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## Welcome to the Gun Show: Will the Court Make a Killing in the Name of “Self-Defense?” The Circuit Split Over “Core” Rights Under the Second Amendment

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WELCOME TO THE GUN SHOW: WILL THE COURT MAKE A  
KILLING IN THE NAME OF “SELF-DEFENSE?” THE CIRCUIT  
SPLIT OVER “CORE” RIGHTS UNDER THE SECOND  
AMENDMENT

*R. Betsy Emmert*

I. INTRODUCTION

The odds are good your neighbor is armed. Four in ten adults report that they live with a gun in their household, according to Pew Research Center (“Pew”) data on social and demographic trends.<sup>1</sup> At least two-thirds of Americans report living in a household with a gun at some point in their lives, and roughly seven in ten Americans report having fired a gun.<sup>2</sup> Approximately one in five gun owners belong to the National Rifle Association (“N.R.A.”), an American nonprofit organization that advocates for gun ownership rights.<sup>3</sup> Pew’s research shows that gun owners are more likely than non-gun owners to contact public officials to express their opinions on gun policy, with one in five gun owners reporting that they have contacted a public official about such policies, as compared to just twelve percent of non-gun owners.<sup>4</sup> However, these statistics, published in June 2017, pre-date the fifty-two (and counting) mass shootings in the United States in the first quarter of 2018 and the political spotlight that has been cast on gun control.<sup>5</sup>

The Second Amendment to the U.S. Constitution stirs an arguably more fervent statutory interpretation debate than any other provision of the Bill of Rights. The single sentence that comprises the entirety of the Second Amendment causes consternation among U.S. Supreme Court Justices, federal and state judges, legal scholars, and citizens, alike.<sup>6</sup> However, the conversation about gun rights in the United States is all the more relevant in recent months and years with the uptick in gun violence and mass shootings across the country. Activists and grassroots organizations, on both ends of the political spectrum, have encouraged

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1. Kim Parker, Juliana Menasce Horowitz, Ruth Igielnik, Baxter Oliphant, and Anna Brown, *America’s Complex Relationship with Guns*, Pew Research Center Social & Demographic Trends (June 22, 2017), <http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Mass Shootings*, Gun Violence Archive, <http://www.gunviolencearchive.org/mass-shooting> (last visited on Mar, 30, 2018). The Gun Violence Archives defines a “mass shooting” as a single incident in which four or more people, not including the shooter, are “shot and/or killed” at “the same general time and location.”

6. U.S. Const. amend. II.

their legislators to advocate for their interests on their behalf. In light of the outbreak of mass shootings, particularly those in schools, a wave of political activism has spurred movements and demonstrations reflecting Americans' demands for tougher gun control measures.<sup>7</sup> Gun violence in the United States has impassioned not only adults, but also thousands of teenagers and children to ignite the growing sentiment for gun control.<sup>8</sup> The March for Our Lives protest, organized by students after the February 2017 school shooting in Parkland, Florida, led hundreds of thousands of students, teachers, parents, and victims in Washington, D.C., and across the country to unite for an end to gun violence and for increased gun control legislation.<sup>9</sup> Protesters at the February rally called for assault weapon bans, limits on high-capacity magazines, as well as universal background checks.<sup>10</sup>

The current Trump Administration is hesitant to enact more stringent gun control laws despite the push for bold measures for gun control legislation since President Trump took office in 2017. While the Department of Justice proposed a plan to ban bump stocks—devices that enable semiautomatic weapons to fire like machine guns—gun laws in the United States continue to move in the opposite direction.<sup>11</sup> The Trump Administration rescinded measures to prevent mentally ill people from obtaining guns, and the current White House budget suggests that it will cut nearly \$12 million from the federal program maintaining the background check system.<sup>12</sup> Congress, likewise, is tentative to pass legislation for various reasons, including the public polarization on gun policy, causing gun advocates to unite while public momentum mounts against the protection of gun rights.<sup>13</sup> Nevertheless, it is difficult to gauge whether this public momentum for increased legislation is momentary, given the widespread media coverage of recent mass shootings, or whether the trend will be long-term.<sup>14</sup>

Much of the political and social debate revolving around the topic of

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7. Samantha Raphelson and Emma Bowman, *Hundreds of Thousands March for Gun Control Across the U.S.*, NPR: The Two-Way: Breaking News from NPR (Mar. 24, 2018, 12:04 PM ET), <https://www.npr.org/sections/thetwo-way/2018/03/24/596679790/hundreds-of-thousands-march-for-gun-control-across-the-u-s>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* See also Z. Byron Wolf, *Trump's One Piece of Gun-Related Legislation Undid Restrictions Aimed at Mental Illness*, CNN Politics (Feb. 18, 2018 at 3:09 p.m.), <https://www.cnn.com/2018/02/15/politics/trump-gun-legislation-mental-health/index.html>.

12. *Id.*

13. Harry Enten, *Why Congress is Hesitant to Pass Gun Control, by the Numbers*, CNN Politics (Feb. 15, 2008 at 6:18 a.m.), <https://www.cnn.com/2018/02/15/politics/congress-gun-control-unlikely-to-pass/index.html>.

14. *Id.*

gun control in the United States stems from the lack of federal judicial guidance in the area relating to the Second Amendment. As states attempt to navigate this area of the law, the Justices sitting on the U.S. Supreme Court, both past and present, have avoided ushering in a new era of gun control legislation. As the law currently stands, Americans have the right to keep and bear arms in the home, yet there has been an absence of guidance from the nation's highest court relating to such right extending *beyond* the home.

Currently, the federal courts are grappling with the divisive question of whether state laws or local ordinances mandating that applicants for concealed carry permits provide evidence of specific personal threats, as opposed to a general concern for self-defense, are constitutional under the Second Amendment.<sup>15</sup> This Casenote addresses, specifically, the split between the D.C. and Second Circuits and their interpretations of state and local laws that regulate the public carrying of firearms beyond the home. Section II of this Casenote begins with a general background of the Second Amendment and gun rights in America, and further addresses the landmark decisions relating to the Second Amendment. Subsequently, Section III of this Casenote continues with a detailed discussion of the decisions handed down by the Second and D.C. Circuits, and explains why the Second Circuit's approach to interpretation of the Second Amendment and what is considered a "core" right is the superior approach and application of the Second Amendment.

## II. BACKGROUND

The history of the Second Amendment traces back to English common law and the pre-colonial emphasis on citizenship, arms, and liberty.<sup>16</sup> Since the colonial era, regulations have been placed on firearms, including laws regulating the storage of firearms and gunpowder, the discharge of weapons at certain times and places, and limitations on the possession of such weapons to virtuous and loyal citizens.<sup>17</sup>

Few guarantees prescribed in the Bill of Rights invite as much contention as the ambiguous text provided under the Second

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15. Zachariah Rivenbark, *Circuit Split on Concealed Carry Permit Requirements*, JURIST (July 17, 2014), [http://www.jurist.org/feature/featured/concealed-and-open-carry-under-the-second-amendment/detail.php#menu\\_top](http://www.jurist.org/feature/featured/concealed-and-open-carry-under-the-second-amendment/detail.php#menu_top) (last visited Mar. 30, 2018).

16. Cornell, Saul, *Natural Rights, Common Law, and the English Right of Self-Defense*, American Bar Association: Insights On Law & Society, Fall 2013, Vol. 14, [https://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/14/fall-2013/natural-rights--common-law--and-the-english-right-of-self-defens.html](https://www.americanbar.org/publications/insights_on_law_and_society/14/fall-2013/natural-rights--common-law--and-the-english-right-of-self-defens.html).

17. *Id.*

Amendment.<sup>18</sup> Still, the Second Amendment is among the youngest areas of jurisprudence in constitutional law.<sup>19</sup> There is undoubtedly much argument about the meaning that the Framers attached to the text of the Second Amendment, but modern debate revolves around whether, and to what extent, it protects the private right of individuals to keep and bear arms.<sup>20</sup> Viewed by many citizens, politicians, legislators, and constitutional law scholars as a fundamental right and liberty interest, the Second Amendment and conceal-carry weapon (CCW) laws are of particular national interest in light of recent decisions by both state and federal courts, as well as the climbing number of mass shootings in the United States.<sup>21</sup>

Part A of the Background section discusses the historical context of the Second Amendment and gun rights in the United States. This part also examines the incorporation of the Second Amendment and statutory interpretation of the amendment as it applies to state legislatures. Part B studies several landmark cases relating to gun rights and models used by the Supreme Court in interpreting the text and its application, vis-à-vis the Fourteenth Amendment. Finally, Part C specifically traces the evolution of CCW laws in the fifty states, and the licensing processes and requirements for such permits. The purpose of this section is to develop a backdrop to analyze the split in authority, specifically between the Second and D.C. Circuits in applying the strictures of the Second Amendment to CCW laws. As evidenced by the opinions in *Kachalsky v. County of Westchester* and *Wrenn v. District of Columbia*, the courts engage in a balancing act to properly weigh public safety interests against individual liberty rights protected by the Second Amendment.<sup>22</sup>

### A. Historical Perspective

#### 1. Gun rights in America

Gun legislation is deeply entrenched in the nation's history, beginning

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18. Lund, Nelson and Adam Winkler, *Common Interpretation: The Second Amendment*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-ii> (last visited on Feb. 3, 2018).

19. Griepsma, Nicholas, *Concealed Carry Through Common Use: Extending Heller's Constitutional Construction*, 85 GEO. WASH. L. REV. 284, 288 (2017).

20. Lund, *supra* note 18.

21. Griepsma, *supra* note 19, at 293-310; Courtland Jeffrey, *Mass Shootings in the US: When, Where They Have Occurred in 2018*, Scripps Media, Inc. (Feb. 14, 2018 at 5:38 p.m.), <https://www.wcpo.com/news/national/mass-shootings-in-the-us-when-where-they-have-occurred-in-2018>.

22. 701 F.3d 81 (2d Cir. 2012); 864 F.3d 650 (D.C. Cir. 2017).

with the ratification of the Second Amendment in 1791.<sup>23</sup> In twenty-seven words, the Drafters of the Bill of Rights summarized the liberty in a single sentence, guaranteeing 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>24</sup> However, the Second Amendment generated very little litigation at a national level until the 2008 decision of *District of Columbia v. Heller*.<sup>25</sup> The early understanding of the Second Amendment rested not upon individual rights, but rather on the belief that it gave state militias a right to obtain and bear arms.<sup>26</sup> In the early and mid-twentieth century, some legislation was passed to regulate guns, including the passage of The National Firearms Act of 1934 and the 1968 Gun Control Act.<sup>27</sup> The former legislation focused primarily on taxation of the manufacturing and transfer of guns and rifles, while the latter specifically regulated the interstate traffic of firearms.<sup>28</sup> In the latter-half of the twentieth-century, Congress approved and passed the Firearm Owner’s Protection Act, the Brady Handgun Violence Act, and the Violent Crime Control and Law Enforcement Act.<sup>29</sup> With the enactment of these laws, felons were restricted from owning guns or ammunition; ammunition capable of penetrating bulletproof vests were outlawed; gun dealers were required to conduct criminal background checks before selling firearms; and the manufacture, use, possession, and import of AK-47s, Uzis, and nineteen other assault weapons were banned.<sup>30</sup>

The discussion around gun rights in the United States gained significant momentum in 1977 at the annual N.R.A. meeting, which transformed the originally apolitical gun-safety organization into an increasingly mobilized and militant group.<sup>31</sup> The wave of conservatism that brought Ronald Reagan into office in the 1980s, propelled gun

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23. *U.S. Gun Laws: A History*, NPR: Special Series—Supreme Court Backs Right to Bear Arms, (June 26, 2008 at 6:36 p.m.), <https://www.npr.org/templates/story/story.php?storyId=91942478>.

24. U.S. Const. amend. II.

25. *Id.*; *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See also* *United States v. Miller*, 307 U.S. 174 (1939) (upholding a federal ban on sawed-off shotguns, implying that the Founding Fathers adopted the amendment to ensure the then-new federal government could not disarm state militias).

26. Azmat Khan, *How Conservatives “Reinvented” the Second Amendment*, FRONTLINE, (Dec. 18, 2012 at 3:42 p.m.), <https://www.pbs.org/wgbh/pages/frontline/government-elections-politics/how-conservatives-reinvented-the-second-amendment/>.

27. *U.S. Gun Laws: A History*, *supra* note 23.

28. *Id.*

29. *Id.*

30. *Id.* (the Violent Crime Control and Law Enforcement Act, banning the manufacture, use, possession, and import of assault weapons was passed in 1994, but subsequently expired in 2004).

31. Michiko Kakutani, *Gun Control and Gun Rights Stay Fighting Words*, *The New York Times: Books* (Oct. 9, 2011), <http://www.nytimes.com/2011/10/10/books/in-gunfight-adam-winkler-traces-the-gun-control-battle.html>. *See also* Khan, *supra* note 26.

advocates and members of the gun lobby to inflexibly oppose gun regulations, and to prevent the “slippery slope to involuntary disarmament.”<sup>32</sup> Nevertheless, the Supreme Court and federal courts saw relatively few cases relating to the question of the Second Amendment and individual rights from 1939<sup>33</sup> until the early 2000s.<sup>34</sup> The U.S. Court of Appeals for the District of Columbia Circuit overturned a law regulating firearms based on the Second Amendment for the first time since *United States v. Miller*, in the case of *Parker v. District of Columbia*.<sup>35</sup> In the 2-1 decision, the court ruled that bans on a new registration of handguns, a ban on carrying a pistol without a license, and a requirement that firearms be kept unloaded and locked were unconstitutional, in violation of the Second Amendment.<sup>36</sup> Interestingly, the modern interpretation of the Second Amendment was not addressed until the Supreme Court granted certiorari to determine the constitutionality of the D.C. laws regarding private gun ownership.<sup>37</sup>

## 2. Conflicting Interpretations of the Second Amendment

Despite the astonishing brevity of the provision, few issues of judicial interpretation raise as much debate as the Second Amendment.<sup>38</sup> The task of interpreting the Second Amendment requires an examination of both the first clause, or preamble, and the second clause, otherwise known as the operative clause.<sup>39</sup> Depending on whether the reader falls into the gun-control camp or the gun-rights advocates camp, the competing interpretations attach different weights and meanings to the preamble and operative clauses.<sup>40</sup> First, the preamble (“[a] well regulated Militia, being necessary to the security of a free State,”) can be

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32. Kakutani, *supra* note 31.

33. *United States v. Miller*, 307 U.S. 174 (1939) (Defendants were indicted for transporting an unregistered double barrel 12-gauge shotgun in interstate commerce in violation of the National Firearms Act. Defendants filed a motion to quash the indictment alleging that the Act was unconstitutional because it violated the Second Amendment. On appeal, the United States Supreme Court found that the Second Amendment did not guarantee defendants the right to keep and transport the shotgun. The weapon was not part of any ordinary military equipment and its use could not contribute to the common defense. The Court found that there was no evidence that possession of such shotgun had any relationship to the preservation of a militia).

34. Luis Acosta, *United States: Gun Ownership and the Supreme Court*, Library of Congress, (July 2008), <https://www.loc.gov/law/help/second-amendment.php>.

35. *Id.*; *Parker v. District of Columbia*, 478 F.3d 370 (D.C. App. 2007).

36. Acosta, *supra* note 34.

37. *Id.*

38. See Mark Tushnet, *Interpreting the Right to Bear Arms—Gun Regulation and Constitutional Law*, Perspective: The New England Journal of Medicine (Apr. 3, 2008), <http://www.nejm.org/doi/full/10.1056/NEJMp0801601>.

39. *Id.*

40. *Id.*

construed as limiting the scope of the operative clause (“the right of the people to keep and bear Arms, shall not be infringed”).<sup>41</sup> Alternatively, the preamble may be construed as merely an explanation—that citizens have an individual right to keep and bear arms to make it easier to arm a militia.<sup>42</sup>

Those who advocate for gun control focus on the term “militia” and the use of the word in other parts of the Constitution.<sup>43</sup> This line of argument suggests that the use of “militia” in other parts of the Constitution refers to the state-organized militia, so too, the preamble of the Second Amendment refers to the state-organized militia.<sup>44</sup> But to gun-control advocates, the Second Amendment guarantees that Congress cannot disarm the state-organized militia and likewise, the phrase to “keep and bear arms” specifically refers to the militia.<sup>45</sup>

On the contrary, those who advocate for gun-rights argue that the Bill of Rights is a bill of *individual* rights, and that therefore, the Second Amendment’s preamble recognizes the *individual* right to keep and bear arms.<sup>46</sup> Moreover, gun-rights supporters believe that at the time of the drafting of the amendment, “militia” referred to the unorganized militia, which comprised “the whole body of people who, if armed, would be able to resist efforts by an oppressive government or to provide self-protection when the government failed in its duty to protect against predators and criminals.”<sup>47</sup>

While the preamble is a source of contention, the operative clause creates further debate between those seeking to regulate gun ownership and those seeking expansive gun ownership rights.<sup>48</sup> While both sides may agree that the Drafters recognized a natural right to self-defense, what is lacking is historical evidence of the Drafters explicitly discussing or debating the right to bear arms as one of the sets of natural rights.<sup>49</sup> Moreover, there is debate regarding the interpretation of the term, “the people,” as referenced in the operative clause.<sup>50</sup> At the time of drafting, some constitutional scholars believe that the amendment is

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41. *Id.*; U.S. Const. amend. II.

42. Tushnet, *supra* note 38.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. AJ Willingham, *27 Words: Deconstructing the Second Amendment*, CNN Politics (Aug. 11, 2016 at 8:20 a.m.), <https://www.cnn.com/2016/08/10/politics/what-does-the-second-amendment-actually-mean-trnd/index.html>.

49. *Id.* (summarizing President and CEO of the National Constitution Center, Jeffery Rosen’s, perspective on the Drafters’ understanding of the Second Amendment).

50. *Id.*



referring to individual persons, while others suggest “the people” speaks to a collective mass of persons, although some groups may be excluded from this category, including slaves and women.<sup>51</sup> However, the Court in *Heller* created a new tension in its analysis of the meaning of the term, “the people.”<sup>52</sup> *Heller*, in effect, changed the meaning of “the people” throughout the Bill of Rights by limiting the term to “members of the political community.”<sup>53</sup> *Heller*’s ambiguous reading of “the people” in the Second Amendment lacks consistency with the reading of “the people” in the First and Fourth Amendments, which prescribe rights to all citizens, not just “law-abiding, responsible citizens.”<sup>54</sup>

Finally, when analyzing the operative clause’s words “to keep and bear arms shall not be infringed,” considerable debate centers around whether the Constitution should be read in a “living” manner, in light of new technologies and weapons.<sup>55</sup> The struggle that historians, legal experts, and judges wrestle with on a daily basis is how to apply the text in modern contexts.<sup>56</sup> The lower courts in recent years have upheld nearly all gun regulations under review—a striking revelation since the Supreme Court decisions of *District of Columbia v. Heller* and *McDonald v. Chicago*, finding regulations on gun rights unconstitutional.<sup>57</sup>

### *B. Landmark Decisions Interpreting the Second Amendment*

The cases that define and shape the Second Amendment, as it applies to the federal government and the states, first, are recent decisions handed down by the Supreme Court, and second, signify a dramatic departure from the previously held understanding of gun rights.<sup>58</sup> Prior to 1939, the Court rarely addressed the interpretation or application of the Second Amendment.<sup>59</sup> In *United States v. Miller*, the Court ruled that the National Firearms Act of 1934, which regulated the transportation in interstate commerce of certain firearms did not violate

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51. *Id.*

52. *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1079 (Feb. 2013).

53. *Id.* at 1078.

54. *Id.* at 1087.

55. Willingham, *supra* note 48.

56. *Id.*

57. *Id.*; *Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010).

58. Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329, 348-49 (2017).

59. 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, 604-05 (Feb. 2012).

the Second Amendment, nor did it invade the police powers reserved for the States.<sup>60</sup> In this case, the defendants argued that the 1934 Act's registration and taxation, as applied to defendants' possession and interstate transportation of an unregistered sawed-off shotgun, were not in the spirit of the Second Amendment.<sup>61</sup> The Court summarily rejected the defendants' argument and, in his majority opinion, Justice McReynolds said "that a shotgun . . . [does not have] any reasonable relation to the preservation or efficiency of a well-regulated militia."<sup>62</sup> Yet after the *Miller* decision, many questions were left unanswered by the Court regarding firearms regulation.<sup>63</sup>

Almost seventy years later, the Court returned to the issue of the rights guaranteed by the Second Amendment, but on this occasion, the Court took an entirely different interpretative approach than the previous Courts.<sup>64</sup> At issue in the landmark case, *District of Columbia v. Heller*, was the District of Columbia law prohibiting handgun possession, which criminalized carrying unregistered firearms and banned the registration of handguns.<sup>65</sup> Further, the law provided that the police chief may issue one-year handgun licenses and required D.C. residents to keep lawfully owned firearms unloaded and trigger-locked in the home.<sup>66</sup> Heller, a D.C. special policeman, applied and was denied a license to keep a handgun at home.<sup>67</sup> Subsequently, Heller filed suit and sought to enjoin the District of Columbia from enforcing the law.<sup>68</sup> Departing from judicial tradition, the Court rejected the premise that the constitutional right to bear arms did not protect an individual right.<sup>69</sup> Rather, *Heller* signifies the pivotal turning point in the interpretation of the Second Amendment, finding that it protects the individual right to possess a firearm unrelated to service in a militia, as well as lawful uses of firearms, including self-defense in the home.<sup>70</sup> The decision in *Heller* recognizes self-defense to be the central purpose of the constitutional right to bear arms and is read to include a presumptive right to carry concealed weapons outside the home.<sup>71</sup>

Following the 2008 decision in *Heller*, the Court again addressed the

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60. *Miller*, 307 U.S. 174 (1939).

61. O'Shea, *supra* note 59 (referencing author's case summary in footnote 73).

62. *Miller*, 307 U.S. at 178.

63. See O'Shea, *supra* note 59, at 605.

64. *Id.*

65. *Heller*, 554 U.S. 570 (2008).

66. *Id.*

67. *Id.*

68. *Id.*

69. O'Shea, *supra* note 59, at 605.

70. *Heller*, 554 U.S. 570 (2008).

71. O'Shea, *supra* note 59, at 596-97.

scope of protection of the Second Amendment in *McDonald v. City of Chicago*.<sup>72</sup> At issue in the case were municipal ordinances banning handgun possession, allegedly in violation of the Second and Fourteenth Amendments.<sup>73</sup> Justice Alito wrote for the majority in *McDonald*, that the Second Amendment is, in fact, incorporated through the Due Process Clause of the Fourteenth Amendment and applies to the States, rendering the municipal bans on handgun possession unconstitutional.<sup>74</sup> The significance of *McDonald*, in a post-*Heller* world, is that the Court reinforces the individual rights interpretation of the Second Amendment, yet leaves open to interpretation the right to carry firearms outside the home.<sup>75</sup> This lack of clarity since the decisions in *Heller* and *McDonald* has spawned differences among state laws and local ordinances regarding applications for concealed-carry permits.<sup>76</sup>

### C. Evolution of State Concealed-Carry Weapon Laws

The concealed-carry movement, or gun-carry revolution, has become the platform for organizations, like the N.R.A. and U.S. Concealed Carry Association, to promote a “concealed-carry” lifestyle.<sup>77</sup> This “lifestyle” refers to products and ideas that promote the decision to carry a gun at all times.<sup>78</sup> Various state law regimes govern the public carry of firearms, however this Casenote focuses namely on handguns, as opposed to long guns, like rifles. Thirty-nine states currently require individuals to obtain state-issued permits before conceal-carrying handguns in public.<sup>79</sup> Of these thirty-nine states, thirty-one are known as “shall-issue” states, thus requiring state permitting agencies to issue concealed-carry licenses without a prerequisite of cause or need for self-defense.<sup>80</sup> Meanwhile, eleven states currently permit residents to publicly carry firearms without a permit.<sup>81</sup> Although some states ban

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72. *McDonald*, 561 U.S. 742 (2010).

73. *Id.*

74. *Id.* at 763; O’Shea, *supra* note 59, at 608-09.

75. O’Shea, *supra* note 59 (discussing the conflicting interpretations of *Heller* and *McDonald* in the ‘highlight’ of the article).

76. Zachariah Rivenbank, *Circuit Split on Concealed Carry Permit Requirements*, JURIST (July 17, 2014 at 11:03 p.m.), <http://www.jurist.org/feature/2014/07/circuit-split-on-concealed-carry-permits.php>.

77. *Handguns in America and the Rise of the ‘Concealed-Carry Lifestyle,’* NPR: Fresh Air (June 23, 2016 at 2:35 p.m.), <https://www.npr.org/2016/06/23/483211713/handguns-in-america-and-the-rise-of-the-concealed-carry-lifestyle>.

78. *Id.*

79. See Griepsma, *supra* note 19, at 294.

80. *Id.*

81. *Id.* States that are “constitutional carry” states include Alaska, Arizona, Arkansas, Idaho, Kansas, Maine, Missouri, Mississippi, Vermont, Wyoming, and West Virginia.

permitting licenses to convicted felons, the fundamental notion of “shall-issue” states is that licenses *shall* be issued without any subjective determination of need (assuming the applicant meets minimum requirements and successfully completes the application process).<sup>82</sup>

The remaining eight of the thirty-nine states requiring individuals to obtain state-issued permits are known as “may-issue” states.<sup>83</sup> In these states, it is at the permitting agency’s discretion to grant concealed-carry licenses to individuals who meet certain subjective requirements, such as demonstration of good character or good cause in light of a credible threat of injury or death to support a need for self-defense in public.<sup>84</sup> It is these “may-issue” states, which permit regulations, that foster much of the post-*Heller* and post-*McDonald* litigation, particularly on the grounds of whether such laws violate the Second Amendment.<sup>85</sup>

#### 1. Incorporation of the Second Amendment and statutory interpretation of the Second Amendment as it applies to state legislatures

Circuit courts have and continue to split on two primary issues since the 2008 and 2010 decisions handed down by the Court: first, what standard of review *Heller* requires for issues relating to the Second Amendment, and second, whether *Heller*’s individual right to self-defense extends beyond the home and into the public sphere.<sup>86</sup> While some circuit courts apply a strict scrutiny standard to determine whether a challenged law burdens a right or conduct, others apply intermediate scrutiny.<sup>87</sup> However, most circuits apply a “means-end” scrutiny to uphold good cause requirements for state “may-carry” laws.<sup>88</sup> This two-prong approach balances interests by first asking whether the challenged law burdens a right or conduct falling *outside* the Second Amendment’s historical context.<sup>89</sup> If the answer to this first question is “yes,” the law is presumptively constitutional. However, if the law or regulation burdens a right or conduct that falls *within* the historical protection of the Second Amendment, the government is then required to justify the regulation under some form of scrutiny—most commonly, intermediate

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82. *Id.*

83. *Id.* at 294-95.

84. *Id.* at 295.

85. *Id.*

86. *Id.*

87. *Id.* at 296.

88. *Id.* at 295-97.

89. *Id.* at 295.

scrutiny.<sup>90</sup> The break among the circuit courts indicates a tipping point for the Supreme Court to grant certiorari to address the variation in state concealed-carry laws and whether such bans on handguns violate the Second Amendment.<sup>91</sup>

## 2. Changes on the Horizon: H.R. 38: Concealed Carry Reciprocity Act

Meanwhile in Washington, D.C., the pending passage of H.R. 38, or the Concealed Carry Reciprocity Act, stands to be the greatest boost to gun rights since the ratification of the Second Amendment.<sup>92</sup> As drafted, the Act provides a means by which *nonresidents* of a State, whose residents may carry concealed weapons, may also carry firearms in the State.<sup>93</sup> The Act passed in the House of Representatives on December 6, 2017, and is awaiting vote in the Senate.<sup>94</sup> Twenty-four state attorneys general advocate for the passage of the bill, however, seventeen state attorneys general (largely in states with stricter gun laws) oppose the bill.<sup>95</sup> Advocates of the bill argue that it streamlines the otherwise disjointed regulation of concealed-carry weapons across the country and further promotes the spirit of the Second Amendment.<sup>96</sup> Others, meanwhile, believe that the bill's passage imperils the public health by giving high-risk people access to concealed-carry permits, infringes on states' police powers, and creates challenges for law enforcement.<sup>97</sup> However, until the Senate votes on H.R. 38, the fate of the nation and its citizens' "right to bear [concealed] arms" for self-defense, or for other "legitimate" purposes, is largely undetermined.

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90. *Id.* at 295-96. (Judge Kavanaugh of the D.C. Circuit promoted an alternative method to the balancing test of strict or intermediate scrutiny, instead favoring an approach wherein "courts are to assess gun bans and regulations based on text, history, and tradition." However, the D.C. Circuit rejected Judge Kavanaugh's argument. The Ninth Circuit is the only circuit to have adopted this approach in 2014, however, the case was overruled in 2016).

91. See John Lott Jr., *Will DC Court's Decision on Concealed Guns be the Tipping Point?*, *The Hill* (July 27, 2017 at 12:40 p.m.), <http://thehill.com/blogs/pundits-blog/civil-rights/344123-will-dc-courts-decision-on-concealed-guns-be-the-tipping>.

92. H.R. 38, 115th Cong. (2017-2018).

93. *Id.*

94. H.R. 38 – 115th Congress: Concealed Carry Reciprocity Act of 2017, GovTrack, <https://www.govtrack.us/congress/bills/115/hr38> (last visited Feb. 14, 2018).

95. Melinda Delkic, *Concealed Carry Reciprocity Passes: Gun Laws May Get A Lot Looser Barely Two Months After Las Vegas Shooting*, *NEWSWEEK* (Dec. 16, 2017 at 5:05 p.m.), <http://www.newsweek.com/gun-laws-looser-concealed-carry-reciprocity-740469>.

96. *See id.*

97. *Id.*

## III. DISCUSSION

Gun control advocates and gun rights advocates likely agree that there are significant differences between a musket, the weapon of choice at the time of the ratification of the Second Amendment in 1791, and an AR-15, the weapon used by the teenager who killed seventeen people in the Florida high school mass shooting in February 2018.<sup>98</sup> While the number and types of guns has increased at a dizzying rate, the nation's laws have failed to keep pace.<sup>99</sup> Since the 2008 decision in *Heller*, the nation's current state of firearms regulations is not entirely unregulated, but the majority writing in this landmark decision refused to accept that the right to bear arms "made sense only in the context of a 'well regulated militia' of the 18<sup>th</sup> century."<sup>100</sup> Under the current state of the law, it is legal for persons to possess a firearm for self-defense, and a complete and total ban on handguns is unconstitutional under the Second Amendment.<sup>101</sup> It is, therefore, left to the states to use their police powers to regulate firearms and to issue concealed-carry permits to their citizens.<sup>102</sup> How the states choose to write those laws and how the state and federal courts interpret these regulations to, in theory, make citizens safer, vary across the country.<sup>103</sup> Part A addresses the Second Circuit's approach to concealed-carry laws and the statutory restrictions imposed by the court. Part B addresses the D.C. Circuit's interpretation of the Second Amendment and approach to striking down concealed-carry bans as unconstitutional. Part C discusses the differences in interpretation between the Second and D.C. Circuit and why the Second Circuit's approach is the proper understanding of the Second Amendment and to the limitations to the right to bear arms. Finally, Part D further discusses how the approach adopted by the D.C. Circuit misinterprets the Second Amendment, but also how its interpretation contributes to the increasing partisan debate regarding the scope of the right to bear arms.

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98. *Why the Second Amendment does not stymie gun control*, The Economist (Feb. 20, 2018), <https://www.economist.com/blogs/economist-explains/2018/02/economist-explains-14>.

99. *Id.*

100. *Id.*

101. U.S. Const. amend. II; *District of Columbia v. Heller*, 554 U.S. 570 (2008).

102. *See generally* Campbell Robertson and Timothy Williams, *As States Expand Gun Rights, Police Object*, The New York Times (May 3, 2016), <https://www.nytimes.com/2016/05/04/us/as-states-expand-gun-rights-police-join-opposition.html>.

103. *Id.*

*A. Statutory Restrictions on Concealed-Carry Are Constitutional with  
“Proper Cause”*

In 2012, the Second Circuit recognized that New York’s legislation restricting full-carry concealed handgun licenses was constitutional despite the requirement that applicants demonstrate “proper cause” for their permits.<sup>104</sup> The court in *Kachalsky v. County of Westchester* maintained that the state’s proper cause requirement was substantially related to governmental interests in both public safety and in crime prevention.<sup>105</sup> The court considered both the historical tradition of New York legislation restricting handgun use, as well as the inconsistent results of studies relating to handgun ownership and crime rates.<sup>106</sup>

The *Kalchalsky* court came to this conclusion by applying a limited version of intermediate review, as opposed to heightened scrutiny.<sup>107</sup> Heightened scrutiny is triggered only when restrictions operate to impose a substantial burden on the ability of law-abiding individuals from owning and using guns in self-defense, as was the case in *Heller*.<sup>108</sup> Because the Court in *Heller* expressly refused to decide the standard of review for laws regulating the right to bear arms, the Second Circuit suggested that the appropriate test turns on the nature of the restricted gun-ownership right.<sup>109</sup> For regulations that significantly burden a “core” right of self-defense in the home, strict scrutiny applies, while intermediate scrutiny is the appropriate standard of review for other “substantial burdens,” with rational basis reserved for the least severe encroachments on the Second Amendment right.<sup>110</sup> Nevertheless, the Second Circuit did not take up the question of the appropriate standard of review in *Kalchalsky*, noting only in passing, that both sides submitted data relating to firearm ownership by lawful citizens and crime rates.<sup>111</sup> Instead, the Second Circuit chose to defer to the state

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104. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); Justine E. Johnson-Makuch, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 FORDHAM L. REV. 2757, 2784 (Apr. 2015).

105. Johnson-Makuch, *supra* note 104, at 2784.

106. *Id.* at 2785.

107. David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1448-49 (May 2014).

108. *Id.*; see also *United States v. DeCastro*, 682 F.3d 160, 166 (2d Cir. 2012).

109. *Kachalsky*, 701 F.3d at 93; Hardy, *supra* note 107, at 1449.

110. *Kachalsky*, 701 F.3d at 93; Hardy, *supra* note 107, at 1449.

111. *Kachalsky*, 701 F.3d at 96-97 (“Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, [the court] conclude[s] that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest . . . As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention”).

legislature, stating that “[i]t is the legislature’s job, not [the court’s], to weigh conflicting evidence and make policy judgments.”<sup>112</sup> The Second Circuit’s interpretation of the Second Amendment to not extend the right to carry handguns outside of the home, is accompanied by similar decisions upholding similar bans in the Seventh and Ninth Circuits.<sup>113</sup>

*B. Are “Good Reason” Concealed Carry Laws Unconstitutional?*

On the opposite end of the spectrum, the D.C. Circuit ruled that laws limiting the issuance of concealed-carry licenses to individuals who demonstrate a special need for self-defense violated the Second Amendment in the 2017 decision of *Wrenn v. District of Columbia*.<sup>114</sup> In the case of *Wrenn*, the plaintiffs sought a preliminary injunction barring the District from enforcing good-reason regulations for concealed-carry licenses.<sup>115</sup>

Rather than address the level of scrutiny applied by the D.C. Circuit, the court found that a total ban failed to pass constitutional muster under any level of scrutiny, including intermediate scrutiny.<sup>116</sup> The D.C. Circuit suggested, and effectively extended, what is considered to be a “core” right under the Second Amendment.<sup>117</sup> The court reasoned that a natural interpretation of the Second Amendment’s “core” includes law-abiding citizens’ right to carry common firearms for self-defense *beyond* the home.<sup>118</sup> The D.C. Circuit effectively stretches the Court’s decision in *Heller* with little support other than reasoning that the right to “bear” arms includes wearing, bearing, and carrying on one’s person a firearm for the use of self-defense.<sup>119</sup> D.C. officials have chosen not to appeal this unfavorable and dangerous ruling in fear of providing an opportunity for the Supreme Court to issue a far-reaching decision that

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112. *Id.* at 99.

113. *See Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (holding that because the Second Amendment did not protect the right to concealed firearms in public, any prohibition or restriction a state might choose to impose on concealed carry, including a requirement of good cause, however defined, was necessarily allowed by the Amendment); *see also Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (choosing not to apply heightened scrutiny to an Illinois state gun-carrying law).

114. *Wrenn*, 864 F.3d 650, 667 (D.C. Cir. 2017).

115. *Id.* at 656. (“The challenged D.C. Code provisions direct the District’s police chief to promulgate regulations limiting licenses for the concealed carry of handguns (the only sort of carrying the Code allows) to those showing a ‘good reason to fear injury to [their] person or property’ or ‘any other proper reason for carrying a pistol’”) (citing D.C. Code §§ 22-4506(a)-(b)).

116. *Id.* at 667. (“The District’s good-reason law is necessarily a total ban on exercises of constitutional right for most D.C. residents. That’s enough to sink this law under *Heller F*”).

117. *Id.* at 657.

118. *Id.*

119. *Id.* at 567-58.



strikes down similar bans on concealed-carry laws across the nation.<sup>120</sup> Interestingly, the D.C. Circuit cites to no additional case law or support in its opinion that addresses the constitutionality of common-sense, “good reason” regulations of concealed-carry licenses for firearms in highly populated cities, none other than the nation’s capital.

This very real concern was aptly captured in Judge Henderson’s dissent in *Wrenn*, noting that the right to bear arms for purposes of self-defense beyond the home is less noticeable and acute than the right to self-defense within the home, and therefore cannot reside at the “core” of the Second Amendment.<sup>121</sup> Judge Henderson further cites to the decision in *Kachalsky* to support the notion that regulations restricting the public carry of firearms are even more compelling in heavily populated cities, like D.C., rather than regulations permitting citizens to conceal-carry with “good cause.”<sup>122</sup> Unlike the majority, Judge Henderson believes that the application of intermediate scrutiny to the D.C. regulation should be guided by two additional principles.<sup>123</sup> The first principle requires that firearms regulations require “ample deference to the legislature.”<sup>124</sup> The second guiding principle recognizes that D.C., as the nation’s capital, faces unique challenges specifically with regards to firearms regulations.<sup>125</sup> Not only is the legislature better equipped to gather and analyze complex and vast data to draft gun laws, but there is also a tight fit with the strong governmental interest in promoting public safety in regulating firearms.<sup>126</sup>

Good reason regulations merit intermediate scrutiny to afford substantial deference to the legislature’s job to weigh conflicting

120. Peter Jamison and Ellie Silverman, ‘Good Reason’ No Longer Needed to Carry a Concealed Gun in D.C., *The Washington Post* (Oct. 7, 2017), [https://www.washingtonpost.com/local/dc-politics/good-reason-no-longer-needed-to-carry-a-concealed-gun-in-dc/2017/10/06/85a21084-aaa0-11e7-92d1-58c702d2d975\\_story.html?utm\\_term=.96b3a4930089](https://www.washingtonpost.com/local/dc-politics/good-reason-no-longer-needed-to-carry-a-concealed-gun-in-dc/2017/10/06/85a21084-aaa0-11e7-92d1-58c702d2d975_story.html?utm_term=.96b3a4930089).

121. *Wrenn*, 864 F.3d at 669. See generally *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (“the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home”) (emphasis added).

122. *Wrenn*, 864 F.3d at 669 (citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

123. *Wrenn*, 864 F.3d at 670.

124. *Id.*

125. *Id.* (citing *Heller v. D.C. (Heller III)*, 801 F.3d 264, 282 (D.C. Cir. 2015) for the proposition that ample deference is due to the legislature regarding firearms regulation; also citing *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 439-40 (2002), for the proposition that the Second Circuit’s analysis should reflect an appreciation for D.C.’s unique challenges as the nation’s capital as it confronts firearms regulations).

126. *Id.* at 671. (Justice Henderson refers to the *Wrenn* App. Br. 41-45 for the empirical connection between “a profusion of guns and increased violent crime, relying on, *inter alia*, the studies of leading researchers, including the National Research Council, and of the legislatures of New York, Maryland, and New Jersey – all of which have put in place similar licensing regimes).

evidence and make public policy judgments.<sup>127</sup> Moreover, other courts, including the Fourth Circuit adhere to similar lines of thinking. Judge Henderson aptly concludes with a thought from the Fourth Circuit’s opinion in *United States v. Masciandaro*, that “[the court does] not wish to be even minutely responsible for some unspeakable tragic act of mayhem because in the peace of [the] judicial chambers [the court] miscalculated as to the Second Amendment rights . . . . If ever there was an occasion for restraint, this would seem to be it.”<sup>128</sup>

### C. The Appropriate View

The D.C. Circuit joins the Seventh Circuit in finding that a ban on public concealed-carry regulations violates the Second Amendment.<sup>129</sup> The Seventh Circuit struck down the Illinois Unlawful Use of Weapons statute that was a total ban on public carrying with narrow exceptions for law enforcement officers, hunters, and members of target shooting clubs, among others.<sup>130</sup> In *Moore v. Madigan*, the Seventh Circuit ruled that self-defense with a gun is not limited to the home.<sup>131</sup> On the other end of the spectrum, the Second Circuit joins the First, Fourth, and Ninth Circuits in upholding “good reason” statutes and other regulations relating to concealed-carry laws beyond the home.<sup>132</sup>

It is both alarming and disconcerting that such a stark lack of uniformity exists among the states and the circuits regarding the legality of concealed-carry laws. Those in favor of deregulation of firearms cite to historical arguments,<sup>133</sup> empirical studies,<sup>134</sup> and other state laws that

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127. *Id.* (citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)).

128. *Masciandaro*, 638 F.3d 458, 475-76 (4th Cir. 2011). In *Masciandaro*, the Fourth Circuit refused to address whether there may be a Second Amendment right in certain places beyond the home and the issue strikes the court “as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.”

129. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (choosing not to apply heightened scrutiny to an Illinois state gun-carrying law).

130. *Id.* at 934.

131. *Id.* at 936.

132. *See Peruta v. Cnty. Of San Diego*, 824 F.3d 919 (9th Cir. 2016) (holding that the because the Second Amendment did not protect the right to concealed firearms in public, any prohibition or restriction a state might choose to impose on concealed carry, including a requirement of good cause, however defined, was necessarily allowed by the Amendment). *See also Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (declining to extend the reasoning in *Heller* to carrying outside the home. And upholding New York’s “good reason” statute, requiring applicants seeking to obtain a concealed handgun permit, to “demonstrate a special need for protection); *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012) (holding that the government “may regulate the carrying of concealed weapons outside the home” and upheld Boston’s “good reason” statute).

133. *See generally* David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (Spring 2014) (discussing how the First Amendment is a helpful tool to analyze and understand the Second Amendment and how these amendments protect individual autonomy against government suppression).

permit the right to carry.<sup>135</sup> While the primary argument that gun rights advocates make for gun ownership is for personal protection, the reality is that the increased ownership of guns *does not* lead to increased safety.<sup>136</sup> Despite death toll numbers indicating otherwise, gun advocates argue that murders, crime, and mass shootings are the fruit of not having enough guns and that by arming Americans, people will be safer and more peaceful because criminals will be less inclined to commit bad acts, knowing that the “good guys” are armed and dangerous.<sup>137</sup> It is this incorrect belief—that gun ownership stops crime in the U.S.—that makes it too easy for Americans to own and keep firearms.<sup>138</sup> According to data from the Gun Violence Archive, there have been fifty-two mass shootings in 2018, as of March 30, 2018, and in 2017, there was a total of 346 mass shootings in the United States.<sup>139</sup> Despite calls to arms by gun advocates, as well as by President Trump in wake of the uptick in mass shootings, researchers have found that “shall issue” laws are connected to a 6.5 percent higher total homicide rate than those states that have “may issue” laws.<sup>140</sup> These findings strongly suggest that the current national trend towards increasingly permissive concealed-carry laws is inconsistent with the promotion of public safety.<sup>141</sup>

The tension emanating from both ends of the political spectrum with respect to the Second Amendment must not inhibit the discussion to dissolve the gridlock for the very reason that the risk of losing human lives to firearms violence is too great a cost. This urgency, however, is stymied by the interpretation of the Second Amendment shared by the

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134. See *Concealed Carry | Right-to-Carry*, NRA-ILA Institute for Legislative Action, <https://www.nra-ila.org/get-the-facts/right-to-carry-and-concealed-carry> (last visited Mar. 9, 2018) (citing to a 2014 Pew Research Center study finding that 57 percent of Americans believe that gun ownership protects people from crime).

135. *Id.*

136. Melinda Wenner Moyer, *More Guns Do Not Stop More Crimes, Evidence Shows*, Scientific American (Oct. 1, 2017), <https://www.scientificamerican.com/article/more-guns-do-not-stop-more-crimes-evidence-shows/>.

137. *Id.*

138. See generally *id.*

139. See *Mass Shootings*, *supra* note 5; Courtney Jeffrey, *Mass shootings in the U.S.: When, where they have occurred in 2018*, ABC15 (Feb. 21, 2018 at 1:40 p.m.), <https://www.abc15.com/news/data/mass-shootings-in-the-us-when-where-they-have-occurred-in-2018>.

140. Salma Abdella, *SPH Study: Higher Homicide Rates Tied to More Permissive Laws*, BU TODAY (Oct. 20, 2017), <https://www.bu.edu/today/2017/concealed-carry-laws-and-homicides/>.

141. *Id.* (citing data from the Centers for Disease Control and Prevention’s Web-Based Injury Statistics Query and Reporting Systems database with which researchers have used to track the relationship between the changes in state concealed-carry laws over time and the rate of firearm-related homicides from 1991 to 2015. This study also examined the FBI’s Uniform Crime Reports Supplementary Homicide Reports database to differentiate between handgun and long gun homicides, as opposed to previous studies that examined homicides by all firearms).

late Justice Scalia, Justice Gorsuch, as well as the retired Judge Posner of the Seventh Circuit.<sup>142</sup> If other circuits adopt an approach advocated by Judge Posner in *Moore v. Madigan*, which uses Scalia's framing in *Heller* of the Second Amendment to grant individuals the right to carry or possess a firearm in times of confrontation (not limited to only the home), it is likely that Justice Gorsuch will adopt a similar approach if and when the Court grants certiorari to a Second Amendment case.<sup>143</sup>

#### *D. A War Zone on Gun Laws*

Perhaps the late Chief Justice Burger—a conservative—had a premonition of the havoc that would later be inflicted on countless cinemas, concerts, schools, and homes by the relaxation of the Second Amendment. According to the former Chief Justice, the Second Amendment “has been the subject of one of the greatest pieces of fraud . . . on the American public by special interest groups” in his lifetime.<sup>144</sup> Despite this foreboding statement, the Court has been painfully reluctant to accept cases challenging gun laws.<sup>145</sup> There are several potential reasons as to why the Court has refused to take up more cases involving the Second Amendment.<sup>146</sup> First, the Court may believe that it already laid down the proper guidelines in *Heller*.<sup>147</sup> Second, it is possible that those justices who think the Constitution permits stricter regulations and those justices who think that such restrictions are unconstitutional are not certain if their side has the votes necessary to prevail if the Court does grant certiorari to the issue.<sup>148</sup> Third, it may be likely that the justices have evolving views on gun laws in light of the current state of affairs in the nation regarding mass shootings and gun control.<sup>149</sup> In this author's opinion, it is likely that the third alternative is the primary reason why the Court has continually refused to address this pressing constitutional and inherently political issue.

In light of the alarming uptick in mass shootings throughout the United States, the public focus has shifted to passing legislation to

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142. Nick Summo, *Keep Calm and Carry On: The Trump Administration, the New High Court, and the Second Amendment*, Sunday Splits (Feb. 12, 2017), <http://sundaysplits.com/2017/02/12/keep-calm-and-carry-on-the-trump-administration-the-new-high-court-and-the-second-amendment/>.

143. *Id.* See 702 F.3d 933 (7th Cir. 2012).

144. Nina Totenberg, *From 'Fraud' To Individual Right, Where Does the Supreme Court Stand on Guns?*, NPR (Mar. 5, 2018), <https://www.npr.org/2018/03/05/590920670/from-fraud-to-individual-right-where-does-the-supreme-court-stand-on-guns>.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

further regulate firearms. This reactive approach to lawmaking is a belated effort to palliate the failure of legislatures and Congress to address the ambiguous state of gun laws, and in particular, concealed-carry laws in America. Despite the dissension on this political issue, it is undeniable that the Founders foresaw the future of firearms in America. Surely, the Founders would have implemented practical restraints on the Second Amendment to protect their progeny for centuries to follow. However, the text of the Second Amendment only spans so far and has admittedly stalled even the Supreme Court. Rather, it is up to the political process to regulate firearms and concealed-carry licenses to protect our country and communities.

Beyond the inherently dangerous implications of arming more citizens with guns, an expansion of the Second Amendment will likely have far-reaching consequences in other areas of the law, including product liability law, public safety, as well as policing.<sup>150</sup> Despite the apparent trepidation of the Court to address the split among the circuits as it relates to concealed-carry laws and “good reason” regulations, citizens and their legislatures deserve a clear statement of the law as a first step to reduce violent crimes with firearms and to provide clarity to individual rights “core” to the Second Amendment.

It is inevitable that the Supreme Court will have to address the issues surrounding the Second Amendment, though it remains uncertain what role and to what extent the history of gun rights and concealed-carry laws will play in future cases.<sup>151</sup> However, if history is any indication of the Second Amendment’s protection of carrying firearms beyond the home, the history of armed carriage laws indicates that it is clearly within the government’s purview and authority to prohibit firearms in public places as a means to preserve the peace and to prevent public injury.<sup>152</sup> It follows that the Second Circuit’s approach in *Kachalsky* is not only appropriate, but also superior to the approach of the D.C. Circuit in *Wrenn*.<sup>153</sup> Aside from the political implications and the exigent public need to address the uncertainty surrounding gun regulation, the Second Circuit correctly recognizes that requiring a showing that there is an objective threat to a person’s safety before granting a concealed-carry license is consistent with the Second Amendment’s right to bear arms.<sup>154</sup>

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150. Summo, *supra* note 142.

151. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 481 (2016).

152. Charles, *supra* note 19

153. *Kachalsky*, 701 F.3d 81 (2d Cir. 2012); *Wrenn*, 864 F.3d 650 (D.C. Cir. 2017).

154. *Kachalsky*, 701 F.3d at 100.

## IV. CONCLUSION

Until the Supreme Court grants certiorari to ultimately shed judicial clarity to this area of the law, affecting citizens on every street corner, school, and workplace, it is important to consider the relative importance of political mobilization for gun control, as opposed to legal mobilization, in light of the nature of constitutional law.<sup>155</sup> While the Second Amendment serves as an important piece of political rhetoric invoked by elected officials to justify permissive gun laws, the Second Amendment serves a relatively less central role in the legal realm.<sup>156</sup> The issue of concealed-carry laws across the states is certainly the pending Second Amendment issue receiving the most legal attention to date, and is, indeed a doctrinal question of paramount concern.<sup>157</sup>

Should the Supreme Court leave the issue of discretionary permitting for concealed-carry permits up to the states, the political mobilization of the Second Amendment will lead to reforms that effectively cease discretionary permitting as the nation knows it.<sup>158</sup> Furthermore, if legislation such as H.R. 38 passes, “national reciprocity” of concealed-carry permits will render meaningless the current constitutional debate among the circuit courts over discretionary concealed-carry.<sup>159</sup> For the conceivable future, it is likely that the political mobilization around the Second Amendment will continue to outpace its legal mobilization. While advocates for gun control do see victories in the courts,<sup>160</sup> gun rights advocates are defeating gun control advocates in both the state and the federal legislatures.<sup>161</sup> Until the Supreme Court addresses the scope of such legislation as it relates to the Second Amendment, these political victories will prove to be far more important than the judicial interpretations. Consequently, gun control advocates and those wishing to see common sense legislation to limit the availability and presence of guns in the public sphere must not only continue to channel, but also increase their efforts of political mobilization. Gaining the necessary political support for gun control and concealed-carry permitting legislation will have a deeper and more immediate impact on the current state of the law than a judicial decision relating to the scope and interpretation of the Second Amendment.

This is not to say that a decision from the Supreme Court would be

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155. Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, ACSblog (Apr. 7, 2017), <https://www.acslaw.org/acsblog/is-the-second-amendment-becoming-irrelevant>.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

161. *Id.*; *see also* Griepsma, *supra* note 19.

irrelevant to the conversation of gun rights in America. Rather, gun control legislation will likely not end or significantly curb gun violence and mass shootings caused by illegally obtained firearms.<sup>162</sup> Nevertheless, political expediency, propelled by local and grassroots organizations, can contribute to the national dialogue surrounding the Second Amendment and provide the foundation for national reform at the judicial level. Precedents set by the Second and Fourth Circuits reinforce the message of gun control advocates with the constitutional and historical underpinnings supporting the pressure for national reform. Regardless of the form taken by gun control advocates—legislative or judicial—expediency is critical in this national “shoot out,” to not only protect the safety of U.S. citizens but to rein in the mistaken view of the Second Amendment as an “unfettered right” by the D.C. Circuit and the courts that follow its precedent. Echoing the Fourth Circuit’s opinion in *Masciandaro*, “[i]f ever there was an occasion for restraint [in our nation’s history for gun control], this would seem to be it.”<sup>163</sup>

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162. See generally Andrew Gillum, Bill Peduto, and Ted Wheeler, *We Want Gun Laws; NRA, Legislatures Won’t Let Us*, Cincinnati Enquirer, Apr. 5, 2018, at 15A (Opinion editorial reprinted in the Cincinnati Enquirer, by the mayors of Tallahassee, Florida, Pittsburgh, Pennsylvania, and Portland, Oregon, arguing that local gun ordinances cannot be passed because forty-three states have some form of gun pre-emption. State legislatures use gun pre-emption to prevent cities and counties from enacting local laws and decision. The authors of this article contend that this form of prevention is happening vis-à-vis gun lobbyists and special interest groups influencing state lawmakers in the state capitols).

163. *Masciandaro*, 638 F.3d 458, 475-76 (4th Cir. 2011).