PACKING HEAT: JUDICIAL REVIEW OF CONCEALED CARRY LAWS UNDER THE SECOND AMENDMENT

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INTRODUCTION

The regulation of firearms is one of the most volatile policy issues in the United States. Virtually every effort to regulate—or deregulate—the accessibility or usage of firearms raises dueling concerns of public safety and individual rights. Federal courts are no exception to the controversy, offering a microcosm of the broader public debate. The Supreme Court's sharply divided decisions in *District of Columbia v. Heller*[1] and *McDonald v. City of Chicago*[2] are illustrative of the point; while *Heller* established the Second Amendment[3] right to keep and bear arms in the individual context, and *McDonald* extended the right as fundamental and binding on the states, the decisions did little to fix the scope and magnitude of the newly created right, leaving it open to spirited debate. In the wake of the two decisions, lower courts have been left to grapple with how far and with what rigor to scrutinize state and local laws that may burden the right to keep and bear arms.

People may kill and injure people, but guns appear to be a weapon of choice.[4] In the United States alone, there are over 32,000 firearm-related deaths annually and an additional 78,000 persons are injured as a result of interpersonal firearm violence.[5] While a significant portion of the casualties are attributable to suicides, accidents, law enforcement, or self-defense, an

1. District of Columbia v. Heller, 554 U.S. 570 (2008).

2. McDonald v. City of Chicago, 561 U.S. 742 (2010).

3. The Second Amendment provides: "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." U.S. CONST. amend. II.

4. *See, e.g.*, Mark Fischetti, *Family, Friends and Gunshot*, SCI. AM., July 2013, at 98 (the murder weapon of choice in the United States is overwhelmingly a gun); Mel Evans, *Guns in America: The Weapon of Choice for Criminals, but Also a Deterrent?*, NBC NEWS (Feb. 10, 2013, 3:02 PM), http://investigations.nbcnews.com/_news/2013/02/10/16912647-guns-in-america-the-weapon-of-choice-for-criminals-but-also-a-deterrent (reporting roughly 70 percent of homicides committed in the United States are with a gun).

5. *See* Liza H. Gold, *Gun Violence: Psychiatry, Risk Assessment, and Social Policy*, 41 J. AM. ACAD. PSYCHIATRY & L. 337, 339 (2013) ("In the United States, firearms have caused an average 32,300 deaths annually between 1980 and 2007 . . . . In 2008, there were 78,622 nonfatal firearms-related injuries in the United States, 73 percent of which were the result of interpersonal violence.").

appreciable portion are the product of criminal activity.[6] Although exact numbers are difficult to ascertain, the Department of Justice estimates that each year, approximately 470,000 persons become victims of a crime committed with a firearm.[7] But perhaps the most visible manifestations of gun violence are "mass shooting" incidents, drawing substantial media coverage and public concern.[8] These variables, among others, animate concerns of public safety, giving rise to policy arguments for more stringent regulations of firearms.[9]

On the other hand, the concept of a constitutionally enshrined right to keep and bear arms is sacrosanct for others.[10] Firearms are deeply engrained in the American ethos, prevalent in history and popular culture.[11] It is estimated that Americans possess anywhere from 270 million to 310 million firearms.[12] While many of the firearms have a common owner, the

6. *See* Andrew V. Papachristos et al., *Social Networks and the Risk of Gunshot Injury*, 89 J. URB. HEALTH 992, 992 (2012) (reporting an estimated 48,158 persons were treated in hospitals for gunshot wounds received in assaults in 2010); Sam Frizell, *Local Prosecutors Form Nationwide Alliance Against Gun Violence*, TIME (Sept. 17, 2014), http://time.com/3394513/gun-control-prosecutors/ (reporting that the Center for Disease Control and Prevention estimated there were 11,068 firearm homicides in the United States in 2011). The Center for Disease Control defines "homicide" as "a death resulting from the use of physical force or power, threatened or actual, against another person, group, or community when a preponderance of evidence indicates that the use of force was intentional." Debra L. Karch et al., *Surveillance for Violent Deaths—National Violent Death Reporting System, 16 States, 2008*, 60 CDC SURVEILLANCE SUMMARIES 1, 4 (2011).

7. *See* MICHAEL PLANTY & JENNIFER L. TRUMAN, FIREARM VIOLENCE, 19932011, at 1 (2013) (estimating a total of 478,400 fatal and nonfatal violent crimes were committed with a firearm in 2011).

8. *See, e.g.*, James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A1; James Brooke, *2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A1; Shaila Dewan, *32 Shot Dead in Virginia; Worst U.S. Gun Rampag*e, N.Y. TIMES, Apr. 17, 2007, at A1; Dan Frosch & Kirk Johnson, *Gunman Kills 12 at Colorado Theater; Scores Are Wounded, Reviving Debate*, N.Y. TIMES, July 21, 2012, at A1; Michael D. Shear & Michael S. Schmidt, *12 Shot to Death by Lone Gunman at a Naval Base*, N.Y. TIMES, Sept. 17, 2013, at A1.

9. For a more detailed examination of the public policy considerations for and against the regulation of firearms, see generally GUN VIOLENCE AND PUBLIC LIFE (Ben Agger & Timothy W. Luke eds., 2014) (providing normative and empirical arguments for and against gun control).

10. *See, e.g.*, Morgan Marietta, *From My Cold, Dead Hands: Democratic Consequences of Sacred Rhetoric*, 70 J. POL. 767, 767 & n.1 (2008) (observing that the rhetoric surrounding gun rights advocacy, such as "we know that there is sacred stuff in that wooden stock and blued steel" and guns must be pried "[f]rom my cold, dead hands" appeals to intrinsic values that resist normal value tradeoffs) (internal quotations omitted).

11. *See, e.g.*, MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE (2000) (tracing the development of gun culture to the availability of manufactured firearms); LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA (1976) (The role of firearms in American history is unparalleled by the experience of other countries because of the unique origins in American society.); PETER SQUIRES, GUN CULTURE OR GUN CONTROL? 56–97 (2002) (exploring the making of American gun culture).

12. Drew Desilver, *A Minority of Americans Own Guns, but Just How Many Is Unclear*, PEW

ownership base is broad—polling data reveals that more than one-third of Americans say they, or someone in their household unit, owns a gun.[13] Groups advocating Second Amendment rights, most notably the National Rifle Association ("NRA"), enjoy broad political influence, exerting substantial pressure against increased restrictions on the availability and permissible uses of firearms.[14] For supporters, the right to keep and bear arms creates an "inalienable natural right to self-defense" that forms an "important part of the constitutional fabric."[15]

Federal inaction has placed the onus on state and municipal governments to regulate firearms.[16] And regulate the states and municipalities have. The vast majority of the estimated 20,000 gun laws and regulations in the United States exist at the state and municipal level.[17] The types of laws and regulations are varied, including: restrictions on classes of weapons, "sales and transfers, gun dealers and other sellers, gun ownership, and consumer and child safety."[18] The laws and regulations exist to reduce gun-related crime and improve public safety.[19]

The constitutionality of state laws regulating the ability of the average citizen to carry a concealed handgun on his or her person has been frequently litigated in the wake of *Heller* and *McDonald*.[20] Because concealed handguns offer advantages to criminals in the commission of a

RESEARCH CTR., (June 4, 2013), http://www.pewresearch.org/fact-tank/2013/06/04/a-minority-of-americans-own-guns-but-just-how-many-is-unclear/.

13. *Id.*

14. *See* Kathrine L. Record & Lawrence O. Gostin, *What Will It Take? Terrorism, Mass Murder, Gang Violence, and Suicides: The American Way, or Do We Strive for a Better Way?*, 47 U. MICH. J.L. REFORM 555, 568–72 (2014) (Gun control legislation has largely failed because of the NRA's political influence in the electoral process.).

15. NELSON LUND, HERITAGE FOUND., THE SECOND AMENDMENT AND THE INALIENABLE RIGHT TO SELF-DEFENSE 1, 5 (Apr. 17, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/CGL16.pdf.

16. *See* William Selway, *The NRA Fights City Hall*, BLOOMBERG BUS. (Aug. 23, 2012, 4:59 PM), http://www.businessweek.com/articles/2012-08-23/the-nra-fights-city-hall (reporting on local and municipal efforts to pass firearm legislation); Ian Simpson, *After Newtown, Focus of U.S. Gun Control Battle Shifts to States*, REUTERS (Dec. 11 2013, 11:48 AM), http://www.reuters.com/article/2013/12/11/us-usa-shooting-connecticut-guncontrol-idUSBRE9BA0UM20131211 (reporting on state efforts to pass firearm legislation on the state level).

17. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 99 n.87 (2013) (quoting ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 181 (1st ed. 1995)).

18. *Id.* at 100 (footnotes omitted).

19. *See id.* at 100–03.

20. *See* Warren Richey, *Gun Rights: Federal Judges Rule Against Calif. Restrictions on Concealed Carry*, CHRISTIAN SCI. MONITOR (Feb. 13, 2014), http://www.csmonitor.com/USA/Justice/2014/0213/Gun-rights-Federal-judges-rule-against-Calif.-restrictions-on-concealed-carry-video (federal appellate courts have split 3-2 in favor of upholding the constitutionality of concealed carry laws that restrict the ability of citizens to carry concealed handguns outside the home).

crime, most states have created regulatory schemes that require a person to obtain a permit before he or she is allowed to carry a concealed handgun.[21] State permit schemes may be classified as "shall issue" or "may issue" laws; shall issue laws issue concealed carry permits to all eligible applicants, while may issue laws are more stringent in providing state or local officials discretionary power to issue permits.[22] Currently, thirty-eight states[23] have enacted "shall issue" laws, while only ten states[24] have opted for potentially more restrictive "may issue" laws.

The constitutional permissibility of may issue laws has proven to be a fault line in Second Amendment cases, creating a jurisdictional split between federal courts.[25] Two of the cases, the Seventh Circuit Court of Appeals' *Moore v. Madigan*[26] and the Ninth Circuit's original decision in *Peruta v. County of San Diego*,[27] held that the fundamental right to keep and bear arms extends outside the home and invalidates may issue laws. Three federal circuits, however, have reached the opposite conclusion—the Fourth Circuit in *Woollard v. Gallagher*,[28] the Third Circuit in *Drake v. Filko*,[29] and the Second Circuit in *Kachalsky v. County of Westchester*[30]—declining to directly answer the question whether Second Amendment rights apply outside the home. Instead, those circuits assumed that if the

21. Only four states—Alaska, Arizona, Wyoming, and Vermont—allow concealed carry of a handgun without a permit. WILLIAM J. KROUSE, CONG. RES. SERVICE, GUN CONTROL LEGISLATION IN THE 113TH CONGRESS 42 (Jan. 8, 2015), http://fas.org/sgp/crs/misc/R42987.pdf. Many states are more permissive with open carry laws that regulate the ability of a person to carry a handgun in public provided it is in plain view. *See* Rani Molla, *Map: Where Is 'Open Carry' Legal?*, WALL ST. J. (Aug. 22, 2014, 4:14 PM), http://blogs.wsj.com/numbers/map-where-is-open-carry-legal-1715/ (reporting that six states and the District of Columbia ban open carry, thirteen states require a special permit or license, and thirty-one states have no requirements).

22. KROUSE, *supra* note 21, at 42.

23. Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 42 n.121.

24. Alabama, California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island. *Id.* at 42 n.122.

25. *See* Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 223 (2014) (noting a split between the Seventh and Ninth Circuit Court of Appeals and the Second, Third, and Fourth Circuits in the sense that the former struck down "may issue" restrictions while the latter upheld the same).

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

27. Peruta v. Cnty. of San Diego, 742 F.3d 1144 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016).

28. Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

29. Drake v. Filko, 724 F.3d 426 (3d Cir. 2013).

30. Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012).

Amendment's rights extended beyond the home, may issue laws would survive under intermediate scrutiny.

Following this Introduction, Part I of this Note examines the Second Amendment right to keep and bear arms through the lens of *Heller* and *McDonald* and considers ambiguities in the cases that federal courts have faced when confronted with Second Amendment questions. Part II focuses on the diverging approaches federal courts have adopted in determining whether the Second Amendment confers a right to carry a firearm outside the home. It also illustrates that methodological approaches to the application of the Amendment in public are paramount, in the sense that they influence the conclusion. Part III then evaluates the comparative strengths and weaknesses of the competing methodologies from originalist, textualist, interest-balancing, and regulatory perspectives. This Note argues that the Ninth Circuit's original approach in *Peruta* offers the best model for assessing laws that limit the right to carry a firearm in public consistently with *Heller* and *McDonald*. Although the Ninth Circuit subsequently reversed itself after an en banc hearing, this Note argues that the original decision is most consistent with the text, history, and tradition of the Second Amendment.

I. THE FOUNDATION OF SECOND AMENDMENT JURISPRUDENCE

This Part surveys the state of Second Amendment jurisprudence by first looking to the Supreme Court's landmark decisions in *Heller* and *McDonald*, cases that held that the Second Amendment protects an individual right to keep a firearm in the home, and made the right applicable to the states under the Fourteenth Amendment. But despite the extensive historical analysis *Heller* and *McDonald* provide concerning the meaning of the Second Amendment, significant ambiguities remain in the decisions, creating interpretive concerns for lower courts. The interpretive issues are highlighted in this Part as well.

A. *DISTRICT OF COLUMBIA V. HELLER*

Without a doubt, the Second Amendment's watershed moment in modern jurisprudence was *Heller*.[31] The case arose when Dick Heller, a

31. *See* Clark Neily, District of Columbia v. Heller: *The Second Amendment Is Back, Baby*, 2008 CATO SUP. CT. REV. 127, 127 (2008). Before *Heller*, the Second Amendment was more or less a "constitutional Loch Ness Monster" in the sense that most judges "were inclined to believe it did not really exist." *Id.*

District of Columbia ("District") resident and police officer, applied for a registration certificate to keep a handgun in his home, but was unable to do so because of the District's general ban of handguns.[32] In response, Heller filed suit in the United States District Court for the District of Columbia, seeking injunctive relief to possess a functional handgun within his home for the purposes of self-defense; the complaint, however, was dismissed by the district court.[33] The District of Columbia Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms, and the District's total ban of handguns violated that right.[34]

In *Heller*, the Supreme Court examined the meaning of the Second Amendment, a task it had not undertaken since the earlier half of the twentieth century.[35] First, the Court addressed the meaning and significance of the Second Amendment.[36] Looking to the text of the Second Amendment, the Court reasoned that the right to "keep arms" implies the ability to "have weapons."[37] It further reasoned the right to "bear arms" signifies a right to "wear, bear, or carry . . . upon the person" a weapon in anticipation of confrontation or conflict.[38] Further, the Court held that what it termed the prefatory clause[39] does not limit what it dubbed the operative clause;[40] the right to keep and bear arms is not limited by the purposes expressed in the first half, the need for a well-regulated militia.[41] After holding for a right not limited to a militia context,[42] the Court imported historical understanding of the right to keep and bear arms—from Blackstone to post-Civil War commentators—to arrive at the conclusion

32. District of Columbia v. Heller, 554 U.S. 570, 575 (2008).

33. *Id.* at 575–76.

34. *Id.* at 576.

35. *See* Printz v. United States, 521 U.S. 898, 938 n.1 (1996) (Thomas, J., concurring) ("Our most recent treatment of the Second Amendment occurred in *United States v. Miller*, 307 U.S. 174 (1939), in which we reversed the District Court's invalidation of the National Firearms Act . . . ."). In *Miller*, the Court upheld a challenge against the National Firearms Act's ("NFA") general ban of short barreled long guns because there was an insufficient evidentiary showing that a "shotgun having a barrel of less than eighteen inches in length . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . ." *Miller*, 307 U.S. at 178 (internal quotation marks omitted).

36. *See Heller*, 554 U.S. at 576–626 (consisting of the Court's substantive interpretation of the meaning of the Second Amendment).

37. *Id.* at 582.

38. *Id.* at 584.

39. *Id.* at 577.

40. *Id.*

41. *See id.* at 577 ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.").

42. *Id.* at 577–78, 595–600.

that the Second Amendment codified a pre-existing right to self-defense.[43]

Turning to the District's ban, the Court reasoned that a complete ban of handguns, the "quintessential self-defense weapon," extending to possession within the home, violated the Second Amendment.[44] The Court ordered the District to allow Heller to register his handgun and license him to carry it in his home.[45] Notably, the Court declined to articulate a standard of scrutiny for reviewing the ban because "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," banning a handgun within the home "would fail constitutional muster."[46] The Court also declined to engage in an "interest-balancing" approach to implement the Second Amendment's core protection because the amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[47]

The Court did, however, qualify its conclusion that the Second Amendment protects non-militia related rights by stating that the Second Amendment right is not unlimited, but instead subject to certain limitations.[48] Under it, a person may not carry "any weapon whatsoever in any manner whatsoever and for whatever purpose."[49] The Court offered a non-exhaustive list of firearm regulations it considered "presumptively lawful . . . measures," including: "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

43. *Id.* at 603–19.

44. *Id.* at 629, 635.

45. *See id.* at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.").

46. *Id.* at 628–29. The Court determined the possibility of rational basis review was foreclosed by the fact that the Second Amendment would be redundant in light of the general prohibition of irrational laws. *Id.* at 628 n.27.

47. *Id.* at 635.

48. Although *Heller* suggests the right to keep and bear arms is limited under certain circumstances, the decision declined to articulate the contours of such limits in a substantial manner because the issue was not properly before the Court. *Id.* at 626. Indeed, the current state of Second Amendment jurisprudence creates ground for potentially outlandish disputes. *See* Thomas M. Burton, *Supreme Court Justice Scalia Addresses Nation's Gun Laws*, WALL ST. J. (July 29, 2012, 3:18 PM), http://blogs.wsj.com/washwire/2012/07/29/supreme-court-justice-scalia-says-addresses-nations-gun-laws/ (reporting on Justice Scalia's comments that although the Second Amendment doesn't apply to "arms that cannot be hand-carried," such as a cannon, it remains to be decided whether the right applies to "hand-held rocket launchers that can bring down airplanes").

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

arms."[50] Weapons not "in common use at the time" or of a "dangerous" or "unusual" nature could be regulated as well.[51] Yet the Court largely left the question of the Second Amendment's limitations for future resolution.[52]

B. *MCDONALD V. CITY OF CHICAGO*

McDonald enshrined *Heller*'s interpretation of the Second Amendment through competing incorporation doctrines under the Fourteenth Amendment.[53] In *McDonald*, petitioner Otis McDonald, a resident of Chicago in his late seventies, lived in a neighborhood with a disproportionately high rate of crime.[54] As a community activist involved in alternative policing strategies, McDonald had become the target of violent threats by drug dealers.[55] Fearing for his safety, he wished to keep a handgun in his home, but was unable to do so because the city effectively banned handgun ownership for private citizens by requiring a license to possess any firearm while simultaneously prohibiting the registration of handguns.[56] After *Heller*, McDonald, amongst others, filed suit in the United States District Court for the Northern District of Illinois, seeking a declaration that the handgun ban violated his Second and Fourteenth Amendment rights.[57] The district court, however, rejected McDonald's argument that the firearm laws creating the ban were unconstitutional.[58] The Seventh Circuit Court of Appeals affirmed the district court's decision,[59] and the Supreme Court granted review.[60]

McDonald considered arguments that the city's ban on handguns was invalid under two clauses of the Fourteenth Amendment: the Privileges and Immunities Clause[61] and the Due Process Clause.[62] On the former, a four-

50. *Id.* at 626–27 & n.26.

51. *Id.* at 627.

52. *See infra* Part II.C.

53. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 723 (2012).

54. McDonald v. City of Chicago, 561 U.S. 742, 751 (2010).

55. *Id.*

56. *Id.* at 750.

57. *Id.* at 752.

58. *Id.*

59. *Id.*

60. *Id.* at 753.

61. The original Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. This clause was then further extended under the Fourteenth Amendment which states, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

62. The Due Process Clause provides that no state shall "deprive any person of life, liberty, or

Justice plurality would have held the theory inapplicable because precedent rejected the use of the Privileges and Immunities Clause to make the Second Amendment binding on the states, and the majority's holding under the Due Process Clause made it unnecessary to revisit the analysis.[63] The Court adhered to "selective incorporation" under the Due Process Clause,[64] inquiring whether the right to keep and bear arms is "fundamental to our scheme of ordered liberty and system of justice" and "deeply rooted in this Nation's history and tradition."[65] Answering in the affirmative, the Court insisted that as it had already made clear in *Heller*, self-defense was a basic right, deeply rooted in national history and tradition.[66] The Court also relied on historical evidence that the framers of both the Bill of Rights and the Fourteenth Amendment considered the ability to keep and bear arms fundamental to the preservation of the American scheme of liberty.[67]

The Court held the city's arguments against deeming the right to keep and bear arms to be fundamentally "at war" with *Heller*—effectively requesting the Court to treat the Second Amendment differently from other rights protecting constitutional provisions and demoting it to a second-class right.[68] The Court again acknowledged concerns about the validity of existing firearm laws,[69] assuring readers that "incorporation does not imperil every law regulating firearms."[70] With the policy concerns disposed of, the Court observed that "[u]nless 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."[71] Consequently, the Court held "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[72] The case was remanded for

property, without due process of law." U.S. CONST. amend. XIV, § 1.

63. *McDonald*, 561 U.S. at 753–59.

64. *Id.* at 763.

65. *Id.* at 764, 767 (emphasis omitted).

66. *Id.* at 767.

67. *Id.* at 767–80.

68. *Id.* at 780.

69. *See id.* at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' '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.' . . . We repeat those assurances here." (quoting District of Colombia v. Heller, 554 U.S. 570, 626–27 (2008))).

70. *Id.*

71. *Id.* at 791.

72. *Id.*

further proceedings.[73]

In the five to four decision, two Justices—Justice Scalia and Justice Thomas—did not agree entirely with the majority opinion. Justice Scalia, despite "misgivings about substantive due process as an original matter" acquiesced in the incorporation under the Due Process Clause because it is "long established and narrowly limited."[74] Justice Thomas, filing a concurring opinion for himself, believed that the Second Amendment was fully applicable to the States not under the Due Process Clause, but under the Privileges or Immunities Clause, and therefore did not join those portions of Justice Alito's plurality opinion relying on the Due Process Clause.[75] Despite the divisions within the majority, five Justices ultimately sanctioned the proposition that the Fourteenth Amendment, by one means or another, makes the Second Amendment binding on the states.[76]

C. AMBIGUITIES IN SECOND AMENDMENT JURISPRUDENCE

While *Heller* and *McDonald* represent landmark decisions for Second Amendment jurisprudence, the two decisions offer limited guidance to courts assessing the constitutionality of a myriad of federal, state, and local firearm regulations.[77] Justice Scalia partially addressed the lack of guidance in *Heller*, arguing that since it was the Court's "first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field," and that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when these exceptions come before us."[78] The Court's ruling in the two cases, however, left the lower courts a daunting task. As Professor Darrell Miller observed, "[i]n [*Heller*], and . . . [*McDonald*], the Court posed a riddle. The

73. *See id.* (remanding the case to the district court to determine whether Chicago's handgun ban violated the Second Amendment).

74. *Id.* (Scalia, J., concurring).

75. *Id.* at 806 (Thomas, J., concurring).

76. *McDonald* is unique in the sense that it can be characterized as a "voting paradox" case, where the outcome of counting each Justice's vote led to a different outcome than if each Justice's vote was counted on the case's individual issues. *See* David S. Cohen, *The Paradox of* McDonald v. City of Chicago, 79 GEO. WASH. L. REV. 823, 825 (2011) ("A 'voting paradox' occurs when the Court issues a decision with splintered opinions, such as *McDonald*, and the resulting groups of Justices are split such that the outcome of the case is the opposite of the outcome that should arise from the majority's resolution of the controlling issues.").

77. *See* Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald?, 21 CORNELL J.L. & PUB. POL'Y 489, 490–91 (2012) "The Court's failure to provide lower state and federal courts with the necessary tools to decide the constitutionality of Second Amendment claims" unleashed a torrent of uncertainty and litigation. *Id.*

78. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

riddle can be restated like this: What test adheres to the Second Amendment's past, rejects balancing that right against present government interests, and preserves all but the most draconian regulations for the future?"[79]

Lower courts are charged with preserving the original meaning of the Second Amendment,[80] evaluating the fundamental right of self-defense to keep and bear arms without compromising it by means of interest balancing,[81] while maintaining the status quo for large swaths of firearm regulation.[82] This demanding task is made more difficult by the inevitable collision between originalism coupled with primacy of the right to self-defense and the Court's suggestion that a variety of firearm regulations are constitutional.[83]

79. Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 855 (2013).

80. *See id.* at 862 ("Commentators across the political spectrum generally acknowledge that the Court's Second Amendment jurisprudence, especially *Heller*, constitutes the apogee of originalism. The originalist inquiry requires that lower courts evaluate constitutional terms like 'keep' or 'bear' or 'arms' in light of historical sources and context." (footnotes omitted)). The guiding interpretation that the Court has left lower courts is that the Second Amendment is to be understood in light of its historical understanding to its framers. *Heller*, 554 U.S. at 576. Lower courts have embraced the approach. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011) ("These now-familiar passages from *Heller* hold several key insights about judicial review of laws alleged to infringe Second Amendment rights. First, the threshold inquiry in some Second Amendment cases will be a 'scope' question: Is the restricted activity protected by the Second Amendment in the first place? . . . The answer requires a textual and historical inquiry into original meaning.").

81. *See* McDonald v. City of Chicago, 561 U.S. 742, 785–86 (2010) ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing . . . and this Court decades ago abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights' . . . ." (internal citation omitted)); *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

82. *See supra* note 79 and accompanying text. Concerning the "presumptively lawful regulations" listed in *Heller*, *supra* notes 49–52 and accompanying text, Professor Miller observed:

> The Court did not describe what constitutes a "sensitive place," which "conditions and qualifications" are constitutional as opposed to an infringement on constitutional rights, or even how one determines whether a regulation is lawful or not. Furthermore, this list is not exhaustive. Other, unidentified regulations could fall within the "presumptively lawful" category, but the Court has decided to wait for future litigation to identify them.

Miller, *supra* note 79, at 863 (quoting *Heller*, 554 U.S. at 626–27).

83. As Justice Breyer alluded to in his dissent, the majority's presumptively lawful firearm regulations were wholly unsupported by originalist analysis, *Heller*, 554 U.S. at 721 (Breyer, J., dissenting), and the refusal to adopt a standard for resolving Second Amendment challenges "threatens to leave cities without effective protection against gun violence and accidents . . . ." *Id.* at 718 (Breyer, J., dissenting).

The nature of the cases adjudicated in *Heller* and *McDonald* further compounds the lack of a constitutional bright line. The District's regulations invalidated in *Heller*, banning the possession of handguns within the home, represented one of the most draconian firearm regulations possible, intruding on one of the most sacred spheres constitutional law recognizes: the home.[84] While *Heller* protected a right to possess a handgun for self-defense, ambiguity in the right's scope remains given the Supreme Court has yet to specify whether a substantive right to keep and bear arms extends beyond the four walls of a person's home.[85] Likewise, *McDonald* sheds little light on the question because it pertained solely to the issue of Second Amendment incorporation, and the constitutionality of Chicago's handgun ban was mooted on remand because the city chose to repeal and replace its ban.[86]

Heller and *McDonald* opened a new frontier of constitutional adjudication to lower courts, but poorly equipped them going forward. As Judge Wilkinson of the Fourth Circuit Court of Appeals aptly observed:

> There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation . . . . The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.[87]

It should therefore be of no surprise that the factors mentioned above have caused different federal circuits to adopt distinct approaches to similar questions regarding the constitutional permissibility of concealed carry

84. *See* Donna E. Young, *"To the Stars Through Difficulties": The Legal Construction of Private Space and* The Wizard of Oz, 20 S. CAL. INTERDISC. L.J. 135, 142 (2010) ("As in the popular imagination, the home holds an exalted, near-sacred status in Anglo-American jurisprudence. Its ideological connection to private family relations and its declared importance as the basis for societal growth and success has resulted in a legal posture that preserves the home as an institution, the sanctity of which ought not to be disturbed by the state.").

85. *See* United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011) ("The upshot of [*Heller* and *McDonald*] is that there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation.").

86. *See* Nat'l Rifle Ass'n of Am. v. City of Chicago, 646 F.3d 992, 993 (7th Cir. 2011) ("The Supreme Court entered its judgment [in *McDonald*] on June 28, 2010. On July 2 Chicago repealed its ordinance; Oak Park followed suit on July 19. We held that the repeals made the litigation moot and directed the district court to dismiss the suits for want of a case or controversy.").

87. *Masciandaro*, 638 F.3d at 475 (alteration in original).

restrictions. The next Part of this Note explores the competing methodologies that lead to diverging conclusions.

II. THE CIRCUIT SPLIT

After *Heller* and *McDonald*, suits were filed challenging laws limiting the number of persons eligible to carry a firearm in public.[88] The lack of detailed guidance by the Supreme Court, however, resulted in diverging approaches among the circuit courts. Three circuits—the Second, Third, and Fourth—did not focus heavily on determining the scope of the Second Amendment's guarantee, opting instead to balance a presumed burden of the Second Amendment against a governmental purpose of public safety by means of intermediate scrutiny. The Seventh and Ninth Circuits took a different approach of defining the contours of the Second Amendment and determining the constitutionality without using means-end scrutiny. The competing approaches led to substantively different outcomes; although the public carry restrictions were functionally similar in all five jurisdictions, the Second, Third, and Fourth Circuits upheld the public carry restrictions while the Seventh and Ninth Circuits invalidated the restrictions. This Part analyzes those cases.

A. CASES APPLYING INTERMEDIATE SCRUTINY TO MAY ISSUE PERMITTING

Kachalsky, *Woollard*, and *Drak*e all endorse a pragmatic form of interest balancing that concludes intermediate scrutiny should be applied to public carry restrictions because it was uncertain to the courts that the core interests protected by the Second Amendment include the right to carry a weapon in public. The level of scrutiny applied—with deference to the state legislatures—permitted the courts to sustain the public carry restrictions. The three cases are presented in chronological order.

1. *Kachalsky v. County of Westchester*

Kachalsky concerned the constitutionality of New York's concealed carry permitting scheme for handguns.[89] Alan Kachalsky sought to carry

88. *See, e.g.*, Woollard v. Sheridan, 863 F. Supp. 2d 462 (D. Md. 2012), *rev'd* 712 F.3d 865 (4th Cir. 2013); Moore v. Madigan, 842 F. Supp. 2d 1092 (C.D. Ill. 2012), *rev'd and remanded*, 702 F.3d 933 (7th Cir. 2012); Piszczatoski v. Filko, 840 F. Supp. 2d 813 (D.N.J. 2012), *aff'd sub nom.* Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Kachalsky v. Cacace, 817 F. Supp. 2d 235 (S.D.N.Y. 2011), *aff'd sub nom.* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 83 (2d Cir. 2012); Peruta v. Cnty. of San Diego, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), *rev'd* 742 F.3d 1144, 1148 (9th Cir. 2014).

89. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 83 (2d Cir. 2012).

his handgun outside his home; he applied for a concealed handgun license, but state officials denied his application because he did not establish "proper cause"—a special need for self-protection.[90] Kachalsky filed suit, alleging the proper cause requirement that rejected a general concern for personal safety impermissibly burdened the Second Amendment right articulated by *Heller*.[91] The United States District Court for the Southern District of New York disagreed, granting summary judgment in favor of Westchester County.[92]

While Kachalsky argued that *Heller* protects a right to possess and carry weapons in public for self-defense, the county argued *Heller*'s holding was not mobile, but instead restricted to the home.[93] On appeal, the circuit court observed, as an initial matter, that "*Heller* provides no categorical answer to this case," raising more questions than answers.[94] Looking to the presumptively lawful regulations endorsed by *Heller* and *McDonald*, the court reasoned the "Second Amendment guarantees are at their zenith within the home."[95] The court took the position that when the "core" protection of the Second Amendment—the right to use a weapon within the home—is burdened, strict scrutiny is the appropriate standard of review, but when the right of self-defense is burdened outside the home, intermediate scrutiny is appropriate because it "makes eminent sense" if the core of the amendment is not implicated.[96]

Distinguishing *Heller* from their case, the court observed that while the New York concealed carry law only affected the ability to carry handguns in public, the District's ban in *Heller* applied in the home.[97] This treatment of the home as special, the court noted, is not unique to firearm regulation, but also applied in cases involving obscenity, sexual privacy, and unreasonable searches.[98] The court's review of the history of firearm regulation led it to believe that state regulation was permissible under the Second Amendment at the time it was adopted, because the state enjoyed a "fair degree of latitude" to regulate firearms in the public sphere.[99]

Shifting to the review itself, the court noted the parties stipulated that

90. *Id.* at 83–84; N.Y. PENAL LAW § 400.00(2)(f) (McKinney 1999).
91. *Kachalsky*, 701 F.3d at 84.
92. *Id.*
93. *Id.* at 88.
94. *Id.*
95. *Id.* at 89.
96. *Id.* at 93.
97. *Id.* at 94.
98. *Id.*
99. *Id.* at 96.

New York not only has a substantial interest in public safety and crime prevention, but a compelling one as well.[100] The question became a matter of whether the proper cause requirement to issue a concealed carry permit was substantially related to the safety or crime prevention interest.[101] In reviewing the adequacy of the state's proper cause restriction, the court found a nexus between the restriction and public safety through "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 the public spaces."[102] The court's review of the history of firearm regulation led it to conclude such regulation did not clearly demonstrate that "limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment."[103] The judgment of the district court was affirmed.[104]

2. *Woollard v. Gallagher*

Woollard involved the constitutionality of Maryland's restrictive permit requirement to carry, wear, or transport a handgun in public.[105] Raymond Woollard filed suit after state authorities denied him a permit to carry a handgun in public because he did not have a "good and substantial reason" to do so.[106] Under the permitting regime, a handgun permit was issued to an applicant only if the need for one could be justified by means of the applicant's business activity, profession, or a sufficient showing of "apprehended danger."[107] Woollard received a permit in 2003, which was renewed in 2006 due to an altercation with his son-in-law, but state authorities denied him a second renewal in 2009 because the permit was no longer a reasonable precaution to protect himself against the son-in-law he had not seen in seven years.[108] The United States District Court for the District of Maryland granted summary judgment in favor of Woollard, permanently enjoining state officials from enforcing the good and substantial reason requirement on grounds that it impermissibly infringed on the right to keep and bear arms.[109]

100. *Id.* at 97.
101. *Id.*
102. *Id.* at 99.
103. *Id.* at 101.
104. *Id.*
105. Woollard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013).
106. *Id.* at 870–71; MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (West 2003).
107. *Woollard*, 712 F.3d at 870.
108. *Id.* at 871.
109. *Id.* at 873.

Like *Kachalsky*, *Woollard* began by acknowledging that the Second Amendment, according to *Heller*, guarantees a right to keep and bear arms for purposes of self-defense, but was principally concerned with the "core protection" for law-abiding citizens to use arms in defense of hearth and home.[110] The circuit court opted for a two-part approach:

> [t]he first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.[111]

It then assumed Heller's right exists outside the home and Woollard's (incorporated) Second Amendment right had been "infringed."[112] But in selecting the level of scrutiny, it decided intermediate scrutiny was appropriate because "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense . . . ."[113]

Engaging in the means-end analysis required by intermediate scrutiny, the court observed that, in enacting its permitting laws, Maryland had substantial governmental interests in protecting public safety and preventing crime.[114] The State, according to the court, "clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public."[115] At the same time, the requirement struck "a proper balance between ensuring access to handgun permits for those who need them while preventing a greater-than-necessary proliferation of handguns in public places that . . . increases risks to public safety," creating a "reasonable fit" between means and ends.[116] Consequently, the court upheld the permitting requirement, reversing the district court.[117]

110. *Id.* at 874.
111. *Id.* at 875 (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).
112. *Id.* at 876.
113. *Id*. (quoting United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2010).
114. *Id.* at 877.
115. *Id.* at 879 (internal quotation omitted).
116. *Id.* at 880.
117. *Id.* at 883.

3. *Drake v. Filko*

New Jersey resident John Drake applied for a handgun permit, but was denied by state officials because he was unable to show "justifiable need" for a permit.[118] The state's "justifiable need" requirement, like the requirements in *Kachalsky* and *Woollard*, was a heightened standard that required applicants to show an "urgent necessity for self-protection as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."[119] Drake sought declaratory and injunctive relief against New Jersey's "justifiable need" requirement on the ground that it violated the Second Amendment.[120] The United States District Court for the District of New Jersey, however, granted summary judgment in favor of the State, dismissing the action.[121]

Using the same approach in *Woollard*, the circuit court endorsed the approach of firstly inquiring whether the challenged law burdened conduct within the scope of the Second Amendment, and secondly, evaluating the burdened conduct under means-end scrutiny.[122] But the court declined to definitively declare whether the individual right to bear arms for self-defense extends beyond the home because it believed the answer was not necessary to its conclusion.[123]

In selecting the appropriate level of scrutiny, the court settled on intermediate scrutiny of the justifiable need requirement because "if the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment."[124] New Jersey, the court held, had a "significant, substantial, and important" interest in protecting the safety of its citizens.[125] To a certain extent, it excused the State's inability to produce reports, statistics, and studies; given the last change to the permit scheme was in 1981, "New Jersey's legislators could not have known that they were potentially burdening protected Second Amendment conduct . . . ."[126] Noting that substantial deference should be accorded to the predictive judgments of a

118. Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013).
119. *Id.* at 428; N.J. STAT. ANN. § 2C:58-4 (West 2005); N.J. ADMIN. CODE. § 13:54-2.4(d)(1) (2016).
120. *Drake*, 724 F.3d at 429 (citing United States v. Marzzarella, 614 F.3d 85, 89 (3d. Cir. 2010).
121. *Id.*
122. *Id.*
123. *Id.* at 431.
124. *Id.* at 436.
125. *Id.* at 437.
126. *Id.* at 437–38.

legislature,[127] the court found that the "justifiable need" requirement provided New Jersey "a means to determine whether the increase in risk and danger borne by the public is justified by a demonstrated risk and danger borne to [sic] the person seeking to carry a handgun," and that the State "has decided that this somewhat heightened risk to the public may be outweighed by the potential safety benefit to an individual" who desires to carry a handgun in public.[128] As a result, the court held that the "justifiable need" standard withstood intermediate scrutiny.[129] The judgment of the district court was affirmed.[130]

B. CASES TAKING A TEXTUAL, HISTORICAL, AND TRADITIONAL APPROACH TO MAY ISSUE PERMITTING

1. *Moore v. Madigan*

In *Moore*, Illinois resident Michael Moore filed suit in the United States District Court for the Central District of Illinois, alleging that the state law forbidding a person carrying a ready to use gun beyond the confines of his or her home or property—with limited exceptions for police, security personnel, hunters, and members of target shooting clubs—violated *Heller*'s interpretation of the Second Amendment.[131] The district court denied Moore's request for injunctive or declaratory relief.[132] Moore appealed.[133]

On appeal before the Seventh Circuit Court of Appeals, Judge Richard Posner, the author of the *Moore* opinion, wrote that while *Heller* protects the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," the Supreme Court had yet to "address[] the question whether the Second Amendment creates a right of self-defense outside the home."[134] To him, *Heller* and *McDonald*'s characterization that the need for defense of self, family, and property may be most acute within the home does not eliminate the possibility the same need is acute outside the home.[135]

127. *Id.* at 436–37 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).
128. *Id.* at 439.
129. *Id.* at 440.
130. *Id.*
131. Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012); 720 ILL. COMP. STAT. ANN. 5/24–1, 1.6 (West 2010).
132. *Moore*, 702 F.3d at 935.
133. *Id.* at 934.
134. *Id.* at 935.
135. *Id.*

The Second Amendment's text, to Judge Posner, suggested that "[t]he right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home."[136] He argued that "a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." In illustration of his point, he observed:

> Suppose one lived in what was then the wild west—the Ohio Valley for example (for until the Louisiana Purchase the Mississippi River was the western boundary of the United States), where there were hostile Indians. One would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed.[137]

Using his narrative of late eighteenth-century America, Judge Posner reasoned the Second Amendment must extend outside the home and the need for self-defense in the United States was elevated because, unlike England, the "west" had wilderness and hostile Indians, and the right to hunt was not restricted to a landowning class.[138] Shifting to the twenty-first century, he admitted that while Illinois no longer had hostile Indians, the need for self-defense may be even greater outside the home than inside; "a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower," and "[a] woman who is being stalked . . . is more vulnerable to being attacked while walking to or from her home than when inside."[139] His conclusion was that to confine the right to be armed in the home alone is to "divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."[140]

Turning to Illinois' policy justifications for the gun ban outside the home, Judge Posner acknowledged there are countervailing arguments: while a gun is a greater potential danger to more people outside the home, there is also a possibility that criminals will be more timid with the knowledge that law-abiding citizens may be carrying a gun.[141] He then compared a number of studies involving gun violence, arguing the safety impact of banning guns outside the home, if any existed, was minimal.[142] His conclusion was that "the empirical literature on the effects of allowing

136. *Id.* at 936.
137. *Id.*
138. *Id.*
139. *Id.* at 937.
140. *Id.*
141. *Id.*
142. *Id.* at 937–39.

the carriage of guns in public fails to establish a pragmatic defense of the Illinois law."[143]

In crafting a standard of review for Illinois' gun ban outside the home, Judge Posner emulated the Supreme Court's review created in *Heller*. First, he noted "a ban as broad as Illinois's can't be upheld merely on the ground that it's not irrational."[144] Next, he observed that under Seventh Circuit precedent, the court required a "strong showing" that a gun ban is "vital to public safety," which he found the State had failed to do.[145] The imposed burden on the Second Amendment right was great: "[a] blanket prohibition on carrying gun[s] in public prevents a person from defending himself anywhere [with a gun] except inside his home . . . [and] requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment . . . ."[146] Driven by the postulate that "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside," Judge Posner held Illinois did not make a strong showing that its "uniquely sweeping ban" was vital to public safety because "[t]he theoretical and empirical evidence . . . is consistent with concluding that a right to carry firearms in public may promote self-defense."[147]

Consequently, the Seventh Circuit reversed the judgment of the district court and remanded the case.[148] The court ordered the mandate to be stayed for 180 days to give the state legislature an opportunity to "craft a new gun law that will impose reasonable limitations, consistent with public safety and the Second Amendment . . . ."[149] As Posner sardonically observed, "Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public."[150]

2. *Peruta v. County of San Diego*

The Ninth Circuit's original decision in *Peruta* represents one of the more recent decisions concerning the constitutional legitimacy of public concealed carried restrictions by a federal appellate court. Edward Peruta, a

143. *Id.* at 939.
144. *Id.*
145. *Id.* at 940.
146. *Id.* (emphasis omitted).
147. *Id.* at 942.
148. *Id.*
149. *Id.*
150. *Id.* at 940.

resident of San Diego County, California, wished to carry a handgun in public, but was unable to do so because he could not show "good cause."[151] Under California law, open carry of a handgun in public is generally prohibited, making concealed carry through licensing by county officials the only practical option.[152] Given the state allowed the counties to create their own standard of what constitutes good cause, a person living or working in San Diego County could obtain a license to carry a concealed handgun in the county only if statutory "good cause" was shown through the county's standard, "[a] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way . . . one's personal safety alone is not considered good cause."[153] Peruta sought injunctive and declaratory relief from the county's denial of a license for lack of a "good cause" on grounds that it violated the Second Amendment.[154] The United States District Court for the Southern District of California denied Peruta's motion for summary judgment, granting the county's motion for summary judgment instead.[155]

On appeal, the Ninth Circuit began its analysis by asking whether the restriction of the ability of a responsible, law-abiding citizen to carry a gun outside the home for self-defense falls within the Second Amendment right to keep and bear arms and, if so, whether the restriction infringes on that right.[156] To answer the first question, the court turned to the text and the text's historical context.[157] Although not conclusive to the court, it found that the textual meaning of the word "bear" within the Second Amendment strongly suggested the Amendment secures a right to carry a firearm in some fashion outside the home.[158] The court then conducted extensive analysis on the historical scope of the Second Amendment, arriving at the conclusion that "the right to bear arms includes the right to carry an operable firearm outside the home for . . . self-defense"; this analysis, according to the court, was necessary to fully understand the historical scope of the right.[159] Furthermore, the court reasoned the historical contours of the Second Amendment may be the dispositive step in the

151. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016).

152. *Id.* at 1147.

153. *Id.* at 1148; CAL. PENAL CODE §§ 26150, 26155 (West 2016).

154. *Peruta*, 742 F.3d at 1148.

155. *Id.*

156. *Id.* at 1150, 1167.

157. *Id.* at 1151.

158. *Id.* at 1151–53.

159. *Id.* at 1166.

analysis if the restriction under review destroys a core right found within the Amendment, necessitating invalidation.[160]

Noting that intermediate scrutiny was inappropriate for a firearm restriction that destroyed a right at the core of the Second Amendment, the court turned to the question whether the "good cause" requirement, as applied by San Diego County, burdened or destroyed Peruta's right to bear arms.[161] The court took a holistic view of California's firearm regulatory scheme, observing that because "it is illegal in virtually all circumstances" to openly carry a handgun, concealed carry presented the only (legal) option.[162] Although the court acknowledged that the permitting scheme with its good cause requirement allowed "*some* people to bear arms outside the home in *some* place at *some* times," the task before the court was to determine whether the restrictions allowed "the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense."[163] The "good cause" requirement, however, precluded the single legal option for the average citizen because, by the county's standards, the citizen cannot "*distinguish* [his or herself] *from the mainstream*."[164] The court found that any exemptions the county could point to in state law that allowed distinct categories of persons to obtain a license did "little to protect an individual's right to bear arms in public for the lawful purpose of self-defense."[165] As a result, the court concluded the right to bear arms is "in effect, destroyed when exercise of the right is limited to a few people, in a few places, at a few times."[166]

Having found an almost total destruction of the right to bear arms outside the home for the responsible, law-abiding citizen, it was unsurprising that the court opted for a *Heller*-style per se invalidation, forgoing the interest balancing of intermediate or strict scrutiny.[167] The court observed that the law invalidated in *Heller*, "a near-total prohibition on keeping arms," is hardly better than the case at hand involving "a near-total prohibition on bearing them," with both going "too far."[168] The court clarified its holding with the caveat that the Second Amendment does not require states to allow concealed carry; instead, it merely requires the states

160. *Id.* at 1167.
161. *Id.* at 1168 & n.15.
162. *Id.* at 1168.
163. *Id.* at 1169 (alteration in original).
164. *Id.* (alteration in original) (internal quotations omitted).
165. *Id.*
166. *Id.* at 1170.
167. *Id.*
168. *Id.*

to allow some form of carry for self-defense outside the home.[169] A state such as California, it reasoned, is free to ban concealed carry or open carry to the average citizen, but not both at the same time because doing so eliminates any viable option to bear arms.[170] The court reversed the district court, invalidating San Diego County's "good cause" requirement.[171]

III. *HELLER*'S APPLICATION TO PUBLIC CARRY RESTRICTIONS

It does not take a great deal of foresight to realize that the approaches of the Second, Third, and Fourth Circuits are demonstrably different than the approaches of the Seventh and Ninth Circuits. The competing approaches have resolved the question of the constitutionality of public carry restrictions differently. The question is which approach is most consistent with the principles of *Heller* and *McDonald*, and should therefore dominate. This Part compares and contrasts the approaches from the perspectives of textualism and originalism, interest balancing, and *Heller*'s "presumptively lawful" firearm regulations. Under each of the evaluative criteria, this Part argues that the Seventh and Ninth Circuits prevail.

A. HISTORICAL ORIGINALISM

As a matter of constitutional interpretation, *Heller* endorsed textualism—"[t]he doctrine that the words of a governing text are of paramount concern, and what they convey in their context is what the text means"[172]—and more particularly, original-meaning originalism, "[t]he doctrine that words are to be given the meaning they had when they were adopted."[173] The guiding principle is that "'[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[174] It was under this operative principle that Justice Scalia, writing for the Court, attempted to reconstruct[175] the historical meaning of the Second

169. *Id.* at 1172.

170. *Id.*

171. *Id.* at 1179.

172. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 441 (2012).

173. *Id.* at 435. Justice Scalia and Professor Garner prefer to use "originalism" to refer to "the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Id.*

174. District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

175. *See* SCALIA & GARNER, *supra* note 172, at xxv ("When it becomes hard to understand how the original interpretive community heard a text, a court must choose from among three options: (1) it

Amendment, ultimately concluding the Second Amendment protected an individual right to possess a firearm for self-defense.[176] The amendment's text and historical understanding took center stage in *Heller*, serving as the focal point of the analysis.[177]

But the opinion that *Heller* is a prototypical originalist and textualist case is not universal. Professor Reva Siegel makes several quite persuasive arguments that *Heller* is an originalist opinion "enforcing understandings forged in popular constitutionalism."[178] First, the individual right to self-defense in *Heller* was found using sources from the seventeenth to the twentieth centuries; the fast and loose play with the sources suggests the majority is more concerned with establishing the common law meaning of the right as opposed to reconstructing the reasoning of the Second Amendment's ratifiers.[179] Second, *Heller* defines the scope of the Amendment's right by exercising discretion and judgment rooted in the present rather than the past.[180] By limiting the scope of the right without reasoning from the perspective of the ratifier's understanding,[181] additional elements of popular constitutionalism come to light. Third, to preserve the regulation of weapons suitable for modern military use, *Heller* relied heavily on the constraints of public opinion that such weapons should

can give that text a new meaning; (2) it can attempt a historical reconstruction; or (3) it can declare that meaning has been lost, so that the living political community must choose. The second of these methods is bound to produce disagreement, as happened a few years ago when the Supreme Court tackled the Second Amendment and all nine Justices tried to understand the original meaning of a text that concerned a form of organization (the 18th-century militia) alien to the modern interpretive community.").

176. *Heller*, 554 U.S. at 595.

177. *Id.* at 576–626.

178. Reva B. Siegel, Heller *& Originalism's Dead Hand - In Theory and Practice*, 56 UCLA L. REV. 1399, 1414 (2009).

179. *See id.* at 1415 ("To establish that the Second Amendment codified the common law of self-defense, the *Heller* majority invokes sources ranging from the seventeenth to the twentieth centuries. Though the majority presents these authorities as establishing the original public meaning of the Amendment's text, their distance in time from the Amendment's ratification raises the possibility that the majority may not be focused on reconstructing the reasoning of the Amendment's ratifiers, but instead on establishing the Amendment's meaning through forms of reasoning conventionally associated with common law rather than positive law claims." (footnote omitted)).

180. *See id.* at 1417 ("The majority sanctions certain familiar forms of gun control regulation because they are familiar, reasoning from tradition and contemporary common sense, rather than original understanding. There is, of course, nothing wrong with reasoning in common law fashion or appealing to tradition and common sense; but acknowledging that the opinion depends on this form of reasoning locates the authority undergirding the judgment in the present, and in the discretion of the court. It is no longer credible to attribute the judgment to strike the District of Columbia's hand gun ban to the eighteenth-century Americans who ratified the Second Amendment, as Justice Scalia does.").

181. *Id.* at 1416–17.

remain regulated[182] despite the fact that all Justices agreed that the "Second Amendment was ratified to secure republican liberties."[183] And finally, historical analysis does not occur in a vacuum: "[c]laims about the past express contemporary identities, relationships, and concerns, and express deep normative convictions."[184] *Heller* is no exception, using "original public meaning originalism" to "vindicate a living constitution, supplying resources through which a community expresses its identity and debates how it is to live together."[185]

The critiques above illustrate that the originalist approach in *Heller* was far from perfect. Indeed, scholars allege that "authentically originalist adjudication is . . . much discussed, but rarely encountered."[186] Nonetheless, *Heller* remains one of "the most thoroughgoing originalist opinion[s] in the Court's history"[187] and reflects originalist practice in several ways. Professor Jamal Greene makes one of the better defenses. First, the opinion seeks to ascertain the original understanding of the Second Amendment's text rather than the purpose behind its codification.[188] Second, the opinion imposes the same methodological limitations on reading of precedent as the reading of constitutional text.[189] And third, *Heller* creates a form of "stare originalism," suggesting that precedential weight may be determined in part by considering whether the precedent gave sufficient consideration to the history of the amendment in question.[190]

Some conservative scholars have been less constructive in their criticism of *Heller*. Judge Wilkinson argues that *Heller* creates policy conflicts with principles originalists strive to defend. Judge Wilkinson views *Heller* in conflict with the separation of powers doctrine given that

182. *See id.* at 1419 ("[A]ccounts suggest that *Heller*'s restriction on military style weapons reflects the constraints of public opinion.").

183. *Id.* at 1418.

184. *Id.* at 1420.

185. *Id.* at 1424.

186. Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1244 (2012).

187. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009).

188. *Id.* at 684.

189. *See id.* at 686 ("In atomistically divorcing the language of the *Miller* opinion from the obvious intent of its drafters—and from the meaning given it by legions of federal courts—Justice Scalia imposes the same methodological limitations on his reading of precedent as on his reading of constitutional text.").

190. *See id.* ("The third, perhaps most ambitious, layer of originalism evident in *Heller* lies in the majority's suggestion that *Miller*'s precedential weight is diminished by its failure to discuss the history of the Second Amendment with sufficient rigor. When stare decisis becomes stare *originalist*, we have reached a high and unprecedented plane of historicism indeed." (footnote omitted)).

the "rights involved in [*Heller*] depend on judgments that legislatures are far better equipped than courts to make."[191] Judge Wilkinson argues that through judicial review of firearm regulations, *Heller* has federal courts substitute their judgment for that of state or local legislative bodies; the courts, however, are at an institutional disadvantage in mimicking their counterparts when it comes to evaluating facts and contested social issues, and adopting flexible policy.[192] He also contends that *Heller* emulates *Roe v. Wade*'s[193] disregard for federalism by consolidating in the federal government police powers reserved to the states.[194] By increasing the power of federal judicial review over state and local firearm regulations, *Heller* threatens to subvert federalism by decreasing the ability of state and local governments to tailor regulations to the preferences of their constituents;[195] limiting the ability of states and locales to function as laboratories of democracy;[196] minimizing federalism's capacity to protect liberty by allowing citizens to vote with their feet;[197] and abandoning state-by-state compromise that fosters national unity.[198]

Judge Wilkinson's critiques of *Heller* resonate on a certain level.

191. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 289 (2009).

192. *Id.* at 295–96 ("Every one of the infirmities that Justice Rehnquist identified in *Roe*—the superior capacity of legislatures to evaluate facts, the narrow perspective that judges bring to contested social issues, and the straitjacket that a constitutional rule places on legislative compromise and changing information—is also present in *Heller*.").

193. Roe v. Wade, 410 U.S. 113 (1973).

194. Wilkinson, *supra* note 191, at 304.

195. *See id.* at 315 ("*Heller* diminished the benefits of decentralized decision-making in adapting gun policies to local opinions and concerns. In particular, establishing a more uniform national gun policy through the Second Amendment would be particularly improvident because gun regulations are so uniquely tied to the different views and conditions among regions, individual states, and even smaller units of government." (footnote omitted)).

196. *See id.* at 318 ("*Heller* also endangers . . . experimentation and innovation in the natural laboratories of the states. Experimentation among states and cities is critical to producing effective gun regulations.").

197. *See id.* at 320 ("The *Heller* decision also repeated *Roe*'s mistake of underestimating federalism's inherent capacity to protect liberty. Like the Court's recognition of a fundamental right to abortion in *Roe*, the Court's recognition of a robust Second Amendment individual right appeared to presume that states and cities cannot adequately protect the liberty to keep and bear arms. But that presumption ignored the protection of liberties in our federal system through diffusion of power, as well as mobility and competition between the states. Residents of the District who were unhappy with the handgun ban, for example, remain free to move to other localities more protective of gun rights.").

198. *See id.* at 321 ("[T]he *Heller* decision abandoned a fourth benefit of our federal structure: the possibility of state-by-state compromise on the controversial issue of gun control and the fostering of national unity around the positive principle of federalism. Just as *Roe* made the abortion issue significantly more divisive by taking the possibility of its resolution away from the states, *Heller* elevated the review of gun regulations to the national level, 'where it is infinitely more difficult to resolve.'").

Indeed, federal courts have routinely resolved cases on principles of federalism and the separation of powers. But as an individual right, the Second Amendment prohibits the federal government and state governments (through the Fourteenth Amendment) from violating the individual right to keep and bear arms.[199] In some instances, enforcement of the individual constitutional right may create a "counter-majoritarian difficulty," operating to thwart the will of elected bodies, but is justified on grounds that the will of the people expressed through the Constitution is superior to the will of the people expressed through the legislative body.[200] The majority in *Heller* grappled with the issue, deciding that between "tak[ing] certain policy choices off the table" or "pronounc[ing] the Second Amendment extinct," the former is the lesser of the two evils.[201] Invalidating state or local firearm regulations that allow for the exercise of the freedoms guaranteed by the Second Amendment is a task for the federal government's judicial branch.[202] The duty of federal courts to apply the provisions of the Bill of Rights does not depend upon the possession of "marked competence in the field where the invasion of rights occurs."[203]

1. Historical Agnosticism

When confronted with a Second Amendment question, the Supreme Court has relied heavily on the Amendment's text and historical analysis of the Amendment to determine the scope of the Amendment's right.[204]

199. *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding the Second Amendment right fully applicable to the states); District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (finding the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation").

200. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962) (describing the problem of the counter-majoritarian difficulty and the judicial response to it).

201. *Heller*, 554 U.S. at 636.

202. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts . . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.").

203. *Id.* at 639.

204. *See Heller*, 554 U.S. 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."). Both Justice Alito's plurality and Justice Thomas's concurrence in *McDonald* endorse historical or textual approaches for incorporating the Second Amendment under the Fourteenth Amendment. *See McDonald*, 561 U.S. at 767–80 (holding the Second Amendment applicable to the state under the Fourteenth Amendment's Due Process Clause because the Amendment is deeply rooted in national history and tradition) (Alito, J.); *id.* at 805–06 (Thomas, J., concurring) (writing a separate opinion from the plurality because he believed it was more faithful to the "Fourteenth Amendment's text and history" to make the Second Amendment applicable to the states under the Fourteenth Amendment's Privileges

Consequently, federal courts considering whether the Amendment's right extends outside the home have determined that similar textual or historical analysis is relevant in determining the scope of the Amendment.[205] The rigor of the analysis is significant because a court that fails to perform a textual and historical inquiry of the Amendment with sufficient diligence risks upholding an intrusion on the right that no standard of review can sustain.[206] Such was the error committed by *Kachalsky*, *Woollard*, and *Drake*; by refusing to consider whether the Second Amendment's right applied outside the home—and in the context of right to carry a weapon in public—all three courts misapprehended the scope of the Amendment, leading them to uphold regulation that violated the Amendment's guarantee.

In *Kachalsky*, the court found the history too ambiguous, failing to speak with "one voice," and did not directly answer the question whether handgun licenses could be limited to persons demonstrating a special need for self-protection.[207] *Woollard* eschewed historical analysis on grounds that it was a "judicious course" because the court believed intermediate scrutiny was the applicable standard of review for the Second Amendment outside the home.[208] In *Drake*, the court declined to engage in a "full-blown

and Immunities Clause).

205. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1167 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) ("Tracing the scope of the [Second Amendment] right is a necessary first step in the constitutionality analysis . . . ."); Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013) ("First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."); Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013) ("[T]he first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification."); Moore v. Madigan, 702 F.3d 933, 936–37 (7th Cir. 2012) (concluding that the text of the Second Amendment and the Amendment's history compel a reading that protects a right to carry a weapon outside the home); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89–91 (2d Cir. 2012) (considering whether the history and tradition of the Second Amendment demonstrate a right to carry a weapon in public).

206. *See Peruta*, 742 F.3d at 1167 ("[I]f self-defense outside the home is part of the core right to 'bear arms' and the California regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-ends scrutiny can justify San Diego County's policy.").

207. *See Kachalsky*, 701 F.3d at 91 ("Even if we believed that we should look solely to this highly ambiguous history and tradition to determine the meaning of the Amendment, we would find that the cited sources do not directly address the specific question before us: Can New York limit handgun licenses to those demonstrating a special need for self-protection?").

208. *See Woollard*, 712 F.3d at 876 ("We hew to a judicious course today, refraining from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections. . . . [W]e merely assume that the *Heller* right exists outside the home and that such right of Appellee Woollard has been infringed. We are free to make that assumption because the good-and-substantial-reason requirement passes constitutional muster under

historical analysis" because "[i]t remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home"[209] and other courts had considered the history and tradition of the Second Amendment.[210]

2. Historical Approach

The starting point for interpreting the Second Amendment is the text of the Amendment itself.[211] Although the words "the right of the people to keep and bear arms, shall not be infringed" do not unequivocally convey that the Amendment protects the right of persons to carry a firearm in public, the text does reasonably support such an inference.[212] The Supreme Court acknowledged this in *Heller*, observing that "bear," as used in the Amendment, means to "carry:" the meaning has not changed since the Amendment's ratification.[213] To the majority in *Heller*, to "bear" arms closely aligned with Justice Ginsberg's dissent in *Muscarello v. United States*,[214] that carrying—or bearing—a weapon in the Second Amendment context indicates "'wear[ing], bear[ing], or carry[ing] . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"[215]

In *Moore*, Judge Posner made a persuasive textual argument why the Second Amendment applies outside the home. The right to "bear" arms is unlikely to be homebound given that the right to "keep" arms already

what we have deemed to be the applicable standard—intermediate scrutiny."). While the assumption offers an advantage in terms of judicial economy, the disadvantage is that if the challenged firearm regulation implicates a fundamental Second Amendment right, a certain latitude of deference is erroneously applied.

209. *Drake*, 724 F.3d at 430–31.

210. *See id.* at 431 ("Appellants contend also that '[t]ext, history, tradition and precedent all confirm that [individuals] enjoy a right to *publicly* carry arms for their defense.' . . . At this time, we are not inclined to address this contention by engaging in a round of full-blown historical analysis, given other courts' extensive consideration of the history and tradition of the Second Amendment.").

211. *See Peruta*, 742 F.3d at 1151 ("[W]e begin our analysis of the scope of the Second Amendment right by examining the text of the amendment in its historical context."); SCALIA & GARNER, *supra* note 172, at 16 ("One naturally must begin with the words of the statute when the very subject of the litigation is what the statute requires.").

212. *See Peruta*, 742 F.3d at 1153 ("[T]he plain-meaning definition of 'bear Arms' elucidated above makes matters even clearer: the Second Amendment right 'could not rationally have been limited to the home.'" (quoting Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012))).

213. *See* District of Columbia v. Heller, 554 U.S. 570, 584 (2008) ("At the time of the founding, as now, to 'bear' meant to 'carry.'").

214. Muscarello v. United States, 524 U.S. 125, 139 (1998).

215. *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143 (Ginsburg, J., dissenting)).

provides the right within the confines of the home.[216] To argue that the Amendment only protects the right to "bear" an arm within the home would not only be an awkward usage, but would also render the provision to "keep" an arm within the home superfluous and unnecessary.[217] What is particularly appealing in the argument is that if the right to "bear" arms truly does mean to wear, bear, or carry a firearm in case of confrontation or conflict, the right can hardly be said to only exist in the home—a place where conflict is less likely.[218] If such is the case, "[a] right to bear arms thus implies a right to carry a loaded gun outside the home."[219] The approach cleaves the operative clause into a right to "keep arms" and a right to "bear arms," but poses no anomalies with respect to *Heller*: the majority analyzed the two phrases individually.[220] The majority in *Heller* directly engaged the dissent's view that "keep and bear arms" has a unitary meaning, responding that constitutions and amendments during the "founding period routinely grouped multiple (related) guarantees under a singular right . . . ."[221]

As in *Heller*, a historical inquiry whether the Second Amendment protects a right to carry a firearm in public confirms the textual analysis.[222] When state or local firearm regulations are challenged, the importance of the historical sources are heightened; at least one court confronted with the question has held that if state or local firearm regulations are challenged, the historical inquiry is "carried forward in time" because "the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified."[223] This is perhaps one of the strongest responses to Justice Scalia's "anachronistic" use of historical sources after 1791 to determine the public meaning of the Second Amendment.[224] As Professor Akhil Amar argues, the post-

216. Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).

217. *See id.* ("To speak of 'bearing' arms within one's home would at all times have been an awkward usage.").

218. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1152 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) ("One needn't point to statistics to recognize that the prospect of conflict—at least, the sort of conflict for which one would wish to be 'armed and ready'—is just as menacing (and likely more so) beyond the front porch as it is in the living room.").

219. *Moore*, 702 F.3d at 936.

220. See *Heller*, 554 U.S. at 582–92 (interpreting the meaning of the phrase to "keep arms" before interpreting the meaning of the phrase to "bear arms").

221. *Id.* at 591 (internal quotation marks omitted).

222. *See id.* at 592 (explaining that the right to possess and carry a weapon is confirmed by the historical background of the Second Amendment); *Peruta*, 742 F.3d at 1166 (concluding after analyzing history that "the right to bear arms includes the right to carry an operable firearm outside the home").

223. Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011).

224. *See* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV.

ratification sources could be justified in terms of understanding the Fourteenth Amendment; they "are best characterized as part of the Civil War amendment process through which America experienced a new birth of freedom and reglossed the Bill of rights."[225]

Before conducting a review of the historical sources, however, it is important to note that certain cases are more probative than others in the inquiry whether the Second Amendment applies outside the home.[226] *Heller* maintains not only that the right to keep and bear arms has always been an individual right, but also that the right has always been oriented for the purpose of self-defense.[227] An interpretation of the right to bear arms that does not recognize an individual right to keep and bear arms for self-defense—whether made in 1791 or last week—is equally in error under *Heller*'s conception of the right.[228] Accordingly, authorities that understand bearing arms for self-defense as an individual right are more useful in ascertaining the meaning of the Second Amendment than authorities that do not understand the right to bear arms as an individual right—the former are more likely to define the contours of the right.[229]

Discounting the evidence that does not agree with *Heller* in such a manner is not what is commonly understood to be originalism.[230] Professor Darrell Miller argues that the Ninth Circuit's original decision in *Peruta* attempts to achieve "fractal originalism" by attempting to achieve "the perfectly originalist opinion, one in which the judge applies originalism to every facet of decisionmaking . . . ."[231] In its ambition to use originalism—

641, 656–57 (2013) ("Justice Antonin Scalia's opinion in *District of Columbia v. Heller* looked to mid- and late nineteenth-century sources to determine the public meaning of the Second Amendment in 1791. One can—and should—criticize Justice Scalia for his anachronistic use of historical sources, but it is still anachronism in the service of adoption history." (footnotes omitted)).

225. Akhil Reed Amar, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 177 (2008) (internal quotation marks and emphasis omitted).

226. *See Peruta*, 742 F.3d at 1155 (noting that in reviewing cases providing gloss on the phrase to "bear arms," some cases "are more equal than others").

227. *Id.*

228. *Id.*

229. *See id.* at 1155–56 ("[H]istorical interpretations of the right's scope are of varying probative worth, falling generally into one of three categories ranked here in descending order: (1) authorities that understand bearing arms for self-defense to be an individual right, (2) authorities that understand bearing arms for a purpose *other than* self-defense to be an individual right, and (3) authorities that understand bearing arms not to be an individual right at all.").

230. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 116 (2010) ("Originalists assert that the meaning of the Constitution is the original public meaning of the text: in the case of the Constitution of 1789, that means that the meaning of the text is a function of the conventional semantic meaning of the words, phrases, and patterns of usage . . . that prevailed at the time these provisions of the Constitution were framed and ratified.").

231. Darrell A.H. Miller, Peruta, *the Home-Bound Second Amendment, and Fractal Originalism*,

and originalism alone—the original *Peruta* rejects methodological pluralism in determining whether a Second Amendment right exists outside the home.[232] Professor Miller argues that the original *Peruta* demonstrates the difficulty in achieving fractal originalism at the lower court level, sacrificing other judicial values such as "neutrality, restraint, and administrability" in the process.[233]

Performing an originalist inquiry as a lower court constrained by Supreme Court precedent adds an additional tension; the inability to credit linguistic or historical data that conflicts with Supreme Court reasoning would tend to cause the lower court to replicate errors in Supreme Court reasoning.[234] For example, if the Second Amendment's prefatory clause should constrain the meaning of the operative clause, *Peruta*'s discounting of historical sources that do not recognize an individual right to self-defense would be in error, reproducing a mistake of *Heller* and *McDonald*. While falling in line with the Supreme Court is something lower courts must do, discounting sources that do not fall in line with prior Supreme Court precedent "stands as a serious institutional constraint on originalism as a methodology for anyone other than the nine Justices at the top of the pyramid."[235] But in defense of *Peruta*, the court "has to decide something. Reconciling the indeterminate history and contextual ambiguities of 'bear' with the reasoning of *Heller* and *McDonald* is one way to discharge [the] duty."[236]

The public understanding at the time of the founding was one that "'the right to bear arms [was] recognized and secured in the constitution itself'" to the point that, "'a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.'"[237] Another legal commentator at the time noted that the right found in the Second Amendment allowed "'everyone . . . to keep or carry a gun, if he does not

127 HARV. L. REV. F. 238, 239 (2014).

232. *See id.* at 238. In determining whether the Second Amendment extends beyond the home, "most judges have been methodologically pluralist: relying on some combination of history, precedent, empirical data, pragmatism, and judicial deference to reach their conclusions." *Id.*

233. *Id.* at 239.

234. *Id.* at 242.

235. *Id.*

236. *Id.*

237. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1154–55 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) (quoting 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 19, n.B (1803)). The source was published about twelve years after the ratification of the Second Amendment.

use it for the [unlawful] destruction of game.'"[238] These early American legal scholars, writing shortly after the Amendment was ratified, made their observations as commentary to William Blackstone's *Commentaries on the Law of England*, adapting his work to the contemporary legal context.[239] *Heller* quoted Blackstone's *Commentaries* heavily, making his observation that there is a "natural right of resistance and self-preservation,"[240] a major tenant of the opinion.

It is also noteworthy that *Heller* provides an additional gloss: "the right secured . . . was by the time of the founding understood to be an individual right protecting against both public and private violence."[241] It can hardly be said that the vast majority of public violence routinely occurs within American homes—the language implies a broader right.[242] *Heller* also noted that the need for the right to keep an arm is "most acute" within the home;[243] the natural implication of the statement is that need exists outside the home, though not necessarily as acutely.[244] Lastly, *Heller* recognizes that firearm regulations "forbidding the carrying of firearms in sensitive places" are presumptively lawful;[245] it would be unnecessary to provide the restriction as an example if the Second Amendment was restricted to the home.[246]

The idea that the right to bear arms was not confined to one's home was more than the intellectual product of legal commentators. "[T]he majority of nineteenth century courts agreed that the Second Amendment right extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense."[247] The first wave of cases—closest to the ratification of the Amendment—reviewed by the original *Peruta* recognized a near-absolute right to carry weapons in public, striking down minimal intrusions on the right. In the 1822 case of *Bliss v. Commonwealth*,[248] for example,

238. *Id.* at 1155 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (Edward Christian ed., 1795)).

239. *See infra* notes 251–52 and accompanying text.

240. District of Columbia v. Heller, 554 U.S. 570, 594 (2008) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1769)).

241. *Id.*

242. *See Peruta*, 742 F.3d at 1153. The language "extend[s] the right in some form to wherever a person could become exposed to public or private violence." *Id.*

243. *Heller*, 554 U.S. at 628.

244. *Peruta*, 742 F.3d at 1153.

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

246. *Peruta*, 742 F.3d at 1153.

247. *Peruta*, 742 F.3d at 1160.

248. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).

interpreting Kentucky's constitutional provision that "the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned,"[249] the Kentucky Court of Appeals concluded that a state statute that only banned concealed weapons impermissibly infringed on the right. The court took the position that "whatever restrains the full and complete exercise" of the right to "bear arms in defense of the citizens" was forbidden—even though the entire right was not destroyed.[250] Another case, *Simpson v. State*[251]—decided in 1833—involved an indictment by a Tennessean grand jury against a plaintiff for being "arrayed in a warlike manner."[252] Observing the state constitution provided that "the freemen of this state have a right to keep and to bear arms for their common defence," the Tennessee Supreme Court held the "express power . . . given and secured to all . . . citizens . . . to keep and bear arms for their defence, without any qualification whatever as to their kind or nature" was irreconcilable with the indictment because it impaired and abridged the right.[253]

The second wave of cases described in the original *Peruta* are less dogmatic than the first wave, in the sense they recognize the state may regulate the right to bear arms to a certain degree. The 1840 case of *State v. Reid*[254] is such a case: an Alabamian law prohibiting the concealed carry of weapons was sustained because it did not, under the pretense of regulation, destroy the right to bear arms to the point the right was destroyed for the purpose of defense.[255] Regulating the manner in which a person carried a weapon—in this case, making a person wear their weapon openly—did not violate the right.[256] Similarly, *Nunn v. State*[257]—decided in 1846—upheld a concealed carry ban that made allowances for open carry. The Supreme Court of Georgia held that laws that regulate the concealed carry of weapons are valid.[258] But the court also stated that when such regulation is enacted, the state may not also ban the open carry of the same weapons, for

249. *Id.* at 90.
250. *Id.* at 90–91.
251. Simpson v. State, 13 Tenn. (5 Yer.) 356 (1833).
252. *Id.* at 357.
253. *Id.* at 360.
254. State v. Reid, 1 Ala. 612 (1840).
255. *Id.* at 616.
256. *See id.* at 617 ("[A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution.").
257. Nunn v. State, 1 Ga. 243 (1846).
258. *Id.* at 251.

the choice would violate state and federal protection of the right to bear arms for self-defense.[259] Likewise, in 1850, Louisiana's Supreme Court, in *State v. Chandler*,[260] sustained a ban on concealed deadly weapons: the law "interfered with no man's right to carry arms (to use its words) 'in full open view,'" allowing persons to make "a manly and noble defence of themselves" in a manner consistent with the Second Amendment's guarantee.[261] The Supreme Court of Texas reached an almost identical holding in 1858 when deciding *Cockrum v. State*.[262] While the law upheld regulated the right to bear arms to a certain degree, the court was of the opinion that while the state legislature could punish abuses of the right to carry arms, the right to bear arms for self-defense may not be regulated to such a degree as to "deter the citizen from its lawful exercise," for "that would be tantamount to a prohibition of the right."[263] The original *Peruta* noted that while these nineteenth-century courts "approved limitations on the manner of carry outside the home, none approved a total destruction of the right to carry in public."[264]

The use of state cases interpreting state constitutional provisions guaranteeing the right to bear arms is unusual from an originalist perspective for at least two reasons: first, the cases postdate the ratification of the Second Amendment by decades,[265] and second, the direct relevance of the state analogues to the Second Amendments is not clearly explained.[266] The two anomalies, however, make greater sense in the face of challenges such as determining the permissibility of laws that may have

259. *Id.*

260. State v. Chandler, 5 La. Ann. 489 (1850).

261. *Id.* at 490.

262. Cockrum v. State, 24 Tex. 394 (1859).

263. *Id.* at 403.

264. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1160 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016). While not challenged, California's prohibition on open carry compels the conclusion. *See supra* notes 168–171 and accompanying text. Just as a ban of handguns in the home could not be upheld simply because a person could lawfully keep another type of firearm, see District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008), a ban outside the home that, for most, severely burdens the core protection of the Second Amendment, the right to self-defense, cannot be sustained. *See also* Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218, 221 (2014) ("None of this means that good cause requirements are always constitutional, only that challenges to them should focus on the details of their implementation. If a public-carry licensing regime operates like a ban, it should be evaluated as such."); Gura, *supra* note 25, at 229 ("If individuals enjoy a right to carry handguns for self-defense, then however that right might be regulated, the Sheriff cannot pick and choose only a select handful of people who may do so.").

265. Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1359 (2009).

266. *Id.*

not yet been considered.[267] Furthermore, during 1791, most states did not include a right to arms provision, reflecting a dearth of gun control regulations at the time.[268] The original *Peruta*, confronted with the same problems of *Heller*, relied on the same cases incorporated in *Heller*'s analysis.[269] But the situation in *Peruta* is distinct from the one in *Heller* because the analysis was conducted as a review of San Diego's good cause requirement under the Second Amendment, as made applicable to the state under the Fourteenth Amendment. As previously stated, the use of the Fourteenth Amendment carries forward the analysis of the original public meaning of the right to keep and bear arms to 1868.[270]

Some cases during the nineteenth century did permit states to go further than regulating the method by which a person carried a weapon in public, banning the carry of certain weapons.[271] The cases, however, are of limited value; a case that rejects *Heller*'s recognition of a right to self-defense—by recognizing only a militia-based right to carry a weapon—sheds little light on the question whether the right to bear arms for the purpose of self-defense extends outside the home.[272] The same limitations are inherent in cases interpreting a state constitutional provision that recognizes a right to bear arms for self-defense, but also authorizes the state legislature to regulate the right in any manner it sees fit.[273] The Second Amendment's text does not contain such an open-ended clause restricting the application of the right to bear arms.[274]

267. *Id.* at 1353–54.

268. *Id.* at 1354 & n.27.

269. District of Columbia v. Heller, 554 U.S. 570, 585 n.9, 603, 612–14, 626, 628–29 (2008) (citing and analyzing *Bliss*, *Simpson*, *Reid*, *Nunn*, *Chandler*, and *Cockrum*).

270. *See supra* note 223 and accompanying text.

271. *See, e.g.*, Haile v. State, 38 Ark. 564, 566 (1882) (upholding a state law requiring pistols as used in the army or navy to be uncovered and carried in the hand because the carrying of such weapons in such a fashion did not advance the "common defense" of citizens); State v. Duke, 42 Tex. 455, 458 (1875) (upholding a law prohibiting the carrying of certain weapons on grounds that the state constitutional protection of the right to bear arms was subject to "regulations as the Legislature may prescribe"); Hill v. State, 53 Ga. 472 (1874) (upholding a state law prohibiting the carriage of pistols to court because the Second Amendment only secures a militia-based right to keep and bear arms); English v. State, 35 Tex. 473 (1872) (upholding a regulation prohibiting the carrying of certain weapons on grounds the Second Amendment only protects the right to keep and bear the arms of a militiaman).

272. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1156 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) ("[C]ases . . . which, like the dissenting opinions in *Heller*, espouse the view that one has a right to bear arms only collectively in connection with militia service and *not* for self-defense within or outside the home—are of no help.").

273. *See Duke*, 42 Tex. at 458 (interpreting a constitutional provision providing "'[e]very person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe'").

274. *Peruta*, 742 F.3d at 1160.

Although not logically probative of original public meaning of the Second Amendment adopted in 1791, post-Civil War legislative activity was nonetheless used in *Heller*.[275] Also, as the time imminently preceding the adoption of the Fourteenth Amendment, the legislative activity is substantially probative of the original public meaning of the Amendment.[276] During Reconstruction, many of the Southern states, through Black Codes, required black persons to obtain a license before carrying or possessing a weapon.[277] The attempts to disarm newly freed slaves, coupled with the grave danger the former slaves faced in pursuing rights as free citizens, spurred debates on whether they had the right to carry weapons to protect themselves from aggressors; although there was no consensus on the issue, some members of Congress expressed sentiments that "every man bearing arms about him . . . for his own defense"[278] was a fundamental right, and proposed "explicitly listing 'the constitutional right to bear arms' among the civil rights protected" in proposed legislation.[279] Orders given by Union commanders in the occupied South recognized a right to bear arms outside the home as well; one commander in South Carolina gave an order that "'[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms, will not be infringed,' though such a guarantee neither foreclosed bans on 'the unlawful practice of carrying concealed weapons' nor authorized 'any person to enter with arms on the premises of another against his consent.'"[280] Such post-Civil War sources suggest the right to keep and bear arms not only protected a right of self-defense, but also encompassed carrying a weapon in public in case of confrontation.[281]

Finally, the right to bear arms in public may be understood by consulting the works of commentators writing after the Civil War. The analysis is more removed from the ratification, but still endorsed by

275. *See id.* at 1161 ("Although consulting post—Civil War discussions may seem to be an unusual means for discerning the original public meaning of the right—particularly given that these discussions postdate the Second Amendment's ratification by three-quarters of a century—we hew to the Supreme Court's conclusion that they retain some significance, albeit less than earlier interpretations of the right.")

276. *See supra* note 223 and accompanying text.

277. *Peruta*, 742 F.3d at 1161 (quoting Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 20 (1995)).

278. *Id.* at 1162 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 340, 371 (1866) (statement of Sen. Henry Winter Davis)).

279. *Id.* (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 585 (1866) (statement of Rep. Nathaniel P. Banks)).

280. *Id.* at 1163 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 908 (1866) (statement of Rep. William Lawrence)).

281. *Id.*

Heller.[282] The view of many of the commentators, such as George Chase, was that:

> "[I]t is generally held that statutes prohibiting the carrying of concealed weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms *in a particular manner*, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence."[283]

John Ordronaux, formulating an explanation similar to Judge Posner's later "wild west" theory in *Moore*, wrote:

> "'[T]he right to bear arms has always been the distinctive privilege of freemen,' rooted in part in the 'necessity of self-protection to the person.' . . . 'Exposed as our early colonists were to the attacks of savages, the possession of arms became an indispensable adjunct to the agricultural implements employed in the cultivation of the soil. Men went armed into the field, and went armed to church. There was always public danger.'"[284]

Other commentaries of the time adhered to a dissenting view that because the right to keep and bear arms was militia-based, states were permitted to regulate almost anything outside the militia context; but once again, *Heller* limits the value of legal commentary that fails to recognize the individual right to self-defense.[285]

Ultimately, the fractal originalist analysis to conform to Supreme Court precedent leads to the conclusion that the right to bear arms includes a right to carry a weapon in public.[286] As the "quintessential self-defense weapon," described in *Heller*,[287] a law or regulation that extinguishes the right to carry handguns in public by banning both concealed and public carry is inconsistent with the right to keep and bear arms.[288] As the original *Peruta* court concluded: "the carrying of an operable handgun outside the

282. *See* District of Columbia v. Heller, 554 U.S. 570, 616–19 (2008) (reviewing commentary by "post-Civil War 19th-century sources" to establish an individual right to keep and bear arms).

283. *Peruta*, 742 F.3d at 1165 (alteration in original) (quoting GEORGE CHASE, THE AMERICAN STUDENTS' BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND 84 n.11 (3d ed. 1890)).

284. *Id.* (alteration in original) (quoting JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES: ITS ORIGIN, AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS, AND OF STATE LEGISLATURES 241–42 (1891)).

285. *See id.* at 1166 ("[W]e must accord these commentaries little weight, and for the same reason we discounted the state cases finding no individual or self-defense-based right to keep and bear arms: *Heller* tells us that they are—and always have been—incorrect interpretations of the nature and scope of the right.").

286. *See id.*

287. *Heller*, 554 U.S. at 629.

288. *See supra* notes 168–171 and accompanying text.

home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes 'bear[ing] Arms' within the meaning of the Second Amendment."[289]

B. INTEREST BALANCING

The intermediate scrutiny applied by the Second, Third, and Fourth Circuits to firearm regulations presents not only the question of whether heightened scrutiny had been appropriately applied in the Second Amendment context, but also whether means-end scrutiny is the method of review most consistent with *Heller*.[290] The state governments in *Kachalsky*, *Woollard*, and *Drake* failed to show that their firearm restrictions did not burden the Second Amendment right more than necessary, yet each restriction was upheld as substantially related to an important or substantial governmental interest under a modified form of intermediate scrutiny.[291] Furthermore, the same courts engaged in heightened scrutiny analysis were explicitly rejected by the majority opinion in *Heller* and endorsed by the dissent.[292] Both issues go to the substantive analysis of the review and an error in either could lead to an incorrect conclusion.

Intermediate scrutiny is most commonly applied in the First Amendment context and the Equal Protection Clause of the Fourteenth Amendment; this Note considers each in turn.[293] Under intermediate scrutiny of commercial speech protected under the First Amendment, a government defending a regulation must: (1) assert a substantial interest in support of the regulation; (2) demonstrate that the regulation directly and materially advances the interest; and (3) prevail in showing that the regulation is "narrowly drawn" to achieve the interest.[294] While there is little doubt that the government can properly assert a substantial interest in

289. *Peruta*, 742 F.3d at 1166.

290. *See supra* Part II.A.

291. *See Peruta*, 742 F.3d at 1177 ("In *Drake*, *Woollard*, and *Kachalsky*, the government failed to show that the gun regulations did not burden 'substantially more' of the Second Amendment right than was necessary to advance its aim of public safety.").

292. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); Colloquy, McDonald v. Chicago: *Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. 437 (2011); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012).

293. This Note addresses First Amendment scrutiny first because it has been more frequently used in the Second Amendment context. This is not to diminish the potential that equal protection tests have: the tests used are substantially similar to the intermediate scrutiny tests applied under the First and Second Amendments.

294. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995).

"public safety"[295] or "preventing crime,"[296] the inquiry does not end there. In showing a direct and material advancement of an interest, the government must show "the harms it recites are real and that its restriction will . . . alleviate them to a material degree"; mere speculation or conjecture is insufficient.[297] Intermediate scrutiny demands "a 'fit' between the legislature's ends and the means chosen to accomplish those ends."[298] The fit does not have to be perfect, but must be reasonable; it is not necessarily the least restrictive means possible, but one nonetheless tailored to accomplish the desired objective.[299]

Under equal protection doctrine, the government defending a classification must show that the classification "serves important governmental objectives" and that the "means employed are substantially related to the achievement of those objectives."[300] "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," nor may it rely on overbroad generalizations.[301] The government must produce an "exceedingly persuasive justification."[302]

Equal protection cases concerning illegitimacy and sexual orientation provide more conventional formulations of intermediate scrutiny. For classifications based on illegitimacy, the "classification must be substantially related to an important governmental objective."[303] The same standard of review has been endorsed by some circuit courts for classifications based on sexual orientation.[304]

Some federal courts have developed intermediate scrutiny for review of firearm regulations that "do not burden the core protection of self-

295. *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 677 (1989) (concluding that a general governmental interest in public safety is compelling).

296. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 750 (1987) (acknowledging that even a general governmental interest in preventing crime is compelling).

297. *Fla. Bar*, 515 U.S. at 626.

298. *Id.* at 632.

299. *Id.*

300. United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)) (internal quotation marks omitted).

301. *Id.*

302. *Id.* at 546 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982)) (internal quotation marks omitted).

303. Clark v. Jeter, 486 U.S. 456, 461 (1988).

304. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (applying heightened scrutiny to classifications based on sexual orientation); Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) (endorsing intermediate scrutiny for classifications based on sexual orientation).

defense in the home."[305] The standards are similar: the government must assert a substantial interest and there must be a reasonable fit between the challenged firearm regulation and the substantial interest, such that the regulation does not burden more conduct than reasonably necessary.[306]

The intermediate scrutiny used by courts under the Second Amendment most closely resembles the intermediate scrutiny used for commercial speech under the First Amendment. The absence of long-established Second Amendment doctrine leads many courts to borrow from the First Amendment because of perceived similarities.[307] *Heller* is exemplary, borrowing from First Amendment doctrine several times, or analogizing to that Amendment to establish the individual right to keep and bear arms.[308] Consequently, many of the circuit courts routinely draw parallels between the First and Second Amendments.[309] *Kachalsky*,

305. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93 (2d. Cir. 2012).

306. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013) ("[U]nder intermediate scrutiny the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary."); Woollard v. Gallagher, 712 F.3d 865, 878 (4th Cir. 2013) ("[W]e must decide if the State has demonstrated that there is a 'reasonable fit' between the good-and-substantial-reason requirement and the governmental objectives of protecting public safety and preventing crime.").

307. Blocher, *supra* note 292, at 379 ("Moreover, rightly or wrongly, the First and Second Amendments have often been considered close cousins. As a result, courts, litigants, and scholars will almost certainly continue to turn to First Amendment doctrine for guidance in developing Second Amendment standards of review, as Justices Scalia and Breyer effectively did in *Heller* by reprising the roles of Justices Black and Frankfurter. That reliance will be especially pronounced in light of the near absence of relevant Second Amendment precedent.").

308. *See* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."); *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*." (alteration in original)); *id.* at 606 (post-ratification commentators grouped the individual rights of the First Amendment with the individual rights of the Second in describing the role of judicial review); *id.* at 625–26 (concluding that since the Court did not hold any law to violate the First Amendment's guarantee of free speech until almost 150 years after the amendment was ratified, it was unremarkable that it took over 200 years to hold that a law violated the Second Amendment's guarantee); *id.* at 635 ("The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people . . . ." (alteration in original)).

309. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) ("[For intermediate scrutiny applied to commercial speech] we can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context."); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) ("Given *Heller* 's focus on 'core' Second Amendment conduct and the Court's frequent references to First Amendment doctrine, we agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment."); United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010) ("Because *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for

Woollard, and *Drake* are no exception, borrowing heavily from First Amendment cases to develop Second Amendment intermediate scrutiny.[310] The resulting product is a functionally identical test.[311]

1. Intermediate Scrutiny in Name, Rational Basis in Practice

While the circuit courts applying intermediate correctly identified substantial governmental interests in support of firearm regulations,[312] their analysis regarding whether the regulations achieved their objectives in a reasonable manner left much to be desired. A central flaw in the method of analysis is the degree of deference the courts accorded to state legislative judgments; all three quoted and rigorously applied the proposition found in *Turner Broadcasting System, Inc. v. FCC*[313] that courts should afford "substantial deference to the predictive judgments of [the legislature]."[314]

guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice. *Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment.").

310. All three cases endorsed the approach used in *Marzzarella*, one of the first cases to adopt intermediate scrutiny to determine whether a challenged regulation impermissibly burdens a Second Amendment right. *See Drake*, 724 F.3d at 429 ("We will consider each [Second Amendment question] . . . following the two-step approach this Court set forth in *United States v. Marzzarella* . . . ."); *Woollard*, 712 F.3d at 874 (citing *Marzzarella* as one of the cases adopting the intermediate scrutiny approach); *Kachalsky*, 701 F.3d at 93 n.17 (citing *Marzzarella* as a case "in line" with the intermediate scrutiny approach). *Marzzarella* formulated the intermediate scrutiny test to apply to Second Amendment cases using the intermediate scrutiny applied to government regulations burdening commercial speech. *See Marzzarella*, 614 F.3d 85 at 97–98 (All First Amendment intermediate scrutiny cases "require the asserted governmental end to be more than just legitimate, either 'significant,' 'substantial,' or 'important,'" demand "the fit between the challenged regulation and the asserted objective be reasonable, not perfect," and that "[t]he regulation need not be the least restrictive means of serving the interest . . . but may not burden more speech than is reasonably necessary . . . ."). *Kachalsky*, *Woollard*, and *Drake* further rely on *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), another First Amendment case calling for intermediate scrutiny for content-neutral "must-carry" regulations applied to broadcasters, for the proposition that the courts should give substantial deference to the predictive judgments of the legislature. *See Drake*, 724 F.3d at 436–37 (citing *Turner Broad Sys.*, 520 U.S. at 195); *Woollard*, 712 F.3d at 881 (The court cannot substitute views for the judgment of the state legislature that the firearm regulation strikes an appropriate balance in protecting the Second Amendment right and maintaining public safety.); *Kachalsky*, 701 F.3d at 97 (citing *Turner Broad Sys.*, 520 U.S. at 195).

311. Both tests require the government to assert a substantial interest, demand a reasonable fit between the challenged regulation, and may not burden more conduct than reasonably necessary.

312. *See Drake*, 724 F.3d at 437 ("The State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety."); *Woollard*, 712 F.3d at 877 ("[W]e 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."); *Kachalsky*, 701 F.3d at 97 ("New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.").

313. *Turner Broad. Sys.*, 520 U.S. at 180.

314. *Id.* at 195; *Drake*, 724 F.3d at 436–37; *Kachalsky*, 701 F.3d at 97. *Accord Woollard*, 712

Turner involved a First Amendment challenge to must-carry rules applied to cable providers that required the providers to provide local television station programming.[315] The Court did accord substantial deference to Congress, the legislative body authorizing the rules, giving deference to the predictive judgments Congress makes.[316] The Court gave no such deference, however, when the Court assessed whether the challenged provision materially advanced the interests articulated by Congress and did so in the least burdensome manner.[317] All three circuit courts upholding concealed carry restrictions not only applied deference in assessing the governmental interests given by the respective state legislatures, but also deferred to the state legislatures' assessment of the fit between the "may issue" permitting schemes and the interests asserted, thus compromising the analysis.[318] By applying a standard of review less rigorous than traditional First Amendment intermediate scrutiny, the courts are, in reality, applying no more than a rational basis test.[319]

The reasoning by *Kachalsky*, *Woollard*, and *Drake* to conclude that public carry restrictions directly and materially advanced the public safety interests of the state legislatures was suspect as well because the litigants

F.3d at 881 ("[I]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.").

315. For a more detailed description of the facts of the case and issue presented, see *Turner Broad. Sys*, 520 U.S. at 185–89.

316. *Id.* at 196. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1177 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) ("In Part II.A. of *Turner*, the Court applied deference to the legislature's judgment regarding the first portion of the intermediate scrutiny analysis: whether there was a 'real harm' amounting to an important government interest and 'whether [the statutory provisions at issue] will alleviate it in a material way.'").

317. *See Peruta*, 742 F.3d at 1177 ("[I]n Part II.B, when assessing 'the fit between the asserted interests and the means chosen to advance them,' the Court applied no such deference. . . . Instead, it required the government to prove that the statute did not burden the right 'substantially more . . . than is necessary to further [the government's legitimate] interests.'" (quoting *Turner Broad Sys.*, 520 U.S. at 213-14)); *Turner Broad. Sys.*, 520 U.S. at 213–24 (analyzing the content-neutral regulation's burden on speech for the promotion of the governmental interest articulated and to determine whether more speech than necessary was burdened). *Cf.* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420–21 (2013) (strict scrutiny may not be "strict in theory but feeble in fact" because the means chosen to effect a compelling interest receives "no deference").

318. *See Peruta*, 742 F.3d at 1177. The courts in *Kachalsky*, *Woollard*, and *Drake* errantly gave a "high degree of deference" to "the state legislatures' assessments of the fit between the challenged regulations and the asserted government interest they served," allowing "'substantially more' of the Second Amendment right than was necessary" to be burdened. *Id.*

319. If a court not only defers to the legislature's articulated interest, but also defers in ascertaining a correct fit between the ends and means, the review more closely resembles rational basis review. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1992) (under rational basis review, a regulation has "a strong presumption of validity" and may be sustained "based on rational speculation unsupported by evidence or empirical data").

defending the restrictions did not adequately demonstrate in litigation that the public safety interests were clearly advanced. Each court reasoned that the firearm permitting scheme allowed the state to restrict the number of persons carrying firearms in public, which in turn improved public safety.[320] But the record to support the conclusion was sparse; New Jersey, for example, made no findings of fact—and produced no legislative record—when it passed its permitting restrictions.[321] The State did not supplement the record with evidence to support its conclusions.[322] Yet the *Drake* court refused to invalidate the permitting restrictions, reasoning that other states had made similar conclusions that an increased number of guns carried in public could decrease public safety and that some studies confirmed that the ability to carry handguns in public had little self-defense benefits to the persons issued permits.[323] The *Kachalsky* opinion similarly absolved the state of its obligation to demonstrate the fit of its law to its public safety permit; the court there sustained the permitting restriction out of deference to the legislature's policy judgments.[324] In reversing the district court, *Woollard* offered more substantive reasoning for upholding the restriction on public carry,[325] but its offered reasoning only undermined

320. *See* Drake v. Filko, 724 F.3d 426, 438 (3d Cir. 2013) ("New Jersey's legislature 'has continually made the reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety.'"); Woollard v. Gallagher, 712 F.3d 865, 879 (4th Cir. 2013) ("The State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public."); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 98 (2d Cir. 2012) ("The decision to regulate handgun possession was premised on the belief that it would have an appreciable impact on public safety and crime prevention.").

321. *See Drake*, 724 F.3d at 437 ("To be sure, New Jersey has not presented us with much evidence to show how or why its legislators arrived at this predictive judgment. New Jersey's counsel acknowledges that 'there is no available commentary which would clarify whether or not the Legislature considered statistical information to support the public safety purpose of the State's Carry Permit Law.'").

322. *See id.* at 454 (Hardiman, J., dissenting) ("To be clear, New Jersey has provided *no evidence at all* to support its proffered justification, not just no evidence that the legislature considered at the time the need requirement was enacted or amended. The majority errs in absolving New Jersey of its obligation to show fit." (alteration in original)).

323. *Id.* at 447.

324. *See Kachalsky*, 701 F.3d at 99 ("It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments. Indeed, assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives, as New York did, is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make.").

325. *See Woollard*, 712 F.3d at 879–80 (holding the State demonstrated its "good-and-substantial-reason requirement" enhances public safety by decreasing the number of stolen handguns; lessening the likelihood of deadly confrontations; adverting confusion; reducing the number of police encounters with armed citizen; reducing handgun sightings; and identifying menacing persons).

the fit between the regulation and interest.

On the issue whether the public carry restrictions were sufficiently tailored to meet the governmental interest, the courts reasoned that in pursuit of public safety, the states could have banned all forms of public carry, but instead chose to create exceptions where the average, law-abiding citizen could obtain a permit after showing reasonable cause.[326] When contrasted with a blanket ban on public carry, a regulation offering some citizens an opportunity to carry a permit bears a certain semblance of reasonableness. But the dichotomy is false: it is incorrect to conclude that a fundamental right is not infringed when the exercise of the right is contingent on proving need.[327] Furthermore, the permitting systems are not sufficiently tailored in the sense that they do not burden more of the Second Amendment right than necessary.[328] The permitting restrictions were premised on the idea that they reduced the number of persons carrying firearms in public; the objective, however, could be equally achieved by a random lottery granting public carry permits to a select number of persons.[329] Even under intermediate scrutiny, the tailoring was insufficient,

326. *See Drak*e, 724 F.3d at 439–40 ("New Jersey engages in an individualized consideration of each person's circumstances and his or her objective, rather than subjective, need to carry a handgun in public. This measured approach neither bans public handgun carrying nor allows public carrying by all firearm owners; instead, the New Jersey Legislature left room for public carrying by those citizens who can demonstrate a 'justifiable need' to do so."); *Woollard*, 712 F.3d at 881 ("We specifically subscribe to the *Kachalsky* court's analysis that New York's proper-cause requirement 'is oriented to the Second Amendment's protections,' and constitutes 'a more moderate approach' to protecting public safety and preventing crime than a wholesale ban on the public carrying of handguns." (quoting *Kachalsky*, 701 F.3d at 98–99)); *Kachalsky*, 701 F.3d at 98–99 ("Here, instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere.").

327. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417–18 (1993) (rejecting an argument that a ban of commercial handbills had a close fit to improving public safety). *See also* Gura, *supra* note 25, at 227 ("As the Supreme Court long ago declared, a law that 'makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" (quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958))).

328. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1177 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) ("In *Drake*, *Woollard*, and *Kachalsky*, the government failed to show that the gun regulations did not burden 'substantially more' of the Second Amendment right than was necessary to advance its aim of public safety.").

329. *See id.* ("[T]he government could not show that the challenged regulation served its needs any better than a random rationing system, wherein gun permits were limited to every tenth applicant."). The purported means by which concealed carry restrictions achieve their end of improving public safety is by reducing the number of persons carrying a firearm in public. The same end is no better achieved by awarding the right to carry firearms in public by lottery. The lottery in all likelihood would be a better means since those meeting a good cause standard presumably face a higher risk to

sweeping in too much of the Second Amendment right in pursuit of public safety.[330] To meet the intermediate scrutiny requirements, *Kachalsky*, *Woollard*, and *Drake* had to fudge the analysis by one means or another to reach the conclusion that the laws directly and materially advanced the asserted interests.

Legal scholars for decades have commented on the permutations of judicial scrutiny that have developed, ranging from rational basis review to strict scrutiny.[331] While several courts have purported to use intermediate scrutiny to assess regulations burdening the Second Amendment right in the context of public carry,[332] in practice they have applied it deferentially.[333] But the degree of deference is unusual: the Supreme Court does not normally decline to engage in the "task of reviewing a legislature's constitutional fact-finding when basic constitutional values are implicated."[334] *Kachalsky*, *Woollard*, and *Drake* defer to the findings of the state legislature in a manner that is inconsistent with a normal constitutional right that is routinely afforded meaningful protection.[335] The result is a review more closely resembling rational basis review where regulations are sustained if they bear a reasonably conceivable relationship to a legitimate governmental interest.[336]

themselves and are more likely to use a firearm to protect themselves.

330. *See id.* at 1178 ("In light of the states' failure to demonstrate sufficient narrow tailoring in *Drake*, *Woollard*, and *Kachalsky*, the gun regulations at issue in those cases should have been struck down even under intermediate scrutiny.").

331. *See* Miller, *supra* note 79, at 895 (some of the variant "flavors" of judicial scrutiny include "intermediate, . . . semi-strict, [and] rational basis with bite").

332. *See supra* note 306 and accompanying text.

333. This is perhaps unsurprising given that "[i]ntermediate scrutiny, as a practical matter, has become something of a catchall for a constitutional domain ranging from rational basis analysis with bite to strict scrutiny without teeth." DAVID L FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 131 (2008).

334. *Id.* at 132.

335. *See* Gura, *supra* note 25, at 227 ("[N]o court would tell an accused individual seeking counsel under the Sixth Amendment, or a person vindicating her right to speak under the First Amendment, that she must 'clearly demonstrate' that the legislative judgment in denying her those rights absent the police's determination of true need is misguided, and that in any event, 'it's not our job' to second-guess the government's decisions regarding who deserves counsel and who is allowed to speak."). *See also* Gonzales v. Carhart, 550 U.S. 124, 165 (2007) ("Although we review congressional fact-finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 314–16 (1984) (Marshall, J., dissenting) (explaining that deference is not given to officials enforcing content-neutral restrictions of speech under the First Amendment).

336. Under rational basis review, a regulation may be sustained by *post-hoc* justifications because the standard of review simply "requires a court to uphold regulation so long as it bears a 'rational relationship' to a 'legitimate governmental purpose.'" District of Columbia v. Heller, 554 U.S. 570,

2. *Heller*'s Defeat and Breyer's Triumph?

The majority in *Heller* and *McDonald* explicitly rejected interest balancing as a means of evaluating whether a firearm regulation violates the Second Amendment.[337] The majority adopted the view that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or . . . future judges think that scope too broad."[338] The comments were directed at Justice Breyer's suggestion in *Heller*'s dissent that he would expressly adopt an interest-balancing inquiry to evaluate firearm regulations because judicial review on the subject inevitably devolves into "an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."[339] He implied that he believed a form of intermediate scrutiny was a proper judicial standard of review given that "review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny)."[340] Justice Breyer also argued that *Turner Broadcasting*[341]—the judicial crux of *Kachalsky*, *Woollard*, and *Drake*[342]—was instructive under his approach because "the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity."[343]

687–88 (2008) (Breyer, J., dissenting). *See also* David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1454 (2014) ("By presuming constitutionality with almost unlimited deference to the legislative process, and accepting justifications based upon speculation rather than evidence, some courts have sometimes applied the standard so loosely to firearm cases that it takes on the attributes of rational basis review.").

337. *See* McDonald v. City of Chicago, 561 U.S. 742, 785 (2010) ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing . . . and this Court decades ago abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'" (quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)); *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." (alteration in original)).

338. *Heller*, 554 U.S. at 634–35.

339. *Id.* at 689 (Breyer, J., dissenting).

340. *Id.*

341. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

342. *See supra* note 306.

343. *Heller*, 554 U.S. at 690.

The very nature of intermediate judicial scrutiny is a balancing test.[344] The government regulation under scrutiny is balanced by evaluating the infringement of an individual's right against the importance of governmental interests furthered, the degree of infringement, and the government's ability to fashion a more narrow (less burdensome) regulation to achieve its interests.[345] In deciding whether a regulation is sufficiently tailored to a substantial or compelling governmental interest, a court must weigh the state's interest against the means used to effectuate the interest.[346] For these reasons, intermediate scrutiny is an "overtly balancing mode."[347]

The tiers of scrutiny used under equal protection doctrine are balancing tests as well. "The levels of scrutiny are essentially balancing tests" because "each test determines how the weights on the scale are to be arranged."[348] As the level of scrutiny increases, the court evaluating the classification must place additional weight against the government.[349] Even more telling, Justice Scalia, the author of the majority opinion in *Heller*, has explicitly labeled intermediate scrutiny applied under equal protection doctrine as a balancing test.[350]

344. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 740–41 (1996) (describing intermediate scrutiny and strict scrutiny as a refinement of First Amendment principles to balance competing interests and special circumstances in varied circumstances); Miller, *supra* note 79, at 864 ("[T]raditional tests for many fundamental rights are, in fact, balancing tests. . . . [A]ll traditional levels of scrutiny require some explicit evaluation of the government interest."). *Cf.* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 889 n.5 (1990) (describing strict scrutiny as a test allowing federal judges to "balance against the importance of general laws the significance of religious practice").

345. *See* Holt v. Hobbs, 135 S. Ct. 853, 859 (2015) (describing strict scrutiny under the First Amendment as a "balancing test"); Witt v. Dep't of Air Force, 527 F.3d 806, 820 (9th Cir. 2008) ("[S]ubstantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals.").

346. *See* Bartnicki v. Vopper, 200 F.3d 109, 124 (3d Cir. 1999) ("[T]he intermediate scrutiny test applied varies to some extent from context to context, and case to case. But it always encompasses some balancing of the state interest and the means used to effectuate that interest.").

347. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992).

348. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080 (2011).

349. *See id.* ("Strict scrutiny puts the weights strongly against the government and rational basis places the weights in its favor.").

350. *See* United States v. Virginia, 518 U.S. 515, 595–96 (1996) (Scalia, J., dissenting) ("Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test—asking whether the State has adduced an 'exceedingly persuasive justification' for its sex-based classification—the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort

Professor Allen Rostron characterized *Heller* and *McDonald* as major victories in the legal skirmish for Second Amendment rights, but observed that the ultimate outcome in the struggle had yet to be determined.[351] He argued that Justice Breyer's dissent in *Heller* was prevailing in the "third battle" for gun rights, fought in the lower courts after *Heller* and *McDonald*.[352] Professor Rostron wrote:

> Justice Antonin Scalia's majority opinion in *Heller* heavily emphasized historical investigation of the original meaning and traditional understandings of the right to keep and bear arms. Justice Scalia also viewed the right in categorical terms, suggesting that courts should try to clearly demarcate the types of guns, people, and activities protected rather than letting analysis degenerate into a more subjective and volatile "interest-balancing inquiry" that would empower judges to let their personal predilections dictate decisions. The lower courts, frustrated by the indeterminacy of historical inquiry and puzzled by the categorizations suggested by Justice Scalia, have steered in other directions. They have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.
>
> . . . [T]he lower courts' decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Stephen Breyer wrote in *Heller* and *McDonald*. Justice Breyer warned that the search for historical, logical, and conceptual answers to difficult Second Amendment questions would prove to be futile, and he urged courts to read and apply the Constitution in ways that respect legislative judgments rather than obstructing the search for practical solutions to difficult problems. Thus far, Justice Breyer's approach appears headed for an unexpected triumph in the third battle over the Second Amendment now being waged in the courts.[353]

Although Professor Rostron made his observation before *Kachalsky*, *Woollard*, or *Drake* were decided in the circuit courts, all three cases perfectly embody the approach he describes.[354] And they are not the only

of single-sex public education.").

351. *See* Rostron, *supra* note 53, at 705 ("The *Heller* and *McDonald* decisions resolved important questions about the right to keep and bear arms, and at first blush they appeared to swing momentum decisively toward gun rights and away from gun control efforts.").

352. *See id.* at 706 ("Although the Supreme Court's rulings in *Heller* and *McDonald* naturally garnered enormous attention, this third battle, playing out in the lower courts, ultimately is of even greater importance. It is in the application of these rulings that 'the Second Amendment rubber meets the road' and the actual impact of these constitutional issues on Americans' lives will be determined.").

353. *Id.* at 706–07 (footnotes omitted).

354. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1176 (9th Cir. 2014), *vacated en banc*, No.

ones; the review of the Second Amendment has turned into a balancing test as "lower court decisions and the analytical approach that has begun to crystallize in them reflect Justice Breyer's sentiments about Second Amendment claims far more than those of Justice Scalia or the other members of the Court who formed the majorities in *Heller* and *McDonald*."[355]

3. *Peruta* and *Moore*'s Zen

The original *Peruta* and *Moore* are distinguishable from *Kachalsky*, *Woollard*, and *Drake* in the sense that they decline to engage in interest balancing—through intermediate or strict scrutiny—in evaluating public carry restrictions.[356] For if the "right to bear arms for self-defense . . . is as important outside the home as inside"[357] or the "Second Amendment does require that the states permit *some form* of carry for self-defense outside the home,"[358] the answer to the question concerning the constitutionality of the firearm restriction has already been reached. The text, history, and tradition of the Second Amendment may obviate interest balancing; "[t]racing the scope of the right is a necessary first step in the constitutionality analysis—and sometimes it is the dispositive one."[359] If the firearm regulation does not burden a right central to the Second Amendment, the regulation stands; if, however, the regulation erases or fundamentally compromises the right, the regulation must be invalidated.[360]

The methodology reflects the judgment that the framers of the Second Amendment already conducted interest balancing and the question is not within the judiciary's province to reconsider.[361] Such a conclusion may

10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) ("[T]he analysis in the Second, Third, and Fourth Circuit decisions is near-identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*.").

355. Rostron, *supra* note 53, at 756.

356. *See Peruta*, 742 F.3d at 1167 ("[I]f self-defense outside the home is part of the core right to 'bear arms' and the California regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-ends scrutiny can justify San Diego County's policy."); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (avoiding balancing under intermediate scrutiny, holding instead that Illinois failed to show "more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety").

357. *Moore*, 702 F.3d at 942.

358. *Peruta*, 742 F.3d at 1172.

359. *Id.* at 1167.

360. *See id.* ("[A] law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down.").

361. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("The Second Amendment is no different. . . . [I]t is the *very product* of an interest-balancing by the people . . . . [I]t surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth

take "certain policy choices off the table"[362] when regulations are found incompatible with the Constitution's guarantees. But if the text, history, and tradition of the Second Amendment are to be taken seriously, this categorical method offers the best approach. Firearm regulations that almost totally ban the right to bear arms—in a place where the right has always been understood to exist—should be as suspect as regulations that almost totally ban the right to keep them.[363]

C. PUBLIC CARRY AND *HELLER*'S REGULATORY SAFE HARBOR

One of the greatest challenges in deciphering *Heller* has been the majority's assertion that the opinion does not cast doubt on certain "longstanding" firearm regulations such as total bans on firearm possession by felons and the mentally ill, bans of firearms in sensitive places, or laws regulating the commercial sale of arms.[364] Footnote twenty-six of the majority opinion obfuscates by specifying that the enumerated "presumptively lawful regulatory measures" are merely exemplary, presumptively implying that lower courts may identify other firearm regulations that should remain unscathed.[365] Some courts have identified this provision as a regulatory "safe harbor," in which firearm regulations may be sustained if they are sufficiently analogous to the lawful measures listed in *Heller*.[366] Relying on these features of *Heller*, lower courts have sustained restrictions on firearm possession by felons, the mentally ill, illegal drug users, domestic violence misdemeanants, and juveniles; upheld bans on firearms that are deemed inherently dangerous, possess exceptional destructive capacity, or have obliterated serial numbers; and sustained firearm bans in "'sensitive places.'"[367]

For an originalist opinion, the *Heller* majority's regulatory safe harbor

and home." (alteration in original)).

362. *Id.* at 636.

363. *Peruta*, 742 F.3d at 1170.

364. *Heller*, 554 U.S. at 626–27.

365. *Id.* at 627 n.26.

366. *See, e.g.*, United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010) ("Some courts have treated *Heller*'s listing of 'presumptively lawful regulatory measures,' for all practical purposes, as a kind of 'safe harbor' for unlisted regulatory measures . . . which they deem to be analogous to those measures specifically listed in *Heller*."); United States v. Skoien, 614 F.3d 638, 646 (7th Cir. 2010) (en banc) ("The government invoked *Heller*'s anticipatory language about certain 'presumptively lawful' firearms regulations—specifically, felon-dispossession laws—as a sort of 'safe harbor' for analogous prohibitions." (quoting *Heller*, 554 U.S. at 627 n.26)).

367. Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of* District of Columbia v. Heller *and* McDonald v. City of Chicago, 19 VA. J. SOC. POL'Y & L. 1, 14 (2011) (quoting *Heller*, 554 U.S. at 626).

provision is somewhat puzzling; no foundation for the exceptions are found in the Second Amendment's text, nor does the majority even suggest, let alone demonstrate, that the framers understood that the presumptively lawful regulations existed.[368] Speculation exists that the language represented an add-on necessary to secure a five-vote majority.[369] But the safe harbor provision creates a question for courts whether public carry restrictions are presumptively lawful because of their longevity and potential to be analogized to the presumptively lawful regulations in *Heller*. After all, some could mistakenly argue that public carry restrictions are longstanding—restrictions on the concealed carry of weapons in public have existed and been sustained since the antebellum era.[370] From this fact, a flawed argument may be made that flat bans on public carry are arguably longstanding; New York's Sullivan Law, for example—the public carry restriction upheld in *Kachalsky*—flatly bans public carry without "proper cause" and has done so since 1913.[371] Public carry restrictions could easily be found to fall into the safe harbor, given that *Heller* recognizes that the Second Amendment does not protect the right to carry a firearm "in any manner whatsoever and for whatever purpose," and "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[372]

The original *Peruta* correctly rejected the regulatory safe harbor defense. It is a mistake to equivocate a total ban on concealed carry with a total ban on both concealed carry and open carry.[373] Laws banning the

368. *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 423 (2014) (from an originalist perspective, the regulatory safe harbor provision in *Heller* was "unsatisfactory" and appeared "ad hoc"); Rostron, *supra* note 53, at 713 ("Scalia's decision to provide a list of presumptively lawful measures is perplexing. . . . [I]t seems quite odd that Scalia would want to offer even a tentative view about the validity of any types of laws without undertaking a historical analysis of them, given that the *Heller* opinion otherwise emphasizes so strongly the need for constitutional decisionmaking to be supported by detailed historical analysis of original understandings and traditional interpretations.").

369. *See* Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009) (speculating that the safe harbor provision was inserted into the majority opinion to "secure a fifth vote," most likely the vote of Justice Anthony Kennedy).

370. *See, e.g.*, State v. Reid, 1 Ala. 612 (1840) (upholding a similar law prohibiting the concealed carry of knives or firearms); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840) (upholding a law prohibiting the concealed carry of a "bowie-knife," "Arkansas toothpick" or similar weapon).

371. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 85 (2d Cir. 2012).

372. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

373. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1171 (9th Cir. 2014), *vacated en banc*, No. 10-56971, 2016 WL 3194315 (9th Cir. June 9, 2016) ("[T]he County's argument . . . reads too much into *Heller*'s ostensible blessing of concealed-carry restrictions. A flat-out ban on concealed carry in a jurisdiction permitting open carry may or may not infringe the Second Amendment right—the passage

concealed carry of weapons in public are sustainable so long as they do not eradicate the right to carry arms in public altogether.[374] The manner in which a weapon is borne in public may be regulated, but the exercise of the right itself may not be abridged to the point that the right can no longer be said to exist.[375] A state or municipality that chooses to ban concealed carry, and concealed carry alone, does not violate the right to bear arms because an alternative means to exercise the right exists.[376] A regulatory regime may favor concealed or open carry over the other, but if one type of carry is to be disallowed, the other must be available to responsible, law-abiding citizens.[377]

The regulatory scheme San Diego County created for concealed and open carry pursuant to California's Penal Code illustrates the point. Considered as a whole, the scheme was impermissible because obtaining a license for concealed carry was the only practical avenue by which a

from *Heller* clearly bears on that issue, which we need not decide. But whether a state restriction on *both* concealed *and* open carry overreaches is a different matter. To that question, *Heller* itself furnishes no explicit answer." (alteration in original)).

374. *See id.* ("[L]aws prohibiting the carry of concealed weapons are valid only so long as they do not destroy the right to carry arms in public altogether."). The assertion is most consistent with what Second Amendment scholars have termed "presumptive carry." *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial. Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 595 (2012) ("A legal provision, whether constitutional or statutory, recognizes presumptive carry rights when it gives most individuals the opportunity, if they so choose, to carry defensive weapons in most places and times. Under this conception, the individual is not confined to carrying in only special or unusual situations (such as when she can document a particularized threat to her life), nor is the individual subject to still sharper restrictions that would prevent carrying a weapon except when *immediately* confronted with a violent assailant." (alteration in original)).

375. *See Peruta*, 742 F.3d at 1172 (noting that *Reid* stood for the proposition that a state legislature may regulate the manner in which a person may bear arms, but may not regulate the ability to bear arms in a manner that destroys the right).

376. *See id.* at 1171 (recognizing that post-Civil War commentators were of the opinion that "statutes prohibiting the carrying of *concealed* weapons are not in conflict with . . . [the Second Amendment] since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence" (alteration in original)). *See also* Nunn v. State, 1 Ga. 243, 243 (1846) ("A law which merely inhibits the wearing of certain weapons in a *concealed manner* is *valid*. But so far as it cuts off the exercise of the right of the citizen altogether to *bear arms*, or, under the color of prescribing the *mode*, renders the right itself useless—it is in conflict with the Constitution, and *void*." (alteration in original)).

377. *See Peruta*, 742 F.3d at 1172 ("To be clear, we are not holding that the Second Amendment requires the states to permit concealed carry. But the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home."); O'Shea, *supra* note 374, at 597 ("Much more common are constitutional decisions recognizing a general right to carry defensive arms while allowing some regulation, such as prohibiting concealed carry while allowing open carry. These too are presumptive carry decisions: they allow for the carrying of defensive weapons in most places and times, in a manner that is effective for self-defense.").

person could carry a weapon in public under state law.[378] It was San Diego County's restrictive interpretation of "good cause" under the concealed carry permit laws that caused the mischief; if the county were to consider a mere desire for self-defense "good cause"—as other counties in the state allow—there would no longer be a Second Amendment issue.[379] Likewise, Illinois' ban on the carrying of firearms ready for use outside the home presented similar deficiencies. At the time *Moore* invalidated the law, Illinois was the only state to maintain a flat ban on firearms outside the home, open or concealed.[380] Again, the ban impermissibly restricted the right of the responsible citizen to the point the right no longer existed.

Although they were upheld, the firearm restrictions in *Kachalsky*, *Woollard*, and *Drake* crossed the line as well. New York's Sullivan Law restricts concealed carry to those who can show special need for self-protection while simultaneously banning open carry.[381] Maryland ties its "good-and-substantial-reason" restriction to the permit required for concealed or open carry, leaving those without "apprehended danger" with no ability to carry a firearm in public.[382] New Jersey's regulations are similar, requiring any person who wants to carry a handgun in public to show "justifiable need" before a license is issued.[383] All three cases feature regulations that place substantial impediments that prevent the general population exercising their right to bear arms.

CONCLUSION

Contemplating the tension between public safety and the right to keep and bear arms, Judge Ronald Gould wrote that "[p]rudent, measured arms restrictions for public safety are not inconsistent with a strong and thriving Second Amendment."[384] The right of responsible, law-abiding citizens to

378. *Peruta*, 742 F.3d at 1171.

379. *See id.* (observing that the minimally intrusive remedy in the case would be for San Diego County, "in line with many of the other counties in the State of California . . . to issue carry licenses to citizens whose only 'good cause' is the *Heller*-approved desire for self-defense"). This does not automatically make the permit on-demand in the sense that authorities must grant an applicant a permit. If, for example, a criminal background check is required before a concealed carry permit is issued, or there is a requirement for the applicant to pass a safety course, the other requirements may prevent a good cause requirement of self-defense only to become one that is simply issued on demand.

380. *See* Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012) ("Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home, though many states used to ban carrying concealed guns outside the home . . . ." (alteration in original)).

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

382. Woollard v. Gallagher, 712 F.3d 865, 869–70 (4th Cir. 2013).

383. Drake v. Filko, 724 F.3d 426, 428 (3d Cir. 2013).

384. Nordyke v. King, 644 F.3d 776, 799 (9th Cir. 2011) (Gould, J., concurring), *vacated en banc*,

carry a weapon in public is no exception; this comment does not endorse the view that the state has no legitimate role in regulating firearms outside the home. Such an opinion would be an absurdity, given "[t]he right to bear arms in the colonial era was not a libertarian license to do whatever a person wanted with a gun."[385] To dismiss all firearm regulations as an encroachment on individual rights is unreasonable; even "the founders understood that gun rights had to be balanced with public safety needs."[386]

Where does this leave states and local governments seeking to strike the proper balance? The original *Peruta* and *Moore* make clear that fidelity to the text, history, and tradition of the Second Amendment disallows the government from destroying the right to bear arms in public by simultaneously banning concealed and open carry to all but a select few persons. The holdings, however, do not mean that governments with legitimate public safety concerns must throw in the towel, abandoning their denizens to settle their differences with gunplay at high noon. Viable policy options that adequately accommodate public safety and the individual right to bear arms already exist.

Fresno County, for example—a county with a population of almost one million[387]—extends "good cause" to "any citizen concerned for the safety of themselves, their family and friends, or their employees."[388] By offering the general public the opportunity to seek a concealed carry permit with a concern in the safety of themselves or others (without a requirement to go to court to establish the sincerity of the professed concerns), the latter definition of "good cause" is compatible with the right announced in the original *Peruta* and *Moore*, giving responsible, law-abiding persons the opportunity to exercise their Second Amendment right outside the home. In effect, the threshold for obtaining a license to carry a weapon in public is lowered within the pre-existing licensing scheme to the point that if a person believes that he or she has reason to fear for the safety of himself, herself, or others, the person may, as a matter of right, apply for a

681 F.3d 1041 (9th Cir. 2012).

385. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 115 (2011).

386. *Id.* at 114.

387. *See* U.S. Census Bureau, *State & County QuickFacts: Fresno County, California*, CENSUS.GOV, http://quickfacts.census.gov/qfd/states/06/06019.html (last updated July 8, 2014) (estimating a population of 955,272 in 2013).

388. CITY OF FRESNO, FRESNO POLICE DEPARTMENT POLICY MANUAL: CONCEALED WEAPON LICENSE, POLICY NO. 218, 2 (2014) http://www.fresno.gov/NR/rdonlyres/F2AB0C4B-7010-4EB5-82A2-4C2DDA5DBC25/29946/Policy218CCWLicense052214WEBREADY.pdf.

license.[389]

The difference described above is the distinguishing characteristic between a "may issue" and a "shall issue" jurisdiction; "may issue" jurisdictions require "persons seeking a carry permit must generally demonstrate that they have a special need to carry weapons in public," while "shall issue" jurisdictions allow persons to "obtain a permit to carry . . . firearms in public, provided that they fulfill certain administrative requirements . . . like completing a safety course."[390] Of course, the practical implication of converting from a "may issue" to "shall issue" jurisdiction is that more people will be able to obtain a permit to carry a weapon in public, presumably leading to a larger number of persons actually exercising the right to carry a weapon in public.[391] But most states—thirty-eight to be exact—are currently considered "shall issue" jurisdictions.[392]

Certain tradeoffs are inevitable when more people are carrying more guns.[393] Some argue that the increased accessibility to firearms undermines public safety by making it easier to commit crime,[394] while others argue public safety is enhanced by deterring criminal activity in the first place.[395]

389. Does such a regime entitle minors to apply for a concealed carry permit as a matter of right? Most likely it does not. *See, e.g.*, NRA, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 202–03 (5th Cir. 2012) (noting that nineteenth-century commentators and courts maintained that age-based restrictions on the ability of persons under the age of twenty-one to obtain a firearm, such as the purchase of one, were consistent with the guarantee of the Second Amendment).

390. Jon S. Vernick, *Carrying Guns in Public: Legal and Public Health Implications*, 41 J.L. MED. & ETHICS 84, 85 (2013).

391. Fresno County—a county with one of the more permissive definitions of "good cause" in California—issued the highest number of concealed carry licenses to civilians for any county in the state. *See* Josh Richman, *Gun Control in California: Concealed-Carry Rules Eased by Federal Court*, SAN JOSE MERCURY NEWS (Feb. 13, 2014, 12:07 PM), http://www.mercurynews.com/california/ci_25134832/gun-control-federal-court-guts-californias-concealed-carry (reporting that in 2013, Fresno County issued 6,277 concealed carry licenses to civilians—more than any other county in California).

392. *See supra* note 23 and accompanying text.

393. *See, e.g.*, Carlisle E. Moody et al., *The Impact of Right-to-Carry Laws on Crime: An Exercise in Replication*, REV. ECON. & FIN. 33, 42–43 (2014) ("The most robust result . . . is that the net effect of RTC [right-to-carry] laws is to decrease murder . . . . However, there is some evidence from state data only that RTC laws may also increase robbery and assault . . . . There is also some evidence from county data only that RTC laws decrease rape . . . . In any case, given that the victim costs of murder and rape are orders of magnitude greater than those of robbery and assault, we conclude that RTC laws are socially beneficial.").

394. *See, e.g.*, Abhay Aneja, John J. Donohue III & Alexandria Zhang, *The Impact of Right-to-Carry Laws and the NRC Report: Lessons for the Empirical Evaluation of Law and Policy*, 13 AM. L. & ECON. REV. 565, 616 (2011) ("If one had to make judgments based on panel data models of the type used in the [National Research Council] report, one would have to conclude that [right-to-carry] laws likely increase the rate of aggravated assault.").

395. *See, e.g.*, JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-

Still others argue the data are inconclusive, taking the position that it remains to be seen that either side is correct.[396] If anything can be ascertained with certainty at this time, it is that the issue will remain the subject matter of a robust discourse among the social sciences for many years to come.

Meanwhile, the law is the law: "[i]t is emphatically the province and duty of the judicial department to say what the law is."[397] If *Heller* and *McDonald*'s interpretations of the Second Amendment are to be taken seriously, the original *Peruta* and *Moore* provide the roadmap for courts going forward. The right to keep and bear arms should not be diluted to a balancing inquiry inconsistent with the Second Amendment—courts would be well advised to avoid the shortcomings of *Kachalsky*, *Woollard*, and *Drake*. It may be less expedient to trace the history and tradition of the amendment, but the correct decision often hangs in the balance.

CONTROL LAWS, at vii (3d ed. 2010) ("By now, dozens of academics have published studies on right-to-carry laws using national data. These studies have either confirmed the beneficial link between gun ownership and crime or at least not found any indication that ownership *increases* crime . . . . [N]ot a single refereed study finds the opposite result, that right-to-carry laws have a bad effect on crime.").

396. Benjamin Reed Ferguson et al., *Concealed Carry Permits: Catalystor Deterrent? A State-by-State Look into How a Change from No-Issue to Shall-Issue Affects Crime Rates*, 2 J.L. & CRIM. JUST. 241, 241 (2014) (concluding in a study whether the "changing of a jurisdiction from no-issue to shall-issue . . . results in more or less violent and or property crime" and that "[f]urther research is likely needed to determine whether unaccounted for variables" were the result of a decrease in violent crime in three out of six states studied, "or if right-to-carry laws have a causal relationship with specific violent crimes").

397. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).