

## HOW FAR DOES THE SECOND AMENDMENT EXTEND? PUBLIC CARRY AND STATE'S RIGHTS

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The Second Amendment of the United States Constitution reads: “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>1</sup> The true meaning of this Amendment has yet to be fully understood, sparking intense debate over its intent and purpose. For many Americans, this Amendment stands for the simple proposition that citizens have the right to defend themselves and their families with a gun. Inherent in that proposition is the right to defend themselves in public; perhaps through the use of a concealed weapon. However, given the sobering fact that the United States has one of the highest rates of gun violence in the world,<sup>2</sup> many people feel the need to attempt to curtail the number of firearms that exist in the public, especially in light of the recent tragic shootings in Las Vegas and at the Margery Stoneman Douglas High School in Florida.

Many states, such as New Jersey, have attempted to do so by making it difficult to qualify for a concealed carry permit.<sup>3</sup> They have accomplished this by requiring that citizens seeking to obtain a concealed carry handgun permit must demonstrate that they have a good cause or a “justifiable need” for self-protection.<sup>4</sup> These statutes have been challenged in court for violating the Constitution of the United States but have been upheld in the majority of cases.<sup>5</sup> However, there is a split in the circuits on this issue and the Supreme Court has not answered the fundamental question of whether or not the Second Amendment protects a right to bear arms outside of the

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

2. Kevin Quealy & Margot Sanger-Katz, *Compare These Gun Death Rates: The U.S. Is in a Different World*, N.Y. TIMES (June 13, 2016), <http://www.nytimes.com/2016/06/14/upshot/compare-these-gun-death-rates-the-us-is-in-a-different-world.html>.

3. Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public: Should Any Reason for Wanting a Gun be Good Enough?*, 127 HARV. L. REV. F. 218 (2014), <http://harvardlawreview.org/wp-content/uploads/2014/04/Blocher-Final.pdf>.

4. *Id.* See also N.J. ADMIN. CODE § 13:54-2.3 (2018).

5. *Drake v. Filko*, 724 F.3d 426, 446–47 (3d Cir. 2013) (concluding that the “justifiable need” requirement is a “longstanding prohibition” on Second Amendment protections and thus is “presumptively valid”).

*RUTGERS UNIVERSITY LAW REVIEW*

home.<sup>6</sup> Due to this lack of guidance, it remains to be seen just how far the Second Amendment's right to defend oneself extends, and to what degree states and municipalities may limit this right without violating the Constitution.

Historical analysis reveals that throughout most of American history there has been a "collective rights" approach to construing the Second Amendment.<sup>7</sup> For example, one 19<sup>th</sup> century case indicated that the Second Amendment does not bar state regulation of firearms. In *United States v. Cruikshank*, the Court determined that the second amendment "has no other effect than to restrict the powers of the national government."<sup>8</sup> This understanding of the Second Amendment did not grant an individual fundamental right to keep firearms. More recent cases mark a shift in the interpretation of the Second Amendment where a more individualistic right has been adopted.

The individual constitutional right to self-defense in the home was established in *District of Columbia v. Heller*. In this case, the Respondent, a special policeman, sued after the District of Columbia denied his application to register a handgun.<sup>9</sup> The District did so because of a statute which banned handgun possession.<sup>10</sup> The law authorized the police chief to issue one-year licenses, and required residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger locking device.<sup>11</sup> The D.C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.<sup>12</sup> The Supreme Court affirmed this decision holding in a 5-4 decision that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a

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6. Ryan Notarangelo, Note, *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, 238 (Fall 2014).

7. Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. Art. 696, 4 (2018).

8. 92 U.S. 542, 553 (1875).

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

10. *Id.* at 573.

11. *Id.*

12. *Id.*

*RUTGERS UNIVERSITY LAW REVIEW*

militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”<sup>13</sup>

This case makes two other important points. First, that the Second Amendment right is not unlimited.<sup>14</sup> Justice Scalia stated that his opinion “should [not] be taken to cast doubt on 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, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>15</sup> Second, the majority opinion explained that precedents show that the sorts of weapons protected are those “in common use at the time” finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons.<sup>16</sup>

The Supreme Court decided that “the District’s total ban on handgun possession in the home amount[ed] to a prohibition on an entire class of ‘arms’ that Americans overwhelmingly choose for the lawful purpose of self-defense.”<sup>17</sup> The Court stated that “[u]nder any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster.”<sup>18</sup> Similarly, the Court reasoned that “the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional.”<sup>19</sup> The Court decided that the District was required to permit *Heller* to register his handgun and issue him a license to keep it in his home.<sup>20</sup> Following *Heller*, the Court in *McDonald v. Chicago* extended the rights established in *Heller* to the states by holding that the Second Amendment right to keep and bear arms applied to the states through the Fourteenth Amendment.<sup>21</sup>

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13. *Id.* at 577.

14. *Id.* at 626–28.

15. *Id.*

16. *Id.* (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

17. *Id.* at 573.

18. *Id.*

19. *Id.*

20. *Id.*

21. 561 U.S. 742 (2010).

*RUTGERS UNIVERSITY LAW REVIEW*

As a result of *Heller* and *McDonald*, there is a new recognition of an individual rights comprehension of the Second Amendment which has established a fundamental individual right to bear arms. However, this fundamental right may not extend as far as some might believe. Rather, the limits that the Supreme Court delineated only clearly define a fundamental right for an individual to bear arms within the confines of their own home. It did not grant an unlimited right to possess any kind of modern weaponry a person may desire, nor did it answer definitively whether this right extended beyond the home. The Court has already recognized the State's powerful right to limit the use of firearms in public, and it is far from clear whose right should be dominant: the individual's or the State's.

There have been several cases litigated on the constitutionality of certain public carry laws, including restrictive concealed carry laws such as New Jersey's "justifiable need" standard. Overall, the majority of courts have held that these restrictions are in fact constitutional under intermediate scrutiny review.<sup>22</sup> One court has indicated that it is unconstitutional for a state to issue a blanket denial of all operational firearms in public, a decision which prompted the state's legislature to rewrite the relevant statute.<sup>23</sup> The most recent development on this issue is from a D.C. Circuit Court decision which seems to be in conflict with the majority of circuit court decisions regarding whether or not a city or state can require a showing of a "a good reason to fear injury" or a "justifiable need" prior to being issued a concealed carry permit.<sup>24</sup> Thus, the split in the circuits grows ever greater with a fundamental disagreement as to how far the individual's right to bear arms extends before the state's rights kick in.

These combined cases seem to indicate that the Second Amendment grants a complete right for eligible citizens to bear certain arms within their homes for self-defense, as well as what could reasonably be described as limitable right to bear arms outside of the home. The limitation of the public right depends on how broadly or narrowly the state's legislature chooses to apply their public carry laws. However, with all that said, this is merely a best guess as to

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22. See *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Woolard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 427–28 (3d Cir. 2013); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016).

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

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

*RUTGERS UNIVERSITY LAW REVIEW*

what the Second Amendment means based on the Supreme Court and the circuit level decisions which have been decided. Ultimately, there will not be a definitive understanding of the Second Amendment until the Supreme Court rules on the public aspect of the Second Amendment.

The United States Supreme Court should finally issue a decisive answer to this question. Given the outcomes of the majority of cases, the Supreme Court should definitively state that if the Second Amendment does indeed offer a fundamental individual right to bear arms, then that right should apply both within the home and in public. However, the Court should clarify that this right is at its strongest within the home and at its weakest in public due to the government's legitimate interest in protecting their citizens by strictly regulating the use of firearms in public. Specifically, the Court should find it unconstitutional for a state legislature to ban all weapons, or to ban functional weapons within the home. It should also find it unconstitutional to have an outright ban on functional weapons in public. What the Court should not do is grant an unfettered right to carry weapons in public. Rather, the Court should adopt a standard of intermediate review, and ultimately leave it to the states to decide how permissive or restrictive they wish to make their public carry laws. It should be left to state legislatures to determine what makes sense for their particular state, and it should ultimately be the people who direct the position their state stakes out on this issue.

The political process is available to the citizens of these states to push for more permissive or more restrictive public carry rights. New Jersey offers an example of this point. Former Governor Chris Christie successfully loosened restrictions on the issuance of concealed carry permits in response to what he perceived to be the will of the people. The current governor, Phil Murphy, has expressed a desire to return the standard to its prior level by defining a "justifiable need" as a demonstration of "the urgent necessity for the firearm rather than 'a more generalized fear or concern,'" and codifying this standard through legislation.<sup>25</sup> Similar actions can be taken throughout the country in both directions on this issue. The governors and legislators of these states may pass legislation, sign or veto such legislation, attempt to

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25. Matt Arco, *6 Gun-Control Bills Phil Murphy Will Likely Sign Into Law*, NJ.COM, [http://www.nj.com/politics/index.ssf/2018/02/6\\_gun\\_safety\\_bills\\_phil\\_murphy\\_will\\_likely\\_sign\\_in.html](http://www.nj.com/politics/index.ssf/2018/02/6_gun_safety_bills_phil_murphy_will_likely_sign_in.html) (last visited Feb. 21, 2018, 11:28 PM).

*RUTGERS UNIVERSITY LAW REVIEW*

strengthen or weaken agency guidelines, and might even go so far as to amend their state constitutions. Thus, the people are not powerless to define what is best for their communities with regard to the right to bear arms in public.

Ultimately, it is the voters who ought to be directing their state legislatures, or perhaps even their county or municipality, on how strongly to regulate the right to carry guns in public. Given the vast differences between some states, what makes sense for one state may seem like utter lunacy to another. What makes sense to the people of Wyoming, which is one of the least densely populated states in the country, might make no sense in New Jersey, which is the most densely populated state. To force the issue either way would be an unnecessary limitation of states' rights and of citizens' rights of self-determination. The Supreme Court should not rule that New Jersey's justifiable need standard, or similar standards in other states, are unconstitutional by granting an unlimited right to carry in public. Instead, the Court should uphold this standard as constitutionally valid and direct the citizens of New Jersey, and citizens similarly situated in other states, to demand greater rights to carry guns in public from their representatives if that is what they think would be right for their state. If that is what the majority of the people of that state believe makes sense for them then that is what they should have the right to do.

While addressing this particular issue will not come close to solving all of the problems this country has with gun violence, a final verdict from the Court highlighting the limitations of the Second Amendment would go a long way towards understanding the rights that the Second Amendment grants, as well as its limitations. Given the intense passion many citizens feel about the Second Amendment, it is important that the Supreme Court renders a final decision on the matter and establishes firm guidelines for the lower courts to follow. Settling the issue once and for all will likely ease some of the tension and polarization caused by diverging opinions on this matter. Allowing the states to determine for themselves what is best for their own people gives legislatures room to work to determine for themselves issues which the courts are not necessarily well-suited to determine. The approach highlighted in this article provides a fair way to define the Second Amendment rights, and a workable framework for state governments to build upon to ensure that the will of the people is respected and that public safety concerns are satisfied.