THE CONSTITUTIONAL "TERRA INCOGNITA" OF DISCRETIONARY CONCEALED CARRY LAWS

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Despite federal appellate court attempts to provide clearer, though tentative, outlines of the Second Amendment's scope in the public sphere, the states' ability to regulate public carry remains ambiguous. Reflecting this ambiguity, state laws remain divergent; some states require that licenses be issued to those who qualify, while others grant issuing agencies discretion in deciding whether to issue a license to otherwise qualified applicants. Further contributing to this confusion are federal appellate court decisions holding disparate opinions of Second Amendment rights in the public realm.

In the state of Illinois, gun policy must be structured with conscious regard for Chicago, a city plagued by gun violence. It is only within the last year that Illinois has extended the right to public carry to its citizens, the result of a Seventh Circuit decision declaring Illinois' categorical ban on public carry unconstitutional. By examining the new Illinois Concealed Carry Act, and comparing it to other state laws in light of the constitutional analyses that Heller *and* McDonald *require, this Note will assess the extent to which public safety issues can guide gun policy. In analyzing attempts to strike this balance, this Note will also examine the constitutionality of two types of concealed carry laws that states have enacted.*

This Note concludes that both the text and a historical analysis of the Second Amendment support the conclusion that the Amendment protects the right to bear arms in public. It also concludes that the Supreme Court will likely hold that the more restrictive concealed carry laws are unconstitutional, as such laws grant issuing authorities the power to deny most law-abiding citizens of the right to carry a gun in public.

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I. INTRODUCTION

The U.S. Supreme Court's first comprehensive analysis of the scope of Second Amendment rights, set forth in the decisions *District of Columbia v. Heller*[1] and *McDonald v. City of Chicago*[2], opened a "vast *terra incognita*" of gun law "to judicial exploration."[3] Although the Supreme Court's decisions hinted at the scope of the Second Amendment right to bear arms outside the home, the issue remains ill-defined and largely unmapped.[4] While some states have recognized the right to carry a weapon outside the home for centuries, others resisted extending this right until recently.[5] It is only within the last year that Illinois has extend-

1. 554 U.S. 570 (2008) (upholding an individual right to possess a firearm for traditionally lawful purposes, like self-defense in the home).

2. 561 U.S. 742, 748 (2010) (holding that the Second Amendment protected the right to keep and bear arms for the purpose of self-defense and was fully applicable to the states).

3. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (quoting United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (citation omitted)).

4. *See id.* at 935 ("But the Supreme Court has not yet addressed the question whether the *Second Amendment* creates a right of self-defense outside the home.").

5. For example, New York first restricted concealed carry of weapons in 1911. *See* Peter Duffy, *100 Years Ago, the Shot That Spurred New York's Gun-Control Law*, N.Y. TIMES, CITY ROOM BLOGS (Jan. 23, 2011, 11:00AM), http://cityroom.blogs.nytimes.com/2011/01/23/100-years-ago-the-shot-that-spurred-new-yorks-gun-control-law/. Several southern states, as well as Indiana, had concealed carry bans during the nineteenth century. CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE

ed this right to its citizens, the result of a Seventh Circuit decision declaring Illinois' categorical ban on public carry unconstitutional.[6] With this change in Illinois law, concealed carry is now legal in some form in all fifty states.[7]

Despite federal appellate court attempts to provide clearer, though tentative, outlines of the Second Amendment's scope in the public sphere, the states' ability to regulate public carry remains ambiguous.[8] The root of this ambiguity is evident in the divergence between state laws, wherein some states require that licenses be issued to those who qualify, while others grant issuing agencies discretion in deciding whether to issue a license to otherwise qualified applicants.[9] The uncertainty of a state's regulatory abilities regarding public carry is emphasized by the subtle disparities between federal appellate court opinions delineating Second Amendment rights in the public realm.[10]

Gun policy in Illinois must be structured with a conscious regard for Chicago, a city plagued by gun violence.[11] The balance struck must yield an effective and constitutional gun-control law that will reduce the homicide rate, or at the very least not increase it. By examining the new Illinois Concealed Carry Act, and comparing it to other state laws in light of the (somewhat conflicting) constitutional analysis that *Heller* and *McDonald* require, this Note will assess the extent to which public safety issues can guide gun policy. It will also provide insight and recommendation as to the level of discretion government agents may constitutionally exercise in the granting of concealed carry permits.

This Note will examine the constitutionality of two types of concealed carry laws that states have enacted. Many states have adopted may-issue concealed carry laws, which are more restrictive than shall-issue laws like the one adopted in Illinois.[12] Several federal appellate courts have considered whether this more restrictive law unconstitutionally infringes on the Second Amendment right to bear arms. The opinions of the Seventh[13] and Ninth[14] circuits conflict with those of the

EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM app. A, 143–53 (1999) (collecting pre-1846 concealed carry laws).

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

7. Ciara McCarthy, *Concealed Carry Is Now Legal in All 50 States, and the NRA Doesn't Want Us to Know What that Really Means*, SLATE (July 11, 2013, 3:06 PM), http://www.slate.com/blogs/crime/2013/07/11/illinois_concealed_carry_carrying_guns_in_public_is_legal_in_all_50_states.html.

8. *See infra* Part III.

9. *See infra* Part II.B.

10. *See infra* Part III.

11. *See* Michael Thompson, *Chicago Murders Top Afghanistan Death Toll*, WND (Jan. 16, 2013, 1:48 PM), http://www.wnd.com/2013/01/chicago-murders-top-afghanistan-death-toll/.

12. *See infra* Part II.B.

13. *See* Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012) (holding that the Illinois Unlawful Use of Weapons statute and the Illinois Aggravated Unlawful Use of a Weapon statute, which generally prohibit the carrying of guns in public, violate the Second Amendment right to bear arms for self-defense outside the home).

14. *See* United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013).

Second,[15] Third,[16] Fourth,[17] and Tenth[18] circuits. The Supreme Court is likely to grant certiorari to resolve the issue in at least one of the petitions currently before it.[19] This Note concludes that both the text and a historical analysis of the Second Amendment support the conclusion that the Amendment protects the right to bear arms in public.[20] It also concludes that the Supreme Court will likely hold that the more restrictive concealed carry laws are unconstitutional because such laws grant issuing authorities the power to deny most law-abiding citizens of the right to carry a gun in public. Thus, the Illinois legislature wisely chose to adopt a less restrictive shall-issue concealed carry law.

II. BACKGROUND

Before 2008, a subdued gun-rights debate focused on whether an individual or collective right formed the basis of Second Amendment rights.[21] In essence, under the collective right analysis, the Second Amendment preserves collective action: the duty of the people to serve in the militia "to secure the free state."[22] The "individual right" view, on the other hand, asserts that the Second Amendment protects a personal right to keep and bear arms that extends beyond militia service.[23] *United States v. Miller*, a 1939 Supreme Court case, suggested the Second Amendment protected a collective right by asserting that the purpose of the Second Amendment was to ensure the effectiveness of the militia forces Congress is granted the power to call by the Constitution.[24] For nearly sixty-nine years,[25] the *Miller* decision, which insinuated that the

15. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012) (holding New York legislation that prevented individuals from obtaining a full-carry concealed-handgun license to possess concealed firearms in public, except upon a showing of "proper cause," as interpreted by the courts to require that these individuals demonstrate a special need for self-protection is distinguishable from that of the general community, did not violate the Second Amendment).

16. *See* Drake v. Filko, 724 F.3d 426 (3d Cir. 2013) *cert. denied*, 134 S. Ct. 2134 (2014) (holding that the requirement that individuals demonstrate a "justifiable need" to publicly carry a handgun for self-defense qualified as a "presumptively lawful," "longstanding" regulation and did not burden conduct with the scope of the Second Amendment).

17. *See* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013) (holding that Maryland's statute that individuals demonstrate "good and substantial reason" for the issuance of a handgun permit was reasonably adapted to substantial government interests of public safety and preventing crime).

18. *See* Peterson v. Martinez, 707 F.3d 1197 (10th Cir. 2013).

19. *See* Eugene Volokh, *What Next for the Second Amendment and the Right to Carry Guns?*, WASH. POST, VOLOKH CONSPIRACY (Feb. 13, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/13/what-next-for-the-second-amendment-and-the-right-to-carry-guns/.

20. *See infra* Part IV.

21. *See* Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 99 (2009), *available at* http://columbialawreview.org/Sidebar/volume/109/97_Volokh.pdf.

22. U.S. CONST. amend. II; D.C. v. Heller, 554 U.S. 570, 645 (2008) (Stevens, J., dissenting).

23. U.S. CONST. amend. II; *Heller*, 554 U.S. at 645 (Stevens, J., dissenting).

24. 307 U.S. 174, 178 (1939) ("The Constitution as originally adopted granted to the Congress power – 'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . . .' With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.").

25. From Miller, *id.* at 174, in 1939 until *Heller*, 554 U.S. at 570, in 2008.

Second Amendment was a collective right, stood as the Supreme Court's only precedent considering the Second Amendment.[26] Lower courts relied on *Miller* to uphold gun restrictions, on the ground that such restrictions did not interfere with the collective right to bear arms, and thus, did not violate the Second Amendment.[27]

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment "codified a pre-existing right," evident in the Founder's use of the words "shall not be infringed" in the Second Amendment.[28] In striking down the District of Columbia's absolute ban on handguns used for self-defense in the home,[29] the Court held that the operative clause of the Second Amendment[30] "guarantee[d] the individual right to possess and carry weapons in case of confrontation."[31] The prefatory clause, the Court continued, "fit[] perfectly" with the individual right "once one knows the history that the founding generation knew . . . ."[32] A meticulous survey of the history of gun rights followed, primarily focused on three phases: English history, the Early Constitutional period, and the Nineteenth Century.[33] Justice Scalia traced a historical understanding through these periods using a variety of sources, including the English Bill of Rights of 1689,[34] jurisprudence,[35] legislation and legislative history,[36] and treatises.[37]

Although the Court elucidated the preexisting individual right, *Heller* confined this right under longstanding restrictions: "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[38] "[N]othing in . . . [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . ."[39] Although the "enshrinement of constitutional rights" prohibited certain regulatory measures, like total bans of guns within the home, "[t]he Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns . . . ."[40] Beyond denouncing rational basis review as

26. Another Supreme Court case from the eighteenth century, *Robertson v. Baldwin*, asserted that concealed carry prohibitions did not violate the Second Amendment. 165 U.S. 275, 281–82 (1897).

27. *See Heller*, 554 U.S. at 638 n.2 (Stevens, J., dissenting) (collecting examples of cases to support the statement that "[s]ince our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there").

28. *Id.* at 592 (majority opinion); *see also* U.S. CONST. amend. II.

29. Heller, 554 U.S. at 636.

30. "[T]he right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

31. *Heller*, 554 U.S. at 592.

32. *Id.* at 598.

33. *See id.* at 594–615.

34. *Id.* at 594.

35. *See, e.g.*, *id.* at 610–14.

36. *See, e.g.*, *id.* at 614–15.

37. *See, e.g.*, *id.* at 607.

38. *Id.* at 626.

39. *Id.* at 626–27.

40. *Id.* at 636.

redundant[41] and Justice Breyer's "interest-balancing" approach as being entirely incompatible with enumerated Constitutional rights,[42] the Court explicitly declined to determine the level of scrutiny applicable to restrictions on Second Amendment rights.[43] Rather, the Court held that the D.C. ban failed constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . ."[44]

After *Heller,* the question remained whether the Second Amendment was incorporated against the states.[45] Two years and two days after the *Heller* decision, the Supreme Court held, in *McDonald v. City of Chicago,* that the self-defense right protected by the Second Amendment was fundamental to our "system of ordered liberty."[46] Therefore, the Second Amendment applied "equally to the Federal Government and the States," and was incorporated through the Due Process Clause of the Fourteenth Amendment.[47]

A. Originalism or "Faux-Originalism?"

Legal scholars have long debated the proper canons of constitutional interpretation.[48] Some scholars and jurists follow the originalist school of thought, which considers only what the Framers intended when they drafted the Constitution in interpreting its tenants.[49] Others believe that the Constitution is and was meant to be an evolving document, and thus should be interpreted in a way that adapts to changing conditions.[50] Although most jurists use one of these two approaches when interpreting the constitution, other approaches do exist. Often, different interpretive forms lead to vastly different judicial determinations, which sparks continued debate about which interpretive form is correct, as well as whether a propounded form has been correctly applied.[51] Polarizing ideologies catalyze political activism focused on asserting or protecting one's views, which in turn fuels these constitutional interpretation arguments.[52] This political activism arguably plays an important role in the outcome of Supreme Court cases. Indeed, some judicial commentators have even referred to the highest judicial Court as a "quasi political body."[53]

41. *See id.* at 628–29 n.27.
42. *Id.* at 634.
43. *See id.*
44. *Id.* at 628.
45. *See* Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 195 (2009).
46. McDonald v. City of Chi., 561 U.S. 742, 748 (2010).
47. *Id.* at 791.
48. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964, 964 (1998).
49. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–64 (1989).
50. *See* Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), http://www.newrepublic.com/article/books/defense-looseness.
51. *E.g.*, *id.* (asserting that Justice Scalia's majority opinion in *Heller* is "faux originalism").
52. *See id.*
53. Debra Cassens Weiss, *Posner Has "Absolutely No Desire" to Join SCOTUS, Which "Isn't a Real Court,"* ABA J. (Nov. 11, 2013, 11:44 AM), http://www.abajournal.com/news/article/

Increasingly, one of the most debated parts of the U.S. Constitution is the Second Amendment. Prior to 2008, the scope of rights protected by the Second Amendment remained a nebulous concept.[54] The disagreement between gun control advocates and gun rights advocates focused on whether the Second Amendment protected a collective or an individual right.[55] Ostensibly, these two types of rights seem to overlap: a collective right to keep and bear arms might require individual possession in order to preserve the right.[56] As argued by its proponents, however, the collective rights theory is diametrically opposed to and discriminatory of individual rights; collective rights place the right to keep and bear arms at a broader communal level, removing and invalidating the right to keep and own a gun in one's home.[57]

In 2008, the *Heller* Court ended this argument,[58] concluding in a five-to-four decision that the Second Amendment protects an individual right to self-defense.[59] The very essence of the majority opinion is that it maintains an originalist interpretation in an effort to preserve the Court's legitimacy.[60] Extensive historical analysis provides foundational support for the Court's conclusions.[61] Simultaneously, however, some elements in the analysis hint that originalist theories may be combined with more modern interpretations that resemble living document principles.[62] Commenters have criticized the *Heller* opinion for these inconsistencies, even referring to the decision as "faux-originalism."[63] The majority opinion defines the proper approach for assessing constitutional challenges to laws that impact the Second Amendment;[64] as a result, these inconsistencies are likely to significantly affect constitutional interpretation in future

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54. *See* D.C. v. Heller, 554 U.S. 570, 626 (2008); *see also* Ilya Shapiro, *Time for the Supreme Court to Explain the Scope of the Second Amendment*, CATO INSTITUTE (Feb. 12, 2014), http://www.cato.org/blog/time-supreme-court-explain-scope-second-amendment.

55. *See generally* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 369 (1998) (asserting that "Madison's objective in writing the Second Amendment was not to grant an individual right but to set limits on congressional power").

56. For an interesting thought experiment about how a collective right might protect an individual right to possess military-grade arms, see Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995).

57. *See id.*

58. 554 U.S. at 570.

59. *See id.* at 622.

60. *See id.* at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

61. *Id.* at 661–79; *see also* Luis Acosta, *United States: Gun Ownership and the Supreme Court*, LIBRARY OF CONGRESS (July 2008), http://www.loc.gov/law/help/second-amendment.php.

62. Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551, 1561–62 (2009); *see Heller*, 554 U.S. at 626.

63. Posner, *supra* note 50, at 32; *see generally* Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609 (2008).

64. Posner, *supra* note 50, at 1.

Second Amendment cases. Therefore, it is essential to understand these inconsistencies and how they might influence constitutional interpretation when attempting to craft a concealed carry rule that will pass constitutional muster.

The inconsistencies within the *Heller* analysis are perhaps most evident in the comparative *consistencies*, at a general level, between the majority and dissenting opinions. For instance, Justice Scalia's majority opinion as well as the two dissenting opinions from Justice Stevens and Justice Breyer advance originalist interpretations and rely on linguistic and historical evidence but arrive at opposite conclusions.[65] Additionally, commenters point out that parts of the majority opinion "actually embod[y] a living, evolving understanding of the right to keep and bear arms."[66] Thus, although the decision explicitly rejects the use of "interest-balancing inquiry" suggested in Justice Breyer's dissent,[67] it also seems to implicitly support such an approach when it sets forth a list of acceptable gun restrictions.[68]

The Second Amendment right is not unlimited, Justice Scalia explains, and the Court's opinion "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ."[69] These prohibitions essentially remain constitutional because of their "longstanding" status; Scalia does not engage, as he does elsewhere in the opinion, in an extensive historical analysis to determine whether the listed prohibitions fall within the scope of Second Amendment rights that the Founders sought to protect.[70] Because the *Heller* majority opinion considered recently recognized restrictions on the right to bear arms, such as laws prohibiting guns in sensitive places such as schools and government buildings, it is evident that the Supreme Court will not confine itself solely to originalist historical considerations when examining Second Amendment rights.[71]

Although *Heller* did not address the issue directly, the majority opinion suggests that an outright ban on carrying concealed weapons would survive a constitutional challenge under the Second Amendment.[72] The Court cites such prohibitions with approval: "[T]he majority of the

65. *Compare Heller*, 554 U.S. at 570, (majority opinion), *with id.* at 637 (Stevens, J., dissenting), *and id.* at 683–87 (Breyer, J., dissenting); *see* Winkler, *supra* note 62, at 1558 ("*Heller* was characterized as a triumph of originalism in part because even the dissenters adopt this approach in arguing that the Second Amendment was restricted to the militia.").

66. Winkler, *supra* note 62, at 1557.

67. *Heller*, 554 U.S. at 634.

68. *Id.* at 626–27.

69. *Id.* at 626.

70. *Id.* at 626; *see also* Winkler, *supra* note 62, at 1561–64 (noting that, despite the likely existence of Founding Era precedent, *Heller* does not cite any historical sources to support the list of longstanding prohibitions that are presumptively lawful under *Heller*).

71. Winkler, *supra* note 62, at 1563 (asserting that bans on possession by the mentally ill and in sensitive places did not exist in the founding generation, whole "[b]ans on ex-felons possessing firearms were first adopted . . . almost a century and a half after the Founding.").

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

19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[73] Yet, Justice Stevens's dissent makes a prescient prediction that holding the Second Amendment protects the right of a "law-abiding, responsible citize[n] . . . to keep and use weapons in the home for self-defense" will cause a domino effect for other gun policies, because "most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home."[74] Justice Stevens indicates that the expounded right will be used to strike down public carry laws.

Further, despite language hinting otherwise, the majority opinion insinuates in dictum that public carry might be a protected Second Amendment right.[75] This is evident in the specific wording that Scalia chose (or, perhaps, the words he did not use), as well as in the historical cases cited.[76] First, when talking about the limits on Second Amendment rights, Justice Scalia explains that prohibitions on *concealed* carry of weapons have been upheld against Second Amendment, or analogous state provision challenges.[77] Concealed carry is only a subset of public carry, and concealed carry prohibitions do not intrinsically restrict the opportunity for open carry of weapons.[78] In fact, the cases that the majority cites as upholding concealed carry bans often do so on the basis that open carry is still an available option, meaning Second Amendment rights to bear arms have not been completely infringed.[79] These cases will be discussed further below in the historical analysis section.[80]

Justice Scalia defends the lack of historical Founding Era support for those gun prohibitions, which he describes as doubtlessly constitutional, by explaining that *Heller* is "this Court's first in-depth examination of the Second Amendment[,] . . . [a]nd there will be time enough to expound upon the historical justifications for the exceptions . . . if and when those exceptions come before us."[81] Thus, according to *Heller*, two things appear certain: first, "that complete disarmament is unconstitutional;"[82] and second, that any regulation that affects Second Amendment rights must comport with the Founding Era understanding of the right to keep and bear arms.[83]

73. *Id.*

74. *Id.* at 679–80 (Stevens, J., dissenting) (citations omitted).

75. *See id.* at 584.

76. *See id.* at 584–85.

77. *Id.* at 626.

78. *See id.* at 571; *see also Open Carrying Policy Summary*, L. CTR. TO PREVENT GUN VIOLENCE (July 29, 2013), http://smartgunlaws.org/open-carrying-policy-summary/.

79. *See, e.g.*, Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822) (holding that a statutory ban diminishes the liberty and restrains the right to bear arms "by prohibiting the citizens [from] wearing weapons in a manner which was lawful to wear them when the constitution was adopted").

80. *See infra* Part III.

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

82. Winkler, *supra* note 62, at 1575.

83. *See infra* Part III.B.2. This premise is certainly difficult for gun control advocates to accept.

Justice Scalia assuages sensational fears of rampant, unrestrained gun possession by asserting, without providing historical support, that at least some logical gun control policies are constitutional.[84] Indeed, even some detractors have described *Heller* "as a symbol of a truly reasonable right to keep and bear arms."[85] It is possible that public interest balancing will become an important factor considering the historical record is split between historical evidence that supports a particular prohibition and other evidence that weighs against that prohibition.[86] An interest-balancing inquiry, which *Heller* explicitly rejects, can be used as a starting point from which legislators can craft gun regulations, as long as these legislated restrictions can be analogized to Founding-Era ideals through historical support.

B. Divergent State Laws

This past year, Illinois enacted a concealed-carry law, becoming the last state to do so.[87] Illinois did not willingly pass the state's concealed carry law, rather it was forced upon the reluctant legislators by the Seventh Circuit's decision in *Moore v. Madigan*.[88] When crafting the Illinois Concealed Carry law, the Illinois General Assembly had the unique opportunity to consider the concealed carry laws of forty-nine other states. In fact, Judge Posner, the author of the *Moore v. Madigan* decision, cited other states' legislation approvingly.[89] Naturally, each state's laws have unique features, but generally the laws of the forty-nine states fall into two distinct categories, referred to as "shall-issue" laws and "may-issue" laws.[90] The main difference between the two types is evident in the name, and hinges on the degree of discretion the body charged with issuing carry licenses has in approving or denying an application.[91]

Nearly all states place restrictions based on age, nonfelon status, and the mental health status of the individual, whether the applicable law is shall- or may-issue.[92] These standard requirements are technically not under the control of the individual and are typically aligned with requirements for gun ownership to begin with, whether or not one seeks to

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

85. Winkler, *supra* note 62, at 1575.

86. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012) ("History and tradition do not speak with one voice [regarding possession of guns in public].").

87. *See* McCarthy, *supra* note 7.

88. 702 F.3d 933 (7th Cir. 2012) (overturning the Illinois ban on the concealed carry of weapons, but staying its mandate for 180 days for the Illinois legislature to draft a new gun law with reasonable limitations consistent with the court's decision).

89. *Id.* at 941.

90. *Compare* WASH. REV. CODE § 9.41.070(1) (1988 & Supp. 1994), *with* N.Y. PENAL LAW §§ 265.01–.04, 265.20(a)(3), 400.00 (McKinney 2013).

91. *See Shall-Issue, May-Issue, No-Issue and Unrestricted States*, BUCKEYE FIREARMS ASS'N, http://www.buckeyefirearms.org/node/6744 (last visited Nov. 22, 2014).

92. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis 2014) (may-issue law); N.Y. PENAL LAW § 400.00 (McKinney 2013) (may-issue law); WASH. REV. CODE ANN. § 9.41.070(1) (1988 & Supp. 1994) (shall-issue law); VA. CODE ANN. § 18.2-308.09(D) (1988 & Supp. 1994) (shall-issue law).

legally carry the gun outside the home.[93] Therefore, unless the state has no requirements for gun ownership, which is extremely rare,[94] these requirements are technically surplusage, as there is no reason for an individual to have a permit to carry a gun outside of the home if they are not able to own a gun in the first place.

Often, states place residency restrictions on those who can seek a concealed carry permit.[95] Typical permitting structures vary in exclusivity: some limit permits to just those who live in the state, others expand the right to those that have obtained permits in a state enumerated within the law, while others extend permits to individuals who have obtained a permit in a state which has permitting laws that meet certain qualifications.[96] The primary reasoning behind exclusive rules is that states often do not share criminal or mental health data with each other, making it very difficult to determine if a person qualifies for a permit.[97]

These requirements are essentially preliminary, however, and often a state establishes many more requirements for a license to be issued.[98] These requirements fall within a spectrum that ranges from those an individual is able to control, such as training and exemplified proficiency with firearms, to those that are completely external, such as license evaluator discretion.[99] The extremes of this spectrum define whether a state is shall-issue or may-issue, which hinges on whether objective criteria or subjective discretion are the determinative factors in issuing a license.

1. "Shall-Issue" Laws

The majority of state public carry laws, including the new Illinois law, are shall-issue laws.[100] As the name suggests, shall-issue laws require

93. *See, e.g.*, COLO. REV. STAT. § 18-12-108–108.5 (2014) (prohibiting handgun ownership by previous offenders and juveniles, respectively); Firearm Owners Identification Card Act, 430 ILL. COMP. STAT. 65/8 (2013) (requiring a permit that establishes similar prohibitions for gun ownership in Illinois).

94. Walter Ricksaw, *What Is the Difference Between Shall Issue and May Issue?*, CONCEALED CARRY CLASS, http://www.concealedcarryclass.net/what-is-the-difference-between-shall-issue-and-may-issue/ (last visited Nov. 22, 2014).

95. *See, e.g.*, COLO. REV. STAT. § 18-12-203(1)(a) (2003).

96. For instance, Colorado offers reciprocal licenses to nonresident applicant that resides in a state that recognizes Colorado concealed carry licenses. *See id.* § 18-12-213; *Cf.* 430 ILL. COMP. STAT. 65/2 (2014) (exempting nonresidents from Firearm Operators Identification requirements when those nonresidents are licensed or registered to possess a firearm in their resident state).

97. *See* Peterson v. Martinez, 707 F.3d 1197, 1203–04 (10th Cir. 2013) (describing how municipal court convictions, mental health issues, juvenile records and 911 calls that do not result in arrest are often not reported to statewide or nationwide databases, making it impossible for those charged with evaluating concealed carry applications in Colorado to fully assess whether the applicant should be granted a license).

98. For an example of a law that has training and proficiency requirements, see 430 ILL. COMP. STAT. 66/75 (2014).

99. *See id.* Those states that give evaluators discretion to determine whether to issue a license include New York, Maryland, and Delaware. *See* N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2013); MD. CODE ANN., PUB. SAFETY § 5-306(a)(ii) (LexisNexis 2014); DEL. CODE ANN. tit. 11 § 1441(5)(d) (2014).

100. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-717, GUN CONTROL: STATES' LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION app. IV (2012)

the issuing authority to issue a permit to an applicant who meets delineated requirements.[101] There is little to no discretion on the part of the issuing body.[102] In the decade between 2002 and 2012, the legislative trend has shown significant preference for shall-issue laws.[103] In that time span, no new states adopted may-issue laws, while three states abandoned their may-issue laws in favor of shall-issue.[104] Without exception, as of July 2013, each of the seven former no-issue states had enacted shall-issue laws.[105]

Shall-issue states generally require the licensing authority to issue a permit in the absence of a statutory reason for denial.[106] As one would expect, this characteristic means that shall-issue states typically issue more permits than may-issue states.[107] As a direct result, shall-issue states often have a higher ratio of active permits relative to adult population than may-issue states.[108]

States with shall-issue laws do not automatically approve all applications for concealed carry permits.[109] In fact, in some shall-issue states, applicants must meet exacting requirements before the licensing authority will issue a permit.[110] The majority of these requirements, however, establish objective criteria that the agency charged with issuing licenses must follow, and an individual applicant is able to exercise some control over their ability to meet this criteria.[111] For instance, Virginia requires that applicants submit proof of firearm safety training to the court charged with issuing such license.[112]

Alaska similarly requires that the individual complete a firearms safety course and exhibit proficiency with a firearm, but goes a step further, requiring that all applicants show proof that they have completed a

(showing thirty-nine states as having shall-issue laws as March 2012); Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 685–86 (1995). As of August 1, 2013, both Illinois and Alabama were added to this shall-issue list, raising the total number of shall-issue states to forty-one. *See* 2013 ALA. CODE § 13A-11-75 (2013); 430 ILL. COMP. STAT. 66/10 (2013). There is a residency-requirement distinction between shall-issue laws: nineteen of the thirty-nine states have shall-issue laws that apply to both residents and nonresidents. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* at app. IV. The other twenty states are shall-issue only with regard to residents of that state. *See id*.

101. Ricksaw, *supra* note 94.

102. *Id.*

103. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 100, at 8.

104. *See id*.

105. *See id.* Three states have abandoned shall-issue laws in favor of not requiring a permit for concealed carry. *See id.* at 9. Vermont has never required a permit for concealed carry. *See id.* at 3 n.7.

106. *Id.* at 9.

107. *See id.*

108. *See id.* at 9–10 ("The ratio of active permits relative to adult population in Georgia and South Dakota (shall-issue states) is approximately 9 percent and 11 percent respectively, while the same ratio in California and Maryland (may-issue states) is approximately 0.1 percent and 0.3 percent respectively.").

109. Beyond the minimum requirements that include: ex-felon status, residency status, mental health status, and age to name a few; see sources cited *supra* notes 98 and 99.

110. *See id.*

111. *See id.*

112. VA. CODE ANN. § 18.2-308.02 (1988 & Supp. 1994).

course providing "knowledge of Alaska law relating to firearms and the use of deadly force;" and "knowledge of self-defense principles."[113] Pennsylvania does not require applicants to undergo any sort of legal or proficiency training, but does require applicants to declare one of the enumerated reasons for seeking such a permit: "self-defense, employment, hunting and fishing, target shooting, gun collecting or another proper reason."[114]

Despite having general requirements that licenses are to be issued if there is no statutory reason for denial, about sixteen shall-issue states grant licensing entities a limited form of discretion in making permit decisions.[115] This discretion is commonly formulated as a statutory requirement that the applicant be of good moral character, but several states have unique discretionary requirements.[116] For instance, some state laws retain indirect discretion by allowing an entity outside the issuing agency, such as a local police force, to object to an individual being granted a license.[117]

2. "May-Issue" Laws

Most may-issue laws stand in sharp contrast to these seemingly lax shall-issue laws.[118] As the name suggests, may-issue laws place discretionary power in the governmental authority charged with issuing concealed carry permits.[119] Typically, applicants in a may-issue state must demon-

113. ALASKA STAT. § 18.65.715(a) (2014).

114. 18 PA. CONS. STAT. § 6109(c) (2014). An ambiguity within this statute may allow it to become more like a may-issue law, as the issuing sheriff is allowed to deny a license where there is "good cause" for such denial. *See id.* § 6109(e).

115. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 100, at 12.

116. *See, e.g.*, GA. CODE ANN. § 16-11-129(d)(4) (2014) (requiring judge to issue permit unless determines, for instance, that the applicant "is not of good moral character"); MONT. CODE ANN. § 45-8-321 (2014) (stating, in a shall-issue law, that "[t]he sheriff may deny an applicant a permit to carry a concealed weapon if the sheriff has reasonable cause to believe that the applicant is mentally ill . . . or otherwise may be a threat to the peace and good order of the community"); N.D. CENT. CODE, § 62.1-04-03 (2014) (disqualifying concealed carry applicants who has been "convicted of an offense involving moral turpitude"); 18 PA. CONS. STAT. § 6109 (2014) (giving a sheriff the power to deny a license to a "habitual drunkard," an individual who is addicted to drugs, or "[a]n individual whose character and reputation is such that the individual would be likely to act in a manner dangerous to public safety").

117. *See* VA. CODE ANN. § 18.2-308.09(13) (1988 & Supp. 1994) (disqualifying a concealed carry applicant whom "the court finds . . . is likely to use a weapon unlawfully or negligently to endanger others. The sheriff, chief of police, or attorney for the Commonwealth may [offer their opinion that] . . . based upon a disqualifying conviction or upon the specific acts set forth . . . the applicant is likely to use a weapon unlawfully or negligently to endanger others").

118. There are examples of may-issue laws that in fact are applied more like shall-issue laws. For example, before August 1, 2013, Alabama was a may-issue state. Tim Brown, *Alabama Concealed Carry: Sheriffs 'Shall-Issue' Concealed Gun-Carry Permits Beginning Today*, FREEDOM OUTPOST (Aug. 1, 2013), http://freedomoutpost.com/2013/08/alabama-concealded-carry-sheriffs-shall-issue-concealed-carry-gun-permits-beginning-today/. In practice, however, the law was treated more like a shall-issue law, as almost all qualified applicants were granted a permit. *See* BUCKEYE FIREARMS ASS'N, *supra* note 91. As of August 1, 2013, Alabama law was changed to the shall-issue model. 2013 ALA. ACTS 283.

119. *See* Cramer & Kopel, *supra* note 100, at 682.

strate a good reason for being allowed to carry a concealed weapon.[120] One of the strictest may-issue laws is found in New York: an applicant who wishes to possess a weapon outside his home or place of business, who does not fall within one of the enumerated employment categories, must show "proper-cause" to obtain a permit to concealed carry.[121]

While not defined within the law itself, "New York State courts have defined the term [proper cause] to include carrying a handgun for target practice, hunting, or self-defense."[122] Only the self-defense category is considered a full carry license.[123] The licensing officer can restrict a license "to the purposes that justified the issuance," meaning that a license for target practice or hunting can be strictly limited to participation in those activities.[124] Further, New York courts have established that, to meet the self-defense requirement, specific examples of threats need to be shown, and that "living or being employed in a 'high crime area,'" and even carrying significant amounts of money in these areas is not enough.[125]

In comparison, Maryland's law is presented as a shall-issue law, but has a requirement similar to New York's: among other things, an investigation must reveal that the applicant "has good and substantial reason to wear, carry, or transport a handgun."[126] In Maryland, however, it is not required that the applicant prove this reason. Rather, such a reason must be found through investigation by the licensing authority, the Secretary of the State Police.[127] The Maryland legislature provides an example of a good reason: "a finding that the permit is necessary as a reasonable precaution against apprehended danger."[128]

In theory, Maryland's apprehended danger standard[129] is an easier standard to meet than New York's "proper cause" requirement, which

120. *See, e.g.*, N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2014); MD. CODE ANN., PUB. SAFETY § 5-306(a)(9)(ii) (LexisNexis 2014).

121. N.Y. PENAL LAW § 400.00(2)(f) (establishing that licenses for concealed carry without regard to employment or place of possession will be issued "when proper cause exists for the issuance thereof").

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

123. *Id.*

124. O'Connor v. Scarpino, 638 N.E.2d 950, 951 (N.Y. 1994).

125. *Kachalsky*, 701 F.3d at 87 (citing Martinek v. Kerik, 743 N.Y.S.2d 80, 81 (N.Y. App. Div. 2002)); *see also* Theurer v. Safir, 680 N.Y.S.2d 87, 88 (App. Div. 1998) ("The mere fact that petitioner travels in high-crime areas to distribute petty cash to company employees . . . does not establish proper cause . . . ."); Sable v. McGuire, 460 N.Y.S.2d 52, 52–53 (App. Div. 1983) ("[T]he high crime areas are not justifiable cause for issuance of a pistol license. . . . [It was not] error for the licensing official to reject the petitioner's 'high crime area' argument, the logical extension of which is to 'make the community an armed camp.'").

126. MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (LexisNexis 2014).

127. *Id.*

128. *Id.* This example makes Maryland's law much less difficult to comply with than New York's law, as New York courts have held that perceived danger is not enough to warrant the issuance of a handgun license. *See, e.g.*, Martinek v. Kerik, 743 N.Y.S. 2d 80, 81 (App. Div. 2002).

129. Maryland courts have interpreted "apprehended danger" to require either evidence that the individual had been threatened or faced a level of danger that is higher than that which the average person would expect to encounter. *See* Scherr v. Handgun Permit Review Bd., 880 A.2d 1137, 1142, 1147–49 (Md. Ct. Spec. App. 2005).

New York courts have interpreted to require "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[130] Moreover, this general community is a big-picture standard, and does not fluctuate at the neighborhood-level scale.[131]

As interpreted, however, the Maryland law is substantially similar to the New York "proper cause" requirement. In upholding the constitutionality of the Maryland "apprehended danger" requirement, the Fourth Circuit held that determining whether "apprehended danger" exists "is an objective inquiry . . . [that] cannot be established by, inter alia, a 'vague threat' or a general fear of 'living in a dangerous society.'"[132]

3. Effectively "No-Issue" Laws

A no-issue state is one that requires, but does not issue, permits for public carry. With the recent enactment of the Illinois Firearm Concealed Carry Act, the last statutory no-issue law within the United States was repealed.[133] It is evident in certain state practices, however, that the discretionary power given to an issuing agent can be tailored or applied to make the state effectively a no-issue state. One example of this practice is Hawaii, where the chief of police of the applicable county is allowed to grant a license "[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property . . . ."[134] According to several sources, a private citizen is rarely able to meet this standard; no such licenses were issued to private applicants in the past four years.[135] Another example is New Jersey: two sections of the New Jersey gun law work in tandem to make a nominal shall-issue law a no-issue law in practice. Under the section governing permits, New Jersey applicants must show "a justifiable need to carry a handgun."[136] A separate provision defines "justifiable need" in regard to a private citizen ap-

130. Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257 (App. Div. 1980).

131. *See, e.g.*, *Martinek*, 743 N.Y.S.2d at 81. This means that living or working in a high crime area is not sufficient to establish proper cause. *Id.*; *see, e.g.*, Sable v. McGuire, 460 N.Y.S. 2d 52, 52–53 (App. Div. 1983).

132. Woollard v. Gallagher, 712 F.3d 865, 870 (4th Cir. 2013) (citing Scherr v. Handgun Permit Review Bd., 880 A.2d 1137, 1148 (Md. Ct. Spec. App. 2005)).

133. *Illinois Enacts Nation's Final Concealed-Gun Law*, USA TODAY (July 9, 2013, 3:45 PM), http://www.usatoday.com/story/news/2013/07/09/illinois-enacts-concealed-gun-law/2503083/.

134. HAW. REV. STAT. § 134-9 (2014).

135. PAUL PERRONE, DEP'T OF THE ATTORNEY GENERAL, FIREARM REGISTRATIONS IN HAWAII, 2012 at 11 (2013), *available at* http://ag.hawaii.gov/cpja/files/2013/03/Firearm-Registrations-2012.pdf (noting that all five private citizens to apply for a concealed carry permit in 2012 were denied, while of 168 private security firm employee applications, only two were denied in the same time period); PAUL PERRONE, DEP'T OF THE ATTORNEY GENERAL, FIREARM REGISTRATIONS IN HAWAII, 2011 at 7 (2012), *available at* http://ag.hawaii.gov/cpja/files/2013/01/Firearms-Registration-2011.pdf (noting that 201 security employee permits were granted, but all eight private individual applications were denied); PAUL PERRONE, DEP'T OF THE ATTORNEY GENERAL, FIREARM REGISTRATIONS IN HAWAII, 2009 at 7 (2010), *available at* http://ag.hawaii.gov/cpja/files/2013/01/Firearms-Registration-2009.pdf (noting that all three private individual applications were denied).

136. N.J. STAT. ANN. § 2C:58-4(c)–(d) (2014).

plicant as "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."[137] The law also requires corroboration of such evidence with law enforcement reports, where possible.[138] Together these provisions severely reduce the likelihood that a private citizen will be issued a concealed carry license, unless, of course, a specific individual poses a verifiable threat to the applicant.

California, a may-issue state, issues concealed carry permits at a local level: an applicant must apply to the sheriff of their county to receive a permit.[139] If applicants wish to carry within a city, however, they must apply to the chief or other head of the municipal police department within that city.[140] Although the qualifications considered by the sheriff or the police chief are enumerated within the statute and are largely the same, the discretionary authority is reserved to the issuing agency through the good moral character" and "good cause" requirements.[141]

Through this unique procedural structure, California allows for local control that can effectively cause drastic variations within a single county.[142] In addition, the law contains a provision that insinuates that discretion will be different between counties that have rural and urban populations.[143] In counties were the population is less than 200,000 according to the most recent federal census, the law enforcement agency can issue licenses to carry that are only applicable in that county.[144] Thus, California law allows an issuing agent to limit its own residents' concealed carry privileges to its county borders.[145]

This local control creates significant statistical differences for permit issuance in different counties, as well as different cities, within

137. N.J. ADMIN. CODE § 13:54-2.4(d)(1) (2014).

138. *Id.* Justifiable need for an employee-applicant from a private detective or security company is established where "(i) In the course of performing statutorily authorized duties, the applicant is subject to a substantial threat of serious bodily harm; and (ii) [t]hat carrying a handgun by the applicant is necessary to reduce the threat of unjustifiable serious bodily harm to any person." *Id.* § 13:54–2.41(d)(2).

139. *How to Obtain a California Permit to Carry a Concealed Firearm: Penal Code 26150 and 26155 PC*, SHOUSE CAL. L. GRP., http://www.shouselaw.com/concealed-weapon.html (last visited Nov. 22, 2014).

140. CAL. PENAL CODE §§ 26150–26155 (West 2014). Because power is granted to two overlapping authorities, the law allows the chief or other head of the municipal police to enter into "an agreement with the sheriff of the county in which the city is located for the sheriff to process all applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter." *Id.* § 26155(c). In the absence of such an agreement, it appears as though a nonresident of a city must get a license from both the county he lives in and from the chief of police of the specific city he resides in in order to carry a gun in both locations. *See id.* §§ 26150–26155.

141. *Id.* §§ 26150(a)(1)–(2), 26155(a)(1)–(2).

142. *Id.* §§ 26150–26155.

143. *Id.* §§ 26150(b)(2), 26155(b)(2).

144. *Id.*

145. *Id.* §§ 26150(b)(2), 26155(b)(2).

California.[146] Not surprisingly, a more populous (urban) county is often less likely to approve concealed carry applications.[147] For instance, one report notes that the Sheriff's Office in Calveras County, which is largely a rural county, approved ninety-three percent of applications between 2011 and 2012.[148] In contrast, the Sheriff's Office in neighboring Contra Costa County, which has a larger population, approved only thirty-six percent of license applications.[149]

Population is not determinative of how stringently applications are accepted, however, as there is a great deal of variation between populous counties.[150] For example, "[t]he San Francisco County Sheriff's Office . . . approved one application in the last 30 years (it expired in 2008)."[151] Yet, in Sacramento County, which has nearly twice the population as San Francisco county, the "Sheriff's Office approves roughly 90 percent of applications . . . there are more than 3,500 permit holders . . . [and] [t]he department also plans to approve nearly all of the 4,000 residents currently waiting for their applications to be reviewed."[152] These differences cannot be attributed to the presence of a large city within the county, since both San Francisco and Sacramento counties are namesakes of the largest city within their respective bounds.[153] These stark statistical differences make it evident that ideological differences play an important role in how the agency entrusted with issuing concealed carry permits will exercise its discretion.

4. Open Carry and No Restriction States

A significant number of states allow residents and nonresidents to carry weapons openly, that is, in plain view of the public.[154] Laws regarding open carry are quite different from those that govern concealed carry, and variation even occurs within the same state.[155] For instance, several states do not require any form of permit to openly carry a weapon.[156] Yet, in some of these states, a permit is required for concealed carry.[157]

146. *See* Kristopher Anderson, *Concealed Weapon Permits Reflect a Patchwork of Standards in California*, LODI NEWS-SENTINEL (Sept. 21, 2013, 12:15 AM), http://www.lodinews.com/news/article_607f4256-6a87-58bd-8e07-b59f4658c373.html.

147. *See id.*

148. *Id*.

149. *Id*.

150. *See id.*

151. *Id.*

152. *Id.*

153. CITY OF SACRAMENTO, SACRAMENTO RAILYARDS SPECIFIC PLAN 10 (2007); *San Francisco Lincoln MKT Town Car Sedan Rental*, SAN FRANCISCO LIMO SERVICE, http://www.sflimoservice.com/san_francisco_lincoln_town_car_sedan_limousine_service.php (last visited Nov. 22, 2014).

154. *Gun Laws In the United States, State by State-Interactive*, GUARDIAN (Jan. 16, 2013, 8:38 PM), http://www.theguardian.com/world/interactive/2013/jan/15/gun-laws-united-states [hereinafter *Gun Laws in the United States*].

155. *See id.*

156. *See id.*

157. *See id.* (indicating that South Dakota requires that a person get a state-issued permit in order to carry a concealed weapon in public); *see also Which States Allow Open Carry in US? (Full List)*,

On a general level, there is not a significant difference between concealed carry and open carry: both allow an individual to possess a firearm in public. Nevertheless, while all fifty states now allow concealed carry in some form, a number of states continue to prohibit open carry.[158] In the past, several states had laws allowing open carry but either did not legally allow, or actively prohibited, concealed carry.[159] For instance, Arizona allowed open carry of handguns for much of its history, but a concealed carry licensing system was not established until 1994.[160] In the nineteenth century, both Louisiana and Georgia prohibited concealed carry but allowed open carry.[161] Somewhat surprisingly, there is no longer any state that bans concealed carry but instead allows individuals to openly carry weapons.[162] Because there is evident historical support for such a practice, if enacted in the future, such laws might pass constitutional muster, as will be discussed in Part III below.

Policy arguments may explain why states such as Texas, Illinois, and New York have chosen to allow some form of concealed carry but have laws that outright ban open carry of handguns.[163] Modern social conventions stigmatize the open carry of weapons, and, in many locations, open carry would make many people uncomfortable.[164] Discomfort often stems from feelings of intimidation and provocation that are concomitant with gun possession.[165] Allowing concealed carry significantly reduces this discomfort and appeals to the logical argument that what you cannot see does not affect your daily life.[166] The feelings of intimidation and discomfort generated by open carry can also lead to harassment, whether intentional or not, by the police. Thus, social and law enforcement pressures can arguably deter people from carrying guns in public.[167] Although anti-gun advocates may find this effect desirable, there is an argument that social pressure that deters constitutionally protected behavior is a substantial and possibly impermissible burden on constitutional rights.[168]

Open carry states present an interesting counterpoint to the constitutional analysis of concealed carry laws, especially those states that maintain discretionary authority to approve or deny a concealed carry

INT'L BUS. TIMES (Aug. 18, 2009, 12:18 PM), http://www.ibtimes.com/which-states-allow-open-carry-us-full-list-312409 (indicating that South Dakota allows people to openly carry weapons without having to obtain a license or permit).

158. *Gun Laws in the United States*, *supra* note 154.

159. Cramer & Kopel, *supra* note 100, at 706.

160. *See* ARIZ. REV. STAT. ANN. § 13-3112(E) (1994); Cramer & Kopel, *supra* note 100, at 705.

161. State v. Chandler, 5 La. Ann. 489 (1850); *see* Nunn v. State, 1 Ga. 243 (1846).

162. *Gun Laws in the United States*, *supra* note 154.

163. *Id.*

164. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523–24 (2009).

165. *See id.*; *see also* Editorial, *Texas Gun Laws Work, Open Carry Wouldn't*, DALLAS MORNING NEWS, Nov. 27, 2012, http://www.dallasnews.com/opinion/editorials/20121127-editorial-texas-gun-laws-work-open-carry-wouldnt.ece [hereinafter *Texas Gun Laws*].

166. *Texas Gun Laws*, *supra* note 165; *see also* Volokh, *supra* note 164, at 1523–24.

167. Volokh, *supra* note 164, at 1521–24.

168. *See id.* at 1521–22.

permit. The primary reason for laws that grant the licensing authority such discretion lies in the longstanding existence of open carry rights at the state level. Part III of this Note will discuss how open carry laws were often cited in nineteenth century cases as at least one, if not the only, reason why concealed carry could be prohibited or restricted. Thus, although the *Heller* majority implicitly approved concealed carry bans,[169] it would likely be a mistake to interpret that opinion as holding that a complete ban on concealed carry is constitutional in the absence of open carry laws. This concept may have important implications for laws that, while purporting to allow concealed carry, in effect or as carried out, actually prohibit concealed carry.

C. Illinois Law

Despite political commentary about the door being open "for Illinois lawmakers to adopt a may-issue [gun] rule like New York's,"[170] Illinois lawmakers chose not to walk through that door. Although the U.S. Supreme Court denied certiorari to a Second Circuit case upholding New York's may-issue regime,[171] legislators passed the Illinois Firearm Concealed Carry Act, a shall-issue law, on July 9, 2013.[172] This law entrusts the Department of State Police with the authority to issue permits to carry a loaded firearm concealed or partially concealed,[173] while open carry remains illegal.[174] As a shall-issue law, the Department of State Police are instructed to issue licenses to applicants who meet the enumerated requirements.[175] The law indirectly retains a minimal amount of discretion in denying licenses, however, ensuring that "[a]ny law enforcement agency may submit an objection to a license applicant based upon a reasonable suspicion that the applicant is a danger to himself or herself or others, or a threat to public safety."[176]

The law also contains a provision designed to secure the denial of permits to gang members and habitual arrestees that is unique among the states, and that the legislature undoubtedly crafted with Chicago in mind.[177] This provision automatically requires the Department of State Police to object

169. D.C. v. Heller, 554 U.S. 570, 626 (2008) ("[T]he 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.").

170. *See* Benjamin Yount, *Way Now Open for More Restrictive Concealed Carry Law*, EVANSTON NOW (Apr. 15, 2013, 5:19 PM), http://evanstonnow.com/story/government/illinois-watchdog/2013-04-15/55774/way-now-open-for-more-restrictive-concealed-carr.

171. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012), *cert. denied sub nom*. Kachalsky v. Cacace, 133 S. Ct. 1806 (2013).

172. 430 ILL. COMP. STAT. 66/10 (2014).

173. *Id.*

174. *See id.*; *see also Concealed Carry Frequently Asked Questions*, ILLINOIS STATE POLICE, http://ccl4illinois.com/ccw/Public/Faq.aspx (last visited Nov. 22, 2014).

175. 430 ILL. 66/10; *see also id.* 66/25 (establishing qualifications for a concealed carry license).

176. *Id.* at 66/15(a).

177. *Id.* at 66/15(b).

> [i]f an applicant has 5 or more arrests for any reason, that have been entered into the Criminal History Records Information (CHRI) System, within the 7 years preceding the date of application for a license, or has 3 or more arrests within the 7 years preceding the date of application for a license for any combination of gang-related offenses . . . .[178]

Thus, the law attempts to create a system that, at least in theory, will catch an individual who has been arrested multiple times but never convicted, such as domestic abusers whose significant-others refuse to press charges.[179]

A separate, newly-created entity called the Concealed Carry Licensing Review Board is in charge of reviewing law enforcement objections, which "must include any information relevant to the objection," as well as the automatic Department of State Police objections.[180] If the Review Board "determines by a preponderance of the evidence that the applicant poses a danger to himself or herself or others, or is a threat to public safety, then the Board shall affirm the objection . . . and shall notify the Department that the applicant is ineligible for a license."[181]

The new Illinois law is more notable for what it lacks than what it contains. Although the law requires training in proficient use of firearms, it does not require any training in the legal concept of self-defense or knowledge of Illinois-specific firearm laws, as some other states' laws require.[182] In addition, the law lacks any significant discretionary provision in contrast to shall-issue state laws that accords the issuing entity some discretion, whether or not utilized, in the form of escape clauses.[183] Although objections can be made by any law enforcement officer, and are automatically made for certain gang members and habitual arrestees, the Review Board can only sustain these objections on a finding by a preponderance of the evidence that an applicant poses a danger to himself or others, or generally threatens public safety.[184] While some of the gang-

178. *Id.*

179. *Id.* at 66/15(a).

180. *Id.* at 66/15(a)–(b).

181. *Id.* at 66/20(g).

182. *See, e.g.*, ALASKA STAT. § 18.65.715(a) (2013) (requiring training to provide "knowledge of Alaska law relating to firearms and the use of deadly force . . . [and] knowledge of self-defense principles").

183. *See, e.g.*, OR. REV. STAT. § 166.293 (2014) ("[A] sheriff *may* deny a concealed handgun license if the sheriff has reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to self or others, or to the community at large, as a result of the applicant's mental or psychological state or as demonstrated by the applicant's past pattern of behavior involving unlawful violence or threats of unlawful violence." (emphasis added)); *see also* Cramer & Kopel, *supra* note 100, at 698–99 (noting that this Oregon "escape clause handles a situation such as an applicant who has a history of wandering the streets shouting threats at Martians or pink elephants, or getting into bar fights, but has so far managed to avoid criminal conviction or commitment to a mental hospital. Yet, the language is narrowly drawn so that a sheriff would need a 'pattern' of behavior to refuse a permit").

184. 430 ILL. 66/20(g).

related offenses that will trigger objection may allow for a finding that an applicant is a danger or threatens public safety,[185] others will not.[186]

III. ANALYSIS

Heller's holding, that "the *central component*" of the Second Amendment is the individual right to self-defense, reveals the baseline from which gun-regulation must not deviate.[187] The Supreme Court cautioned, however, that "the right secured by the Second Amendment is not unlimited."[188] Indeed, repeating its assurance from *Heller* in *McDonald*, the Court attempted to assuage the fears of states and municipalities by explaining that its holding

> did not cast doubt on such longstanding regulatory measures such 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."[189]

Although the states have a "variety of tools for combating [the handgun violence] problem," it is unclear exactly what tools are housed within the veritable constitutional toolbox. The Supreme Court has provided a few "longstanding" examples of available tools,[190] a list that "does not purport to be exhaustive."[191] Yet, the Supreme Court has explicitly refrained from determining the level of scrutiny which lower courts are to use when analyzing gun restrictions and has left the scope of gun rights outside the home largely indeterminate. Indeed, the two cases establish that complete disarmament is unconstitutional, that gun regulations must comport with historical and traditional understandings of the Second Amendment, and that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense . . . ."[192]

This "clarity" has created a morass of opinions regarding scope and proper analysis of the Second Amendment.[193] The apparent contradic-

185. For instance, Criminal Street Gang Recruitment on School Grounds, 720 ILL. 5/12-6.4, involves knowing threats of physical force which would support a finding of threat to public safety.

186. The offenses of Unlawful Contact with Streetgang Members, 720 ILL. 5/25-5, and Peace Officer or Correctional Officer; Gang-Related Activity Prohibited, *id.* 5/33-4, are inherently nonviolent offenses that may not support a finding of danger or threat by a preponderance. Although each of the cited gang offenses carry felony charges, and would thus automatically invalidate a convicted applicant, the Firearm Concealed Carry Act requires Department of State Police objection based solely on three or more arrests in the seven years preceding application. 430 ILL. 66/15(b).

187. D.C. v. Heller, 554 U.S. 570, 599 (2008).

188. *Id.* at 626.

189. McDonald v. City of Chi., 561 U.S. 742, 786 (2010) (quoting *Heller,* 554 U.S. at 626–627).

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

191. *Id.* at 627 n.26.

192. *McDonald*, 561 U.S. at 749–50; *see also Heller*, 554 U.S. at 628 (stating that "the inherent right of self-defense has been central to the Second Amendment right").

193. *See, e.g.*, Winkler, *supra* note 62, for an analysis of both the level of judicial review necessary and a discussion of the problems defining a "sensitive place." *But see* Volokh, *supra* note 164, at 1446–47 ("[S]tate right-to-bear-arms claims ought [not] to be subject to strict scrutiny, intermediate scrutiny, an undue burden standard, or any other unitary test.").

tions in *Heller* have created a great deal of uncertainty. This analysis will consider two of the most important questions that have arisen since *Heller*, which have generated intense debate and persuasive, competing arguments. First, whether the scope of the Second Amendment right to bear arms extends beyond the home and protects the right to carry a weapon in public. Second, if the Second Amendment does protect the right to bear arms in public, what level of judicial scrutiny should apply to restrictions on public carry. Disagreement on these two important issues is evident in the scholarly literature.[194] More importantly, it has led to several divergent federal appellate opinions.[195] This analysis will compare different approaches that courts have adopted in analyzing the two questions outlined above.[196]

The first part of the analysis in this Note will consider whether the Second Amendment embraces the right to bear arms in public.[197] In addressing this question, the text of the Second Amendment is discussed.[198] The analysis next considers whether the right to bear arms was historically understood to apply outside the home.[199] This Section examines the history of the right to bear arms in England prior to the American Revolution, and suggests that the Framers undoubtedly considered the unique circumstances in America when drafting the Second Amendment. Opinions from the Ninth and Seventh Circuits are considered and the historical analysis that those courts employed is compared with the conflicting analysis found in a Second Circuit opinion. This Section will suggest that the historical analysis that the Ninth Circuit adopted in *Peruta v. County of San Diego*[200] is the most comprehensive and most likely to comport with *Heller's* demands.

The second part of the analysis will discuss the standards of review that various courts have employed in reviewing legislation that restricts the right to bear arms outside the home.[201] The intermediate scrutiny approach propounded by several circuits is examined, focusing here on the Second and Fourth Circuits. Examination of opinions adopting this standard suggests that, as applied, the intermediate scrutiny approach closely resembles the interest-balancing approach that Justice Breyer's dissent proposed in *Heller*.[202] Because the majority opinion in *Heller* specifically rejected this approach,[203] it will probably reject the intermediate scrutiny standard as well.

194. *See id.*

195. *Compare* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1152, 1175 (9th Cir. 2014), *and* Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012), *with* Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013), *and* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93 (2d Cir. 2012); s*ee infra* Part III.C.

196. *See infra* Part III.C.

197. *See infra* Part III.A.

198. *See infra* Part III.A.

199. *See infra* Part III.B.

200. *Peruta*, 742 F.3d at 1151.

201. *See infra* Part III.C.

202. D.C. v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

203. *Id.* at 634 (majority opinion).

The analysis next suggests that courts should adopt an alternative standard of review. Under this better standard, a court must first determine how severely a proposed regulation interferes with the right to bear arms in public.[204] Where a statute imposes a severe burden on the right to bear arms, the state must demonstrate with empirical proof that the regulation actually serves a compelling state interest and is narrowly tailored to achieve that interest. Where a statute imposes a minor burden on the right to bear arms, the state's burden of proof would be less stringent.[205] Applying this standard, it is unlikely that the Supreme Court will uphold New York's may-issue law, and those like it, which deprive most law-abiding citizens of the right to bear arms outside the home.[206]

A. Textual Analysis

The Second Amendment states: "A well regulated Militia being necessary to the security of a free State, the right to keep and bear Arms shall not be infringed."[207] As previously noted, the *Heller* Court construed this amendment as protecting an individual, as opposed to a collective, right to arms.[208] The Supreme Court also concluded that the rationale underlying the Second Amendment was the right to self-defense.[209]

Those courts that have concluded that the scope of the Second Amendment does not protect the right to carry weapons outside the home generally do not discuss the text of the amendment.[210] Rather, they look at the Supreme Court decisions in *Heller* and *McDonald* and conclude that the language of those decisions suggests that the Second Amendment does not embrace the right to carry weapons outside the home.[211] Any construction of the Second Amendment that limits it to the home is arguably inconsistent with the text of that amendment, which

204. *See* United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013) ("The two-step Second Amendment inquiry we adopt (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.").

205. The correct application of this alternative standard was best demonstrated in the concurring opinion, written by Justice Bea, in *Chovan*, which upheld a statute barring domestic violence misdemeanant from obtaining concealed carry license. *Id.* 1142–52 (Bea, J., concurring in result) (disagreeing with the majority "default" opinion that misdemeanor conviction deprives defendant of core Second Amendment rights and arguing that misdemeanants are not the same as felons, who fall outside the "core" of the Second Amendment; thus, misdemeanant restrictions should be subject to strict scrutiny, with the same result as majority).

206. *See infra* Part IV.

207. U.S. CONST. amend. II.

208. *See Heller*, 554 U.S. at 592.

209. *Id.* at 628.

210. *See, e.g.*, Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89 n.9 (2d Cir. 2012) (disagreeing with the view that "courts must look solely to the text, history, and tradition of the Second Amendment to determine whether a state can limit the right without applying any sort of means-end scrutiny").

211. *See, e.g.*, *id.* at 94 ("New York's licensing scheme affects the ability to carry handguns only *in public*, while the District of Columbia ban applied *in the home* 'where the need for defense . . . is most acute.'") (quoting *Heller*, 554 U.S. at 628).

specifically protects the right to "keep" and "bear" arms.[212] Those courts that have limited the right to keep arms to the home have simply ignored the word "bear" or worse, read it out of the text of the amendment.[213] The *Heller* Court expressly determined the meaning of the right to bear arms, stating, "At the time of the founding, as now, to 'bear' meant to 'carry.' When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose—confrontation."[214] The *Heller* Court then stated that the term "bear arms" as used in the Second Amendment meant to "wear, bear, or carry. . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[215] The *Heller* Court ultimately concluded that the operative clause of the Second Amendment guaranteed the individual right to possess and carry weapons in case of confrontation.[216]

As the Seventh Circuit noted in *Moore v. Madigan*, it would be unnatural to conclude that the founders, in protecting the right to "bear arms" intended to recognize a limited right to carry a weapon inside the home.[217] Indeed, the Second Amendment is about self-defense, and the need for self-defense is generally greater outside the home, where one cannot rely on other measures, like locks and alarms, for protection against criminals.[218] It is entirely consistent with the text of the Second Amendment, and the analysis of that text in *Heller* and *McDonald*, to conclude that two distinct rights are protected: the right to "keep" arms in the home and to "bear" arms in public, for the purpose of self-defense.[219]

Those decisions that limit the Second Amendment right to bear arms for purposes of self-defense arguably conflict with the Framer's understanding of the right.[220] At the time of the founding, no organized police force existed and private citizens acted not only as primary defenders of themselves, their homes, and their families; but also as police officers.[221] The need of individuals to protect their families and neighbors from criminal violence presumes the right to carry arms in public.[222]

212. U.S. CONST. amend. II.

213. Woollard v. Gallagher, 712 F.3d 865, 878 (4th Cir. 2013) (noting the right to keep and bear arms is fundamental, but explaining that bear was not on "equal footing" with the right keep arms in the home).

214. *Heller*, 554 U.S. at 584 (citations omitted).

215. *Id.* (quoting Justice Ginsburg's dissent in Muscarello v. United States, 524 U.S. 125, 143 (1998)).

216. *See id.* at 592.

217. Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012) ("To speak of 'bearing' arms within one's home would at all times have been an awkward usage.").

218. *See id.* at 937 ("[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.").

219. *See* McDonald v. City of Chi., 561 U.S. 742, 775 (2010); *Heller*, 554 U.S. at 586.

220. That understanding, according to *Heller*, focused on the right to self-defense. *Heller*, 554 U.S. at 628.

221. *See The Early Days of American Law Enforcement*, NAT'L L. ENFORCEMENT MUSEUM INSIDER, http://www.nleomf.org/museum/news/newsletters/online-insider/2012/April-2012/early-days-

The decisions instead attempt to determine the scope of the Second Amendment by considering particular language in the *Heller* and *McDonald* opinions while ignoring the text of the amendment itself.[223] One gets the impression that the courts are anxious to interpret the Second Amendment as narrowly as they can while remaining consistent with *Heller*. The meaning of the Second Amendment, however, is a distinct question from what is good policy, and the Supreme Court warned against using policy arguments in interpreting the right to bear arms, stating:

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution . . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[224]

Further, the courts cannot treat the right to keep and bear as a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause."[225]

B. Historical Approach

In *Heller*, the Court engaged in meticulous historical analysis of the basis for the Second Amendment, as well as the United States' understanding of the rights it protected.[226] This analysis proceeded through three different time periods and used legislation, case law, and legal commentary as guiding sources.[227] First, "because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right," the Court assessed the English understanding of the right to keep and bear arms in the public sphere.[228] The Court also evaluated gun rights from the post-

american-law-enforcement-april-2012.html (last visited Nov. 22, 2014) (noting that early law enforcement was "a combination of obligatory and voluntary participation").

222. *See Moore*, 702 F.3d at 936.

223. *See, e.g.*, Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89 n.9 (2d Cir. 2012) (noting disagreement with idea that courts must only consider the text and history of the Second Amendment to determine constitutionality of restrictions).

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

225. McDonald v. City of Chi., 561 U.S. 742, 780 (2010).

226. *See Heller*, 554 U.S. at 581.

227. *See id.* at 590–619.

228. *Id.* at 592–93.

enactment period[229] through the Antebellum Period,[230] and into the Reconstruction Era.[231] For these three periods, the Court examined "analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment;"[232] as well as "a variety of legal and other sources to determine *the public understanding* of . . . [the] legal text in the period after its enactment or ratification."[233]

Specific restrictions on the right to keep and bear arms exist at every stage of the historical analysis.[234] These "traditional restrictions [on the Second Amendment] go to show the scope of the right" and reveal the extent to which a state can constitutionally infringe on an individual's right to self-defense outside the home.[235] But therein lies a problem: people's ideas concerning political and social rights and privileges change with location, time, experience, political and social pressures, as well as continental expansion. The historical records reflect these changes, and have the potential problem of expressing the anachronistic views of the author, whether he or she holds the role of a judge propounding the law, a legislator making the law, or a legal historian recording the law. Trying to resolve a contentious constitutional issue using history and tradition can prove problematic when "[h]istory and tradition do not speak with one voice . . . ."[236] Thus, it would be remiss to believe this analytical guidance is any more than the first step in a long journey through a "terra incognita."[237]

Despite the problems inherent in such a historical analysis, scholars and courts since *Heller* have examined historical sources in an attempt to determine whether the Second Amendment right to bear arms applies outside the home.[238] Any such analysis must begin by examining the English understanding of the right to carry arms in public. Several commenters have argued that, in the historical English understanding, arms-

229. *See id.* at 605–10. The Second Amendment was enacted in 1791. *See* Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012).

230. *See Heller*, 554 U.S. at 610–14.

231. *See id.* at 614–19.

232. *Id.* at 600–01, 605–10. The *Heller* Court also considered the drafting history and debates surrounding the ratification of the Second Amendment. *Id.* at 599–600, 603–04. The majority advises against relying on drafting history "to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one." *Id.* at 603. Whether or not the debates and drafting history surrounding enactment are helpful in determining the right protected by the Second Amendment, they are not particularly helpful in determining the scope of those rights in the public sphere.

233. *Id.* at 605.

234. *See* McDonald v. City of Chi., 561 U.S. 742, 843 (2010).

235. *Id.* at 3056 (Scalia, J., concurring). Granted, this presupposes that the right applies outside the home at all. Several commentators would strongly disagree. *See, e.g.*, Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 4 (2012). Since Illinois' ban on public carry of weapons was struck down in *Moore*, none of the fifty states has a complete ban on carrying ready-to-use guns outside the home. *See* Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012); McCarthy, *supra* note 7, at 1.

236. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012).

237. United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

238. *See, e.g.*, Charles, *supra* note 235, at 4.

carry did not extend outside the home.[239] Subsection 1 will summarize this history, which was not specifically addressed in *Heller*, and offer insight as to how courts are likely to assess it.[240] Subsection 2 will examine the post-ratification history through the Antebellum period and into the Reconstruction period, exhibiting both the divergence of opinions in historical sources and the ambiguity of Second Amendment rights outside of the home they create.[241] This Subsection will suggest that the right approach is to categorize these sources, accepting as legitimate only those that comport with the *Heller* Court's determination that the Second Amendment protects an individual right to self-defense.[242]

1. The English Understanding of the Right to Bear Arms in Public

Heller and *McDonald* held that English law and legal commentary provided at least some understanding, if not a dispositive framework, of what the Second Amendment meant to the U.S. Founders.[243] In the time since those decisions, the Statute of Northampton has become an oft-cited exemplar of the English right to bear arms.[244] The fourteenth century statute reads, in pertinent part, that no person shall "go nor ride armed by night nor by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere."[245]

One commenter has suggested that a plain reading of the Statute of Northampton suggests that the statute "primarily stands for . . . preventing the carrying or use of dangerous arms among the concourse of the people, for in these instances one's personal security is divesting with a well-regulated society."[246] Other commenters and courts disagree with the suggestion that the statute prohibits the carrying of arms in public. Instead, they suggest that, by "enumerat[ing] the locations at which going armed was thought [to be] dangerous to public safety . . . the statutory limitation of the right of self-defense . . ." was concerned with something other than "indoors versus outdoors as such."[247] In any event, because

239. *Id.*

240. *See infra* Part III.B.1.

241. *See infra* Part III.B.2.

242. *See id.*

243. In fact, Judge Posner posits that 1791 is "the critical year for determining the [Second] [A]mendment's historical meaning, according to *McDonald v. City of Chicago* . . . ." Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012) (citing McDonald v. City of Chi., 561 U.S. 742, 766, n.14 (2010)); *see also* D.C. v. Heller, 554 U.S. 570, 593–95 (2008).

244. *See, e.g.*, *Moore*, 702 F.3d at 936; Charles, *supra* note 235, at 7–36 (analyzing the role of the Statute of Northampton as originally understood in Fourteenth Century England and tracing this interpretation through Seventeenth and Eighteenth Century England and the United States, and into the nineteenth century United States).

245. 5 THE FOUNDERS CONSTITUTION 209 (Phillip B. Kurland & Ralph Lerner, eds., 1987) (quoting Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.)).

246. Charles, *supra* note 235, at 36.

247. *Moore*, 702 F.3d at 936. Judge Posner combined Chief Justice Coke's interpretation of the statute "to allow a person to possess weapons inside the home but not to 'assemble force, though he be extremely threatened, to go with him to church, or market, or any other place'" with the enumerated locations to suggest that the true concern was "with armed gangs, thieves, and assassins rather than

Heller relies, at least in part, on the English understanding of the right to arms,[248] both commenters and courts that assert a Second Amendment right outside the home must address this English history head-on.[249] Creative attempts to interpret the text of the Statute of Northampton include imputing a scienter requirement into the statute,[250] maintaining that the statute was more concerned with protected places, not public in general,[251] and asserting that public carry was only prohibited by that statute in "circumstances where carrying of arms was unusual and therefore terrifying."[252] In response, one commenter claims that tracing the history of the Statute of Northampton, both before and after promulgation, using monarchal proclamations, statutes, and treatises suggests that public carry of weapons was illegal for the very reason that it generally terrified citizens, not that it was illegal *if* it would terrify citizens.[253]

The importance of this history finds strength in *Heller's* text: "the historical reality [is] that the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'"[254] It is likely, however, that the Supreme Court will be unwilling to consider English historical data as wholly representative of Second Amendment rights. Indeed, *Heller* did not rest its holding on English history, but used U.S. legislation, case law, and commentary from the eighteenth and nineteenth century to confirm that the Second Amendment creates an individual right to keep and bear arms. Further, the *Heller* Court pointed to the English Declaration of Rights of 1689,[255] rather than the Statute of Northampton, as the formative juncture that defined the Founding Fathers understanding of the right to have arms.[256] The English people drew up the Declaration of Rights to secure the nat-

with indoors versus outdoors as such." *Id.* (quoting EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 162 (1797)).

248. *Heller*, 554 U.S. at 592–94. In fact, the Supreme Court indirectly cites the Statute of Northampton when it quotes Blackstone for the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 148–49 (1769)).

249. *See, e.g.*, *Moore*, 702 F.3d at 936; Volokh, *supra* note 164, at 1481.

250. *See, e.g.*, David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1127 (2010) (asserting that violation of the statute involved a specific intent to terrorize the public).

251. *See infra* note 285 and accompanying text.

252. Volokh, *supra* note 21, at 101. Historical evidence provides support for this position; *See* Sir John Knight's Case, (1686) 87 Eng. Rep. 75 (K.B.) (holding that the purpose of the Statute of Northampton was "to punish people who go armed to terrify the King's subjects."); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (photo. reprint 1973) (London, Prof. Books Ltd.) (interpreting the statute to apply in "[s]uch Circum[s]tances as are apt to terrify the People").

253. *See* Charles, *supra* note 235, 7–23. Charles asserts that the historical record "in terms of our Anglo-American legal tradition . . . [shows] that the Second Amendment was not viewed as extending outside the home" tempering that position with "if it did at all, it only provided minimal protection." *Id.* at 8.

254. D.C. v. Heller, 554 U.S. 570, 599 (2008) (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).

255. Bill of Rights, 1688, 1 W. & M., c. 2, § 7, *available at* http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction [hereinafter Bill of Rights of 1688].

256. *See Heller*, 554 U.S. at 594.

ural rights of Protestants to have arms, after several Catholic monarchs attempted to disarm their Protestant opponents.[257] The *Heller* Court looked to the English Bill of Rights to find that, at the time of the Founding, the right to have arms was "understood to be an individual right protecting against both public and private violence."[258] It is arguable that the *Heller* court concluded that the Declaration of Rights of 1689 significantly altered the Statute of Northampton, which was over three centuries old when that Declaration was enacted.[259]

In addition, scholars and judges have advanced numerous reasons why the English understanding of the right to bear arms outside the home should not be dispositive of the Founding Father's understanding.[260] One commenter has argued that caution should be exhibited before "we import English practice wholesale."[261] Although the Constitution represents an amalgamation of historical experiences in governing structures, including the English model, the Founders had as their conscious goal to rectify the problems they saw evident in English law.[262] Therefore, while some of the rights protected by the Bill of Rights are comparable to English practices, comparing the protections offered by specific amendments to English counterparts reveals significant differences and counsels against importation.[263]

257. *See id.* at 592–93 ("Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.").

258. *Id.* at 594.

259. Charles argues that the English Declaration of Rights of 1689 "have arms" provision did not alter the status quo evident in the Statute of Northampton. *See* Charles, *supra* note 235, at 27. Relying on William Hawkins' *Pleas for the Crown*, with the "original intent of the Statute of Northampton as a guidepost," Charles asserts that it remained unlawful to go armed in public. *See id.* at 23–26 (citing 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 (photo. reprint 1973) (London, Prof. Books Ltd.)). Charles also asserts that exceptions to the rule, including one for persons of "quality," were subject to acquiescence by English lawmakers, and not seen as a more fundamental right. *See id.* at 26. The time from which Charles pulls the majority of his support, however, precedes the Glorious Revolution and the 1689 Declaration of Rights, codified in the English Bill of Rights, that the *Heller* Court cited as influential in the foundational understanding of an individual right. *Heller*, 554 U.S. at 594 ("The right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.").

260. *See* Tushnet, *supra* note 63, at 613 ("[W]e should be wary of the casual assumption, which pervades Justice Scalia's opinion in *Heller*, that conventional understandings are stable over long periods, to the point that we can learn something about what the founding generation understood the Second Amendment to mean by paying attention to what the Reconstruction generation understood it to mean.").

261. Richard L. Aynes, McDonald v. Chicago*, Self-Defense, the Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL'Y 181, 195 (2011).

262. *See* Charles, *supra* note 235, at 31.

263. For instance, English freedom of speech primarily secured against prior restraint. Aynes, *supra* note 261, at 195 (citing RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.3(c) (4th ed. 2008)). Moreover, "English practice allowed writs of assistance for general warrants, but our Fourth Amendment does not; the early American treatises distinguish part of Blackstone's treatise as inapplicable to the U.S. because sovereignty was in the Crown in England and in the people in the U.S." *Id.* (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 66 (1998) and Randy E. Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 7 (2006)).

There is also an argument based on the process of historical-analysis. Professor Akhil Reed Amar counsels students of the Bill of Rights to not forget that "more than two centuries separate us from the world that birthed the Bill."[264] One must endeavor to understand how "nineteenth- and twentieth-century events and ideas have organized our legal thinking, predisposing us to see certain features of the Bill of Rights and to overlook others."[265]

The same premise applies to how the Founders understood and adapted English laws to fit their concepts of a "more perfect union."[266] "The 1789 Bill of Rights was, unsurprisingly, a creature of its time."[267] It did not just adopt English law as it stood, but rather reflects the unique experience of the Founding Fathers.[268] For instance, St. George Tucker noted "[t]he bare circumstance of having arms . . . creates a presumption of warlike force in England" but questioned whether such an assumption applied "in America, where the right to bear arms is recognized and secured in the constitution itself."[269] Thus, the English understanding of the right to have arms, especially that stemming from a statute enacted over four-hundred years prior to the writing of the Bill of Rights, should not be dispositive.[270] An assertion that the understanding of the right to be armed remained consistent throughout English history, from the twelfth century through the Glorious Revolution, and later defined the Founding Father's understanding of the Second Amendment[271] certainly warrants much caution. Just as Professor Amar warns scholars not to impute anachronistic views upon the Founder's Constitution, we must not so easily frame the Founder's Second Amendment to perfectly conform to the English understanding of the right to bear arms.

The premise that the Founding Father's unique situation influenced the preexisting right codified by the Second Amendment finds support in the comparison of geographic and ethnic realities in England versus the United States. America was a vast frontier, and was indigenously populated, unlike England.[272] In England, "the right to hunt was largely lim-

264. AKHIL REED AMAR, THE BILL OF RIGHTS 3 (1998).

265. *Id.*

266. U.S. CONST. pmbl.

267. AMAR, *supra* note 264, at 3.

268. *See, e.g.*, Peruta v. Cnty. of San Diego, 742, F.3d 1144, 1154–55 (9th Cir. 2014).

269. 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., n.B (1803). Indeed, Tucker noted, "[i]n many parts of the United States, 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." *Id.*

270. It would be an understatement to say much had happened in the 463 years between the promulgation of the Statute of Northampton in 1328 and the adoption of the Second Amendment in 1791. Not the least of these events was the Glorious Revolution and the 1689 English Declaration of Rights, which specifically protected the right of Protestants to "have Arms for their Defense suitable to their Conditions and as allowed by Law." Bill of Rights of 1688, *supra* note 255.

271. *See, e.g.*, Charles, *supra* note 235, at 35.

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

ited to landowners . . . who were few."[273] Hunting was widespread and often required for sustenance in America.[274] Moreover, the presence of a hostile group of Native Americans and highway robbers would make leaving one's house and traveling some distance through wilderness a treacherous trip, more so if one went unarmed.[275] To be sure, there were robbers and bandits in England. But these miscreants were a less prevalent and less dangerous threat than those Americans faced.[276] Yet, whether exceptions or the general rule, English laws allowed legally qualified persons to possess weapons in the English countryside.[277] It is hard to imagine, in addition, that an English individual who carried, and indeed needed, a gun as he traversed between populated areas would have to abandon that gun when he got to a city limit.[278]

In any event, the significant differences between England and America reveal that a significant number of Americans would need the ability to carry guns in public. The Founding Fathers were certainly aware of this reality. Thus, any assessment of Second Amendment rights in the public sphere may require a court to place greater reliance on historical evidence from the United States, rather than that of England.

2. Hidden, on the Hip, or Not Allowed: Public Carry in Precolonial Times, Post-Ratification Through the Nineteenth-Century

The *Heller* Court proffered analogies to legislation, case law, and commentary spanning the precolonial period through the nineteenth century to confirm its interpretation that the Second Amendment protected an individual right to self-defense.[279] The *Heller* majority contend "that different people of the founding period had vastly different conceptions of the right to keep and bear arms. . . . simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties."[280] While the right to a weapon inside the home remained without significant caveat in the precolonial period through the nineteenth century, right outside the home was a different story.[281] Indeed, the divergence in opinion with regard to guns outside the home

273. *Id.* (citing Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 34–35 (2000)).

274. *See Moore,* 702 F.3d at 936.

275. *Id.*

276. *See id.* ("The situation in England was different—there was no wilderness and there were no hostile Indians . . . .").

277. *See* Charles, *supra* note 235, at 19.

278. In London, however, there were laws that required travelers to leave their arms at the inn or hostel at which they were staying, as arms were not allowed within the city. *See id.* at 14 (citing 1 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364, at 156 (Dec. 19, 1343) (A.H. Thomas Ed., 1898)). Such a law is clearly premised on the idea that people are perfectly free to carry arms outside the city, but it is unclear how it would work in practice, such as when one was leaving the city later for travel, but would not return home before leaving.

279. D.C. v. Heller, 554 U.S. 570, 600–19 (2008).

280. *Id.* at 604–05.

281. *See* Charles, *supra* note 235, at 45.

throughout the period from colonialism to early U.S. existence led one nineteenth century court considering the issue to exclaim "*tot homines, quot sententiæ*."[282]

The historical record is ostensibly ambivalent. On one side, "given that the founders borrowed their understanding of the right to arms from their English ancestors, they would have also borrowed and understood the ideological and philosophical restrictions on the right . . . ."[283] One scholar has argued that this "borrowing" included the Statute of Northampton.[284] In fact, "[t]he Statute was expressly incorporated by Massachusetts, North Carolina, and Virginia in the years immediately after the adoption of the Constitution."[285] On the other side, the historical record also reveals state constitutional provisions that, either explicitly or implicitly, extend an individual right to bear arms outside the home.[286] For instance, *Heller* cites Pennsylvania's Declaration of Rights of 1776, which states that "the people have a right to bear arms *for the defence of themselves* and the state . . . ."[287] The "defence of . . . the state" was not restricted to the home, so it is arguable that the defense of the self was not either.[288] In addition, *Heller* points out that "[m]any colonial statutes required individual arms-bearing for public-safety reasons," citing a 1770 Georgia law that "required those men who qualified for militia duty individually 'to carry fire arms' 'to places of public worship.'"[289]

282. "[S]o many men, so many opinions!" Nunn v. State, 1 Ga. 243, 248 (1846).

283. Charles, *supra* note 235, at 31.

284. *Id.* For a discussion of early weapons bans in Seventeenth and Eighteenth Century America, see *id.* at 31–36.

285. *Id.* at 31–32 (collecting citations). It is interesting to note that the North Carolina "statute read almost verbatim by prohibiting going armed at night or day 'in fairs, markets, nor in the presence of the King's Justices, or other ministers, *nor in no part elsewhere* . . . .'" *See id.* at 32 (emphasis added) (citing FRANCIOS-XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60 (Newbern 1792)). It is hard to understand why a state would enact a law that mentions the King over ten years after the end of the Revolutionary War and seven years after the Constitution was adopted. Thus, there is an argument that the words and meanings did not mean what they explicitly say in this statute: there were no King's justices, and perhaps this was not a categorical ban on going armed in public. Indeed, if the Statute of Northampton stood for the protection of specific locations, it would make sense that this statute would just be adopted to continue the protection of those specific locales. *See* Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).

286. *See* Pa. Declaration of Rights § XIII, *available at* http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss5.html.

287. D.C. v. Heller, 554 U.S. 570, 601 (2008) (quoting Pa. Declaration of Rights § XIII, in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3082, 3083 (F. Thorpe ed. 1909) (emphasis added by court)).

288. *Id.*

289. *Id.* (citing 19 COLONIAL RECORDS OF THE STATE OF GEORGIA pt. at 1137–39 (A. Candler ed. 1911). This reality provides a counterargument to Charles' assertion that the Statute of Northampton generally prohibited arms in public. *See* Charles, *supra* note 235, at 31. Sir John Knight's case reveals that the Statute of Northampton specifically applied in the church setting, as Sir John Knight was indicted for going armed to a church. *See* Sir John Knight's Case, [1686] 87 Eng. Rep. 75, 75 (K.B.); Charles, *supra* note 235, at 28–29 & n.145. This Georgia law reveals that a law was required to specifically exempt carrying a weapon into church. Carrying a weapon into church presupposes carrying a weapon in public to the church doors. Thus, it is interesting to note that no exception was needed to allow for this public carry.

The ambiguity is prevalent among later sources as well. For instance, several states specifically banned concealed carry of weapons in the nineteenth century.[290] In fact, several concealed carry prohibitions were challenged under state constitutional provisions that were substantially similar to the U.S. Second Amendment.[291] State courts nearly unanimously upheld such concealed carry bans despite state constitutional provisions protecting the right to keep and bear arms.[292] But while they upheld concealed carry laws, the majority of these courts qualified the legislatures ability prohibit weapons in public: restrictions on the "manner in which arms shall be borne" were permissible, while "[a] statute which, under the pretence of regulating, amounts to a destruction of the right" to bear arms was not.[293] Basically, a destruction of the right would materialize where *both* open *and* concealed carry were prohibited.[294] Therefore, the majority of nineteenth century cases premised the constitutionality of concealed carry bans on the fact that open carry was allowed in the state.

Of course, the state court decisions were not unanimous in the opinion that state analogues of the Second Amendment created a presumption of the right to carry outside the home.[295] At least five cases provide some support for the premise that public carry could be completely prohibited.[296] The Second Circuit favorably cited these authorities in upholding New York's may-issue law.[297] The Statute of Northampton served as guidance for determining that the scope of arms-bearing did not extend

290. *See, e.g.*, Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (Ky. Ct. App. 1822) (finding the Kentucky concealed carry ban unconstitutional).

291. *See, e.g.*, *id.* at 91 (asserting that the Kentucky bear arms provision "is as well calculated to secure to the citizens the right to bear arms in defence of themselves and the state, as any that could have been adopted by the makers of the constitution").

292. *See, e.g.*, State v. Chandler, 5 La. Ann. 489, 489–90 (1850) (holding that a ban on concealed carry is "absolutely necessary to counteract a vicious state of society" and that such a ban does not interfere with the right to carry weapons openly, a "right guaranteed by the Constitution of the United States"); Nunn v. State, 1 Ga. 243, 251 (1846) (upholding a ban on concealed carry of specific weapons, stating that such a prohibition does not "deprive the citizen of his *natura*l right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . . ."); State v. Reid, 1 Ala. 612, 616–17 (1840) (upholding a concealed carry ban in Alabama but warning that state's ability to regulate arms was not unlimited); *Bliss*, 12 Ky. at 90 (holding a statutory ban on concealed weapons restrains the right to bear arms, and is thus unconstitutional, because it prohibits "citizens [from] wearing weapons in a manner which was lawful to wear them when the constitution was adopted"). This earliest decision in *Bliss* is the most radical of the group in its protection of gun rights. The *Bliss* decision stood for twenty-eight years until 1850, when Kentucky amended its constitution to explicitly give the legislature the ability to prohibit the carrying of concealed weapons, thereby abrogating the *Bliss* ruling. *See* KY. CONST. of 1850, art. XIII, § 25; *see also* Posey v. Commonwealth, 185 S.W.3d 170, 189 (Ky. 2006). This amended provision still stands today. KY. CONST. § 1(7).

293. *Reid*, 1 Ala. at 616–17.

294. *See Nunn*, 1 Ga. at 248.

295. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1160 (9th Cir. 2014) (noting the "presumptive carry view" among nineteenth century courts).

296. *See* sources cited *supra* notes 234–41.

297. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 90–91 (2d Cir. 2012).

to the public setting in two of these historic cases.[298] Two of the cases upheld restrictions on public carry under state constitutional "keep and bear arms" provisions that specifically allowed the state to regulate the right.[299] Three other cases, one each from Texas,[300] Tennessee,[301] and Arkansas[302] upheld prohibitions on both concealed and open carry, citing the "general good" of prohibiting weapons in public that is evocative of gun-opponent arguments today.[303] *Heller* grounds its originalist holding in the premise that historical evidence shows a static individual-rights understanding of the Second Amendment in the post-enactment United States.[304] Therefore, vacillating opinions about the arms in public may prove fatal for the public scope of the Second Amendment.

But there are a number of reasons why a court should ignore the ambiguity these historical cases create and the consequent doubt they cast on the proposition that the Second Amendment was historically understood to protect the right to bear arms in public. First, several of the states in which state courts upheld complete prohibitions on public carry had constitutional provisions that are distinguishable from the U.S. Second Amendment.[305] For instance, the basis of the decision in *English v. State*, a Texas case which upheld a complete public carry ban in 1872, is the right to bear arms provision of the Texas Constitution of 1869, which allowed "such regulations as the legislature may prescribe."[306] The U.S. Second Amendment contains no similar language.[307]

The most compelling argument, however, is drawn from *Heller* itself. The Ninth Circuit, in *Peruta v. County of San Diego*, first proposed a

298. English v. State, 35 Tex. 473, 478 (1871) (upholding constitutionality of a statute prohibiting both open and concealed carry of specified weapons under both the U.S. and Texas constitutions); State v. Huntly, 25 N.C. (3 Ired.) 418, 421–22 (1843) (upholding conviction of a man armed in public in the face of a right to bear arms defense).

299. *See* Haile v. State, 38 Ark. 564, 567 (1882) (upholding concealed carry restriction under state constitutional provision that allowed the legislature to "regulate the wearing of arms, with a view to prevent crime"); Hill v. State, 53 Ga. 472, 474 (1874) (same).

300. *English*, 35 Tex. at 473.

301. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 166 (1871).

302. State v. Buzzard, 4 Ark. 18, 32 (1842) (holding that restrictions on carrying weapons for self-defense fell within the purview of state police power regulations). Two other Arkansas cases relied on this case in upholding concealed carry bans. *See* Fife v. State, 31 Ark. 455, 458 (1876); Carroll v. State, 28 Ark. 99, 101 (1872). The Arkansas court retreated from this position in 1878, asserting that the state may cause "unwarranted restriction upon . . . [the] constitutional right to keep and bear arms" where it exerts its police power to ban "the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey . . . or when acting as or in aid of an officer." Wilson v. State, 33 Ark. 557, 560 (1878).

303. *Fife*, 31 Ark. at 460 (noting that the keeping of weapons cannot be infringed, but their use can be "subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good"); *see also English*, 35 Tex. at 477 (noting that society must not revert to a state of barbarism by righting its own wrongs through violence, but must look to the state to prevent and redress wrongs).

304. D.C. v. Heller, 554 U.S. 570, 605 (2008) ("We now address how the Second Amendment was interpreted . . . [finding that] virtually all interpreters of the Second Amendment in the century after its enactment interpreted the Amendment as we do.").

305. *See* cases cited *supra* note 292.

306. 35 Tex. at 473.

307. U.S. CONST. amend. II.

historical-category approach to nineteenth century sources that is extrapolated from the *Heller* holding.[308] Although all nineteenth century precedents "are . . . equally relevant, for every historical gloss on the phrase 'bear arms' furnishes a clue of the phrase's original or customary meaning . . . some cases are more equal than others."[309] Based on the fact that "*Heller* clarifies that the keeping and bearing of arms is, *and has always been*, an individual right . . . oriented to the end of self-defense . . . [a]ny contrary interpretation of the right, whether propounded in 1791 or just last week, is error."[310]

Accordingly, the *Peruta* court was able to articulate three categories of "historical interpretations of the right's scope [that] are of varying probative worth . . . ."[311] The most probative category contains those interpretations that directly comport with *Heller* and "understand bearing arms for self-defense to be an individual right."[312] The second category includes those "authorities that understand bearing arms for a purpose *other* than self-defense to be an individual right," which are "only marginally useful."[313] An example of an authority in the second category would be one that asserts an individual right to bear arms to keep the government in check.[314] Finally, the third category is made up of those authorities that deny individual arms rights altogether. This last category acts as a receptacle for cases that are in fundamental disagreement with *Heller*, and can therefore be ignored.

Nearly every historical case that upheld state laws that barred *both* concealed and open carry falls into this third category.[315] Typically, these state courts claimed Second Amendment state analogues applied only to the militia.[316] The Second Circuit[317] and, implicitly, the Third[318] and

308. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1156 (9th Cir. 2014).

309. *Id.* at 1155.

310. *Id.* (citing D.C. v. Heller, 554 U.S. 570, 616 (2008)).

311. *Id.*

312. *Id.* at 1156.

313. *Id.*

314. *See id.*

315. *See, e.g.*, English v. State, 35 Tex. 473, 473 (1871) (holding that the Second Amendment only applies to the militia); Andrews v. State, 50 Tenn. 165, 166 (1871) (same). It should be noted, however, that Andrews v. State held that a self-defense exception was built-in to Tennessee's Second Amendment analogue. *Id.* at 191 ("The Legislature [is not authorized] to prohibit such wearing, where it was clearly shown they were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm, circumstances essential to make out a case of self-defense.").

316. *See* sources cited *supra* note 292.

317. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012) ("In the nineteenth century, laws directly regulating concealable weapons for public safety became commonplace and far more expansive in scope than regulations during the Founding Era.").

318. In upholding New Jersey's "justifiable need" standard, the Third Circuit cited *Kachalsky* for the proposition that "[i]n the 19th Century, '[m]ost states enacted laws banning the carrying of concealed weapons,' and '[s]ome states went even further than prohibiting the carrying of concealed weapons . . . bann[ing] concealable weapons (subject to certain exceptions) altogether whether carried openly or concealed.'" Drake v. Filko, 724 F.3d 426, 433 (3d Cir. 2013) (quoting *Kachalsky*, 701 F.3d at 95–96).

Fourth[319] Circuits relied on these cases to show that "[h]istory and tradition do not speak with one voice" regarding gun rights outside the home.[320] The divergence in historical opinion meant, for these circuits, that restrictive may-issue public carry statutes were constitutional. The historical cases the Second, Third, and Fourth Circuits relied on, however, can and should be disregarded: they are in conflict with an individual right to "keep and bear arms for self-defense," which is what the Second Amendment has always stood for.[321] What remains are cases from the first and second categories,[322] which nearly unanimously assert an individual public carry right.[323]

While some state court decisions suggest that the right to carry arms in public was not historically recognized,[324] those decisions do not comport with *Heller's* holding that the Second Amendment protects the individual right to bear arms for the purpose of self-defense, and therefore should not be considered.[325] When one considers only those decisions that comport with the *Heller* holding, there remains the undeniable conclusion that the Second Amendment protects the right to bear arms in public for self-defense and that this right was recognized at the Founding Era and through the Civil War Era.

As the Seventh Circuit correctly noted in *Moore*, recognition of the right to bear arms in public makes sense, while limiting the right to the home does not.[326] People often need to defend themselves against criminal offenses outside the home. Most robberies, rapes, and assaults occur outside the home.[327] A ban on possession of handguns outside the home would be even more burdensome than the ban struck down in *Heller*: there the Court noted that homeowners could still keep shotguns or rifles in the home, which is not the case outside of the home.[328]

Some argue that, even if the Second Amendment was historically understood to protect the right to bear arms in public, it does not protect the right to bear *handguns* in public because effective handguns did not

319. Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (according *Kachalsky*, 701 F.3d at 96, for the proposition that "our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public . . . .").

320. *Kachalsky,* 701 F.3d at 91.

321. McDonald v. City of Chi., 561 U.S. 742, 789 (2010) (citing D.C. v. Heller, 554 U.S. 570 (2008)).

322. Cases from the second category are only "marginally useful" and can provide "only indirect support" for individual self-defense rights outside the home. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1156 (9th Cir. 2014). The only case that seems to fall squarely within the second category (those that support public carry for reasons other than self defense) is *Aymette v. State*, which stated "[i]n the nature of things, if [persons] were not allowed to bear arms openly, they could not bear them in their defence of the State at all." 21 Tenn. 154, 160 (1840); *see also Peruta*, 742 F.3d at 1158.

323. *See* cases cited *supra* note 292.

324. *See* English v. State, 35 Tex. 473, 473 (1872).

325. *See Heller*, 554 U.S. at 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense. . . .").

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

327. Volokh, *supra* note 164, at 1518.

328. *Moore*, 702 F.3d at 935–36.

exist until around 1835.[329] This argument is "frivolous" after *Heller*, however, which states "the Second Amendment extends . . . even [to] those [arms] not in existence at the time of the founding."[330] Alternatively, the very existence of state legislation prohibiting concealed carry, or public carry entirely, reveals a longstanding tradition of states being able to regulate the right. While it is true that state laws barring concealed carry have been upheld under the Second Amendment, these laws were typically only upheld where the ability to open carry was not infringed.[331] The fact that states have, throughout history, banned concealed carry (while allowing open carry) does not establish that all regulation of firearms is therefore permissible under the Second Amendment; states have often passed legislation that is in violation of constitutional rights.[332] Courts exist at both the federal and state level to shear these violations from the statute books; one has to look no further than *Heller* and *McDonald* to show that some regulations violate the Second Amendment.[333]

Indeed, a quick summary of post-Civil War race relations reveals the flaws of such an argument. To respond to the fear that the slavemaster would become the slave, Reconstruction Era southern states enacted Black Codes, which included provisions that prohibited freedmen from keeping and bearing arms.[334] These codes led to the confiscation of guns found in the home or on the person of freedmen.[335] In response, Congress added a provision to "the Freedmen's Bureau Act of 1866, which acknowledged the existence of the right to bear arms."[336] The legislative history of this provision as well as legal commentary from the Reconstruction period demonstrates that the Second Amendment was understood to protect the right to bear arms inside and outside the home.[337]

329. *Gun Timeline*, PBS, http://www.pbs.org/opb/historydetectives/technique/gun-timeline/ (last visited Nov. 22, 2014) (showing that dueling pistols were in use as early as 1750, but the first Colt revolver was not produced until about 1835).

330. *Heller*, 554 U.S. at 582 (noting that the First and Fourth Amendments apply to modern forms of speech and search, respectively). Indeed, *Heller* notes "handguns [are] the quintessential self-defense weapon." *Id*. at 629.

331. *See, e.g.*, Nunn v. State, 1 Ga. 243, 251 (1846) ("[A] prohibition against bearing arms openly, is in conflict with the Constitution, and void . . . .").

332. For a list of nearly one thousand state laws held unconstitutional by the United States Supreme Court, see *State Laws Held Unconstitutional*, JUSTIA, http://law.justia.com/constitution/us/047-state-laws-held-unconstitutional.html (last visited Nov. 22, 2014).

333. McDonald v. City of Chi., 561 U.S. 742, 748 (2010) (applying the Second Amendment to the states through the 14th Amendment and striking Chicago and Oak Park handgun bans).

334. *See* CRAMER, *supra* note 5, at 9–15 (explaining how Black Codes and other state laws designed for control over free blacks played a role on concealed carry laws both before and after the Civil War).

335. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144 (9th Cir. 2014).

336. *McDonald*, 561 U.S. at 773; *see also Peruta*, 742 F.3d at 1161–63 (discussing the Black Codes and Congress' response as relates to Second Amendment rights).

337. *See Peruta*, 742 F.3d at 1163–66 (discussing cases and commentary from legal scholars).

C. Level of Scrutiny

Having concluded that the Second Amendment protects the right to bear arms in public does not resolve the issue of whether state "may-issue" laws comport with that right or unconstitutionally infringe upon it. One must consider the standard of review that courts have employed in determining whether "may-issue" regulations are valid under the Constitution. As previously noted, the Supreme Court in *Heller* failed to adopt an analytical framework for evaluating challenges under the Second Amendment.[338] Lower courts confronted with the question have generally looked to the "tiered approach" established in First Amendment jurisprudence in formulating a standard.[339]

Courts addressing challenges under the Second Amendment have relied upon a second tier of review, or intermediate scrutiny, which considers whether the regulation implicates an important government interest and whether the regulation substantially relates to achieving that interest.[340] In all such cases, the state or government entity bears the burden of proof and must satisfy the court that the challenged regulation does not overburden individual constitutional rights.[341] The Second and Fourth Circuits have used the intermediate scrutiny approach to uphold state may-issue laws. As applied in these circuits, the standard closely resembles the interest-balancing approach Justice Breyer presented in his *Heller* dissent, an approach that was specifically rejected by the *Heller* majority.[342]

Justice Breyer's dissent in *Heller* scolds the majority for its failure to announce the proper constitutional standard a court should use to assess firearm regulations.[343] Breyer also cites with approval that "the majority implicitly . . . rejects" the proposal to apply strict scrutiny to gun laws.[344] His approval is somewhat puzzling, however, as in Breyer's view, "any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry," just the inquiry that Justice Breyer believes should apply to these cases.[345]

338. D.C. v. Heller, 554 U.S. 570, 634 (2008).

339. *See* Ezell v. City of Chi., 651 F.3d 684, 706 (7th Cir. 2011) ("Both *Heller* and *McDonald* suggest that First Amendment analogues are . . . appropriate.").

340. *See, e.g.*, *id.* at 703–04 (noting that *Heller* ruled out rational-basis review, and citing Circuit court cases from the Third, Fourth, Seventh, and Tenth circuits that apply intermediate scrutiny to Second Amendment cases).

341. *See id.* at 708–09 (explaining that the City bears the burden of establishing a "strong public interest[] justification," a "close fit between the range ban and the actual public interest it serves" and must establish that the public's interests outweigh the substantial burden on the individual Second Amendment rights).

342. *Heller*, 554 U.S. at 634.

343. *Id.* at 687 (Breyer, J., dissenting).

344. *Id.* at 688.

345. *Id.* at 689. Breyer explains that the application of strict scrutiny will become an interest-balancing approach because the court has already found "'the Government's general interest in preventing crime' to be 'compelling.'" *Id.* (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)). Thus, to determine if the fit is narrowly tailored, the analysis will become "an interest-balancing in-

Justice Breyer's interest balancing analysis consists of balancing three concerns: "how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the second amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests."[346] Ultimately, "whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate."[347] The *Heller* majority explicitly rejected this approach.[348]

Three federal appellate courts that have considered challenges to may-issue restrictions have engaged in a two-step approach, applying intermediate scrutiny, as they define it, in the second step.[349] First, the court determines whether the challenged right falls within the *core* of the Second Amendment through historical analysis.[350] Finding that the right to bear arms in public falls outside the *core* of Second Amendment, these three appellate courts nonetheless assume that "the Amendment must have some application in the very different context of the public possession of firearms."[351] For this reason, the three courts engaged in what each court refers to as "intermediate scrutiny."[352] In reality, the scrutiny more closely resembles Justice Breyer's interest-balancing approach.

In light of the textual and historical analysis discussed previously in this Note, it is probable that the three federal circuits improperly concluded that the right to public carry is outside the core rights protected in the Second Amendment.[353] Even assuming, for the sake of argument, that the right to bear arms in public is not within the *core* of the Second Amendment and that intermediate scrutiny is the proper standard, these three appellate courts failed to apply this standard properly. There are two prongs to consider under intermediate scrutiny.[354] First, a court determines whether there is an actual harm that the government has an important interest in alleviating.[355] Where this important interest exists, the court then assesses whether the action the government has taken is substantially related to the problem it is seeking to alleviate.[356] In assessing

quiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other . . . ." *Id.*

346. *Id.* at 693.

347. *Id.* (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

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

349. *See* Drake v. Filko, 724 F.3d 426, 430 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012).

350. *See, e.g.*, *Kachalsky*, 701 F.3d at 84. All three of these cases rely, at least implicitly, on 'category three' cases to determine that public carry is not within the *core* of the Second Amendment. *See* cases cited *supra* note 349.

351. *E.g.*, *Kachalsky*, 701 F.3d at 89.

352. *See id.* at 96; *Drake*, 724 F.3d at 430; *Woollard*, 712 F.3d at 876.

353. *See supra* Part III.B–C.

354. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (addressing a content-neutral statute that implicated the First Amendment, explaining that such a regulation "will be sustained . . . if it advances important government interests . . . and does not burden substantially more . . . than necessary to further those interests.").

355. *Id.*

356. *Id.*

the government action, these three circuits have noted that "'substantial deference to the predictive judgments of [the legislature]' is warranted."[357] However, as the *Peruta* court noted, this deference only applies to the first prong of the analysis.[358] The legislature does not receive complete deference when determining whether the fit between the government action and the asserted governmental interest shows a substantial relationship.[359]

In fact, the government may only use the specific regulation "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' and does not 'burden [the right] substantially more . . . than necessary to further' that [government] interest."[360] Each of the three appellate courts here improperly deferred to the state legislature's findings of the fit between the respective law and the end to be achieved, namely public safety.[361] In essence, each of these circuits equated "substantially related" with "rationally related."[362] None of the state governments were required to show that its actions did not burden Second Amendment public carry rights substantially more than required to ensure public safety. Indeed, such a showing likely would have been impossible, as the may-issue regimes in the three states at issue were highly restrictive and deprived most law-abiding citizens of the right to bear arms in public. Thus, if these three circuits had not deferred to the legislative determinations of it, the court would have been required to invalidate the may-issue laws.

For example, in *Kachalsky v. County of Westchester*, the Second Circuit noted that "[t]he historical prevalence of the regulation of firearms in public demonstrates that . . . states have long recognized" the ability to regulate "handgun ownership and use in public."[363] Based on both the ambivalent history and the longstanding nature of the law,[364] the court held that New York's restrictive "proper cause requirement falls outside the core Second Amendment protections identified in *Heller*."[365] Therefore, the law was subject to intermediate scrutiny, as only re-

357. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (citing *Turner Broad Sys.*, 520 U.S. at 195).

358. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1177 (9th Cir. 2014) (citing *Turner Broad. Sys.*, 520 U.S. at 195).

359. *See Turner Broad. Sys.*, 520 U.S. at 213–14.

360. *Id.*

361. *See* Drake v. Filko, 724 F.3d 426, 439 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 880 (4th Cir. 2013); *Kachalsky*, 701 F.3d at 100.

362. *Compare Kachalsky*, 701 F.3d at 99–100 (finding that the legislature could make the policy judgment, despite conflicting evidence over whether "widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces"), *with* Moore v. Madigan, 702 F.3d 933, 939 (7th Cir. 2012) (explaining that "[i]n sum, the empirical literature on the effects of allowing . . . guns in public fails to establish a pragmatic defense of the Illinois law"). The mere possibility of increased crime or death rates was not enough for the Seventh Circuit, but was enough for the Second. *See id.*

363. *Kachalsky*, 701 F.3d at 96.

364. New York's Sullivan Law was amended in 1913 to provide the proper-cause standard for the issuance of public carry licenses throughout New York. *See id.* at 85.

365. *Id.* at 94.

strictions on the *core* Second Amendment rights garnered a strict scrutiny analysis.[366]

Under the intermediate scrutiny analysis, the court held that the first prong was easily met: "[a]s the parties agree, New York has substantial, indeed compelling, governmental interest in public safety and crime prevention."[367] Therefore, the only question was "whether the proper cause requirement is substantially related to these interests."[368] Deferring to the legislature's findings, the court held that there was a substantial relationship.[369] "The decision to regulate handgun possession," the court explained, "was premised on the *belief* that it would have an appreciable impact on public safety and crime prevention." [370] New York did not violate the Second Amendment, in the Second Circuit's analysis, when it "determined that limiting handgun possession to [individuals who can demonstrate proper cause] . . . is in the best interest of public safety and *outweighs* the need to have a handgun for an unexpected confrontation."[371] The court recognized the existence of conflicting studies as to the relationship between handgun ownership and violence,[372] but such studies could only reveal whether there was an actual harm that the government was seeking to remedy in the first place.[373] The court concluded that the proper cause requirement substantially fit the legitimate interest in public safety by actually increasing public safety.[374]

Similarly, in *Drake v. Filko*, the Third Circuit determined that New Jersey's "justifiable need" requirement "qualifie[d] as a 'presumptively lawful,' 'longstanding' regulation and therefore [did] not burden conduct within the scope of the Second Amendment's guarantee."[375] Just to be safe, however, the court assessed whether the standard withstood intermediate scrutiny.[376] Finding an important government interest, the court moved to the second prong, noting that "the fit" must be "reasonable" and "may not burden more [conduct] than is reasonably necessary."[377] The State introduced no evidence to show that there was a reasonable fit between the justifiable need requirement and the legislature's interest in public safety.[378] The state also failed to introduce evidence to demonstrate that the "justifiable need" requirement did not burden the individual right to armed self-defense in public more than reasonably necessary.[379] Instead, the Third Circuit deferred to the legislature's judgment,

366. *Id.* at 96.
367. *Id.* at 97.
368. *Id.*
369. *Id.* at 100–01.
370. *Id.* at 98.
371. *Id.* at 100 (emphasis added).
372. *Id.* at 97.
373. *Id.*
374. *Id.*
375. Drake v. Filko, 724 F.3d 426, 429–30 (3d Cir. 2013).
376. *Id.* at 430.
377. *Id.* at 436 (citing United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010)).
378. *Id.* at 454 (Hardiman, J., dissenting).
379. *Id.* at 453 (Hardiman, J., dissenting).

finding fit in the fact that "New Jersey has decided that this somewhat heightened risk [of injury] to the public [if individuals can carry for self-defense] *may be outweighed* by the potential safety benefit to an individual with a 'justifiable need' to carry a handgun."[380] Despite this equivocating, the court held that, even though the justified need requirement burdened the Second Amendment right to public carry, the court would defer to the legislature's conclusion that it was a reasonable implementation of the state's substantial interest in public safety.[381]

Moreover, the Fourth Circuit in *Woollard v. Gallagher* also granted deference to the legislature's claim of fit.[382] The court did note six examples offered by Maryland for how its good-and-substantial-reason requirement advanced public safety and crime reduction.[383] It did not, however, critically analyze the asserted fit. Instead, the court relied on the state's assertions that "the good-and-substantial-reason requirement 'strikes the 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.'"[384]

Overall, this deference to the legislatures' determination of fit makes the Second, Third, and Fourth Circuits' analysis strikingly similar to the interest-balancing approach proposed in Justice Breyer's dissent in *Heller*.[385] These circuits assert that the individual self-defense in the public sphere is outside the *core* of the enumerated Second Amendment right, despite the fact that *Heller* held that "the inherent right of self-defense has been central to the Second Amendment right."[386] Like the suggested interest-balancing approach, these circuits then assess complex and competing constitutional interests by asking "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important government interests."[387] By giving deference to the legislatures' findings, these three circuits determine that the respective state interests in public safety are stronger than the individual's interest in armed self-defense in public.[388] In so doing, they violate a central tenet of *Heller*: "[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[389]

380. *Id.* at 439 (emphasis added).
381. *Id.* at 439–40.
382. Woollard v. Gallagher, 712 F.3d 865, 880–82 (4th Cir. 2013).
383. *Id.* at 879–80.
384. *Id.* at 880 (citing Joint App. 113).
385. D.C. v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).
386. *Id.* at 628.
387. *Id.* at 689–90 (Breyer, J., dissenting).
388. *See supra* notes 317–19 and accompanying text.
389. *Heller*, 554 U.S. at 634.

IV. RESOLUTION: THE RIGHT APPROACH TO MAY-ISSUE LAWS

A Second Amendment right to self-defense has broad implications in the public sphere. As the Seventh Circuit has noted, "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."[390] An individual has a right to a gun in the home according to *Heller* and *McDonald*, but the Supreme Court has yet to expand the Second Amendment to public areas.[391] When the Supreme Court addresses the issue,[392] it is highly likely that it will find both a textual and historical public-carry right, as exhibited in foregoing discussion.[393] With such support for a public right to self-defense, it is likely that may-issue laws that infringe on the majority of citizens' rights to self-defend will face heavy scrutiny.

Before considering state may-issue laws, this Note must consider what approach the Supreme Court will adopt in assessing the constitutionality of public carry restrictions. In determining the proper level scrutiny to apply to gun restrictions, the Supreme Court must wade through morass of divergent lower court decisions. In *Heller* the Court held that it was not necessary to determine the proper analytical framework for assessing the statute alleged to infringe Second Amendment rights, because it found that the law at issue did not pass muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . ."[394] The Court did not end its analysis there, however, but stated, in dicta, that nothing in its opinion should be interpreted to cast doubt on the validity of certain enumerated gun restrictions. Among those restrictions are (1) bans on the possession of firearms by felons and the mentally ill, (2) bans on carrying firearms "in sensitive places such as schools and government buildings," [395] (3) laws imposing conditions and qualifications on the commercial sale of arms,[396] (4) bans on carrying concealed weapons, and (5) bans on "those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[397]

These statements create ambiguity in the *Heller* opinion. At the same time *Heller* espouses a Founding Era understanding of the Second Amendment and denounces the interest-balancing approach as illegitimate,[398] it seemingly preserves gun-rights restrictions without producing

390. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).
391. *Id.* at 935.
392. A petition for certiorari from the Third Circuit case *Drake v. Filko* was denied in May 2014. *See* Drake v. Filko, 724 F.3d 426 (3d Cir. 2013), *cert denied*, Drake v. Jerejian, 134 S. Ct. 2134 (2014).
393. *See supra* Part III.A–B.
394. *Heller*, 554 U.S. at 628.
395. *Id.* at 627.
396. *Id.* at 626–27.
397. *Id.* at 625.
398. *Id.* at 634–35.

Founding Era historical support for such restrictions.[399] In fact, by upholding such restrictions, some have argued that the Court may be engaging in the very interest-balancing that it condemns.[400] Superficially, at least, this ripple in the analysis has created confusion about the proper scope of the Second Amendment.[401]

In preserving these gun restrictions the *Heller* Court noted that such restrictions are "presumptively lawful."[402] Several of the restrictions that the *Heller* Court sets forth are ones that the Founders who drafted the Bill of Rights would have recognized. When the Bill of Rights was drafted, certain traditions existed which were certainly known to the drafters. For example, although the Founders recognized the right to free speech, they did not abrogate the tradition that private property owners could limit speech on their property and that trespass laws would ensure such limits.[403] Similarly, certain types of speech, such as libel and obscenity, were recognized to be outside the *core* rights protected by the First Amendment.[404]

Similar traditions existed with regard to the natural right to bear arms that was protected in the Second Amendment. Among these conditions was the understanding that felons and the mentally infirm were outside the class of persons entitled to bear arms.[405] Similarly, when the Second Amendment was drafted, certain longstanding laws and traditions established that arms were not permitted in "sensitive areas." The Statute of Northampton, for instance, specifically prohibited the bearing of arms in certain settings.[406] Similarly, a 1770 Georgia statute that required men to wear their weapons to church was enacted, in part, because such places were traditionally places where arms were not worn.[407] Thus, these restrictions mentioned in the *Heller* opinion may be considered as involving persons or places outside the *core* rights protected in the Second Amendment. Alternatively, these restrictions would likely

399. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634–35. "Nothing in [this] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" *Id.* at 626.

400. Winkler, *supra* note 62, at 1573 ("All of these exceptions—a ban on plastic pistols, bans on felony gun possession, sensitive place limitations—are products of interest balancing. If they are constitutional, it is because government's underlying reasons for limiting the right to keep and bear arms are sufficiently strong.").

401. *Compare* Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), *with* Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012).

402. *Heller*, 554 U.S. at 627 n.26.

403. *See* Volokh, *supra* note 164, at 1451–52.

404. *Heller*, 554 U.S. at 635 ("The *First Amendment* contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets . . . .").

405. *See* United States v. Chovan, 735 F.3d 1127, 1144 (9th Cir. 2013) (Bea, J., concurring in result).

406. *See supra* Part III.B.1.

407. *See supra* note 289 and accompanying text.

withstand strict scrutiny and therefore qualify as acceptable infringements on the Second Amendment right to bears arms.

The *Heller* Court's conclusion that laws requiring commercial gun sellers to meet certain requirements were presumptively lawful is also consistent with its analysis of the Second Amendment. The Court concluded that the Second Amendment protected the individual right to self-defense. Laws that apply only to gun sellers would normally not implicate an individual right to self-defense, since sellers do not seek to protect another person's right to self-defense. The Second Amendment does not protect a seller's interest in selling guns.[408]

The Court's list of presumptively lawful restrictions also hints that different restrictions on Second Amendment rights will be subject to different levels of scrutiny. The three presumptively legal restrictions cited by the Supreme Court are narrow. Laws prohibiting guns in sensitive places or requiring a commercial gun seller to meet certain requirements do not prevent individuals from exercising their right to armed self-defense per se. Although the self-defense rights of a convicted felon or a person who mentally ill rights are invalidated, such persons were historically recognized as not having the right to bear arms on par with other citizens.[409] Such narrow restrictions, the *Heller* Court seemingly asserts, warrant a lower level of scrutiny in order to be considered presumptively lawful. On the other hand, broad restrictions that invalidate the majority of citizens' ability to exercise their Second Amendment rights are highly suspect, and warrant a higher level of scrutiny.

Therefore, the right analysis for assessing state gun restrictions is a categorical approach. This analysis has strong similarities to the First Amendment "time, place, and manner" doctrine in that it applies different levels of scrutiny to different degrees of burden on constitutional rights while considering the whole effect of the regulation.[410] Such an analysis upholds the constitutionality of the "presumptively lawful regulatory measures" and abides by the *Heller* command to not engage in interest-balancing.[411]

Although *Heller* made specific comparisons between the two amendments,[412] lower courts have balked at the idea of wholly importing

408. Such laws are only considered presumptively lawful in *Heller*. *See Heller*, 554 U.S. at 627 n.26. A presumption is rebuttable. Therefore, where a law restricting commercial gun sales impaired an individual's right to attain the means of self-defense, the presumption might be rebutted.

409. Felons and mentally-ill individuals alike face a loss of many rights, including freedom, whether through jail time or involuntary civil commitment. *See generally* Velmer S. Burton, Jr., *The Consequences of Official Labels: A Research Note on Rights Lost by the Mentally Ill, Mentally Incompetent, and Convicted Felons*, 26 COMMUNITY MENTAL HEALTH J. 267, 267–76 (June 1990).

410. Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012) ("A blanket prohibition on carrying gun[s] in public . . . requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would. In contrast, when a state bans guns merely in particular places . . . that's a lesser burden, the state doesn't need to prove so strong a need."); *see* Volokh, *supra* note 21, at 100.

411. *Heller*, 554 U.S. at 627 n.26.

412. *Id.* at 592, 595, 606, 635.

First Amendment rights into the Second Amendment context.[413] There are certainly good reasons not to import the whole of First Amendment doctrine into Second Amendment jurisprudence.[414] But a sliding-scale approach similar to that applied in First Amendment cases is the best fit for how to assess regulations on the enumerated Second Amendment right to self-defense, which surely applies outside the home.[415] Moreover, this approach comports with the presumptively lawful regulations announced in *Heller*.[416] In fact, the Seventh Circuit and other lower courts have applied this approach in assessing Illinois gun regulations.[417]

Applying this sliding scale analysis to "may-issue" regulations, it is likely that the Supreme Court will strike down these laws as violating the Second Amendment, and reject the contrary conclusion reached in the Second, Fourth, and Tenth circuits.[418] The Supreme Court will likely follow the Ninth Circuit's analysis in *Peruta*[419] and conclude that the may-issue laws unconstitutionally infringe on the individual right of most law-abiding citizens to carry a weapon in public for the purpose of self-defense.

Certainly, the argument will be that may-issue state laws are *longstanding*. For instance, New York will argue that its Sullivan Law, which has restricted public carry since 1913, qualifies as one of the *Heller* court's presumptively lawful longstanding restrictions.[420] In determining whether a statute qualifies as longstanding, courts have disagreed as to whether the analysis must look to whether the restriction existed in the Founding Era, when the Bill of Rights was drafted, or whether the restriction was recognized in the Reconstruction Era, when the Fourteenth Amendment was ratified.[421] Although the Seventh Circuit in *Moore* concluded that 1791 was the "critical year" for determining what the Second

413. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91–92 (2d Cir. 2012) (explaining it would be "imprudent to assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second [Amendment]").

414. For instance, such a complete adoption would have profound affects in the school setting, where First Amendment rights play a larger and more important role, while Second Amendment rights should likely be subject to restriction.

415. *See supra* Part III.

416. *Heller,* 554 U.S. at 627 n.26.

417. *See* Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012) (explaining that Illinois "would have to make a stronger showing in this case than the government did in [United States v.] *Skoien*, [614 F.3d 648 (7th Cir. 2010),] because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of the entire law-abiding adult population of Illinois").

418. *See supra* Part III.C.

419. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1149 (9th Cir. 2014); *see supra* Part III.B.

420. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 90 n.11 (2d Cir. 2012) (discussing the history of New York's Sullivan Law).

421. *See generally*, Jonathan Meltzer, Note, *Open Carry for All:* Heller *and Our Nineteenth Century Second Amendment*, 123 YALE L.J., 1486, 1515 (2014) (noting the inconsistency of courts in choosing whether to interpret the Second Amendment in the context of the Founding Era or Reconstruction).

Amendment meant,[422] it is not necessary to analyze the question here, since New York's "may-issue" regulation was not in effect until more than fifty years after the latest possible date of 1868, when the Fourteenth Amendment was adopted.[423] Therefore, the New York may-issue would not qualify as longstanding.

Alternatively, states with may-issue laws may cite nineteenth century cases upholding concealed carry bans, as well as cases upholding complete public carry bans. But the cases that states will inevitably produce to demonstrate that the historical record is ambiguous can and must be filtered using categories that comport with the *Heller* holding that the Second Amendment protects an individual right to self-defense.[424] As shown above, those cases that upheld a complete ban on public carry premised their decisions on the fact that the rights protected by state analogues of the Second Amendment only pertained to the militia.[425] Moreover, where state concealed carry prohibitions were upheld by a state court, that decision was typically contingent on the existence of an alternative method, like open carry, for an individual to exercise their constitutional right to bear arms.[426]

It is possible that states may attempt to defend the "may-issue" statutes as a reasonable time, place, and manner restriction; because such restrictions only bar the right to carry a weapon in public places. The very essence of time, place, or manner restrictions on First Amendment rights is that such restrictions "leave open ample alternative channels for communication of the information."[427] In addition, these alternative channels must be available in the geographical area at issue.[428] Thus, the notion that an individual's right to communicate is protected in other geographic locations does not justify restrictions, and those who wish to speak are not required to *vote with their feet*.[429] Further, in the First Amendment context, a time, place, or manner regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests."[430] The "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[431] Therefore, the court assesses the policy in light of other opportunities for an individual to exer-

422. *See Moore*, 702 F.3d at 935 (citing McDonald v. City of Chi., 561 U.S. 742, 766 n.14 (2010) ("1791, the year the Second Amendment was ratified—the critical year for determining the amendment's historical meaning, according to *McDonald* . . . .").

423. *See* U.S. CONST. amend. XIV; *Kachalsky*, 701 F.3d at 84.

424. *See* D.C. v. Heller, 554 U.S. 570, 626–27 (2008).

425. *See supra* Part III.B–C.

426. *See, e.g.*, Nunn v. State, 1 Ga. 243, 251 (1846).

427. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

428. *See* Ill. Ass'n of Firearms Retailers v. City of Chi., 961 F. Supp. 2d 928, 939 n.5 (N.D. Ill. 2014) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986)).

429. *Cf.* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 82 (2013) (arguing that state preemption laws should take account of 'longstanding' differences between rural and urban gun control policies).

430. *Ward*, 491 U.S. at 799.

431. *Id.* (citation omitted).

cise First Amendment rights. In the absence of these requirements, the law is presumptively unlawful, and strict scrutiny applies.

The challenged may-issue laws may not be regarded as a rational "place" restriction, however, because the regulations effectively destroy the right to carry a weapon outside the home for the vast majority of law-abiding citizens.[432] The Second Amendment differs from the First Amendment, as "self defense can't be shifted to a more convenient time or location." [433] Self-defense has to take place where one is located. Therefore, "[a] ban on public possession of arms does not leave open ample channels to defend oneself as the need arises."[434]

Consequently, challenges to public carry should look at the state's public carry laws in its entirety, subjecting highly restrictive may-issue laws to strict scrutiny in the absence of an alternative option like open carry. The focus of the sliding-scale approach falls on an individual's general lawful ability to carry in public, whether in a concealed or open manner. There is support for such an approach among the federal circuits. For instance, one federal court found that, in analyzing a regulation challenged under the Second Amendment, courts should consider the regulation in terms of who, what, where, when, and why, as they do in cases involving challenges under the First Amendment.[435] The Seventh Circuit decision in *Moore* is similar, in that it considers the former Illinois ban on public carry with regard to (1) who it affected, (2) what it affected, and (3) where it affected them: (1) all Illinois residents' (2) ability to exercise their Second Amendment right to self-defense (3) in public.[436] A law that restricts the vast majority of people from carrying all firearms is an extremely broad and significant burden on Second Amendment rights. Whether the restrictive result is achieved by completely banning public carry, as was formerly the case in Illinois,[437] or by prohibiting one form of carry and severely restricting the other, such as under New York's proper cause requirement,[438] such laws should be subject to strict scrutiny.

These may-issue laws are unlikely to survive strict scrutiny analysis. Although there is certainly a compelling government interest in preserving public safety, may-issue laws are not narrowly tailored to achieve this result. The strongest evidence of this lack of narrow tailoring is in the comparison of may-issue and shall-issue laws: both are designed to protect the public, but may-issue laws block most law-abiding citizens from exercising their Second Amendment rights, while shall-issue statutes grant licenses to all qualified applicants. In addition, the justification for

432. *See* Volokh, *supra* note 164, at 1458–59.

433. Volokh, *supra* note 21, at 100.

434. *Id.* On the other hand, prohibitions on specific manners of public carry, where other opportunities are available, do not *prima facie* conflict with Second Amendment rights.

435. United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (10th Cir. 2012).

436. *See generally* Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

437. *Id.* at 942.

438. N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2014).

may-issue laws lies on the tenuous principle that having more legally owned guns in public will result in more crime and more injuries arising from accidents and misuse.[439]

Furthermore, a higher burden for laws that broadly restrict a citizen's ability to self-defend gives cognizance to the fact that people are concerned with criminal violence and the government's inability or failure to protect them from it. It is evident that the police are unable to protect all citizens from criminal behavior, particularly in high crime areas.[440] The Second Amendment should be interpreted to uphold the natural right of individuals to defend themselves from harm. A higher standard of review, similar to that employed when other fundamental rights, such as the First Amendment, are at issue, is therefore appropriate. When compared with other important provisions of the Bill of Rights, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial, and due process of law.

V. CONCLUSION

Although the *Heller* majority implicitly approved concealed carry bans, it would be a mistake to interpret that opinion as holding that a complete ban on concealed carry is constitutional in the absence of open carry laws. As this Note exhibited, both the text and a historical analysis of the Second Amendment support the conclusion that the Second Amendment protects the right to bear arms in public. Indeed, the individual right to self-defense that is central to the Second Amendment, according to *Heller*, is often of greater need in the public context.

Based on this, the Supreme Court will likely disagree with federal circuits that have determined that public carry falls outside the *core* protections of the Second Amendment. In so doing, the Supreme Court will likely invalidate restrictive may-issue laws because they grant issuing authorities the power to deprive most law-abiding citizens of the right to carry a gun in public. Thus, the Illinois legislature wisely chose to adopt a less restrictive shall-issue concealed carry law.

439. *See Moore*, 702 F.3d at 937 (citing studies that show that "evidence is insufficient to determine whether the degree or intensity of firearms regulation is associated with decreased (or increased) violence" (citation and internal quotation marks omitted)).

440. Despite a lower murder rate in Chicago in 2013, "at least 412 Chicagoans lost their lives violently," most of them in high-crime areas. One has to look no further than the high murder rate in Chicago for this premise. Cheryl Corley, *Despite the Headlines, Chicago's Crime Rate Fell in 2013*, NPR (Dec. 31, 2013, 3:31 AM), http://www.npr.org/2013/12/31/258413771/despite-the-headlines-chicagos-crime-rate-fell-in-2013.