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Young v. Hawaii: A Dangerous Precedent

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YOUNG V. HAWAII: A DANGEROUS PRECEDENT

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I. INTRODUCTION

It is no surprise that firearms possession is the subject of much debate in the United States. Since 1966, there have been over 150 mass shootings where the shooter or shooters killed four or more people.[1] While mass shootings are some of the most visible incidents of gun violence, they account for only a fraction of the number of gun-related incidents each year.[2] At the time of writing, the United States has seen 69,081 gun-related incidents in 2019 alone.[3] While gun violence is not a novel phenomenon, the magnitude of this problem is unique to the United States.[4] Despite the availability of this sobering data, American lawmakers have been unsuccessful at combatting these rising numbers, perhaps due to varying interpretations of the Second Amendment to the United States Constitution. What is more, vague

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1. Bonnie Berkowitz & Chris Alcantara, *The Terrible Numbers That Grow with Each Mass Shooting*, WASH. POST, https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?noredirect=on&utm_term=.c9b6c2ffbfcf (last updated Dec. 18, 2019).

2. *Compare* EVERYTOWN FOR GUN SAFETY SUPPORT FUND, GUN VIOLENCE IN AMERICA 1 (2019), https://everytownresearch.org/wp-content/uploads/2018/07/Gun_Violence-America-REPORT-040919A.pdf (the average numbers of gun deaths and injuries per year are 36,383 and 100,120, respectively), *with Ten Years of Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (Nov. 21, 2019), https://everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019 (in 2017, mass shootings accounted for 159 deaths and 452 injuries).

3. *Gun Violence Archive 2019*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/past-tolls (last visited Mar. 15, 2020) (this accounts for 39,429 gun-related deaths and 29,652 gun-related injuries).

4. *See* EVERYTOWN FOR GUN SAFETY SUPPORT FUND, *supra* note 2, at 2 (The United States has a gun homicide rate of 4.1 per 100,000 residents. Compare this to Canada's rate of just 0.3 per 100,000 residents.).

Supreme Court decisions interpreting the scope of the Second Amendment frustrate the issue even further.

In 1939, the Supreme Court interpreted the Second Amendment to protect a citizen's right to possess a firearm so long as that firearm was reasonably related to service in a militia.[5] Subsequent federal court decisions interpreted the Second Amendment as "preserving the authority of the states to maintain militias."[6] In the years that followed, each state adopted its own system of gun-control laws.[7] For nearly seventy years, the Supreme Court did not review any cases related to the Second Amendment.[8] In 2008, the Court heard *District of Columbia v. Heller*,[9] where it found that the Second Amendment "confers an individual right to possess a firearm for traditionally lawful purposes."[10] The Court reasoned, however, that while the federal government cannot violate this right, the right is not absolute and could be subject to regulation.[11] Unfortunately, the *Heller* decision left much to be desired. While it was clear that the Second Amendment "protects the right of law-abiding citizens to possess weapons for lawful purposes,"[12] there were no clearly defined principles by which lower courts could determine whether a purpose was in fact lawful. The Court has made it clear that the possession of a firearm in one's home for self-defense is lawful.[13] However, the Court has yet to address whether the possession of an operable firearm in public for self-defense is lawful. In the absence of clear authority on the subject, lower courts have begun to apply a two-part framework that approximates the *Heller* Court's rationale.[14] In 2010, the Court supplemented its *Heller* holding in *McDonald v. City of Chicago*,[15]

5. *See* United States v. Miller, 307 U.S. 174, 178 (1939).

6. Luis Acosta, *United States: Gun Ownership and the Supreme Court*, LIBRARY OF CONG. (July 2008), https://www.loc.gov/law/help/usconlaw/second-amendment.php.

7. *See Gun Law Navigator*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, https://everytownresearch.org/navigator/index.html (last visited Feb. 23, 2020).

8. *See* Acosta, *supra* note 6.

9. 554 U.S. 570 (2008).

10. Acosta, *supra* note 6.

11. *Heller*, 554 U.S. at 626–28.

12. SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 12 (2019), https://fas.org/sgp/crs/misc/R44618.pdf.

13. *Heller*, 554 U.S. at 635.

14. PECK, *supra* note 12, at 12; *see* Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 960–61 (9th Cir. 2014). The Ninth Circuit's version of the two-part framework will be discussed in greater detail, *infra* Part III(B), notes 101–125.

15. 561 U.S. 742 (2010).

finding that Second Amendment protections also apply against state governments through the Fourteenth Amendment.[16]

In *Young v. Hawaii* (*Young II*),[17] the Ninth Circuit found that a Hawaii statute violated the protections of the Second Amendment as construed by the Supreme Court in *Heller*.[18] This Comment will examine the Ninth Circuit's rationale and explain why that rationale was incorrect. Part II of this Comment discusses the facts and holding of *Young II*. Part III discusses Second Amendment jurisprudence established by the Supreme Court and the Ninth Circuit in order to show the analytical process the *Young II* panel was bound to follow. Part IV discusses the Ninth Circuit's rationale in *Young II*, in particular how the Ninth Circuit conducted its analysis of the history of the Second Amendment and the Ninth Circuit's own two-part framework for alleged violations of the Second Amendment. The analysis in Part IV is accompanied by a critique of the panel's analysis which applies the Ninth Circuit's Second Amendment jurisprudence to *Young II* and explains why the Ninth Circuit should reinstate the district court's holding when *Young II* is reheard en banc.[19]

II. *YOUNG V. HAWAII*

A. Procedural Posture

On June 12, 2012, George K. Young, Jr. ("Young") filed a complaint in the United States District Court for the District of Hawaii against the State of Hawaii, the Governor of the State of Hawaii, the State Attorney General (collectively, "State defendants"); and the County of Hawaii, William P. Kenoi in his capacity as Mayor of the County of Hawaii, the Hilo County Police Department, and Harry S. Kubojiri in his capacity as Chief of Police ("Hawaii County Chief of Police") (collectively, "County defendants").[20] In his complaint,

16. Acosta, *supra* note 6.

17. 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.).

18. *Id.* at 1074.

19. The Ninth Circuit granted a rehearing en banc on February 8, 2019. *See* Young v. Hawaii (*Young III*), 915 F.3d 681, 681–82 (9th Cir. 2019) (mem.). On January 22, 2019, the Supreme Court granted certiorari in *New York State Rifle & Pistol Ass'n v. City of New York*, 139 S. Ct. 939 (2019) (mem.). The en banc proceedings in *Young III* have been stayed pending the Supreme Court's issuance of an opinion in that case. *See* Order at 1, Young v. Hawaii, No. 12-17808 (9th Cir. Feb. 14, 2019), ECF No. 209.

20. *See* Complaint for Deprivation of Civil Rights at 1, Young v. Hawaii, 911 F. Supp. 2d 972 (D. Haw. 2012) (No. 12-00336), 2012 WL 489184.

Young alleged that Hawaii Revised Statute section 134-9 violated the rights guaranteed to him by the Second Amendment of the United States Constitution.[21] Section 134-9 prohibited any person from publicly carrying an operable pistol or revolver, concealed or unconcealed, without a license.[22] The law also outlined the process by which a United States citizen aged twenty-one or older could obtain the requisite license.[23] Applicants were required to submit an application to "the chief of police of the appropriate county."[24] The local chiefs of police had discretion to issue these permits.[25] Further, permits issued under section 134-9 were only valid "within the county where the license [was] granted."[26]

To obtain a concealed carry permit, an applicant had to first show "reason to fear injury to [his or her] person or property."[27] This preliminary finding was required regardless of which county the applicant submitted an application to.[28] County chiefs of police were also expected to adopt procedures to verify that all those granted a concealed carry permit

> (1) Be qualified to use the firearm in a safe manner;
> (2) Appear to be a suitable person to be so licensed;
> (3) Not be prohibited under section 134-7 from the ownership or possession of a firearm; and
> (4) Not have been adjudged insane or not appear to be mentally deranged.[29]

Thus, the county chief of police would carry out the adopted procedures to ascertain whether the applicant satisfied the additional four requirements only after the applicant had demonstrated reason to fear injury to his or her person or property.

As for unconcealed carry permits, a county chief of police could only issue such permits to "applicant[s] of good moral character," who

21. *See* Young v. Hawaii (*Young I*), 911 F. Supp. 2d 972, 979 (D. Haw. 2012), *rev'd*, 896 F.3d 1044 (9th Cir. 2018). Young also asserted that section 134-9 violated various other provisions of the Constitution. *Id.* Because these claims were abandoned on appeal, they will not be discussed in this Comment.

22. HAW. REV. STAT. § 134-9(c) (2019), *invalidated by Young II*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

23. *Id.* § 134-9(a).

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* § 134-9(b).

have sufficiently indicated "the urgency or the need," and who were "engaged in the protection of life and property" and not otherwise "prohibited under section 134-7 from the ownership or possession of a firearm."[30] Put simply, unconcealed carry permits were reserved for law enforcement or security officers who needed to carry a firearm to protect life and property. Concealed carry permits, on the other hand, were reserved for any applicant, provided the applicant sufficiently demonstrated reason to fear injury to person or property. Thus, the success of an applicant's unconcealed carry permit application depended on his or her employment, while the success of an applicant's concealed carry permit application depended on his or her reason to fear injury.

In accordance with section 134-9, Young applied for a permit on two occasions in 2011.[31] Young applied for a permit "to carry a firearm, outside of the home, either concealed or unconcealed, stating the purpose being for personal security, self-preservation and defense, and protection of personal family members and property."[32] The Hawaii County Chief of Police denied both applications, stating that the chief of police may grant a permit "only in exceptional cases or a demonstrated urgency."[33]

The State and County defendants filed a motion to dismiss Young's complaint.[34] The court first found that Young's suit against the State defendants was barred by the doctrine of sovereign immunity.[35] Young's claims against the County defendants were not, however, barred by sovereign immunity.[36] The court found that Young had standing to bring his suit under the Second Amendment because the denial of a permit or license "pursuant to a state administrative scheme regulating firearms may constitute an actual and ongoing

30. *Id.* § 134-9(a).

31. *See* Complaint for Deprivation of Civil Rights, *supra* note 20, at 13.

32. *Id.*

33. *Id.* Two portions of section 134-9 are relevant here. The first states that concealed carry permits may be issued in "an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property." HAW. REV. STAT. § 134-9(a) (2019), *invalidated by Young II*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019). The second states that unconcealed carry permits may be issued "[w]here the urgency or the need has been sufficiently indicated." *Id.*

34. *Young I*, 911 F. Supp. 2d 972, 979 (D. Haw. 2012), *rev'd*, 896 F.3d 1044 (9th Cir. 2018).

35. *Id.* at 981–84.

36. *See id.* at 984–92.

injury for infringing upon . . . [the] Second Amendment."[37] Having found that Young had standing to bring suit, the court proceeded to evaluate whether Young had stated a claim under the Second Amendment.[38]

Relying on *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the court determined that although the Second Amendment was not necessarily limited to bearing arms for self-defense in the home, it did not confer "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[39] The court acknowledged that the *Heller* and *McDonald* decisions did not establish to what extent the Second Amendment extends beyond the home and the appropriate level of scrutiny by which to evaluate restrictions on the right to bear arms.[40] The court then drew upon the two-step approach that several other circuits had adopted for evaluating Second Amendment challenges.[41] The first step is to "determine whether the challenged law regulates activity that falls within the Second Amendment's scope."[42] If the law does not regulate such activity, it does not violate the Second Amendment.[43] Otherwise, the court then determines whether the regulation unconstitutionally burdens protected activity.[44]

Under the first step of the inquiry, the district court found that the Second Amendment did not protect an absolute right to carry a firearm in public for two reasons.[45] First, the court noted that the weight of authority amongst several circuits, including the Ninth Circuit and its district courts, favored a position that the Second Amendment confers a narrow right to keep an operable firearm for self-defense in the home.[46] In particular, the court was convinced that a narrow interpretation was justified because an individual's interest in self-defense outside of the home is outweighed by public safety interests.[47]

37. *Id.* at 987 (first citing Kachalsky v. Cacace, 817 F. Supp. 2d 235, 248–49 (S.D.N.Y. 2011), *aff'd*, 701 F.3d 81 (2d Cir. 2012); and then citing Dearth v. Holder, 641 F.3d 499, 501–02 (D.C. Cir. 2011)).

38. *See id.* at 987.

39. *Id.* at 988 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 988–90.

46. *Id.* at 989.

47. *See id.* (citing United States v. Masciandaro, 638 F.3d 458, 470–71 (4th Cir. 2011)).

Additionally, the Hawaii statute did not act as a complete ban on carrying firearms, and other courts have upheld laws similar to the challenged Hawaii statute.[48] In Hawaii, a gun owner is only permitted to keep a firearm at his or her residence, place of business, or sojourn but may lawfully transport the firearm between such places, as well as several other locations, such as shooting ranges.[49] Gun owners generally are not permitted to possess loaded firearms on a public highway; however, individuals with a permit issued under section 134-9 are exempt from that prohibition.[50] The court determined that when viewed as part of Hawaii's overall statutory scheme for gun regulation, section 134-9 did not operate as a complete ban or burden on gun ownership for the lawful purpose of self-defense in the home.[51] In other words, the district court found that the possession of a handgun for self-defense outside of the home was not conduct within the scope of the Second Amendment's constitutional protections.

Having found that section 134-9 did not regulate conduct within the scope of the Second Amendment, the district court could have dismissed the case without moving on to the second step of the inquiry under ordinary circumstances. However, the *Heller* and *McDonald* opinions proved inconclusive as to the scope of the Second Amendment beyond self-defense in the home.[52] In response, federal appellate courts "advised lower courts to await direction from the Supreme Court regarding the Second Amendment's scope outside the home."[53] This requires that district courts proceed to the second step of the inquiry operating under the assumption that the conduct regulated is within the scope of the Second Amendment, even if the court has already determined that the conduct was not within the scope of the Second Amendment. In accordance with this directive, the court found that even if section 134-9 did regulate conduct within the scope of the Second Amendment's protection, the statute would stand up to constitutional muster.[54] To do so, the court applied the "intermediate scrutiny standard for the Second Amendment context" used by district

48. *See id.* at 989–90.

49. *Id.* at 990 (citing HAW. REV. STAT. §§ 134-23, -24, -25, -27 (2019)).

50. *Id.* (citing §§ 134-9, 26).

51. *See id.* (comparing section 134-9 with the statutes challenged in McDonald v. City of Chicago, 561 U.S. 742 (2010)).

52. *See id.* at 988.

53. *Id.* at 990.

54. *See id.*

courts in the Ninth Circuit.[55] To satisfy this standard, the regulation must further a "significant, substantial, or important" governmental objective, and the "regulation must reasonably fit the asserted objective."[56] The court found that Hawaii's firearm carrying laws were implemented and enforced to promote the government's "important and substantial interest" in protecting "the public from the inherent dangers of firearms."[57] The court then found that section 134-9 reasonably fit this objective for three reasons.[58] First, it allowed officials to "differentiate between individuals who need[ed] to carry a gun for self-defense and those who [did] not."[59] Second, it was not an outright ban on firearms.[60] Finally, it only regulated handguns.[61] In accordance with its findings, the court dismissed Young's claim.[62]

B. Appellate Proceedings

Young timely appealed the district court's ruling, arguing that giving state and county officials discretion to issue permits under section 134-9 violated the Second Amendment because that statute was "the only means to bear arms in Hawaii."[63] It is unclear what Young meant by this assertion. The most convincing argument is perhaps that the permitting process outlined in section 134-9 afforded far too much deference to the chief of police in granting permits. However, section 134-9 was narrow in scope; it only regulated the licensing process for obtaining a permit to publicly carry handguns and did not interfere with an individual's right to possess or bear a firearm within his or her home.[64] On appeal, the County defendants emphasized that the Supreme Court's narrow holdings in *McDonald*

55. *Id.*
56. *Id.* at 991 (citing United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010)).
57. *Id.*
58. *See id.*
59. *Id.*
60. *Id.*
61. *See id.*
62. *Id.* at 992.
63. Appellant's Opening Brief at 5, *Young II*, 896 F.3d 1044 (9th Cir. 2018) (No. 12-17808), 2013 WL 663797.
64. *See* HAW. REV. STAT. § 134-9 (2019), *invalidated by Young II*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

and *Heller* reiterated much of the rationale the district court used to uphold section 134-9.[65]

The panel began its analysis[66] by mirroring the *Heller* Court's approach of first analyzing the text of the Second Amendment and then looking to the contemporary understanding of the Second Amendment shortly after the founding of the United States when it was ratified and during the period surrounding the ratification of the Fourteenth Amendment.[67] The panel concluded that the text and historical context of the Second Amendment protected a right to openly carry a firearm in public for self-defense, and thus, section 134-9 burdened conduct protected by the Second Amendment.[68] Then, the panel went on to determine the appropriate level of scrutiny to be applied.[69] The panel utilized a sliding scale to evaluate the appropriate level of scrutiny.[70] Laws that impose such a severe restriction on a core right of the Second Amendment which effectively destroy the right are unconstitutional under any standard of review.[71] Courts apply strict scrutiny when a regulation severely burdens a core right of the Second Amendment.[72] At the other extreme, regulations that do not severely burden a core right of the Second Amendment, but nonetheless burden conduct protected by the Second Amendment, are subject to intermediate scrutiny.[73] The panel relied on its earlier finding, that the Second Amendment protected a right to publicly carry a firearm for self-defense, and found that section 134-9 did affect a core right of the Second Amendment.[74] The panel further found that section 134-9 effectively destroyed that core right, and was therefore unconstitutional under any standard of review.[75] Although the *Young*

65. Defendants-Appellees County of Hawai'i, William P. Kenoi & Harry S. Kubojiri's Answering Brief at 5–6, *Young II*, 896 F.3d 1044 (9th Cir. 2018) (No. 12-17808), 2013 WL 2403526; *see Young I*, 911 F. Supp. 2d at 989–92.

66. The description that follows is a general overview of the Ninth Circuit's approach. Part IV provides a more in-depth analysis for each section of the Ninth Circuit's approach.

67. *See Young II*, 896 F.3d 1044, 1052–68 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.).

68. *Id.* at 1068.

69. *Id.*

70. *Id.* (citing Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016)).

71. *Id.* (citing Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014)).

72. *See Silvester*, 843 F.3d at 821 (citing United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013)).

73. *See Young II*, 896 F.3d at 1068 (citing *Jackson*, 746 F.3d at 961).

74. *Id.* at 1070.

75. *Id.* at 1071.

II panel relied on the appropriate authority, the majority opinion misapplied the standards prescribed by that authority.

III. SECOND AMENDMENT JURISPRUDENCE

A. Supreme Court Precedent

1. *District of Columbia v. Heller*

To better understand the state of the law on the Second Amendment, it is essential to look to the Supreme Court's decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Both decisions define the scope of the Second Amendment as interpreted by the Supreme Court. The decisions also provide trial courts with some guidance as to how alleged violations of the Second Amendment should be examined.

In *Heller*, the Supreme Court found that the Second Amendment guaranteed an individual the "right to possess and carry weapons in case of confrontation."[76] The Court explicitly stated that this "right was not unlimited" and did not permit individuals "to carry arms for *any sort* of confrontation."[77] The Court elaborated, stating that its decision was narrow and would not place in doubt the validity of "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."[78]

The Court then moved on to discuss the scope of the Second Amendment. The law challenged in *Heller* instituted an absolute ban on handgun possession in the home and required that any firearms kept lawfully in the home be rendered inoperable.[79] The Court took issue with both prohibitions.[80] The Court found that the ban on the possession of handguns in the home was unconstitutional for two reasons. First, "the need for defense of self, family, and property is most acute" in the home.[81] Second, a categorical ban on handguns, the

76. District of Columbia v. Heller, 554 U.S. 570, 592 (2008).
77. *Id.* at 595.
78. *Id.* at 626–27.
79. *Id.* at 628.
80. *See id.* at 628–30.
81. *Id.* at 628.

weapon many consider to be the quintessential weapon for home defense, all but obliterated an individual's Second Amendment right.[82]

With respect to the requirement that any firearms kept in the home be rendered inoperable, the Court found that this too was unconstitutional because it made "it impossible for [individuals] to use them for the core lawful purpose of self-defense."[83] Based on this finding, the District of Columbia argued that the Court should read the statute to include an exception for self-defense, so as to avoid invalidating it as a whole.[84] Unconvinced, the Court concluded that the existence of several other enumerated exceptions to the regulatory scheme suggested that an exception for self-defense should not be read into the statute.[85] Based on the Court's concern with failure to explicitly set forth an exception for self-defense, it is possible that the law at issue and others like it would survive constitutional muster so long as the law clearly provides an exception for the lawful purpose of self-defense. Unfortunately, the Court did not establish a cognizable standard of review by which courts are to examine Second Amendment challenges. However, it drew two conclusions. First, any categorical ban on handgun possession in the home violates the Second Amendment.[86] Second, any requirement that lawful firearms in the home be rendered inoperable so that they cannot be used for the lawful purpose of self-defense violates the Second Amendment.[87]

2. *McDonald v. City of Chicago*

The Supreme Court clarified the extent of the Second Amendment's protections two years after *Heller* in *McDonald*, where a city ordinance effectively banned possession of handguns both inside and outside the home.[88] The Court acknowledged that, like the rest of the Bill of Rights, the Second Amendment clearly proscribed federal regulation of conduct protected by the amendment.[89] In fact, Chief Justice Marshall plainly stated that the framers had intended that the first eight amendments of the Bill of Rights only act as limitations

82. *See id.* at 628–29.
83. *Id.* at 630.
84. *See id.*
85. *See id.*
86. *Id.* at 635.
87. *Id.*
88. McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010).
89. *Id.* at 754.

on the federal government and not the states.[90] After the ratification of the Fourteenth Amendment, the Court began to incorporate portions of the Bill of Rights against the states through the Fourteenth Amendment's Due Process Clause.[91] Relying on the Due Process Clause of the Fourteenth Amendment, the Court found that the Second Amendment "right to keep and bear arms is fundamental to our [nation's] scheme of ordered liberty."[92] The Court emphasized that the incorporation of the Second Amendment against the states does not eliminate their ability to regulate conduct protected by the right but rather limits that ability.[93] The Court also reassured state governments that the incorporation of the Second Amendment against the states did not effectively destroy every existing regulation of firearms.[94] The Court's holding may be summed up in one sentence: "the Second Amendment right recognized in *Heller*" is incorporated against the states by way of the Fourteenth Amendment's Due Process Clause.[95]

Limiting the *Heller* and *McDonald* decisions to their facts, the Supreme Court has made it clear that two types of regulations on firearms are facially unconstitutional: categorical bans on handgun ownership and prohibitions on keeping operable firearms in the home. Thus, it is unclear whether the Second Amendment protects the possession of operable firearms, including handguns, outside the home. The Court also did not explain why certain longstanding regulations would be undisturbed by its decisions.[96] This was the precise question raised at trial in *Young I*—whether section 134-9's regulation of the possession of operable firearms outside the home ran afoul of Young's Second Amendment right to bear arms.[97] The district court in *Young I* proposed two possible interpretations, both of which are convincing.[98] The first was that these regulations proscribed conduct that was not protected by the Second Amendment.[99] The second was that although these regulations burdened conduct protected by the Second Amendment, the regulations passed

90. *See id.* (citing Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. 243, 247 (1833)).
91. *See id.* at 759–61.
92. *Id.* at 767 (emphasis omitted).
93. *See id.* at 784–85.
94. *See id.* at 786.
95. *Id.* at 791.
96. *See* District of Columbia v. Heller, 554 U.S. 570, 626–28 (2008).
97. *Young I*, 911 F. Supp. 2d 972, 979 (D. Haw. 2012), *rev'd*, 896 F.3d 1044 (9th Cir. 2018).
98. *See id.* at 990–91.
99. *Id.* at 990.

constitutional muster.[100] Thus, it is evident that certain regulations which do burden conduct protected by the Second Amendment pass constitutional muster. Unfortunately, the lack of a predetermined standard of review makes ascertaining whether or not a law violates the Second Amendment even more challenging. The Supreme Court has yet to establish the level of scrutiny trial courts are expected to apply to firearms regulations challenged on the grounds that they violate the Second Amendment. This has led to varying approaches amongst the circuit courts. To properly evaluate the Ninth Circuit's *Young II* holding, it is essential to understand how the Ninth Circuit evaluates Second Amendment challenges.

B. The Ninth Circuit's Two-Step Inquiry

The Ninth Circuit's leading cases on Second Amendment challenges are *United States v. Chovan*[101] and *Jackson v. City and County of San Francisco*.[102] *Chovan* collected the approaches other circuit courts had taken and ultimately applied the two-step inquiry many other circuit courts had applied.[103] The first step of the inquiry "asks whether the challenged law burdens conduct protected by the Second Amendment."[104] If the answer is in the affirmative, the court must move on to the second step of the inquiry—to determine the "appropriate level of scrutiny" and apply it to the challenged law.[105] The Supreme Court found that rational basis review is not an appropriate level of scrutiny for laws that burden conduct protected by the Second Amendment.[106] Therefore, such laws are evaluated under either intermediate or strict scrutiny.[107]

The Ninth Circuit determines the appropriate level of scrutiny by balancing two factors.[108] The first factor is "how close the law comes to the core of the Second Amendment right."[109] The Ninth Circuit has

100. *Id.* at 991.
101. 735 F.3d 1127 (9th Cir. 2013).
102. 746 F.3d 953 (9th Cir. 2014).
103. *See Chovan*, 735 F.3d at 1136.
104. *Id.* This step appears fairly easy to satisfy; it seems as though the first step is satisfied as long as the challenged law regulates firearm possession in any manner whatsoever.
105. *Id.*
106. District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008); *see Chovan*, 735 F.3d at 1137.
107. *See Chovan*, 735 F.3d at 1137.
108. *See id.* at 1138 (citing Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)).
109. *Id.*

interpreted the core of the Second Amendment right as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[110] For instance, in *Chovan*, the Ninth Circuit found that the challenged law did not come close to the core of the Second Amendment right because it prohibited the possession of firearms by domestic violence misdemeanants who are not "law-abiding citizens" within the definition set forth in *Heller*.[111] In contrast, the Ninth Circuit found that the challenged law in *Jackson* came close to the core of the Second Amendment right because it gave handgun owners two alternatives while in their own homes: either carry their gun on their person at all times or store it in a locked container or with a trigger lock.[112]

The second factor looks to "the severity of the law's burden on the right."[113] Laws that only regulate the manner in which an individual may exercise their Second Amendment right are less burdensome than laws that prohibit firearm possession altogether.[114] In *Chovan*, for example, the challenged law was deemed to impose a substantial burden because it prohibited a particular class of persons from possessing any firearm, although the existence of several exemptions to the law lessened the severity of that burden.[115] However, in *Jackson*, the challenged law was not considered a severe burden because it only burdened the manner in which a person could exercise their Second Amendment right, requiring handgun owners in their own homes to lock their weapons when not carried on their person, rather than absolutely prohibiting the possession of handguns.[116]

This process creates a spectrum of alternative approaches under which courts in the Ninth Circuit may evaluate Second Amendment claims.[117] On one extreme, laws that strike at the core of the Second Amendment right and impose such a severe burden on the exercise of that right "'amount[ ] to a destruction of the . . . right,' [and] [are]

110. *Id.* (quoting *Heller*, 554 U.S. at 635). As noted earlier, many courts are reluctant to expand the holding in *Heller* beyond the possession of firearms in the home for self-defense. *See supra* text accompanying note 46.

111. *See Chovan*, 753 F.3d at 1138; *Heller*, 554 U.S. at 635.

112. Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 963 (9th Cir. 2014).

113. *Chovan*, 753 F.3d at 1138.

114. *See id.*

115. *Id.*

116. *See Jackson*, 746 F.3d at 964–65.

117. *See id.* at 961.

unconstitutional under any level of scrutiny."[118] In the middle are laws that come close to the core of the Second Amendment right and impose a severe burden but do not amount to a destruction of the right.[119] Such laws are presumably subject to strict scrutiny.[120]

At the other end of the spectrum are laws that either do not come close to the core of the Second Amendment right or do not impose a severe burden on the exercise of the right.[121] These laws are subject to intermediate scrutiny and thus require that the regulation furthers an important, significant, or substantial governmental objective and that the regulation is substantially related to that objective.[122] Furthermore, it would appear that neither factor on its own is sufficient to warrant strict scrutiny. By way of example, the *Chovan* court found that the law was a severe burden on conduct protected by the Second Amendment but that the core of the Second Amendment was not implicated.[123] In contrast, the *Jackson* court found that the law implicated the core of the Second Amendment but did not severely burden the Second Amendment right.[124] Nevertheless, the Ninth Circuit analyzed both laws under intermediate scrutiny.[125]

IV. THE *YOUNG II* PANEL'S APPROACH: ANALYSIS AND CRITIQUE

There are two aspects of the *Young II* panel's opinion in particular that prove troublesome. The first is the panel's expansion of the scope of the Second Amendment right to apply outside the home. The second is the panel's application of the Ninth Circuit's two-step inquiry for Second Amendment challenges.

A. Expansion of the Second Amendment Right

The *Young II* panel held that the core of the Second Amendment encapsulates not only the right to possess a firearm within one's home for self-defense but also the right to openly carry a firearm in public

118. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008)).
119. *See Chovan*, 735 F.3d at 1138.
120. *See id.*
121. *See id.*
122. *See id.* at 1138–40.
123. *See supra* notes 111, 115 and accompanying text.
124. *See supra* notes 112, 116 and accompanying text.
125. *See Chovan*, 735 F.3d at 1138; Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 965 (9th Cir. 2014).

for self-defense.[126] The panel did so by emulating the Supreme Court's approach in *Heller* and *McDonald*: first looking to the text of the Second Amendment, then moving on to the history of judicial interpretations of the right to bear arms.[127] One troubling aspect of the panel's historical analysis was its strong emphasis on the right to bear arms in the antebellum South, presenting the views of only two reports which criticized discriminatory policies restricting the right to bear arms of recently freed slaves.[128] What was strikingly absent from the panel's discussion was an analysis of the primary criticism contained within the reports. There are two liberty concerns implicated in prohibiting liberated slaves from possessing firearms. The first is whether this was an assault on the Second Amendment right itself. The second is the fact that these laws categorically denied a class of persons, newly freed slaves, their right to bear arms. However, the panel did not address which of these concerns was at the center of the reports. It is unclear whether the reports were concerned with the negative impact such laws would have on the Second Amendment right in the future or with the fact that the class of newly freed slaves received differential treatment. Furthermore, language from one report emphasized that freedmen needed firearms to hunt.[129] The panel did not, however, highlight the portions of these reports that stressed the need to bear arms for self-defense. Surely the panel would have referenced such discussions if they existed, for those statements would be invaluable evidence supporting the panel's position.

Putting aside the inherent problems with the panel's historical analysis, the panel should not have even conducted such a review because the circuit had implicitly resolved this very issue in a recent decision.[130] In *Peruta v. County of San Diego*,[131] the Ninth Circuit upheld a good cause restriction on obtaining a concealed carry permit in California.[132] A good cause restriction is a type of firearm regulation requiring that applications show that the applicant has "good cause"

126. *See Young II*, 896 F.3d 1044, 1074 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.).

127. *Id.* at 1052–68.

128. *See id.* at 1054–61.

129. *Id.* at 1061.

130. *See* Peruta v. County of San Diego, 824 F.3d 919, 929–39 (9th Cir. 2016).

131. 824 F.3d 919 (9th Cir. 2016).

132. *Id.* at 924.

to carry a firearm.[133] The definition of "good cause" can vary based on the law that instituted the regulation. For instance, the California law at issue in *Peruta* gave county sheriffs authority to establish and publish policies that defined good cause.[134] The sheriffs of San Diego and Yolo Counties defined good cause as "a particularized reason why an applicant need[ed] a concealed firearm for self-defense."[135] This is similar to section 134-9's requirement that an applicant for a concealed carry permit must show reason to fear injury to his or her person or property.[136]

The court was careful to limit the scope of its findings, holding that the decision only applied to the carrying of concealed firearms in public, and not on the right to openly carry firearms in public.[137] While the matter of openly carrying a firearm in public was not the issue in *Peruta*, the court acknowledged the nature of California's firearm regulations, which encapsulate policies for openly carrying a firearm in public and for carrying a concealed firearm in public.[138] California firearms regulations permit concealed carry of firearms in public upon a showing of good cause, while the right to openly carry firearms is restricted, almost to the point of prohibition, with some exceptions.[139] These exceptions are fairly narrow, applying only to peace officers, security guards, and individuals with similar occupations who have completed firearms training; hunters and fishermen while engaged in hunting or fishing; and individuals transporting unloaded firearms to and from a firing range.[140] Once again, this is similar to section 134-9 in that section 134-9 also limited the issuance of public carry permits to those who had a need to possess a firearm in order to engage in the protection of property or persons.[141] Taken together, this suggests that the court found that imposing a good cause requirement on the right to carry a concealed firearm was not unconstitutional, even though obtaining a concealed carry permit was the only way an individual

133. *See id.*
134. *See id.*
135. *Id.*
136. *See* HAW. REV. STAT. § 134-9 (2019), *invalidated by Young II*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).
137. *Peruta*, 824 F.3d at 942.
138. *Id.* at 925.
139. *Id.*
140. *See id.*
141. *See* HAW. REV. STAT. § 134-9 (2019), *invalidated by Young II*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

who did not fall under the statutory exceptions could carry a firearm in public.[142]

The California regulatory scheme analyzed in *Peruta* bears a great deal of similarity to the Hawaii regulatory scheme scrutinized in *Young II*. In fact, section 134-9 was far less restrictive than the law challenged in *Peruta*. Whereas section 134-9 only applied to handguns, a single class of firearms, California's laws apply to all classes of firearms, not just handguns.[143] Thus, it is unclear how the *Young II* panel felt it could contravene the existing circuit precedent in *Peruta* which had implicitly resolved the same question under similar circumstances concerning a law that covered a broader class of firearms.

B. Applying the Appropriate Standard of Review

Even assuming that the *Young II* panel was correct in expanding the Second Amendment right beyond the home, the panel applied the improper standard of review. The panel held that section 134-9 was unconstitutional altogether because it struck directly at the core of the Second Amendment right and imposed such a severe burden on that right that it effectively destroyed this newfound right to carry a firearm openly in public.[144] The panel majority criticized the dissent's view that good cause requirements on open public carry, like section 134-9, did not amount to a destruction of the Second Amendment right and should be analyzed under intermediate scrutiny.[145] The dissent's primary point was that section 134-9 did not foreclose citizens from publicly carrying a firearm in public for self-defense, thus circuit precedent would suggest that the regulation was "less likely to place a severe burden on the Second Amendment right."[146] Though persuasive, the majority hastily dismissed the dissent's argument.[147] The majority found that section 134-9 effectively prohibited concealed

142. *See Peruta*, 824 F.3d at 925.

143. *Compare* HAW. REV. STAT. § 134-9 (2019), *invalidated by Young II*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (describing the process to obtain a permit to carry a loaded handgun in public), *with* CAL. PENAL CODE § 25850 (West 2012) ("A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street.").

144. *See Young II*, 896 F.3d 1044, 1071 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.).

145. *Id.* at 1071–72.

146. *Id.* at 1081 (Clifton, J., dissenting).

147. *Id.* at 1072 (majority opinion).

carry of firearms in public because no concealed carry license had ever been issued by the county.[148] Yet, while the majority claimed that "the dissent must shut its eyes" to this fact, the majority itself averted its eyes from the multiple reasons this could be the case.[149] While it may be true that no permit had ever been issued, the majority failed to provide context to this fact. There was no discussion of how many applicants had previously applied for such a permit. There was no examination of why these earlier applications were denied. There was not even an argument that the prior denials were arbitrary. The majority made it a point to chide the dissent for ignoring a fact while it too failed to provide the context that would make that fact significant.

The majority continued, correctly noting that section 134-9 lacked any provision granting administrative or judicial review to the denial of a permit, unlike some other good cause regimes which had been upheld.[150] The majority criticized the dissent's view that the record in the case was insufficient to place the law's "good cause" element in question at the motion to dismiss stage.[151] The majority's criticism was inadequate. Noticeably absent from Young's complaint and the subsequent moving papers were allegations that he satisfied the exceptional case portion of the statute; he merely emphasized his generalized purpose for applying.[152] On appeal, Young implied that he had been denied the permit because the Hawaii County Chief of Police had found he was unqualified.[153] However, there was no evidence that the Hawaii County Chief of Police denied Young's application because he found Young was unqualified.[154] Rather, it appears Young's application was denied because he failed to establish that he had the requisite reason to fear injury for a concealed carry permit or to sufficiently indicate an urgency or need to obtain an unconcealed carry permit.[155] In his own complaint, Young described the basis of his application in general terms, "for personal security, self-

148. *Id.*
149. *Id.*
150. *Id.*
151. *See id.*
152. Complaint for Deprivation of Civil Rights, *supra* note 20, at 13.
153. Appellant's Opening Brief, *supra* note 63, at 4.
154. *Id.* Indeed, even if this was the basis for Young's denial, the opening brief merely stated that Young was qualified without any explanation of the qualifications he possessed. *Id.*
155. *See* Complaint for Deprivation of Civil Rights, *supra* note 20, at 13.

preservation and defense, and protection of personal family members and property."[156]

Perhaps the most significant challenge to the panel majority's decision is its failure to follow its own circuit precedent for evaluating challenged gun-control laws. Under the Ninth Circuit's Second Amendment jurisprudence, challenged gun-control laws are subject to a two-step inquiry. The panel majority found that the law was unconstitutional on its face, yet the opinion was devoid of any detailed discussion of the Ninth Circuit's well-established two-step inquiry as applied to the facts in *Young I*. No court applying the Ninth Circuit's two-step inquiry could come to such a conclusion absent a thorough examination of what the law regulated and how it did so.

1. Application of the Ninth Circuit's Two-Step Inquiry

The Ninth Circuit determines the appropriate level of scrutiny in challenges to gun-control laws by analyzing "how close the law comes to the core of the Second Amendment right" and "the severity of the law's burden on the right."[157] Under the inquiry, there are three possible outcomes: the law effectively destroys the Second Amendment right and is facially unconstitutional,[158] the law severely burdens the core of the right and is subject to strict scrutiny,[159] and the law either does not come close to the core of the right or does not severely burden the exercise of the right and is subject to intermediate scrutiny.[160]

Prior to *Young II*, the Ninth Circuit interpreted the core of the Second Amendment right as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[161] However, the panel majority believed that the core of the Second Amendment was not limited to self-defense within the home and also included self-defense in public. This Comment will not belabor the bounds of the core of the Second Amendment right; the Supreme Court is likely to

156. *Id.*

157. United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013) (citing Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)).

158. *See* Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014).

159. *See Chovan*, 735 F.3d at 1138.

160. *See, e.g.*, *id.* at 1138–40.

161. *Id.* at 1138 (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

resolve this question by the conclusion of its 2019 term.[162] Assuming the panel was correct in finding that the right to openly carry a firearm in public was within the core of the Second Amendment right, circuit precedent nonetheless demanded that the majority analyze whether section 134-9 imposed such a severe burden on the right that it effectively destroyed it. The panel merely said that the law destroyed that right but did not conduct a sincere analysis of the severity of the burden.

Laws that only regulate the manner in which an individual may exercise their Second Amendment right are less burdensome than laws prohibiting firearm possession altogether.[163] Much like the laws at issue in *Chovan* and *Jackson*, section 134-9 did not act as a blanket prohibition on the possession of firearms. Section 134-9 bears more similarity to the laws challenged in *Chovan* and *Jackson* because it merely regulated the manner in which an individual may openly carry a firearm—only after obtaining a permit from local law enforcement authorities. Moreover, section 134-9 was far from similar to the laws struck down by the Supreme Court in *Heller* and *McDonald*. Both of those laws absolutely prohibited the possession of operable handguns, even within one's own home.

There are two points of divergence between section 134-9 and the laws struck down in *Heller* and *McDonald* that are particularly helpful in understanding why section 134-9 did not severely burden the Second Amendment right. First, the geographic scope of the regulation: in *Heller* and *McDonald*, the challenged laws purported to regulate handgun possession everywhere, including one's own private property. In contrast, section 134-9 applied only to handgun possession in public. Second, the nature of the regulation: the challenged laws in *Heller* and *McDonald* were categorical prohibitions on handgun possession with few exceptions. Section 134-9, however, merely established qualifications for carrying a handgun in public and procedures by which a person could demonstrate that he or she had met those qualifications. Section 134-9 only regulated how an individual may exercise their Second Amendment right. Moreover, it did not come close to a prohibition on handgun possession in public.

162. *Docket Search Results: No. 18-280*, U.S. SUPREME COURT, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-280.html (last visited Feb. 23, 2020).

163. *See Chovan*, 735 F.3d at 1138.

Therefore, it did not severely burden the core of the Second Amendment as expanded by the *Young II* majority. This, in turn, means that section 134-9 was not facially unconstitutional and should have been analyzed under intermediate scrutiny.

2. Subjecting Section 134-9 to Intermediate Scrutiny

The Ninth Circuit's intermediate scrutiny test for regulations that allegedly violate the Second Amendment has two components. First, courts determine whether the regulation furthers a significant government objective.[164] Then, if the law furthers such an objective, the court determines whether the regulation reasonably fits that objective.[165] As the district court explained, the Hawaii legislature's objective in enacting section 134-9 was to protect the public from the danger posed by firearms.[166] The Supreme Court has held that protecting the public's safety is "unquestionably at the core of [a] [s]tate's police power."[167] Furthermore, the Court has noted that a state's exercise of its police powers is presumptively valid, provided that it does not otherwise offend the Constitution.[168] Thus, a gun-control regulation designed to protect the safety of the public is unquestionably a regulation designed to further a significant government objective.

Having determined that section 134-9 furthers a significant government objective, the next step in the inquiry is to determine whether it reasonably fits that objective. It should be of no surprise that some states have taken legislative measures to protect their citizens from the dangers of gun violence, a persistent public safety concern. Handguns in particular account for the vast majority of gun-related homicides.[169] Section 134-9 addressed this danger by isolating handguns as a class and regulating the possession of that class of firearms in public. A law that only regulates who may carry a handgun in public is undoubtedly a reasonable fit for achieving the objective of

164. *Young I*, 911 F. Supp. 2d 972, 991 (D. Haw. 2012), *rev'd*, 896 F.3d 1044 (9th Cir. 2018).

165. *Id.*

166. *Id.* Gun violence statistics certainly justify the state's concern. *See Gun Violence Archive 2019*, *supra* note 3. In 2019 alone there have been 39,429 deaths attributable to firearms. *Id.*

167. Kelley v. Johnson, 425 U.S. 238, 247 (1976).

168. *Id.* at 247–48.

169. *See Expanded Homicide Data Table 8*, FED. BUREAU OF INVESTIGATION: UNIF. CRIME REPORTING, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-8.xls (last visited Feb. 23, 2020).

enhanced public safety. Thus, under the appropriate standard of review, section 134-9 would have been upheld.

V. CONCLUSION

The panel majority in *Young II* suggested that the Supreme Court clearly defined the extent of the Second Amendment in its *Heller* and *McDonald* decisions. This could not be further from the truth. The Court did undeniably resolve the question of whether the Second Amendment protects the right to possess an operable handgun within one's own home for the purpose of self-defense. After *Heller*, circuit courts began to adopt their own frameworks for addressing Second Amendment challenges, with the clear trend being the two-step inquiry,[170] which the Ninth Circuit also follows. Nevertheless, the Court's equivocations in *Heller* have made applying any sort of uniform inquiry difficult. The likely result is future inconsistent rulings in courts across the country. To resolve this concern, there are three things the Supreme Court must do. First, it must settle the discrepancy among circuits by adopting a standard of review for Second Amendment challenges. Given the trend amongst the circuits, the two-step inquiry is perhaps best suited to address these issues because it balances the right as it is understood against the regulatory scope of the law. The inquiry provides for an appropriate standard of review depending on the outcome of the balancing analysis, which is necessarily a fact specific inquiry. This effectively calls upon courts to first determine which facet of the Second Amendment right is implicated and then to evaluate the substantive impact the challenged law has on the right.

In addition to adopting a uniform standard of review for the Second Amendment, the Court must clarify the scope of the right. While *Heller* made it clear that the core of the right included possession of a handgun in the home for self-defense, it did not define what else the core of the right included. In the absence of clear guidance, the panel majority in *Young II* took it upon themselves to extend the core of the right beyond the threshold of the home to permit the open carry of a handgun in public for self-defense without a permit. This failure to clearly define the core of the right has created a dangerous slippery slope. If a circuit court decided that all individuals

170. PECK, *supra* note 12, at 12.

have the right to possess a handgun in public for self-defense without a license, the concern is what comes next. May all drivers of passenger vehicles now carry handguns on their person? Are assault rifles self-defense weapons? What about rifles in the possession of game hunters en route to their hunting grounds? The vague bounds of the right set out in *Heller* offer no clear guidance for lower courts.

As the top judicial authority in the nation, it is the Supreme Court's responsibility to reconcile diverging opinions amongst the circuit courts, as inconsistent standards have developed, to ensure uniform application of the laws. This is particularly important when the law in question is part of the Bill of Rights. Perhaps the reluctance to draw a bright line stems from a desire to adhere to the original intent of the framers, who were themselves far from clear in their intent. While this desire is understandable, it is undeniable that the technology of today differs vastly from that of the late eighteenth century. Today, there is a multitude of firearms available for a variety of purposes: home defense, hunting, military use—the list goes on. Each of these weapons varies in their ammunition capacity and their destructive capabilities. Yet this arsenal of weaponry was not available, and quite possibly inconceivable, at the founding. There was but a single standard issue firearm amongst members of the continental army: the single shot musket. This very same weapon used in the fight for our nation's independence was the same weapon used by colonists in defense of home and for hunting. Thus, it is erroneous to impute such an expansive view of the Second Amendment to the framers because of the significant variance between the technological realities of their time and those of the modern era.

Finally, the Court must clarify what limitations on the right are permissible. In *Heller*, the Court noted that several longstanding firearm restrictions, including prohibitions on carrying firearms in certain locations, possession of firearms by certain classes of people, and imposing qualifications for commercial sales of firearms, would be unaffected.[171] Though the Court was silent as to why these prohibitions would remain intact, each of these regulations furthers an important government interest: the preservation of the public's safety. For example, the *Heller* Court noted that regulations imposing qualifications on the commercial sale of firearms are presumptively

171. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

lawful.[172] Today, however, gun sales can be consummated online by unlicensed vendors.[173] Even more startling than off-market sales is the availability of blueprints to create a 3D-printed gun within the confines of one's own home.[174] The gun is untraceable by authorities and requires no background check.[175] While there certainly is a distinction between regulation of the possession of firearms and imposing qualifications on the sale of firearms, the goal is the same—ensuring that firearms do not come into possession of individuals who should not possess them. However, when individuals can easily take advantage of gaps in the law and circumvent regulations by way of off-market transactions or self-manufacturing, the regulations fail to do what they are designed to do—keep Americans safe. Thus, states must turn to regulations that restrict the areas where individuals may carry firearms. This is perhaps the reason why some states find restrictions on the possession of firearms in public to be a workable alternative—because imposing qualifications on vendors who sell firearms is simply ineffective at achieving the ultimate goal of maintaining the safety of their citizens. Thus, it is imperative that the Court clarify what kinds of regulations severely burden the right to bear arms. Based on the majority opinion in *Heller*, it seems reasonable that a regulation imposing qualifications on one's ability to possess a firearm would not severely burden the right, provided that the regulation does not amount to a prohibition, excepting, of course, for certain extenuating circumstances.

Gun violence is a serious concern to the American public, a harsh reality that affects Americans every single day. No legislation, court ruling, or executive order is likely to change that fact overnight. Furthermore, there will always be those who believe gun-control regulations go too far, and those who argue that the regulations do not go far enough. The plain language of the Second Amendment has yielded an amorphous right, one that would benefit from clarity. Congress has proven to be ineffective at passing any meaningful gun-control legislation time and time again. Thus, the responsibility to clarify the bounds of the Second Amendment falls on the Supreme

172. *Id.*

173. *See Gun Laws, Loopholes, and Violence*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, https://www.bradyunited.org/issue/laws-and-loopholes (last visited Feb. 23, 2020).

174. *Emerging Dangers*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, https://www.bradyunited.org/issue/emerging-dangers (last visited Feb. 23, 2020).

175. *Id.*

Court by way of its power to interpret the Constitution. An established analytical framework for Second Amendment challenges and clarification on the extent of the right would give Congress and state legislatures a concrete understanding of the Second Amendment. A defined Second Amendment standard will enable legislative bodies to focus on how a proposed policy best protects the American people from the dangers of gun violence and not belabor the potential constitutional challenges to that policy.