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# An Evolving Right: The Shifting Core of the Second Amendment and its Effect on Public-Carry

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# AN EVOLVING RIGHT: THE SHIFTING CORE OF THE SECOND AMENDMENT AND ITS EFFECT ON PUBLIC-CARRY

## I. INTRODUCTION

On April 17, 2015, John Hendricks was faced with a choice: fight or flight.[1] Taking a break between fares while working as an Uber driver, he found himself in a life-or-death situation.[2] He heard a man, later identified as Everardo Custodio, yell to a group of pedestrians.[3] Hendricks then watched as Custodio produced a gun and began firing at the group.[4] In imminent danger himself, Hendricks realized that his only means of potential escape was to drive through Custodio's gunfire.[5] Therefore, Hendricks, a concealed-carry permit holder, drew his handgun and shot Custodio.[6] As a result of Hendricks's actions, Custodio was the only party injured in the incident, although Hendricks's vehicle was struck by a bullet Custodio fired.[7] John Hendricks's harrowing ordeal on the streets of Chicago provides a useful illustration of the polarizing issue of the public-carry of handguns in the United States. Viewed from a social standpoint, some believe Hendricks's best course of action was the one he took—using his firearm to defend himself and other innocent bystanders. On the other hand, some would argue that Hendricks should have refrained because Custodio had not shot anyone and might have stopped firing before anyone was hit. Whether Hendricks is properly characterized as a hero, an ordinary citizen exercising his right to self-defense, or an outdated throwback clinging to his guns depends on whom you ask. One certainty is that if Hendricks's story had unfolded before Illinois joined the vast majority of states and became a shall-issue regime, the outcome likely would have been different and the death toll higher.

A shall-issue state is one in which public-carry permits are issued to all applicants so long as certain baseline requirements are satisfied.[8] Usually, these requirements are minimal and are met when an applicant proves the absence of both criminal history and significant mental health concerns.[9] On the other hand, a may-issue state is a regime that

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1. *See generally* Geoff Ziezulewicz, *Concealed Carry Shootings Now Part of Chicago's Gun Reality*, CHI. TRIB. (Nov. 20, 2015, 12:12 PM), http://www.chicagotribune.com/news/ct-concealed-carry-shooting-interview-met-20151120-story.html; Adam Bates, *An Uber Driver With a Concealed Handgun Prevented a Mass Shooting in Chicago*, BUSINESS INSIDER (Apr. 21, 2015, 11:38 AM), https://www.businessinsider.com/uber-driver-with-concealed-handgun-prevents-mass-shooting-in-chicago-2015-4.

2. *Id.*

3. Ziezulewicz, *supra* note 1.

4. *Id*.

5. *Id.*

6. *Id.*

7. *Id.*; Bates, *supra* note 1.

8. *See* Nicholas J. Johnson, *Lawful Gun Carriers (Police and Armed Citizens): License, Escalation, and Race*, 80 LAW & CONTEMP. PROBS. 209, 231 n.3 (2017); John R. Lott Jr., *What a Balancing Test Will Show for Right-to-Carry Laws*, 71 MD. L. REV. 1205, 1207 (2012); Aaron Morrison, *Where is it Legal to Carry a Gun? List of States with Concealed-Carry Laws*, MIC (July 20, 2016), https://mic.com/articles/149325/where-is-it-legal-to-carry-a-gun-list-of-states-with-concealed-carry-laws#.ggQtnJ6TY; DANIEL W. WEBSTER, CONCEALED CARRY OF FIREARMS: FACTS VS. FICTION 2 (Nov. 16, 2017) https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/concealed-carry-of-firearms.pdf (providing a map of shall-issue versus may-issue states).

9. *See, e.g.*, *Handgun Licensing FAQ*, OKLA. ST. BUREAU INVESTIGATION, http://osbi.ok.gov/handgun-licensing/faq (last visited Nov. 13, 2018); *Eligibility Requirements for a Florida Concealed Weapon License*, FLA. DEP'T AGRIC. & CONSUMER SERVS., https://www.freshfromflorida.com/Consumer-Resources/Concealed-

often restricts public-carry to those applicants who demonstrate some specific, enhanced need for self-defense.[10]

It is important to bear in mind throughout this Note that John Hendricks's lawful shooting does not exist in isolation. For example, in 2018, a lawfully armed person in Florida shot and wounded a gunman who fired multiple rounds in a crowded park at a back-to-school event, and, in 2017, a lawfully armed citizen dubbed a "Good Samaritan" killed an active shooter at a sports bar in Texas.[11]

Shooting events like these keep the controversy over public-carry squarely at the forefront of the national conscience. Simultaneously, courts are struggling to determine the extent and the nature of public-carry rights. Specifically, courts are endeavoring to determine whether the right to carry firearms in public is constitutionally guaranteed. Further, if such a right does exist under the Second Amendment, what type of public-carry is guaranteed by the Constitution: concealed-carry, where the firearm is hidden from view; open-carry, where the firearm is exposed; or both? Despite the argument that the nation's framers intended the Second Amendment to apply only to the maintenance of the collective state militias,[12] the Supreme Court made it clear in *District of Columbia v. Heller* and *McDonald v. City of Chicago* that the Second Amendment's guarantee is an individual one that is fully applicable to the states and that protects the right to use handguns for self-defense.[13]

In *Heller* and *McDonald*, the Court focused on handgun possession within the home and conclusively determined that the in-home possession of handguns is not only a constitutionally guaranteed right, but also a fundamental one.[14] But what happens when a gun owner chooses to carry a firearm beyond the home? Circuits are split over the extent to which *Heller* extends to public settings. The judicial tension seems to stem from the varying definitions courts are giving to the core of the Second Amendment because, since *Heller*, most courts have assumed that a statute that implicates the Amendment's core must be subjected to a higher standard of judicial scrutiny than a statute that does not.[15]

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Weapon-License/Applying-for-a-Concealed-Weapon-License/Eligibility-Requirements (last visited Nov. 13, 2018).

10. *See, e.g.*, MD. CODE ANN. PUB. SAFETY § 5-306(a)(6)(ii); HAW. REV. STAT. § 134-9(a); N.J. STAT. ANN. § 2C:58-4(c); MASS. GEN. LAWS ANN. ch. 140 § 131; *see also* Lott, *supra* note 8, at 1208; Morrison, *supra* note 8.

11. Travis Fedschun, *Florida Armed Bystander Stops Gunman at Crowded Back-to-School Event at Park, Police Say*, FOX NEWS (Aug. 6, 2018), http://www.foxnews.com/us/2018/08/06/florida-armed-bystander-stops-gunman-at-crowded-back-to-school-event-at-park-police-say.html; Phil McCausland, *'Good Samaritan' Kills Active Shooter in Texas Sports Bar: Police*, NBC NEWS (May 4, 2017, 8:40 PM), https://www.nbcnews.com/news/us-news/good-samaritan-kills-active-shooter-texas-sports-bar-police-n755136.

12. PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 104 (2018); *see also* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1124–25, 1130 (2006); Richard Aborn & Marlene Koury, *Toward a Future, Wiser Court: A Blueprint for Overturning* District of Columbia v. Heller, 39 FORDHAM URB. L.J. 1353, 1360–62 (2012).

13. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).

14. *Heller*, 554 U.S. at 628–29; *McDonald*, 561 U.S. at 767, 791.

15. *E.g.*, Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) ("[W]e assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.") (quoting United States v. Masciandaro, 638

As a starting point, *Heller* defined the core purpose of the Second Amendment as the right to use handguns for self-defense.[16] Absent from this definition is the answer to a crucial question, the question on which this Note will focus: is the core limited to certain locations? Stated more directly, is it limited to the home? As the recent cases of *Wrenn v. District of Columbia* and *Young v. Hawaii* illustrate, by expanding or contracting the Second Amendment's core, courts give themselves significant leeway to determine whether a statute that limits firearm possession outside the home is constitutional.[17] Such limiting statutes—commonly referred to as good-cause statutes—often restrict the right to carry handguns in public to a sub-set of law-abiding citizens who are capable of articulating some heightened need of self-defense.[18] As will be dissected below, *Heller*'s discussion of public-carry was ambiguous. However, as interpreted by some lower courts, *Heller*'s language supports the inference that the right to self-defense does reach beyond the home and may sit at the core of the Second Amendment.[19] If the Supreme Court were to reach a decisive conclusion on the matter, the public safety implications could be extensive.

Part I of this Note explores the background of the Second Amendment by highlighting the role of the militia during the American Revolution. This section illustrates the public admiration of the militia during the colonial period as well as the shared public fear of the militia's antithesis: a standing military.[20] As discussed in other writings, there is an argument that the founders did not envision the Second Amendment as a protection of individual firearm rights unrelated to state militias but, rather, intended it to provide a

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F.3d 458, 470 (4th Cir. 2011)); Gould v. Morgan, 907 F.3d 659, 670–71 (1st Cir. 2018) ("In our judgment, the appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right. A law or policy that burdens conduct falling within the core of the Second Amendment requires a correspondingly strict level of scrutiny, whereas a law or policy that burdens conduct falling outside the core of the Second Amendment logically requires a less demanding level of scrutiny."); Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012) ("We do not believe however, that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment . . . . Although we have no occasion to decide what level of scrutiny should apply to laws that burden the 'core' Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense . . . ."); *see also* Sam Zuidema, *Raising* Heller*: Constitutional Scrutiny in a New Age of Second Amendment Rights*, 2018 U. ILL. L. REV. 813, 826 (2018) ("Most courts have determined that the core is afforded more protection than rights falling within the amendment's periphery.").

16. *Heller*, 554 U.S. at 630.

17. *See* 864 F.3d 650, 661, 667 (D.C. Cir. 2017); 896 F.3d 1044, 1070–71 (9th Cir. 2018).

18. *See, e.g.*, MD. CODE ANN. PUB. SAFETY § 5-306(a)(6)(ii); HAW. REV. STAT. § 134-9(a); N.J. STAT. ANN. § 2C:58-4(c); MASS. GEN. LAWS ANN. ch. 140 § 131; *see also* Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218, 218 (2014) ("[S]ome jurisdictions . . . require applicants for . . . public carrying licenses to show cause (such as Maryland's 'good and substantial reason' or New York's 'special need for self-protection') for public carrying . . . .").

19. *Wrenn*, 864 F.3d at 657–58 (discussing their opinion that public-carry lies and the core of the Second Amendment and stating that in *Heller*, the Supreme Court gave "seemingly equal treatment to the right to 'keep' and to 'bear,' first defining those 'phrases' and then teasing out their implications. In that long preliminary analysis, the Court elaborates that to 'bear' means to 'wear, bear, or carry . . . upon the person . . . in a case of conflict with another person. That definition shows that the Amendment's core must span . . . the 'right to possess and *carry* weapons in case of confrontation.'") (citations omitted); Moore v. Madigan, 702 F.3d 933, 935–36 (7th Cir. 2012) ("*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home . . . .").

20. CHARLES, *supra* note 12, at 104; Nelson Lund, *The Right to Keep and Bear Arms in the Roberts Court*, 2–3 SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3038923 (last revised Apr. 5, 2018).

balance against the federal military by granting citizens the right to keep and bear arms in the limited context of militia service.[21]

Part II analyzes the Supreme Court's decisions in *Heller* and *McDonald*. While these decisions relied heavily on a historical interpretation of the Second Amendment, in both instances, the Court expanded the reach of the widely-believed intent of the framers and held that the Second Amendment protects an individual right to possess handguns for self-defense even in the absence of any militia connection.

Part III discusses the hotly contested right of public-carry by examining and defining good-cause statutes. As previously noted, such statutes often deny public-carry permits to law-abiding citizens with no mental health concerns unless the applicant is able to establish cause for self-defense over and above the self-protection needs of the general public.[22] This portion of the Note also analyzes the public-carry circuit split in light of the recent *Wrenn* and *Young* decisions, and more specifically, exposes the shifting core of the Second Amendment. While *Wrenn* created the split,[23] *Young* introduced a third interpretation of the core, thus revealing the core's malleable nature.[24]

Importantly, by order issued on February 8, 2019, the Ninth Circuit has voted to rehear *Young v. Hawaii* en banc.[25] However, the date of the rehearing is uncertain because on February 14, 2019, the Ninth Circuit issued an order staying the en banc proceeding pending the Supreme Court's ruling in *New York State Rifle & Pistol Ass'n v. City of New York* (a Second Circuit case focused on the constitutionality of a New York City handgun licensing scheme that restricts the circumstances under which a licensed firearm can legally be transported from a licensed premises).[26] The Supreme Court is scheduled to hear *New York State Rifle & Pistol Ass'n v. City of New York* during its October 2019 term.[27]

Regardless of whether courts are reshaping the core as a result of uncertainty or in an effort to achieve a desired result, the effect of such expansion or contraction of the core is significant because a court's definition of the core often determines the level of scrutiny that it applies to test the constitutionality of a challenged good-cause statute. Finally, this section of the Note discusses two potential flaws in the *Young* ruling, namely the Ninth Circuit's failure to rule decisively on the constitutionality of good-cause statutes and the court's over-application of history during its analysis of the Second Amendment.

Part IV raises the point that the judicial focus on the Second Amendment's core

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21. CHARLES, *supra* note 12, at 104; *see also* Cornell, *supra* note 12, at 1124–25, 1130; Aborn & Koury, *supra* note 12, at 1360–62.

22. Blocher, *supra* note 18, at 218.

23. Brief of Plaintiff-Appellant in Opposition of Rehearing En Banc at 12 n.8, Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018) (No. 12-17808) [hereinafter Brief of Plaintiff-Appellant], https://www.ar15.com/forums/general/Response-to-En-Banc-Petition-in-Young-v-State-of-Hawaii-filed/5-2163534/ (stating, "[t]o be sure, there is conflict between the holding in *Wrenn* that a 'good cause' requirement is facially unconstitutional, and the holdings in *Gould*, *Woollard*, *Kachalsky* and *Drake*, that a 'good cause' requirement facially comports with the Second Amendment").

24. 896 F.3d at 1070.

25. Order Granting En Banc Rehearing, 915 F.3d 681 (9th Cir. 2019).

26. Order Staying En Banc Rehearing, No. 12-17808 (9th Cir. Feb. 14, 2019) (D.C. No. 1:12-cv-0036-HG-BMK); New York State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018).

27. *Supreme Court of the United States Granted & Noted List October Term 2019 Cases for Argument*, SUPREME COURT U.S. (Jan. 22, 2019), https://www.supremecourt.gov/orders/19grantednotedlist.pdf.

appears to have grown since *Heller*. Given the current spotlight on the core, this Part argues that the concept of the core is possibly being rendered unnecessarily abstract as a result of the relevant case law's failure to explain what exactly it means for the Second Amendment to have a core in the first place. This portion of the Note suggests, based on language and inferences drawn from *Heller* and *McDonald*, that the Second Amendment's core is properly defined and understood simply as the Amendment's primary purpose. It then examines whether such a substitution of terms might have altered the Ninth Circuit's ruling in *Young*.

Given the shifting nature of the core, Part VI concludes by arguing that the disagreement among the circuits regarding the right to carry handguns in public makes Supreme Court intervention both necessary and appropriate. In America's mass-shooting society, the public safety implications of a Supreme Court ruling placing the right of public-carry either inside or outside of the core of the Second Amendment could be profound.[28]

## II. THE ORIGINAL PURPOSE OF THE SECOND AMENDMENT: PRESERVATION OF STATE MILITIAS

The Revolutionary War began on April 19, 1775, with the Battles of Lexington and Concord.[29] These battles were the American response to increasing tension between Britain and the colonies over Britain's attempt to seize colonial weapons.[30] At this point in American history, militias were recognized by some as an established defense system, as many militia-men had fought in the French and Indian War and were formidable combatants.[31] As a result, when 20,000 colonists intercepted British troops on the Lexington town square, they forced a retreat.[32] In the early days of the war, the colonists reveled in the idea of "the people" finally taking their stand against the Crown.[33] However, as the war progressed, national leaders began to doubt whether national security was sufficiently safe in the hands of the militia system.[34] Shortly after the Revolution began, Congress renamed the militia groups the new "American Continental Army" and elected George Washington Commander-in-Chief.[35] After joining his troops, Washington found disarray.[36] Desertion was commonplace and leadership was poor.[37] In light of his observations, Washington wrote Congress and said:

> To place any dependence upon Militia, is, assuredly, resting upon a broken staff. Men just

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28. I assert that the public safety impact could be profound because, although the majority of states are shall-issue states, those states that are may-issue are some of the nation's most populous. As a result, a Supreme Court ruling that placed public carry at the core of the Second Amendment would affect millions of Americans. *See* WEBSTER, *supra* note 8, at 2.

29. *Battles of Lexington and Concord*, HISTORY, https://www.history.com/topics/american-revolution/battles-of-lexington-and-concord (last visited Sept. 4, 2018).

30. *Id*.

31. MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 10 (2014).

32. *Battles of Lexington and Concord*, *supra* note 29; WALDMAN, *supra* note 31, at 10.

33. WALDMAN, *supra* note 31, at 11.

34. *Id.* at 12–13.

35. *Id*. at 13–14.

36. *Id.* at 14.

37. *Id.*

> dragged from the tender scenes of domestic life; unaccustomed to the din of arms; totally unacquainted with every kind of military skill . . . [are] timid and ready to fly from their own shadows. Besides, the sudden change in their manner of living . . . produces shameful, and scandalous desertions . . . . Certain I am, that it would be cheaper to keep 50,000 or 100,000 men in constant pay than to depend upon half the number, and supply the other half occasionally with militia.[38]

As Michael Waldman argued in his book *The Second Amendment: A Biography*, "Wars change many things. They reorder thinking, teach hard lessons, jumble social classes. Certainly the American Revolution did that. Among other things, it instantly began to school its leaders in the limits of the much romanticized militia system and the role of the citizen soldier."[39] The lessons learned in war were not forgotten during the Constitutional Convention, and they provided the backdrop that resulted in the granting of significant power to the federal government to maintain a national military and regulate the militia.[40]

A centralization of military power was a concern among the people when the Bill of Rights was drafted, and the framers were sensitive to the public disquiet.[41] Recognizing that a standing military was a potential danger to individual liberty, the founders believed the state militias provided a necessary barrier against oppressive federal power.[42] This was the mindset that led to the inclusion of the Second Amendment in the Bill of Rights,[43] which simply states, "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."[44]

The Founding Fathers viewed the Amendment as a constitutional protection against a standing military.[45] Regarding the Constitution's division of militia power between state and federal government, "all room for doubt, or uneasiness upon the subject" was "completely removed" by the Bill of Rights' inclusion of the Second Amendment.[46] Thus, the addition of the Amendment was perceived to balance control over the militia in the people's favor because it ensured that, via the right to arms in the context of militia service, the ability of the people to defend their liberty was maintained.[47]

Absent from the founders' idea of a right to keep and bear arms in militia service is the notion of the right to do so for the purpose of individual self-defense. During ratification, which included ardent discussion, writings, and speeches, concerns that the government would infringe upon individual gun possession rights were infrequently raised.[48] In other words, John Hendricks's right to possess a firearm with which to confront Everardo Custodio did not appear to be one of the founders' driving concerns.

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38. WALDMAN, *supra* note 31, at 14–15.
39. *Id*. at 12–13.
40. Lund, *supra* note 20, at 3; U.S. CONST. art. I, § 8, cl. 12–16.
41. Lund, *supra* note 20, at 2.
42. CHARLES, *supra* note 12, at 104.
43. *Id*.
44. U.S. CONST. amend. II.
45. CHARLES, *supra* note 12, at 70.
46. *Id.* at 100 (quoting founding-era law professor, St. George Tucker).
47. *See id*.
48. WALDMAN, *supra* note 31, at 43.

## III. THE *HELLER* EFFECT—DESPITE THE PURPOSE OF ITS CODIFICATION, THE SECOND AMENDMENT GUARANTEES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

Despite the founders' focus on the militia, the general understanding of the Second Amendment changed during the nineteenth century.[49] Increasingly, it became more associated with individual self-defense and less with militia service.[50] Several factors contributed to the transformation, including: "the decline of the militia, the expansion of the United States, changes in constitutional drafting, legal commentary and opinions as to what the Second Amendment and the right to arms afforded, and varying public attitudes . . . on the ownership . . . of arms . . . ."[51] Surprisingly, it took over 200 years from its ratification for the United States Supreme Court to conduct an in-depth analysis of the Second Amendment's guarantee.[52] That does not mean that the Court has never analyzed the Amendment, but a review of pre-*Heller* Supreme Court precedent reveals that no law regulating firearm possession had ever been declared unconstitutional.[53] Prior to *Heller*, the Court viewed the right of individual firearm possession to exist only in the context of militia service.[54] However, in a contentious five to four decision in 2008, *Heller* changed the narrative.

Dick Heller was a special police officer who was permitted to possess a handgun while on duty.[55] He attempted to register his weapon to keep it at home as well, but he was denied due to District of Columbia Code provisions that generally prohibited the registration of handguns.[56] Heller filed suit against the District on Second Amendment

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49. CHARLES, *supra* note 12, at 122.

50. *Id.*

51. *Id.*

52. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("[T]his case represents this Court's first in-depth examination of the Second Amendment . . . .").

53. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 956 (2015); *see also* ROOSEVELT THOREAU, THE RIGHT TO BEAR ARMS IN A MODERN AMERICA: THE ORIGINAL INTENT OF THE SECOND AMENDMENT, THE SUPREME COURT DECISIONS THAT DEFINE IT, & THE RIGHT TO KEEP AND BEAR ARMS IN A VIOLENT SOCIETY 9–11 (2017); *see also, e.g.*, United States v. Miller, 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less eighteen inches in length' . . . has some reasonable relationship to the preservation . . . of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."); Miller v. Texas, 153 U.S. 535, 538 (1894) (referring to Defendant's claim that a Texas statute violated his Second Amendment rights, the Court concluded "[w]e have examined the record in vain, however, to find where the defendant was denied the benefit to any of these provisions, and, even if he were, it is well settled that the restrictions of these amendments operates only upon the federal power, and have no reference whatever to proceedings in state courts"); United States v. Cruikshank, 92 U.S. 542, 553 (1875) ("The second amendment declares [the right to bear arms for a lawful purpose] shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to . . . the 'powers which related to merely municipal legislation . . . .'"); Presser v. Illinois, 116 U.S. 252, 265 (1886) (citing favorably the above passage from *Cruikshank*).

54. *See Miller*, 307 U.S. at 178 (stating that possession of the sawed off shotgun in question was not protected by the Second Amendment because such weapons did not have a reasonable relationship to the preservation of a well-regulated militia); CHEMERINSKY, *supra* note 53, at 956.

55. *Heller*, 554 U.S at 575.

56. *Id.* at 575.

grounds, seeking to enjoin the city from enforcing the provisions.[57]

In the *Heller* majority opinion, Justice Scalia expressly agreed that the original purpose of the Amendment's inclusion in the Bill of Rights was the preservation of the militia.[58] The Court then reasoned that the purpose behind the codification of the Amendment was only part of the story. It highlighted the fact that the Second Amendment is syntactically split into two parts: a prefatory clause ("A well regulated militia, being necessary to the security of a free State") and an operative clause ("the right of the people to keep and bear Arms, shall not be infringed").[59] The Court concluded that the prefatory clause did not limit the right granted by the operative clause, but simply announced the reason for its inclusion in the Bill of Rights.[60] This purpose-only view of the prefatory clause meant that it need not be considered when determining the scope of the right granted by the Amendment.[61] The majority reasoned that the guarantee—"the inherent right of [individual] self-defense"[62]—was revealed in the operative clause which the Court defined as "the *central component* of the right itself."[63]

For some, including the dissent, this interpretation of the effect—or lack of effect—that the clauses of the Second Amendment have on one another was a dramatic shift in thinking.[64] By disregarding the prefatory clause in defining the Second Amendment's guarantee, the majority expressly acknowledged what it considered to be an appropriate rephrasing of the Amendment: "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[65]

After pronouncing that the Second Amendment secures an individual right to possess handguns for self-defense, the Court drew several conclusions that are currently proving both central and problematic to the circuits as they struggle to determine whether—and to what extent—*Heller* protects an individual firearm possession right beyond the home. First, the Court noted that "the core lawful purpose" of the Second Amendment is the individual right to use operable handguns for self-defense.[66] Next, it observed that the need for self-defense is most acute within the home.[67] Further, and similarly, the Court opined that the right of law-abiding citizens to use handguns in defense of their homes is elevated above all other interests.[68] Finally, while ruling out rational basis as a viable option, the Court left open the question of the appropriate level of scrutiny

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57. *Id* at 575–76.
58. *Id.* at 599.
59. *Id.* at 576–77.
60. *Heller*, 554 U.S. at 577.
61. *Id.* at 578; *see also* Wrenn v. District of Columbia, 864 F.3d 650, 658 (D.C. Cir. 2017) (quoting *Heller* and reasoning that "while preventing Congress from eliminating state militias was the 'purpose that prompted the [Amendment's] codification,' that purpose did not limit the right's substance, which encompassed the personal right to armed self-defense").
62. *Heller*, 554 U.S. at 628.
63. *See id.* at 592, 599.
64. *Id*. at 640–43.
65. *Id*. at 577.
66. *Id.* at 630; *see also* McDonald v. City of Chicago, 561 U.S. 742, 767–68 (2010) (confirming the core protection guaranteed in *Heller*); Zuidema, *supra* note 15, at 826.
67. *Heller*, 554 U.S. at 628.
68. *Id*. at 635.

to apply to challenged Second Amendment regulations.[69]

These pronouncements from *Heller* raise several issues: if the core of the Second Amendment is an individual right to keep handguns for self-defense, is that core limited to the home—the realm in which the need is most acute? Does the fact that the need for self-defense is most acute in the home mean that, in public settings, the core is not triggered? Moreover, while the Court made it clear that a ban on handgun possession in the home would likely fail under any standard of judicial scrutiny, does that necessarily mean that restrictions on handgun possession in public would survive some appropriate level of scrutiny? If so, what is the appropriate level?

In 2010, in *McDonald v. City of Chicago*, two Chicagoans brought an action contesting the constitutionality of the city's firearm laws that precluded citizens from keeping handguns at home, the Supreme Court revisited the matter and left these questions unanswered.[70] What *McDonald* did announce was that the Second Amendment guarantee in *Heller*, and the unanswered questions presented, are not solely a federal problem. *McDonald* reiterated that the individual right of self-defense is the central component of the Second Amendment,[71] and by virtue of the Fourteenth Amendment's due process clause, is applicable to the states.[72] As a direct result of *McDonald*, state and local gun laws were opened to Second Amendment challenges.[73]

In short, while clearly pronouncing a right to possess handguns at home for self-defense, *Heller* and *McDonald* generated more questions than they answered. As *Heller* itself stated, "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ."[74] In no area is this lack of clarification more apparent than in the arena of the right to bear arms in public. The quagmire regarding the extension of *Heller* beyond the home was summarized by the Fourth Circuit in *United States v. Masciandaro*, when Justice Niemeyer, seemingly conveying a sense of frustration, stated:

> 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 . . . . The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.[75]

## IV. THE SHIFTING CORE: DOES *HELLER* EXTEND BEYOND THE HOME?

The confusion expressed in *Masciandaro* is deepened by the fact that *Heller* and *McDonald* noted that, although the right guaranteed by the Second Amendment is fundamental, it is not absolute.[76] As Justice Scalia stated in *Heller*, "nothing in our opinion

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69. *Id.* at 628 n.27.
70. *See generally* 561 U.S. 742.
71. *Id.* at 767.
72. *Id.* at 791.
73. CHEMERINSKY, *supra* note 53, at 959.
74. 554 U.S. 570 at 635.
75. 638 F.3d 458, 475 (4th Cir. 2011).
76. *McDonald*, 561 U.S. at 801–02 (Scalia, J., concurring); *Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."); CHEMERINSKY *supra* note 53, at 958.

should 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 . . . ."[77] Recall however, that *Heller* also seemed to imply that a statute that destroys the core purpose—or central component—of the Amendment will likely fail under any level of judicial scrutiny.[78] Thus, lower courts currently have two guideposts regarding the constitutionality of statutes that restrict Second Amendment rights: first, legislatures would be wise to avoid trifling with the Amendment's core purpose, and second, anything beyond the core purpose may be regulated so long as the regulation withstands the appropriate level of judicial scrutiny—whatever level that might be.

### *A. The Constitutionality of Good-Cause Statutes*

Good-cause statutes, and their relationship to the core of the Second Amendment, are at the heart of the public-carry circuit split.[79] While such statutory schemes carry different labels such as "good reason to fear injury,"[80] "exceptional case,"[81] "justifiable need,"[82] "good and substantial reason,"[83] or "proper-cause,"[84] they all stand for the idea that a state retains the authority to deny an individual the privilege to carry a handgun beyond the home unless the applicant articulates some need for protection greater than the need of the general public.[85]

In such jurisdictions, concerns which commonly lead to a desire to be armed, like working or residing in high-crime areas, are insufficient justifications.[86] By their very design, good-cause statutes limit the public-carry rights of law-abiding citizens. These statutes seek the promotion of public safety through the theory that fewer guns equate to a decrease in public safety risks.[87] As the theory goes, allowing people with vague safety concerns to carry firearms outside the home increases the danger to the public because armed persons will expose the public to risk if they choose to use their weapons.[88] It is important to note that while may-issue states that enforce good-cause statutes are numerical outliers, their impact on the public-carry discussion is profound because they

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77. 554 U.S. at 626.

78. *See id.* at 628–30.

79. Brief of Plaintiff-Appellant, *supra* note 23, at 12 n.8 (stating, "[t]o be sure, there is conflict between the holding in *Wrenn* that a 'good cause' requirement is facially unconstitutional, and the holdings in *Gould*, *Woollard*, *Kachalsky* and *Drake*, that a 'good cause' requirement facially comports with the Second Amendment").

80. MASS. GEN. LAWS ANN. ch. 140 § 131(d).

81. HAW. REV. STAT. § 134-9(a).

82. N.J. STAT. ANN. § 2C:58-4(c).

83. MD. CODE ANN. PUB. SAFETY § 5-306(a)(6)(ii).

84. N.Y. PENAL LAW §400.00(2)(f).

85. *See, e.g.*, MD. CODE ANN. PUB. SAFETY § 5-306; HAW. REV. STAT. § 134-9; N.J. STAT. ANN. § 2C:58-4; MASS. GEN. LAWS ANN. ch. 140 § 131(d).

86. *E.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 656 (D.C. Cir. 2017) ("[L]iving or working 'in a high crime area shall *not* by itself establish a good reason' to carry . . . ."); Kachalsky v. County of Westchester, 701 F.3d 81, 86 (2d Cir. 2012) ("A generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'"); Woollard v. Gallagher, 712 F.3d 865, 870 (4th Cir. 2013) ("[A]pprehended danger cannot be established by . . . a 'vague threat' or a general fear of 'liv[ing] in a dangerous society.'").

87. *See* Drake v. Filko, 724 F.3d 426, 439 (3d Cir. 2013).

88. *See id.*

include some of the most populous states in the nation.[89] In contrast, recall that the majority of states have adopted shall-issue statutes and grant public-carry licenses to all law-abiding citizens with no mental health concerns or significant criminal records without requiring any special showing of need for self-defense.[90]

### *B. Conflicting Views of the Second Amendment's Core: Analysis of the Circuit Split Prior to* Young v. Hawaii

To date, the constitutionality of good-cause statutes has turned on the examining court's interpretation of the Second Amendment's core guarantee.[91] As will be explored below, circuits that place public-carry outside the core have upheld good-cause statutes when challenged on Second Amendment grounds. On the other hand, circuits that situate public-carry within the core have struck down good-cause statutes as impermissible constitutional infringements.

#### i. The Restricted Core: According to *Heller*, the Core Guarantee of the Right to Keep and Bear Arms is Limited to the Home

The initial circuit court opinion on the right to carry a handgun in public for self-defense was offered by the Second Circuit.[92] In *Kachalsky v. County of Westchester*, several plaintiffs sought licenses to carry concealed handguns; each was denied for failure to establish "proper-cause" as required by New York's licensing statute.[93] Relying on *Heller*, the complainants argued that the proper-cause requirement was an unconstitutional restraint on their Second Amendment rights.[94] The *Kachalsky* court noted that while proper-cause was not statutorily defined, common law viewed it as a "demonstrat[ion] of a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[95]

While analyzing the challenged statute, the *Kachalsky* court conceded that, in the wake of *Heller*, the extent of the Second Amendment guarantee beyond the home is unknown.[96] The Second Circuit then made an important assumption when it observed that "[a]lthough the Supreme Court's cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home . . . [,] the Amendment must have ***some*** application in the very different context of the public possession of firearms."[97] It then turned its attention to the appropriate level of scrutiny to

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89. *See* WEBSTER, *supra* note 8, at 2.

90. *Id*; Johnson, *supra* note 8, at 231 n.3; *see also Handgun Licensing FAQ*, *supra* note 9; *Eligibility Requirements for a Florida Concealed Weapon License*, *supra* note 9.

91. *Kachalsky*, 701 F.3d at 93–94, 101 (upholding a good-cause statute after first determining that public-carry did not lie at the core of the Second Amendment); Gould v. Morgan, 907 F.3d 659, 671, 675 (1st Cir. 2018) (upholding a good-cause statute after first determining that public-carry does not lie at the core); *Wrenn*, 864 F.3d at 661, 665–66 (striking down a good-cause statute after determining that public-carry is part of the Second Amendment's core guarantee).

92. *See generally Kachalsky*, 701 F.3d 81.

93. *Id.* at 83–84; N.Y. PENAL LAW §400.00(2)(f).

94. *Kachalsky*, 701 F.3d at 88.

95. *Id.* at 86.

96. *Id.* at 89.

97. *Id.*

apply to the challenged statute.[98] In doing so, the court focused on defining the core of the Second Amendment because it reasoned that a lower level of scrutiny could be applied to a statute that does not infringe on the core than could be applied to a statute that does.[99]

The Second Circuit then invoked *Heller* in support of a restricted view of the core when it noted, "*Heller* explains that the 'core' protection of the Second Amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'"[100] Accordingly, the *Kachalsky* court concluded that New York's proper-cause statute, which only affected the right to possess firearms in public, was not a restriction on the core.[101] By the court's own estimation, its finding that the challenged statute did not implicate the core permitted it to apply intermediate scrutiny.[102] This narrow interpretation of the core allowed the court to weigh the individual right to possess a handgun in public (absent the demonstration of a special need for self-defense) versus the State's interests in crime prevention and public safety.[103] While conducting its analysis, the *Kachalsky* court acknowledged that if the statute had burdened the core of the Second Amendment, the application of a higher level of scrutiny would likely have been required.[104] However, upon finding that the core was not impacted, the court observed that the proper-cause requirement substantially related to the state's interest of promoting public safety, and, accordingly, ruled that the statute, which limited lawful handgun possession to a subset of law-abiding citizens (those able to demonstrate proper-cause), was constitutional.[105]

As evidenced by similar rulings from the First, Third, and Fourth Circuits, the core as defined by *Kachalsky* is logical and can be reasonably inferred from *Heller*.[106] These circuits have followed *Kachalsky*'s lead and upheld good-cause statutes under intermediate scrutiny reasoning that, although such statutes do infringe Second Amendment rights, they do not infringe the Amendment's core.[107] While *Heller*'s pronouncement of a core lawful purpose of self-defense does not seem to implicate any location-based limitations, the Supreme Court's adamant tone regarding the sanctity of the right to self-defense within the home cannot be ignored. Far from ignoring it, *Kachalsky* elevated it. However, this widely accepted view that the core is limited to one's dwelling

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98. *Id.* at 93.
99. *Kachalsky*, 701 F.3d at 93.
100. *Id.*
101. *Id.* at 94.
102. *See id.* at 96–97.
103. *See id.* at 98–99.
104. *See* 701 F.3d at 93 (discussing the ban struck down in *Heller* and noting that certain handgun restrictions may fail under any standard of judicial scrutiny).
105. *Id.* at 98–99.
106. Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013) ("[T]he core of the right conferred upon individuals by the Second Amendment is the right to possess usable handguns *in the home* for self-defense."); Woollard v. Gallagher, 712 F.3d 865, 874 (4th Cir. 2013) ("*Heller* . . . was principally concerned with the 'core protection' of the Second Amendment: 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'"); Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018) ("[T]he core Second Amendment right is limited to self-defense in the home.").
107. *Woollard*, 712 F.3d at 876; *Gould*, 907 F.3d at 672–73, 675. Note that the Third Circuit actually did not determine that the challenged statute in *Drake* needed to withstand intermediate scrutiny because it did not burden conduct protected by the Second Amendment. However, in dicta, the court noted that if the statute had been subjected to intermediate scrutiny it would have passed constitutional muster under that standard. *Drake*, 724 F.3d at 429–30, 436.

is not without its detractors, and it has its weaknesses. Consider again *Kachalsky*'s interpretation of the core: "*Heller* explains that the 'core' protection of the Second Amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'"[108] While it is sensible to surmise that *Kachalsky*'s interpretation of the core is what *Heller* meant, that is not exactly what *Heller* said.

While *Heller* noted that the Second Amendment elevates, above all other interests, the right to possess handguns in the home,[109] the contested statute in *Heller* had no application outside the home.[110] Therefore, arguably, a definitive beyond-the-home examination of Second Amendment rights would have been unnecessary.[111] *Heller* simply opined that the "core lawful purpose" of the right to keep and bear arms is self-defense,[112] and also noted that "the inherent right of self-defense is central to the Second Amendment right."[113] If the core of the Second Amendment is the right to self-defense, does it not follow that when the need to defend oneself arises beyond the home, the core is triggered?[114] Can it be that every time a person exits her front door she forfeits this right?

As a matter of practical application, recall John Hendricks's story. Where would New York's statute leave him? The decision to supplement one's income as an Uber driver can be an inherently dangerous one.[115] Uber drivers inevitably contact, and are confined in a vehicle with, strangers, often in groups, who display a wide range of sanity, sobriety, and emotional states. For many considering such employment, this risk may be tempered by laws that allow them to carry firearms for self-defense. However, if Mr. Hendricks lived in New York, he simply could not choose to do so because a general, unspecified desire for self-protection is insufficient to establish proper-cause.[116] As a result, Mr. Hendricks would have a decision to make. Some would argue that the simplest solution would be to find another job. But what if Mr. Hendricks, for a variety of legitimate reasons, was unable to do so and working as an Uber driver remained his best or only option? He would be forced either to carry a firearm in violation of the law to defend himself if necessary, or routinely expose himself to potentially dangerous situations with no means of self-protection. Arguably, this is a choice between equally poor alternatives. By concluding that a right to public-carry lies at the core of the Second Amendment guarantee, other

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108. 701 F.3d at 93.

109. 554 U.S. 570, 635 (2008).

110. *Id*. at 575–76; *see also* Young v. Hawaii, 896 F.3d 1044, 1069 (2018) (stating "we afford little weight to *Heller's* emphasis on the application of the Second Amendment to the home specifically, for the challenge there exclusively concerned handgun possession in the home").

111. *See Young*, 896 F.3d at 1069 (stating "we afford little weight to *Heller's* emphasis on the application of the Second Amendment to the home specifically, for the challenge there exclusively concerned handgun possession in the home").

112. 554 U.S. at 630.

113. *Id.* at 628.

114. *See* Blocher, *supra* note 18, at 219–20 ("If a person . . . wants a gun because he is in immediate danger of being killed by violent criminals . . . then his claim to carry a weapon in public would fall squarely within the 'core' interest of self-defense.").

115. *See, e.g.*, Crystal Hill, *75-Year-Old Uber Driver was Picking up a Rider. An Attack Almost Took his Life, he Says*, MIAMI HERALD (June 22, 2018, 4:50 PM), https://www.miamiherald.com/news/nation-world/national/article213676669.html; Travis Fedschun, *Las Vegas Uber Driver Pummeled by Passengers in Attack Caught on Video*, FOX NEWS (Jan. 16, 2019), https://www.foxnews.com/us/uber-driver-in-las-vegas-attacked-by-passengers-after-refusing-to-give-ride.

116. Kachalsky v. County of Westchester, 701 F.3d 81, 86 (2d Cir. 2012).

circuits provide individuals, like Mr. Hendricks, who desire to carry handguns for self-defense with a more attractive option.

### ii. The Expanded Core: According to *Heller*, the Core Guarantee of the Right to Keep and Bear Arms is Fully Applicable in Public

Disagreement with *Kachalsky* was immediate. Fifteen days after the Second Circuit's decision, the Seventh Circuit held that the right to self-defense extends beyond the home.[117] In *Moore v. Madigan*, the appellants argued that an Illinois law that prohibited individuals, other than police officers and security guards, from carrying guns in public ran afoul of the Second Amendment as interpreted by *Heller*.[118] While the *Moore* court did not invalidate Illinois' public-carry statute,[119] it outlined the logic by which such a statute could be deemed unconstitutional. In *Moore*, Judge Posner dissected *Heller*'s reasoning that the need for self-defense is most acute inside the home, and he noted that *Heller* did not imply that the need to defend oneself has no salience in other locations.[120] Importantly, Judge Posner observed that the Second Amendment encompasses both a right to bear arms as well as a right to keep them,[121] and reasoned that the right to bear arms seems to extend beyond the home.[122] Although *Moore* gave little attention to the boundaries of the core, it provided a roadmap by which a court could expand the core beyond that adopted by *Kachalsky*. In 2017, the D.C. Circuit took that opportunity.

In *Wrenn v. District of Columbia*, two plaintiffs filed suit, claiming that their Second Amendment rights were violated after they were denied concealed-carry licenses (the only method of carry allowed under the D.C. Code)[123] because of their inability to show a special need for self-defense.[124] Under the D.C. good-cause statute, concealed-carry licenses were attainable only by those able to show a "good reason" to fear injury.[125] Good reason was interpreted as "a special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life."[126]

The D.C. Circuit signaled a pending circuit split when it offered its interpretation of the core of the Second Amendment, which contrasted notably with the interpretation of the Second, Third, and Fourth Circuits. As understood by *Wrenn*, "[t]he 'core' or 'central component' of the Second Amendment right to keep and bear arms protects 'individual self-defense' by 'law-abiding, responsible citizens.'"[127] This interpretation, which did not signal any type of home-based limitation, was then directly applied to the question of

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117. Moore v. Madigan, 702 F.3d 933, 935–36 (7th Cir. 2012).
118. *Id.* at 934–35.
119. *Id.* at 942 (The Court did not immediately strike down the law. Instead it gave the state Legislature 180 days to craft a new gun law "consistent with . . . public safety and the Second Amendment").
120. *Id.* at 935.
121. *Id.* at 936.
122. *Moore*, 702 F.3d at 936.
123. 864 F.3d 650, 656 (D.C. Cir. 2017).
124. *Id*.
125. *Id.* at 655.
126. *Id.*
127. *Id.* at 657.

whether the core extended to public-carry.[128] *Wrenn* reasoned that if the core guarantee is the right to self-defense, *Heller*'s holding "doesn't mean that self-defense at home is the *only* right at the Amendment's core."[129] Following *Moore*'s template, the D.C. Circuit argued in favor of their view by emphasizing that the Second Amendment includes both a right to keep[130] and a right to bear,[131] and pointed out that in *Heller*, the Supreme Court gave seemingly equal treatment to these independent concepts despite the fact that the specific facts of *Heller* arguably only involved the right to keep arms.[132] *Wrenn* then set a new course and expanded the core of the Second Amendment by holding that "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protection."[133]

After determining that public-carry is part of the core guarantee, the D.C. Circuit turned its attention to the appropriate level of scrutiny to apply to the challenged statute.[134] It held that the D.C. good-reason law was a total ban enacted against *most* law-abiding citizens, namely those who lacked a special need for self-defense, and therefore it destroyed the Second Amendment guarantee of the very class it was designed to protect: law-abiding citizens.[135] Accordingly, the *Wrenn* court took the *Heller* approach and declined to apply any level of scrutiny, holding that such a destruction of the core of the Second Amendment would fail any judicial test.[136]

The core as defined by *Wrenn* was a vast extension of the core contemplated by *Kachalsky* and its progeny. Although both variants find support in *Heller*, the *Wrenn* interpretation, that the core encompasses a right to public-carry even in the absence of a heightened need for self-defense, is on more equal footing with *Heller*. As previously discussed, while *Heller* limited its holding to the home, the challenged statute in that case was a ban on the possession of operable handguns in the home.[137] Arguably, such a statute would only invoke the right to "keep" arms (which would sensibly apply within the home) and leave untouched any concern over the right to "bear" them (which logically extends to public settings). Nonetheless, as noted by *Wrenn*, the *Heller* Court felt compelled to devote a considerable portion of its opinion to the discussion of the meaning of "keep," as

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128. *Wrenn*, 864 F.3d at 657.
129. *Id.* (emphasis added).
130. *Id.*
131. *Id.*
132. *Id.* at 657; *see also* PATRICK J. CHARLES, HISTORICISM, ORIGINALISM, AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE 122–23 (2014) ("To be clear, according to the tenets of originalism, the Second Amendment protects the right to 'keep arms' and the right to 'bear arms.' The right to 'keep arms' embodies a right to retain, have in custody or have weapons, and [the] right to 'bear arms' is understood as a right to carry.").
133. 864 F.3d at 661.
134. *Id*. at 664.
135. *Id.* at 664–66.
136. *Id*. at 665–66.
137. District of Columbia v. Heller, 554 U.S. 570, 575–76 (2008); *see also* Young v. Hawaii, 896 F.3d 1044, 1069 (9th Cir. 2018) (stating, "we afford little weight to *Heller's* emphasis on the application of the Second Amendment to the home specifically, for the challenge there exclusively concerned handgun possession in the home").

opposed to the meaning of "bear."[138] In doing so, the Supreme Court reasoned that the word "bear" is properly understood as carrying a weapon upon one's person in clothing or in a pocket.[139] As pointed out by the D.C. Circuit, in *Heller*, the highest Court gave no indication that the right to bear arms was inferior to the right to keep them.[140] Further, recall that the core lawful purpose of the Second Amendment as defined by *Heller* is to guarantee an individual right to use handguns for self-defense.[141] While it was *Heller*'s opinion that this right is at its apex in the home,[142] it seems to cut against the spirit of *Heller* to conclude that individuals forgo their self-defense right on the ground that, while in public, their need to exercise that right is less critical in the eyes of the judiciary.[143]

*Wrenn*'s beyond-the-home expansion of the core Second Amendment guarantee was the antithesis of the core as interpreted by the Second, Third, and Fourth Circuits. *Wrenn* created divergent views of the scope of the constitutional right to bear arms. Accordingly, when the Ninth Circuit took up the issue in *Young v. Hawaii*, it had two apparent options to choose from—either the core is limited to the home, or it extends to the public. In a sense, the *Young* court rejected both and shifted the core in a new direction.

### *C. The Contribution of* Young v. Hawaii*: The Shifting Core of the Right to Keep and Bear Arms Exposed*

*Young v. Hawaii* was not the Ninth Circuit's first analysis of the individual right to carry firearms in public. In the 2016 en banc ruling of *Peruta v. County of San Diego*, the Ninth Circuit determined that the Second Amendment does not, in any manner, protect an individual right to carry concealed firearms beyond the home.[144] Interestingly, and perhaps as a harbinger of *Young*, the *Peruta* court went out of its way to address the issue of open-carry by noting that, although there is no concealed-carry right, there may or may not be an individual Second Amendment right to carry firearms in public in some manner.[145]

During the summer of 2018, the Ninth Circuit revisited the issue in *Young* and concluded that while there is no constitutional right to concealed-carry,[146] the Second Amendment does, at its core, protect the right of law-abiding citizens to carry firearms openly in public.[147] While this interpretation of the core is more similar to *Wrenn* than *Kachalsky* in that it includes some method of public-carry, it is distinct from all previous

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138. *Wrenn*, 864 F.3d at 657 (referencing *Heller* and stating that "the Court . . . spent over fifty pages giving independent and seemingly equal treatment to the right to 'keep' and to 'bear,' first defining those 'phrases' and then teasing out their implications").

139. *Heller*, 554 U.S. at 584.

140. *Wrenn*, 864 F.3d at 657.

141. 554 U.S. at 630.

142. *Id*. at 628, 635.

143. *See* Moore v. Madigan, 702 F.3d 933, 935–36 (7th Cir. 2012) ("Both *Heller* and *McDonald* do say 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 the home. *Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home . . . .") (internal citations omitted).

144. 824 F.3d 919, 924, 939 (9th Cir. 2016).

145. *Id.* at 927, 939.

146. Young v. Hawaii, 896 F.3d 1044, 1068 (2018).

147. *Id*. at 1070.

circuit level interpretations of the core. The core as defined by *Young* includes only a right to a specific manner of public-carry—open-carry—and thus illustrates that the Second Amendment's core is malleable and susceptible to varying interpretations.

The holding in *Young* has two notable deficiencies. First, the Ninth Circuit sent mixed signals regarding the constitutionality of good-cause statutes that fall short of complete bans on public-carry. Second, the *Young* court over-utilized the historical approach to Second Amendment analysis by using history to pinpoint a precise method of public-carry that lies at the Amendment's core.

i. The *Young* Holding: Bring Your Guns, but only if You're Man Enough to Show 'Em

*Young* centered on the constitutionality of Hawaii's good-cause statute.[148] The specific statute offered limited exceptions to the general statutory scheme restricting firearm possession to an individual's home or business.[149] In order to carry a concealed firearm, the statute required a demonstration of "an exceptional case" in which "an applicant show[ed] reason to fear injury."[150] Regarding open-carry, an applicant was required to demonstrate that the need to carry a firearm openly "ha[d] been sufficiently indicated," and the applicant "[wa]s engaged in the protection of life and property."[151] Hawaii County later promoted regulations that clarified the open-carry standard essentially limited the right to individuals "in the actual performance of [their] duties," meaning that open-carry was a requirement of the applicant's profession.[152] Seeking to carry in either fashion (openly or concealed), George Young, the petitioner, was twice denied by Hawaii County.[153] He filed suit, alleging that the county's denials, which were based on his inability to satisfy either the "exceptional case" or the "engaged in the protection of life and property" standards, were unconstitutional infringements on his Second Amendment right.[154]

The Ninth Circuit conducted an exhaustive historical analysis of gun rights similar to and overlapping with the analysis done in *Heller*.[155] Although the method of analysis was similar, *Young*'s objective was different. Recall that *Heller* looked to history to determine whether an individual right of self-defense existed.[156] Moving forward from

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148. HAW. REV. STAT. ANN. § 134-9.

149. *Young*, 896 F.3d at 1048; HAW. REV. STAT. ANN. §§ 134-23, 134-24, 134-25.

150. HAW. REV. STAT. ANN. § 134-9.

151. *Id.*

152. *Young*, 896 F.3d at 1048. *But see* Defendant-Appellees Petition for Rehearing En Banc at 8–9, Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018) (No. 12-17808) (stating that the Court characterization of the open-carry standard is "a [f]undamental [m]isunderstading of Hawaii [l]aw") https://1.next.westlaw.com/Link/Docket/Blob/ecf/CTA9/009030337278,239321/12-17808_DocketEntry_09-14-2018_155.pdf?courtNorm=CTA9&courtnumber=2045&casenumber=12-17808&originationContext=document&transitionType=DocumentImage&uniqueId=59011204-59f4-42c0-bb04-a3439ee8b6e8&localImageGuid=I2aec9db0b8ed11e8966fbfbf4347e034&contextData=(sc.Default)&attachments=false.

153. *Young*, 896 F.3d at 1048.

154. *Id.* at 1049–50.

155. *Id.* at 1052–64.

156. *See* Heller v. District of Columbia, 554 U.S. 570, 592 (2008) ("Putting all these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This

*Heller*'s conclusion that such a right does exist, *Young* utilized history to determine the scope and the precise nature of the right.[157] Following its analysis of history, the *Young* court determined that "the right to bear arms must guarantee *some* right to self-defense in public."[158] Thus, it concluded that Hawaii's firearm regulations burdened Young's Second Amendment rights.[159] The Ninth Circuit then contemplated the appropriate level of scrutiny to apply to the challenged statute.[160] In doing so, it considered two factors: "(1) how close the law c[ame] to the core of the Second Amendment right, and (2) the severity of the law's burden on the right."[161] The Ninth Circuit reasoned, as had other courts that had previously taken up the issue, that a law which so restricted the core that it effectively destroyed the Second Amendment guarantee would likely fail under any level of scrutiny.[162] On the other hand, the *Young* court noted that the application of intermediate scrutiny was appropriate if the challenged statute did not implicate the core.[163]

The Ninth Circuit focused on *Heller*'s implication that the core purpose of the Second Amendment right—self-defense—is not limited to the home[164] because "[w]hile the Amendment's guarantee of a right to 'keep' arms effectuates the core purpose of self-defense within the home, the separate right to 'bear' arms protects the core purpose outside the home."[165] The *Young* court then fell back on its holding in *Peruta* and reasoned that, although there is no constitutional right to carry a firearm in a concealed manner,[166] the "right to carry a firearm openly for self-defense falls within the core of the Second Amendment."[167] Upon finding that the core guarantee includes a right to open-carry, the *Young* court addressed Hawaii's statute which limited open-carry to those "engaged in the protection of life and property."[168] The court observed that the Second Amendment protects law-abiding citizens, and therefore, it must secure a right to bear arms for typical members of that class.[169] Accordingly, it held that Hawaii's statute, which limited the right to open-carry to security guards and others similarly situated,[170] excluded the majority of the class it was intended to protect, and therefore it would fail under any level of judicial scrutiny.[171]

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meaning is strongly confirmed by the historical background of the Second Amendment.").

157. *Young*, 896 F.3d at 1068 ("Concluding our analysis of text and review of history, we remain unpersuaded . . . that the Second Amendment only has force within the home. Once identified as an individual right focused on self-defense, the right to bear arms must guarantee some right to self-defense in public. While the concealed carry of firearms categorically falls outside such protection, we are satisfied that the Second Amendment encompasses a right to carry a firearm openly in public for self-defense.").
158. *Id.*
159. *Id.*
160. *Id*.
161. *Id*.
162. *Young*, 896 F.3d at 1068.
163. *Id.*
164. *Id*. at 1069.
165. *Id.*
166. *Id*. at 1068.
167. *Young*, 896 F.3d at 1070.
168. *Id.*
169. *Id.* at 1071.
170. *Id*.
171. *Id*.

In sum, the Ninth Circuit's ruling in *Young* confirmed and expanded its ruling in *Peruta*. Taken together, these cases stand for the proposition that there is no Second Amendment protection whatsoever for the right to carry a concealed handgun[172] but an individual right to carry a firearm openly lies at the core of the Amendment.[173] While the *Young* court laid out *Heller* and *McDonald*'s support for its conclusion that a right to carry firearms for self-defense beyond the home does exist,[174] *Young*'s nuanced, open-carry-only interpretation of the core is unique. It is the only circuit opinion to reach beyond a ruling on the extent of the Second Amendment guarantee (that is, whether it exists in public) and to rule on the precise nature of the guarantee (that is, only a right to open-carry in public exists). From a practical standpoint, *Young*'s open-carry-only ruling seems an odd result. In fact, one would likely be among friends if this holding invokes images of leather-skinned, steely-eyed gunslingers squaring off with nervous hands hovering above their six-shooters.

With *Young* in mind, think back to John Hendricks's story. Now, imagine that he is an Uber driver in Honolulu and wishes to carry a firearm at work for self-protection. If he is only permitted to carry the firearm openly displayed on his hip, the effect on his income potential seems significant. Today, most of his customers would be put off at best, and terrified at worst, of the prospect of being escorted about town by a stranger visibly toting a pistol on his belt.[175] As such, Mr. Hendricks's options would largely be the same as they were in New York. Hawaii's statute leaves him with a choice: he may accept the risk of lost income and carry openly, he may carry his weapon in a more socially acceptable—but statutorily prohibited—manner (i.e., concealed),[176] or he may ignore his safety concerns and work unarmed.[177] However, a further issue remains. Assuming Mr. Hendricks chose to comply with the statute and wished to carry openly, in the wake of *Young*, what must he demonstrate, if anything, in order to obtain his open-carry permit? As will be discussed below, the answer is less than clear.

ii. The *Young* Holding Failed to Rule Decisively on the Constitutionality of Good-Cause Statutes

At first glance, *Young* appears to reject the constitutionality of good-cause statutes,

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172. *Young*, 896 F.3d at 1068; Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016).

173. *Young,* 896 F.3d at 1070. Interestingly, this holding was essentially predicted in 2014. *See generally* Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2014).

174. *See Young*, 896 F.3d at 1070 (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008); McDonald v. City of Chicago, 561 U.S. 742, 787 (2010)) (stating "we reject a cramped reading of the Second Amendment that renders to 'keep' and to 'bear' unequal guarantees. *Heller* and *McDonald* describe the core purpose of the Second Amendment as self-defense, and 'bear' effectuates such core purpose of self-defense in public.").

175. Symposium, Heller *and Public Carry Restrictions*, 40 CAMPBELL L. REV. 431, 432 (2018) [hereinafter Symposium] (proposing that in today's society openly displaying a firearm is considered provocative and very aggressive); *See* Meltzer, *supra* note 173, at 1526 (crediting Eugene Volokh with the proposition that due to social norms and the stigma against open carry, a right to open-carry would only deter law-abiding citizens from carrying at all).

176. Symposium, *supra* note 175, at 432.

177. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1522 (2009).

at least to the extent that they infringe upon open-carry rights.[178] Such a conclusion would place *Young* squarely on *Wrenn*'s side of the circuit divide.[179] The simple fact that the *Young* court placed the right to open-carry within the Second Amendment's core supports the inference that the Ninth Circuit agreed with *Wrenn*.[180] *Young*'s apparent concurrence is further demonstrated by the Ninth Circuit's repeated citations to *Wrenn*, with each reference being either favorable or neutral.[181] Certainly, none of *Young*'s abundant discussion of *Wrenn* conveyed any sense of disagreement with the D.C. Circuit's analysis.[182]

Perhaps most importantly, the *Young* court seemingly agreed with *Wrenn*'s logic that Second Amendment challenges must be decided by analyzing their effect on typically situated, law-abiding citizens.[183] The *Young* court even went so far as to quote *Wrenn*'s assertion that "if the [Second] Amendment is for law-abiding citizens as a rule, then it must secure gun access at least for each typical member of that class."[184] It is crucial to recall that in *Wrenn*, the D.C. Circuit rejected a good-cause statute because it prevented most law abiding citizens—those who lacked good-cause—from exercising their core Second Amendment right of public-carry.[185]

After announcing *Wrenn*'s law-abiding citizen standard as its guidepost, the *Young* court reasoned that "the Second Amendment protects the right of *individuals* to keep and bear arms, not *groups* of individuals. An individual right that does not apply to ordinary citizens would be a contradiction in terms; its existence would wax and wane with the whims of the ruling majority."[186] Such language naturally leads to the inference that the Ninth Circuit believed that all law-abiding citizens—including those who lack good-cause—have a constitutional right to carry firearms in public for self-defense. If the *Young* court did in fact intend to grant an individual open-carry right to all law-abiding citizens, the result could be a sweeping change to the status quo in Hawaii. However, the Ninth Circuit's attitude toward good-cause statutes was somewhat veiled in *Young*, and there is a legitimate argument that such drastic change was not the court's goal.

The counterargument is that *Young*'s holding should not be interpreted as disfavoring legitimate good-cause statutes. Instead, it should be read only as a rejection of outright bans on open-carry. The distinction is critical. Remember that the split between

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178. *See Young*, 896 F.3d at 1071 ("[I]f the Amendment is for law-abiding citizens as a rule, then it must secure gun access at least for each typical member of that class.") (quoting Wrenn v. District of Columbia, 864 F.3d 650, 665 (D.C. Cir. 2017)).

179. Wrenn v. District of Columbia, 864 F.3d 650, 665–66 (2017) ("[T]he point of the Amendment isn't to ensure that some guns would find their way in to D.C., but that guns would be available to each *responsible citizen* as a rule . . . . So if *Heller I* dictates a certain treatment of 'total bans' on Second Amendment rights, that treatment must apply to total bans on carrying (or possession) by ordinarily situated *individuals* covered by the Amendment. This point brings into focus the legally decisive fact: the good-reason law is necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs . . . . [I]t looks precisely for needs 'distinguishable' from those of the community.").

180. *Young*, 896 F.3d at 1070.

181. *See id*. at 1052, 1058, 1062, 1064, 1069–71, 1074.

182. *Id*.

183. *Id*. at 1071 (citing *Wrenn*, 864 F.3d at 665).

184. *Id.*

185. 864 F.3d at 664–66.

186. *Young*, 896 F.3d at 1071.

the First, Second, Third, and Fourth Circuits on one side and the D.C. Circuit on the other stems from a divergence of opinion over the constitutionality of good-cause statutes.[187] However, circuits on both sides of the divide appear to believe that outright bans on public-carry—that is, bans that deny the right even to those who demonstrate good-cause—are more likely to be unconstitutional.[188] Perhaps *Young* only stands for the proposition that complete open-carry bans are unconstitutional. Since the *Young* holding is somewhat opaque, the conclusion that the Ninth Circuit only intended to convey its disapproval of outright bans may also reasonably be inferred. Consider the following excerpt from *Young*:

> Restricting open carry to those whose job entails protecting life or property necessarily restricts open carry to a small and insulated subset of law-abiding citizens. Just as the Second Amendment does not protect a right to bear arms only in connection with a militia, it surely does not protect a right to bear arms only as a security guard. The typical law-abiding citizen in the State of Hawaii is therefore entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense.[189]

If this passage merely means that all law-abiding citizens—not just those who are security guards—must be given the opportunity to establish good-cause before their open-carry applications are accepted or rejected, then *Young*'s impact on Hawaiian gun laws and its contribution to the public-carry discussion are greatly minimized. The Ninth Circuit's observation that Hawaii's statute was not a good-cause statute at all but was more akin to a de facto ban because, at least with regard to concealed carry, no license had ever been granted by the county, hints that *Young*'s holding may have been nothing more than a rejection of outright bans.[190] In fact, the Ninth Circuit went so far as to note its belief that even the circuits that had previously upheld good-cause statutes would have struck down a restriction as burdensome as Hawaii's.[191] The court's discussion of legitimate good-cause statutes versus total bans on public-carry was surprisingly brief.[192] Be that as it may, the discussion arguably leads to the reasonable assumption that if the Ninth Circuit had considered Hawaii's open-carry restriction to be a legitimate good-cause statute it might have upheld it.

If this is the correct interpretation of *Young*, then it is better-positioned against the D.C. Circuit and with the First, Second, Third, and Fourth Circuits. Under this view, *Young* would only add the unique wrinkle that while a state may enact a complete ban on concealed-carry, it must permit law-abiding citizens the opportunity to attempt to establish

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187. Gould v. Morgan, 907 F.3d 659, 676–77 (1st Cir. 2018); Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426, 434 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013); *Wrenn*, 864 F.3d at 664–67 (D.C. Cir. 2017).

188. This assertion is based on the fact that, in all of the following cases, the examining courts appear to make a point of distinguishing the laws they eventually declare valid under intermediate scrutiny from laws that operate as complete bans on public-carry. Presumably, this leads to the conclusion that these court consider complete public-carry bans to be more constitutionally problematic. *See Gould*, 907 F.3d at 674*; Woollard*, 712 F.3d at 881 n.10; *Kachalsky*, 701 F.3d at 91; *Drake*, 724 F.3d at 440.

189. 896 F.3d at 1071.

190. *See id*. at 1071–72; *see also Gould*, 907 F.3d at 674 (noting that in *Young*, "[t]he Ninth Circuit took pains to distinguish the Hawaii law from laws in which the 'good cause' standard 'did not disguise an effective ban on the public carry of firearms'").

191. *Young*, 896 F.3d at 1072.

192. *Id.* at 1071–72.

good cause to carry handguns openly. So what is the Ninth Circuit's opinion regarding the constitutionality of good-cause statutes that fall short of complete bans on open-carry? Although the weight of the *Young* opinion appears to concur with *Wrenn*, the court's holding is ambiguous and leaves room for the argument that the Ninth Circuit would uphold a good-cause statute so long as it was less similar to an outright ban on open-carry than the one struck down in *Young*.

iii. The *Young* Court Over-Emphasized the Appropriate Role of Historical Analysis

Regardless of whether *Young*'s holding is better understood as a rejection of the constitutionality of good-cause statutes or merely as a rejection of complete open-carry bans, it is out of step with modern sensibilities.[193] While the ultimate pronouncement from *Young*, that some form of public-carry lies at the core of the Second Amendment, is arguably consistent with the spirit of *Heller*,[194] the *Young* holding is deficient because it places open-carry, and only open-carry, within the Amendment's core.[195] The logic that led to this conclusion appears to be an over-application of history to the Ninth Circuit's Second Amendment analysis.

True, *Heller* relied on history when declaring the existence of an individual right to handgun possession in the home.[196] And it is further true that circuit courts since *Heller* have largely utilized a historical approach to determine the scope of the right (that is, does it or does it not extend to public settings).[197] However, by relying on antiquated case law expressing the preferences of open-carry versus concealed-carry that were contemporary to the antebellum south,[198] *Young* likely reached beyond the utility of history to determine that only open-carry lies at the core of the Second Amendment. There comes a point when the application of history is too tenuous, especially if used to place rights in, or keep them out of, the Second Amendment's nearly untouchable core. Societal preferences regarding open-carry versus concealed-carry are not the same today: in fact, they are arguably completely opposite.[199]

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193. Nine years prior to *Young v. Hawaii*, Eugene Volokh observed that if a court employed history to conclude that the Second Amendment protected only a right to carry openly, it would arguably be mistaken given the change in public opinion regarding public vs. concealed carry. *See* Volokh, *supra* note 177, at 1521–24.

194. *See Young*, 896 F.3d at 1070 (stating "we reject a cramped reading of the Second Amendment that renders to 'keep' and to 'bear' unequal guarantees. *Heller* and *McDonald* describe the core purpose of the Second Amendment as self-defense, and 'bear' effectuates such core purpose of self-defense in public.") (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008); McDonald v. City of Chicago, 561 U.S. 742, 787 (2010)); *see also* Volokh, *supra* note 177, at 1520 (stating "[m]y inclination . . . is to defer . . . to a presumption that people should be free to have the tools they need for self-defense until there is solid evidence that possession of those tools will indeed cause serious harm. . . . Heller's discussion of the phrase "keep and bear" points in the same direction").

195. *Young*, 896 F.3d at 1069–70.

196. *See* 554 U.S. 570, 595 (2008).

197. *See, e.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 89, 91 (2d Cir. 2012) ("History and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms . . . ."); Wrenn v. District of Columbia, 864 F.3d 650, 658 (2017) ("Under *Heller I*'s treatment of these and earlier cases and commentaries, history matters . . . ."); Peruta v. County of San Diego, 824 F.3d 919, 929 (9th Cir. 2016).

198. *Young*, 896 F.3d at 1054–57.

199. *See* Volokh, *supra* note 177, at 1524 (arguing against the legitimacy of concealed carry bans by stating "[t]he historical exclusion [of a right to carry concealed] . . . was contingent on the social convention of the

A review of the precedent *Young* utilized to determine that open-carry is the only manner of public-carry within the core reveals fiery language regarding the concealed-carry of handguns. For example, in 1850, while discussing a state statute that restricted the right to carry a concealed weapon in Louisiana, that state's supreme court concluded:

> The [concealed carry] act[,] . . . [which] makes it a misdemeanor to be "found with a concealed weapon, such as a dirk, dagger, knife, pistol, or any other deadly weapon concealed . . . [so] that [it] does not appear in full open view[,]" . . . became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man's right to carry arms . . . "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, *and which is calculated to incite men to a manly and noble defence of themselves . . . without any tendency to secret advantages and unmanly assassinations*.[200]

Moreover, in 1840, while interpreting the right to bear arms in *State v. Reid*, the Alabama Supreme Court referred to concealed-carry as "the evil practice of carrying weapons secretly"[201] and upheld a ban on concealed-carry, so long as some means of public-carry was permitted.[202] Notably, the allowance of some form of public-carry was key to the court.[203] It reasoned that a statute which prohibited public-carry entirely would be unconstitutional,[204] and it explicitly noted that the legislature could not justifiably outlaw open-carry.[205] After pronouncing the limits of legislative power regarding public-carry restrictions, the *Reid* court affirmed the legislature's authority to limit the specific manner of carry "as may be dictated by the safety of the people *and the advancement of public morals*,"[206] thus implying that Alabama's legislature likely viewed concealed-carry as immoral. Further still, in Georgia, in 1846, the *Nunn v. State* court concluded that a concealed-carry ban was constitutional because the ban merely "prohibit[ed] the wearing of certain weapons in such a manner as is calculated to *exert an unhappy influence upon the moral feelings of the wearer*."[207] In line with the high courts in Louisiana and Alabama, the Georgia Supreme Court held that, while concealed-carry could be banned, some form of public-carry must be permitted (leaving open-carry as the only logical alternative).[208]

All of these cases stand for the same idea. During the 1800's, legislatures enacted and courts upheld concealed-carry bans because concealed-carry was considered a devious, cowardly practice.[209] On the other hand, the right to carry firearms openly, which

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time—the social legitimacy of open carry, and the sense that concealed carry was the behavior of criminals—and this exclusion is no longer sustainable now that conventions are different"); Symposium, *supra* note 175, at 432 (proposing that in today's society openly displaying a firearm is considered provocative and very aggressive).

200. State v. Chandler, 5 La. Ann. 489, 489–90 (1850) (emphasis added).
201. 1 Ala. 612, 614, 616 (Ala. 1840).
202. *Id.* at 616–17, 619.
203. *Id*.
204. *Id.* at 616–17.
205. *Id*. at 619.
206. *Reid*, 1 Ala. at 616 (emphasis added).
207. 1 Ga. 243, 249 (Ga. 1846) (emphasis added).
208. *Id.* at 249, 251.
209. *See* Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 REG.

was viewed as noble and upright,[210] was permitted and could not constitutionally be denied.[211] The question that naturally follows is—what influence should these opinions have had on the Ninth Circuit in 2018 as it endeavored to determine whether a specific method of public-carry is permitted by the Constitution? While the *Young* court seemingly assigned them great weight,[212] their role in the 2018 decision should have been minimal at most and certainly not controlling because "[t]he historical exclusion [of concealed carry] was contingent on the social conventions of the time . . . and this exclusion is no longer sustainable now that the conventions are different."[213] Unlike the social norms in the nineteenth-century South, modern opinion largely views the practice of open-carry as aggressive and provocative.[214] Arguably, most of present-day society would prefer that if an individual chooses to carry a firearm in public they "not flaunt it" to the rest of us.[215]

In sum, although *Heller* makes clear that historical analysis is an important consideration in resolving Second Amendment issues,[216] *Young* likely over-stepped the boundaries of history's proper influence since "the historical hostility to concealed carry [appears] inapt today."[217] Since the antebellum opinions *Young* relied on were exclusively based on public-carry attitudes of a specific time and region, and further, since those attitudes arguably no longer persist, *Young* used history to apply antiquated and irrelevant social opinions to modern-day conduct.

Admittedly, a counter-argument can be made that *Young*'s placement of open-carry at the core was dictated by *Heller*.[218] Obviously, *Heller* prevented the *Young* court from working with a blank canvas,[219] and there is language in *Heller* suggesting that concealed-carry bans may be lawful under the Second Amendment.[220] While pronouncing that Second Amendment rights are not unlimited and that "the right was not a right to keep and

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KY. HIST. SOC'Y 370, 370–72 (1993) (asserting that those opposed to outlawing the practice of dueling to settle disputes in Kentucky were giving license to cowards to arm themselves with concealed weapons); Volokh, *supra* note 177, at 1521–23.

210. Volokh, *supra* note 177, at 1523 ("Carrying arms, the theory went, was 'one of the most essential privileges of freemen,' but 'open, manly, and chivalrous' people wore their guns openly . . . .").

211. *Reid*, 1 Ala. at 619; State v. Chandler, 5 La. Ann. 489, 490 (1850); *Nunn*, 1 Ga. at 249.

212. 896 F.3d 1044, 1056–57 (9th Cir. 2018) ("[E]ven though our court has read these cases to exclude *concealed* carry from the Second Amendment's protections, . . . the same cases command that the Second Amendment must encompass a right to open carry.").

213. This is Eugene Volokh's quote made while advancing an argument that seems to support this proposition. *See* Volokh, *supra* note 177, at 1524.

214. Symposium, *supra* note 175, at 432.

215. *Id.*

216. *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008); *see also* Wrenn v. District of Columbia, 864 F.3d 650, 658 (D.C. Cir. 2017) ("Under *Heller I's* treatment of these and earlier cases and commentaries, history matters . . . .").

217. Volokh*, supra* note 177, at 1522.

218. *Cf.* Nelson Lund, *The Second Amendment and the Inalienable Right to Self-Defense*, HERITAGE (Apr. 17, 2014) (stating that *Heller's* non-exclusive list of presumptively lawful regulations included a ban on concealed carry, thus arguably implying that the only public-carry option left available by *Heller* was open-carry), http://www.heritage.org/the-constitution/report/the-second-amendment-and-the-inalienable-right-self-defense.

219. Telephone Interview with Nelson Lund, Professor, George Mason University Antonin Scalia Law School, (Nov. 30, 2018).

220. *See Heller*, 554 U.S. at 626; Lund, *supra* note 20, at 10 (noting that *Heller* appeared to approve of concealed carry restrictions).

carry any weapon whatsoever in any manner whatsoever,"[221] the specific illustration *Heller* used to demonstrate its point is telling. The Supreme Court opined "[f]or example, the majority of 19th-century courts . . . held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[222] If this language means that *Heller* favored (or at least did not overtly disfavor) concealed-carry bans,[223] and further, if it was *Young*'s aim to ensure the protection of some form of public-carry, then the previous argument of this Note fails. Under such circumstances, the Ninth Circuit's only option was to place open-carry at the core because Hawaii had every right, under *Heller*, to ban concealed-carry.[224]

On the other hand, maybe *Heller* did not intend to convey approval of concealed-carry bans.[225] Perhaps, the Supreme Court was simply using historical bans on concealed-carry to illustrate a larger point that Second Amendment rights are not unlimited.[226] Consider carefully *Heller*'s direct discussion of historical concealed-carry restrictions:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.* (citations omitted). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should 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.[227]

The precise sequence of the Court's discussion is noteworthy.[228] First, the Court

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

222. *Id*.

223. *See* Peterson v. Martinez, 707 F.3d 1197, 1201 (10th Cir. 2013) (supporting the view that *Heller*'s language excluded concealed carry rights from Second Amendment protection); Heller v. District of Columbia, 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (supporting the view that concealed-carry regulations are permissible under *Heller*); Jonathan Lowy & Kelly Sampson, *Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187, 189 (2016); Meltzer, *supra* note 173, at 1486; Lund, *supra* note 218.

224. *See* Lowy & Sampson, *supra* note 223, at 189; Lund, *supra* note 218.

225. *See* Megan Ruebsamen, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post*-Heller *Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 76 (2013) (referencing *Heller* and stating "[t]he Supreme Court did not examine the constitutionality of statutes restricting the right of law-abiding citizens to carry concealed weapons for use in self-defense, but their lack of examination does not mean laws restricting conceal and carry are presumptively valid"); Jeff Golimowski, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post*-Heller *World*, 49 AM. CRIM. L. REV. 1599, 1608 n.85 (2012) (noting that although concealed-carry restrictions were discussed in *Heller*, they were not included in "*Heller's* laundry list" of presumptively lawful prohibitions); Lund *supra* note 20, at 10 (noting that although *Heller* **appeared** to approve of concealed carry restrictions, the Court stopped short of expressly doing so) (emphasis added).

226. *See* Golimowski, *supra* note 225, at 1608 n.85.

227. 554 U.S. 570, 626–27 (2008) (emphasis added) (internal citations omitted).

228. The argument advanced in this Note regarding the possible significance of the Court's sequence of discussion regarding concealed-carry was developed after noting Jeff Golimowski's observation in n.85. *See* Golimowski, *supra* note 225, at 1608 n.85.

acknowledged the existence of nineteenth-century concealed-carry restrictions.[229] The Court then seemed to pause and interject its unwillingness to undertake a full analysis of the scope of the Second Amendment.[230] And then, only after declining to conduct a full scope analysis, the Court expressly listed several types of Second Amendment regulations its holding was not intended to disturb.[231] Strikingly absent from this list was any suggestion that *Heller* favored concealed-carry prohibitions.[232] Although *Heller's* list of lawful prohibitions was not exhaustive,[233] it is reasonable to conclude that if the Supreme Court had intended to support concealed-carry restrictions, it would have made that intent apparent by including concealed-carry bans on its list of acceptable Second Amendment limitations.

Perhaps, the Court's unwillingness to conduct a full Second Amendment scope analysis was intended to be a signal that if the Court had chosen to conduct a scope analysis, it would have determined that concealed-carry bans were not "presumptively lawful."[234] If this proposal is sound, then *Young's* placement of open-carry within the core was unnecessary. A better alternative would have been for the Ninth Circuit simply to follow *Wrenn* and place public-carry at the core, then allow Hawaii to decide which manner(s) of public-carry it preferred to make available to its citizens.[235]

## V. WHAT IS A CORE IN THE FIRST PLACE? A MORE CONCRETE DEFINITION MAY HAVE CAUSED A DIFFERENT OUTCOME IN *YOUNG*

Perhaps, in order to determine whether an individual public-carry right is properly placed at the core of the Second Amendment, it is necessary to first address a more fundamental question: what exactly does it mean for the Second Amendment to have a core? Importantly, this question does not ask what *the* core of the Amendment is; rather, it asks what *a* core is in the first place. One must accept here, as a practical matter, that a right cannot be accurately positioned in relation to the core unless there is a concrete understanding of what a core is. A review of circuit-level public-carry case law reveals no firm definition of a core within the context of the Second Amendment.[236]

Notably, the judicial focus on the core appears to be growing alongside the temporal distance from *Heller*. In *Heller*, the word "core" was only used three times in the entirety

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229. *Heller*, 554 U.S. at 626; *see also* Golimowski, *supra* note 225, at 1608 n.85.

230. *See Heller*, 554 U.S. at 626; *see also* Golimowski, *supra* note 225, at 1608 n.85.

231. *Heller*, 554 U.S. at 626–27; *see also* Golimowski, *supra* note 225, at 1608 n.85.

232. *Heller*, 554 U.S. at 626–27; *see also* Golimowski, *supra* note 225, at 1608 n.85.

233. *Heller*, 554 U.S. at 626–27 n.26.

234. *Id*.

235. This is known as the alternative outlet theory which has been discussed in case law and scholarly writing. The theory stands for the proposition that one method of carry may be banned or restricted so long as the other method is permitted. *See* Wrenn v. District of Columbia, 864 F.3d 650, 662 (D.C. Cir. 2017) ("The rights to keep and to bear, to possess and to carry, are equally important inasmuch as regulations on each must leave alternative channels for both."); *see also* Meltzer, *supra* note 173, at 1525–28; James Bishop, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 917–21 (2012).

236. *See generally* Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012); Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016); *Wrenn*, 864 F.3d 650; Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018); Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018).

of the opinion.[237] On the other hand, in the recent cases of *Wrenn*, *Young*, and *Gould*—all of which use *Heller* as their primary guide—those majorities used the word "core" twenty-seven times, twenty-five times, and nineteen times respectively.[238]

*A. A Proposed Definition of the Core*

Relying on language and inferences from *Heller*, a "core" guarantee within the context of the Second Amendment is properly defined and understood as the Amendment's "primary purpose." From a simple content standpoint, the Supreme Court opinions on the matter appear to support this proposition. While *Heller* used the word core only three times, the majority alone used the word purpose thirty-five times.[239] Moreover, when the Supreme Court did use the word core, it was commonly in conjunction with the word purpose. For example, in *McDonald*, the Court noted that "citizens must be permitted 'to use [handguns] for the *core* lawful *purpose* of self-defense.'"[240] The same interplay was also present in *Heller*. After examining a requirement that all handguns in an individual's home must be kept inoperable, the *Heller* Court concluded that such a restriction "ma[de] it impossible for citizens to use [handguns] for the *core* lawful *purpose* of self-defense and [wa]s hence unconstitutional."[241] If this proposed substitution of terms were accepted, it would cause an examining court to substitute the phrase primary purpose every time it intended to use the word core.

Substituting the phrase primary purpose for the word core and applying it to *Heller* renders the reasonable conclusion that the primary purpose of the Second Amendment is to guarantee an individual right of self-defense.[242] Prior to *Young*, the split among the circuits was limited to a lack of agreement over the extent of the primary purpose. Specifically, was the primary purpose of the Amendment to guarantee a right of self-defense wherever such need arose, or was it only to guarantee a self-defense right within the home? This is a legitimate question which *Heller* left unanswered—hence the split.

*B. The Potential Impact of this Proposed Definition of the Core on Young*

*Young* essentially concluded that the primary purpose of the Second Amendment is to secure an individual right to self-defense wherever such need arises, but only by way of open-carry.[243] But if core actually means primary purpose, *Young's* conclusion does not

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237. *Heller*, 554 U.S. at 630, 634, 720.

238. *Wrenn*, 864 F.3d at 657–59, 661, 664–67; *Young*, 896 F.3d at 1052, 1068–71; *Gould*, 907 F.3d at 667, 670–72, 674.

239. *Heller*, 554 U.S. at 577–78, 584, 588–90, 595, 599–600, 602, 608, 612–13, 617–18, 620, 625–26, 628–31, 635.

240. McDonald v. City of Chicago, 561 U.S. 742, 768 (2010) (emphasis added).

241. *Heller*, 554 U.S. at 630 (emphasis added); *see also* Zuidema, *supra* note 15, at 826 ("*Heller* identified the core of the Second Amendment as the right to keep firearms for the 'lawful purpose of self-defense,' while the periphery consists of the right to keep and bear arms for lawful purposes other than self-defense, such as hunting or recreation.").

242. *See Heller*, 554 U.S. at 592 ("[W]e find [the textual elements of the Second Amendment] guarantee the individual right to possess and carry weapons in case of confrontation. . . . The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'").

243. *Cf. Young*, 896 F.3d at 1070.

add up because a person can defend herself regardless of whether she carries her firearm openly or concealed. Stated plainly, the manner of carry (concealed versus open) has no relationship to the primary purpose of self-defense. Since the Second Amendment's primary purpose can be carried out by either manner of carry, it was inappropriate for the Ninth Circuit to elevate one manner to the core and exclude the other.

The reason for excluding such matters from the core guarantee is apparent given the previously discussed notion that statutes which infringe on the core will be subjected to a heightened level of scrutiny.[244] By placing open-carry within the core of the Second Amendment, the Ninth Circuit seemingly foreclosed Hawaii's option to limit open-carry in favor of concealed-carry. This is a faulty result. Although some lower courts have observed *Heller* and *McDonald's* apparent support for the idea that the right to self-defense exists wherever the need arises,[245] individual states should have latitude to choose whether they want to allow both methods of public-carry or prefer to restrict or even ban one in favor of the other.[246]

## VI. GIVEN THE DISAGREEMENT OVER THE SECOND AMENDMENT'S CORE AND AMERICA'S STATUS AS A MASS-SHOOTING SOCIETY, SUPREME COURT INTERVENTION IS NECESSARY

Given the shifting and malleable nature of the Second Amendment's core, Supreme Court resolution of the circuit dispute is both necessary and appropriate. While it is dangerous to speculate whether the highest Court would place a right to public-carry within the core, it is undeniable that the public safety implications of its decision could be profound. 2019 America is arguably a mass-shooting society.[247] Within a recent twelve-

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244. *E.g.*, Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (quoting U.S. v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011)) ("[W]e assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."); Gould v. Morgan, 907 F.3d 659, 670–71 (1st Cir. 2018) ("In our judgment, the appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right. A law or policy that burdens conduct falling within the core of the Second Amendment requires a correspondingly strict level of scrutiny, whereas a law or policy that burdens conduct falling outside the core of the Second Amendment logically requires a less demanding level of scrutiny."); Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012) ("We do not believe however, that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment. . . . Although we have no occasion to decide what level of scrutiny should apply to laws that burden the 'core' Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense . . . ."); *see also* Zuidema, *supra* note 15, at 826 ("Most courts have determined that the core is afforded more protection than rights falling within the amendment's periphery.").

245. *See* Wrenn v. District of Columbia, 864 F.3d 650, 657–58 (D.C. Cir. 2017); *Young*, 896 F.3d at 1070 (citing *Heller*, 554 U.S. at 599; McDonald v. City of Chicago, 561 U.S. 742, 787 (2010)).

246. The conclusion that "core" is properly defined as "primary purpose" supports the alternative outlet theory mentioned in note 235. The theory has been discussed in case law and scholarly writings. The theory stands for the proposition that one method of carry may be banned or restricted so long as the other is allowed. *See Wrenn*, 864 F.3d 650 at 662–63 ("The rights to keep and to bear, to possess and to carry, are equally important inasmuch as regulations on each must leave alternative channels for both."); *see also* Meltzer, *supra* note 173, at 1525–28; Bishop, *supra* note 235, at 917–21.

247. *See* Susan Miller & Kevin McCoy, *Thousand Oaks makes 307 mass shootings in 311 days*, USA TODAY (Nov. 8, 2018, 10:29 AM), https://www.usatoday.com/story/news/nation/2018/11/08/thousand-oaks-california-bar-shooting-307th-mass-shooting/1928574002/ (stating that in the 311 days of 2018 up to the writing of the

day span, twenty-three people were killed and nine more injured in two high-profile mass shootings at a synagogue in Pittsburgh and a crowded bar in Thousand Oaks, California.[248] As senselessly tragic as the murders of twenty-three people are, it is equally appalling that this nation has reached the point where certain mass shootings are high-profile—necessarily implying that other mass shootings are not.[249]

John Hendricks's actions are instructive. When Hendricks shot Everardo Custodio, Custodio was firing a gun into a group of pedestrians on the opposite side of the street.[250] Under such circumstances, is it not reasonable to conclude that Hendricks prevented a mass shooting? If it is reasonable, now take Hendricks and place him leaning against the corner of a pool table at the Borderline Bar and Grill in Thousand Oaks, California, or worshiping at the Tree of Life Synagogue in Pittsburgh. Assuming he perceived the same threat and took the same action he did in Chicago, those recent tragedies are possibly prevented or, at least, rendered less catastrophic.[251]

It is necessary to recognize that individuals calling for greater control and those seeking expanded gun rights, while taking diametrically opposed positions, presumably share the same end goal—increased public safety. Arguably, a shortcoming of the gun control argument is a failure to recognize the reality of *Heller*'s effect. While the belief that *Heller* was wrongly decided is fair, it is also irrelevant. *Heller*, at a minimum, guarantees the right to possess and use handguns for self-defense in the home.[252] As a result, handguns are plentiful in America, and *Heller* takes no issue with that.[253] Given this, it is questionable whether restrictions on the right to carry handguns in public for self-defense would have a positive impact on public safety,[254] especially within the sphere of mass shootings. It seems a somewhat tenuous argument to claim that criminalizing public-carry by law-abiding citizens will dissuade a mass-shooter from carrying out his

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article, 307 mass shootings had occurred).

248. Shelly Bradbury, *Tree of Life Survivor Released from Hospital After Mass Shooting*, PITTSBURGH POST-GAZETTE (Nov. 7, 2018, 9:49 AM), http://www.post-gazette.com/local/city/2018/11/07/Tree-of-Life-survivor-released-from-hospital-Andrea-Wedner/stories/201811070114 (providing updated information on the mass shooting that occurred on October 27, 2018); Katie Zezima, Mark Berman, Lindsey Bever & Isaac Stanley-Becker, *12 People Killed, Including Sheriff's Deputy in 'Horrific' California Bar Shooting*, WASH. POST (Nov. 8, 2018, 6:03 PM), https://www.washingtonpost.com/nation/2018/11/08/multiple-injuries-reported-bar-shooting-thousand-oaks-calif/?noredirect=on&utm_term=.5fb1dd7424f2; *Mass Shootings in 2018*, GUN VIOLENCE ARCHIVE (last visited Nov. 9, 2018), https://www.gunviolencearchive.org/reports/mass-shooting.

249. *Cf.* Miller & McCoy, *supra* note 247 (stating that in the 311 days of 2018 up to the writing of the article, 307 mass shootings had occurred).

250. *See, e.g.*, Bates, *supra* note 1; Ziezulewicz, *supra* note 1.

251. *Cf.* Bates, *supra* note 1; Fedschun, *supra* note 11; McCausland, *supra* note 11. *But see Violence Policy Center: Concealed Carry Killers*, CONCEALED CARRY KILLERS, http://concealedcarrykillers.org/ (last updated Jan. 17, 2019).

252. District of Columbia v. Heller, 554 U.S. 570, 628–30 (2008).

253. *Id*. at 636 ("We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe the prohibition of handgun ownership is a solution. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."); Moore v. Madigan, 702 F.3d 933, 939 (7th Cir. 2012) ("Anyway the Supreme Court made clear in *Heller* that it wasn't going to make a right to bear arms depend on casualty counts. If the mere possibility that allowing guns to be carried in public would increase crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way . . . .").

254. *See* Lott, *supra* note 8, at 1212–13 (2012). *But see* WEBSTER, *supra* note 8, at 6–7.

carnage.[255] An extension of *Heller* to include, as part of the Second Amendment's core guarantee, the right to carry handguns beyond the home for self-defense might reduce the mass-shooting casualty count.

## VII. CONCLUSION

Despite the well-founded argument that the nation's framers intended the Second Amendment to apply only to the preservation and maintenance of state militias, *Heller* confidently pronounced that the Amendment secures an individual right to self-defense that is preserved even in the absence of any militia connection. But, how far does this right extend? Is it limited to the home or does it also exist in public? As evidenced by the current circuit split, *Heller*'*s* holding has spawned confusion and disagreement over the scope of the Second Amendment's guarantee. While there is a general consensus that the Second Amendment must have some application in public, the tension among the circuits appears to be narrowly focused on whether public-carry does or does not lie within the Amendment's core. Although *Heller* provides fodder for both views, the more compelling argument, advanced in *Wrenn* and arguably—although not decisively—in *Young*, is that public-carry is included in the Amendment's core guarantee. As such, good-cause statutes that restrict the public-carry rights of law-abiding citizens should be deemed unconstitutional.

Despite *Young*'s apparent concurrence with *Wrenn* on the determination that public-carry is part of the Amendment's core, the Ninth Circuit's nuanced conclusion, that open-carry is the only form of public-carry within the core, disconnects it from modern sensibilities.[256] While an argument can be made that placing open-carry at the core was the only option *Heller* left available to the *Young* court if its aim was to place some form of public-carry within the core,[257] there is a counter-argument that *Heller* did not intend to endorse concealed-carry restrictions.[258]

If the core of the Second Amendment is accurately defined as the primary purpose of the Amendment, then it was inappropriate for the Ninth Circuit to place a specific manner of public-carry within the core because the Amendment's primary purpose—self-defense—can be exercised regardless of whether a handgun is carried openly or concealed. Given the disagreement over the scope of the Second Amendment's core, Supreme Court intervention is necessary to decisively determine the level of constitutional protection public-carry should be afforded. A ruling in either direction could have significant public

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255. *See* Lott Jr., *supra* note 8, at 1212–13. *But see* WEBSTER, *supra* note 8, at 6–7.

256. *See* Ireland, *supra* note 209, at 370–72; Volokh, *supra* note 177, at 1523–24; Symposium, *supra* note 175, at 432 (proposing that in today's society openly displaying a firearm is considered provocative and very aggressive).

257. *Cf.* Lund, *supra* note 218 ("*Heller* . . . set[s] forth a non-exclusive list of 'presumptively lawful' regulations that include . . . bans on the concealed carry of firearms . . . .").

258. *See* Ruebsamen, *supra* note 225, at 76–77 (referencing *Heller* and stating, "[t]he Supreme Court did not examine the constitutionality of statutes restricting the right of law-abiding citizens to carry concealed weapons for use in self-defense, but their lack of examination does not mean laws restricting conceal and carry are presumptively valid"); Golimowski, *supra* note 225, at 1608 n.85 (noting that although concealed-carry restrictions were discussed in *Heller*, they were not included in "*Heller*'s laundry list" of presumptively lawful prohibitions); Lund, *supra* note 20, at 10 (noting that although *Heller* **appeared** to approve of concealed carry restrictions, the Court stopped short of expressly doing so).

safety implications. In fact, the next John Hendricks's life might depend on the decision.

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