PASSIVE VIRTUES AND THE SECOND AMENDMENT

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2016 MICH. ST. L. REV. 1357

ABSTRACT

When the Supreme Court decided District of Columbia v. Heller *and* McDonald v. City of Chicago*, the Court left the U.S. Circuit Courts of Appeal to decide the last remaining major Second Amendment issue: whether the right to bear arms extends outside of the home. Eventually, a circuit split developed over the issue of whether the Second Amendment applied outside of the home and what types of burdens on that right were permissible. The various circuits disagreed on the type of analysis that was required and the historical importance of the Second Amendment. Thus, the issue of whether the Second Amendment extends outside of the home may be ripe for a decision by the Supreme Court.*

If the Supreme Court were to resolve this circuit split, then it may remove a contentious issue from the political process resulting in social and political backlash that may damage the Court's legitimate role as interpreter of the Constitution. The Court should employ Deliberative Democratic theory and Judicial Minimalism to ensure that the social and political backlash that followed the Court's Roe v. Wade *decision does not reoccur. Using Deliberative Democratic theory to resolve the circuit split, the Court would consider the interests of both sides and structure the holding to be reasonably acceptable to both sides of the issue. Furthermore, by using Judicial Minimalism, the Court would be able to limit the negative externalities of a broad holding by deciding a narrow issue. Last, by applying these theories, the Court will be able to avoid the*

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social and political backlash that may follow a highly contentious decision. By avoiding backlash from an overbroad decision, the Court would be ensuring that deliberation on the topic of gun rights can lead to a more democratic result in the realm of gun rights. Thus, the Court would avoid having its holding redefined or reinterpreted by future Courts, like the Roe *decision was in 1992. The Court, in focusing on the theories of Deliberative Democracy and Judicial Minimalism in crafting its decision, would ensure that the Second Amendment remains a strong fundamental right for years to come.*

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INTRODUCTION

Imagine two counties, one in New York and one in California, where the local governments have decided that general self-defense is not a sufficient reason for a person to be permitted to carry a concealed weapon.[1] In this hypothetical, the legislatures have required that a person seeking a concealed weapons permit show "good cause" to receive a permit.[2] Two people, one in New York and one in California, are seeking to carry a gun for general self-defense.[3] Each person is denied a concealed weapons permit for a lack of "good cause" and brings suit in federal district court claiming that their Second Amendment right has been infringed.[4] On appeal, the circuit courts perform radically different analyses and come to similar conclusions.[5] The Ninth Circuit performs a historical analysis of the Second Amendment, does little to address the individual plaintiff's argument supporting the right to bear arms in self-defense outside of the home, and holds that there is not and never has been a right to bear arms outside of the home.[6] The Second Circuit does a thorough analysis of the interests of both parties and concludes that the regulation was a permissible burden on the Second Amendment.[7] Unfortunately, neither circuit has rendered a democratically legitimate decision.[8]

Despite the Second Circuit correctly analyzing the issue by considering the legitimate interests of both sides, the court incorrectly held that the fundamental right to keep and bear arms for

1. *See* Peruta v. Cty. of San Diego, 824 F.3d 919, 927 (9th Cir. 2016); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 83 (2d Cir. 2012).
2. *See Peruta*, 824 F.3d at 924; *Kachalsky*, 701 F.3d at 83.
3. *See Peruta*, 824 F.3d at 924; *Kachalsky*, 701 F.3d at 83.
4. *See Peruta*, 824 F.3d at 924; *Kachalsky*, 701 F.3d at 83.
5. *See Peruta*, 824 F.3d at 929-39 (using a thorough historical analysis of the Second Amendment to determine whether the right to bear arms exists outside of the home); *Kachalsky*, 701 F.3d at 88-101 (assuming that the right to bear arms exists outside of the home and analyzing the interests of both the government and the plaintiff before reaching a conclusion).
6. *See Peruta*, 824 F.3d at 929-39.
7. *See Kachalsky*, 701 F.3d at 88-101.
8. *See infra* Part III (discussing the requirements of Deliberative Democracy and Judicial Minimalism that can help judges render more democratic decisions).

the purpose of self-defense did not extend outside of the home.[9] Furthermore, the Ninth Circuit also incorrectly decided the issue, incorrectly analyzed the issue, and paid little attention to the legitimate interests of the individual plaintiff in carrying a gun for self-defense.[10] Thus, the Ninth Circuit did little to democratically justify its decision by addressing counterarguments, while the Second Circuit gave little weight to the historical understanding of the Second Amendment.[11] The disparities in the analyses and holdings of these courts are just two of the problems that have arisen out of this circuit split, which includes three other circuits.[12]

The Second Amendment of the U.S. Constitution states that "[a] well regulated [m]ilitia, being necessary to the security of a free State, the right of the people to keep and bear [a]rms, shall not be infringed."[13] The Second Amendment has been interpreted to limit the federal government's power in the field of firearm regulation.[14] However, a state may restrict a citizen's Second Amendment right under the states' police power.[15] As a result, many states have adopted regulations concerning citizens' ownership of guns.[16] Regardless of the regulation of guns, the Supreme Court has concluded, through a historical analysis, that gun ownership is an individual right that is unrelated to militia service.[17]

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9. *See Kachalsky*, 701 F.3d at 101 (analyzing the interests of both parties and holding that "New York's proper cause requirement is constitutional under the Second Amendment as applied to Plaintiffs").

10. *See Peruta*, 824 F.3d at 929-39 (analyzing the history of carrying weapons outside of the home and holding that there is no individual right to carry a concealed weapon outside of the home).

11. *See id.* at 924-42 (failing to acknowledge any existing counter-argument and the plaintiff's arguably valid interest in carrying a concealed weapon); *Kachalsky*, 701 F.3d at 88-101.

12. *See infra* Part II (discussing the disagreement among the circuits concerning whether the right to bear arms in self-defense outside of the home is infringed by good cause requirements).

13. U.S. CONST. amend. II.

14. District of Columbia v. Heller, 554 U.S. 570, 619-20 (2008) (citing United States v. Cruikshank, 92 U.S. 542, 553 (1875)).

15. *Id.* at 620.

16. *See Peruta*, 824 F.3d at 925-27 (summarizing the requirements of California's regulation of firearms, which requires citizens seeking a concealed weapons permit to establish "good cause"); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012) (summarizing the "proper cause" requirement of section 400.00(2)(f) of the New York Penal Law); Drake v. Filko, 724 F.3d 426, 428 (3d Cir. 2013) (summarizing the "justifiable need" requirement of section 13:54-2.4(d)(1) of the New Jersey Administrative Code).

17. *Heller*, 554 U.S. at 605.

The Supreme Court's holding on the issue of gun rights in *District of Columbia v. Heller* struck down the District of Columbia's ban on keeping handguns within the home.[18] In *Heller*, the Court held that an outright ban on handguns for the use of self-defense within the home was unconstitutional because the ban was inconsistent with the individual right to bear arms in self-defense.[19] Following *Heller*, the Court decided *McDonald v. City of Chicago* in which the Court held that the Second Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.[20] In *McDonald*, the Court held that the right to keep and bear arms was a fundamental right as evidenced by Second Amendment interpretations from the colonial period through the Supreme Court's holding in *Heller* in 2008.[21] Thus, the issues of whether the right to bear arms within the home is protected by the Second Amendment and whether that right is a fundamental liberty has already been decided by the Supreme Court, leaving the issue of whether the right to bear arms extends outside of the home to be decided by the circuit courts.[22]

The Ninth Circuit's holding in *Peruta v. County of San Diego* widened the circuit split concerning the issue of whether the Second Amendment protects a right to bear arms outside of the home.[23] The

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18. *Id.* at 628-29.

19. *Id.* at 628.

20. *See* McDonald v. City of Chi., 561 U.S. 742, 791 (2010) ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." (citation omitted)).

21. *Id.* at 767-78 (examining "whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty"). For a thorough examination of the history of interpretations of the Second Amendment as a fundamental right, see Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 56-71 (2007).

22. *See Heller*, 554 U.S. 570, 635 (2008) ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."); *McDonald*, 561 U.S. at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

23. *See* Peruta v. Cty. of San Diego, 824 F.3d 919, 939 (9th Cir. 2016) ("In so holding, we join several of our sister circuits that have upheld the authority of

Ninth Circuit sided with the Second, Third, and Fourth Circuits on the issue of concealed carry against the holding of the Seventh Circuit.[24] The Second, Third, and Fourth Circuits refused to take a purely historical approach to interpreting the Second Amendment.[25] If the Supreme Court were to decide the issue of whether the right to bear arms extends outside of the home, it would be removing another contentious issue concerning the Second Amendment from political discourse within an eight year timeframe.[26] Such a drastic change in a short period of time may result in political backlash not seen since the Court's decision in *Roe v. Wade*.[27] In order to avoid the political backlash of broad decisions that remove controversial issues from political discourse, the Court should ensure that its opinion does not permanently foreclose political debate on the issue and is as narrow as possible to avoid unseen externalities of the opinion.[28]

Part I discusses the history of the Second Amendment. Furthermore, Part I presents Deliberative Democratic theory (also known as Deliberative Democracy) and Judicial Minimalism as possible solutions to the circuit split. Last, Part I discusses the political backlash of *Roe v. Wade* that the Court should strive to avoid when making its next controversial decision in the context of the Second Amendment. Part II analyzes the Seventh Circuit decision on this issue and the circuit split that resulted from holdings in the Second, Third, Fourth, and Ninth Circuits. Finally, Part III argues that the Supreme Court should take a prudential position on the issue of whether the Second Amendment extends outside of the home. By invoking the theories of Deliberative Democracy and Judicial Minimalism, the Court may avoid the political backlash that may result from political groups becoming further entrenched in their views.

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states to prohibit entirely or to limit substantially the carrying of concealed or concealable firearms.").

24. *See id.*

25. *See id.* at 939 (summarizing the analytical approaches of the Second, Third, and Fourth Circuits on the issue of whether the Second Amendment bestowed the right to carry guns outside of the home).

26. *See infra* Part III; *see also* Subsections I.A.4.a-b.

27. *See infra* Section I.D.

28. *See infra* Part III.

I. DEFINING THE SECOND AMENDMENT, DELIBERATIVE DEMOCRACY, JUDICIAL MINIMALISM, AND *ROE V. WADE* BACKLASH

The Supreme Court has utilized the Individual Right theory in interpreting the Second Amendment, making the Individual Right theory the primary theory for Second Amendment analysis.[29] Individual Right theorists have focused exclusively on the history of the Amendment and have concluded that the historical purpose of the Amendment was to ensure that there was an armed American citizenry to fight against any threat to liberty.[30] However, the Second Amendment does not confer an unlimited right, despite the fact that the Supreme Court has deemed the right to keep and bear arms as fundamental.[31] Furthermore, the current Court is far from a unanimous agreement on whether the Second Amendment confers a right to individuals or to the states to form a militia.[32] The theories of Deliberative Democracy and Judicial Minimalism may serve as a useful guide for the Court in ensuring that debate on the issue of whether the right to bear arms extends outside of the home is not prematurely ended.[33] Specifically, Deliberative Democracy would require the Court to address the interests of both sides, while rendering a decision that may be reasonably accepted by all sides.[34] Similarly, Judicial Minimalism would require the Court to limit its holding to the case in front of it, while limiting the amount of dicta that may broaden the opinion beyond the Court's intended scope.[35] Scholars suggest that the Court's incorporation of Deliberative Democratic theory and Judicial Minimalism would help to avoid the backlash that may follow when a contentious issue, such as the correct interpretation of the Second Amendment or the right to an abortion, is removed from political discourse by the Court.[36]

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29. *See infra* Subsection I.A.1; *see also* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (concluding that "the Second Amendment conferred an individual right to keep and bear arms"); McDonald v. City of Chi., 561 U.S. 742, 791 (2010) (concluding that the individual right mentioned in *Heller* is fundamental to individual liberty).
30. *See infra* Subsection I.A.2.
31. *See infra* Subsections I.A.3-4.
32. *See infra* Subsection I.A.4.
33. *See infra* Sections I.B-D.
34. *See infra* Section I.B.
35. *See infra* Section I.C.
36. *See infra* Sections I.B-D.

A. The Second Amendment

The majorities in *Heller*,[37] *McDonald*,[38] and *Peruta*[39] each undertook a historical analysis to determine whether the Framers intended to confer an individual right with the Second Amendment, but for different reasons. The majority in *Heller* used a historical approach to determine whether the Second Amendment bestowed an individual right to keep and bear arms within an individual's home.[40] Similarly, the *McDonald* Court analyzed whether the Second Amendment right to keep and bear arms was a fundamental right that should be applied to the states.[41] Finally, the majority in *Peruta* mirrored the historical analysis in *Heller* to determine whether the Second Amendment bestowed an individual right to keep and bear arms outside of the home.[42] In all three cases, the Supreme Court and the Ninth Circuit used historical state court decisions, documents, and treatises from the founding era to inform their analysis of the Second Amendment.[43]

However, decisions such as *Heller*, *McDonald*, and *Peruta* were not made in a vacuum and surely took into account the competing Second Amendment theories arguing for and against the Second Amendment as an individual right.[44] Interpreting the Second Amendment requires both statutory and historical analysis.[45]

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37. *See* District of Columbia v. Heller, 554 U.S. 570, 605-19 (2008) (analyzing the historical understanding of the Second Amendment from ratification to the nineteenth century in the context of whether the amendment bestowed an individual right).

38. *See* McDonald v. City of Chi., 561 U.S. 742, 768-78 (2010) (analyzing the historical understanding of the Second Amendment from the ratification of the Second Amendment to the ratification of the Fourteenth Amendment to determine whether the right to keep and bear arms is a fundamental right).

39. *See* Peruta v. Cty. of San Diego, 824 F.3d 919, 929-39 (9th Cir. 2016) (analyzing the historical understanding of the Second Amendment from ratification through the nineteenth century to determine whether the right to keep and bear arms extends to outside of the home).

40. *See Heller*, 554 U.S. at 605-19.

41. *See McDonald*, 561 U.S. at 768-78.

42. *See Peruta*, 824 F.3d at 929-39.

43. *See Heller*, 554 U.S. at 605-19; *McDonald*, 561 U.S. at 768-78; *Peruta*, 824 F.3d at 929-39.

44. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983) (describing the rise of two opposing interpretations of the Second Amendment).

45. *See Heller*, 554 U.S. at 592 (using statutory interpretation to conclude that the text of the Amendment guarantees an individual right to keep and bear

Proponents of the two competing Second Amendment interpretations have undertaken both a historical and statutory analysis and have come to differing conclusions.[46] Not surprisingly, the issue of whether the right to bear arms extends outside of the home resulted in similar analyses, but different conclusions.[47] This Section will present the various cases and types of analyses that constitutional scholars and the federal circuit courts have used to analyze the Second Amendment, beginning with the dominant Second Amendment theory: the Individual Right theory.[48]

1. *The Individual Right Theory*

The Individual Right theory enjoys wide acceptance among the general population, nonlegal scholars, and the Supreme Court.[49] Opponents of the Individual Right theory often point to the prefatory clause of the Amendment as proof that the Amendment was not intended to bestow an individual right.[50] The Amendment states that

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arms); *id.* (concluding, through historical analysis, that the Second Amendment is an individual right).

46. *See id.* at 606-10 (concluding, through historical analysis, that the overwhelming majority of commentators agree that individuals were meant to be armed under the Second Amendment); *id.* at 643 (Stevens, J., dissenting) (concluding, through historical analysis, that the Second Amendment bestowed a right to the states to form a militia); *id.* at 592 (majority opinion) (concluding that the text of the Amendment guarantees an individual right to keep and bear arms); *id.* at 643 (Stevens, J., dissenting) (arguing that the prefatory clause of the Second Amendment guarantees the use of firearms for a military purpose in a militia).

47. *See generally Peruta*, 824 F.3d 919; Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012); Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2012).

48. *See infra* Subsections I.A.1-4.

49. *See* Kates, *supra* note 44, at 206 ("The individual right view is endorsed by only a minority of legal scholars, but accepted by a majority of the general populace who, through supporting the idea of controlling guns, increasingly oppose their prohibition, believing that law-abiding citizens may properly have them for self-defense."); *Heller*, 554 U.S. at 592 (concluding that the text of the Second Amendment guarantees an individual right to keep and bear arms).

50. *See* Kates, *supra* note 44, at 214 (Individual Rights opponents' "analyses have tended not to come to grips with these obstacles; if they focus on the amendment's wording at all, it is only on the word 'militia,' assuming that the Framers meant 'militia' to refer to 'a particular military force,' *i.e.*, the states' home reserve").

a militia is necessary for the security of a free State[51] and Individual Right opponents have latched onto this prefatory clause as stating the clear purpose for the Amendment.[52] However, a historical analysis of the word "militia" reveals that the Framers of the Constitution made an assumption about the population that many would not make today.[53] The Framers of the Constitution assumed that the citizenry would be armed and would, thus, be able to form the militia that the Amendment alluded to.[54] Therefore, the Individual Right opponents are correct when they argue that the Framers' intent for the Second Amendment was to ensure that a militia could be called up at any time, but they do not agree with the assumption by Individual Right theorists that the Framers also intended to create a right to personal gun ownership.[55]

Furthermore, the Amendment clearly states that "the right of the people to keep and bear [a]rms, shall not be infringed."[56] The plain language of the Amendment, which confers a right to the people, supports the construction that the Second Amendment right is one that is enjoyed by individuals, and not by the states as the arbiter of the militia.[57] Also, the phrase "the people" has been used throughout the Bill of Rights and has been interpreted by the Supreme Court to confer individual rights to the people.[58] Individual Right theorists argue that if the Second Amendment confers a state's right, not an individual one,

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51. U.S. CONST. amend. II ("A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.").

52. *See* Kates, *supra* note 44, at 214.

53. *See id.* at 217 ("In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia. In this respect it would never have occurred to the Founders to differentiate between the arms of the two groups in the context of the amendment's language.").

54. *See id.* ("The personally owned arms of the individual were the arms of the militia.").

55. *See id.* at 217-18 ("Thus, the amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.").

56. U.S. CONST. amend. II.

57. *See* Kates, *supra* note 44, at 218 (arguing that it would be illogical to think "that the Framers ill-advisedly used the phrase 'right of the people' to describe what was being guaranteed when what they actually meant was 'right of the states'").

58. *See id.* at 218 ("The phrase 'the people' appears in four other provisions of the Bill of Rights, always denoting rights pertaining to individuals.").

> [T]he following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used "right of the people" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to states; (3) but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment.[59]

The Individual Right theorists believe that their structural argument concerning the use of "right of the people" is a convincing one, especially in light of the first Congress's clear intention to distinguish "the people" from "the states" in the text of the Tenth Amendment.[60] Thus, Individual Right theorists have a convincing structural statutory interpretation argument that relies on the notion that the Framers' use of "right of the people" was meant to actually confer a right to individual people, not to the militias in the states.[61] Individual Right theorists suggest it would be unreasonable to assume that the Framers meant to confer a right to the states by using the wording "right of the people," when the Tenth Amendment actually confers rights to the states by specifically addressing the states in the text.[62]

2. *The Historical Purposes of the Second Amendment*

The two purposes of the Second Amendment, according to Individual Right theorists, are: (1) to provide citizens with a means of self-defense; and (2) to serve as a check on tyranny.[63] The overall purpose, which would encompass these two specific purposes, was to give citizens the right to protect themselves from *anyone* seeking to infringe their individual liberty.[64] The right to self-defense against the

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59. *Id.*
60. *See id.*
61. *See id.*
62. *See id.*
63. *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 467 (1995) (recognizing that Individual Right theorists believe that the Second Amendment serves the purposes of providing citizens the ability to use self-defense and as a check on government tyranny).
64. *See id.* (arguing that the Second Amendment "allowed individuals to defend themselves from outlaws of all kinds—not only ordinary criminals, but also soldiers and government officials who exceeded their authority, for in the legal and philosophical framework of the time no distinction was made between the two").

tyranny of the government was considered synonymous with the right to self-defense against common criminals.[65] While the commentators of the nineteenth century identified the two purposes as distinct purposes, many of them agreed that the Individual Right theory was supported by the Second Amendment.[66]

The purposes of the Second Amendment, as well as the Individual Right theory, can be traced back to the English Bill of Rights and American colonial practice.[67] The American right to bear arms, codified in the Second Amendment, was an expansion of the English Bill of Rights and was in agreement with the colonial precedent of keeping and bearing arms for individual protection.[68] Thus, the self-defense justification of the right to bear arms is inextricably tied to the English Bill of Rights and colonial practice, which provided the foundation for the Second Amendment.[69] Furthermore, the Framers of the Constitution explicitly rejected language that would link the right to bear arms solely to the common defense of the nation.[70] Second Amendment scholars argue that the Framers intended to provide society with arms under the assumption that private arms in the hands of citizens would help defend their liberties against any infringers.[71] Therefore, the reasons the Framers adopted the Second Amendment, to protect against tyranny and for general self-defense, may still be useful to Americans today.

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65. *See id.*

66. *See id.* at 470 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890, at 746 (Melville M. Bigelow ed., Da Capo Press 1970) (1891); Thomas M. Cooley, *The Abnegation of Self-Government*, PRINCETON REV. 209, 213-14 (1883)).

67. *See* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 162 (1994) ("Such an individual right was a legacy of the English Bill of Rights. This is also plain from American colonial practice, the debates over the Constitution, and state proposals for what was to become the Second Amendment.").

68. *See id.* ("In keeping with colonial precedent, the American article broadened the English protections. English restrictions had limited the right to have arms to Protestants and made the type and quantity of such weapons dependent upon what was deemed 'suitable' to a person's 'condition.'").

69. *See id.*

70. *See id.* ("These privately owned arms were meant to serve a larger purpose as well, albeit the American framers of the Second Amendment, like their English predecessors, rejected language linking their right to 'the common defence.' When, as Blackstone phrased it, 'the sanctions of society and laws are found insufficient to restrain the violence of oppression,' these private weapons would afford the people the means to vindicate their liberties." (citation omitted)).

71. *See id.*

3. *Widely Accepted Limits on the Second Amendment*

The Supreme Court has long recognized that the right is subject to government regulation, especially by the states.[72] In *Heller* and *McDonald*, the Supreme Court made it clear that an outright ban on weapons inside the home destroyed the Second Amendment right to keep and bear arms.[73] However, in both decisions, the Court noted that the Second Amendment may be regulated and that common-sense regulations would not infringe the Second Amendment.[74] The Court recognized that, like most rights in the Bill of Rights, the rights conferred by the Second Amendment are not unlimited.[75] Furthermore, the Second Amendment right has long been considered an area of the Constitution that is subject to heavy regulation by the states.[76] As a result, courts have held that restrictions like licensing laws, background checks, and waiting periods are not inconsistent with the Second Amendment right to keep and bear arms.[77]

This rise in the regulation of guns by the states was a direct result of the Supreme Court's decision in *United States v. Cruikshank*,[78] in which the Court left the issue of gun regulation

72. *See* District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).

73. *See id.* at 628-29 (holding that an outright ban on handguns "under any . . . standard[] of scrutiny . . . would fail constitutional muster"); McDonald v. City of Chi., 561 U.S. 742, 791 (2010) (holding that the Second Amendment is a fundamental right that applies to the states and that an outright ban of handguns by the state is unconstitutional).

74. *See Heller*, 554 U.S. at 626-27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); *McDonald*, 561 U.S. at 786 (recognizing the longstanding prohibitions of firearms listed in *Heller* and stating that those longstanding prohibitions are not hindered by the Court's holding).

75. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

76. *See* United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that the Second Amendment only limits the federal government's power in relation to gun rights).

77. *See* Reynolds, *supra* note 63, at 481 ("Furthermore, licensing laws, background checks, and waiting periods—so long as all are reasonable and not simply covert efforts at restricting the availability of guns to those who qualify—do not violate the right, arguments of overzealous gun enthusiasts to the contrary notwithstanding.").

78. 92 U.S. 542 (1875).

exclusively to the states.[79] As a result, states have devised creative ways to regulate guns, such as the "good cause" statutes that states like New York, New Jersey, and Maryland have adopted, which limit the ability of a person to carry a concealed weapon for the sole purpose of self-defense.[80] However, these statutes were met with opposition by citizens arguing that the statutes effectively destroyed what they believed was their right to carry a weapon outside of the home for the purpose of self-defense.[81] The existing circuit split heavily favors "good cause" statutes as being permissible under *Heller* and *McDonald*.[82] Thus, reasonable regulations of guns by the states are legal, but states may never impose an outright ban, or what may amount to an outright ban, on guns under *Heller*.[83]

4. *Defining the Second Amendment in the Wake of* Heller *and* McDonald

Second Amendment jurisprudence was changed drastically as a result of the Supreme Court's decisions in *Heller*[84] and *McDonald*.[85] As a result of these "maximalist" decisions, the Supreme Court solidified the individual right to keep and bear arms while incorporating the Amendment to apply to state governments as

79. *See id.* at 553.

80. *See* Drake v. Filko, 724 F.3d 426, 431-32 (3d Cir. 2013) (upholding New Jersey's law requiring an applicant to show a "justifiable need" to receive a concealed weapons permit); Woollard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013) (upholding Maryland's "good-and-substantial-reason" requirement to receive a concealed weapons permit); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) (upholding a New York law requiring an applicant to show "proper cause").

81. *See* Peruta v. Cty. of San Diego, 824 F.3d 919, 924 (9th Cir. 2016) (describing the appellants' argument "that their counties' definitions of good cause violate their Second Amendment right to keep and bear arms" by requiring that they demonstrate "'good cause' to carry a concealed firearm"); Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012) (describing the challenge to the Illinois law that resulted in an outright ban on carrying guns in public).

82. *See Drake*, 724 F.3d at 431-32 (upholding New Jersey's law requiring an applicant to show a "justifiable need" to receive a concealed weapons permit); *Woollard*, 712 F.3d at 868 (upholding Maryland's "good-and-substantial-reason" requirement to receive a concealed weapons permit); *Kachalsky*, 701 F.3d at 101 (upholding the "proper cause" statute under intermediate scrutiny and giving deference to the legislature to make policy decisions concerning guns).

83. *See* District of Columbia v. Heller, 554 U.S. 570, 626-28 (2008).

84. 554 U.S. 570 (2008).

85. 561 U.S. 742 (2010).

well.[86] Thus, when the Court decided two issues concerning the right to keep and bear arms, it effectively removed them from public discourse.[87] The Court, in *Heller*, held that the right to keep and bear arms within one's home is an individual right.[88] In *McDonald*, the Court held that the Second Amendment conferred a fundamental right and that the Due Process Clause incorporates the Second Amendment right.[89] Thus, two issues were removed from public discourse in a dramatically short time span and, as a result, Second Amendment jurisprudence changed drastically.[90]

a. *District of Columbia v. Heller*

In *Heller*, the Court addressed the issue of whether the District of Columbia's outright ban on handguns was prohibited by the Second Amendment.[91] The District's laws, which made it a crime to carry an unregistered handgun and prohibited the registration of handguns, effectively resulted in a ban on keeping any handguns inside the District of Columbia.[92] The Court held that the Second Amendment conferred the right to keep and bear arms to

86. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 27 (1996) ("A court that is determined to be maximalist may fill its opinion with broad pronouncements . . . .").

87. *See Heller*, 554 U.S. at 628-29 (holding that an outright ban on handguns would fail constitutional muster under any standard of scrutiny); *McDonald*, 561 U.S. at 791 (holding that the Second Amendment is a fundamental right that applies to the states and that an outright ban of handguns by the state is unconstitutional).

88. *See Heller*, 554 U.S. at 595.

89. *See McDonald*, 561 U.S. at 791 (holding that the Second Amendment is a fundamental right that applies to the states and that an outright ban of handguns by the state is unconstitutional).

90. The third issue concerning the Second Amendment is this issue presented by the circuit split discussed in this note of whether the Second Amendment right extends to carrying weapons outside of the home. If the Supreme Court were to decide whether the right extends to outside of the home this year, the Supreme Court would likely have concluded all major Second Amendment Jurisprudence within a seven-year span. *See infra* Part II.

91. *See Heller*, 554 U.S. at 573.

92. *See id.* at 574-75.

individuals.[93] However, the Court limited its interpretation of the Second Amendment to keeping and bearing arms within the home.[94]

To begin the analysis, the Court interpreted both the "operative" clause and the "prefatory" clause separately to determine their individual meanings.[95] The Court, in interpreting the operative clause, concluded that the phrase "right of the people" suggests that the right is one conferred upon individuals.[96] The Court agreed with the Individual Right approach that individual rights conferred by the Constitution have the following two structural ingredients: a "right" that is attributed to "the people."[97] Next, the Court concluded that the word "arms" has the same meaning today as it did in the eighteenth century.[98] According to the Court, the word "arms" referred "to weapons that were not specifically designed for military use and were not employed in a military capacity."[99] Next, the Court relied on *Muscarello v. United States*,[100] in which the Court defined the meaning of "bear arms" as to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action."[101] These two interpretations of the separate elements of the operative clause supported the Court's later conclusion that the operative clause guarantees an individual the right to bear arms in case of confrontation.[102]

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93. *See id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

94. *See id.* at 635 ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

95. *See id.* at 579-600 (discussing the meaning of the operative clause and the prefatory clause of the Second Amendment separately).

96. *See id.* at 579-80.

97. *Compare id.* at 580, *with* Kates, *supra* note 44, at 218.

98. *See Heller*, 554 U.S. at 581 ("Before addressing the verbs 'keep' and 'bear,' we interpret their object: 'Arms.' The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined 'arms' as '[w]eapons of offence, or armour of defence.'").

99. *Id.*

100. 524 U.S. 125 (1998).

101. *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143).

102. *See 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.").

Next, the Court turned to its analysis of the prefatory clause to determine if it also supported an Individual Right interpretation.[103] The Court identified the prefatory clause as "[a] well regulated Militia, being necessary to the security of a free State."[104] The Court relied on the definition of the word "militia" from *United States v. Miller*,[105] in which the Court held that "the Militia comprised all males physically capable of acting in concert for the common defense."[106] However, the *Miller* Court rejected the construction that the word "militia" referred exclusively to those able-bodied men convened by the states or by Congress.[107] The Court held that the Constitution assumes that the militia already exists—Congress merely has the power to call for the militia.[108] Finally, the Court concluded that the meaning of the wording "Security of a Free State" means the security of a free country, not each individual state.[109] Therefore, the Court concluded that the prefatory clause served the distinct purpose of identifying the militia, comprised of individually armed and able-bodied men, as being necessary to ensure that the country remain free.[110]

Next, the Court turned to historical legal scholars to determine whether they understood the Second Amendment to confer such an individual right.[111] St. George Tucker referred to the Second Amendment "as the true palladium of liberty" and said that the "[t]he right to self defence is the first law of nature."[112] In 1825, William Rawle concluded that the plain language of the Amendment placed a general prohibition on any attempt of government to disarm the

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103. *See id.* at 595 ("Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.").

104. *Id.* ("The prefatory clause reads: 'A well regulated Militia, being necessary to the security of a free State . . . .'").

105. 307 U.S. 174 (1939).

106. *See Heller*, 554 U.S. at 595 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

107. *See id.* at 596.

108. *See id.* ("Unlike armies and navies, which Congress is given the power to create . . . the militia is assumed by Article I already to be *in existence*.").

109. *See id.* at 597 ("It is true that the term 'State' elsewhere in the Constitution refers to individual States, but the phrase 'security of a free State' and close variations seem to have been terms of art in 18th-century political discourse, meaning a 'free country' or free polity.").

110. *See id.* at 595-98.

111. *See id.* at 605-19 (discussing the post-ratification, pre-civil war, and post-civil war Second Amendment commentators).

112. *See id.* at 606.

people.[113] Furthermore, Joseph Story compared the individual right to bear arms bestowed upon Englishmen in the English Bill of Rights to the Second Amendment right conferred by the Constitution.[114] The Court concluded that most post-ratification commentators supported the theory that the Second Amendment was a preexisting right of the individual.[115]

Next, the Court turned to Pre-Civil War case law to determine whether the interpretation of the Second Amendment changed from the post-ratification commentators to the Pre-Civil War courts.[116] Many of the Pre-Civil War courts agreed that the right to bear arms was conferred upon individuals, but that right was subject to restrictions by the states.[117] The Court analyzed three cases from Pennsylvania, Georgia, and Louisiana, all of which agreed that the right to bear arms was an individual right.[118] However, the Court recognized that there were restrictions on the Second Amendment right.[119] For example, in *Cruikshank*, the Supreme Court held that the States were free to regulate guns under their police power.[120]

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113. *See id.* at 607 ("The first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent. . . . The corollary from the first position is, that the right of the people to keep and bear arms shall not be infringed. . . . The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people." (quoting WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121-22 (1825))).

114. *See id.* at 608 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1891, at 747 (1833)).

115. *See id.* at 605.

116. *See id.* at 610-14.

117. *Id.* at 611 ("Many early-19th century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions.").

118. *See id.* at 610-13; Johnson v. Tompkins, 13 F. Cas. 840, 852 (C.C.E.D. Pa. 1833) (No. 7,416) (holding that "[a citizen] had a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either"); Nunn v. State, 1 Ga. 243, 251 (1846) (holding that the Second Amendment protects a "*natural* right of self-defence"); State v. Chandler, 5 La. Ann. 489, 490 (1850) (holding that the Constitution guarantees citizens the right to carry weapons).

119. *See Heller*, 554 U.S. at 620-28 (discussing prior Supreme Court precedent interpreting the Second Amendment and the historical limitations on the right to keep and bear arms).

120. *See id.* at 620 ("States, we said, were free to restrict or protect the right under their police powers."); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (implying that regulation of the Second Amendment by the States is permissible because "[t]he second amendment . . . means no more than that it shall not be infringed by Congress"). The holding in *Cruikshank* would later be narrowed as the

Similarly, in *Miller*,[121] the Court held that a short barrel shotgun was not military equipment considered to be useful in the common defense.[122] While the Court summarized the holding of *Miller* as merely demonstrating that the Second Amendment only applies to certain types of weapons,[123] the Court ultimately concluded that like other rights conferred by the Bill of Rights, the Second Amendment is not unlimited.[124]

Following its textual and historical analysis, the Court concluded that the Second Amendment guaranteed the individual the "right to possess and carry weapons in case of confrontation."[125] However, the Court, constrained by the facts of this particular case, limited their holding to the right to possess handguns within the home.[126] The issue of whether the right defined in *Heller* extended outside of the home was addressed and confirmed in dicta, but was not part of the holding due to the specific facts of the case.[127]

b. *McDonald v. City of Chicago*

In *McDonald v. City of Chicago*,[128] the Court considered whether the Second Amendment right defined in *Heller* applied to the states.[129] The plaintiffs in *McDonald* challenged Chicago's handgun ban, which was implemented to reduce gun violence within the city.[130] Plaintiffs lived in high-crime neighborhoods and, as a

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Second Amendment was applied to the states through the Fourteenth Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

121. 307 U.S. 174 (1939).

122. *Id.* at 178 ("In the absence of any evidence trending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

123. *See Heller*, 554 U.S. at 623 ("*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.").

124. *See id.* at 595 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.").

125. *Id.* at 592.

126. *See id.* at 628.

127. *See id.* at 628, 635.

128. 561 U.S. 742 (2010).

129. *See id.* at 750.

130. *See id.* at 750-51 ("Chicago enacted its handgun ban to protect its residents 'from the loss of property and injury or death from firearms.'").

result, were targeted and threatened by criminals.[131] The plaintiffs argued that the Due Process Clause of the Fourteenth Amendment prohibited the states from infringing the Second Amendment right recognized by the Court in *Heller*.[132] As a result, the Court addressed the question of whether the Second Amendment is "fundamental to *our* scheme of ordered liberty" or, in other words, "whether this right is 'deeply rooted in this Nation's history and tradition.'"[133]

The Court's initial analysis relied heavily on *Heller*, which recognized that the right of an individual to bear arms in self-defense is protected by the Second Amendment.[134] Furthermore, the historical analysis in *Heller* led the majority in *McDonald* to conclude that the Second Amendment is "deeply rooted in this Nation's history and tradition."[135] However, the *McDonald* majority continued its analysis by examining interpretations of the Second Amendment following the ratification of the Fourteenth Amendment.[136] Following the end of the Civil War, the Union Army and the Thirty-Ninth Congress attempted to protect the right of freed slaves to keep and bear arms in self-defense.[137] Specifically, the Thirty-Ninth Congress passed the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866, precursors to the Fourteenth Amendment, which aimed to provide equal protection of the law, including the right to bear arms conferred by the Second Amendment.[138] However, the failure of

131. *See id.* at 751 (summarizing the factual situation faced by Otis McDonald and Colleen Lawson in which both plaintiffs have been threatened by criminals in their neighborhoods).

132. *See id.* at 753.

133. *See id.* at 767 ("In answering that question . . . we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

134. *See id.* ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right." (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008))).

135. *See id.* at 768 (quoting *Glucksberg*, 521 U.S. at 721).

136. *See id.* at 770-78.

137. *See id.* at 773 ("Union Army commanders took steps to secure the right of all citizens to keep and bear arms, but the 39th Congress concluded that legislative action was necessary. Its efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental.").

138. *See id.* at 773-75 (summarizing the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866 as attempts to provide equal protection of the law, including the right to bear arms, prior to the ratification of the Fourteenth Amendment).

Congress's legislation led to the proposal and ratification of the Fourteenth Amendment, which the Court in *McDonald* concluded was evidence that the right to keep and bear arms was fundamental to the liberty of the country.[139]

McDonald reaffirmed the longstanding, constitutional limitations on the Second Amendment that the Court confirmed in *Heller*.[140] The Court held that the Second Amendment right defined in *Heller* was fundamental to American liberty and, therefore, the Due Process Clause incorporates the right conferred by the Second Amendment.[141] Therefore, Chicago's outright ban on handguns was no longer clearly constitutional and was subject to the limitations of the Second Amendment.[142] *McDonald* limited the ability of state legislatures to regulate the Second Amendment right to bear arms, which gave rise to the circuit split examined in this Note.[143]

B. Deliberative Democracy

Like in *Heller* and *McDonald*, the Supreme Court often decides constitutional issues that remain permanently engrained as law.[144] In a democracy, the permanent decisions made by unelected judges should be analyzed from the viewpoints of democratic theory in order to determine whether judges have overstepped their democratic boundaries. Deliberative Democratic theory, in the context of judicial action, focuses on whether the action taken by the court can

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139. *See id.* at 776 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental."). Congress deemed their legislation a failure at ensuring newly freed slaves were able to bear arms in self-defense due to many freed slaves being disarmed by Confederate sympathizers after the Civil War. *Id.* at 772.

140. *See id.* at 786.

141. *See id.* at 791 (Scalia, J., concurring) ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

142. *See id.* at 752, 791 (holding that the judgment of the Court of Appeals, which held that an outright ban on handguns was permissible, was reversed).

143. *See infra* Part II.

144. *See supra* Subsection I.A.4.

be supported by the ideals of democracy.[145] The theory focuses on two main goals: (1) to encourage people to deliberate and justify their positions; and (2) to produce policy that is the best possible outcome for the most people.[146] The theory recognizes that in a heterogeneous democracy, such as the United States, diversity of opinion can cause instability.[147] Furthermore, contentious issues decided by the Court, such as abortion or gun rights, have the potential to permanently entrench groups in their political viewpoints, thus resulting in political and cultural backlash.[148]

To avoid societal backlash and raising the stakes of politics, Deliberative Democratic theorists argue that the Court should ensure that its decisions address opposing arguments in a respectful manner and justify its position to all interested parties.[149] Since Deliberative Democratic theory requires that the governed have power in the decision making process, the Court must be careful not to usurp the will of the people.[150] Instead, the Court should take on the role of the educator and guide the values of Americans in a way that "shows us where our own convictions lead."[151] To accomplish this purpose, the Court, as an institution, must do more than agree with the status quo on the issue.[152] The Court's decision on a contentious issue should "reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices . . . were

145. *See generally* Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303 (2013).

146. *See id.* at 305 ("At the heart of deliberative democracy is the idea that when free and equal people come together and discuss important decisions jointly—justifying their reasons publicly on the basis of generally understood principles—then the resulting policy will be both better for society and better for the participants themselves.").

147. *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005).

148. *See id.* at 1313.

149. *See* Sen, *supra* note 145, at 306.

150. *See id.* (noting that one requirement of Deliberative Democracy is that the governed have a say in how they are governed); Anthony Townsend Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1574 (1985) (recognizing that when the Supreme Court holds an act passed by the people's legislature unconstitutional, "it thwarts the will of representatives of the actual people of the here and now" (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 17 (1962))).

151. *See* Kronman, *supra* note 150, at 1575, 1581.

152. *See id.* at 1592.

brought to bear on the decision-making process."[153] Furthermore, the Court's decision on a contentious issue would be democratically acceptable as long as the side in disagreement with the decision can understand the essential content of the decision.[154] The ideals of Deliberative Democratic theory incorporate "an ideal of reciprocity, in which citizens are aware of and responsive to one another's interests and claims."[155] Therefore, a Court seeking to adhere to Deliberative Democratic theory would justify its decision in terms that could be reasonably accepted by both sides of the issue.[156]

However, Deliberative Democratic theory may not be the best theory to apply in this particular circuit split. For example, opponents of Deliberative Democracy, so-called Majoritarian Democrats, believe that consideration of the minority view, while admirable, is not necessary because in a democracy a majority rules.[157] Majoritarian Democrats view democracy as follows: "All qualified members of the political community have an equal voice in political decisions made by the community, such that political decisions generating the support of a majority of the community's members for that reason carry the day."[158] In essence, a majority rules no matter what the minority has to say about the particular issue.[159] While opponents of Deliberative Democracy may feel that Majoritarian Democracy is a more viable goal to achieve in a democracy, they fail to consider the disastrous effects of a democracy that shuns deliberation and substitutes the majoritarian will.[160]

"Enclave deliberation" is "deliberation within small groups of like-minded people"[161] and is the unintended result of groups being locked out of reasoned deliberation on the issues they care about.[162]

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153. *See id.*

154. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 4 (2004).

155. *See* Sunstein, *supra* note 86, at 37.

156. *Id.*

157. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 702 (1995).

158. *Id.* at 703 (defining the Majoritarian Principle of Democracy).

159. *See id.*

160. *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 15 (2001) (discussing "enclave deliberation" as a hindrance to deliberation in a democracy, generally).

161. *See id.*

162. *See* Eskridge, *supra* note 147, at 1294 (discussing democracy as "dynamic and fragile" because of the possibility that groups may exit the democratic process and forego deliberation on issues).

When a political group feels that its views are not considered in making important decisions, such as in a Majoritarian Democracy, the group may exit the deliberative process and voice their opinions in enclave deliberation, rather than with other political groups.[163] Thus, once a political group has foregone deliberation, the group will likely grow more extreme[164] and likely oppose the decisions made by the majority without their consent.[165] Therefore, the principles of Majoritarian Democracy may not be as helpful as compared to the principles of Deliberative Democracy, especially when the issue being decided is a contentious one.

C. Judicial Minimalism

If Deliberative Democracy is the lens through which judges should view their prospective decisions, then Judicial Minimalism is the tool judges should use to make their decisions. The theory of Judicial Minimalism advocates for the Court to only decide the issues that must be decided and not to include overzealous reasoning that may lead to unwanted effects.[166] Judicial opinions should be narrow in their holdings, rather than wide, so that courts only decide the case that is in front of them.[167] Furthermore, judicial opinions should be shallow in their reasoning, rather than deep, so that the Court produces "concrete judgments backed by unambitious reasoning."[168] By limiting the reasoning to only the amount that is necessary to reach the correct conclusion and to guide lower courts, the Court will ensure that the opinion is one "on which people can converge from diverse foundations."[169] Furthermore, a minimalistic

163. *Id.* ("Pluralist democracy is dynamic and fragile. It is dynamic because the nature, composition, and balance of politically relevant groups shift over time. It is fragile because it depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains.").

164. *See* SUNSTEIN, *supra* note 160, at 22-23 ("The result is that groups often make more extreme decisions than would the typical or average individual in the group (where 'extreme' is defined solely internally, by reference to the group's initial dispositions).").

165. *See infra* Section I.D (discussing the backlash of the evangelical right following the Supreme Court's decision in *Roe v. Wade*).

166. *See* Sunstein, *supra* note 86, at 15, 20.

167. *Id.* at 15.

168. *See id.* at 20.

169. *See id.*

judicial strategy may further the democratic process on a contentious issue.[170]

Judicial Minimalism may further the democratic process by leaving the bulk of a contentious issue to the states or political branches of government.[171] Also, Judicial Minimalism acknowledges that judges may decide an issue incorrectly or may stray from the focus of a particular issue through unneeded dicta.[172] Therefore, when an issue concerning the constitutionality of a statute is before the Court, the combination of a narrow and shallow holding, with the Court's reliance on precedent, will provide "desirable incentives for participants in the democratic process."[173] The predictability of how the Court will analyze a statute will give Congress a guideline of how to frame and justify a statute to withstand constitutional scrutiny, thus, forcing democratic deliberation.[174]

D. The Backlash to *Roe v. Wade*

Roe v. Wade,[175] one of the most prominent and controversial Supreme Court decisions, illustrates the effects that a decision may have when the Court fails to utilize the ideals of Deliberative Democracy and Judicial Minimalism.[176] In *Roe v. Wade* the Supreme Court held that the right to privacy included a woman's decision to have an abortion.[177] The Court reasoned that either the concept of liberty in the Fourteenth Amendment or the reservation of rights to the people present in the Ninth Amendment were broad enough to encompass and protect a woman's decision to have an abortion.[178] However, the Court did not specifically identify which Amendment

170. *See id.*

171. *See id.* ("In sum, minimalism can promote democracy because it allows democratic processes room to maneuver.").

172. *See id.* ("Judges should allow such room because their judgments might be wrong and, even if right, their judgments may be counterproductive.").

173. *See id.* at 27.

174. *See id.* ("If courts do not alter their interpretation of statutes, even when their interpretation is wrong, Congress will have an especially clear background against which to work, knowing that Congress itself must correct any mistake.").

175. 410 U.S. 113 (1973).

176. *See supra* Sections I.B-C.

177. *See Roe*, 410 U.S. at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision . . . .").

178. *See id.* at 153.

the liberty stemmed from.[179] Furthermore, the Court concluded that the right to privacy and, by extension, the right to have privacy during a decision to abort a fetus, were fundamental rights.[180] The Court further reasoned that because the right to privacy was a fundamental right, a state's regulation of abortion must be "justified only by a 'compelling state interest'" and the regulation "must be narrowly drawn to express only the legitimate state interests at stake."[181] Thus, the Court decided that the right to choose to have an abortion is fundamental, so a state would have to satisfy strict scrutiny with any legislation that regulated the right.[182]

Some legal scholars have suggested that *Roe* was decided in a manner that was too broad and drastic.[183] Professor Robert Post argues that the *Roe* decision galvanized conservative opposition not only to the liberalization of abortion, but to the entire liberal agenda.[184] Professor Post summarized the backlash as a social movement much larger than *Roe* since the backlash against abortion began before the decision and did not gain prominence until years after.[185] This backlash resulted from the Court's willingness to recognize what it deemed to be national values by adjudicating using the open-ended wording of various constitutional amendments, rather than the explicit language of the Constitution.[186] Furthermore, Professor Post recognizes that misunderstandings of the Constitution by the public can cause strong backlash when the Court decides the most contentious issues.[187] In recent years, mass shootings have become more prominent and the public has become more and more entrenched on the issue of guns in American society.[188] As a result,

179. *See id.* (declaring that the right to privacy for a woman's abortion decision is covered by the Fourteenth or Ninth Amendment, but does not say which Amendment is the true source of the right).

180. *See id.* at 155.

181. *See id.*

182. *See id.* at 154-55.

183. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 373, 374 (2007); Eskridge, *supra* note 147, at 1285-87, 1312-13; Sunstein, *supra* note 86, at 49-50.

184. *See* Post & Siegel, *supra* note 183, at 407-08.

185. *See id.* at 423.

186. *See id.* at 378.

187. *See id.* at 379.

188. *See* Jordan Fabian, *Obama, Dems All in on Gun Control in 2016*, HILL (Jan. 5, 2016, 6:00 AM), http://thehill.com/homenews/administration/264745-obama-dems-all-in-on-gun-control-in-2016 [https://perma.cc/892E-QU6V]; *see also* Alexandra Samuels, *University of Texas Protestors to Fight Guns with Sex Toys*,

contentious issues, such as the debate over guns in society, if decided too quickly or broadly, may result in irreversible backlash.[189] That backlash is further evidenced by the Court's subsequent recharacterization of *Roe v. Wade*'s holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[190]

In *Casey*, the Court recharacterized its holding in *Roe* by disposing of the rigid trimester framework of when an abortion could be performed, changing the analysis from strict scrutiny to undue burden, and allowing the state to pursue its interest in potential life.[191] In its opening paragraph, the Court noted that "[l]iberty finds no refuge in a jurisprudence of doubt."[192] This opening line may be a reference to the intense backlash and scrutiny that the Court endured in the years following the decision of *Roe v. Wade*, in which many commentators and abortion opponents called the decision into question.[193] Thus, backlash may have influenced the Court's decision to revisit and recharacterize the holding of *Roe v. Wade*.[194]

Individual right theorists argue that the Second Amendment conferred an individual right to bear arms outside of the home.[195] This theory is bolstered by historical sources, from Bill of Rights contemporaries to Post-Civil War commentators, all of whom agreed that the Second Amendment conferred an individual right.[196] Furthermore, the historical sources support Individual Right theorists' belief that the purpose of the Second Amendment was to provide Americans with a means of self-defense and protection from government tyranny.[197] In *Heller*, the Court adopted the Individual Right theory in their holding, but acknowledged that the right was not unlimited and longstanding regulations of guns were permissible.[198] Furthermore, in *McDonald*, the Court incorporated the right recognized in *Heller* and, thus, held that the Second

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USA TODAY (Oct. 12, 2015, 10:06 AM), http://college.usatoday.com/2015/10/12/cocksnotglocks-protest-planned-by-university-of-texas-students/ [https://perma.cc/YUL8-QK9Q].

189. *See infra* Section III.C.
190. 505 U.S. 833 (1992).
191. *See id.* at 878-79.
192. *See id.* at 844.
193. *See id.*
194. *See infra* Section III.C.
195. *See supra* Section I.A.
196. *See supra* Section I.A.
197. *See supra* Subsection I.A.2.
198. *See supra* Subsection I.A.4.a.

Amendment applied to the states.[199] As a result, two critical Second Amendment issues were decided in a span of two years, and a third issue, whether the right to bear arms extends outside of the home, has caused a split among the circuit courts.[200] To solve the circuit split, the theories of Deliberative Democracy and Judicial Minimalism may be useful to the Supreme Court if it was to grant certiorari.[201] Particularly, these theories may help the Court avoid the political and social backlash that may follow when the Court decides a contentious issue, such as *Roe v. Wade*.[202]

II. THE CIRCUIT SPLIT

The Ninth Circuit, in *Peruta v. County of San Diego*, recently addressed the Second Amendment and the question of one's right to possess a gun outside of one's home.[203] The Ninth Circuit mimicked the analysis in *Heller* and examined historical sources to determine whether the right to keep and bear arms applied to individuals outside of their homes.[204] The court concluded that the Second Amendment does not guarantee an individual the right to carry a concealed weapon outside of the home.[205] Similarly, the Second, Third, and Fourth Circuits have held that similar regulations of the Second Amendment did not conflict with *Heller*.[206] In *Woollard v. Gallagher*, the Fourth Circuit upheld a Maryland statute that required an applicant to demonstrate a good-and-substantial reason for carrying a gun.[207] Similarly, in *Drake v. Filko*, the Third Circuit upheld a New Jersey statute that required individuals seeking a concealed weapons permit to demonstrate a justifiable need, beyond self-defense, to carry a gun.[208] Last, in *Kachalsky v. County of*

199. *See supra* Subsection I.A.4.b.

200. *See infra* Part II.

201. *See supra* Sections I.B-C.

202. *See supra* Section I.D.

203. Peruta v. Cty. of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016) ("On October 23, 2009, after the County denied his application for a concealed-carry license, Peruta sued the county of San Diego . . . requesting injunctive and declaratory relief from the enforcement of the County policy's interpretation of 'good cause.'").

204. *See Peruta*, 824 F.3d at 929-39.

205. *See id.* at 939.

206. *See* Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 86 (2d Cir. 2012).

207. *See Woollard*, 712 F.3d at 882.

208. *See Drake*, 724 F.3d at 429-30.

Westchester, the Second Circuit upheld New York's proper cause requirement to carry a concealed weapon.[209]

Conversely, the Seventh Circuit invalidated an Illinois law that limited an individual's right to carry a firearm to one's home, property, or place of business.[210] The Seventh Circuit recognized that the Illinois law amounted to an outright ban on carrying a gun and thus violated the Second Amendment as defined in *Heller*.[211] Thus, the Seventh Circuit is the lone circuit that has recognized a right to bear arms outside of the home.[212]

A. The Seventh Circuit

In 2012, the Seventh Circuit addressed the issue of whether the right to bear arms extends outside of the home.[213] Unlike its sister circuits, the Seventh Circuit held that the right to bear arms extends outside of the home.[214] The Seventh Circuit struck down a far more intrusive regulation of the Second Amendment when it held that an outright ban on carrying weapons outside of the home was unconstitutional.[215] As a result, only the Seventh Circuit has held that the right to bear arms in self-defense, as defined in *Heller*, extends outside of the home.[216] In *Moore v. Madigan*,[217] the Seventh Circuit struck down an Illinois statute that imposed an outright ban on carrying guns outside of the home.[218] The Seventh Circuit struck down the law due to the government's inability to justify an outright ban.[219] The court recognized that some sort of regulation may be put in place, but the regulation may not destroy the Second Amendment right that *Heller* referred to as a right based on self-defense.[220] One noticeable difference between the reasoning in *Heller* and the

209. *See Kachalsky*, 701 F.3d at 100.
210. *See* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).
211. *See id.* at 935.
212. *See infra* Section II.A.
213. *See infra* Section II.A.
214. *See infra* Section II.A.
215. *See Moore*, 702 F.3d at 942.
216. *See infra* Section II.A.
217. 702 F.3d 933.
218. *See id.* at 934.
219. *See id.* at 940 ("A blanket prohibition on carrying [a] gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would.").
220. *See id.*

reasoning in *Moore* is that the Seventh Circuit in *Moore* considered the interests of the government and those supporting the outright ban through amici curiae.[221]

In *Heller*, the Court determined that the ban on handguns was per se invalid, and any consideration of the District of Columbia's interest in the ban would be unnecessary because it destroyed the entire Second Amendment right.[222] Therefore, in *Heller*, the ban could not stand regardless of how strong of an interest the District had in the ban.[223] Here, Seventh Circuit precedent required that a panel reviewing a gun regulation imposed for the purpose of public safety must hold the government to a higher standard than rational basis.[224] However, the actual standard was left ambiguous by the court.[225] Regardless of whether the government had to satisfy rational basis scrutiny or the stronger burdens of intermediate or strict scrutiny, the important point is that the Seventh Circuit addressed the merits of the plaintiff's self-defense argument and the government's public safety argument, and decided that the government's argument failed.[226] Despite the Seventh Circuit's consideration of the government's interest in public safety, the court concluded, under *Heller*, that an outright ban on handguns could not comport with the Second Amendment and must be struck down.[227]

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221. *See id.* at 935, 942 ("The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense. Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden.").

222. *See* District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008) ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster." (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007))).

223. *See id.* at 629.

224. *See Moore*, 702 F.3d at 940 ("In *Skoien* we said that the government had to make a 'strong showing' that a gun ban was vital to public safety—it was not enough that the ban was 'rational.'" (quoting United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010))).

225. *See id.*

226. *See id.* at 939 ("In sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law.").

227. *See id.* at 942 ("The Supreme Court's interpretation of the Second Amendment therefore compels us to reverse the decisions in the two cases before us and remand them to their respective district courts for the entry of declarations of unconstitutionality and permanent injunctions.").

B. The Second, Third, Fourth, and Ninth Circuits

On the other side of the circuit split, the Second, Third, Fourth, and Ninth Circuits applied different standards to determine whether gun regulations outside of the home passed constitutional muster.[228] The Second, Third, and Fourth Circuits *assumed* that the right to bear arms extended outside of the home, but did not affirmatively recognize that the right *definitely* extended outside of the home.[229] Similarly, the Ninth Circuit did not use any formal doctrinal scrutiny, but held that the right to bear arms did not extend outside of the home after conducting a historical analysis.[230] Thus, this side of the circuit split decided that very similar regulations that were unconstitutional in the Seventh Circuit, were constitutional in their circuits.[231] The split is a result of clear analytical (and arguably political) differences in which the Second, Third, and Fourth Circuits did not undertake a historical analysis, but did analyze, at the very least, the need for government to regulate guns for public safety.[232] On the other hand, the Ninth Circuit did undertake a historical analysis and came to a similar conclusion as the Second, Third, and Fourth Circuits.[233] The most recent decision on this side of the circuit split was handed down by the Fourth Circuit in *Woollard v. Gallagher*.[234]

1. Woollard v. Gallagher

In *Woollard v. Gallagher*, the state of Maryland denied the plaintiff's request for a renewal of his weapon permit after Maryland state officials determined that the plaintiff did not satisfy the good and substantial reason requirement under Maryland law.[235] The plaintiff's request for a permit renewal was denied due to his lack of documented threats on his application, despite a home invasion seven years earlier in which the plaintiff held his son-in-law (the home invader) at gun point after the two wrestled over a shotgun.[236]

228. *See infra* Subsections II.B.1-3.
229. *See infra* Subsections II.B.1-3.
230. *See infra* Subsection II.B.4.
231. *See infra* Subsections II.B.1-3.
232. *See infra* Subsections II.B.1-3.
233. *See infra* Subsection II.B.4.
234. *See infra* Subsection II.B.1.
235. *See* Woollard v. Gallagher, 712 F.3d 865, 871 (4th Cir. 2013).
236. *See id.*

In order to obtain a concealed weapon permit in Maryland, an applicant must demonstrate that he or she has a good and substantial reason to wear or carry a firearm.[237] However, if an applicant falls within the category of merely seeking a permit for personal protection, the applicant must demonstrate that there is an "apprehended danger" to their person, but a "general fear of 'liv[ing] in a dangerous society'" will not suffice to receive a permit.[238]

On appeal, the Fourth Circuit applied intermediate scrutiny and held that Maryland's good and substantial reason requirement for concealed weapons permits was reasonably adapted to a substantial governmental interest of protecting public safety and preventing crime.[239] Like the Ninth Circuit in *Peruta*, but unlike the Seventh Circuit in *Moore*, the court failed to consider the losing party's interest and the reasons why the parties may support or oppose the Second Amendment right leaving the home, as required by Deliberative Democracy.[240] The result is a Second Amendment holding that assumes that the right to self-defense in *Heller* extends outside of the home, but limits the right by upholding Maryland's good-and-substantial-reason requirement.[241]

2. Drake v. Filko

Similar to Maryland in *Woollard*, New Jersey law requires that individuals demonstrate a "justifiable need" for a concealed weapons

237. *See id.* at 869.

238. *See id.* at 870 (quoting Scherr v. Handgun Permit Review Bd., 880 A.2d 1137, 1148 (2005)).

239. *See id.* at 876 ("As explained herein, the State has satisfied the intermediate scrutiny standard, in that it has demonstrated that the good-and-substantial-reason requirement for obtaining a Maryland handgun permit . . . 'is reasonably adapted to a substantial governmental interest.'"); *id.* at 877 ("In these circumstances, we can easily appreciate Maryland's impetus to enact measures aimed at protecting public safety and preventing crime, and we readily conclude that such objectives are substantial governmental interests.").

240. *See id.* at 876-81 (discussing at length the state's interest in preventing crime and protecting the public, while reducing the plaintiff's argument for allowing self-defense outside of the home to a plead for the court to apply strict scrutiny); *id.* at 878 ("The Appellees would have us place the right to arm oneself in public on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny in our review of the good-and-substantial-reason requirement.").

241. *See id.* at 882 ("In summary, although we assume that Appellee Woollard's Second Amendment right is burdened by the good-and-substantial-reason requirement, we further conclude that such burden is constitutionally permissible.").

permit.[242] In *Drake v. Filko*, the plaintiffs were denied permits because the state determined that they failed to satisfy the justifiable need requirement to receive a permit.[243] On appeal, the Third Circuit made two conclusions concerning the plaintiff's challenge to the justifiable need requirement: (1) that the regulation was a presumptively lawful, longstanding regulation that did not burden the Second Amendment; and (2) that even if the justifiable need requirement did burden the Second Amendment, it withstood intermediate scrutiny as a constitutionally permissible burden.[244]

Like the Seventh Circuit in *Woollard*, the Third Circuit assumed that the Second Amendment right defined in *Heller may* be applicable outside of the home, but declined to affirmatively recognize that the right *definitely* extended outside of the home.[245] In sum, the Third Circuit concluded that the New Jersey legislature had a significant interest in public safety and that requiring citizens to demonstrate a justifiable need for a permit was reasonable in response to the threat to public safety posed by guns.[246] Notably absent from the Third Circuit's opinion was any discussion of the plaintiff's interests in obtaining a gun for the purpose of self-defense.[247]

3. Kachalsky v. County of Westchester

The plaintiffs in *Kachalsky v. County of Westchester* were denied concealed weapons permits for their failure to demonstrate a

242. *See* Drake v. Filko, 724 F.3d 426, 428 (3d Cir. 2013).

243. *See id.* at 429.

244. *See id.* at 429-30.

245. *See id.* at 431 ("For these reasons, we decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the 'core' of the right as identified by *Heller*. We do, however, recognize that the Second Amendment's individual right to bear arms *may* have some application beyond the home.").

246. *See id.* at 438. The Third Circuit gave the New Jersey legislature great deference in their decision to enact the justifiable need requirement, despite New Jersey's inability to point to a single study or set of crime statistics showing an increase in gun violence warranting the new legislation. *Id.* at 437-38. However, despite any proof or showing of an increase in gun violence, the court determined that New Jersey supported their claim that the justifiable need requirement was reasonable. *Id.*

247. *See generally Drake*, 724 F.3d 426 (focusing solely on the government's interest in public safety and preventing crime, but ignoring the specific situations or viewpoints of various plaintiffs challenging the law).

specific need for self-defense.[248] Unlike the Ninth, Fourth and Third circuits, the Second Circuit did address and counter the plaintiffs' arguments about the historical purpose of the Second Amendment, the plaintiffs' possible needs for self-defense, and the statistical proof (or lack thereof) that an increase in guns in society may lead to increased crime.[249] The court recognized that both sides submitted statistical studies contesting whether guns lead to increased gun violence in society.[250] In the court's view, the plaintiffs overestimated the scope of the Second Amendment by assuming that all regulations hindering their right to self-defense were per se invalid.[251] While the court recognized that the plaintiffs' needs for self-defense may arise without warning, New York's interest in general public safety "outweighs the need to have a handgun for an unexpected confrontation."[252] Therefore, unlike the Third Circuit in *Filko*, the Fourth Circuit in *Woollard*, and the Ninth Circuit in *Peruta*, the Second Circuit considered the plaintiffs' arguments and explicitly addressed why the court believed their arguments were not correct.[253] The Seventh and Second Circuits, while they decided their Second Amendment issues differently, addressed the various interests of each party and made it clear why the losing party should lose their case.[254]

4. Peruta v. County of San Diego

In *Peruta v. County of San Diego*,[255] the San Diego County Sheriff's Department interpreted § 26150's "good cause" requirement to receive a concealed weapons permit to be "a set of circumstances that distinguish the applicant from the mainstream and

248. *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 83-84 (2d Cir. 2012).

249. *See id.* at 99-101.

250. *See id.* at 99 ("To be sure, we recognize the existence of studies and data challenging the relationship between handgun ownership by lawful citizens and violent crime. We also recognize that many violent crimes occur without any warning to the victims. But New York also submitted studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces.").

251. *See id.* at 99-100.

252. *See id.* at 100.

253. *See id.* at 99-101.

254. *See id.*; Moore v. Madigan, 702 F.3d 933, 935, 942 (7th Cir. 2012).

255. 824 F.3d 919 (9th Cir. 2016).

causes him or her to be placed in harm's way."[256] The plaintiff challenged the county's interpretation that the applicant's individual safety alone, without a documented threat, was not considered "good cause" under § 26150.[257] The plaintiff argued that by defining "good cause" to exclude those who wish to carry a gun for self-defense, the County had infringed his Second Amendment right to bear arms.[258]

The Ninth Circuit in *Peruta* mimicked the Supreme Court's analyses in *Heller* and *McDonald*, both of which used historical analysis to answer the questions of whether the right to bear arms was an individual right and a fundamental right.[259] Furthermore, the court in *Peruta* understood two issues to be settled law after *Heller* and *McDonald*: (1) that keeping and bearing arms within the home has always been an individual right for the purpose of self-defense and (2) that the right is "among those fundamental rights necessary to our system of ordered liberty."[260] The court concluded, after an analysis of nineteenth century Second Amendment decisions, that the majority of nineteenth century courts agreed that the Second Amendment did not guarantee the right to carry a weapon outside of the home.[261] The Ninth Circuit held that "the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public."[262] The *Peruta* court determined that because the right to bear

256. *Id.* at 926.

257. *Id.* at 927.

258. *See id.* ("First, they contend that the Second Amendment guarantees at least some ability of a member of the general public to carry firearms in public. Second, they contend that California's restrictions on concealed and open carry of firearms, taken together, violate the [Second] Amendment. Third, they contend that there would be sufficient opportunity for public carry of firearms to satisfy the Amendment if the good cause requirement for concealed carry, as interpreted by the sheriffs of San Diego and Yolo Counties, were eliminated.").

259. *See id.* at 927-29. "Finally, both *Heller* and *McDonald* identify the 'core component' of the right as self-defense, which necessarily 'take[s] place wherever [a] person happens to be,' whether in a back alley or on the back deck." Peruta v. Cty. of San Diego, 742 F.3d 1144, 1153 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919, 928-29 (9th Cir. 2016).

260. *Peruta*, 824 F.3d at 928-29.

261. *Id.* at 939 ("We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.").

262. *Id.*

arms does not extend outside of the home, the state may choose to impose any restriction on concealed carry that it deems necessary.[263]

As a result, these circuits have split on two different issues: (1) the correct scrutiny to apply to Second Amendment cases and (2) whether the right to bear arms in self-defense extends outside of the home.[264] The Seventh Circuit held that the right to bear arms in self-defense does extend outside of the home, but refused to apply any kind of formal scrutiny in its case.[265] Contrary to the holdings of the Seventh Circuit, the Second, Third, and Fourth Circuits held that the right to bear arms may extend outside of the home.[266] However, according to those circuits, denying concealed weapons permits on the basis of a need for general self-defense was a valid regulation under the Second Amendment since the regulations passed intermediate scrutiny.[267] The Ninth Circuit, in a broad decision, held that the right to bear arms outside of the home does not exist and has never been guaranteed by the Second Amendment.[268] However, the Ninth Circuit agreed with the Second, Third, and Fourth Circuits when it held that the state may impose a "good cause" requirement as a prerequisite to carrying a gun.[269]

III. How the Supreme Court Should Resolve the Circuit Split: Democracy, Judicial Minimalism, and Avoiding "*Roe* Rage"

If the Court is to resolve the circuit split, it should utilize the theories of Deliberative Democracy and Judicial Minimalism to craft its opinion. By doing so, the Supreme Court would be able to ensure that the democratic will of the people is not usurped from their elected representatives.[270] A contentious and divisive issue, such as the ownership of guns in America, can further entrench the public in their views if the decision is decided by the Supreme Court in a way

263. *Id.* ("Because the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of 'good cause,' however defined—is necessarily allowed by the Amendment.").

264. *See supra* Sections II.A-B.

265. *See supra* Section II.A.

266. *See supra* Subsections II.B.1-3.

267. *See id.*

268. *See supra* Subsection II.B.4.

269. *See id.*

270. *See supra* Sections III.A-B.

that permanently ends the debate on guns.[271] An ideal Supreme Court decision resolves the issues (and only the issues) before the Court, defers to the elected branches of government when necessary, considers all interests at stake, and avoids alienating those that will likely disagree with the Court's decision.[272] These virtues are derived from the theories of Judicial Minimalism and Deliberative Democracy.[273] These theories are a guide to ensuring that the most contentious issues in American society are resolved in a respectful, dignified and democratic manner, with the Court merely guiding the discussion. The ideals of Deliberative Democracy require that the Court consider the interests of both parties while settling on an outcome that is acceptable to most, if not all, parties involved. Similarly, the ideals of Judicial Minimalism would require that the Court decide a narrow issue, especially when the issue is a contentious one, in order to avoid unanticipated externalities of an overly broad decision. By employing both of these theories, the Court would ensure that the political and social backlash that plagued the broad *Roe v. Wade* decision does not reoccur.

A. A Democratic Decision

In order to reinforce the ideals of Deliberative Democracy in our society, the Court should make a prudent judgment concerning the divisive issue of whether individuals have a right to carry concealed weapons outside of the home. A prudent judgment on the issue of whether the Second Amendment extends outside of the home would take into account the complexity of the issue, such as a plaintiff's need for a gun for self-defense and the government's need to ensure public safety.[274] In doing so, the Court will take into account the "practical realities" of the Second Amendment in modern America.[275] Furthermore, when the Supreme Court holds that a statute is unconstitutional, occasionally the Court has usurped the

271. *See supra* Section III.C.

272. *See generally* Sunstein, *supra* note 86; Eskridge, *supra* note 147.

273. *See generally* Sunstein, *supra* note 86; Eskridge, *supra* note 147.

274. *See* Kronman, *supra* note 150, at 1569 ("A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, . . . but is nevertheless able to devise successful strategies for the advancement (however gradual or slow) of . . . favored principles and ideals.").

275. *Id.* at 1570.

power of the people to self-govern.[276] When the Supreme Court strikes down a law as unconstitutional, "a present minority (and a very small one at that)" has effectively vetoed "a present majority."[277] When dealing with a contentious issue over which reasonable minds may differ, the Supreme Court should strive to defer to the elected representatives of the people and merely serve as a guide to the country's values.[278]

American democracy is not dependent on the decisions of the Supreme Court to operate day-to-day, but democracy is dependent on the Court to be the arbiter of the most contentious constitutional issues that cannot be efficiently resolved by the political branches of government.[279] When the Court does resolve contentious issues, it must ensure that the decision reflects upon all of the views of the various groups with interests in the outcome of the decision, or it may risk alienating various groups from the political process.[280] Furthermore, a functional democratic system is simultaneously dependent on new groups entering the political discussion and retaining established groups.[281] However, when new emerging groups are not granted access to political discourse, or when established groups feel that they have been shut out of a political discourse that they once dominated, the deliberation is at risk of collapsing.[282] The Court can counter the possibility of collapse by ensuring that their decision is democratic and lowers the stakes of the political issues at hand.[283]

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276. *See id.* at 1574 ("[W]hen the Supreme Court holds an executive or legislative act unconstitutional, 'it thwarts the will of representatives of the actual people of the here and now' and 'exercises control, not in behalf of the prevailing majority, but against it.'" (quoting BICKEL, *supra* note 150, at 17)).

277. *See id.*

278. *See id.* at 1575 ("According to Bickel, it is the special responsibility of the Supreme Court (and, to a lesser degree, of inferior courts) to act as 'the pronouncer and guardian' of our society's 'enduring values.'").

279. *See id.* at 1581 (discussing the Court's role as the "educator whose mission is to instruct and elevate, to bring out the best in us and show us where our own convictions lead").

280. *See id.* at 1592 ("This means that the institutions must not merely represent a numerical majority, which is a shifting and uncertain quantity anyway, but must reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices, that all their diverse characteristics, were brought to bear on the decision-making process." (quoting ALEXANDER BICKEL, POLITICS AND THE WARREN COURT 184 (1965))).

281. *See* Eskridge, *supra* note 147, at 1294.

282. *See id.*

283. *See id.*

If the Supreme Court were to decide this circuit split, it must ensure that its decision embraces the ideas of Deliberative Democracy in order to ensure that its decision does not unnecessarily vacate the decisions of elected officials.[284] By giving deference to gun regulations, passed by state legislatures and within the constitutional limitations of government, the Court would be exercising the first principle of Deliberative Democratic theory: that the public must have a say in the decision-making process.[285] However, the elected officials representing the public may not flout the Second Amendment protections enumerated by the Supreme Court in both *Heller* and *McDonald*.[286] The virtue of ensuring that the people have a say in the way they are governed is evidenced by the Second, Third, and Fourth Circuits' deference to legislatures that chose to enact "good cause" or "justifiable need" requirements to receive a concealed weapons permit.[287] However, full deference to the will of the people is not required when it clearly conflicts with the Constitution since Deliberative Democracy only requires that the Court respect and consider, but not necessarily adopt, the viewpoints of the majority of people.[288]

In this particular circuit split, there are three types of government actors, on both the state and federal level, making decisions either burdening or broadening the Second Amendment.[289] This continuum of government actors consists of county officials, state legislators, and the federal circuit courts, all of which have

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284. *See* Sen, *supra* note 145, at 305 ("At the heart of deliberative democracy is the idea that when free and equal people come together and discuss important decisions jointly—justifying their reasons publicly on the basis of generally understood principles—then the resulting policy will be both better for society and better for the participants themselves.").

285. *See id.* at 306 ("The first attribute of a deliberative democracy is the importance of public incorporation into the decision-making process.").

286. *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008); McDonald v. City of Chi., 561 U.S. 742, 786 (2010).

287. *See* Woollard v. Gallagher, 712 F.3d 865, 881-82 (4th Cir. 2013); Drake v. Filko, 724 F.3d 426, 438 (3d Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81, 98 (2d Cir. 2012).

288. *See* Sen, *supra* note 145, at 306 ("For courts to fully embrace deliberative democracy (as many theorists believe they do), then actions and decisions must demonstrate respect for members of the public, and their opinions must be justified to all.").

289. *See generally* Peruta v. Cty. of San Diego, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016); Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012); *Kachalsky*, 701 F.3d 81; *Drake*, 724 F.3d 426; *Woollard*, 712 F.3d 865.

taken some action concerning the Second Amendment.[290] However, there is also a fourth government dynamic—the Constitution as interpreted by the Supreme Court.[291] While there is some leeway for legislation and interpretation among the other three actors in the continuum, none of the actions taken by those three actors, even if perfectly legitimate under Deliberative Democratic theory, can trump the Supreme Court's interpretation of the Second Amendment.[292]

In *Peruta*, the controversy arose at the county level when the San Diego County Sherriff's Department *interpreted* a state statute to preclude anyone citing a general need for self-defense from receiving a concealed weapons permit.[293] The county's interpretation was an undemocratic action because the county altered the meaning of the statute to impose a new requirement that was not authored by the California legislature.[294] By changing the implications of the statute to fit its interpretation, the county impermissibly hindered the Second Amendment rights of its citizens by adopting an unreasonable interpretation in light of the holdings in *Heller* and *McDonald*.[295] The unreasonable interpretation of the "good cause" statute adopted by the county sheriff's department is the least democratic of all of the government actions challenged in this circuit split.[296] When the legislation of a state legislature is impermissibly altered by a single county entity, then the will of the people has

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290. *See generally Peruta*, 742 F.3d 1144; *Moore*, 702 F.3d 933; *Kachalsky*, 701 F.3d 81; *Drake*, 724 F.3d 426; *Woollard*, 712 F.3d 865.

291. Specifically, the interpretation of the Second Amendment in *Heller* and *McDonald* trump the actions of the other government actors in this circuit split.

292. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

293. *See Peruta*, 742 F.3d at 1148.

294. *See id.* at 1169 (explaining that the county's interpretation of the statute hinders a citizen's right to bears arms in self-defense and that the interpretation made it impossible for citizens to distinguish themselves as needing protection); *see also* Sen, *supra* note 145, at 306 (explaining that the first attribute of Deliberative Democracy is ensuring that those that are governed have a say in how they are governed).

295. *See Peruta*, 742 F.3d at 1153 (noting that both *Heller* and *McDonald* recognized a fundamental right to self-defense wherever a person is).

296. *See* Sen, *supra* note 145, at 306 (noting that Deliberative Democracy is dependent on the governed having a say in the decisions of elected officials). While the County Sherriff is elected on a local level, he is but one actor having a profound effect on the legislation passed by a majority of the California Legislature.

arguably been usurped at the local level.[297] The usurpation of power, in this case, is by a local county entity misinterpreting the clear language of the elected state legislature.[298]

Unlike in *Peruta,* the controversies from *Moore*, *Filko*, *Woollard*, and *Kachalsky* were direct challenges to the statutes passed by state legislatures.[299] Assuming there was spirited deliberation in the state legislatures, then the various interests of the people the legislatures represent were heard and vetted by both sides, thus satisfying the principle of reciprocity.[300] In Deliberative Democracy, the principle of reciprocity requires that deliberation be done in public and that each competing side's reasons be accessible to the other side.[301] For example, the principle of reciprocity would not be satisfied if, during deliberation, Republicans cited a religious text as a justification for the Second Amendment extending outside of the home.[302] Likewise, the principle of reciprocity would not be satisfied if, during deliberation, Democrats argued that only the government could be trusted with guns in public and the Second Amendment could not possibly extend outside of the home.[303] However, the ideals of Deliberative Democracy were most likely satisfied by the legislatures in *Moore*, *Filko*, *Woollard*, and *Kachalsky* in enacting the various statutes precluding citizens from offering self-defense as a reason for obtaining a concealed weapons

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297. Of course, if the county Sherriff conducted a town-hall meeting where county residents could deliberate and convince each other of the correct course of action, then the ideals of Deliberative Democracy would be satisfied and the outcome, whether for or against the interpretation of the statute, would have been democratically legitimate. *See id.* at 305 ("At the heart of deliberative democracy is the idea that when free and equal people come together and discuss important decisions jointly—justifying their reasons publicly on the basis of generally understood principles—then the resulting policy will be both better for society and better for the participants themselves.").

298. *See Peruta*, 742 F.3d at 1169; *supra* notes 296-97.

299. *See generally Peruta*, 742 F.3d 1144; Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012); Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

300. *See* GUTMANN & THOMPSON, *supra* note 154, at 4.

301. *See id.* ("First, the deliberation itself must take place in public, not merely in the privacy of one's mind.").

302. *See id.* (noting that appeals to religion as a support for public policy are inaccessible to others that do not share that belief).

303. *See id.* The principle of reciprocity would not be satisfied in this case because it negates the stated purpose of the Second Amendment, which is to limit the government in regulating guns and to ensure that the country remains free from tyranny. *See* U.S. CONST. amend. II.

permit.[304] Also, Deliberative Democracy, while helpful and aspirational, cannot trump the Supreme Court precedent and analysis undertaken in *Heller* and *McDonald*.[305]

To comply with Deliberative Democracy, courts must ensure that they address both sides of the argument while rendering a decision that is a result of analysis that is accessible to both sides.[306] Unfortunately, of the five decisions in this Second Amendment circuit split, only one decision made a thorough examination of both arguments and justified its decision in terms that both parties could likely accept.[307] The Seventh Circuit in *Moore* addressed each empirical and constitutional argument that the state offered in support of the outright ban of carrying handguns in public in Illinois.[308] For every well-researched study the state offered, the court pointed to other well-researched studies from the plaintiff's brief to counter the state's argument.[309] When the state presented evidence that gun ownership leads to an increase in homicides, the petitioners rebutted with evidence that violent crime and gun ownership were falling simultaneously.[310] The court treated these responsive arguments as offsetting and further noted that the study presented by the state dealt with *ownership* and not with concealed carry.[311] As a result, the court considered both sides of the empirical evidence as offsetting and determined that the state failed to demonstrate that "the public *might* benefit . . . though there is no proof it would."[312]

Thus, the *Moore* court addressed both sides of the empirical argument and determined that any results about concealed carry or

304. *See generally Woollard*, 712 F.3d 865; *Drake*, 724 F.3d 426; *Kachalsky*, 701 F.3d 81; *Moore*, 702 F.3d 933.

305. *See* Part I (discussing the Individual Right theory of the Second Amendment, the Court's adoption of that theory in *Heller*, and the *Heller* right's incorporation to the States through the Due Process Clause in *McDonald*).

306. *See* GUTMANN & THOMPSON, *supra* note 154, at 4 (arguing that a democratic decision, which may be disagreeable to certain groups, is still accessible as long as the disagreeing side can understand the essential content of the decision).

307. *See Moore*, 702 F.3d at 939 (arguing that while the empirical literature is telling about gun violence in Illinois, a wholesale ban on guns cannot comport with the Second Amendment).

308. *See id.* at 937-41 (countering the various empirical studies on gun violence and ownership while providing alternatives to an outright ban that withstood scrutiny in other circuits).

309. *See id.* at 937-39 (discussing the various empirical studies for and against a ban on carrying weapons in public).

310. *See id.* at 938.

311. *See id.*

312. *See id.* at 940.

gun ownership in general were inconclusive.[313] Therefore, the state's case for an outright ban relied solely on historical interpretations of the Second Amendment.[314] However, precedent established by the Supreme Court in *Heller* and *McDonald* rejected the notion that the Second Amendment was understood by its contemporaries to convey a right to the states.[315] In *Moore*, there was deliberation at every stage of decision making, from the legislature to the Seventh Circuit Court of Appeals, satisfying Deliberative Democratic theory.[316] Furthermore, the outcome in *Moore* was accessible to both sides of the argument because the empirical data depicted a stalemate and stare decisis mandated that the holdings of *Heller* and *McDonald* govern.

However, the circuit courts in *Peruta*, *Filko*, *Woollard*, and *Kachalsky* did not demonstrate any adherence to Deliberative Democratic theory and, specifically, the principle of reciprocity.[317] Not only did the Ninth Circuit incorrectly decide the issue of good cause requirements in light of the Supreme Court's adherence to the Individual Right theory, but it also failed to address any of the interests that the appellants had in carrying a concealed weapon for the purpose of self-defense.[318] In *Peruta*, the court determined that the Second Amendment does not and never has guaranteed an individual the right to carry a concealed weapon in public.[319] As a result, the court determined that the County's interpretation was

313. *See id.* at 939.

314. *See id.* at 935 (explaining that the Supreme Court rejected notion that the Second Amendment conferred a right to the states in *Heller* and *McDonald*).

315. *See id.* 935-36 ("Both *Heller* and *McDonald* do say that 'the need for defense of self, family, and property, is *most* acute' in the home, but that doesn't mean it is not acute outside the home. *Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' Confrontations are not limited to the home.").

316. *See id.* at 937-41. The Seventh Circuit considered both sides of the argument and, I assume, that the legislature considered both sides during debate on the outright ban in Illinois.

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

318. *See generally Peruta*, 824 F.3d 919 (lacking any meaningful discussion of the possible arguments for the appellants' interest in carrying a concealed weapon for the purpose of self-defense).

319. *See id.* at 929-39 (looking to historical interpretations of the Second Amendment and concluding that the Amendment does not and has never conferred an individual right to carry a concealed weapon).

perfectly valid and did not need to address the appellant's argument in support of concealed carry.[320]

Similarly, the Fourth Circuit discussed the state's arguments in support of the good and substantial reason requirement at length, but characterized the plaintiff's argument in support of the right to carry a concealed weapon as a plea for the court to apply strict scrutiny.[321] The court mischaracterized the petitioner's argument as a plea for the court to abandon Fourth Circuit precedent by applying strict scrutiny to Second Amendment issues, when the petitioner's argument was actually a plea for the court to adhere to the teachings of *Heller* and *McDonald* that the right to bear arms in self-defense is a fundamental liberty.[322] In *Filko*, the Third Circuit correctly assumed that the Second Amendment right was applicable outside of the home, but upheld New Jersey's justifiable need requirement without any empirical support for the legislation.[323] As a result, residents of New Jersey had to provide a justifiable need to carry a gun in public, but New Jersey did not have to provide the court with a justifiable need of their own to hinder the Second Amendment.[324] Furthermore, the court failed to address any of the possible interests that the petitioner had in obtaining a concealed weapons permit for the purpose of self-

320. *See id.* at 939 ("Our holding that the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public fully answers the question before us. Because the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of 'good cause,' however defined—is necessarily allowed by the Amendment.").

321. *See Woollard*, 712 F.3d at 876-81 (discussing at-length the state's interest in preventing crime and protecting the public, while reducing the plaintiff's argument for allowing self-defense outside of the home to a plead for the court to apply strict scrutiny).

322. *See id.* at 878 ("The Appellees would have us place the right to arm oneself in public on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny in our review of the good-and-substantial-reason requirement.").

323. *See* Drake v. Filko, 724 F.3d 426, 437-38 (3d Cir. 2013) (illustrating that the court gave the New Jersey legislature great deference in their decision to enact the justifiable need requirement, despite New Jersey's inability to point to a single study or set of crime statistics showing an increase in gun violence warranting the new legislation).

324. *See id.* at 438. The Third Circuit determined that New Jersey supported its claim that the justifiable need requirement was reasonable without providing any evidence of an increase in gun violence. *Id.*

defense.[325] Thus, if the Supreme Court were to resolve this circuit split, it should consider the various shortcomings of the circuit court decisions, due to their lack of adherence to the ideals of Deliberative Democracy, when writing its opinion.[326]

B. A Minimalist Decision

The Supreme Court's ability to remove a particular issue from public discourse can be near absolute.[327] By removing an issue from the public discourse, the Court's holding on a particular issue, though in agreement with the popular politics of the time, may be counterproductive overall.[328] For example, the issue of abortion was permanently removed from the public discourse when the Court decided the fundamental abortion issue within one case.[329] While the Court's decision on this issue would not be nearly as abrupt as its decision in *Roe v. Wade*, the Court would still be removing a divisive issue from the public discourse.[330] *Roe v. Wade* is a maximalist decision, as opposed to a minimalist decision, because the Court made broad pronouncements about abortion and the Fourteenth Amendment that were not necessary to resolving the case at hand.[331] As a result, opposition to abortion may have been galvanized as a result of the Court's removal of the issue from public discourse.[332]

Heller is one example of a maximalist decision in the context of the Second Amendment.[333] In *Heller*, the Court concluded that the Second Amendment conferred an individual right despite the arguably controversial language in the prefatory clause of the

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325. *See generally id.* at 426 (focusing solely on the government's interest in public safety and preventing crime, but ignoring the specific situations or viewpoints of various plaintiffs who challenged the law).

326. *See supra* Section III.A (analyzing the lack of Deliberative Democratic ideals utilized in the circuit court decisions of this circuit split).

327. *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that an outright ban on abortion violates the Due Process Clause of the Fourteenth Amendment).

328. *See* Sunstein, *supra* note 86, at 20 ("In sum, minimalism can promote democracy because it allows democratic processes room to maneuver. Judges should allow such room because their judgments might be wrong and, even if right, their judgments may be counterproductive.").

329. *See id.* (referring to the Supreme Court's decision in *Roe v. Wade* and the Court's mistake of deciding "too many issues too quickly").

330. *See id.*

331. *See id.* at 20, 27.

332. *See infra* Section III.C.

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

Amendment.[334] A minimalist decision with the same facts as *Heller* might have ruled in favor of the petitioner and held that the Second Amendment protects the right to keep weapons within the home.[335] However, in order to narrow its maximalist decision, the Court might have upheld the District's requirement that guns be locked at all times.[336] The hypothetical minimalist Court could further parse the issue and allow that the gun may be kept loaded, to enable the owner to be prepared for confrontation, but still require the gun to be locked.[337] This hypothetical minimalist Court would have considered the principles of the competing sides to the issue and crafted its decision to avoid galvanizing the opposition to gun rights.[338] If the Court were to take up *Peruta* in the coming terms, the Court should craft a prudential decision that embraces the idea of "democracy-forcing minimalism."[339]

A decision promoting democracy-forcing minimalism would decide the issue narrowly and leave further questions open.[340] By deciding the issue narrowly, the Court would be granting legislatures the ability to speak clearly in their statutes and better tailor their laws to comport with the Constitution.[341] However, if the Court did not wish to foreclose debate on the issue of whether the Second Amendment applies outside of the home, the Court could decide a less substantive issue, such as the type of scrutiny to apply to Second Amendment cases. For example, in *Peruta* the Ninth Circuit did not apply any sort of formal scrutiny in deciding whether the Second Amendment protected concealed carry of firearms.[342] Conversely, the other circuits in the circuit split analyzed similar statutes using

334. *See id.* at 592.

335. *See* Sunstein, *supra* note 86, at 21 (noting that when a contentious issue is before the Court, "the Justices can make progress by putting those disagreements to one side and converging on an outcome and a relatively modest rationale on its behalf"). For example, this hypothetical would require a majority of justices to agree that a person has a right to defend himself inside his home, but the hypothetical Court may compromise by recognizing the right, while allowing reasonable limitation of the right. *Id.*

336. *See Heller*, 554 U.S at 575.

337. *See id.*

338. *See* Sunstein, *supra* note 86, at 97.

339. *See id.* at 25.

340. *See id.*

341. *See id.*

342. *See* Peruta v. Cty. of San Diego, 824 F.3d 919, 925-42 (9th Cir. 2016) (refusing to apply formal scrutiny on the Second Amendment issue and, instead, conducting a historical analysis to determine the scope of the right).

intermediate scrutiny.[343] Therefore, if the Supreme Court felt that holding that the Second Amendment extends outside of the home would invite overwhelming political backlash, the Court may choose to simply define the type of scrutiny that must be applied to cases in which the Second Amendment has been burdened.[344] Thus, if the Supreme Court simply defined the type of scrutiny that the circuit courts should apply, the Court would have clarified the type of analysis that circuit courts should perform, while leaving the substantive constitutional issue open for debate.[345]

Thus, the Supreme Court should be cognizant of the effect that its holding may have on the political climate.[346] While it is the duty of the Supreme Court to decide issues that the circuit courts have disagreed on, it is by no means required to decide each and every issue that arises. With that in mind, the Court should ensure that a highly contentious issue, such as guns in society, remains a topic for debate among the political branches of state governments.[347] In doing so, the Court would be using Judicial Minimalism in a way that reinforces Democracy, rather than undercutting it.[348] To reinforce Democracy, the Court can grant certiorari in order to clarify an issue, such as the correct scrutiny to apply, rather than to permanently decide a substantive issue, such as whether the Second Amendment extends outside of the home.[349] In doing so, the Court will ensure that the political backlash of *Roe v. Wade* is not relived through a different constitutional issue.

C. Avoiding Second Amendment "*Roe* Rage"

In 2015, there were 372 instances in which four or more people were killed by someone wielding a gun.[350] Shootings, such as the Newtown Elementary School shooting and the Aurora Colorado

343. *See* Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013); Drake v. Filko, 724 F.3d 426, 429-30 (3d Cir. 2013); Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012).

344. *See supra* Part II (describing the difference in constitutional scrutiny applied to Second Amendment cases among the different circuits).

345. *See supra* Part II; *supra* Section III.A.

346. *See supra* Section III.B.

347. *See id.*

348. *See id.*

349. *See id.*

350. *See* Millie Dent, *21 Unbelievable Facts About Guns in America*, FISCAL TIMES (Jan. 7, 2016), http://www.thefiscaltimes.com/2016/01/07/21-Unbelievable-Facts-About-Guns-America [https://perma.cc/TMX6-2D8G].

movie theater shooting, have galvanized left-leaning politicians and citizens to denounce guns and call for reform of how this country treats the Second Amendment.[351] Similarly, right-leaning politicians and organizations, such as the NRA, are more determined than ever to ensure that the right to keep and bear arms remains protected.[352] Furthermore, the diversion of politicians and the public to the far-right and far-left on the issue of gun control could have a profound impact on the country.[353] Thus, a broad ruling by the Supreme Court on a contentious issue could spark the same type of backlash that the Court sparked when it handed down *Roe v. Wade*.[354]

The *Roe* decision arguably led to the rise of the pro-life movement and the galvanization of the evangelical right in opposition to the liberal legislative agenda.[355] Like *Roe*, a Supreme Court decision resolving the substantive issue of whether the Second Amendment leaves the home may have similar disastrous effects.[356] If the Supreme Court were to decide the substantive issue present in the current Second Amendment circuit split by recognizing that the right to bear arms extends outside of the home and that this right is fundamental, the decision may galvanize the opposition to gun rights for years to come.[357] However, unlike with *Roe*, a decision resolving this issue would result in the rise of the extreme left, rather than the extreme right.[358]

A maximalist decision declaring the right to bear arms outside of the home as fundamental would likely invite strong backlash from the political left and may result in the Court recharacterizing its

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351. *See* Fabian, *supra* note 188; *see also* Samuels, *supra* note 188.

352. *See* Scott Wong & Cristina Marcos, *GOP Scrambles for Response to Obama's Gun Control Actions*, HILL (Jan. 5, 2016, 3:13 PM), http://thehill.com/homenews/house/264812-gop-scrambles-for-response-on-guns [https://perma.cc/P34H-RE63]; Tim Devaney, *Obama, NRA on Collision Course*, HILL (Jan. 5, 2016, 6:00 AM), http://thehill.com/blogs/blog-briefing-room/news/264735-obama-nra-on-collision-course [https://perma.cc/Q35H-6WMK].

353. *See* Rebecca Leber, *Gun Control Can Swing the 2016 Election*, NEW REPUBLIC (Jan. 14, 2016), https://newrepublic.com/article/127473/gun-control-can-swing-2016-election [https://perma.cc/5497-BNMP].

354. *See generally* Post & Siegal, *supra* note 183; *supra* Section I.D.

355. *See* Post & Siegal, *supra* note 183, at 407-08.

356. *See id.* at 378 (noting that extreme views against abortion did not gain prominence until the years following the *Roe* decision).

357. *See id.* at 380 (noting that "Americans have thus found it important that courts articulate a vision of the Constitution that reflects their own ideals").

358. *See id.* at 378.

holding in subsequent cases.[359] Such was the case when the holding of *Roe v. Wade* was subsequently pealed back by the Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[360] In *Casey*, the Court opened its opinion by stating that "liberty finds no refuge in a jurisprudence of doubt."[361] This opening line is undoubtedly a reference to the political backlash, the calls for *Roe* to be overturned, and the sentiment that *Roe* was constitutionally incorrect.[362] Thus, *Casey* recharacterized the holding in *Roe* by scrapping the trimester framework of when an abortion could be performed, changing the analysis from strict scrutiny to undue burden, and allowing the state to pursue its interest in potential life.[363] If the Court were to make a maximalist decision holding that the Second Amendment right extends outside of the home and that the right is fundamental, then the Court's Second Amendment jurisprudence will be left exposed to a subsequent Court's possible recharacterization of its holding.[364]

By employing the theories of Deliberative Democracy and Judicial Minimalism in crafting its decision, the Court would ensure that the disastrous effects of Majoritarian Democracy, evidenced by the backlash to *Roe v. Wade*, would not occur.[365] The backlash that followed *Roe v. Wade* is illustrative of the reaction of political groups that feel a majority has imposed its will on a powerless minority.[366] Following *Roe v. Wade*, the "political losers"[367] of the decision—the evangelical right—became more polarized on the issue

359. *See* Sunstein, *supra* note 86, at 26 (noting that "if subsequent courts have a great deal of discretion to recharacterize holdings, they can effectively turn any prior decision into a minimalist opinion").

360. 505 U.S. 833 (1992).

361. *Id.* at 844.

362. *See* Post & Siegal, *supra* note 183, at 407-08.

363. *See Casey*, 505 U.S. at 878-79.

364. *See id.* (peeling back the broad holding of *Roe v. Wade* as a response to the political backlash from the political right); Sunstein, *supra* note 86, at 26 (noting that a subsequent Court can undertake "creative reinterpretation" to recharacterize past holdings).

365. *See supra* Section I.B (discussing the disastrous effects of Majoritarian Democracy); *supra* Section I.D (describing the political backlash that resulted from the broad decision of *Roe v. Wade*).

366. *See supra* Section I.D; Eskridge, *supra* note 147, at 1294 (describing the reaction of "political losers" as leaving the democratic process in protest of the lack of deliberation).

367. Eskridge, *supra* note 147, at 1294.

of abortion[368] and resorted to enclave deliberation.[369] It is likely that if the Court did not adhere to the principles of Deliberative Democracy and Judicial Minimalism, then special interest groups that are anti-gun rights will react in a similar fashion as the evangelical right did to *Roe v. Wade*. Thus, Majoritarian Democracy, a theory critical of deliberation in general, would be a less than ideal theory to decide the issue of whether there is a right to bear arms outside of the home.

If the Court were to decide this contentious issue, it should do so in a way that embraces the ideals of Deliberative Democratic theory and Judicial Minimalism in order to avoid the disastrous outcome of *Roe v. Wade*.[370] By embracing Deliberative Democracy, the Court would have to address the interests of both sides and provide reasoning and an outcome that can be accepted by reasonable parties.[371] In doing so, the Court would avoid the one-sided reasoning and outcomes that many of the circuit courts applied.[372] In addition to applying Deliberative Democracy in their reasoning, the Court should employ Judicial Minimalism to limit the breadth of their decision and any unanticipated externalities of the decision.[373] By limiting its holding to a narrow issue, such as the correct type of scrutiny to apply to Second Amendment cases, the Court will avoid deciding a contentious and substantive constitutional issue that could result in social and political backlash.[374] If the Court were to stray from these theories and unilaterally decide that the Second Amendment extends outside of the home, the Court would risk the social and political backlash of the political left overpowering its Second Amendment jurisprudence, thus, resulting in a weaker Second Amendment right.

CONCLUSION

Following the Supreme Court's decisions in *Heller* and *McDonald*, the Federal Circuit Courts were presented with the question of whether the right to bear arms extended outside of the home. The Seventh Circuit concluded that the Second Amendment

368. *See* Post & Siegal, *supra* note 183, at 378 (discussing the polarization of the evangelical right on the abortion issues following the *Roe* decision).
369. *See* SUNSTEIN, *supra* note 160, at 15.
370. *See supra* Part III.
371. *See supra* Section III.A.
372. *See supra* Part II.
373. *See supra* Section III.B.
374. *See supra* Section III.B.

extended outside of the home. The Second, Third, and Fourth Circuits concluded that the Second Amendment may extend outside of the home, but that a state's denial of a concealed weapons permit for the purpose of general self-defense was a permissible burden on the right. The Ninth Circuit, in extreme fashion, declared that the Second Amendment does not and has never supported the right to carry a concealed weapon outside of the home. In order to resolve this split, the Court should utilize the theories of Deliberative Democracy and Judicial Minimalism in order to avoid the backlash that the Court has previously experienced when it has broadly decided a contentious issue.

If the Court were to decide the issue of whether the Second Amendment right extends outside of the home, it should do so by utilizing Deliberative Democracy and Judicial Minimalism to ensure that its decision is not subsequently altered, thus, resulting in a weakened Second Amendment. The Court should employ Deliberative Democracy by addressing the arguments and counterarguments of both sides and settling upon a holding that can be reasonably accepted by both sides, rather than alienating one side. Furthermore, the Court should decide a narrow issue, such as the correct scrutiny lower courts should apply when analyzing the Second Amendment, to ensure that the substantive constitutional issue is not prematurely removed from political discourse. By using these theories, the Court will ensure that subsequent Courts do not recharacterize its Second Amendment jurisprudence in order to weaken Second Amendment rights.

If the Court were to resolve this circuit split at a time when gun rights are the subject of vigorous debate, the public may feel that the Court has removed an important political issue from the political process. The removal of this issue from the political process may result in political and social backlash similar to the backlash that occurred following *Roe v. Wade*. This backlash would place tremendous pressure on the political branches of government and the Court to overturn its decision recognizing that the Second Amendment is applicable outside of the home. Thus, in order to protect the Second Amendment, the Court should employ the theories of Deliberative Democracy and Judicial Minimalism to ensure that the Second Amendment right is protected for generations to come.