keep and bear arms for the lawful purpose of self-defense.<sup>24</sup> However, the Court did not explicitly comment on the scope of the Second Amendment outside of the home.<sup>25</sup> Although lower federal courts have examined this particular aspect of the Second Amendment without clear guidance from the nation's highest court, their opinions are scattered like birdshot on a silhouette target.<sup>26</sup> Recently, the U.S. Court of Appeals for the Third Circuit, in *Drake v. Filko*,<sup>27</sup> considered the Second Amendment's rights outside of the home and rebuffed a challenge to New Jersey's "justifiable need" requirement for the issuance of a firearm carry permit.<sup>28</sup> The court declined to decide whether the Second Amendment protected a right to bear arms outside the home.<sup>29</sup> Instead, it simply *assumed* that the Second Amendment applied

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19. See *Heller*, 554 U.S. at 594–95 (discussing the threats the colonists faced from the British); see also HALBROOK, *supra* note 17, at 13–14 (noting that, as Plato and Aristotle taught, "an armed populace means polity and direct democracy").

20. See WARREN FREEDMAN, *THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION* 44–45 (1989) (stating that colonial law required nearly all households to have firearms).

21. *Heller*, 554 U.S. at 594–95; HALBROOK, *supra* note 17, at 181 (asserting that some feared congressional control of the militia would turn the militia into a dangerous group).

22. *Heller*, 554 U.S. at 601–02; see also HALBROOK, *supra* note 17, at 305 (elucidating the Framers' intent with regards to the Second Amendment).

23. See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* ix (1994); see also *infra* note 35 and accompanying text.

24. *Heller*, 554 U.S. at 635; see also *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3026 (2010) (noting the Court's holding in *Heller*).

25. See, e.g., *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 264 (S.D.N.Y. 2011) (stating that *Heller* did not discuss the Second Amendment right outside of the home), *aff'd sub nom.* *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

26. See *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (holding that the "amendment confers a right to bear arms for self-defense, which is as important outside the home as inside"); *but see Drake v. Filko*, 724 F.3d 426, 430–31 (3d Cir. 2013) (assuming *arguendo* that the Second Amendment protects a right outside of the home, but upholding the gun restrictions based on means-end scrutiny), *cert. denied sub nom.* *Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

27. 724 F.3d 426 (3d Cir. 2013).

28. *Drake*, 724 F.3d at 429–30 (concluding that the "justifiable need" requirement is a longstanding prohibition on Second Amendment protections and, thus, presumptively valid under the Second Amendment).

29. *Id.* at 440 (focusing on the regulations' failure to burden Second Amendment rights).

outside of the home,<sup>30</sup> and held that the requirement of a “justifiable need” to bear arms outside of the home did not violate the Second Amendment’s core protection of self-defense.<sup>31</sup>

This Note discusses why *Drake v. Filko* is inconsistent with the Second Amendment as interpreted in *Heller*. Beginning with an analysis of the history and text of the Second Amendment, from its English roots to its meaning throughout both the Framers’ era and the post-ratification period, this Note then turns to the Supreme Court’s application of the Second Amendment in *Heller* and *McDonald v. Chicago*,<sup>32</sup> noting the ramifications of each with regard to carrying firearms for the lawful purpose of self-defense outside of the home.<sup>33</sup> Next, this Note addresses the federal circuit courts’ varying approaches to the issue of whether the Second Amendment protects a right to carry a firearm for the lawful purpose of self-defense outside of the home, with a particular focus on the *Drake* decision.<sup>34</sup> Finally, this Note proposes that *Drake*’s dissent, coupled with the U.S. Courts of Appeals for the Seventh and Ninth Circuits’ decisions, is the proper interpretation of the Second Amendment’s protections. In light of the text and history of the Second Amendment and Supreme Court precedent, the Second Amendment protects a right to lawful armed self-defense, both inside and outside of the home.

#### I. THE ROOTS OF THE RIGHT: SEEDS SOWN BY ENGLISH HANDS BUT GROWN ON AMERICAN SOIL

Throughout the twentieth century, the rights now guaranteed by the Second Amendment were a mystery—their dark grey shadow only seen through an

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30. *Id.* at 431 (“Assuming that the Second Amendment individual right to bear arms does apply beyond the home . . .”).

31. *See id.* at 440.

32. 130 S. Ct. 3020, 3026 (2010).

33. This Note does not address the applicable level of judicial scrutiny required when evaluating the Second Amendment. Nor does it distinguish between concealed and openly-carried weapons, or address the various sensitive places where an individual may or may not carry a firearm. Furthermore, it will not consider public policy arguments based on gun violence. *See* *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (stating that public policy arguments are inappropriate in analyzing constitutional amendments). Rather, the Note’s focus is only on the antecedent question: whether the Second Amendment’s right to bear arms has any application outside of the home for self-defense.

34. There are other areas outside the home in which the Second Amendment might afford its protections, such as hunting, sport shooting, and target practice. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1448 (2009).

opaque window.<sup>35</sup> Yet, this could not have always been the case.<sup>36</sup> The English origins of the right to bear arms, its growth in colonial America, and the Framers' conception of the Second Amendment all support the proposition that the Second Amendment protects a right to bear arms outside of the home for the lawful purpose of self-defense.

A. *Carrying Firearms for the Lawful Purpose of Self-Defense Outside of the Home: A "True, Ancient, and Indubitable Right"*

The right to bear arms in England began not as a right, but rather as a duty to bear arms.<sup>37</sup> During the English Civil War, in the seventeenth century, the duty to bears arms evolved into a right to be armed.<sup>38</sup> In that war, citizens began to carry personal weapons for self-defense and armed resistance.<sup>39</sup> As codified in the English Declaration of Rights in 1689, the right to bear arms for self-defense was not clearly confined to the walls of the home.<sup>40</sup> Although English history is not dispositive when interpreting the protections of the Second Amendment, it provides, as *Heller* stated, the integral, foundational context that is necessary

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35. See *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J.) (noting that evaluating Second Amendment protections outside of the home is "a vast *terra incognita*").

36. *Heller* noted "that the Bill of Rights codified venerable, widely understood liberties." *Heller*, 554 U.S. at 605. See HALBROOK, *supra* note 17, at 310–20 (stating that the Framers, who drafted, discussed, and ratified the Second Amendment, understood its purpose).

37. MALCOLM, *supra* note 23, at 1 (noting the right to bear arms in England grew from a prior obligation to be armed).

38. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 214–15 (1983).

39. MALCOLM, *supra* note 23, at 31. Under the rule of King Charles II, large groups of Protestant Englishman were disarmed by force. See *Heller*, 554 U.S. at 592–93; see also MALCOLM, *supra* note 23, at 75–76 (stating that Game Act of 1671 served as a means of arms control). After the English Civil War, British Parliament recognized the dangers to its power associated with gun possession by commoners and did not want to allow the King Charles II, a Catholic, to disarm Protestants while arming Catholics. ANDREW CARLSON, *THE ANTIQUATED RIGHT: AN ARGUMENT FOR THE REPEAL OF THE SECOND AMENDMENT* 26–27 (2002) (noting that the Game Act of 1671 allowed landlords to disarm their mostly Catholic tenants). Parliament, disapproving of James' actions to arm Catholics, asked William of Orange to become king. *Id.* at 27.

40. See *Heller*, 554 U.S. at 593. In 1689, after the Glorious Revolution, recently enthroned William called a convention to address the rights of the English people and to secure the rights of his subjects against any future intrusions by a new king. MALCOLM, *supra* note 23, at 113 (expressing the concerns shared by Englishmen over another tyrannical rule). The Convention promulgated a Declaration of Rights. See *Heller*, 554 U.S. at 593.

The Declaration of Rights enumerated the "true, ancient, and indubitable," MALCOLM, *supra* note 23, at 115, rights and liberties of the English people, one of which provided: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." *Heller*, 554 U.S. at 593 (quoting 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441) (internal quotation marks omitted). This right protected an individual right to bear arms for self-defense, rather than a collective right to bear arms. MALCOLM, *supra* note 23, at 119–20.

to understand the adoption and meaning of the Second Amendment.<sup>41</sup> For more than one hundred years, this English right to bear arms developed in colonial America and evolved into a fundamental right for the young American country.<sup>42</sup>

*B. Disarmed and Alarmed in Colonial America: Privately Possessing Firearms Outside of the Home for Self-Defense was Essential to American Triumph over Tyranny in the Revolution*

As a result of expanding British military presence, American colonists formed armed militias.<sup>43</sup> The British, however, seized the arms in an attempt to stifle these militias.<sup>44</sup> To combat against these seizures, some of the Colonies passed declarations of rights enshrining the right to bear arms for the purpose of self-defense.<sup>45</sup> In addition, carrying firearms outside of the home was a vital component of self-defense against Native Americans, European countries, and

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41. See *Heller*, 554 U.S. at 592, 595; FREEDMAN, *supra* note 20, at 43–44.

42. 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, 637–38 (2012); see also HALBROOK, *supra* note 17, at 148–49 (discussing the strong sense of entitlement to the ability to carry arms in early America); *infra* Part I.B.

43. HALBROOK, *supra* note 3, at 59–61. A few years after 1768, the British military effectively occupied the city of Boston and began disarming the fleeing colonists by requiring them to turn over arms and ammunition before passing through the city limits. *Id.* at 59.

44. Kates, *supra* note 38, at 229. In fact, the Battles of Lexington and Concord at the start of the Revolutionary War were instigated by such a plan to seize arms and ammunition. *Id.*

45. See, e.g., HALBROOK, *supra* note 3, at 64. For example, the Virginia Declaration of Rights of 1776 stated: “[T]hat a well-regulated militia, or composed of the body of the people, trained to arms, is the proper, natural and safe defense of a free state . . . .” David T. Hardy, *The Rise and Demise of the “Collective Right” Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315, 323 (2011) (quoting Virginia Declaration of Rights § 13 (1776), available at [http://www.constitution.org/bcp/virg\\_dor.htm](http://www.constitution.org/bcp/virg_dor.htm) (last visited Nov. 26, 2014)) (internal quotation marks omitted). Thomas Jefferson proposed that the Virginia Constitution state, “[n]o freeman shall be debarred the use of arms.” 1 THE PAPERS OF THOMAS JEFFERSON 344 (Julian P. Boyd ed., 1950). The Pennsylvania Declaration of 1776 and Vermont’s Declaration of Rights of 1777 stated “[t]hat the people have a right to bear arms for the *defense of themselves* and their own State. . . .” Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 246 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)) (quoting Pennsylvania Ratification Convention Minority Proposal (Dec. 12, 1787), reprinted in *THE COMPLETE BILL OF RIGHTS* 182 (Neil H. Cogan ed., 1997)) (internal quotation marks omitted). The North Carolina Declaration of Rights stated “‘that the people have a right to bear arms, for defense of the State.’” HALBROOK, *supra* note 3, at 64 (quoting N.C. Declaration of Rights, XVII (1776)). These declarations could reasonably be read as an assumption of the individual right to bear arms outside the home and the expansion of the right for collective use against tyrannical rule. The Massachusetts Declaration of Rights of 1780 stated: “The people have a right to keep and to bear arms for the common defence.” Megan Ruebsamen, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 70 (2013) (quoting MASS. CONST. Pt. 1, art. XVII) (internal quotation marks omitted).

other individuals.<sup>46</sup> Ultimately, the individual right to bear arms provided colonists with legal justification and the physical means to fight the British.<sup>47</sup> In the wake of victory over the British, the American colonists began to build the new country through the U.S. Constitution.<sup>48</sup>

*C. Enshrining the Right to Bear Arms for Self-Defense Outside of the Home through Conventions, the Constitution, the Congress, and the Framers*

Shortly after the Revolutionary War, two political parties formed: the Federalists and the Anti-Federalists.<sup>49</sup> Although the two parties disagreed on the terms of a bill of rights, they both agreed on the importance of an individual's right to bear arms for self-defense.<sup>50</sup> When the right to bear arms amendment

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46. Kates, *supra* note 38, at 214–16 (explaining early laws requiring citizens to carry weapons outside the home).

47. See HALBROOK, *supra* note 3, at 58 (recognizing that an important factor in the American victory in the Revolutionary War was the citizens' ownership of and experience with weapons). John Adams, the drafter of the Massachusetts Declaration, "wrote that 'arms in the hands of citizens [may] be used at individual discretion . . . in private self-defence.'" *Id.* at 65 (alterations in original).

48. See Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 *FORDHAM URB. L.J.* 1727, 1781 (2012) (stating that the Founders replaced the Articles of Confederation with the Constitution to, inter alia, enumerate the "federal-state division" over military powers).

49. See HALBROOK, *supra* note 3, at 65–66. During the ratification process, the states held conventions to discuss the Constitution. See *District of Columbia v. Heller*, 554 U.S. 570, 603–05 (2008) (highlighting some of the certain state conventions). Anti-Federalists, like John Adams and Thomas Jefferson, preferred "[a]n armed populace." See HALBROOK, *supra* note 3, at 63. Moreover, the Anti-Federalists feared that without a bill of rights a free-standing army or select militia would disarm the people. See *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3037 (2010); see also CLAYTON E. CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* 61 (1994) (stating that the First Congress "fear[ed] not of an *armed* population, but of a *disarmed* population").

Federalists, like Noah Webster, "promised that even without a bill of rights, the American people would *remain armed* to such an extent as to be superior to any standing army raised by the federal government." HALBROOK, *supra* note 3, at 68. Philodemos, a prominent constitutional commentator, pronounced, "[e]very free man has a *right to the use of the press*, so he has to *the use of his arms*." HALBROOK, *supra* note 3, at 69 (internal quotation marks omitted).

During the Virginia convention, Patrick Henry rhetorically asked, "[h]ave we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?" *Id.* at 73–74 (quoting Patrick Henry, *The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 2, 1788)*, in 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787* 386 (Jonathan Elliot ed., 2d ed. 1836)). This fear led to the enshrinement of the individual right to bear arms in the Second Amendment. *Id.* at 74.

50. Kates, *supra* note 38, at 221 ("The proponents and the opponents of ratification of the Constitution equally buttressed their conflicting arguments on the universal belief in an armed citizenry.").

was proposed, it underwent several congressional changes<sup>51</sup> before the adoption of the Second Amendment.<sup>52</sup>

Although the Second Amendment does not explicitly state in what manner or where an individual can bear arms, at the time of its 1791 ratification, it was understood as protecting a right to bear arms outside of the home.<sup>53</sup> For example, in 1799 in Philadelphia, Dr. James Reynolds, an Anti-Federalist, protested the Alien and Sedition Acts.<sup>54</sup> When a Federalist mob rushed Reynolds for his protestations, he pulled out a pistol that he carried in his overcoat for self-defense.<sup>55</sup> At his trial for assault with a deadly weapon, Reynolds' attorney argued that, in the absence of any laws prohibiting it, "every man has a right to carry arms who apprehends himself to be in danger."<sup>56</sup> Reynolds was acquitted on these grounds, thus, suggesting an interpretation of the Second Amendment that protected an individual's right to carry a firearm for self-defense outside of the home.<sup>57</sup>

The Framers understood the right to bear arms as a right to carry firearms outside of the home for self-defense and to protect oneself against tyranny and despotism.<sup>58</sup> However, the protections of the Second Amendment have been misunderstood by generations of Americans.<sup>59</sup> The battle over the Second

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51. Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1182–83 (2009) ("The First Congress made the following changes to the text before ratifying it: (1) the reference to 'well armed' in the description of the militia was deleted; (2) the description of the militia as 'being the best security of a free country' was changed to 'necessary to the security of a free State'; (3) the language barring compelled military service of those 'religiously scrupulous of bearing arms' was dropped; and (4) the position of the militia language in the Amendment was changed. . . .").

52. U.S. CONST. amend. II. Congress responded to state calls for a declaration of rights by adopting various amendments to the Constitution, which ultimately became the Bill of Rights. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 107–09 (2011) (discussing the hesitancy of some to ratify the Constitution without a Bill of Rights). Ultimately, Congress adopted the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

53. See, e.g., HALBROOK, *supra* note 17, 317 (noting that George Washington carried a gun for self-protection during his travels).

54. See David B. Kopel & Clayton E. Cramer, *The Keystone of the Second Amendment: The Quakers, the Pennsylvania Constitution, and the Flawed Scholarship of Nathan Kozuskanich*, 19 WIDENER L.J. 277, 300 (2010).

55. *Id.* at 300–01 (stating Pennsylvania law did not prohibit carrying a firearm for personal protection).

56. SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 91 (2006) (internal quotation marks omitted).

57. *Id.* at 92.

58. See *supra* Part I.C. The right to bear arms was sacred and dear to revolutionary heroes such as Patrick Henry, James Madison, Thomas Jefferson, and George Washington. HALBROOK, *supra* note 17, at 315–17 (discussing the Framers' interest in firearms).

59. See HALBROOK, *supra* note 17, at 310–20 (summarizing the Framers' views on firearms). There were Supreme Court cases concerning the Second Amendment in the antebellum era, but *Heller* is the determinative case on the matter. See *District of Columbia v. Heller*, 554 U.S. 570,

Amendment's interpretation has continued, while reaching some conclusiveness nearly two centuries later.<sup>60</sup>

## II. GUNFIGHTS IN THE COURTHOUSE: THE SECOND AMENDMENT IN JUDICIAL CROSSHAIRS

### A. *Heller* & *McDonald*: Finding that the Core of the Second Amendment is an Individual Right to Bear Arms for Self-Defense

In *District of Columbia v. Heller*,<sup>61</sup> the Supreme Court grappled with the question of whether the Second Amendment protected an individual right or a collective right to bear arms.<sup>62</sup> In its first extensive analysis of the Second Amendment, the Court considered the District of Columbia's ban on the possession of operable handguns inside the home.<sup>63</sup> The Court concluded that to "bear arms" meant to carry a weapon for purposes unrelated to militia service.<sup>64</sup> According to the *Heller* Court, the Second Amendment "guarantee[s]

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634–35 (2008) (determining that the core of the Second Amendment was, is, and always will be an individual right to lawful armed self-defense).

60. See *infra* Part II. Typically, most Second Amendment cases arise from handgun regulatory schemes. The first set of cases concerns the issuance of permits to purchase handguns. The second set concerns the issuance of permits to carry a handgun in public. See, e.g., *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012). The issuance of a carry license or permit begins with an applicant filing an application with an administrator, local official, or sometimes a law enforcement officer. In some instances, if the administrator approves, the judiciary may review the permit's issuance. In the event of a denial, the applicant can appeal the decision to the trial court.

A permit to purchase is a prerequisite to buy a handgun, while a permit to carry is a prerequisite to carry a handgun. The statutory schemes vary, but the components are similar. Most litigation surrounds the restrictive demonstrations required to obtain a permit or license to carry a handgun in public. For example, New Jersey requires an applicant to show a "justifiable need" to carry a handgun. *Drake*, 724 F.3d at 429 (quoting N.J. STAT. ANN. § 2C:58-4(d) (West 2014)) (internal quotation marks omitted). In New York, the applicant must show a "proper cause" to carry a handgun in public. *Kachalsky v. Cnty of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (internal quotation marks omitted). Maryland requires the applicant to have a "good and substantial reason" to carry a handgun in public. *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (quoting MD. CODE ANN., Public Safety, § 5-306(a)(5)(ii) (LexisNexis 2012)) (internal quotation marks omitted).

61. 554 U.S. 570 (2008).

62. *Id.* at 579 (asserting that each amendment that refers to "rights of the people . . . . [U]nambiguously refer[s] to individual rights, not 'collective' rights").

63. *Id.* at 635 (stating that the District's gun ban case "represents this Court's first in-depth examination of the Second Amendment").

64. *Id.* at 584–86 (internal quotation marks omitted). Furthermore, the Court noted 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.

the individual right to possess and carry weapons in case of confrontation.”<sup>65</sup> In other words, the Second Amendment’s core is a right to bear arms for the lawful purpose of self-defense.<sup>66</sup> However, the Court stated that the Second Amendment right was not unlimited.<sup>67</sup>

Though the Second Amendment protects a right of self-defense, the Court said there can be no doubt about the validity of “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 schools and government buildings.”<sup>68</sup> In addition, the Court rejected any public policy argument against the Second Amendment right to bear arms based on gun violence statistics because “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>69</sup> Ultimately, the Court held that the District’s ban on operable gun possession in the home violated the Second Amendment’s core right to keep and bear arms for the lawful purpose of self-defense.<sup>70</sup> However, limited by the facts of the case before the Court, *Heller* did not directly address

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*Id.* at 584 (alterations in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)) (internal quotation marks omitted). Considering the textual analysis of the Second Amendment, the Court asserted that the Second Amendment’s wording infers that it was a codification of a pre-existing right to bear arms for self-defense. *Id.* at 594–95. *Heller* implicitly assumed that the Second Amendment extends to carrying outside the home. *See Moore*, 702 F.3d at 935 (noting that *Heller*’s analysis of the Second Amendment’s history did not speak in limiting terms); *see also* Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 227–28 (2008) (arguing that *Heller*’s logic applies to carrying arms both inside and outside the home).

65. *Heller*, 554 U.S. at 592; *see Acosta*, *supra* note 13, at 1122–24 (discussing the Court’s analysis in *Heller*).

66. The Court held that the right to bear arms was primarily a right for the purpose of self-defense, given the historical analysis of the Second Amendment. *See Heller*, 554 U.S. at 599 (stating that the “central component” of the right to bear arms is self-defense); *see also id.* at 630 (recognizing that bearing arms for “the core lawful purpose of self-defense” is constitutional). Likewise, *Heller* noted that “the inherent right of self-defense has been central to the Second Amendment right.” *Id.* at 628.

67. *See id.* at 595 (explaining that the Second Amendment does not “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*”).

68. *Id.* at 626.

69. *Id.* at 636; *but see Drake v. Filko*, 724 F.3d 426, 438 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (stating that the statute would be valid even if the state could not provide a report to prove its statistical assertions that its gun control law saves lives).

70. *Heller*, 554 U.S. at 635; *see id.* at 595 (“[T]he Second Amendment conferred an individual right to keep and bear arms.”). Because the District’s handgun ban extended “to the home[] where the need for defense of self, family, and property is most acute,” *id.* at 628, it violated “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635. Therefore, the District of Columbia’s ban on having operable handguns inside the home was found to be unconstitutional. *Id.*

whether the Second Amendment protects a right to bear arms for self-defense outside of the home.<sup>71</sup>

In *McDonald v. City of Chicago*,<sup>72</sup> decided two years after *Heller* in 2010, the Supreme Court struck down Chicago's ban on the possession of handguns inside the home.<sup>73</sup> The *McDonald* Court held that the Second Amendment was applicable to the states through incorporation and "protect[ed] a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."<sup>74</sup> In doing so, the Court reaffirmed *Heller's* holding that the Second Amendment safeguards the right to bear arms for self-defense.<sup>75</sup> According to the Court, the core focus of the Second Amendment is the ancient right of self-defense.<sup>76</sup> Moreover, the right to bear arms for self-defense is a long-established belief and value of the American people that is not contingent on "controversial public safety implications."<sup>77</sup>

As in *Heller*, the Court rejected public policy arguments based on public safety concerns over increased gun violence, because the Second Amendment right to bear arms foreclosed any policy considerations.<sup>78</sup> However, the Court recognized that the Amendment does not afford an unlimited right to carry a gun for any purpose and reaffirmed the constitutionality of the longstanding prohibitions listed in *Heller*.<sup>79</sup> Again, as in *Heller*, the nature of the facts in *McDonald* did not warrant exploration of the Second Amendment's protections outside of the home, and the Court did not address that issue.<sup>80</sup>

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71. See *Heller*, 554 U.S. at 628–30 (focusing the Court's analysis on the applicability of the gun regulation on the right to self-defense); see also *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) ("[T]he Supreme Court has not yet addressed the question whether the Second Amendment creates a right of self-defense outside the home.").

72. 130 S. Ct. 3020 (2010).

73. *Id.* at 3026.

74. *Id.* at 3044.

75. *Id.* at 3026 (reiterating that *Heller* "held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense").

76. *Id.* at 3036 ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right." (footnote omitted)). See *Heller*, 554 U.S. at 628 (summarizing the Court's historical analysis that recognized the Second Amendment's codification of an "inherent right" of self-defense).

77. *McDonald*, 130 S. Ct. at 3045. Even though the early colonial fears about Congress disarming the people faded, the right to bear arms remained exalted for self-defense. *Id.* at 3038.

78. See *McDonald*, 130 S. Ct. at 3045–46 (noting that "[t]he right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications").

79. *Id.* at 3047. The longstanding prohibitions listed by *Heller* are: in sensitive areas, by felons, and by the mentally ill. *Id.*

80. *Id.* at 3088–89 (Stevens, J., dissenting) ("Neither submission requires the Court to express an opinion on whether the Fourteenth Amendment places any limit on the power of States to regulate possession, use, or carriage of firearms outside the home.").

### B. *The Fight over the Second Amendment Carries on*

Current Second Amendment litigation has focused on whether the Second Amendment protects an individual's right to carry a handgun for the purpose of self-defense outside of the home.<sup>81</sup> These cases generally arise out of the denial of a carry permit or license to carry handguns outside of the home for the lawful purpose of self-defense.<sup>82</sup> Though some states restrict a person's ability to carry a handgun through a regulatory scheme requiring a demonstration of a particular need to carry a firearm outside of the home,<sup>83</sup> other states do not employ these restrictions.<sup>84</sup> The federal courts of appeal have adopted two distinct approaches to the question of whether the Second Amendment protects a right to carry arms *extra domum* for the purpose of self-defense.<sup>85</sup>

The first approach finds that the Second Amendment protects a right to carry firearms outside of the home for the lawful purpose of self-defense.<sup>86</sup> The second approach does not decide whether the Second Amendment protects a right to carry firearms outside of the home, but first *assumes* the Second Amendment's applicability before applying intermediate scrutiny.<sup>87</sup>

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81. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012) (challenging an Illinois statute that prohibited carrying an easily accessible, loaded firearm); see also *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013) (stating that the lower court determined the Second Amendment extended outside the home), *cert. denied*, 134 S. Ct. 422 (2013). However, the battle is not only in the courts. The United States House of Representatives has put forth a bill to remedy at least one problem associated with carrying outside of the home. See National Right-to-Carry Reciprocity Act of 2013, H.R. 2995, 113th Congress § 2(a) (2013) (proposing that, under certain circumstances, a person may carry concealed weapons in public).

82. See, e.g., *Drake v. Filko*, 724 F.3d 426, 427 (3d Cir. 2013), *cert. denied sub nom.* *Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

83. See, e.g., *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012) (stating that the New York law at issue, N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2014) required a demonstration of a "proper cause"), *cert. denied sub nom.* *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013).

84. See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) (citing COLO. REV. STAT. ANN. § 18-12-203(1)(a) (West 2013) that only restricts non-residents).

85. See, e.g., *Martinez*, 707 F.3d at 1201 (stating that there is no right outside the home); *Moore*, 702 F.3d at 942 (holding that there is a right to bear arms outside of the home for non-residents); *Woollard*, 712 F.3d at 881-82 (assuming that there is a right to bear arms outside of the home); see also Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 177 (2013) ("[T]he lower courts have had to determine the appropriate analysis themselves, guided by the Supreme Court's approach in *Heller*. The courts have not taken a uniform approach.").

86. See *Moore*, 702 F.3d at 942 (explaining that "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense," and that "evidence . . . is consistent with concluding that a right to carry firearms in public may promote self-defense").

87. See *Woollard*, 712 F.3d at 881-82 ("[W]e assume that . . . Woollard's Second Amendment right is burdened by the good-and-substantial-reason requirement, we further conclude that such burden is constitutionally permissible.").

*1. The First Approach: The Second Amendment Protects a Right to Bear Arms Outside of the Home*

In *Moore v. Madigan*,<sup>88</sup> the U.S. Court of Appeals for the Seventh Circuit addressed a constitutional challenge to an Illinois statute that prohibited a person from carrying a handgun outside the home for self-defense.<sup>89</sup> The Seventh Circuit concluded that the Second Amendment, as interpreted by *Heller*, “confers a right to bear arms for self-defense, which is as important outside the home as inside.”<sup>90</sup> Overturning the district court, the Seventh Circuit held that the right to bear arms included the right to carry arms outside of the home for the lawful purpose of self-defense.<sup>91</sup>

The heart of the Seventh Circuit’s analysis focused on the implications of *Heller* for the Second Amendment’s protections outside of the home.<sup>92</sup> First, the Seventh Circuit stated that, although *Heller* and *McDonald* noted that the right to engage in armed self-defense was strongest inside the home,<sup>93</sup> it did not follow from this assertion that the need for self-defense was not important outside of the home.<sup>94</sup> Second, the Seventh Circuit declared that *Heller*

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88. 702 F.3d 933 (7th Cir. 2012).

89. See *id.* at 934. The statute provided that “[a] person commits the offense of unlawful use of weapons when he knowingly . . . [c]arries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode, legal dwelling.” 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4) (West 2010). Exceptions to the law include police officers, security guards, target shooters, and persons on their private real property. *Moore*, 702 F.3d at 934. The issue for the court was whether carrying guns in public is protected by the Second Amendment; the case did not concern handgun ownership. *Id.* at 934, 938.

In a similar case, the United States District Court for the District of Columbia recently found that the Second Amendment protects a right to carry arms outside of the home for the purpose of lawful self-defense and struck down the District’s ban on carrying weapons outside of the home. *Palmer v. D.C.*, No. 1:09-CV-1482 (FJS), 2014 WL 3702854, \*7–8 (D.D.C. July 24, 2014) (noting that the recent Supreme Court decisions mandated such a finding).

90. See *id.* at 942.

91. In the district court case, *Moore v. Madigan*, 842 F. Supp. 2d 1092 (C.D. Ill.), *rev’d*, 702 F.3d 933 (7th Cir. 2012), plaintiffs moved for a preliminary or permanent injunction enjoining the enforcement of two Illinois state weapons statutes that prohibit the carrying of loaded and operable firearms in public. *Id.* at 1095–96, 1099. The defendant, the attorney general, moved to dismiss. *Id.* at 1096. The plaintiffs argued that the Second Amendment protects the rights of an individual to carry firearms in public. *Id.* at 1098. The district court held that *Heller*’s narrow holding is that the Second Amendment only provides an individual right to lawfully bear firearms in the home for the purpose of self-defense. *Id.* at 1102. Moreover, the court explained that “[n]either *Heller* nor *McDonald* recognizes a Second Amendment right to bear arms outside of the home.” *Id.* at 1101. Because *Heller* and *McDonald* addressed the Second Amendment only within the purview of the home, the court reasoned that the Second Amendment right to bear arms is limited to self-defense inside the home. See *id.* at 1102.

92. See *Moore*, 702 F.3d at 935. Discussing *Heller*, the court stated that it cannot “ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one’s home.” *Id.*

93. *Id.*

94. *Id.* The court continued its analysis of *Heller* and *McDonald* by adding that “‘the need for defense of self, family, and property is most acute’ in the home, but that doesn’t mean it is not

guaranteed a right to carry in case of confrontation, and, therefore, by implication, the Second Amendment protected a right to carry outside of the home because “[c]onfrontations are not limited to the home.”<sup>95</sup>

Next, following *Heller*, the Seventh Circuit considered the text and the history of the Second Amendment. The court looked to the plain language of the Second Amendment to uncover its meaning and noted that “bearing arms” would have been a peculiar and improper phrase to apply only in the home and not outside of the home.<sup>96</sup> Therefore, the plain language of the Second Amendment, the Court observed, supported the conclusion that “[a] right to bear arms thus implies a right to carry a loaded gun outside the home.”<sup>97</sup>

Furthermore, the court, aware of *Heller*’s historical Second Amendment decision, noted that *Heller*’s holding was based on a historical analysis of the Second Amendment and that the lower courts were bound by that determination.<sup>98</sup> The court stated that although the same historical circumstances did not exist in the modern world as they did when the Second Amendment was ratified in 1791, the protections of the Amendment remained the same in the twenty-first century.<sup>99</sup> The Second Amendment’s core protection of armed self-defense, the court reasoned, was more likely to be needed to defend oneself on the streets than in one’s own home.<sup>100</sup> Furthermore, the Seventh Circuit explained that “[t]o confine the right to be armed to the home [was] to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”<sup>101</sup>

Following the Supreme Court’s lead in *Heller*, the Seventh Circuit again emphasized that the right to bear arms was not dependent on gun violence statistics.<sup>102</sup> The Supreme Court removed this policy choice from consideration,

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acute outside of the home.” *Id.* (citation omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

95. *Id.* at 936; *see also id.* at 935–36 (stating that “*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home, as when it says that the amendment ‘guarantee[s] the individual right to possess and carry weapons in case of confrontation.’” (alteration in original) (quoting *Heller*, 554 U.S. at 592)).

96. *Id.* at 936.

97. *Id.*

98. *Id.* at 937–38 (referencing *Heller* repeatedly and relying on its analysis and stating “we are bound by the Supreme Court’s historical analysis because it was central to the Court’s holding in *Heller*”).

99. *See id.* at 936–37 (recognizing the threat of attacks from Native Americans is no longer present).

100. *Id.* at 937. There is a stronger self-defense claim in public than in the home. *Id.* It would be hard to imagine a woman exercising self-defense more often inside the home than outside, of the home. She is more vulnerable outside without any protections than behind her closed apartment doors. *Id.* Especially, because, as in this case, most murders in Chicago are committed outside of the home rather than inside. *Id.*

101. *Id.* at 937.

102. *See id.* at 939 (“Anyway the Supreme Court made clear in *Heller* that it wasn’t going to make the right to bear arms depend on casualty counts.”).

and, therefore, the Seventh Circuit stated that, in Second Amendment jurisprudence, empirical gun violence data was irrelevant.<sup>103</sup> Rather, what matters is self-defense.<sup>104</sup>

The Seventh Circuit accepted limited bans on carrying outside of the home, focusing on the longstanding bans listed in *Heller*.<sup>105</sup> However, *Moore* stated that a ban cannot apply to either every class of persons or every public place.<sup>106</sup> In addition, because the Illinois statute was not one of the acceptable longstanding prohibitions, it destroyed the Second Amendment right to bear arms for self-defense outside of the home.<sup>107</sup>

Like the Seventh Circuit, the U.S. Court of Appeals for the Ninth Circuit, in *Peruta v. San Diego County*,<sup>108</sup> held that the Second Amendment protected a right to bear arms for the purpose of self-defense both inside and outside of the home.<sup>109</sup> In *Peruta*, the Ninth Circuit analyzed a California statute that required a concealed carry permit applicant to attest to a good moral character, attend a training course, and demonstrate a “good cause” to carry a firearm in public.<sup>110</sup> “Good cause,” according to the San Diego County Sheriff, meant a “sufficiently pressing need for self-protection” compared to the general population.<sup>111</sup> Each plaintiff was either denied a concealed carry permit by San Diego County for lacking a “good cause” to carry outside of the home or declined to apply, fearing that they would not meet the “good cause” requirement.<sup>112</sup> The *Peruta* court, relying heavily on *Heller*’s determination that the core of the Second Amendment’s right to bear arms is self-defense, reiterated that any statute that infringed on the right to bear arms for self-defense destroyed the Second

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103. *Id.* at 939.

104. *See id.* at 942.

105. *Id.* at 940–41.

106. *Id.* at 940. But the court said there was a justification to restrict the rights of those who are mentally ill or criminals and in public places like courtrooms, government buildings, or public schools because these are longstanding prohibitions acknowledged by *Heller*. *Id.* at 940–41; *see also id.* at 940 (“[A] person can preserve an undiminished right of self-defense by not entering those places . . .”). Moreover, there is nothing that would question the ban of guns for undocumented aliens, children, and others. *Id.* at 940–41. However, the court hypothesized that it is reasonable to condition the right to bear arms outside of the home on a gun safety course or some other training procedure. *See id.* at 941 (stating that a person who is not trained in firearms “is a menace to himself and others”).

107. *See People v. Aguilar*, 2 N.E.3d 321, 326–28 (Ill. 2013) (agreeing with the Seventh Circuit and holding that the Illinois statute discussed in *Moore* violated the Second Amendment’s right to carry a firearm outside of the home for the purpose of self-defense).

108. 742 F.3d 1144 (9th Cir. 2014).

109. *Id.* at 1166–67 (“Put simply, a law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down.” (citing *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008))).

110. *Id.* at 1148.

111. *Id.* (stating that “California law delegates to each city and county the power to . . .” define “good cause”).

112. *Id.*

Amendment right.<sup>113</sup> Because the San Diego County’s definition of “good cause” infringed on the right to bear arms for self-defense, the scheme was deemed unconstitutional.<sup>114</sup>

The Ninth Circuit, like the Seventh Circuit, determined that *Heller*’s analytic approach controls the analysis of Second Amendment rights.<sup>115</sup> First, like *Heller*, the Court asked whether the activity fell within the scope of the Second Amendment’s protection.<sup>116</sup> To determine whether the Second Amendment protected a right to bear arms outside of the home, the Ninth Circuit consulted the text and history of the Amendment.<sup>117</sup> Based on the text, the court concluded that “bear” means to “carry for . . . confrontation” inside and outside of the home.<sup>118</sup> Based on the post-ratification history of the Second Amendment, the court determined that the Second Amendment protected the right to bear arms outside of the home for self-defense.<sup>119</sup> Thus, the Ninth Circuit concluded the text and history of the Second Amendment confirmed that it protected a right to armed self-defense outside of the home.<sup>120</sup>

Next, like the Supreme Court in *Heller*, the *Peruta* court asked whether the challenged law infringed on the right to bear arms.<sup>121</sup> To determine whether the statute infringed on the right, the court inquired into whether the statute burdened or destroyed the right.<sup>122</sup> If the statute destroys the right to bear arms, then it is unconstitutional.<sup>123</sup> California does not allow open carry and the only way to bear arms is through a concealed carry permit.<sup>124</sup> Because there was no other way to carry than to carry concealed arms and because self-defense was not considered a “good cause,” the Ninth Circuit held that the statute destroyed the core protection of the Second Amendment.<sup>125</sup> Thus, after this two-step analysis, the court concluded that San Diego’s practice was unconstitutional.<sup>126</sup>

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113. *See id.* at 1153, 1172.

114. *Id.* at 1179.

115. *Id.* at 1155 (noting historical “findings” that contradict the Supreme Court’s findings in *Heller* are not applicable to determine the Second Amendment’s right to bear arms).

116. *Id.* at 1150.

117. *See id.* at 1150–51.

118. *Id.* at 1151–52 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008)) (internal quotation marks omitted).

119. *See id.* at 1156–60 (performing a significant historical analysis of “the nineteenth-century case law interpreting the Second Amendment”).

120. *See id.* at 1166 (noting its holding conforms with other circuits).

121. *Id.* at 1167.

122. *Id.* at 1168.

123. *See id.*

124. *Id.*

125. *See id.* (referring to the statute as a “rationing system”).

126. *Id.* at 1179.

2. *The Second Approach: A Judicial Reluctance to Decide the Scope of the Second Amendment's Application Outside of the Home*

The second approach is categorized by an assumption. The federal circuit courts *assume* that Second Amendment rights have some application outside of the home, but the courts do not determine the scope of the right. In *Woollard v. Gallagher*,<sup>127</sup> the U.S. Court of Appeals for the Fourth Circuit confronted a challenge to a Maryland regulatory scheme that required an applicant to demonstrate a “good and substantial reason . . . to carry . . . a handgun.”<sup>128</sup> The court, “without . . . demarcating the reach of the Second Amendment,” reversed the district court’s ruling that the Second Amendment protected a right to carry a firearm outside of the home for the lawful purpose of self-defense.<sup>129</sup> The Fourth Circuit, relying upon its precedent, stated that it was not necessary for lower courts to search for the meaning of the Second Amendment.<sup>130</sup> Rather, the court stated that lower courts should await instructions from the Supreme Court on the issue.<sup>131</sup>

However, the Fourth Circuit *assumed*, for the sake of argument, that there was a right to bear arms outside of the home.<sup>132</sup> The *Woollard* court concluded that the “good and substantial reason” criterion for a carry permit was permissible because it did not burden an individual’s right to bear arms for self-defense.<sup>133</sup> The “good and substantial reason” criterion did not burden the right to bear arms because, as the court held, the state’s interest in public safety outweighed an individual’s interest in self-defense.<sup>134</sup> Therefore, Second Amendment rights outside the home may be restricted more than inside the home.<sup>135</sup>

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127. 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013).

128. *Id.* at 868 (quoting MD. CODE ANN., Public Safety, § 5-306(a)(5)(ii) (LexisNexis 2012)) (internal quotation marks omitted).

129. *Woollard*, 712 F.3d at 868. In *Woollard*, at the district court, the plaintiff, an applicant for a permit to carry a handgun outside of the home, brought action against the state claiming that the requirement to demonstrate “good and substantial reason” for the issuance of a carry permit violated the Second Amendment. *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 465–66 (D. Md. 2012), *rev’d sub nom. Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013). The district court decided it had to determine whether the statute “burden[ed] any Second Amendment right at all.” *Id.* at 469. Relying on *Heller*, the district court stated that the right for self-defense was *strongest* inside the home, implying that it existed in a less acute form outside of the home. *Id.* Moreover, the district court reasoned that self-defense is an *in rem* need wherever a person is located, and, therefore, found that the Second Amendment’s protections extend beyond the home. *Id.*

130. *Woollard*, 712 F.3d at 876 (stating that when examining the scope of the Second Amendment outside of the home, a previous Fourth Circuit case controls review).

131. *Id.* at 872.

132. *Id.* at 876.

133. *Id.* at 881–82.

134. *Id.* at 882.

135. *Id.* at 876.

In *Kachalsky v. County of Westchester*,<sup>136</sup> the U.S. Court of Appeals for the Second Circuit heard a constitutional challenge to a restrictive gun carry permit scheme.<sup>137</sup> Specifically, the court considered whether a New York statute that required a showing of “proper cause” to conceal a handgun in public violated the Second Amendment.<sup>138</sup> Under New York law, to secure a concealed carry permit for the purpose of self-defense, an applicant needed to demonstrate “proper cause,” which was defined as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”<sup>139</sup> The plaintiffs each sought to carry firearms outside of the home for purposes of self-defense, and all were denied a permit.<sup>140</sup>

The Second Circuit emphasized that the Second Amendment protections “are at their zenith within the home” and cautioned that its implications outside the home are a “vast ‘*terra incognita*.’”<sup>141</sup> With no clear direction from the Supreme Court regarding the Second Amendment’s protections outside of the home, the Second Circuit *assumed* that the Second Amendment has “some” application outside of the home but did not make a conclusive decision one way or the other.<sup>142</sup> Then, the court distinguished *Kachalsky* from *Heller*.<sup>143</sup>

Specifically, the Second Circuit said that the distinction between the cases was the need to promote public safety.<sup>144</sup> The Second Circuit noted that there were no public safety concerns in *Heller* because the ban applied to firearms inside

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136. 701 F.3d 81, 84 (2d Cir. 2012), *cert. denied sub nom.* *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013).

137. *Id.* at 83.

138. *Id.* According to the court, under the New York law, in order to qualify for a carry license, one must have a handgun license. *Id.* at 83–84. The handgun licenses are restricted to those over the age of twenty-one who have a good moral character and lack a criminal history or mental illness. *Id.* at 86 (citing N.Y. PENAL LAW § 400.00(1)(a)–(c), (i) (McKinney 2014)). According to the court, the statute does not supply a definition for “proper cause.” *Id.* Consequently, New York courts have determined “proper cause” to include carrying for the purposes of target shooting, hunting, or self-defense. *Id.*

139. *Id.* (quoting *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

140. *See id.* at 83; *see also id.* at 88 (“Plaintiffs’ applications were all denied for the same reason: Failure to show any facts demonstrating a need for self-protection distinguishable from that of the general public.”).

141. *Id.* at 89 (quoting *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)). However, the Seventh Circuit later claimed that the “‘vast *terra incognita*’ has been opened to judicial exploration by *Heller* and *McDonald*.” *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). It is the lower courts’ job to explore the limits of the Second Amendment and to substantively rule on these issues, rather than assume for the sake of argument that a right exists, because without the courts acting on this the Supreme Court will never be able to give direction to the lower courts.

142. *See Kachalsky*, 701 F.3d at 89.

143. *Id.* at 94. New York’s scheme concerned carrying handguns in public, while *Heller* concerned a ban within the home. *See id.*

144. *See id.* (noting public safety usually outweighs the Second Amendment interest in self-defense).

the home, while the statute in *Kachalsky* restricted carrying in public due to public safety concerns.<sup>145</sup> Thus, in *Kachalsky*, handgun regulation was a means to achieve the state's goal of promoting public safety.<sup>146</sup> The *Kachalsky* court concluded that the statute did not infringe on the right to bear arms because the "proper cause" restriction on carrying handguns was substantially related to New York's interest in protecting the public and preventing crime and it promoted those interests.<sup>147</sup> Therefore, the court noted that this public safety interest outweighs an individual's right to bear arms in public.<sup>148</sup>

### III. DRAKE V. FILKO: THE THIRD CIRCUIT'S ANALYSIS OF THE SECOND AMENDMENT'S SCOPE OUTSIDE OF THE HOME

#### A. *Majority View*: Drake v. Filko

In *Drake v. Filko*,<sup>149</sup> the U.S. Court of Appeals for the Third Circuit weighed in on the circuit split concerning the Second Amendment's protections of the right to bear arms outside of the home.<sup>150</sup> In this case, the appellants were each denied a New Jersey concealed carry permit because they failed to demonstrate the statutory prerequisite of a "justifiable need" to carry a handgun for self-defense in public.<sup>151</sup> The New Jersey statute defined "justifiable need" as a special need for self-defense apart from the general population.<sup>152</sup>

The district court held that the statute was a longstanding restriction contemplated by *Heller* and, therefore, did not violate an individual's right to

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145. *Id.*

146. *Id.* at 98. The restriction is in the interest of "public safety and crime prevention." *Id.*

147. *See id.* at 98–99 (noting that it was unnecessary to apply strict scrutiny to the statute).

148. *Id.* at 100.

149. 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom.* Drake v. Jerejian, 134 S. Ct. 2134 (2014).

150. *Id.* at 431.

151. *Id.* at 428–29 (stating that appellants "were denied, however, because pursuant to [N.J. STAT. ANN.] § 2C:58–4(c) either a police official or superior court judge determined that they failed to satisfy the 'justifiable need' requirement").

152. *Id.* at 428 (stating that "justifiable need" means "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" (quoting N.J. ADMIN. CODE § 13:54-24(d)(1) (2007)) (internal quotation marks omitted)).

bear arms.<sup>153</sup> The Third Circuit agreed, while recognizing that the Second Amendment's application outside of the home was an unsettled issue.<sup>154</sup>

The court stated that *Heller* and *McDonald* only conferred an individual right to bear arms *inside* the home for the lawful purpose of self-defense.<sup>155</sup> Although the court acknowledged that the Seventh Circuit in *Moore* determined that *Heller*'s historical analysis implied that the Second Amendment protected a right outside of the home, the *Drake* court suggested that the Seventh Circuit "may have read *Heller* too broadly."<sup>156</sup> In doing so, the Third Circuit rejected the appellants' argument that a historical analysis was necessary because "[h]istory and tradition do not speak with one voice."<sup>157</sup>

The court declined to perform a historical analysis of the Second Amendment and did not decide whether an "individual right to bear arms for the purpose of self defense extend[ed] beyond the home."<sup>158</sup> Rather, a determination of the Second Amendment's protections outside of the home was "not necessary to [its] conclusion."<sup>159</sup> Instead, the Third Circuit continued its analysis by "[a]ssuming that the Second Amendment individual right to bear arms [did] apply beyond the home."<sup>160</sup>

Under this *assumption*, the court questioned whether the "'justifiable need' [requirement] to carry a handgun for self-defense burden[ed] conduct within the scope of that Second Amendment guarantee."<sup>161</sup> Applying intermediate

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153. *Id.* at 429. In the district court, the plaintiff claimed that there is a fundamental right to carry a firearm under the Second Amendment. See *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012), *aff'd sub nom. Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014). The court declined to find such a right outside of the home because as it understood *Heller* only protects a right to carry inside the home. *Id.* at 816. Furthermore, the Court reasoned, the historical evidence *Heller* cited is unclear on whether there is a right to carry outside of the home. See *id.* at 824. However, the court assumed that there is a right to bear arms outside of the home, even though it came to the opposite conclusion that there is no right outside of the home. See *id.* at 826 (stating an absolute ban on carrying weapons outside the home would be unconstitutional). The court then upheld the gun regulation because it passed intermediate scrutiny. *Id.* at 837.

154. *Drake*, 724 F.3d at 429–30.

155. See *id.* at 430 ("Taken together, these cases made clear that 'Second Amendment guarantees are at their zenith within the home.'" (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013))).

156. *Id.* at 430 (emphasis added).

157. *Id.* at 431 (alteration in original) (quoting *Kachalsky*, 701 F.3d at 91) (internal quotation marks omitted) (rejecting appellants contention that "[t]ext, history, tradition and precedent all confirm that [individuals] enjoy a right to *publicly* carry arms for their defense" (alteration in original) (quoting Appellant's Brief and Appendix Volume I at 12, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (No. 12-1150))).

158. *Id.* ("At this time, we are not inclined to address this contention by engaging in a round of full-blown historical analysis, given other courts' extensive consideration of the history and tradition of the Second Amendment.").

159. *Id.*

160. *Id.* (emphasis added).

161. *Id.*

scrutiny, the court concluded that, according to *Heller*, “the ‘justifiable need standard’” to obtain a permit to carry publicly a handgun for self-defense “qualifie[d] as a ‘longstanding,’ ‘presumptively lawful’ regulation.”<sup>162</sup> In other words, the requirement for a “justifiable need” to carry a handgun for lawful self-defense is a proper, longstanding restriction on an individual’s Second Amendment rights.<sup>163</sup> Therefore, the court concluded that New Jersey’s “justifiable need” requirement to carry a handgun did not burden the Second Amendment right to bear arms outside of the home for self-defense, and the “justifiable need” statutory scheme was constitutional.<sup>164</sup>

*B. Dissent: The Second Amendment Protects a Right to Carry a Firearm Outside the Home*

The dissent in *Drake*, however, rejected the majority’s reading of *Heller*.<sup>165</sup> The dissenting judge stated that the interpretation of the Second Amendment under *Heller* and *McDonald* protected an individual’s right to keep and bear arms for the purpose of lawful self-defense.<sup>166</sup> Because the Second Amendment secures the right to bear arms for self-defense, and as the need for self-defense is arguably greater outside of the home than inside the home, the dissent believed that the Second Amendment must apply outside of the home.<sup>167</sup> Furthermore, the dissent noted that *Heller* and *McDonald* explained that the Second Amendment removed certain policy choices from the legislature.<sup>168</sup> Moreover, New Jersey’s policy choice to restrict the right to bear arms to a “justifiable need” violated the Second Amendment’s core protection of a right to armed self-defense.<sup>169</sup> The dissent stated that “interpreting the Second Amendment to

162. *Id.* at 434.

163. *See id.* (“[A]ssuming that the Second Amendment confers upon individuals some right to carry arms outside the home, we would nevertheless conclude that the ‘justifiable need’ standard . . . is a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller* . . .”).

164. *See id.* at 439–40 (“We refuse Appellants’ invitation to intrude upon the sound judgment and discretion of the State of New Jersey, and we conclude that the “justifiable need” standard withstands intermediate scrutiny.”).

165. *Id.* at 440 (Hardiman, J., dissenting) (“New Jersey’s law conditioning the issuance of a permit to carry a handgun in public on a showing of ‘justifiable need’ contravenes the Second Amendment.”).

166. *Id.* at 444–45 (explaining that the Supreme Court’s historical understanding of an individual’s right to bear arms protects an individual in both public and private settings).

167. *See id.* at 445–46 (“[T]he legal principle enunciated in *Heller* is not confined to the facts presented in that case.”); *see also id.* at 445 (stating that the Supreme Court declined to apply the Second Amendment outside of the home, because the case was limited to the facts at issue). Moreover, the Second Amendment, according to the dissent, applies outside of the home. *Id.*

168. *See id.* at 442 (“[T]he question presented is not whether New Jersey’s justifiable need requirement is a reasonable, let alone a wise, policy choice. Rather, we must decide whether the New Jersey statute violates the Second Amendment.”).

169. *See id.* at 444 (“[T]he *Heller* Court repeatedly noted that the Second Amendment protects an inherent right to self-defense . . .”).

extend outside the home [was] merely a commonsense application of the legal principle established in *Heller* and reiterated in *McDonald*: that ‘the Second Amendment protect[ed] the right to bear arms for the purpose of self-defense.’”<sup>170</sup>

#### IV. THE TEXT AND HISTORY DICTATE THAT THE SECOND AMENDMENT PROTECTS THE RIGHT TO BEAR ARMS OUTSIDE OF THE HOME

##### A. *The Third Circuit Unpersuasively Assumed the Scope of the Second Amendment Without Discussing Its Text and History*

Historically, the Second Amendment’s right to bear arms “is, and has always been, an individual right” to armed self-defense.<sup>171</sup> The Supreme Court, in its discussion of the Second Amendment in *Heller*, held that the Second Amendment protected an individual’s right to bear arms for the purpose of self-defense because of the Amendment’s text and historical origins.<sup>172</sup> The Third Circuit’s decision in *Drake* ignored the text and history of the Second Amendment and arrived at a flawed conclusion.

First, the text of the Second Amendment implies a right to bear arms outside of the home for self-defense. As interpreted by *Heller*, the right “to bear arms”<sup>173</sup> refers to a right to carry for the purpose of confrontation.<sup>174</sup> Confining the right “to bear arms” to the home, as the Seventh and Ninth Circuits noted, is nonsensical, improper, and an awkward use of the phrase.<sup>175</sup>

Second, if restricted solely to the home, the right “to bear arms” would lose its intended meaning.<sup>176</sup> The idea of carrying a gun for self-defense “does not exactly conjure up images of father stuffing a six-shooter in his pajama’s pocket before heading downstairs to start the morning’s coffee.”<sup>177</sup> Rather, it brings to

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170. *Id.* at 446 (quoting *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3026 (2010)).

171. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1155 (9th Cir. 2014) (citing *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008)).

172. *See Heller*, 554 U.S. at 595; *id.* at 622 (“This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms . . .”).

173. *Id.* at 584 (“At the time of the founding, as now, to ‘bear’ meant to ‘carry.’”).

174. *See Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). (“[T]he right to ‘bear’ . . . 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.”).

175. *See id.*; *Peruta*, 742 F.3d at 1152 (“To be sure, the idea of carrying a gun ‘in the clothing or in a pocket, for the purpose . . . of being armed and ready,’ does not exactly conjure up images of . . . mother concealing a handgun in her coat before stepping outside to retrieve the mail.” (omission in original)).

176. *See Heller*, 554 U.S. at 592 (“Putting all of the [ ] textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”); *Moore*, 702 F.3d at 936 (“Confrontations are not limited to the home.”).

177. *Peruta*, 742 F.3d at 1152.

mind the image of a woman carrying a handgun to protect herself on her nightly jog.<sup>178</sup> Therefore, there seems to be no logical reason solely based on the language of the Second Amendment to restrict the right of self-defense to the home,<sup>179</sup> because there is an interest in self-defense outside of the home, as well.<sup>180</sup>

Third, although the Third Circuit stated that history was inconsistent and “do[es] not speak with one voice” on the right to bear arms, its determination ignored *Heller*’s rejection of flawed cases that misinterpreted the Second Amendment.<sup>181</sup> Rather, history confirms the Second Amendment’s protection of the right to bear arms outside of the home. As shown, during the Revolutionary War and the ratification process of the Bill of Rights, the Second Amendment protected a right to bear arms for the purpose of self-defense inside and outside of the home.<sup>182</sup> The Framers also understood the same when they drafted the Second Amendment.<sup>183</sup> Because these historical determinations were integral to *Heller*’s holding, they must be followed in all Second Amendment litigation.<sup>184</sup>

*Moore* and *Peruta* affirm this notion that these historical analyses are central to *Heller*’s holding and, even if the courts disagree with them, they are bound to follow the holding.<sup>185</sup> In other words, without these historical analyses, *Heller* could not stand on its own. As the *Peruta* court noted, “*Heller* clarifie[d] that the keeping and bearing of arms [was], and ha[d] always been, an individual right. . . . [T]he right [was], and ha[d] always been, oriented to the end of self-defense. Any contrary interpretation of the right, whether propounded in 1791 or just last week, [was in] error.”<sup>186</sup> Thus, the Third Circuit’s reliance on

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178. See *Moore*, 702 F.3d at 937 (explaining that it is more likely for a woman to defend herself outside of the home than it is for her to need self-defense inside of her home); see also *Peruta*, 742 F.3d at 1152 (stating that the right to bear arms “brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site”).

179. Compare *Heller*, 554 U.S. at 584 (noting that the natural meaning of the language indicates carrying a weapon for self-defense), with *Moore*, 702 F.3d at 936 (“[O]ne doesn’t have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home.”).

180. *Drake v. Filko*, 724 F.3d 426, 446 (3d Cir. 2013) (Hardiman, J., dissenting) (“[T]he need for self-defense naturally exists both outside and inside the home”), cert. denied sub nom. *Drake v. Jerejian*, 134 S. Ct. 2134 (2014). The “object” of self-defense is one’s own person, and this “object” is not restricted to, or defined by, its position inside or outside the home.

181. *Id.* at 431 (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806 (2013)) (internal quotation marks omitted).

182. See *supra* Part I.B–C.

183. See HALBROOK, *supra* note 17, at 310–20 (discussing the Framers’ intent).

184. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (“The appellees ask us to repudiate the Court’s historical analysis. That we can’t do.”).

185. See *id.* at 935 (stating that the court cannot “ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one’s home”).

186. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1155 (9th Cir. 2014) (citations omitted).

nineteenth century cases, which are contrary to *Heller*'s holding, as evidence that the history of the Second Amendment "do[es] not speak with one voice," is incorrect.<sup>187</sup> These cases were rejected by *Heller* as misinterpreting the Second Amendment.<sup>188</sup> Therefore, because the Third Circuit declined to perform a full historical analysis of the right to bear arms outside of the home, it misunderstood the history of the Second Amendment and reached an incorrect conclusion.

Furthermore, although the *Drake* court refrained from addressing the Second Amendment's protections outside of the home, its justification for doing so was weak. The court stated that it would await directions from the Supreme Court on the issue.<sup>189</sup> However, federal circuit courts could easily explore the scope of the law.<sup>190</sup> Instead, the court wrongly skirted the issue to await the Supreme Court's directions.

As the *Drake* court, along with the Second and Fourth Circuits, were correct to point out, *Heller* noted that the Second Amendment was "most acute" inside the home.<sup>191</sup> Yet, the Third Circuit ignored the implication of this statement in its holding. If the Second Amendment's core protection is "'most acute' in the home,"<sup>192</sup> then it implies that the core protection must also extend beyond the home. There is no need to assume that the Second Amendment may have some application outside of the home.<sup>193</sup> Based on the above reasons, the implications of *Heller* should have been enough to warrant a full historical analysis of the Second Amendment's protections outside of the home.

Although *Heller* did not "clarify" the entire scope of the Second Amendment, it provided courts with certain immutable conclusions based on the amendment's text and history.<sup>194</sup> The *Heller* Court concluded that the right was, and always had been, at its core, an individual right to self-defense.<sup>195</sup> This cannot be ignored.

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187. See *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013)) (internal quotation marks omitted), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

188. See *District of Columbia v. Heller*, 554 U.S. 570, 619–23 (2008).

189. *Drake*, 724 F.3d at 431 (stating that the court will not explain the scope of the Second Amendment beyond what the Supreme Court has determined it to mean).

190. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to [s]ay what the law is. Tho[s]e who apply the rule to particular ca[s]es, mu[s]t of nece[ss]ity expound and interpret that rule.").

191. *Heller*, 554 U.S. at 628 ("[T]he prohibition [in this case] extends, moreover, to the home, where the need for defense of self, family, and property is most acute.").

192. See *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (quoting *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3036 (2010)).

193. *Contra Drake*, 724 F.3d at 431.

194. See *Moore*, 702 F.3d at 937 ("[W]e are bound by the Supreme Court's historical analysis because it was central to the Court's holding in *Heller*.").

195. *Heller*, 554 U.S. at 595 ("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.").

*B. The Third Circuit Wrongly Allowed a Government Interest in Public Safety to Destroy the Second Amendment's Core Right to Self-Defense*

The core of the Second Amendment is the “inherent right of self-defense” and because its core protection is implicated in *Drake*, legislation that destroyed its core protection would not survive under any level of expressed scrutiny.<sup>196</sup> By applying intermediate scrutiny, the Third Circuit wrongly allowed a government interest to destroy the Second Amendment’s core protection. In New Jersey, the only way an individual may carry a handgun for self-defense outside of the home is if he can demonstrate a “justifiable need” to carry a firearm.<sup>197</sup> New Jersey’s requirement for a “justifiable need” hinges entirely on its interest in public safety.<sup>198</sup> Because a “justifiable need” constitutes something more than self-defense, New Jersey’s law destroys the core of the Second Amendment’s protections. The individual, seeking to bear arms for the lawful purpose of self-defense, is left with no way to bear arms. Therefore, the statute’s requirements are unconstitutional.

In addition, as the Seventh Circuit, Ninth Circuit, and the dissent in *Drake* affirm, the interpretation of the Second Amendment’s right to armed self-defense is not contingent on casualty data.<sup>199</sup> The Supreme Court in *Heller* and *McDonald* acknowledged and reaffirmed that consideration of public policy is removed from judicial deliberation because the Second Amendment itself is a policy choice that guarantees a right to bear arms for self-defense.<sup>200</sup> As a result, when discussing the Second Amendment’s core protection of bearing arms for self-defense, certain policy and gun violence arguments shall not be considered.

*C. The Third Circuit Improperly Concluded that an Early Twentieth Century Regulatory Scheme Is the Type of Longstanding and Acceptable Prohibition on Second Amendment Rights Heller Envisioned*

Although *Heller* approved certain longstanding prohibitions against carrying guns, these were all well-established before the nineteenth century.<sup>201</sup> The Third

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196. *Heller*, 554 U.S. at 628, 634–35.

197. *Drake*, 724 F.3d at 428. In addition, by statute, the state has removed the possibility of openly “carrying handguns in public . . . without first obtaining a permit, and again conditioned the issuance of such permits on a showing of [justifiable] need.” *Id.* at 432.

198. *Id.* at 439 (finding that the core of New Jersey’s “‘justifiable need’ standard” is the mechanism that “best protect[s] public safety”).

199. *See Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012) (citing *Heller*, 554 U.S. at 636) (“Anyway the Supreme Court made clear in *Heller* that it wasn’t going to make the right to bear arms depend on casualty counts.”).

200. *See Heller*, 554 U.S. at 636 (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”); *see also McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3045 (2010).

201. *See United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (examining Framers-era sources and concluding that “felons, infants and those of unsound mind may be prohibited from possessing firearms” without running afoul of the Second Amendment); *Kates*, *supra* note 38, at

Circuit detrimentally relied on *Heller*'s dicta approval of certain longstanding prohibitions on the right to bear arms.<sup>202</sup> Yet, the court ignored *Heller*'s legal principle. The *Drake* court claimed that a “justifiable need” requirement was similar to the longstanding prohibitions approved by *Heller*.<sup>203</sup> However, enacted only in 1924, the “justifiable need” restriction does not rest on a 1791 historical foundation and therefore, it is not a longstanding *Heller*-approved prohibition.<sup>204</sup>

As the *Drake* court stated, *Heller* was not intended “to clarify the entire field’ of Second Amendment jurisprudence.”<sup>205</sup> The Third Circuit concluded that the “justifiable need” requirement to carry a handgun was a “longstanding” prohibition acknowledged by *Heller*.<sup>206</sup> However, the “longstanding prohibitions” the *Heller* Court enumerated were:

[T]he possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>207</sup>

Although this was not a comprehensive list, the prohibitions listed concern the outright prohibition on the use, possession, and purchase of firearms in certain locations and by people with certain character, behavioral, psychological, or psychiatric dispositions.<sup>208</sup>

These presumptively valid longstanding prohibitions are not substantially the same as a “justifiable need” to carry a handgun in public.<sup>209</sup> In fact, unlike the “longstanding prohibitions” mentioned in *Heller*, the so-called “longstanding” regulation in *Drake* was not a prohibition against a certain class of persons or prohibition from carrying in protected areas.<sup>210</sup> Instead, this “longstanding prohibition” is not a prohibition at all—it is a predicative and demonstrative

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266 (stating that the eighteenth century view that “[f]elons simply did not fall within the benefits of the common law right to possess arms”).

202. *Drake*, 724 F.3d at 431–22.

203. *Id.* at 432; *see Heller*, 554 U.S. at 635 (“[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).

204. *Drake*, 724 F.3d at 432.

205. *Id.* at 430–31 (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013)).

206. *Id.* at 431–32.

207. *Heller*, 554 U.S. at 626–27.

208. *See id.* at 626–27 & n.26.

209. *See Amy Hetzner, Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 MARQ. L. REV. 359, 382 n.165 (2011) (stating that there are presumptively valid longstanding prohibitions around sensitive areas such as schools); *see also Adam Winkler, Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1577 (2009) (“In short, the meaning of the Second Amendment has changed a lot, but its impact on gun control has not.”).

210. *Drake*, 724 F.3d at 428–29 (describing a statutory scheme that emphasized all persons and places).

legal requirement to exercise the fundamental right of the Second Amendment. The regulation declared that one must demonstrate that he satisfies the need-based qualification, that is, the person must show that he has a “justifiable need” for self-defense.<sup>211</sup> This determination by *Drake* is at odds with *Heller*’s conclusion that every American citizen has the right to bear arms for self-defense under the Second Amendment.<sup>212</sup>

#### V. CONCLUSION

The text, history, and Supreme Court jurisprudence of the Second Amendment reveal that the Third Circuit, in *Drake v. Filko*, was incorrect by holding that New Jersey’s “justifiable need” requirement does not burden the core of the Second Amendment’s protection of the right to bear arms. Although the Supreme Court has yet to determine the “vast *terra incognita*” of the Second Amendment’s *extra domum* scope, the federal district and circuit courts are not restricted from exploring the unknown. Rather, the history of the Second Amendment—its English and Constitutional origins—indicate that the Second Amendment has a general application to bearing arms both inside and outside the home. The Second Amendment’s rights’ core is related to, and dependent on, an individual’s inherent and natural right to self-defense.

It is most consistent, with both the historical analysis of the Second Amendment and *Heller*’s holding, for the courts to conclude that the Second Amendment protects a right to bear arms outside of the home for the purpose of self-defense. Consequently, the courts should strike down a “justifiable need,” “good cause,” “proper cause,” or “good and substantial reason” to carry in public unless these requirements are equivocal to the Second Amendment’s core protection of self-defense. Otherwise, the Second Amendment’s core protection is destroyed. Furthermore, courts should not address public policy choices limiting the Second Amendment’s core right to bear arms, because the Second Amendment preserves the public policy decision made at its ratification, and only Congress is tasked with altering that decision.

The *Drake* dissent, *Moore* and *Peruta* majorities, and *Heller* are the most appropriate approaches to Second Amendment issues today. As shown, these approaches are consistent with the text of the Second Amendment, its history, and its meaning as described by the Supreme Court. *Drake*’s conclusion demonstrates a desire of the federal circuit courts to skirt the Second Amendment’s scope, to ignore history, and to fabricate an erroneous solution that infringes on a legitimate, constitutionally protected right to bear arms for self-defense.

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211. *See id.* (discussing the application of New Jersey’s “justifiable need” permit requirement).

212. *Heller*, 554 U.S. at 592, 595.