THE CONSTITUTIONALITY OF SOCIAL COST

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During the Passover Seder, it is customary in the Jewish faith for the youngest child at the table to ask a series of four questions that begins with, "why is this night different from all other nights?" In order to understand the current state of our Second Amendment jurisprudence, one must ask, "why is this right different from all other rights?" In *District of Columbia v. Heller* and *McDonald v. Chicago*, while the majority and dissenting opinions wildly differed over the historical pedigree of the individual right to keep and bear arms, they agreed that the governmental interest in reducing the risk of danger from firearms should play *some role* in the constitutional calculus, and that the Second Amendment should be treated differently.

At first blush, this makes sense. Guns are dangerous. As Justice Breyer noted, "the carrying of arms . . . often puts others lives at risk."[1] Since a "primary concern of every government [is a] a concern for the safety and indeed the lives of its citizens,"[2] when construing the Second Amendment, it would seem straightforward that courts take into consideration the social cost, or negative externalities, of private ownership of firearms.[3] So obvious in fact, that courts and pundits perfunctorily gloss over the constitutionality of limiting liberty in order to minimize social costs. This judicial oversight is glaring, and has contributed to the current disjointed state of Second Amendment jurisprudence.

While the Second Amendment has been singled out from its brethren in the Bill of Rights as *the most dangerous right*, it is not the only dangerous right. The Supreme Court has developed over a century of jurisprudence to deal with forms of liberty that that yield negative externalities. The right to speak freely is balanced with the possible harm that can result from people preaching hate, violence, intolerance, and even fomenting revolution. The freedom of the press permits the media to report on matters that may harm national security. The freedom of association allows people to congregate, and incite certain types of violence. The freedom to be secure in one's persons, houses, papers, and effects against unreasonable searched and seizures permits people to possess the fruits and instrumentalities of crime with impunity. Inculpatory evidence seized in violation of this right is generally inadmissible during trial, permitting crimes to go unpunished. Likewise, a violation of a person's *Miranda* rights renders any confessions—even an uncoerced inculpatory confession—inadmissible. Procedural rights during the criminal trial—including the right to grand jury indictment, the right against self-incrimination, the right against double jeopardy, the right of compulsory process, the right of confrontation, the right of a speedy and public trial, the right of trial

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[1] McDonald v. Chicago, 130 S.Ct. 3020, 3120 (Breyer, J., dissenting).
[2] *Id*. at 3126 citing United States v. Salerno, 481 U. S. 739, 755 (1987).
[3] *See* Eugene Volokh, *Implementing The Right To Keep And Bear Arms For Self-Defense: An Analytical Framework And A Research Agenda*, 56 UCLA L.REV. 1443 (2009) (noting that one of the "four different categories of justifications for restricting" the right to keep and bear arms should be "danger reduction justifications, which rest on the claim that some particular exercise of the right is so unusually dangerous that it might justify restricting the right.").

by jury—all make the prosecution of culpable defendants significantly harder. The due process clause, which imposes limitations on all government actions, places the burden of proof beyond a reasonable doubt on the prosecution—an additional, nearly insurmountable burden for a conviction. The right to non-excessive bail and reasonable fines make it easier for suspects to avoid prison during prosecutions, and perhaps, allows them to abscond before trial. The right against cruel and unusual punishments removes certain forms of retribution from the quiver of the state, thereby limiting the ability to punish those found guilty of a crime. The right of habeas corpus ensures that a person—however dangerous—cannot be indefinitely detained without proper procedures. Liberty's harm to society takes many forms—not just loaded weapons.

These precedents show how the Court balances freedom and the harm that may result from its exercise. While a "primary concern of every government [is a] a concern for the safety and indeed the lives of its citizens,"[4] this concern is not constitutionally sacrosanct.

This article aims to explore the constitutional dimensions of the social costs of exercising liberty. While some have suggested that courts should look to the First Amendment for interpretational guidance for the Second Amendment, I propose a more holistic approach—look to the entire Bill of Rights. By reconceptualizing the right to keep and bear arms through the lens of social cost in light of over a century of Supreme Court jurisprudence, one realizes that despite its potentiality for dangerousness, the Second Amendment is not that much different from all other rights—and accordingly, it should not be treated differently.

This article proceeds in four parts. Part I provides an overview of the competing views of social cost in *District of Columbia v. Heller* and *McDonald v. Chicago*. In *Heller*, Justice Scalia showed "aware[ness] of the of the problem of handgun violence in this country" in holding that "the enshrinement of constitutional rights necessarily takes certain policy choices off [but leaves others on] the table."[5] In *McDonald*, Justice Alito found that the second amendment, like "[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes" "has controversial public safety implications."[6] While these opinions ostensibly discount the role that gun violence should play in construing the Second Amendment, the holding and nebulous dicta in these cases reveal that the scales used to balance the Second Amendment are not calibrated similarly to the scales used to consider other rights.

Part II introduces the concept of the *constitutionality of social cost*. Building on Ronald Coase's canonical article, *The Problem of Social Cost*,[7] this concept recognizes that exercising all forms of liberty yields both positive and negative social costs—and courts have traditionally recognized this. Liberty is dangerous. To provide more clarity on the harm that results from firearm ownership, this part focuses on the social costs that result from the exercise of three significant rights—the first Amendment, the exclusionary rule of the Fourth Amendment, and *Miranda v. Arizona*. The right to speak freely is balanced with the possible harm that can result from people preaching hate, violence, intolerance, and even fomenting revolution. The exclusionary rule,

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[4] *McDonald*, at 3126 citing United States v. Salerno, 481 U. S. 739, 755 (1987).
[5] District of Columbia v. Heller, 554 U.S. 570, 636 (2008).
[6] *McDonald*, at 3045.
[7] Ronald Coase, *The Problem of Social Cost*, 3 Journal of Law and Economics 1 (1960).

notwithstanding its attendant good faith exception, "exacts a substantial social cost for the vindication of Fourth Amendment rights,"[8] as it excludes reliable evidence and allows those guilty of crime to go unpunished. Even though, "[a]s many as 36,000 robberies, 82,000 burglaries, 163,000 larcenies, and 78,000 vehicle thefts remain uncleared each year as a result of *Miranda*,"[9] the Supreme Court constitutionalized[10] this "hazardous experimentation . . . which yields . . . social costs of crime [that] are too great" to warrant protection.[11] Even accepting Justice Breyer's one-sided statistics about violence from firearm ownership from *McDonald* at face value, the Second Amendment is not really "unlike other forms of substantive liberty."[12]

Part III develops the notion of *equality of rights*. While the Constitution demands equal protection of the laws for all persons,[13] all of the rights "retained by the people,"[14] and particularly those in "the first ten amendments,"[15] should not be denied or disparaged unequally. No right, including the Second Amendment, should be treated as a "second-class right."[16] In addition to the Court's heightened concern for social cost, *Heller* and *McDonald* also insert an effective geography clause into the Second Amendment, whereby the nature of the right can mean different things in different places. Specifically, an urban, high-crime area can take into account the dangers of gun violence, and restrict the right more heavily than a rural, low-crime area could. While in obscenity[17] and the Fourth Amendment contexts[18] the Court has permitted the state to take into consideration particularities of specific localities, this discretion is greatly proscribed and is

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[8] Rakas v. Illinois, 439 U.S. 128, 137 (1978). *See also*, United States v. Leon, 468 U.S. 897 (1984) ("The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern.").

[9] Paul G. Cassell Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L.REV. 1055, 1083 (1998). *See also*, *Paul Cassell, Miranda's Social Costs: An Empirical Reassessment*, 90 N.W. L.REV. 387 (1996).

[10] Dickerson v. United States, 530 U.S. 428 (2000) (finding that *Miranda v. Arizona* is a constitutional right).

[11] Miranda v. Arizona, 384 U.S. 436, 517 (1966) (White, J., dissenting) ("We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.").

[12] *McDonald*, at 3120.

[13] U.S. CONST. amend. XIV, § 1.

[14] U.S. CONST. amend. IX.

[15] United States v. Carolene Products, 304 U.S. 144, 153 n. 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as *those of the first ten Amendments*, which are deemed equally specific when held to be embraced within the Fourteenth.")(emphasis added).

[16] *McDonald*, at 3044.

[17] Miller v. California, 413 U.S. 15 (1973) (defining obscenity as (a) whether "the average person, *applying contemporary community standards*" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.")(emphasis added).

[18] *The Fourth Amendment's Third Way*, 120 Harv. L. Rev. 1627 (2007) (Arguing "the [Fourth] Amendment should be interpreted as dynamically incorporating state law, and it explains how this interpretive method injects substantive legal content into the vague constitutional text and reconciles the tension between the Amendment's two clauses.").

disfavored—particularly by some of the fair-weather Federalists *McDonald* dissenters.[19] Further, despite the weak bonds of stare decisis for constitutional decisions, the *Heller* Court still sought to protect certain "longstanding prohibitions" on the exercise of the right to keep and bear arms, notwithstanding the fact that those laws were enacted under the authority of prior, now-overruled Second Amendment precedents. Following *Mapp v. Ohio*[20] and *Miranda v. Arizona*,[21] longstanding police interrogation techniques that violated the Constitution were not upheld—nor should the seemingly random prohibitions the *Heller* Court identified.

Building on Parts I, II, and III, Part IV provides a roadmap for the development of Second Amendment jurisprudence going forward. Rather than starting with a presumption of constitutionality,[22] the Court should begin where it starts elsewhere—with a focus on the individual of the liberty first, and the possible harm to society second. While not identical, the scales used to balance the Second Amendment should be calibrated similarly to the scales used to balance the other rights. With such an approach, the Second Amendment will develop and evolve, and assume its equal station among our most cherished Constitutional rights.

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[19] *See e.g.,* Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 589 (2002) (Breyer, J., concurring) ("I write separately because I believe that Congress intended the statutory word "community" to refer to the Nation's adult community taken as a whole, not to geographically separate local areas.").

[20] Mapp v. Ohio, 367 U.S. 643 (1961).

[21] Miranda v. Arizona, 384 U.S. 436 (1966).

[22] *Heller*, at 626 ("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.")(emphasis added).