

THE RIGHT TO BEAR ARMS: FOR ME, BUT NOT FOR THEE?

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I am going to talk about the right to bear arms, which seems like it would be a simple topic. The Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.”¹ The question being hotly litigated in the minority of states that have enacted so-called discretionary license issuance for carrying handguns² is whether “bear arms” means that you have a constitutional right to carry a firearm outside your home. The words of the Second Amendment alone seem to be conclusive about that—a right to keep arms and a right to bear arms. These are two distinct rights: keeping arms would obviously include keeping them at home.³ “Bear” means nothing if it means you can only carry arms in your home.⁴ It has to mean something more than that. When the Bill of Rights restricts some element of the subject to the home, it says so very clearly. In the Third Amendment, for example, soldiers will not be “quartered in any house” without the consent of the owner, unless in times of war.⁵ The word “houses” appears in the Fourth Amendment in terms of search and seizure issues.⁶ So, when restricting an activity to the home, the Bill of Rights plainly says so.

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1. U.S. CONST. amend. II.
2. See MASS. GEN. LAWS ch. 140, § 131 (2018); N.Y. PENAL LAW § 400.00 (McKinney 2008 & Supp. 2020).
3. See *District of Columbia v. Heller*, 554 U.S. 570, 582–84 (2008).
4. See *id.* at 582–92.
5. U.S. CONST. amend. III.
6. U.S. CONST. amend. IV.

So, really, the word “bear” does nothing unless it means you can carry a firearm. And when reference is made to the right of the people, one would think that includes society at large—individuals at large—and not those who would be chosen by government to exercise a given right.⁷ You cannot imagine regarding the right of the people to assemble in the First Amendment, that the government gets to decide who has that right and that you can get a license to exercise the right only “for good cause” that differs from the situation of the people at large.

That’s the text of the Bill of Rights, and then we move on to *District of Columbia v. Heller*.⁸ The complaint in the case alleged a right to keep arms in the home, and therefore that the D.C. handgun ban was unconstitutional.⁹ And, of course, the Court so held.¹⁰ The decision discusses the right to bear arms as a right to carry arms.¹¹ In fact, Justice Scalia’s opinion goes into great detail in the course of refuting the idea that bearing arms only refers to bearing arms in the militia and about the fact that carrying arms is what bearing arms means.¹² A good quote in the opinion comes from Justice Ginsburg’s decision in an 18 U.S.C. § 924(c) case about what it means to bear arms; she states that bear arms means carrying, for example, a gun in the pocket or otherwise on the person.¹³

The *Heller* decision also refers to restrictions on the Second Amendment right generally.¹⁴ One of those is that you cannot carry in sensitive places, such as schools and government buildings.¹⁵ This seems to imply that, “Aha! Nonsensitive places are places where you *can* carry.” So in addition to that, the decisions that the Court relies on in *Heller* talk about the right actually to carry arms—handguns, for example—and the Court

7. See Robert A. Sedler, *The Enduring Constitution of the People and the Protection of Individual Rights*, 66 MICH. B.J. 1108, 1108–09 (1987).

8. 554 U.S. 570.

9. *Id.* at 575–76.

10. *Id.* at 635.

11. *Id.* at 582–95, 600–03.

12. *Id.* at 580–603, 605–19.

13. *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

14. *Id.* at 626–28.

15. *Id.* at 626.

refers to some of the nineteenth-century cases: *Nunn v. State*¹⁶ from Georgia and *Andrews v. State*¹⁷ from Tennessee.¹⁸ In those two states, there were times when the legislature declared a prohibition on carrying handguns, either openly or concealed, and those laws were invalidated.¹⁹ And *Heller*, towards the end of the decision, states that the D.C. law is somewhat like these nineteenth-century laws.²⁰ Such nineteenth-century laws were so extreme in terms of prohibiting the right to bear arms altogether.²¹ By the same token, the District of Columbia was prohibiting the right merely to possess handguns altogether.²²

One more part of *Heller* makes clear that under the Court's decision, although the issue wasn't squarely before the Court, there is a right to carry outside the home. The Court refers to the fact that the Second Amendment has the militia clause, but for the people who lived at the time of the Founding, even more important to them was the right to carry arms for self-defense and for hunting.²³ You don't go hunting in your home, you may or may not have to defend yourself in the home, and certainly militia activities do not take place in the home. So there's a lot in *Heller* to go on here in terms of predicting what might happen in the future in the Court.

If we move on to *McDonald v. City of Chicago*,²⁴ which applied the Second Amendment to the states through the Fourteenth Amendment,²⁵ the very first carry law that the Court refers to in terms of what the Fourteenth Amendment was intended to invalidate was the Mississippi Black Code from 1865, which provided that no African American, no freedman, no freed slave could carry a firearm without some kind of permit from the authorities.²⁶ In fact, those types of statutes pervaded both the slave codes and then later the Black Codes from the early Reconstruction period, requiring a permit that is solely at the

16. 1 Ga. 243 (1846).

17. 50 Tenn. (3 Heisk.) 165 (1871).

18. *Id.* at 608, 612, 614, 629.

19. See *Andrews*, 50 Tenn. (3 Heisk) at 186–87; *Nunn*, 1 Ga. at 243, 246–47, 251.

20. *Heller*, 554 U.S. at 628–29.

21. *Id.* at 629.

22. *Id.* at 628.

23. *Id.* at 599.

24. 561 U.S. 742 (2010).

25. *Id.* at 791.

26. *Id.* at 771.

discretion of the issuing authority in terms of whether the person could have a right to bear arms.²⁷ So, there were a lot of African Americans who were arrested and prosecuted and their guns seized and confiscated under these laws.²⁸ You'll see speeches in Congress about the purpose of the Second Amendment in terms of wanting to get rid of these laws and invalidate them.²⁹

You also have the passage of the Freedman's Bureau Act in 1866, which was enacted by two-thirds of the same Congress that passed the Fourteenth Amendment and sent it to the states for ratification.³⁰ The Freedman's Bureau Act explicitly declared that the rights to personal security and personal liberty include the right to bear arms.³¹ They were referring to the right of African Americans to have the rights of full citizenship, which included the right to carry arms outside the home.³²

Now, there is a third Supreme Court case that suggested *Heller's* demise was like when Mark Twain said, "The reports of my death have been greatly exaggerated."³³ If you remember after *Heller* and *McDonald*, the Supreme Court was not granting certiorari in any Second Amendment cases.³⁴ It was like maybe they are never going to take another one. And then all of a sudden they took a case based solely on the cert petition and the opposition to it from the State of Massachusetts involving a stun gun ban.³⁵

There was a woman who had been threatened and beat up by her ex-boyfriend, and she had a stun gun.³⁶ She had it with her and then was busted in a parking lot with the stun gun, which

27. See *id.* at 771–72.

28. See *id.*

29. See, e.g., *id.* at 775–76.

30. See *id.* at 773, 775–76.

31. *Id.* at 773.

32. *Id.*

33. See Stephen P. Halbrook, *Taking Heller Seriously: Where has the Roberts Court Been, and Where is it Headed, on the Second Amendment?*, 13 CHARLESTON L. REV. 175, 196 (2018).

34. Jonathan H. Adler, *Supreme Court declines to hear Second Amendment case over dissent of two justices*, WASH. POST (June 9, 2015, 10:28 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/09/supreme-court-declines-to-hear-second-amendment-case-over-dissent-of-two-justices/> [<https://perma.cc/N6GY-MD4K>].

35. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam).

36. *Id.* at 1028 (Alito, J., concurring).

was prohibited under Massachusetts law.³⁷ The Massachusetts Supreme Judicial Court upheld that law,³⁸ and it went to the Supremes, and they said, “Hold on. Your reasoning is totally out of whack with what we held in *Heller*.” The weapon does not have to be a type that existed at the time of the Founding, just as *Heller* made clear regarding modern communications and the exercise of free speech and a free press, even though there was no internet at the time of the Founding.³⁹ But under the Speech and Press Clauses, the internet is still protected.⁴⁰ By the same token, types of weapons, if they’re commonly possessed by law-abiding people for lawful purposes, or typically possessed for lawful purposes, are protected by the Second Amendment.⁴¹

And so, the Supreme Court, simply on the basis of the petition in opposition, reversed and remanded to the Massachusetts court and said, “Go back and look at this again under our precedent. You have not been consistent with what we’ve ruled.”⁴² The interesting part about that case, about which there is more detail in Justice Alito’s concurring opinion, is that it took place outside the home.⁴³ So, had the Court thought that there was no right to carry any kind of arm outside the home as guaranteed by the Second Amendment, the Court could have dealt with the case that way. There was no reason to go into the analysis of the type of weapon. So, yes, the Court didn’t make that proposition explicit, but rather seemed to assume that there is a right to carry some kinds of arms outside the home.⁴⁴ That was a 8-0 per curiam opinion assuming that there’s a right to carry outside the home.⁴⁵

As Judge Katsas mentioned, the *Gould v. Morgan*⁴⁶ case out of the First Circuit is one that my colleague Jonathan Taylor and I participated in in different roles. He got to argue. I didn’t get to

37. *Id.* at 1029.

38. *Id.* at 1027 (per curiam).

39. *See id.* at 1030–31 (Alito, J., concurring).

40. *See id.* at 1030.

41. *Id.* at 1030.

42. *See id.* at 1028.

43. *Id.* at 1029 (Alito, J., concurring).

44. *See id.* at 1027–28.

45. *Id.*

46. 907 F.3d 659 (1st Cir. 2018).

do that. But what's funny about these cases, or interesting, is how the turn into ancient history becomes a big part of the case. Specifically, you'll see a lot of briefs about the Statute of Northampton⁴⁷ from the 1300s in England.⁴⁸ And that was 50 years before Chaucer wrote *The Canterbury Tales*.⁴⁹

How many of you remember reading that in high school, *The Canterbury Tales*? We were just high school kids. We thought it was really funny. I remember the phrase, somebody called somebody else a "merry knave"⁵⁰ and a "saucy bumpkin[],"⁵¹ and we thought that was just hilarious.

But the argument seems to be that the statute overrides the Second Amendment because it was passed by a monarch in Medieval England. And that becomes a big part of the briefing.⁵² And it's really fun to do that kind of briefing, but like the D.C. Circuit said in *Wrenn v. District of Columbia*⁵³ that overturned D.C.'s discretionary license issuance regime, that we're not turning the clock back to the time of Chaucer, and that's not what the Second Amendment talks about.⁵⁴ It talks about the right to bear arms.⁵⁵ Look at the text and the structure, and look at the different decisions. Look at the *Heller* and *McDonald* cases. We're not going to be bound by those old laws.⁵⁶

47. 1328, 2 Edw. 3 c. 3.

48. See e.g., Brief of *Amicus Curiae* Patrick J. Charles in Support of Neither Party at 22–30, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, No. 18-280 (U.S. May 14, 2019); Brief of the Cato Institute and History Professor Joyce Lee Malcolm as *Amici Curiae* in Support of Respondent at 16–19, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

49. Nevill Coghill, *Introduction to GEOFFREY CHAUCER, THE CANTERBURY TALES*, at xi, xvi (Nevill Coghill trans. & ed., Penguin Books 2003) (1476) (noting that Chaucer began writing *The Canterbury Tales* in 1386 or 1387).

50. CHAUCER, *supra* note 49, at 92.

51. *Id.* at 230.

52. See *supra* note 48.

53. 864 F.3d 650 (D.C. Cir. 2017).

54. See *id.* at 660.

55. See *id.*

56. See *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008) ("It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one."); see also *McDonald v. City of Chicago*, 561 U.S. 742, 817–18 (2010) (Thomas, J., concurring in part and concurring in the judgment) (discussing the colonists view of certain inalienable rights that transcended English laws).

What the Statute of Northampton did was to prohibit riding or going armed.⁵⁷ And it also had language about doing so to the terror of the King's subjects.⁵⁸ And the way the English courts ended up construing that statute was it was an offense to go armed only if you did so in a manner that terrified other people.⁵⁹ So if you were carrying concealed, obviously, you wouldn't be doing that. Or if you were simply peacefully going about your business, you wouldn't be doing that.

But anyway, in that debate there's *Sir John Knight's Case*⁶⁰ from 1686.⁶¹ The court agreed with the construction of the Statute of Northampton that it only precluded going armed to the terror of other people.⁶² Then you get to William Hawkins and Blackstone, and all of these people.⁶³ So you'll have a lot of arguments. It's really fun arguing these really old authorities, but they don't count as much when you look at the text of the amendment and the fact that we have *Heller* and *McDonald* giving a lot of guidance in terms of what the amendment protects.⁶⁴

And we also have to look at the unique situation here in the United States. What parts of the common law did the colonists carry over? The first declaration of rights to mention the right to bear arms was that of Pennsylvania in 1776.⁶⁵ And it referred to the right of the people to bear arms for defense of themselves and the state—clearly an individual right.⁶⁶ You had different variations of that being adopted before the Second Amendment

57. Stephen P. Halbrook, *The Right of "The People" to "Bear Arms": The Common Law, the Second Amendment, and the Carrying of Firearms Outside the Home 7–8* (March 19, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3355601> [<https://perma.cc/ZQ5E-G2TZ>].

58. *Id.*

59. *Id.*

60. (1686) 87 Eng. Rep. 75; 3 Mod. 117.

61. *Wrenn v. District of Columbia*, 864 F.3d 650, 660 (D.C. Cir. 2017) (citing *Knight's Case*, 87 Eng. Rep. 75; 3 Mod. 117).

62. *Id.*

63. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *149; 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 135 (London, Eliz. Nutt 1716).

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

65. PA. DECLARATION OF RIGHTS art. XIII (1776); see also Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 267–68 (1985).

66. PA. DECLARATION OF RIGHTS art. XIII (1776); see also Halbrook, *supra* note 65, at 268.

by other states.⁶⁷ And then, finally, you have the Second Amendment itself.⁶⁸ And we used to debate whether the Second Amendment referred to a “collective right” of basically nobody to keep and bear arms, the National Guard, or whoever it would be, and that argument became abandoned by the time of *Heller*. You’ll see even in Justice Stevens’s dissent, which talks about an individual right to bear arms in the militia, and that’s the exclusive protection that the amendment provides.⁶⁹

In any case, there’s no question that under these state guarantees there’s a right to bear arms outside the home.⁷⁰ And, in fact, most states do provide for what are called shall-issue license regimes under which, if you meet certain qualifications, like if you pass your background check, have certain training and otherwise, then you can get a permit to carry and that you can carry for self-defense other than in certain places where carrying is banned.⁷¹ And that’s the law in almost all states, but there’s maybe seven or eight states that have discretionary issuance.⁷²

Anyway, what’s the Supreme Court going to do? That’s fun always to speculate about, and we never really know what might happen with that. In the *Wrenn v. District of Columbia* case, D.C.’s law was overturned,⁷³ and the D.C. attorney general reviewed whether to petition the Supreme Court.⁷⁴ And this was in the newspapers.⁷⁵ The attorneys general from other

67. Halbrook, *supra* note 65, at 282–83, 290–92, 301–03 (discussing North Carolina’s, Vermont’s, and Massachusetts’s incorporation of the right to bear arms into their state constitutions and bills of rights).

68. U.S. CONST. amend. II.

69. *Heller*, 554 U.S. at 636–37 (Stevens, J., dissenting).

70. See Halbrook, *supra* note 65, at 314–20.

71. Shawn E. Fields, *Guns, Knives, and Swords: Policing a Heavily Armed Arizona*, 51 ARIZ. ST. L.J. 505, 517–18 (2019); see also *id.* at 518 n.59 (compiling statutes).

72. *Id.* at 518 n.59 (compiling statutes to find that only ten states have discretionary issuance and two of those ten states have the practical equivalent of a shall-issue scheme).

73. 864 F.3d 650, 668 (D.C. Cir. 2017).

74. See Press Release, Office of the Attorney General for the District of Columbia, Attorney General Racine’s Statement on Decision Not to Appeal in *Wrenn v. D.C. and Grace v. D.C. Gun Cases* (Oct. 5, 2017), <https://oag.dc.gov/release/attorney-general-racines-statement-decision-not> [<https://perma.cc/H5QD-LQZN>].

75. See, e.g., Ann E. Marimow, *Appeals court blocks enforcement of District’s strict concealed-carry law*, WASH. POST (July 25, 2017, 4:40 PM), <https://www.washingtonpost.com/local/public-safety/appeals-court-blocks-enforcement->

states where may-issue license laws existed and circuits that have upheld these laws—the First,⁷⁶ Second,⁷⁷ Third,⁷⁸ and Fourth⁷⁹—bore down on the D.C. attorney general, like, “Don’t go there. D.C. you made this mistake once before when you insisted on taking the handgun ban case to the Supreme Court. That ruined everything to start with. That did away with the Second Amendment as only a collective militia right theory. And the Second Amendment does mean something. So don’t do it again.” And the D.C. attorney general, therefore, did not petition the Supreme Court.⁸⁰

So we have three circuits, basically, in agreement that the right extends beyond the home, and that would be the D.C. Circuit,⁸¹ the Seventh Circuit,⁸² and the—well, this is kind of weird: the Ninth Circuit.⁸³ The Ninth Circuit has gone in different directions. First, there was a case called *Peruta v. County of San Diego*,⁸⁴ where the Ninth Circuit, sitting en banc, upheld discretionary license issuance for concealed weapons.⁸⁵ California, during that litigation, also banned open carry of handguns.⁸⁶ But the court refused to deal with that issue.⁸⁷ It started out that the policy of discretionary issuance was invalidated by a panel

of-districts-strict-concealed-carry-law/2017/07/25/29bcbdfc-7146-11e7-9eac-d56bd5568db8_story.html [https://perma.cc/8KKE-DF8U].

76. *Gould v. Morgan*, 907 F.3d 659, 672, 676–77 (1st Cir. 2018) (holding a good-cause statute constitutional under intermediate scrutiny).

77. *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (rejecting the plaintiff’s arguments that New York’s proper cause requirement is facially unconstitutional for overbreadth and unconstitutional as applied).

78. *Drake v. Filko*, 724 F.3d 426, 429 (3rd Cir. 2013) (“[W]e conclude that the requirement that applicants demonstrate a ‘justifiable need’ to publicly carry a handgun for self-defense qualifies as a ‘presumptively lawful,’ ‘longstanding’ regulation and therefore does not burden conduct within the scope of the Second Amendment’s guarantee.”).

79. *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming that a “good-and-substantial reason requirement” is constitutional because it survives intermediate scrutiny).

80. See Press Release, *supra* note 74.

81. *Wrenn v. District of Columbia*, 864 F.3d 650, 661, 668 (D.C. Cir. 2017).

82. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

83. *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

84. 824 F.3d 919 (9th Cir. 2016) (en banc).

85. *Id.* at 939.

86. *Id.* at 950 (Callahan, J., dissenting).

87. *Id.* at 942 (majority opinion).

decision, 2-1.⁸⁸ And then, en banc, though, the Ninth Circuit reversed and said that discretionary issuance on concealed weapons is okay, but we're going to close our eyes to whether you can carry firearms openly under the Second Amendment.⁸⁹ And so you have some strong dissents to that.⁹⁰

But then the same issue came up again.⁹¹ The State of Hawaii doesn't issue general licenses to individuals permitting them to carry a firearm outside of their "place of business, residence, or sojourn."⁹² The only license you can get is an open-carry license if you're a security guard.⁹³ And a three-judge panel, with one judge dissenting, held in *Young v. Hawaii*⁹⁴ that can't be the meaning of the Second Amendment.⁹⁵ It's not limited to security guards. And so that panel said that policy was invalid.⁹⁶ And of all things—that was a preliminary injunction case.⁹⁷ It went up to the Ninth Circuit and the Ninth Circuit affirmed at that level under the preliminary injunction standard that the case was sent back for further proceedings.⁹⁸ So as of that decision, the Ninth Circuit is on the record saying that you can carry openly,

88. *Peruta v. County of San Diego*, 742 F.3d 1144, 1179 (9th Cir. 2014), *rev'd*, 824 F.3d 919.

89. *Peruta*, 824 F.3d at 942.

90. *Id.* at 950 (Callahan, J., dissenting) ("In the context of California's choice to prohibit open carry, the counties' policies regarding the licensing of concealed carry are tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense, and are therefore unconstitutional."); *id.* at 959–60 (Smith, J., dissenting).

91. *See Young v. Hawaii*, 896 F.3d 1044, 1048, 1068 (9th Cir. 2018).

92. *Id.* at 1048 (quoting HAW. REV. STAT. §§ 134-23, 134-24, 134-25 (LexisNexis 2013)) (internal quotation marks omitted).

93. *Id.* at 1070. To qualify for an exception to the general prohibition against carrying a firearm outside of a residence or place of business, an applicant must show sufficient reason to "fear injury to the applicant's person or property." *Id.* at 1048 (quoting HAW. REV. STAT. § 134-9 (LexisNexis 2013)) (internal quotation marks omitted). Upon a showing of sufficient reason, a police chief may only grant a license where a person "is engaged in the protection of life and property," effectively limiting concealed carry to security guards. *Id.* at 1048 (quoting HAW. REV. STAT. § 134-9 (LexisNexis 2013)) (internal quotation marks omitted).

94. 896 F.3d 1044. The Ninth Circuit decided to rehear the case en banc; therefore, the 2018 decision has no precedential weight. *Young v. Hawaii*, 915 F.3d 681, 682 (9th Cir. 2019) (mem.). The Ninth Circuit has not released the en banc decision yet.

95. *See Young*, 896 F.3d at 1074.

96. *Id.*

97. *Id.* at 1049.

98. *Id.* at 1074.

and that's guaranteed by the Second Amendment,⁹⁹ but not concealed under the en banc *Peruta* decision.¹⁰⁰

So then-Judge Gorsuch on the Tenth Circuit made some comments about Second Amendment issues, but more in terms of felon-in-possession issues,¹⁰¹ and you might have noticed the Court's grant of cert in a case involving whether it's an element of the offense that the government has to prove a felon knew of that status as a prohibited person.¹⁰²

Judge Gorsuch concurred in the judgment in a case where the state court judge caused a defendant to believe that he wasn't a convicted felon because the case was going to be somehow nullified at the end of the probationary period.¹⁰³ The defendant subsequently possessed a firearm, and was prosecuted for it despite that advice.¹⁰⁴ While that was not a carry case, the opinion rendered did involve Second Amendment issues.

As discussed later in this Essay, then-Judge Kavanaugh, who dissented in the *Heller II*¹⁰⁵ case,¹⁰⁶ would have held not only that the D.C. ban on semiautomatic rifles was contrary to the Second Amendment, but also that the D.C. gun registration

99. *Id.* ("But, for better or for worse, the Second Amendment does protect a right to carry a firearm in public for self-defense.").

100. *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) ("[T]he Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.").

101. *See, e.g., United States v. Fraser*, 647 F.3d 1242, 1246 (10th Cir. 2011) (holding that defendant did not lack reasonable lawful alternative to taking possession of firearm that defendant used as required to establish necessity defense to being a felon in unlawful possession of a firearm).

102. *Rehaif v. United States*, 139 S. Ct. 914 (2019) (mem.). Since this speech was given, the Court decided *Rehaif*. *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (holding that knowledge of one's status as a prohibited person is an element of the offense that must be proven).

103. *United States v. Games-Perez*, 667 F.3d 1136, 1142–46 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment); *see also id.* at 1138 (majority opinion) ("This is such a really good offer, I would hate to see you throw this away, because eventually, if you come back to this courtroom on July 21, 2011, if you have done everything we have asked you to do, we are going to dismiss this case; but more importantly, you can have this removed from your record." (citation omitted) (internal quotation marks omitted)).

104. *Id.* at 1139. *But see United States v. Games-Perez*, 695 F.3d 1104, 1117–18 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc) (opining that knowledge of one's status as a prohibited person is an element of the offense).

105. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

106. *See id.* at 1269–96 (Kavanaugh, J., dissenting).

system was not justified under the Second Amendment.¹⁰⁷ He used the methodology of text, history, and tradition, as opposed to levels of scrutiny like strict scrutiny or intermediate scrutiny.¹⁰⁸

So there you have an understanding of the Second Amendment that I think would be potentially favorable to hearing the issue of the right to carry, if the Supreme Court does grant cert. We've got some new kids on the block, if I can use that term, in the Court, and so we'll see what the Court does next. But that's what makes this subject so much fun, and I think Jonathan Taylor will have something to say about that too.

[Rebuttal to Jonathan Taylor:] First, I want to start with the standard of review. In *Heller*, what did the Court do? It looked at the text.¹⁰⁹ It looked at history and tradition.¹¹⁰ While not exactly how the *Heller* Court phrased its reasoning, that is how Judge Kavanaugh described it in *Heller II*.¹¹¹ But that's what the Court did. It looked at the English tradition, saying that the right was fundamental for the original settlers who took the English traditions.¹¹² The Court also specifically used the word

107. *Id.* at 1269.

108. *Id.* at 1271.

109. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) ("In interpreting [the text of the Second Amendment], we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (second alteration in original) (first quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931); then citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824))).

110. *Id.* at 592 ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment."); *id.* at 627 ("We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying 'of dangerous and unusual weapons.'" (citations omitted)).

111. See *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) ("To be sure, the Court never said something as succinct as 'Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulation.' But that is the clear message I take away from the Court's holdings and reasonings in [*Heller* and *McDonald*].").

112. See *Heller*, 554 U.S. at 592–94; see also *id.* at 594 ("In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.").

“fundamental” to describe the right twice.¹¹³ When *Heller II* was litigated in the district court, the opinion denied all claims saying, “Well, the Court didn’t say the word ‘fundamental right’ enough. It only said it twice, so we’re not going to treat this as a fundamental right,” because we were arguing strict scrutiny at the time.¹¹⁴ Subsequently when *McDonald* came down, it used the word “fundamental” to describe the right over a dozen times.¹¹⁵

Justice Breyer’s dissenting opinion in *Heller* was akin to intermediate scrutiny.¹¹⁶ He relied on the same cases that were soundly rejected in the majority opinion.¹¹⁷ Following Justice Breyer’s dissent, lower courts have gone to intermediate scrutiny, using a two-part balancing test that concludes carrying outside the home can be banned.¹¹⁸ We can also ban semiautomatic rifles because the government says that that’s necessary to prevent crime.¹¹⁹ If you look at *Heller*, though, Justice Breyer’s dissent would rely on committee reports, and statistics, and criminological data.¹²⁰ And the majority said “no, we don’t go

113. *Id.* at 593–94. (“By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said, ‘constituted the preeminent authority on English law for the founding generation,’ cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.” (citations omitted)).

114. *See Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (“If the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly. The court will not infer such a significant holding based only on the *Heller* majority’s oblique references to the gun ownership rights of eighteenth-century English subjects.” (citing *United States v. Miller*, 604 F. Supp. 2d 1162, 1170 n.10 (W.D. Tenn. 2009))), *aff’d in part, vacated in part, Heller II*, 670 F.3d 1244.

115. *See McDonald v. City of Chicago*, 561 U.S. 742, 754, 767–69, 773, 775–76, 778, 784, 788–89, 791 (2010).

116. *See Heller*, 554 U.S. at 681–723 (Breyer, J., dissenting).

117. *Compare id.* at 634 (majority opinion) (rejecting interest-balancing test), *with id.* at 690, 704–05 (Breyer, J., dissenting) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195–96 (1997)) (advocating interest-balancing test).

118. *See, e.g., Woollard v. Gallagher*, 712 F.3d 865, 874–82 (4th Cir. 2013) (adopting two-part test asking whether a law imposes a burden on conduct falling within the scope of the Second Amendment and, if so, whether it passes intermediate scrutiny, and upholding discretionary issuance of carry licenses).

119. SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, POST-HELLER SECOND AMENDMENT JURISPRUDENCE 26–29 (2019).

120. *Heller*, 554 U.S. at 704 (Breyer, J., dissenting) (noting the empirical evidence presented is “sufficient to allow a judge to reach a firm *legal* conclusion”).

there.”¹²¹ The guarantee in the Second Amendment is off the table. So that’s where I think the Supreme Court needs to step in and clarify this standard of review.

Looking at the history and tradition in the United States, in the nineteenth century, actually, the Southern states, by and large, enacted concealed weapon laws,¹²² which implied that there was no going-armed prohibition, because you would not need to ban concealed weapons if it was already illegal. However, the Northern states did not.¹²³ The Massachusetts law from 1836¹²⁴ did not provide that it was a crime to be armed in public. It said that if you are armed, if someone is feeling threatened, that person can bring a petition, and if that person can reasonably show that he or she is threatened by you or that you are threatening a breach of the peace, that person can basically get a peace bond where you have to get sureties to guarantee your good behavior.¹²⁵ That was not a ban at all, as it required actually threatening people. And everybody could agree with that. That is fully consistent with a constitutional right to bear arms—that if you bear arms and you threaten other people, or if you are likely to commit a breach of the peace, we do not want people like that going around, being armed, engaging in that kind of disruptive behavior.

So there were basically no carry restrictions in the Northern states as long as it was peaceable.¹²⁶ And, in fact, in New Jersey, which today has some of the most stringent restrictions on the bearing of arms, open carry was legal until 1966, which sounds

121. *Id.* at 634–35 (majority opinion).

122. CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 1–3 (1999).

123. *Id.* at 4.

124. 1836 Mass. Acts 748, 750, ch. 134, § 16 (“If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.”).

125. Halbrook, *supra* note 57, at 38 (citing 1836 Mass. Acts 748, 750, ch. 134, § 16).

126. Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 653 (2012) (noting that Northern states tended to adhere to the “tradition of presumptive carry”).

incredible.¹²⁷ And open carry, by the way, is still lawful, and never has been restricted since colonial times in most states.¹²⁸ The Commonwealth of Virginia is a good example¹²⁹ and Delaware too.¹³⁰ You can go down the list. There is no longstanding tradition of saying that we are going to delegate to the authorities a decision about whether you need to carry a gun as long as you are doing so peaceably. The good-cause restrictions basically delegate an arbitrary power to law enforcement authorities to decide whether you have given good enough reasons.¹³¹ It is kind of weird for a constitutional right to be in a status like that.

Now, it's true in *Gould v. Morgan*,¹³² Mr. Gould had a limited license where he could carry at different places, but he could not generally carry in nonsensitive places for self-defense,¹³³ and that is really what the issue is here. In many jurisdictions where you have discretionary issuance, you do not get any kind of carry license, even to carry in the course of business or to carry it at certain places like hiking as in the *Gould* case.¹³⁴ These laws are enforced in different ways. Some law enforcement authorities give out a license fairly readily and others do not.¹³⁵ California is a good example. San Diego changed its pol-

127. *Drake v. Filko*, 724 F.3d 426, 448 (3d Cir. 2013) (Hardiman, J., dissenting).

128. Joshua Gillin, *There are 45 states that allow open carry for firearms, former NRA president says*, POLITIFACT (Nov. 18, 2015), <https://www.politifact.com/florida/statements/2015/nov/18/marion-hammer/there-are-45-states-allow-open-carry-handguns-form/> [<https://perma.cc/3HY7Z5B>] (confirming as “Mostly True” statement by former NRA president that 45 states allow the open carry of handguns).

129. *Firearms/Concealed Handguns Frequently Asked Questions*, VA. ST. POLICE, <https://www.vsp.virginia.gov/Firearms.shtm> [<https://perma.cc/Z49A-QGHZ>] (last visited Jan. 18, 2020) (noting that only machine guns are registered in Virginia and that a firearm may be carried openly in Virginia except where prohibited by statute).

130. *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 644 (Del. 2017) (“Delaware is—and always has been—an ‘open carry’ state.” (citing *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 663 (2014))).

131. Halbrook, *supra* note 33, at 177.

132. 907 F.3d 659 (1st Cir. 2018).

133. *Id.* at 662 (“[The licenses] allowed the plaintiffs to carry firearms only in relation to certain specified activities but denied them the right to carry firearms more generally.”).

134. *Id.* at 664 (discussing the different types of license restrictions).

135. *See, e.g., Peruta v. County of San Diego*, 824 F.3d 919, 958 (9th Cir. 2016) (en banc) (Silverman, J., dissenting) (noting that sheriffs arbitrarily apply the good-cause requirement without any explanation for the differences); Richard A. Oppel, Jr. & Tim Arango, *Guns Across Borders: California Has Strict Laws, but Nevada*

icy in the *Peruta* case, as the sheriff changed the policy to a more permissive issuance.¹³⁶ The bottom line is this is what the Supreme Court needs to decide because there is a circuit conflict on whether there is a constitutional right to carry per se. And then after that, the scope of the regulations become an issue, whether they're consistent with Second Amendment rights.

Doesn't, N.Y. TIMES (July 30, 2019), <https://nyti.ms/2Yuf0Hf> [<https://perma.cc/HSD9-SYQQ>] (noting the patchwork of state laws).

136. See *Peruta*, 824 F.3d at 925 (after his policy was ruled contrary to the Second Amendment, San Diego County's sheriff announced that he would not petition for rehearing en banc; the effect was to adopt a shall-issue license policy); see also Matt Drange, *Want to carry a concealed gun? Live in Sacramento, not San Francisco*, REVEAL (June 12, 2015), <https://www.revealnews.org/article/want-to-carry-a-concealed-gun-live-in-sacramento-not-san-francisco/> [<https://perma.cc/83TZ-SURW>] (observing that the outgoing sheriff reversed his longstanding policy limiting the number of concealed weapon permits).