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# A "JUSTIFIED NEED" FOR THE CONSTITUTIONALITY OF "GOOD CAUSE" CONCEALED CARRY PROVISIONS

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*The U.S. Supreme Court's landmark decision in* District of Columbia v. Heller *held that the prohibition of handguns in the home was unconstitutional and the Court extended this holding to the states through the Fourteenth Amendment in* McDonald v. City of Chicago. *Through these cases, the Court clarified that the core of the Second Amendment was self-defense. However, it did not specify the scope of this self-defense "core" and left the lower courts with room for interpretation—for example, it is unclear whether and to what extent the Second Amendment applies to the public space. Furthermore, the Supreme Court did not provide a standard of review for lower courts to apply when weighing the constitutionality of gun regulations. Lastly, while the Court relied heavily on the nation's history to justify its holding in* Heller*, it did not give any further guidance regarding the sources of history that the Court deemed most reliable.*

*Given these ambiguities, states have implemented statutes that require law-abiding citizens interested in obtaining a handgun license for concealed public carry to articulate a specified need for self-defense. Lower courts had generally accepted such provisions as constitutional until the D.C. Circuit in* Wrenn v. District of Columbia *held otherwise.*

*This Note analyzes the constitutionality of these provisions. It attempts to clarify some of the Supreme Court's ambiguities through its analysis and ultimately proposes that these state statutes are constitutional.*



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## INTRODUCTION

States are currently grappling with increasing gun regulation in response to high levels of gun-related violence.[1] In 2018 alone, there were 337 mass shootings where four or more people were killed or injured, not including the shooter.[2] This amounts to almost one mass shooting a day. So far this year,

1. In 2018, state legislatures passed a total of 126 pieces of legislation involving guns, ranging from disqualifying owners to allowing more access. *Gun Laws in 2018*, NEWSDAY, https://projects.newsday.com/databases/long-island/gun-laws-in-2018 [https://perma.cc/6PN2-Y9FR] (last visited Oct. 6, 2019).

2. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, http://www.gunviolencearchive.org/past-tolls [https://perma.cc/6WB2-384U] (last visited Oct. 6, 2019). For the purposes of this Note, I use this definition of a "mass shooting"; however, other sources have defined it in various ways. *See, e.g.*, Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Aug. 31, 2019, 7:30 PM), https://www.motherjones.com/politics/2012/07/mass-shootings-map [https://perma.cc/24XU-KD6N] (adopting terminology from the FBI and defining a mass shooting as a "single attack in a public place in which four or more victims were killed").

as of October 6, 2019, there have already been 324 reported incidents of mass shootings, which suggests a continuing trend from 2018.[3]

The recent data on gun violence is not an anomaly; in fact, it speaks to an underlying pattern of gun violence that has been steadily increasing over the past four years.[4] While the number of actual shootings has been about the same over the past three years, the number of injuries and deaths has risen every year.[5] For example, in 2017, there were about three thousand more reported deaths and ten thousand more reported injuries compared to 2014.[6]

The increase in gun violence has heightened the debate around gun control. Those who support more gun control call for increased gun regulation, such as requiring more thorough background checks and greater protections against the mentally ill buying guns.[7] They argue that having more gun control laws would reduce gun deaths,[8] that guns are rarely used in self-defense,[9] that legally owned guns are often stolen,[10] and that the presence of a gun makes a conflict more likely to turn violent.[11] Additionally, the United States has one of the highest gun homicide rates compared to other high-

3. *Gun Violence Archive 2019*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org [https://perma.cc/Y3L9-TKBQ] (last visited Oct. 6, 2019).

4. *See Past Summary Ledgers*, *supra* note 2.

5. *Id.*

6. *Id.*

7. *History of Gun Control*, PROCON.ORG, https://gun-control.procon.org/view.resource.php?resourceID=006436 [https://perma.cc/6CSM-GFEC] (last updated Mar. 25, 2019).

8. A March 2016 study found that "implementing federal universal background checks could reduce firearm deaths by a projected 56.9%; background checks for ammunition purchases could reduce death by a projected 80.7%; and gun identification requirements could reduce deaths by a projected 82.5%. Gun licensing laws were associated with a 14% decrease in firearm homicides . . . ." *Should More Gun Control Laws Be Enacted?*, PROCON.ORG, https://gun-control.procon.org [https://perma.cc/Y3HD-B6ZV] (last updated Aug. 14, 2019). Having a gun in the home makes it three times more likely that a homicide will occur in the home and makes it five times more likely that a suicide will occur in the home. Symposium, Heller *in the Lower Courts*, 40 CAMPBELL L. REV. 399, 411 (2018).

9. *Should More Gun Control Laws Be Enacted?*, *supra* note 8 ("Of the 29,618,300 violent crimes committed between 2007 and 2011, 0.79% of victims . . . protected themselves with a threat of use or use of a firearm . . . . Of the 84,495,500 property crimes committed between 2007 and 2011, 0.12% of victims . . . protected themselves with a threat of use or use of a firearm.").

10. *Id.* "Between 2005 and 2010, 1.4 million guns were stolen from US homes during property crimes . . . [and] the presence of more guns can actually serve as a stimulus to [more] burglary and theft." *Id.*

11. In a June 1985 study, "the *American Journal of Public Health* found that 'the weapons used [in altercations] were those closest at hand.'" *Id.* (quoting Jess Hedeboe et al., *Interpersonal Violence: Patterns in a Danish Community*, 75 AM. J. PUB. HEALTH 651, 651 (1985)). "Gun-inflicted deaths ensue from impromptu arguments and fights: in the U.S., two-thirds of the 7,900 deaths in 1981 involving arguments and brawls were caused by guns." Susan P. Baker, *Without Guns, Do People Kill People?*, 75 AM. J. PUB. HEALTH 587, 587–88 (1985). Gun prevalence also increases criminal violence and harm in the community because of a greater shift towards lethality. Symposium, *supra* note 8, at 411.

income nations.[12] Furthermore, stricter gun control policies have proven to be effective in reducing gun homicides and suicides.[13]

Opponents of gun control argue that such laws do not deter crime; in fact, gun ownership deters crime.[14] Additionally, gun control laws would not actually prevent potential criminals from obtaining guns or breaking the law,[15] and more gun control is unnecessary because, compared to other causes of death, relatively few people are killed by guns.[16] Opponents of gun control believe that gun regulations have generally been ineffective[17] and, instead of more gun control, education about guns and gun safety is likely more helpful.[18]

States and cities like the District of Columbia have recently tightened gun regulations by limiting the possession of firearms in public spaces.[19] Similar to gun control laws adopted in states like New York, New Jersey, Maryland, and California, these laws permit some individuals to carry guns in public but require them to pass a stricter licensing procedure.[20] Specifically, states have required users to articulate a self-defense need explaining why carrying a handgun in public is justified.[21] The federal courts have generally accepted

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12. *See* Kara Fox, *How US Gun Culture Compares with the World*, CNN (Aug. 6, 2019, 10:18 AM), https://www.cnn.com/2017/10/03/americas/us-gun-statistics/index.html [https://perma.cc/AQP8-8JG3].

13. Switzerland and Finland, for example, are countries that "require gun owners to acquire licenses and pass background checks . . . among other restrictions and requirements." *Should More Gun Control Laws Be Enacted?*, *supra* note 8. They rank third and fourth in international gun ownership rates (both about 45 guns per 100 people) whereas the United States ranks first with 88.8 guns per 100 people as of 2007. *Id.*

14. A November 2013 study found that "states with restrictions on the carrying of concealed weapons had higher gun-related murder rates than other states." Mark Gius, *An Examination of the Effects of Concealed Weapons Laws and Assault Weapons Bans on State-Level Murder Rates*, 21 APPLIED ECON. LETTERS 265, 265 (2014). On the other hand, "[w]hile gun ownership doubled in the twentieth century, the murder rate decreased." *Should More Gun Control Laws Be Enacted?*, *supra* note 8.

15. *Id.* "Of 62 mass shootings in the United States between 1982 and 2012, 49 of the shooters used legally obtained guns. Collectively, 143 guns were possessed by the killers with about 75% obtained legally." *Id.*

16. *Id.* ("[B]etween 1999 and 2013, Americans were 21.5 times more likely to die of heart disease (9,691,733 deaths); 18.7 times more likely to die of malignant tumors (8,458,868 deaths); and 2.4 times more likely to die of diabetes or 2.3 times more likely to die of Alzheimer's (1,080,298 and 1,053,207 respectively) than to die from a firearm (whether by accident, homicide, or suicide). The flu and related pneumonia (875,143 deaths); traffic accidents (594,280 deaths); and poisoning whether via accident, homicide, or suicide (475,907 deaths) all killed more people between 1999 and 2013 than firearms.").

17. *Id.* "[M]ost state level gun control laws do not reduce firearm death rates, and, of 25 state laws, nine were associated with higher gun death rates." *Id.*

18. *Id.* "95% of all US gun owners believe that children should learn about gun safety . . . . [P]eople need more gun education and mental illness screening to prevent massacres." *Id.*

19. *See* Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

20. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 869 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 84–85 (2d Cir. 2012).

21. *See Wrenn*, 864 F.3d at 655 (requiring a "good reason to fear injury" in D.C.); *Drake*, 724 F.3d at 429 (requiring a "justifiable need" in New Jersey); *Woollard*, 712 F.3d at 869

these provisions either because of the statute's long-standing history in the state or because these courts have deemed that the protections of the Second Amendment are weaker in the public space.[22] However, the most recent decision by the D.C. Circuit, echoing the U.S. Supreme Court's holding in *District of Columbia v. Heller*[23] (*Heller I*) and referring to other case law, held that such statutory provisions are unconstitutional because a requirement asking law-abiding citizens to specify a self-defense reason for public carry would put too great of a burden on the Second Amendment's core.[24] This circuit split leaves an unclear path forward for how other gun control measures in the public space will be viewed by other courts, leaving them, perhaps, in a constitutional limbo.[25]

This Note examines the circuit split created by *Wrenn v. District of Columbia*[26] and analyzes whether state statutes requiring law-abiding citizens to articulate a particular need for self-defense to obtain a concealed public carry license are constitutional. Part I examines the extent of the Supreme Court's Second Amendment jurisprudence and identifies the questions left unanswered for the lower courts. Part II weighs the constitutionality of the state statutory provisions in question by considering various interpretations of the Second Amendment's scope. Part III then suggests that while the core of the Second Amendment includes both the right to have a handgun in the home and in public, the public right was always meant to be a weaker right, allowing it to be subjected to greater regulation. Furthermore, this Note proposes that courts should defer to legislative bodies, which are better equipped to understand the contexts and implications of gun use in their respective localities.

## I. THE SELF-DEFENSE CORE OF THE SECOND AMENDMENT AND THE AMBIGUITIES LEFT BY THE SUPREME COURT

The Supreme Court's jurisprudence on the Second Amendment is currently limited to *Heller I* and *McDonald v. City of Chicago*,[27] which were decided almost a decade ago. The Supreme Court has not affirmatively ruled on any other Second Amendment issue since then,[28] leaving lower courts unsure of the scope of their holdings. Recently, however, the Court has granted certiorari to determine whether certain regulations that limit the

(requiring a "good and substantial reason" in Maryland); *Kachalsky*, 701 F.3d at 84 (requiring a demonstration of "'proper cause'—a special need for self-protection" in New York).

22. *See Drake*, 724 F.3d at 430–31; *Woollard*, 712 F.3d at 876–78; *Kachalsky*, 701 F.3d at 89.

23. 554 U.S. 570 (2008).

24. *See Wrenn*, 864 F.3d at 666–67.

25. *See infra* Part I.B.

26. 864 F.3d 650 (D.C. Cir. 2017).

27. 561 U.S. 742 (2010).

28. *See Protecting Strong Gun Laws : The Supreme Court Leaves Lower Court Victories Untouched*, GIFFORDS L. CTR., https://lawcenter.giffords.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched [https://perma.cc/SQD9-93DX] (last updated May 31, 2019).

transfer of handguns obtained with a premises license are constitutional.[29] This is an opportunity for the Court to clarify its understanding of the Second Amendment. First, this Part walks through the Supreme Court's jurisprudence leading up to *Heller I* and *McDonald*.[30] Then, this Part identifies the ambiguities in the Supreme Court's jurisprudence.[31] These ambiguities have led the lower courts to uphold a wide range of gun laws regulating the public carry of handguns, which has ultimately led to the circuit split this Note discusses.[32]

### *A. The Supreme Court's Second Amendment Jurisprudence*

Since the Second Amendment was ratified in the eighteenth century, the Supreme Court has not weighed in on the individual nature of the Amendment's words: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[33] In fact, the Supreme Court initially believed that an individual right to gun ownership did not exist within the Second Amendment.[34] Instead, the Court held that the Second Amendment was a collective right pertaining to the maintenance of the militia[35] in the three cases it considered regarding this matter, the last being *United States v. Miller*[36] in 1939.[37]

Following the *Miller* decision, the Court largely refrained from ruling on gun regulations governing the individual right to carry throughout the twentieth century.[38] However, as the focus on guns began to peak through numerous well-publicized acts of violence, state legislatures became increasingly active in imposing gun restrictions.[39] Still, the courts were generally not involved, as this issue was largely left to the democratic branches, and there seemed to be no limits on what sorts of policies could be passed in order to preserve order.[40]

By the twenty-first century, the country was increasingly concerned about gun violence and states began to pass legislation in the form of bans to

29. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 138 S. Ct. 939 (2019).
30. *See infra* Part I.A.
31. *See infra* Part I.B.
32. *See infra* Part I.B.
33. U.S. CONST. amend. II.
34. *See* MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 96–97 (2015).
35. *See id.*
36. 307 U.S. 174 (1939).
37. *See* WALDMAN, *supra* note 34, at 96–97; *see also Miller*, 307 U.S. at 178 (holding that Congress can regulate a sawed-off shotgun because it did not have a "reasonable relationship to the preservation . . . of a well regulated militia"). *See generally* Miller v. Texas, 153 U.S. 535 (1894) (referring to the notion that a criminal defendant did not have an individual right to keep and bear arms); Presser v. Illinois, 116 U.S. 252 (1886) (referring to the notion that gun rights belong to the militias).
38. WALDMAN, *supra* note 34, at 83–84.
39. *See id.*
40. *See id.*

promote gun control.[41] For example, the District of Columbia made it unlawful to possess handguns in the home and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable."[42] In response to this legislation, the Supreme Court finally stepped in with its 2008 landmark decision in *Heller I.*

In interpreting the Second Amendment, the Supreme Court in *Heller I* moved away from its previously held notion that the Second Amendment is a collective right.[43] Rather, it held that the Second Amendment conferred an individual right to keep and bear arms.[44] To justify the necessity of an individual right, the Court held that self-defense was considered the "first law of nature" by leaders of the past.[45] Historically, rulers were able to restrict individual liberties and take command with the use of standing armies by curtailing the individual right to bear arms.[46] In response, the Court held that the Second Amendment served to preserve the militia by preventing the federal government from stripping its citizens of their right to self-defense by taking away their arms.[47] Therefore, from its origins, the "central component" of the Second Amendment was the individual right to self-defense.[48]

After establishing the Second Amendment's individual right, the Court further held that it is "the home, where the need for defense of self, family, and property is *most* acute."[49] Therefore, while the Court acknowledged that the scope of the Second Amendment had its limitations,[50] "certain policy choices [were necessarily] off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."[51] Preventing handguns from being in the home was unconstitutional because the "core" of the Second Amendment—the individual right to self-defense—was improperly burdened.[52]

In 2010, the Supreme Court extended *Heller I*'s Second Amendment holding to the states through the Fourteenth Amendment in *McDonald v. City of Chicago*.[53] While the Court moved away from some of its justifications in *Heller I*, specifically its concerns that the federal government would

41. *See* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 636 (2008).
42. *See id.* at 628.
43. *See id.* at 579–81.
44. *See id.* at 622.
45. *See id.* at 606.
46. *See id.*
47. *See id.* at 599.
48. *Id.*
49. *Id.* at 628 (emphasis added).
50. At this time the Second Amendment only applied to the Federal Government because the Court believed that "[s]tates . . . were free to restrict or protect the right under their [own] police powers," especially considering matters such as public peace. *Id.* at 607–08, 620. The Court further held that their ruling should not "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 626–27.
51. *Id.* at 636.
52. *Id.* at 634.
53. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

disarm the militia by stripping away the arms of its citizens, it ultimately held that "the right to keep and bear arms was [still] highly valued for purposes of self-defense."[54] The Court explained that certain Bill of Rights provisions that are "fundamental to our scheme of ordered liberty and system of justice"[55] or "deeply rooted in this Nation's history and tradition" are incorporated into the Due Process Clause of the Fourteenth Amendment.[56] That said, the Court in *McDonald* held that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day."[57] Echoing the analysis in *Heller I*, the Court deemed that the Second Amendment should be incorporated into the Fourteenth Amendment because the right to self-defense, particularly being "most acute" in the home, was indeed "deeply rooted in this Nation's history and tradition" since its ratification in the eighteenth century.[58]

As in *Heller I*, the Court in *McDonald* did not detail the Second Amendment's full scope and limitations as they would be applied to the states.[59] The Court only implied that the incorporation of the Second Amendment to the states through the Fourteenth Amendment should not yield a "watered-down, subjective version of the individual guarantee[]" because "it would be 'incongruous' to apply different standards."[60]

### *B. The Holes in* Heller*: The State of Gun Regulations in the United States Today*

The Supreme Court in *Heller I* and *McDonald* made at least two things clear: statutes that ban handguns in the home were unconstitutional because they impinged on the Second Amendment's core of self-defense and the right to self-defense was at its strongest in the home.[61] However, the Court did not articulate the reach of its holdings.[62] For example, in *Heller*, the Court gave examples of long-standing prohibitions that would be presumptively upheld as constitutional gun regulations;[63] however, it did not clarify what the threshold of "long-standing" would be. Additionally, the Supreme Court did not leave the lower courts with a mechanism to analyze new gun laws. This left the lower courts to come up with standards of review on their own.

Most courts began to adopt a two-part test, used by the D.C. Circuit in *Heller v. District of Columbia*[64] (*Heller II*), derived from First Amendment jurisprudence.[65] The two-part test "ask[s] first whether a particular provision

54. *Id.* at 770.
55. *Id.* at 764.
56. *Id.* at 767.
57. *Id.*
58. *Id.* at 768.
59. *See id.* at 768–70.
60. *Id.* at 765 (quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)).
61. *See Heller I*, 554 U.S. 570, 628 (2008); *see also McDonald*, 561 U.S. at 768.
62. *See Heller I*, 554 U.S. at 626.
63. For examples of long-standing prohibitions, see *supra* note 50.
64. 670 F.3d 1244, 1257 (D.C. Cir. 2011).
65. *See* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1257 (D.C. Cir. 2011).

burdens a Second Amendment right and then, if it does, go[es] on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny."[66] However, without additional guidance from the Supreme Court, lower courts inconsistently applied this test to public gun laws because it was unclear at what point the Second Amendment's core of self-defense would be burdened.[67]

The lack of clarity around the history of "long-standing" provisions, the scope of the Second Amendment's core of self-defense, and the appropriate standard of review left lower courts with a lot of discretion.[68] Consequently, regulation of the public carrying of handguns "resemble[d] a patchwork quilt that largely reflect[ed] local custom."[69]

States have implemented different degrees of public gun regulations between open carry and concealed carry.[70] Currently, thirty-one states allow citizens to openly carry a handgun in public without a license or a permit.[71] On the other hand, there are five states that prohibit open carry in public places in general.[72] Lastly, there are fourteen states that require some form of license or permit.[73] Fifteen states allow for the concealed carry of a handgun in public without a license or permit.[74] Thirty-five states generally require a permit in order to carry concealed weapons in public; however, the amount of regulation within these states varies.[75] For example, seven of the thirty-five states require a showing of "good cause or a justifiable need to carry a concealed weapon," which generally means that the applicant needs to show a credible threat to his or her safety "that cannot be alleviated through other legal channels."[76] These states are California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and New York.[77]

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66. Wrenn v. District of Columbia, 864 F.3d 650, 666 (D.C. Cir. 2017) (quoting *Heller II*, 670 F.3d at 1252).

67. Symposium, *supra* note 8, at 413.

68. *See id.* at 413–16.

69. *See* Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (Hardiman, J., dissenting).

70. "'Open carry' refers to the practice of carrying openly visible firearms in public." *Open Carry*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry [https://perma.cc/J54F-SEHP] (last visited Oct. 6, 2019). Concealed carry refers to the carrying of "concealed, loaded guns in public spaces." *Concealed Carry*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry [https://perma.cc/Z4PZ-WDQE] (last visited Oct. 6, 2019).

71. *Open Carry*, *supra* note 70.

72. *Id.* "Five states (California, Florida, Illinois, New York, and South Carolina), as well as the District of Columbia, generally prohibit people from openly carrying handguns in public places." *Id.*

73. *Id.* (including New Jersey and Maryland).

74. *Concealed Carry*, *supra* note 70.

75. For example, within the permit regulations, there are "may issue" laws and "shall issue" laws, the former giving "significant discretion to the issuing official to grant or deny the permit." *Id.*

76. *Id.*

77. *See* CAL. PENAL CODE § 26150(a)(2) (West 2019); DEL. CODE ANN. tit. 11, § 1441(a)(1) (2019); HAW. REV. STAT. § 134-9(a) (2019); MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2019); MASS. GEN. LAWS ch. 140, § 131(d) (2019); N.J. STAT. ANN. § 2C:58-4(c) (West 2019); N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2019). For the sake of brevity, this Note refers to these provisions within the statutes as "good cause" provisions.

Federal circuit courts have held that such "good cause" provisions in California, Delaware, Hawaii, Maryland, New Jersey, and New York are constitutional.[78] The District of Columbia tried to follow this trend by implementing its own "good cause" provision within its concealed carry statute; however, the D.C. Circuit deemed the provision unconstitutional.[79] The circuit court for the remaining state, Massachusetts, has yet to make a decision.

## II. ANALYZING THE CONSTITUTIONALITY OF "GOOD CAUSE" PROVISIONS

Without further clarity from the Supreme Court, lower courts have weighed in on the constitutionality of these "good cause" provisions through varied interpretations of history, the Second Amendment's core of self-defense, and the application of the two-part test used in *Heller II*.[80] This Part first explores the arguments for the unconstitutionality of "good cause" provisions in the concealed public carry statutes.[81] Specifically, this Part points out the historical interpretations, the interpretation of the Second Amendment's core, and the standard of review that best support these provisions' unconstitutionality.[82] Then, this Part considers the constitutionality of "good cause" provisions[83] and highlights the arguments that best support these provisions' constitutionality.[84]

### *A. Unconstitutionality of "Good Cause" Provisions*

The D.C. Circuit in *Wrenn v. District of Columbia* is the only circuit court thus far that has held that "good cause" provisions are unconstitutional.[85] The *Wrenn* court addressed a D.C. concealed carry provision that limited the distribution of permits to those who had "good reason to fear injury to their person or property" or "any other proper reason for carrying a pistol."[86] In order to show a "good reason to fear injury," applicants had to show a "special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life."[87] For example, "an applicant's need to carry around cash or valuables as a part of her job" would be sufficient for an applicant to receive a concealed carry license.[88]

78. *See* Peruta v. County of San Diego, 824 F.3d 919, 941–42 (9th Cir. 2016); Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 882–83 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 84 (2d Cir. 2012).

79. *See* Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

80. *See id.*; *Peruta*, 824 F.3d at 941–42; *Drake*, 724 F.3d at 429; *Woollard*, 712 F.3d at 882–83; *Kachalsky*, 701 F.3d at 84.

81. *See infra* Part II.A.

82. *See infra* Part II.A.

83. *See infra* Part II.B.

84. *See infra* Part II.B.

85. *See Wrenn*, 864 F.3d at 655.

86. *Id.* (quoting D.C. CODE § 22-4506(a)).

87. *Id.*

88. *Id.* at 656.

However, simply "living or working 'in a high crime area [did] not by itself establish a good reason.'"[89]

The court determined that "good cause" provisions are unconstitutional without applying any standard of review because the self-defense core was not only burdened but effectively destroyed.[90] The D.C. Circuit interpreted the Second Amendment's core broadly to include self-defense generally and not just within the home.[91] Despite its lone standing amongst its sister courts, the D.C. Circuit's stance has garnered support amongst scholars who argue that the court's reasoning is doctrinally sound.[92] This section analyzes the arguments that support the D.C. Circuit's holding by examining the court's justifications for a broader interpretation of the Second Amendment's core, the relevant history it cites, and its reasoning behind not applying a standard of review.

### 1. The Broad Scope of the Second Amendment's Core

The *Wrenn* court determined that the individual right to carry handguns beyond the home and in the public space fell within the Second Amendment's core.[93] In other words, the Second Amendment's core protected individual self-defense generally.[94] The *Wrenn* court looked to the text of the Amendment and applied the definitions of "keeping" and "bearing" arms used in *Heller I*.[95] It held that the "definition[s] show[] that the Amendment's core must span . . . the 'right to possess *and carry* weapons in case of confrontation.'"[96] This covered carrying beyond the home for self-defense because, echoing Judge Richard Posner of the Seventh Circuit, "[c]onfrontations are not limited to the home."[97]

Some have justified the *Wrenn* court's broad reading of the Second Amendment by citing to *Moore v. Madigan*,[98] in which the Seventh Circuit struck down a ban on public carrying altogether.[99] While the underlying facts differ, the Seventh Circuit alluded to the broad nature of the Second Amendment's core as a part of its analysis.[100] In *Heller I*, the Supreme Court

89. *Id.* (quoting D.C. Mun. Regs. tit. 24, § 2333.4).
90. *See id.* at 666.
91. *See id.* at 657 (stating that "the Amendment's 'core lawful purpose' is self-defense . . . and the need for [self-defense] might arise beyond as well as within the home" (quoting *Heller I*, 554 U.S. 570, 630 (2008))).
92. *See generally* Betty J. Craipo, *Judicial Toleration for Negative Externalities of Bearing Arms in Public: Addressing the Second Amendment Circuit Split*, 14 SETON HALL CIR. REV. 209 (2018); John R. Thompson, Note, *An Elevated Need for Constitutional Rights: Good Cause Requirements and Washington, D.C. Concealed Carry Applications*, 26 GEO. MASON U. C.R.L.J. 381 (2016).
93. *Wrenn*, 864 F.3d at 661.
94. *See id.* at 659.
95. *Id.* at 657–58.
96. *Id.* at 658 (quoting *Heller I*, 554 U.S. 570, 592 (2008)).
97. Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).
98. 702 F.3d 933 (7th Cir. 2012).
99. *See, e.g.*, Thompson, *supra* note 92, at 399.
100. *See Moore*, 702 F.3d at 935–36.

stated that the need for self-defense was "*most* acute" in the home.[101] The Seventh Circuit emphasized the use of the comparative term to highlight the notion that the need for self-defense also had to be acute outside of the home.[102] The court then proceeded with a commonsense approach, stating that "one doesn't have to be a historian to realize that a right to keep and bear arms . . . could not rationally have been limited to the home"[103] because a citizen is a "good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment."[104]

The *Wrenn* court went further, stating that "[t]he rights to keep and to bear, to possess and to carry, are *equally* important" to the extent that alternative channels must be left for people to access both.[105] Therefore, private and public gun regulations might not necessarily destroy the Second Amendment's core of self-defense as long as the restrictions leave "ample opportunities" for both.[106] For example, prohibiting the public carrying of handguns near "sensitive"[107] sites listed in *Heller I* does not destroy the Amendment's core because the right can still be preserved by simply avoiding those places.[108]

### 2. Historical Interpretation of Broad Public Carry Rights

To further justify its reasoning, the *Wrenn* court echoed the history presented in *Heller I* and focused on the general trends of public carrying at the time of the nation's founding.[109] The *Wrenn* court pointed out that "by the time of the Founding, the 'preexisting right' enshrined by the Amendment . . . ripened to include carrying more broadly."[110] It was an "individual right protecting against both public and private violence."[111]

The D.C. Circuit highlighted this notion of a broadened "pre-existing right" by citing to late nineteenth-century case law.[112] These cases spoke of the right to bear arms, not only for the purposes of defending one's home and property but also for the purpose of protecting oneself as necessary.[113] The

101. *Heller I*, 554 U.S. 570, 628 (2008) (emphasis added).
102. *Moore*, 702 F.3d at 935–36.
103. *Id.* at 936.
104. *Id.* at 937.
105. Wrenn v. District of Columbia, 864 F.3d 650, 662 (D.C. Cir. 2017) (emphasis added).
106. *Id.* In this Note, "private gun regulations" refer to regulations of at-home gun use and "public gun regulations" refer to regulations of gun use outside the home.
107. *Id.* at 626. Examples of "sensitive" sites include schools and government buildings. *See supra* note 50.
108. *Wrenn*, 864 F.3d at 662.
109. *See id.* at 660.
110. *Id.*
111. *Heller I*, 554 U.S. 570, 594 (2008).
112. *See Wrenn*, 864 F.3d at 658.
113. *See, e.g.*, State v. Reid, 1 Ala. 612, 616–17 (1840) (allowing regulation regarding the "manner of bearing arms" but not to the extent where the right would be "wholly useless for the purpose of defence"); Nunn v. State, 1 Ga. 243, 251 (1846) (stating that a "prohibition against bearing arms *openly*" would be deemed invalid); State v. Chandler, 5 La. Ann. 489, 490 (1850) (acknowledging that the Second Amendment protects a right to open carry, at least where the firearm is "in full open view"); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 187

court acknowledged that there were also nineteenth-century cases that upheld "onerous limits" on carrying guns in spite of the Second Amendment.[114] However, the *Wrenn* court dismissed these cases as irrelevant because their holdings were based on the Second Amendment's collective right of maintaining a militia, which the Supreme Court in *Heller I* clarified was an outdated doctrine.[115]

The *Wrenn* court further bolstered its opinion by considering historical arguments that favored the long-standing nature of public carrying restrictions.[116] Specifically, it considered the old English Statute of Northampton and "surety laws."[117]

The 1328 Northampton statute was an English law that banned carrying firearms in crowded areas and, by the late eighteenth century and early nineteenth century, several American colonies and states had adopted similar laws.[118] However, the *Wrenn* court, echoing the Supreme Court in *Heller I*, held that such Northampton-like laws do not have any merit because they were beyond the scope of public carrying.[119] The Northampton laws were targeted towards banning "only the carrying of 'dangerous and unusual weapons'"[120] or the wielding of weapons "with evil intent or in such a way as 'to terrify the King's subjects.'"[121] Neither of these purposes pertained to the general right to publicly carry firearms.

English "surety laws" required an individual with a pistol to pay a bond that covered any damage he might do, unless the individual proved that there was "reason to fear injury to his person or family or property."[122] These "surety laws" were arguably comparable to the "good cause" provisions at issue in that individuals were required to articulate a specified reason to justify the potential use of the pistol. However, the *Wrenn* court dismissed this comparison because the "surety laws" limited the individual's use of a handgun and not the individual's possession of one.[123] In other words, under "surety laws," people still had "robust carrying rights" as they were already allowed to publicly carry handguns without facing any criminal penalty.[124]

### 3. A Standard of Review Does Not Apply

The *Wrenn* court established that the Second Amendment's core included an equal public and private right subject to long-standing restrictions that

(1871) (invalidating a ban on carrying pistols "publicly or privately, without regard to time or place, or circumstances"). For a full list of cases that the *Wrenn* court references, see *Wrenn*, 864 F.3d at 658.

114. *Wrenn*, 864 F.3d at 658.
115. *Id.*
116. *See id.* at 659–60.
117. *See id.*
118. *Id.* at 660.
119. *See id.* at 660–61.
120. *Id.* at 660 (quoting *Heller I*, 554 U.S. 570, 627 (2008)).
121. *Id.* (quoting Sir John Knight's Case (1686) 87 Eng. Rep. 75, 76).
122. *Id.* at 661.
123. *See id.*
124. *Id.*

leave "ample opportunities" to bear arms. The court then concluded that the "good cause" provisions were unconstitutional without applying a standard of review.[125] The court acknowledged that, in its own holding in *Heller II*, it adopted the two-step approach for reviewing gun laws, which was widely used by other courts.[126] The two-step approach considered whether the provision in question burdened the Second Amendment right, and, if it did, required the court to apply the appropriate level of constitutional scrutiny.[127] In *Heller II*, the court drew comparisons to its First Amendment jurisprudence and concluded that the appropriate level of scrutiny would typically be limited to intermediate scrutiny or strict scrutiny.[128] However, the *Wrenn* court held that its own precedent did not apply to its analysis of "good cause" provisions because the opinion in *Heller II* was "expressly limited . . . to laws 'significantly less severe' than a 'total prohibition.'"[129]

The *Wrenn* court interpreted the "good cause" provision as an overall ban on public carry that made a narrow exception for D.C. residents who were able to show a "special need."[130] Interpreted this way, the court felt that the "good cause" provision was similar to the prohibition of handguns in the home struck down in *Heller I*.[131] The "good cause" provisions substantially burdened and destroyed the Second Amendment's core of self-defense because it did not provide the ordinary citizen with any alternative channels.[132]

Notably, the *Wrenn* court also acknowledged that the D.C. Council had already passed legislation that placed significant limitations on public carrying.[133] Therefore, while not explicitly stated, the court may have further considered D.C.'s "good cause" provision as "necessarily a total ban on most D.C. residents' right to carry a gun" because of the territory's unique context.[134] The combined restrictions on open carry and concealed carry speak further to the limited alternative means to carry a gun in the public space and the substantial burden that the "good cause" provisions have on the Second Amendment's core.

### *B. Constitutionality of "Good Cause" Provisions*

The Second, Third, Fourth, and Ninth Circuits analyzed similar "good cause" requirements for applicants who sought to obtain concealed carry licenses. However, in contrast to *Wrenn*, they each upheld the respective

125. *See id.* at 666–67.
126. *See id.* at 666.
127. *Id.*
128. *See Heller II*, 670 F.3d 1244, 1257 (D.C. Cir. 2011). In *Heller II*, the court described how courts generally treat First Amendment regulations, noting that severe restrictions would require an analysis under strict scrutiny, whereas intermediate scrutiny would suffice for more modest restrictions. *See id.*
129. *Wrenn*, 864 F.3d at 666 (quoting *Heller II*, 670 F.3d at 1266).
130. *Id.* at 665.
131. *Id.*
132. *See id.* at 662–63, 666–67.
133. *See id.* at 655 n.1 (citing D.C. CODE § 22-4504.01).
134. *See id.* at 666.

local laws as constitutional. The Second Circuit, in *Kachalsky v. County of Westchester*,[135] ruled on New York's "good cause" provision that required applicants to articulate a "proper cause" for self-protection.[136] Reasons that satisfied the provision included using a handgun for target practice, hunting, and self-defense.[137] To prove a need for self-defense, applicants had to "demonstrate a special need for self-protection distinguishable from that of the general community."[138]

California's "good cause" provision, which was held constitutional by the Ninth Circuit in *Peruta v. County of San Diego*,[139] required a showing of "a set of circumstances that distinguish[ed] the applicant from the mainstream and cause[d] him or her to be placed in harm's way."[140] Examples included being a victim of a violent crime or a business owner who normally carries large sums of cash or who works in remote areas.[141]

The Third Circuit, in *Drake v. Filko*,[142] analyzed New Jersey's "good cause" provision that required its applicants to show a "justifi[ed] need" for a handgun.[143] New Jersey applicants had to show an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by [other] means."[144]

Lastly, the Fourth Circuit, in *Woollard v. Gallagher*,[145] analyzed Maryland's "good cause" provision that required applicants to provide a "good and substantial reason" for a concealed carry permit, including certain business activities, regulated professions, "assumed risk" professions, and personal protection.[146] For the purposes of personal protection, the applicant needed to show an "apprehended danger," which was determined by considering the likelihood of a threat and how temporally and proximally pertinent the threat was to the applicant.[147]

Despite the varied standards of the states' "good cause" provisions, each of the circuit courts upheld the constitutionality of these laws.[148] Similar to the D.C. Circuit in *Wrenn*, these sister courts relied on their own

135. 701 F.3d 81 (2d Cir. 2012).
136. *Id.* at 84.
137. *Id.* at 86.
138. *Id.*
139. 824 F.3d 919 (9th Cir. 2016).
140. *Id.* at 926.
141. *Id.*
142. 724 F.3d 426 (3d Cir. 2013).
143. *Id.* at 428.
144. *Id.*
145. 712 F.3d 865 (4th Cir. 2013).
146. *Id.* at 869–70.
147. *Id.* at 870 (Factors considered were "(1) the 'nearness' or likelihood of a threat or presumed threat; (2) whether the threat can be verified; (3) whether the threat is particular to the applicant, as opposed to the average citizen; (4) if the threat can be presumed to exist, what is the basis for the presumption; and (5) the length of time since the initial threat occurred.").
148. *See* Peruta v. County of San Diego, 824 F.3d 919, 941–42 (9th Cir. 2016); *Drake*, 724 F.3d at 429; *Woollard*, 712 F.3d at 882–83; Kachalsky v. County of Westchester, 701 F.3d 81, 84 (2d Cir. 2012).

interpretations of the Second Amendment's core, its relevant history, and the appropriate standard of review. However, contrary to *Wrenn*, they asserted a narrower scope of the Second Amendment's core, referenced national and state-specific histories, and proposed various formulations of intermediate scrutiny. This section analyzes each interpretation in turn.

1. A Narrow Reading of the Second Amendment's Core

In holding that "good cause" provisions are constitutional, circuit courts narrowed the Second Amendment's core to the home. While the Second Circuit in *Kachalsky* acknowledged that the Amendment must have *some* application to the public possession of firearms, it did not adopt the *Wrenn* court's assertion that the public right should be treated equally.[149] Highlighting the *Heller I* Court's language of the "right of law-abiding, responsible citizens to use arms in defense of hearth and home,"[150] where the "need for the defense of self, family, and property is most acute,"[151] the *Kachalsky* court limited the core's protection to the home because it considered the home to be a special zone that was generally free from government intrusion.[152] This was also consistent with Supreme Court's treatment of other individual rights.[153] For example, state regulations could not criminalize the possession of obscene materials if they were in the home.[154] Additionally, regulating private sexual conduct was considered an "unwarranted" government intrusion into the home.[155] The right to public carry, however, could not be part of the Second Amendment's core because states enjoyed a "fair degree of latitude" to impose gun regulations.[156] Handgun rights outside of the home were greatly limited because "public safety interests often outweigh[ed] individual interests in self-defense."[157]

Other circuit courts, such as the Third Circuit, also acknowledged that *Heller I* may have extended the Second Amendment's core to a right to publicly carry handguns for self-defense.[158] It considered the language used in the Seventh Circuit's interpretation of *Heller I* in *Moore*, which established that bearing arms for self-defense was "as important outside the home as inside."[159] However, the Third Circuit ultimately followed the Second Circuit in *Kachalsky* because it wanted to err on the side of certainty.[160] *Heller I*'s holding specifically struck down a "single law" that pertained to

149. *See Kachalsky*, 701 F.3d at 89.
150. *Id.* at 93 (quoting *Heller I*, 554 U.S. 570, 634–35 (2008)).
151. *Id.* at 94 (quoting *Heller I*, 554 U.S. 570, 628 (2008)).
152. *Id.*
153. *See id.*
154. *See id.* (citing Stanley v. Georgia, 394 U.S. 557, 568 (1969)).
155. *See id.* (citing Lawrence v. Texas, 539 U.S. 558, 562 (2003)).
156. *Id.* at 96.
157. *Id.* at 94 (quoting United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011)).
158. Drake v. Filko, 724 F.3d 426, 430 (3d Cir. 2013).
159. *Id.* (quoting Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012)). For more information on the Seventh Circuit's analysis of the Second Amendment's core, see *supra* Part II.A.1.
160. *See Drake*, 724 F.3d at 430–31.

the individual right to possess a handgun in the home.[161] Beyond that, *Heller I* "was never meant to 'clarify the entire field' of Second Amendment jurisprudence."[162] The Third Circuit believed that the Seventh Circuit in *Moore* interpreted the Amendment's core too broadly.[163] It believed that "*Heller*'s language 'warn[ed] readers not to treat *Heller* as containing broader holdings than the [Supreme] Court set out to establish: that the Second Amendment created individual rights, one of which is keeping operable handguns *at home* for self-defense."[164]

Scholars who agree with these circuit courts focus on the extent of government regulation of guns in the public space.[165] *Heller I*'s decision was not meant to assert a conclusion but, rather, to introduce "a really involved task of figuring out what the Second Amendment means for many different types of gun laws."[166] Echoing the Second and Third Circuits, scholars argue that the Second Amendment's core was not meant to be unlimited in scope and *Heller I* even acknowledged this when it provided a nonexhaustive list of long-standing regulations that were presumptively constitutional.[167] In fact, since *Heller I*, "significant" areas of gun laws regulating public carry have been "repeatedly upheld."[168] In addition to categorical prohibitions,[169] lower courts have upheld waiting periods for permits, background checks, gun registration, fingerprinting and photographing, safety training requirements, and safe storage requirements.[170] Through all this legislation, the Supreme Court has, for the most part, remained silent or declined to review these regulations,[171] which suggests that *Heller I* was not meant to endorse broad public carry rights.[172]

### 2. Historical Interpretation of Narrower Public Carry Rights

History supporting the narrow scope of the Second Amendment's core and the constitutionality of "good cause" provisions is much more varied. The Second Circuit acknowledged these different histories when it said, "[h]istory and tradition do not speak with one voice," alluding to the fact that

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161. *Id.* at 431.
162. *Kachalsky*, 701 F.3d at 89 (quoting *Heller I*, 554 U.S. 570, 635 (2008)).
163. *Drake*, 724 F.3d at 430.
164. *Id.* at 431 (quoting United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010)).
165. *See* Symposium, *supra* note 8, at 400–01, 412; *see also* Symposium, Heller*: Past, Present, and Future*, 40 CAMPBELL L. REV. 361, 370 (2018).
166. Symposium, *supra* note 8, at 400.
167. *See id.* at 401, 412.
168. Symposium, *supra* note 165, at 370.
169. Categorical prohibitions refer to "[b]ans on gun possessions by felons, even nonviolent felons, and other categories of high-risk individuals, including domestic violence miscreants." *Id.*
170. *Id.*
171. As of February 1, 2018, the Supreme Court had declined to review at least eighty-two Second Amendment cases since *Heller I*. *Id.* at 371. *But see supra* note 29 and accompanying text.
172. Symposium, *supra* note 165, at 370 (referencing the number of gun control regulations and the courts' rejection of over 90 percent of gun regulation challenges).

states had their own perspectives regarding the scope of the right to carry.[173] Generally, courts and scholars have relied on the history of concealed carry amongst the states, the longevity of state-specific provisions, and legislative history.

For example, the Second Circuit in *Kachalsky* stated that by the nineteenth century, government regulation of concealable weapons, which included handguns, was expansive.[174] Most states banned or restricted concealed weapons for the sake of public safety.[175] For example, laws in Ohio and Virginia allowed the use of concealed weapons for limited reasons similar to those required in "good cause" provisions.[176] Other states, like Georgia and Tennessee, prohibited individuals from carrying concealed weapons altogether.[177] Dicta in a nineteenth-century Supreme Court case also indicated that the Second Amendment would not be infringed by the prohibition of concealed weapons.[178]

The Ninth Circuit in *Peruta* took the Second Circuit's analysis further to conclude that, given the degree and the extent of state legislation on concealed weapons in the public space, the Second Amendment could not have intended to cover concealed carry.[179] The Ninth Circuit referenced the Northampton laws,[180] the nation's pre-Amendment history,[181] and the nation's post-Amendment history[182] and indicated that, within each time period, state courts have overwhelmingly concluded that the regulation or prohibition of carrying concealed weapons by the general public was permitted.[183] Given these trends, the *Peruta* court concluded that the Second Amendment, at the time of the nation's founding, could not have contemplated a general right to concealed carry.[184] Instead, the core of the Second Amendment must have been limited to the home and, if the Amendment does extend to the public space at all, it must be limited to some degree of open carry.[185]

Instead of focusing on national trends, the Third Circuit in *Drake* argued for the constitutionality of New Jersey's "good cause" provision by asserting that the longevity of its law fit within the presumptively constitutional long-standing exceptions to the Second Amendment.[186] The *Drake* court traced

173. Kachalsky v. County of Westchester, 701 F.3d 81, 91 (2d Cir. 2012).
174. *Id.* at 95.
175. *Id.* at 94–95.
176. *See id.* at 96.
177. *See id.*
178. *Id.* at 95–96 (citing Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897)).
179. Peruta v. County of San Diego, 824 F.3d 919, 942 (9th Cir. 2016).
180. *See id.* at 929–32. Note that the *Wrenn* court addressed the Northampton laws as well and distinguished them from the "good cause" provisions. *See supra* Part II.A.2.
181. *See Peruta*, 824 F.3d at 933–36.
182. *See id.* at 936–39.
183. *See id.* at 933–39.
184. *See id.* at 939.
185. *See id.* at 942. The Ninth Circuit did not speak further on open carry to specify the extent of the Second Amendment's reach because the facts in *Peruta* were limited to the concealed carry "good cause" provision in California. *Id.*
186. *See* Drake v. Filko, 724 F.3d 426, 433 (3d Cir. 2013).

New Jersey's "good cause" provision back to the early twentieth century, when the law banned the concealed carrying of handguns except for those who had a "showing of need."[187] Eventually, the law was amended and revised multiple times; however, the "requirement of 'need'" endured in each iteration until the "present-day standard of 'justifiable need' became statutorily enshrined."[188] The court also noted that New York's "proper cause" provision analyzed in *Kachalsky* shared a similar century-old history.[189] These laws fit within the long-standing exceptions to the Second Amendment because they were just as old as some of the laws that *Heller I* explicitly stated were presumptively constitutional.[190] For example, the Supreme Court stated that the prohibition on the possession of firearms by felons was considered to be "long-standing"; however states only began enacting these prohibitions in the early twentieth century.[191] If the early twentieth century served as the benchmark for a law to be considered "long-standing," the court held, then both New York's "proper cause" and New Jersey's "justifiable need" standards would be upheld as presumptively constitutional.[192]

In addition to the circuit courts' analyses of the relevant history, the legislative history of public carry laws further supports the idea of a Second Amendment core that is limited to the home.[193] The first congressional debate on public carry laws in 1890 shows that, while there may have been general acceptance of the right to have guns in the home, "there was a broad regional variation" regarding what the right to carry would look like in public spaces.[194] For example, most northern states wanted to prohibit carrying firearms in public with the exception of those who were faced with an "imminent threat."[195] Most southern states wanted to maintain their tradition of allowing the open carry of firearms while prohibiting concealed carry.[196] Western states, on the other hand, generally advocated for a mixed approach.[197] They wanted to adopt the northern states' complete prohibition of public firearms for their populated cities and towns, while placing no restrictions on gun laws for those on the "rural frontier."[198] Part of *Heller I*'s holding was that "the Bill of Rights codified venerable, *widely understood* liberties."[199] Therefore, because the issue of public carry, according to

187. *Id.* at 432.
188. *Id.*
189. *Id.* at 433.
190. *Id.* at 433–34. The list of long-standing exceptions included prohibitions against gun possession by felons and the mentally ill and the prohibition of guns in sensitive areas. *See supra* note 50.
191. *Drake*, 724 F.3d at 434.
192. *Id.*
193. *See generally* Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What It Tells Us About Firearm Regionalism*, 40 CAMPBELL L. REV. 335 (2018).
194. *See id.* at 354–55.
195. *Id.* at 339, 355.
196. *Id.*
197. *See id.*
198. *Id.*
199. *Heller I*, 554 U.S. 570, 605 (2008) (emphasis added).

legislative history, was regionally divisive and far from "widely understood," the Amendment's core could not have included the public carrying of firearms.[200]

### 3. A Standard of Review: Intermediate Scrutiny

Unlike the D.C. Circuit in *Wrenn*, the Second, Third, and Fourth Circuits have subjected "good cause" provisions to the second prong of *Heller II*'s two-part test by applying a standard of constitutional scrutiny.[201] These courts have determined that while "good cause" provisions burdened the Second Amendment to a degree, the laws did not destroy the right altogether because the Amendment's self-defense core is centered on the home.[202]

The Second and Fourth Circuits held that the appropriate level of scrutiny for the "good cause" provisions was intermediate scrutiny.[203] Similar to the D.C. Circuit in *Heller II*, the Second Circuit justified its use of intermediate scrutiny by referencing its First Amendment jurisprudence on private and public regulations.[204] When dealing with First Amendment issues, "content-based restrictions on noncommercial speech are subject to strict scrutiny, while laws regulating commercial speech are subject to intermediate scrutiny" because one's privacy interests are greater in the home.[205] The courts found that this framework was also applicable to the Second Amendment; *Heller I* held that the "need for defense of self, family, and property was most acute" in the home.[206] Therefore, for the "good cause" provisions, which dealt with guns in the public space, the court moved forward with intermediate scrutiny.[207] Adopting a similar framework, the Fourth Circuit cited to its previous holding in *United States v. Masciandaro*,[208] where it held that "law[s] that would burden the 'fundamental,' core right of self-defense in the home . . . would be subject to strict scrutiny," but intermediate scrutiny would apply "to laws that burden [the] right . . . outside of the home."[209]

Under intermediate scrutiny, the "good cause" provision passed constitutional muster if it was "substantially related to the achievement of an

200. *See* Frassetto, *supra* note 193, at 355 (stating that "[w]ith this level of variation, it is impossible to say any conception of the Second Amendment, let alone a conception mandating a broad right to carry firearms in public, constituted a widely understood right").

201. *See* Drake v. Filko, 724 F.3d 426, 434–39 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 93–96 (2d Cir. 2012). The Ninth Circuit did not apply any standard of review because it held that the Second Amendment guaranteed no right to concealed carry; therefore, it was not a Second Amendment issue. *See* Peruta v. County of San Diego, 824 F.3d 919, 942 (9th Cir. 2016).

202. *See Drake*, 724 F.3d at 430–31; *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 93–94.

203. *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 93.

204. *See Kachalsky*, 701 F.3d at 94.

205. *Id.* (citations omitted).

206. *Id.* (quoting *Heller I*, 554 U.S. 570, 628 (2008)).

207. *See id.* at 96.

208. 638 F.3d 458 (4th Cir. 2011).

209. Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (quoting *Masciandaro*, 638 F.3d at 470–71).

important governmental interest."[210] The *Kachalsky* court held that New York's "proper cause" provisions triggered important governmental interests in public safety and crime prevention.[211] To determine whether the provisions were substantially related to the stated interests, the court emphasized that the fit of the challenged legislation did not have to be perfect.[212] As long as New York showed that its legislation was not "an arbitrary licensing regime" but rather a product of "assessing the risks and benefits of handgun possession," the bar of intermediate scrutiny would be met.[213] Here, the court determined that New York had considered data indicating that "widespread access to handguns in public increase[d] the likelihood that felonies w[ould] result in death and fundamentally alter[ed] the safety and character of public spaces."[214] Furthermore, limiting the concealed carry of handguns may help law enforcement by giving officers a greater opportunity to lawfully intervene before fatal consequences could occur.[215] Because of this information, New York created a licensing scheme that sufficiently balanced the interests of its people while addressing the issues of public safety and crime prevention.[216]

The Fourth Circuit in *Woollard* offered additional insight into the application of intermediate scrutiny. While the important government interests in public safety and crime prevention remained the same, to show a substantial basis, the *Woollard* court relied on significant data indicating that

> (1) the number of violent crimes committed in the State has increased alarmingly in recent years; (2) a high percentage of violent crimes committed in the State involves the use of handguns; (3) the result is a substantial increase in the number of deaths and injuries largely traceable to the carrying of handguns in public places by criminals; [and] (4) current law has not been effective in curbing the more frequent use of handguns in committing crime.[217]

The court also relied on the state's findings that Maryland had the "'eighth highest violent crime rate,' 'the third highest homicide rate,' and the 'second highest robbery rate' of any state in 2009."[218] Furthermore, at the time, "97.4% of all homicides by firearm were committed with handguns" and "of the 158 Maryland law enforcement officers who have died in the line of

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210. *Kachalsky*, 701 F.3d at 96.
211. *Id.* at 97.
212. *Id.*
213. *Id.* at 98–99.
214. *Id.*
215. *Id.* at 98.
216. The "proper cause" provision did not apply to people who wanted to use a handgun for target practice or hunting, to people who had an actual and articulable need for self-defense, to people engaged in certain employment situations, to merchants and storekeepers to keep guns in their place of business, to messengers for banking institutions and express companies, to state judges and justices, and to employees at correctional facilities. *Id.*
217. Woollard v. Gallagher, 712 F.3d 865, 876–77 (4th Cir. 2013) (quoting MD. CODE ANN., CRIM. LAW § 4-202).
218. *Id.* at 877.

duty . . . 132—or 83.5%—died as the result of intentional gun fire, usually from a handgun."[219]

Additionally, the *Woollard* court gave a substantial list of public policy reasons why a "good and substantial reason" requirement would help to prevent crime and ensure public safety.[220] Limiting the public carrying of handguns would decrease the availability of handguns to potential criminals, lessen the likelihood of confrontations between individuals turning deadly, lessen the chance of confusion or hesitation by police officers, maintain routine and trusting relationships with police officers,[221] and limit the expenditure of police resources by reducing the number of handgun sightings.[222] Therefore, the *Woollard* court held that the additional concealed carry requirement was constitutional because Maryland "demonstrated that the good-and-substantial-reason requirement [was] reasonably adapted to Maryland's significant interests in protecting public safety and preventing crime."[223]

The Third Circuit in *Drake* also held that intermediate scrutiny would apply to New Jersey's "good cause" provision requiring concealed carry applicants to show a "justified need."[224] However, instead of asking whether there was a substantial basis behind an important governmental interest, the *Drake* court asked whether there was a "reasonable fit" between the government interest and the "good cause" provision.[225] As long as the law did not "burden more conduct than [what was] reasonably necessary," the law would pass constitutional muster.[226] Additionally, when assessing the constitutionality of statutes, the Third Circuit's intermediate scrutiny gave "substantial deference" to the legislature.[227]

Given the deferential nature of the Third Circuit's approach, the *Drake* court upheld the constitutionality of New Jersey's "justifiable need" provision despite the fact that New Jersey did not provide the court with any evidence underlying its legislation.[228] In fact, the Third Circuit came up with reasons of their own by referencing the Supreme Court of New Jersey's opinion in *Siccardi v. State*,[229] where a report found that the "possession of a handgun is rarely an effective means of self-protection," "no data exist which would establish the value of firearms as a defense against attack on the

219. *Id.*
220. *See id.* at 879–81.
221. "If the number of legal handguns on the streets increased significantly, police officers would have no choice but to take extra precautions before engaging citizens, effectively treating encounters between police and the community . . . as high-risk stops, which demand a much more rigid protocol." *Id.* at 880.
222. More resources would have to be spent responding to reports of handgun sightings and identifying potential security risks because more people may have guns without having a good and substantial reasons to do so. *Id.*
223. *Id.* at 882.
224. Drake v. Filko, 724 F.3d 426, 436–37 (3d Cir. 2013).
225. *See id.* at 437.
226. *Id.* at 436.
227. *Id.* at 436–37.
228. *See id.* at 437.
229. 284 A.2d 533 (N.J. 1971).

street," and "the ready accessibility of guns contributes significantly to the number of unpremeditated homicides and to the seriousness of many assaults."[230] This report, along with New Jersey's assertion that handguns are "obviously" dangerous and deadly in nature because the presence of guns "exposes members of the community to a somewhat heightened risk" of injury, sufficed to pass the necessary constitutional muster of the Third Circuit's version of intermediate scrutiny.[231]

## III. A NARROWER SCOPE, A PULL AWAY FROM HISTORY, AND A CALL FOR MORE DEFERENCE

The Supreme Court's landmark decision in *Heller I* left lower courts with more questions than answers. What is the scope of the Second Amendment's self-defense core? What type of source or time period of history is relevant to cite? What is the appropriate standard of review or level of constitutional scrutiny? These ambiguities led to a circuit split where the courts, using their discretion, arrived at a wide range of interpretations. This Part addresses each of these questions with a plausible perspective for future courts to consider. First, this Part argues that the Second Amendment's core includes a public right to carry; however, this public right is a much weaker right. Second, this Part argues that courts should avoid undertaking a historical analysis until the Supreme Court provides more clarity regarding the relevant history that matters for Second Amendment issues. Lastly, this Part argues that the Second Amendment should be treated as a separate right, instead of comparing it to the First Amendment, to determine the appropriate level of constitutional scrutiny. Courts should follow the Third Circuit's analysis in *Drake* and apply a "lesser" intermediate scrutiny that is more deferential to the legislature. Therefore, under a more deferential intermediate scrutiny analysis, "good cause" provisions[232] should be deemed constitutional.

### *A. The Second Amendment's Core Includes a Weaker Public Right*

The most natural reading of *Heller I* is that the Second Amendment's core of self-defense exists both in the home and in the public space. First, the Supreme Court established that the Amendment considered both private and public spaces in *McDonald*, which clarified that "self-defense is a basic right, recognized by many legal systems from ancient times to the present day."[233] Furthermore, the Seventh Circuit in *Moore* correctly pointed out that when the Supreme Court said that the need for self-defense was "*most* acute" in the home, the use of the comparative term suggests that the need for self-defense

230. *Id.* at 552 (quoting GEORGE D. NEWTON, JR. & FRANKLIN E. ZIMRING, NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE, FIREARMS & VIOLENCE IN AMERICAN LIFE 67 (1969), https://www.ncjrs.gov/pdffiles1/Digitization/769NCJRS.pdf [https://perma.cc/U8UY-NXL9]).

231. *See Drake*, 724 F.3d at 438–39.

232. For examples of the exact language of the statutes discussed in these cases, see *supra*, note 21. For a further description of these statutes, see *supra* Parts II.A–B.

233. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

is *less* acute outside of the home.[234] This natural reading also makes sense when considering the Supreme Court's definition of "keeping and bearing arms" as the "right to possess and carry weapons in case of confrontation."[235] As the Supreme Court did not specify "confrontation *in the home*," it suggests that the Second Amendment was meant to cover confrontations in public spaces as well.

While the Second Amendment protects both private and public carrying, the latter seems to be a weaker right. The *Wrenn* court proposed that both rights should be considered equally;[236] however, that reading does not seem to align with the comparative terminology that the Supreme Court used throughout *Heller I* to distinguish the home.[237] Furthermore, the Second Circuit in *Kachalsky* referred to a number of other individual rights that followed a similar framework, where the individual interests were greatest in the home and weaker elsewhere.[238] Lastly, the sheer number and extent of the limitations already placed on public carrying, from categorical prohibitions to training requirements, together with the Supreme Court's silence on these issues, strongly suggest that the public right was meant to be a lesser right.[239]

This interpretation of the Second Amendment's core also makes sense when balancing the individual's interest with public safety. Once outside of the home, the individual interest in self-defense clashes with the government's interest in keeping its citizens safe.[240] In this situation, the balance should be tipped in favor of public safety because "[p]roviding for the safety of citizens within their borders has long been [the] state government's most basic task."[241] It is hard to disagree with the notion that the most fundamental right is not the right to self-defense but the right to live.[242] The right to life is unique because "it is the necessary condition for the enjoyment of all other goods. Therefore, every person by and large tends to value his life preeminently, and any society must place a high value on preserving it."[243] In fact, even the Second Circuit in *Kachalsky* mentioned that the right to self-defense is constrained by other laws to ensure that the right to live is prioritized.[244] This is the right that justifies the passing of

234. *See* Moore v. Madigan, 702 F.3d 933, 935–36 (7th Cir. 2012); *supra* Part II.A.1.
235. *Heller I*, 554 U.S. 570, 592 (2008); *see also supra* Part II.A.1.
236. *See supra* Part II.A.1.
237. *Heller I*, 554 U.S. at 628.
238. *See supra* Part II.B.1.
239. *See supra* Part II.B.1.
240. *See supra* Part II.B.3; *see also* Symposium, Heller *and Public Carry Restrictions*, 40 CAMPBELL L. REV. 431, 437 (2018) (asserting that "all constitutional rights are circumscribed by public safety").
241. Symposium, *supra* note 240, at 438.
242. *Id.* at 437.
243. Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 871 (1976).
244. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 100 (2d Cir. 2012) (referring to a New York law that prevented an individual from engaging in self-defense with a firearm until the "objective circumstances justify the use of deadly force").

numerous public carry regulations and makes the Second Amendment's core of self-defense in public spaces necessarily weaker.

### *B. A Historical Analysis Should Be Avoided*

Without additional clarity from the Supreme Court, historical analysis of "good cause" provisions should be avoided. The *Kachalsky* court said it best: "history and tradition do not speak with one voice."[245] Various perspectives have shaped centuries of history and this allows courts to pull out pieces of history that will best fit their positions. For example, the *Wrenn* court cited historical case law to support broad acceptance of public carrying.[246] However, its sister courts asserted historical case law along with national trends to support the opposite conclusion.[247] Additionally, the distinctions drawn by the *Wrenn* court between the "good cause" provisions at issue and the Northampton and English "surety laws" hold some merit.[248] However, it is also hard to ignore the fact that some of the "good cause" provisions are just as old as the "long-standing" exceptions that the Supreme Court referenced in *Heller I* and that the legislative history of public carry laws actually indicates a regionally divisive Congress.[249]

Ultimately, historical analysis is unreliable in this context because history is malleable.[250] Similar to how one formulates an argument based on case law, courts can take language from history and parse it until it makes "perfect sense."[251] These sorts of historical debates "tend to reduce to, 'Yeah, but yours are wrong, and mine are right.'"[252] What is needed is a normative standard of history that all courts can refer to.[253] This is a standard that should be determined by the Supreme Court because unanimity amongst lower courts is unlikely.[254] Until the Supreme Court steps in to "draw the line between a sufficient historical record to uphold a firearm regulation and a record that is too sparse,"[255] historical analyses of "good cause" provisions will continue to lack consistency.

### *C. The Appropriate Standard of Review: Intermediate Scrutiny*

Following the two-part test established in *Heller II*, "good cause" provisions burden the Second Amendment, which makes them subject to the different tiers of constitutional scrutiny. The *Wrenn* court argued that the tiers of scrutiny did not apply to D.C.'s "good cause" provisions because the

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245. *Id.* at 91.
246. *See supra* Part II.A.2.
247. *See supra* Part II.B.2.
248. *See supra* Part II.A.2.
249. *See supra* Part II.B.2.
250. *See* Symposium, *supra* note 240, at 447.
251. *Id.*
252. *Id.*
253. *Id.*
254. *See* Frassetto, *supra* note 193, at 356 (referring, for example, to the lack of unanimity amongst the states during the first congressional debate on public carry).
255. *Id.*

provisions effectively banned public carry and destroyed the Second Amendment.[256] However, the *Wrenn* court's assertion assumed that the Second Amendment protection applies equally in the home and in public.[257] This Note has argued that the right to public carry is necessarily a weaker right.[258] Therefore, while "good cause" provisions regulating handguns in the home would likely be deemed unconstitutional, "good cause" provisions for concealed public carry should not be held to the same standard. Since public carrying is a weaker right, these laws only burden, not destroy, the Second Amendment and the tiers of constitutional scrutiny apply.[259]

Intermediate scrutiny is the appropriate standard of review for concealed public carry regulations. Almost all lower courts have used intermediate scrutiny to assess gun regulations—reaching a near-consensus.[260] Furthermore, it seems to fit neatly within the framework that courts have used to assess regulations dealing with other individual rights, such as the First Amendment.[261] Strict scrutiny would apply for gun regulations in the home, where the Second Amendment's protection is greatest; however, intermediate scrutiny would apply when the regulations affect gun possession outside the home.[262]

The difference in the amount of information that the Second and Fourth Circuits relied on in their applications of intermediate scrutiny is relevant.[263] While the Fourth Circuit pulled from numerous sources of state-specific data and made multiple public policy arguments for better law enforcement and crime prevention, the Second Circuit seemed content with general data connecting guns with greater risks of violence.[264] Perhaps this speaks to the "malleable" nature of intermediate scrutiny;[265] however, it may be an issue that the courts may look to normalize to ensure a consistent application of the law.

Nevertheless, under intermediate scrutiny, "good cause" provisions pass constitutional muster. The government has an important and compelling

256. *See supra* Part II.A.3.

257. *See supra* Part II.A.2.

258. *See supra* Part III.A. Even if the right to public carry was considered an equal right, "good cause" provisions do not seem to function as a "total ban" as the *Wrenn* court described. A 2017 study has shown that 98.6 percent of all gun licensing applications were approved between 2006 and 2014. JACK MCDEVITT & JANICE IWAMA, AN ASSESSMENT OF THE IMPLEMENTATION OF THE ACT RELATIVE TO THE REDUCTION IN GUN VIOLENCE 22 (2017), https://www.northeastern.edu/csshresearch/irj/wp-content/uploads/sites/4/2017/10/Massachusetts-Gun-Violence-Reduction-Report.pdf [https://perma.cc/WAQ2-XDPG]. This suggests people who want guns are getting them.

259. *See supra* Part II.B.3.

260. *See* Symposium, *supra* note 8, at 402.

261. *See supra* Parts II.A.3, II.B.3.

262. *See supra* Part II.B.3.

263. *See supra* Part II.B.3. The Ninth and Third Circuits are left out because the Ninth Circuit did not apply any standard of review and the Third Circuit, in its intermediate scrutiny application, was not provided with any information. *See supra* Part II.B.3.

264. *See supra* Part II.B.3.

265. *See* Symposium, *supra* note 8, at 410.

interest in public safety and crime prevention.[266] Furthermore, in *Kachalsky* and *Woollard*, New York and Maryland both established a substantial basis for the "good cause" provisions by showing that their legislation was not "an arbitrary licensing regime" but a product of balancing the risks and benefits of concealed carry.[267]

Critics have indicated that "good cause" provisions should fail intermediate scrutiny because they unfairly burden the law-abiding citizen with a necessary showing of proof in order to obtain a handgun for concealed carry.[268] Instead of the government carrying the burden of proving that an individual constitutes a threat, the individual is assumed to be a threat until he or she proves otherwise.[269] This argument holds some merit because the "foundations" of criminal law always place the burden on the government.[270]

Intermediate scrutiny requires courts to consider whether the government can implement a "substantially less restrictive alternative."[271] However, in instances where the alternatives would be "too administratively burdensome, and difficult," a law can still be considered constitutional.[272] This line of reasoning would apply to "good cause" provisions. It would be an impractical strain on resources to have the government identify every individual who is eligible for a concealed carry permit. This would also require the government to gather personal information, such as a history of physical altercations, that the individual may not want to share. It is ultimately much less burdensome for people who want a concealed carry permit to identify themselves.

### *D. A Call for a More Deferential Intermediate Scrutiny Analysis*

Unlike the Second and Fourth Circuits, the Third Circuit in *Drake* applied a version of intermediate scrutiny that only required New Jersey to show that its "good cause" provision reasonably fits within the government's important interests in public safety and crime prevention.[273] While this "lesser" intermediate scrutiny is not the standard that the lower courts commonly use, courts should consider applying a standard that is more deferential to the legislature.

Courts have drawn parallels between the Second Amendment and the First Amendment in formulating a standard of review for gun regulations.[274] However, the Second Amendment should not be compared to any other

266. *See supra* Parts II.B.3, III.A.
267. Kachalsky v. County of Westchester, 701 F.3d 81, 98–99 (2d Cir. 2012); *see also supra* Part II.B.3.
268. *See* Craipo, *supra* note 92, at 230.
269. *Id.*
270. *Id.* at 229.
271. Symposium, *supra* note 8, at 408.
272. *Id.* (referring to a Tenth Circuit case, *Bonidy v. U.S. Postal Service*, 790 F.3d 1121 (10th Cir. 2015), where the prohibition of guns in post office parking lots was upheld because assessing the eligibility of each employee and issuing licenses would be too burdensome).
273. *See supra* Part II.B.3.
274. *See supra* Parts II.A.3, II.B.3.

amendment—it should stand on its own. The Second Amendment is, by nature, a unique right because it is our "most dangerous right."[275] The right to have a gun naturally increases the risk of harm to those around the individual and to the community at large.[276] No other enumerated right has implications to public safety to the degree that the Second Amendment does.[277] Put simply, "[t]he unique nature of the Second Amendment Right demands its own unique jurisprudence."[278] In fact, in other areas of the law, the First and Second Amendments are treated differently. For example, when individuals are convicted of a verbal offense, such as fraud or libel, they still retain their rights of speech.[279] However, when people are convicted of a crime involving a handgun, there are various restrictions that are placed on the right to carry.[280]

The Second Circuit in *Kachalsky*, while it ultimately applied a normal intermediate scrutiny analysis, also considered a more deferential approach.[281] The *Kachalsky* court implied that the public regulation of firearms is a matter "beyond the competence of the courts" and that the legislature was "better equipped" to make "sensitive public policy judgments . . . concerning the dangers in carrying firearms."[282] Similarly, Judge J. Harvie Wilkinson III of the Fourth Circuit pushed for a more deferential approach by stating:

> Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.[283]

Deference would allow courts to consider the nuances of every city, for example, the significant differences between rural and urban norms and culture.[284] Furthermore, gun regulations already spark a lot of political activity.[285] Therefore, judicial intervention is not needed because the "political safeguards" are "sufficiently robust" to prevent any abuse of the law.[286] Lastly, deference to the legislature would allow for elected officials

275. Symposium, *supra* note 8, at 410.
276. *Id.*
277. *Id.*
278. *Id.* at 411.
279. *Id.* at 423.
280. *Id.*
281. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012).
282. *Id.* at 97.
283. Symposium, *supra* note 240, at 438 (quoting Kolbe v. Hogan, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring)).
284. *See* WALDMAN, *supra* note 34, at 173.
285. Symposium, *supra* note 8, at 421–22.
286. *Id.*

to be held accountable, which may incentivize ordinary citizens to be more politically active.[287]

## CONCLUSION

Mass shootings have become commonplace. Statistics indicate about one mass shooting occurs every day.[288] Therefore, there may be a greater push for gun regulations, including "good cause" provisions for the concealed carry of handguns. While the Second, Third, Fourth, Ninth, and D.C. Circuits have weighed in on the issue, their sister courts may soon be called to assert a position. There needs to be an urgency to carefully assess these gun laws because guns, generally, impact people's lives. Courts should strive to standardize their jurisprudence on this consequential matter by consistently deeming "good cause" provisions constitutional.

A natural reading of *Heller I* suggests that the right to public carry is necessarily a weaker right compared to the right to have a handgun in the home. Additionally, when assessing "good cause" provisions, courts should avoid historical analysis until further clarification from the Supreme Court is given and should be more deferential to state legislatures. States are best equipped to understand the contexts of their localities and protect their citizens. Furthermore, in the public space, the government's interest in the safety of its citizens should take priority over the Second Amendment's core of self-defense because the right to live—not the right to self-defense—is the most fundamental right.[289]

287. Symposium, *supra* note 240, at 455.
288. *See supra* note 2 and accompanying text.
289. Symposium, *supra* note 240, at 437.