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Examining Powell, A New Wrinkle in an Old Debate

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Circuit Review Note

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Examining Powell, A New Wrinkle In An Old Debate

Burden of producing a license as a defense to firearm possession charge did not clearly violate due process

INTRODUCTION

An elderly man closes up his shop after a long day of work. He has owned this shop for the last 20 years. Recently there have been some break-ins and some of his merchandise was stolen. He has had to install extra security measures to protect his merchandise. He looks around before he pulls down the metal gate to lock up shop. He begins to walk home. He only lives a couple blocks away. The neighborhood has become increasingly run down because the economy has suffered. He has noticed some other stores around his have closed. There has also been an increase in muggings in the neighborhood and the storeowner fears for his safety. The man holds his lunch box filled with an empty container of food, his earnings for the day, and a pistol. He has owned the pistol for thirty years or so. The gun was passed down from his father when he passed away. The man never liked guns, but with the increase in violence, he felt it was necessary to keep it with him at his business and at home.

The storeowner is walking on his normal route when he sees a man walking towards the end of the block walking in his direction. As the man approaches the storeowner doesn't recognize him, and grabs his lunch box a little tighter towards his chest. As the stranger approaches he asks, "Do you have a lighter," while stopping in front of the storeowner.

The storeowner replies, “No sorry,” as he tries to move around the man. But the stranger quickly sidesteps and blocks his path.

The stranger chuckles, “What’s in the bag old man?”

The storeowner retreats a step backwards, “Please, I’m just trying to get home, the---”

“Open the bag,” the assailant interrupts as he slowly pulls a box cutter from his pocket. The man instinctively thinks maybe he can try to scare his assailant away with the gun. After all he cannot afford to lose his earnings for the day. He begins to open the lunch box, and grabs the handle of the pistol. The assailant seeing the handle appear out of the lunch box lunges and smacks the pistol down on the ground. The two men begin to grapple. They end up on the floor, with the assailant on top. The younger and stronger assailant begins to drive the box cutter blade slowly down toward the storeowner’s chest despite his efforts to repel the assailant. The storeowner turns away as a tear rolls down his face. In his despair he sees the pistol just within reach. In a last ditch effort to save his life; he redirects the blade trajectory away from his body to the side. The blade hits the concrete floor. The storeowner kicks away, just enough to reach out for the gun and shoots his assailant before he recuperated. The storeowner sits up and stares at the man, and realizes he just killed a man.

The police arrive, and take the storeowner’s statement. Can the storeowner be charged with illegal possession of a firearm? Clearly he was using the gun in self-defense. However in some states it is illegal to carry a gun without a license. So can the storeowner be charged with possessing a firearm, without a license, even though he only intended to carry the gun back and forth between work and his home, where he is allowed to keep a firearm for self-defense. Does there exist a fundamental right to possess a firearm outside the home for self-defense? If the police do charge

the storeowner with possession of a firearm without a license, must the State or the defendant prove the existence of a proper license? Does making the defendant must prove he has a valid license to carry violate Due Process? The answer to these questions depends on what state you are in. This article analyzes how the different circuits have struggled to define the outer limits of the Second Amendment, whether there exists a right to carry a firearm outside the home for self-defense, and finally whether an evidentiary presumption exists in court that you may possess a firearm outside the home for self-defense.

SECOND AMENDMENT

One in three Americans owns a gun, and not too long ago in 2011 the percentage of adults with a gun in their home or on their property was the highest since 1993.¹ Over 108,000 (108,476) people in America are shot in murders, assaults, suicides and suicide attempts, unintentional shootings, or by police intervention.² With all the recent gun violence in the news, there has been public outcry to place increased limitations on the right to bear arms. Given the tension in this country over gun violence, it is helpful to first re-examine the Second Amendment, and the right to bear arms. The Second Amendment provides, “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.”³

What this article does is examine is examine the Second Amendment. In particular this article examines the right to bear arms, the limitations on that right, the justifications for those limits, and what level of scrutiny should apply to those limits. More specifically we examine how

¹ See Lydia Saad, Self-Reported Gun Ownership in U.S. Is Highest Since 1993, Gallup (Oct. 26, 2011), <http://www.gallup.com/poll/150353/Self-Reported-Gun-Ownership-Highest-1993.aspx> (explaining 47% reported gun ownership in October 2011). Contrasting this with a decrease in reported gun ownership in the early 1990s, the data suggests “that attitudes [towards firearms] may again be changing.”

² <http://www.bradycampaign.org/key-gun-violence-statistics>.

³ U.S. Const. amend. II.

the courts in Massachusetts' have interpreted Massachusetts' Laws concerning the Second Amendment and how Massachusetts compares to other states.

Based on both the text and history, the Second Amendment conferred an individual right to keep and bear arms.⁴ However, the right is not unlimited, just as the First Amendment's right of free speech is not.⁵ Therefore, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.⁶

Many of the important issues surrounding the Second Amendment arise over what limitations can be placed on the right to bear arms. For example, there have been 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.⁷

A related question is what standard of review should these limitations be subjected to? Should strict scrutiny apply? The Supreme Court has not specified a particular level of scrutiny or other means-ends test that should govern Second Amendment issues, although *Heller* did declare that the right must be protected by something more demanding than mere rational basis scrutiny.⁸

⁴ D.C. v. Heller, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008).

⁵ See, e.g., United States v. Williams, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

⁶ Heller, 554 U.S. at 595.

⁷ *Id.* at 626-27.

⁸ *Id.* at 628 n.27; Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 752 (2012) at note 4, at 716-17.

Courts therefore tend to regard the matter as coming down to a choice between intermediate scrutiny and strict scrutiny, and most choose the former.⁹

The Supreme Court has always been very cautious in determining the outer limits of the Second Amendment. In recent years, the Supreme Court has provided some clarity. In *D.C. v. Heller*, the Court struck down the District of Columbia's ban on handgun possession and its prohibition on keeping operable firearms in the home, holding that each of these laws violated the Second Amendment.¹⁰ The Supreme Court held that the Second Amendment secures a limited individual right to keep and bear arms for self-defense of hearth and home unconnected to organized militia.¹¹ Furthermore, the Court suggested that the right to bear arms “guarantee[s] the individual right to carry weapons in case of confrontation.”¹² In *McDonald v. City of Chicago*, the plaintiffs were Chicago residents who desired to keep a handgun in their residences for self-defense; one was a resident of a high-crime neighborhood who had been threatened by drug dealers, and another had been the victim of a home burglary.¹³ The court seemed to follow a pattern of focusing on self-defense as a purpose for the Second Amendment in their analysis. Because Chicago's handgun ban was essentially identical to the District of Columbia ban struck down in *Heller*, the only issue in the case was whether the individual right to keep and bear arms recognized by the Second Amendment was made applicable, or “incorporated,” against state and local

⁹ See, e.g., *Chovan*, 735 F.3d at 1138; *Drake*, 724 F.3d at 435; *Schrader*, 704 F.3d at 989; *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 205; *Staten*, 666 F.3d at 159. *But see* *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, No. 13-1876, 2014 WL 7181334, at *17 (6th Cir. Dec. 18, 2014) (opting to apply strict scrutiny rather than intermediate scrutiny in Second Amendment cases).

¹⁰ *Heller*, 554 U.S. at 595.

¹¹ *Id.* at 570.

¹² *Id.* at 584 (2008) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)) (ellipses omitted) (internal quotation marks omitted).

¹³ *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 748, 130 S. Ct. 3020, 3026, 177 L. Ed. 2d 894 (2010).

governments by the Fourteenth Amendment of the Constitution.¹⁴ Ultimately, a majority of the Supreme Court agreed that the Second Amendment “right to keep and bear arms for the purpose of self-defense” is a fundamental constitutional right that is protected, through the Fourteenth Amendment, against infringement by state or local governments to the full extent that the Second Amendment protects the same right against federal infringement.¹⁵ However both *Heller* and *McDonald* fell short of answering the pertinent question of whether the Second Amendment provides a right to possess a firearm outside the home for self-defense.¹⁶

There is a current circuit split on the issue.¹⁷ Several circuits have boldly decided to enter into the fray. However there are also circuits who have declined to answer this question, in hopes the Supreme Court will answer the issue. For example, the Third Circuit, in *Drake v. Filko*,¹⁸ 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.¹⁹ Instead, it simply *assumed* that the Second Amendment applied outside of the home,²⁰ 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.²¹

¹⁴ 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, 617-18 (2012).

¹⁵ *Id.*

¹⁶ *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).

¹⁷ *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).

¹⁸ *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

¹⁹ *Id.* 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).

²⁰ *Id.* at 440 (focusing on the regulations' failure to burden Second Amendment rights).

²¹ *Id.*

This issue as to whether there exists a right to possess a firearm outside the home for self-defense has led to a lot of difficulties in the lower courts in interpreting the Second Amendment. Particularly many courts have struggled in reasoning what level of judicial scrutiny should apply to possessing a firearm outside the home for self-defense after *Heller*; as well as what evidentiary presumptions exist as to someone who possesses a firearm outside the home without a license to carry. The First Circuit's ruling in *Powell v. Tompkins*, provides an interesting wrinkle in the ongoing debate. Powell dealt with a state law that creates an evidentiary presumption that possession of a firearm outside the home is unlawful. The First Circuit rules that such a law does not clearly violate the U.S. Constitution.²² There are, however, opinions from the Second, Seventh, and Ninth circuits suggesting that the Second Amendment does provide a right to possess firearms outside the home for self-defense.

MASSACHUSETTS LAW

To understand Massachusetts's law on firearms it is important to note that The Declaration of Rights of the Massachusetts Constitution provides the private citizen no right to keep and bear arms.²³ All gun owners are required to be licensed in Massachusetts.²⁴ There are several ways to go about getting a license to possess a firearm.²⁵ One-way is to get either get a Class A or a Class B license.²⁶

Under Mass. Gen. Laws Ann. ch. 140, § 131, All licenses to carry firearms shall be designated Class A or Class B, and the issuance and possession of any such license shall be subject to the following conditions and restrictions:

²² *Powell v. Tompkins*, 783 F.3d 332, 340 (1st Cir. 2015).

²³ 18A Mass. Prac., Municipal Law and Practice § 16.10 (5th ed.).

²⁴ Mass. Gen. Laws Ann. ch. 140, § 131, (West).

²⁵ § 131, (West).

²⁶ § 131, (West).

(a) A Class A license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) firearms, including large capacity firearms, and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper...

(b) A Class B license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) non-large capacity firearms and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of such firearm as the licensing authority deems proper; provided, however, that a Class B license shall not entitle the holder thereof to carry or possess a loaded firearm in a concealed manner in any public way or place; and provided further, that a Class B license shall not entitle the holder thereof to possess a large capacity firearm, except under a Class A club license issued under this section or under the direct supervision of a holder of a valid Class A license at an incorporated shooting club or licensed shooting range; and (ii) rifles and shotguns, including large capacity rifles and shotguns, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as he deems proper.²⁷

The main difference between the two is that a person with a Class B license is prohibited from the purchase, rent, lease, possession, and carrying of a large capacity firearm.²⁸ Another essential difference is that Class B license holders are prohibited from possessing a loaded firearm in a concealed manner in any public way or place.²⁹

Under Mass. Gen. Laws Ann. ch. 140, § 122, The chief of police or the board or officer having control of the police in a city or town, or persons authorized by them, may, after an

²⁷ § 131, (West).

²⁸ § 131, (West).

²⁹ § 131, (West).

investigation into the criminal history of the applicant to determine eligibility for a license under this section, grant a license to any person except an alien, a minor, a person who has been adjudicated a youthful offender, as defined in section fifty-two of chapter one hundred and nineteen, including those who have not received an adult sentence or a person who has been convicted of a felony or of the unlawful use, possession or sale of narcotic or harmful drugs, to sell, rent or lease firearms, rifles, shotguns or machine guns, or to be in business as a gunsmith.³⁰ The licensing authority to whom such application is made shall cause one copy of said applicant's fingerprints to be forwarded to the department of the state police, who shall within a reasonable time thereafter advise such authority in writing of any criminal record of the applicant.³¹ The fee for an application for a license issued under this section shall be \$100, which shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial.³² A person refused a license may, within ten days, apply to the state commissioner of public safety for such license.³³ The local authority issuing or renewing a license must send notice of its action to the state commissioner.³⁴

Under Massachusetts's law, in processing an application for a license to carry a firearm, the licensing authority is required to conduct a two-step inquiry to determine the applicant's eligibility.³⁵ In the first step, the licensing authority looks at the applicant's personal suitability for

³⁰ Mass. Gen. Laws Ann. ch. 140, § 122 (West).

³¹ § 122 (West).

³² § 122 (West).

³³ § 122 (West).

³⁴ § 122 (West).

³⁵ Mass. Gen. Laws Ann. ch. 140, § 131, (West).

gun ownership.³⁶ At the second step, the licensing authority is required to consider whether the applicant has a “proper purpose” for carrying a firearm.³⁷

Another way to legally possess a firearm in Massachusetts is to obtain a Firearm Identification Card.³⁸ The Firearm Identification Card allows a person to possess a firearm in his home or to carry a shotgun or rifle.³⁹ This card does not authorize the carrying of a pistol or revolver. For this privilege, a license to carry is necessary.⁴⁰

Under Mass. Gen. Laws ch. 269, criminal sanctions may be imposed on, among others:

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession ... a firearm, loaded or unloaded, as defined in [ch. 140, § 121] without either:

(1) being present in or on his residence or place of business; *or*

(2) having in effect a license to carry firearms issued under [ch. 140, § 131 governing licensure];....

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with [ch. 140 § 129C governing FID cards]....⁴¹

Therefore, to lawfully possess and carry a firearm within the Commonwealth of Massachusetts a person must either obtain a license to do so or be exempt from the normal licensing requirements.⁴² Additionally, unless an individual standing accused of unlawfully possessing a firearm produces evidence at trial demonstrating licensure, state law presumes that he or she is not licensed in accordance with Section 7 of the Massachusetts criminal procedure.⁴³

³⁶ § 131, (West).

³⁷ § 131, (West).

³⁸ 32 Mass. Prac., Criminal Law § 306 (3d ed.).

³⁹ § 306.

⁴⁰ § 306.

⁴¹ *see* Mass. Gen. Laws ch. 269, §§ 10(a), (h),

⁴² *See generally* Mass. Gen. Laws ch. 140, §§ 121–131P; *Hightower v. City of Boston*, 693 F.3d 61, 65 (1st Cir.2012) (surveying Massachusetts law)

⁴³ *See Commonwealth v. Davis*, 359 Mass. 758, 270 N.E.2d 925, 926 (1971) (noting that the section 7 criminal procedure provision “allows the defendant to show that his conduct is within an exception to the proscription” on carrying firearms).

The Section 7 criminal procedure provision is a rule of state criminal procedure that applies in an array of criminal prosecutions beyond the firearms context.⁴⁴

This statute from Massachusetts is not uncommon but definitely one of the strictest in the country. Massachusetts has some of the toughest gun laws in the country, giving local licensing authorities the power to determine who can obtain a concealed carry permit.⁴⁵ The preliminary issue that this statute raises is whether failing to have a license is an element of the crime.

The Dissent in *Powell* concluded that in Massachusetts, a lack of a license is an element of the offense of possessing a gun without a license.⁴⁶ The dissent relied on the clear text of Powell's criminal complaint and the Massachusetts statutes, the unclear gloss on those statutes supplied by the Massachusetts Supreme Judicial Court (SJC), and the comparison to other jurisdictions.⁴⁷ The Court noted that the titles of the relevant counts are “Firearm *Without FID Card*, Possess” and “Firearm, Carry *Without License*.” (emphasis added).⁴⁸ Likewise, the descriptions of the counts against *Powell* repeat the “without a license” phrase.⁴⁹ Furthermore, one of the relevant statutes provides: “Whoever ... possesses a firearm *without complying with the [FID card] provisions* shall be punished by imprisonment....” Mass. Gen. Laws ch. 269, § 10(h)(1) (emphasis added).⁵⁰ The other relevant statute provides: “Whoever has in his possession a firearm *without having in effect a license* shall be punished by imprisonment....” *Id.* § 10(a) (emphasis added).⁵¹

⁴⁴ *Powell*, 783 F.3d at 339.

⁴⁵ See Mass. Gen. Laws ch. 140, §131(a) (2010) (explaining Class A license only permit authorizing holder to carry concealed firearm); see also *Howard v. Chief of Police*, 794 N.E.2d 604, 606-07 (Mass. App. Ct. 2003) (explaining police chief of Massachusetts town or city has right to grant license to carry).

⁴⁶ *Powell*, 783 F.3d at 355-56.

⁴⁷ *Id.* at 355.

⁴⁸ *Id.* at 350.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Powell*, 783 F.3d at 350.

However, the majority in *Powell*, relied on *Com. v. Jones*, stating that the absence of a license is not ‘an element of the crime,’ as that phrase is commonly used.⁵² In the absence of evidence with respect to a license, no issue is presented with respect to licensing.⁵³ In other words, the burden is on the defendant to come forward with evidence of the defense.⁵⁴ If such evidence is presented, however, the burden is on the prosecution to persuade the trier of facts beyond a reasonable doubt that the defense does not exist.⁵⁵ In essence the burden-shifting device created by Massachusetts General Laws chapter 278, section 7 accords with due process.⁵⁶

The majority’s view is more reasonable because it’s interpretation follows three decades of precedent after *Jones* was decided.⁵⁷ Although the wording of the relevant case law through the years has muddied the water, the intent of the statute is not to punish someone simply for not having a license to carry.⁵⁸ At court the accused can present evidence of a license, which then shifts the burden of proof as to the license on the prosecution.⁵⁹

The question that remains is whether the statute is constitutional. The answer to this question depends on whether there exists a fundamental right to possess a firearm outside of the home for self-defense. To examine this we look at *Powell* in more depth.

A CLOSER LOOK AT THE CIRCUIT SPLIT- EXAMING POWELL

⁵² *Id.* at 339 (1st Cir. 2015), citing *Com. v. Jones*, 372 Mass. 403, 406, 361 N.E.2d 1308, 1311 (1977).

⁵³ *Jones*, 361 N.E.2d at 1311.

⁵⁴ *Id.*

⁵⁵ *Id.* listing Cf. *Commonwealth v. Kostka*, 350 N.E.2d 444 (1976) (defense of insanity); *Commonwealth v. Rodriguez* 352 N.E.2d 203 (1976) (self-defense).

⁵⁶ *Powell*, 783 F.3d at 350, (summarizing the majority’s conclusion).

⁵⁷ *Id.* at 339.

⁵⁸ *Id.*

⁵⁹ *Id.*

The First Circuit, in *Powell* held a state law that creates an evidentiary presumption that possession of a firearm outside the home is unlawful does not clearly violate the U.S. Constitution.⁶⁰ Petitioner Aaron Powell was convicted on several state charges including unlawful possession of a loaded firearm,⁶¹ which were affirmed by the Massachusetts Supreme Judicial Court.⁶² Powell then sought federal habeas relief pursuant to 28 U.S.C. § 2254, which was denied by the district court.⁶³

Powell argued that the lack of license presumption infringes on his Second Amendment rights as secured under *Heller* and *McDonald*.⁶⁴ According to Powell, these decisions “restored the presumption of innocence, invalidating statutes like [section 7]” that impose criminal punishment on persons simply for exercising their Second Amendment rights.⁶⁵

The First Circuit distinguished *Heller*, and *McDonald*, by stating that while the Supreme Court spoke of a right of law-abiding, responsible citizens to keep and bear arms “in case of confrontation” outside the context of an organized militia,⁶⁶ it did not say, and to date has not said, that *publicly* carrying a firearm unconnected to defense of hearth and home and unconnected to militia service is a definitive right of private citizens protected under the Second Amendment.⁶⁷ The First Circuit went on to acknowledge that the debate continues among courts.⁶⁸ The First Circuit cited conflicting views in the Ninth, Third, Seventh, and Fourth Circuits.⁶⁹

⁶⁰ *Id.* at 340.

⁶¹ *See* Mass. Gen. Laws ch. 269, §§ 10(a), (h), (n).

⁶² *See* *Commonwealth v. Powell*, 459 Mass. 572, 946 N.E.2d 114 (2011).

⁶³ *Powell*, 783 F.3d at 334.

⁶⁴ *Id.* at 345.

⁶⁵ *Id.*

⁶⁶ *Heller*, 554 U.S. at 582–92, 128 S.Ct. 2783; *see McDonald*, 130 S.Ct. at 3036–42, 3048.

⁶⁷ *Powell*, 783 F.3d at 348.

⁶⁸ *Id.*

⁶⁹ *Compare* *Peruta v. County of San Diego*, 742 F.3d 1144, 1149–66 (9th Cir.2014), *request for rehearing en banc granted*, 781 F.3d 1106, 2015 WL 1381752 (9th Cir.2015) (No. 10–56971); *See* *Drake v. Filko*, 724 F.3d 426, 430–

The First Circuit repeated its position to not weigh in on the scope of the Second Amendment as to carrying firearms outside the vicinity of the home without any reference to protection of the home.⁷⁰ The First Circuit subsequently stated that it has held that any individual right “in carrying concealed weapons outside the home is distinct from [the] core interest emphasized in *Heller*,” and that under *Heller*, “[l]icensing of the carrying of concealed weapons is presumptively lawful.”⁷¹ Finally the First Circuit concluded that Powell's Second Amendment claim provided no grounding for setting aside his state firearms convictions.⁷²

The First Circuit seems to suggest a very narrow reading of *Heller*, by saying it does not even suggest that a right exists as to carrying a firearm outside the home for self-defense. Somewhat similarly to the First Circuit, the Fourth Circuit has held there may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions.⁷³ The Court noted the dilemma faced by lower courts in the post-*Heller* world, which is how far to push *Heller* beyond its undisputed core holding.⁷⁴ The court thought it prudent to await direction from the Court itself on the question of *Heller's* applicability outside the home environment.⁷⁵

31 (3d Cir.2013), *cert. denied*, 134 S.Ct. 2134, 188 L.Ed.2d 1124 (2014); Woollard, 712 F.3d at 874–76; Moore v. Madigan, 702 F.3d 933, 935–36 (7th Cir.2012), *with* Peruta, 742 F.3d at 1179–91 (Thomas, J., dissenting); Drake, 724 F.3d at 444–46 (Hardiman, J., dissenting); Moore, 702 F.3d at 944–49 (Williams, J., dissenting); *see also* United States v. Masciandaro, 638 F.3d 458, 467–68, 474–76 (4th Cir.2011).

⁷⁰ *Hightower*, 693 F.3d at 72.

⁷¹ *Id.* at 72-74 & n. 8.

⁷² Powell, 783 F.3d at 348-49.

⁷³ Masciandaro, 638 F.3d at 467–68, 474–76.

⁷⁴ *Id.* at 475.

⁷⁵ *Id.* *See also* Williams v. State, 417 Md. 479, 10 A.3d 1167, 1177 (2011) (“If the Supreme Court, in [*McDonald's*] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.”); *see also* Sims v. United States, 963 A.2d 147, 150 (D.C.2008).

The Second Circuit has held that the Second Amendment must have *some* application in the very different context of the public possession of firearm.⁷⁶ In *Kachalsky v. Cnty. of Westchester*, Plaintiffs challenged a New York legislation that prevented individuals from obtaining a full-carry concealed-handgun license to possess concealed firearm in public, in general and not for specific purposes such as hunting and target practice, except upon showing of “proper cause,” as interpreted by courts to require that these individuals demonstrate a special need for self-protection distinguishable from that of the general community.⁷⁷ Plaintiffs argued that the Second Amendment guarantees them a right to possess and carry weapons in public to defend themselves from dangerous confrontation and that New York cannot constitutionally force them to demonstrate proper cause to exercise that right.⁷⁸ The Court concluded that intermediate scrutiny was appropriate in this case because their tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public.⁷⁹ It determined that the proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest.⁸⁰ Also the Court found that New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.⁸¹ Finally the Court concluded that the proper cause requirement was substantially related the State’s interests.⁸² In making the

⁷⁶ *Kachalsky*, 701 F.3d 81, cert. denied sub nom., *Kachalsky v. Cacace*, 2013 BL 100186 (U.S. 2013).

⁷⁷ *Id.* at 97.

⁷⁸ *Id.* at 88.

⁷⁹ *Id.* at 96-97.

⁸⁰ *Id.* at 96-97 *See, e.g.*, *Masciandaro*, 638 F.3d at 471; *Skoien*, 614 F.3d at 641–42; *see also* *Ernst J. v. Stone*, 452 F.3d 186, 200 n. 10 (2d Cir.2006) (“[T]he label ‘intermediate scrutiny’ carries different connotations depending on the area of law in which it is used.”).

⁸¹ *Id.* at 97 (2d Cir. 2012) *See, e.g.*, *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997); *Schall v. Martin*, 467 U.S. 253, 264, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Kuck v. Danaher*, 600 F.3d 159, 166 (2d Cir.2010).

⁸² *Id.*

determination, the court reasoned that “substantial deference to the predictive judgments of [the legislature]” is warranted.⁸³

The Third Circuit has recognized that the Second Amendment right may have some application beyond the home.⁸⁴ In *Drake v. Filko*, Appellants challenged New Jersey's Handgun Permit Law, which requires that individuals who desire a permit to carry a handgun in public must apply to the chief police officer in their municipality or to the superintendent of the state police.⁸⁵ The chief police officer or superintendent considers the application in accordance with the following provisions of the Handgun Permit Law:

No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in 2C:58–3c. [which includes numerous criminal history, age and mental health requirements], that he is thoroughly familiar with the safe handling and use of handguns, *and that he has a justifiable need to carry a handgun.*⁸⁶

One of the Appellants arguments was that “[t]ext, history, tradition and precedent all confirm that [individuals] enjoy a right to *publicly* carry arms for their defense.⁸⁷ The court rejected the Appellants' contention that a historical analysis leads *inevitably* to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for self-defense.⁸⁸ Second Circuit in *Kachalsky* observed that “[h]istory and tradition do not speak with one voice here.”⁸⁹ What history demonstrates is that states often disagreed as to the scope of the right to bear

⁸³ *Id.* See also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997).

⁸⁴ *Drake*, 724 F.3d at 430–31, *cert. denied*, U.S., 134 S.Ct. 2134, 188 L.Ed.2d 1124 (2014), *request for rehearing en banc granted*, 781 F.3d 1106, 2015 WL 1381752 (9th Cir.2015) (No. 10–56971).

⁸⁵ N.J.S.A. § 2C:58–4(c).

⁸⁶ § 2C:58–4(c).

⁸⁷ *Drake*, 724 F.3d at 431 (3d Cir. 2013) *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134, 188 L. Ed. 2d 1124 (2014).

⁸⁸ *Id.*

⁸⁹ *Id. citing Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012).

arms, whether the right was embodied in a state constitution or the Second Amendment.”⁹⁰ The Court ultimately declined to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the “core” of the right as identified by *Heller*.⁹¹ However the Court did recognize that the Second Amendment's individual right to bear arms *may* have some application beyond the home.⁹²

The opposing view comes from the Seventh Circuit, which has expressly held that a right to bear arms thus implies a right to carry a loaded gun outside the home.⁹³ In *Moore v. Madison*, the court examined the constitutionality of an Illinois law, which forbids a person, with exceptions mainly for police and other security personnel, hunters, and members of target shooting clubs, to carry a gun ready to use (loaded, immediately accessible—that is, easy to reach—and uncased).⁹⁴ The appellants argued that the Illinois law violates the Second Amendment as interpreted in *Heller*.⁹⁵ *Heller* held that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁹⁶

In its decision, the Court focused on the original intent of the framers. The Court also interpreted what the terms of the Second Amendment meant given the historical context of when the Bill of rights was enacted. It found that the right to “bear” as distinct from the right to “keep” arms is unlikely to refer to the home.⁹⁷ To speak of “bearing” arms within one's home would at all times have been an awkward usage.⁹⁸ By awkward usage the court meant that one does not usually

⁹⁰ *Id. citing* *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Moore*, 702 F.3d at 935–36.

⁹⁴ *Id.* at 934.

⁹⁵ *Id.* at 934–35 (7th Cir. 2012), referring to *Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

⁹⁶ *Heller*, at 595, 2799, 637.

⁹⁷ *Moore*, 702 F.3d at 936.

⁹⁸ *Id.*

“bear” arms at home, they “keep” arms at home.⁹⁹ The framers intended to restrict people from the usage of guns outside the household, not inside the household. The Second Amendment provides that there is a right to “bear” arms, which according to the Seventh Circuit, meant possess a firearm outside the home. The court ultimately held a right to bear arms thus implies a right to carry a loaded gun outside the home.¹⁰⁰ The Seventh Circuit reasoned that this right is appropriate considering the implications of the right.¹⁰¹ The Seventh Circuit stated that, just because *Heller* and *McDonald* noted that the right to possess a firearm for self-defense was strongest inside the home,¹⁰² that doesn’t mean that the right to possess a firearm outside the home was not important.¹⁰³ The Seventh Circuit further reasoned that *Heller* 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.”¹⁰⁴

Similarly in the Ninth Circuit case *Peruta v. Cnty. of San Diego*, a California statute was challenged which generally prohibited the open or concealed carriage of a handgun, whether loaded or unloaded, in public locations.¹⁰⁵ Peruta sued the County in which he lived in after they denied his application for a concealed carry license.¹⁰⁶ Puerta sued under 42 U.S.C. § 1983,

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 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, 248 (2014) *citing* 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.*

¹⁰² Moore, 702 F.3d at 935.

¹⁰³ *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 acute outside of the home.” *Id.* (citation omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

¹⁰⁴ *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)).

¹⁰⁵ *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1147 (9th Cir. 2014), . *See also* Cal.Penal Code § 25400 (prohibiting concealed carry of a firearm); *id.* § 25850 (prohibiting carry of a loaded firearm); *id.* § 26350 (prohibiting open carry of an unloaded firearm); *see also id.* § 25605 (exempting the gun owner's residence, other private property, and place of business from section 25400 and section 26350).

¹⁰⁶ *Id.* at 1148.

requesting injunctive and declaratory relief from the enforcement of the County policy's interpretation of "good cause."¹⁰⁷ Peruta's main argument was that, by denying him the ability to carry a loaded handgun for self-defense, the County infringed his right to bear arms under the Second Amendment.¹⁰⁸ The Ninth Circuit concluded that the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense.¹⁰⁹ The Ninth Circuit noted that their reading of the Second Amendment was akin to the Seventh Circuit's interpretation in *Moore*,¹¹⁰ and at odds with the approach of the Second, Third, and Fourth Circuits in *Drake*,¹¹¹ *Woollard*,¹¹² and *Kachalsky*.¹¹³ The Ninth circuit critiqued the decisions of the Second, Third, and Fourth Circuits contrary to the approach in *Heller*, declining to undertake a complete historical analysis of the scope and nature of the Second Amendment right outside the home, which was contrary to *Heller*.¹¹⁴ The Ninth Circuit reasoned that as a result, the three circuits misapprehend both the nature of the Second Amendment right and the implications of state laws that prevent the vast majority of responsible, law-abiding citizens from carrying in public for lawful self-defense purposes.¹¹⁵

ANALYSIS

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1149–66.

¹¹⁰ *Moore*, 702 F.3d at 936–42.

¹¹¹ *Drake*, 724 F.3d at 431–35.

¹¹² *Woollard*, 712 F.3d at 876.

¹¹³ *Kachalsky*, 701 F.3d at 89, 97–99. *See also* *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1173 (9th Cir. 2014).

¹¹⁴ *Peruta*, 742 F.3d at 1173-74, *Comparing Heller*, 554 U.S. at 605, 128 S.Ct. 2783 (examining the post-ratification interpretations of the Second Amendment because “the public understanding of a legal text in the period after its enactment or ratification” is “a critical tool of constitutional interpretation” (emphasis omitted)), *with Drake*, 724 F.3d at 431 (noting that the court was “not inclined to address [text, history, tradition and precedent] by engaging in a round of full-blown historical analysis” and relying on the Second Circuit's conclusion that “[h]istory and tradition do not speak with one voice” (quoting *Kachalsky*, 701 F.3d at 91)); *Woollard*, 712 F.3d at 874–76 (declining to “impart a definitive ruling” regarding the scope of the Second Amendment right), *1174 *and Kachalsky*, 701 F.3d at 91 (refusing to look at “highly ambiguous history and tradition to determine the meaning of the Amendment”).

¹¹⁵ *Peruta*, 742 F.3d at 1173-74 (9th Cir. 2014).

A.) FUNDAMENTAL RIGHT TO BEAR ARMS OUTSIDE THE HOME FOR SELF-DEFENSE

When analyzing this split, the first question to consider is whether a fundamental right to possess a firearm outside the home for self-defense exists.¹¹⁶ Although confronted with this question, the First Circuit declined to recognize any right. The First Circuit has expressed its skepticism by hinting that they would likely reject that *Heller*, extends to any right outside the home.¹¹⁷ The First Circuit takes this position despite acknowledging that other circuits have answered the question in the affirmative.¹¹⁸

However the original intent of the Second Amendment, and the case law support that there does in fact exist a right under the Second Amendment to possess a firearm outside the home for self-defense.¹¹⁹ The First Circuit's reasoning is flawed because they fail to recognize the importance that self-defense plays in the purpose of the Second Amendment. Both *Heller* and *McDonald* held that the Second Amendment protects the individual "right to keep and bear arms for the purpose of self-defense."¹²⁰ Self-defense against the government as well as against people is fundamental to the Second Amendment.¹²¹ Also the First Circuit did not properly interpret the plain meaning of the terms in the Second Amendment. The right to "bear" arms implies that there exists some right to bear arms outside the home because of the word "bear."

¹¹⁶ Powell, 783 F.3d at 348.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Heller*, 554 U.S. at 628; 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.

¹²⁰ *Heller*, 554 U.S. at 595, *see also McDonald*, 561 U.S. at 748.

¹²¹ *Id.* at 628.

Instead the Seventh and the Ninth Circuits' approach to determine whether a right to possess a firearm outside the home is better reasoned. The Seventh and Ninth Circuits analyze both the plain meaning of the of the words used in Second Amendment at the time the Bill of Rights was enacted, as well as the historical context.¹²² The Second Amendment states in its entirety "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" (emphasis added).¹²³ The Seventh Circuit interprets the right to "bear" as distinct from the right to "keep" arms is unlikely to refer to the home.¹²⁴ To speak of "bearing" arms within one's home would at all times have been an awkward usage.¹²⁵ Therefore they conclude that a right to bear arms thus implies a right to carry a loaded gun outside the home.¹²⁶ The word "bear" is synonymous with "carry" or "produce." Bear refers to taking or carrying something away.

The Seventh Circuit also looked at the historical context of the Second Amendment. The court stated "one 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."¹²⁷ The court gave the example of a person who lived in the Wild West, where there were conflicts with the Native Americans.¹²⁸ In that situation the court reasoned that, "one would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route

¹²² Moore, 702 F.3d at 936.

¹²³ U.S. Const. amend. II

¹²⁴ Moore, 702 F.3d at 936.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed.”¹²⁹

The court then acknowledged that many of the dangers that were prevalent at the time of the framers do not exist anymore, however “a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.”¹³⁰ A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside.”¹³¹ Although the court overstates the importance of guns, the truth is we unfortunately do not yet live in a world where guns are no longer needed, at least in very specific circumstances. And even if we did live in that world, there could be an argument made that any outright ban on the right to possess a firearm outside the home for self-defense should come from the amendment process and not left up to the individual states. One reason would be because potential Privilege and Immunities Clause issues could surface.

All things considered, the more reasonable argument is that there does exist a fundamental right to possess a firearm outside the home for self-defense. It is the more reasonable argument based on the purpose, the interpretation of the language, the case law (*Heller* and *McDonald*), and the historical context of the Second Amendment is. The next question to address is how far does this right extend? Does it extend past self-defense? What weapons may be carried outside the home for self-defense? Most importantly, what level of judicial scrutiny applies to the right?

B.) LIMITATIONS ON THE RIGHT AND THE LEVEL OF JUDICIAL SCRUTINY

¹²⁹ *Id.*

¹³⁰ Moore, 702 F.3d at 937.

¹³¹ *Id.*

The framers of the Bill of Rights purposefully left the Second Amendment broad so that the States could regulate the right to bear arms with broad discretion. This would follow the general framework of the Constitution as a whole. The Constitution is a living-breathing document. The Constitution was set up as a guidepost that could withstand new, novel issues that would arise in our country's future. The framers could not have set up a document that governed every aspect of our lives. Such a document would have been impossible to create and in some cases rendered useless because of how much our society has changed. What the framers set out to do was set up broad guidelines for the States to use in order to set up more detailed regulations. The fundamental rights of the Second Amendment are just that, broad guidelines. However they are by no means absolute. The rights must be regulated through proper legislation. There needs to be limits placed on the Second Amendment, and those limitations must be constitutional.

Some circuits like the First Circuit have mistakenly failed to extend the right to bear arms outside the home for several reasons. First the Circuit might believe that if they open the door to recognize a right to possess a firearm outside the home for self-defense, then that could lead to the right being extended even further. In essence what the Circuit is arguing is slippery slope argument. Further the Circuit might not want to recognize the right because then that right would be considered a fundamental right subject to strict scrutiny review. Finally, the Circuit might just not want to recognize the right because the Supreme Court has not yet done so. However these reasons are not compelling because even if any given Circuit was to recognize that the Second Amendment extends past the home for self-defense, the Legislature can still place limits on that right. The courts cannot violate principles of federalism and perform the role of the Legislature.

For example *Powell*, where Powell was seen by officers walking near groups of lively youths that were pointing and shouting at each other.¹³² When Powell saw the police officers he was observed moving his hands toward his waist in a manner, which the officers viewed as consistent with concealing or retrieving contraband.¹³³ He then began to run, and a foot chase ensued.¹³⁴ An officer saw Powell clutch a gun and later drop it before he was captured and arrested.¹³⁵

Even if Powell had a right to possess a firearm outside the home, that right would still be subject to limitations.¹³⁶ For example, the most common requirement is to require a license to carry a firearm, and Massachusetts does in fact require a license to have a firearm.¹³⁷ The First Circuit could have easily acknowledged a Second Amendment right to bear arms outside the home while still holding that such a right did not protect Powell because he did not have a license. There would be a difference in the level of judicial scrutiny that applied to that limitation if the First Circuit recognized that right, but we will return to that point. One way to get around the stricter judicial scrutiny might be to more carefully draft the statutes. Another way would be to add additional limits that pass the level of scrutiny. For example, the State may require someone to take some approved test in order to be allowed to bear arms outside the home. Or the State could require additional training, safety classes, and educational seminars for those who meet the preliminary requirements. The State could also try to deter people from violating this right by creating strict

¹³² *Powell*, 783 F.3d at 335.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Heller*, 554 U.S. at 595.

¹³⁷ *See generally* Mass. Gen. Laws ch. 140, §§ 121–131P; *Hightower v. City of Boston*, 693 F.3d 61, 65 (1st Cir.2012) (surveying Massachusetts law).

and harsh punishments for those who do not follow the process to lawfully exercise the right. Whatever the case may be, the Court would have to rely on the legislature to do their job.

As previously mentioned, one reason the First Circuit did not want to acknowledge a fundamental right was because the court did not know what standard of judicial review to use. After *Heller*, we have seen that limits on the Second Amendment by lower courts have generally been analyzed under two different standards. The first approach is Justice Antonin Scalia's majority opinion in *Heller* heavily emphasized historical investigation of the original meaning and traditional understandings of the right to keep and bear arms.”¹³⁸ The *Heller* majority “also viewed the right in categorical terms, suggesting that courts should try to clearly demarcate the types of guns, people, and activities protected” by the Second Amendment.¹³⁹ It is important to note that even Justice Scalia’s approach has not specified a particular level of scrutiny or other means-ends test that should govern Second Amendment issues, although *Heller* did declare that the right must be protected by something more demanding than mere rational basis scrutiny.¹⁴⁰ This means that either strict scrutiny or intermediate scrutiny applies. Intermediate scrutiny is the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives.¹⁴¹ With strict scrutiny the statute must fall unless the government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest.¹⁴²

The second approach, which has been adopted by most lower courts, is Breyer’s dissent in *Heller*. Breyer’s approach favored a more flexible, pragmatic sort of analysis, enabling them to

¹³⁸ Allen Rostron, The Continuing Battle over the Second Amendment, 78 Alb. L. Rev. 819, 819-20 (2015).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 824.

¹⁴¹ 16B Am. Jur. 2d Constitutional Law § 857.

¹⁴² 16B Am. Jur. 2d Constitutional Law § 857

weigh the burdens imposed by legal limits on firearms against the public policy concerns motivating such restrictions.¹⁴³ As a result the emerging consensus in the lower courts was that constitutional challenges to gun laws should be evaluated under an intermediate scrutiny approach that was “highly deferential to legislative determinations and [resulted in] all but the most drastic restrictions on guns being upheld.”¹⁴⁴

The major fault in Justice Scalia’s approach is that historical inquiries are extremely difficult and do not produce determinate answers to the types of detailed questions raised by the array of constitutional challenges being brought against a wide variety of gun laws.¹⁴⁵ However, Justice Breyer’s approach also has a major flaw taking into consideration that there does in fact exist a fundamental right to possess a firearm outside the home for self-defense. The flaw is that fundamental rights require that limitations be subject to strict scrutiny.¹⁴⁶

So how should this issue be resolved? The Supreme Court should step in and resolve the issue. The Court has a dilemma. The dilemma is that strict scrutiny applies to fundamental rights. The right to bear arms is a fundamental right. However the majority of circuits have been applying intermediate scrutiny to the Second Amendment. How can the Supreme Court provide a flexible yet constitutional solution?

Perhaps there is a middle ground between the two approaches. This could be accomplished by limiting the scope of the Second Amendment. One way is for the Supreme Court to formally

¹⁴³ Allen Rostron, The Continuing Battle over the Second Amendment, 78 Alb. L. Rev. 819, 820 (2015)

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 16B Am. Jur. 2d Constitutional Law § 857.

recognize that there is a right to possess a firearm outside the home, but that right only extends to possessing a firearm outside the home for self-defense.

This approach would set the outer limits of the Second Amendment and establish the standard of review that has caused so much confusion for the circuits. Taking this approach one step further, the Supreme Court would then be rejecting the argument that the Second Amendment grants a general right to carry a firearm outside the home. Therefore possessing a firearm outside the home for purposes other than self-defense would not be a fundamental right. Furthermore, possessing a firearm outside the home not for self-defense would be subject to intermediate scrutiny.

The key to this approach is that the Supreme Court establishes the outer limits of the Second Amendment. It is key because fundamental rights must be reviewed under strict scrutiny. Although most courts have applied intermediate scrutiny, the Supreme Court cannot follow that fallacy because the Second Amendment is a fundamental right. The right to bear arms, deals with personal autonomy, and the right to privacy. That connection may seem tenuous at first, but the right to bear arms means the right to protect your home, and yourself. Inherent in the right to privacy is the right to protect your privacy and yourself. That is why self-defense from the government and from other people is key to interpreting the meaning, and setting the outer limits of the Second Amendment.

Additionally, this approach would be constitutional unlike how some circuits have been applying intermediate scrutiny to the possession of a firearm outside the home for self-defense. This approach is appropriate because strict scrutiny would apply to possessing a firearm inside the home and outside the home for self-defense. As for possession of a firearm in all other

circumstances, the Supreme Court could choose apply intermediate scrutiny, which most courts have already chosen to apply.

C.) RE-EXAMING POWELL, UNDER INTERMEDIATE SCRUTINY

For illustration, looking back at *Powell*, applying our new approach would result in the same outcome but with different reasoning. We would first look to see if Powell was exercising a fundamental right under the Second Amendment. Here, he was not in possession of a firearm at home.¹⁴⁷ Powell was also not in possession of a firearm for the purpose of self-defense.¹⁴⁸

In Massachusetts, in order to raise issue of self-defense there must be evidence warranting at least a reasonable doubt that the defendant:

- (1) had reasonable ground to believe and actually did believe that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force,
- (2) had availed himself of all proper means to avoid physical combat before resorting to the use of deadly force, and
- (3) used no more force that was reasonably necessary in all the circumstances of the case.¹⁴⁹

Because Powell was not in possession of a firearm for self-defense he would not have a fundamental right in that situation. Therefore, the court would review any limits on the right he had using intermediate scrutiny.

¹⁴⁷ *Powell*, 783 F.3d at 339.

¹⁴⁸ *Id.*

¹⁴⁹ *Com. v. Harrington*, 379 Mass. 446, 450, 399 N.E.2d 475, 479 (1980).

Additionally in *Powell*, the State could require that only arms typically possessed by law-abiding citizens for lawful purposes, including handguns be used for self-protection. This requirement would be a limit on a fundamental right and would be subject to strict scrutiny.

D.) WHY THE SUPREME COURT SHOULD RESOLVE THIS DISPUTE

Powell is not the appropriate case for the Supreme Court to grant cert in order to address the issue of the whether a right to bear arms outside the home exists for self-defense because the Supreme Court would not be directly presented with that issue. *Powell* was not possessing a firearm outside the home for self-defense. Therefore it would be inappropriate for the Supreme Court to rule on that point. However *Powell* illustrates the tension in the First Circuit in addressing the right to possess a firearm outside the home. *Powell* also illustrates the need to set a clear judicial standard of review for the Second Amendment.

One potential reason the Supreme Court has been reluctant to extend its decision in *Heller* would be that the court is worried about the political backlash they could face. The Supreme Court might not want to expressly state that there is a fundamental right to possess a firearm that extends outside the home considering all the recent public outcry for increased gun control.

Given the right set facts, the Supreme Court should address the issue in order to clarify the issue not only for the courts but also for the legislative branch. The Supreme Court has a huge impact on public discourse.¹⁵⁰ The legislature would benefit from a clear understanding of the

¹⁵⁰ See, e.g., Thomas R. Marshall, *Public Opinion and the Supreme Court* (1989); see also Lee Epstein & Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* 9-33, 299-312 (1992); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 *Am. Pol. Sci. Rev.* 299 (1998).

Second Amendment because they would be able to enact more effective laws. The legislature would be able to tailor their laws in order to withstand the level of judicial scrutiny.

Gun control is a heavily debated topic.¹⁵¹ The Legislature has recently been under a lot of pressure to increase Gun Control.¹⁵² President Obama gave a speech where he advocated for the need for heightened restrictions to respond to the gun violence in the U.S.¹⁵³ On May 4, 2013, before the National Rifle Association's (NRA) annual convention, Texas Senator Ted Cruz then promised that he, along with fellow Tea Party Conservatives Kentucky Senator Rand Paul and Utah Senator Mike Lee, would make sure to “filibuster any legislation that undermines the Bill of Rights or the Second Amendment right to keep and bear arms.”¹⁵⁴ It appears that significant gun regulation will not occur unless the Supreme Court identifies the outer limits of the Second Amendment because many states are unwilling to close the door on the Second Amendment granting some fundamental right to possess a firearm outside the home for purposes other than self-defense. If the Supreme Court would limit the Second amendment to only protecting a right to possess a firearm outside the home for self-defense, it would be interesting to see the creative ways the Legislature could try to decrease gun violence. Moreover, it would be interesting to see if there are any substantial differences in the type of legislation States try to pass, and whether strict scrutiny has any effect on legislation already in place.

¹⁵¹ *The Controversy of Gun Control*, Open Discussions About Various Controversies, <http://openreader.org/the-controversy-of-gun-control/> (last visited Feb. 02, 2016).

¹⁵² GOP scrambles for response to Obama's gun control actions, 2016 WL 60556.

¹⁵³ *Id.*

¹⁵⁴ Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?*, 23 Wm. & Mary Bill Rts. J. 1143 (2015), (citing Nat'l Rifle Ass'n, Ted Cruz at National Rifle Association Convention, YouTube (Feb. 02, 2016), at 3:07-3:20, <https://www.youtube.com/watch?v=dFLUzObt2a0> (excerpt from Ted Cruz's speech before the 2013 National Rifle Association Convention)).

CONCLUSION

A fundamental right exists to possess a firearm outside the home for self-defense. That right is considered a fundamental right in which strict scrutiny applies. Possession of a firearm outside the home for reasons other than self-defense is not fundamental right, and is subject to intermediate scrutiny. When re-examining *Powell*, we find that the court can achieve the same outcome with constitutionally sound reasoning. Ultimately, the level of judicial scrutiny might not end up making that much of a difference. Many laws that are currently passed under intermediate scrutiny would probably pass under strict scrutiny as well. However it would be interesting to see what new legislation that States would be confident enough to pass if the Supreme Court specified the outer limit of the Second Amendment was possession of a firearm for the purpose of self-defense.