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Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot Out

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STATUTORY RESTRICTIONS ON CONCEALED CARRY: A FIVE-CIRCUIT SHOOT-OUT

*Justine E. Johnson-Makuch**

In District of Columbia v. Heller, the U.S. Supreme Court clarified a citizen’s core Second Amendment right to keep a firearm at home; however, the Court left open the question of how the Second Amendment applies beyond the home. Since Heller, lower courts have struggled to determine the constitutionality of concealed carry laws in light of this new understanding of the Second Amendment.

Many states have enacted laws that restrict a citizen’s ability to obtain a concealed carry permit, and some of the restrictions are not controversial, such as the requirements to be above a certain age and have a clean criminal record. However, concealed carry laws also involve more contentious requirements, such as New Jersey’s “justifiable need” and New York’s “good cause” requirements. One concealed carry law reviewed by lower courts was so restrictive that it amounted to a full ban on carrying firearms in public. Citizens who have been denied concealed carry permits challenged the constitutionality of these laws.

This Note summarizes five federal circuits’ decisions regarding such challenges to statutory restrictions on concealed carry of handguns. Three of these circuit courts found the laws constitutional, while two held that the laws were unconstitutional. After this Note considers how each court reached its decision and why these courts reached differing results, it ultimately evaluates and critiques the circuit court opinions.

INTRODUCTION.....	2758
I. THE EVOLUTION OF THE SECOND AMENDMENT AND FIREARM REGULATIONS	2760
A. <i>Heller and the Historical Basis of the Second Amendment</i> ...	2760
B. <i>History of Concealed Carry Laws</i>	2767
C. <i>Current State Restrictions on Carrying Concealed Firearms</i>	2770
D. <i>Defining the Two-Prong Marzzarella Test</i>	2774
II. THE SCOPE OF THE SECOND AMENDMENT BEYOND THE HOME: THREE INTERPRETATIONS	2775

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A. <i>Second Amendment Extends Outside of the Home</i>	2775
B. <i>Second Amendment Does Not Extend Outside of the Home</i> ..	2778
C. <i>Silence on Whether the Second Amendment Extends Beyond the Home</i>	2779
III. CONSTITUTIONALITY OF STATUTORY RESTRICTIONS ON CONCEALED CARRY	2780
A. <i>The Appropriate Standard of Review</i>	2781
B. <i>Statutory Restrictions on Concealed Carry Are Constitutional</i>	2784
1. Second Circuit: Upholding a Showing of “Proper Cause”	2784
2. Fourth Circuit: Permitting Proof of a “Good and Substantial Reason”	2785
3. Third Circuit: Sustaining a “Justifiable Need” Requirement	2787
C. <i>Statutory Restrictions on Concealed Carry Are Unconstitutional</i>	2791
1. Ninth Circuit: Striking Down a “Good Cause” Requirement	2792
2. Seventh Circuit: Dismantling a Wholesale Ban.....	2794
IV. TAKING AIM AT THE STRENGTHS AND WEAKNESSES OF THE CIRCUIT COURTS’ DECISIONS	2796
CONCLUSION	2799

INTRODUCTION

On a September evening in 2013, two men shot each other dead in Ionia, Michigan during an escalated instance of road rage.¹ One man began tailgating the other while driving on the highway before the two eventually stopped in a nearby parking lot.² They stepped out of their vehicles, pulled out handguns, and fatally shot each other.³ Police later learned that both men had valid permits to carry concealed firearms.⁴ One man’s permit had been revoked in 2006 after a misdemeanor conviction for driving under the influence and carrying a firearm in his vehicle; however, he received a new license in 2010 upon reapplying.⁵ In Michigan, citizens may be issued a permit to carry a concealed handgun so long as they are over age twenty-one, have taken a gun safety class, and meet various requirements such as

1. Kami Dimitrova, *Two Michigan Drivers Shoot and Kill Each Other After Road Rage Incident*, ABC NEWS (Sept. 20, 2013, 4:03 PM), <http://abcnews.go.com/blogs/headlines/2013/09/two-michigan-drivers-shoot-and-kill-each-other-after-road-rage-incident/>.

2. *Id.*

3. *Id.*

4. Hunter Stuart, *2 Concealed Carry Holders Kill Each Other in Road Rage Incident*, HUFFINGTON POST (Sept. 19, 2013, 3:57 PM), http://www.huffingtonpost.com/2013/09/19/michigan-concealed-carry-road-rage-two-dead_n_3956491.html.

5. See Dimitrova, *supra* note 1.

having no felony convictions or mental illness diagnoses.⁶ Had the permit requirements been more restrictive, it is possible neither man would have been carrying a handgun. Rather, non-permit-carrying Michigan citizens are required by law to store their firearms locked in a special case in the trunks of their cars.⁷

The number of concealed carry permits has grown exponentially in the past decade. In 1999, there were 2.7 million concealed carry permit holders in the United States; however, by June 2014, roughly 11.1 million citizens owned concealed carry permits.⁸

This dramatic scene illustrates the effect that state-specific concealed carry requirements can have on preventing confrontations that turn deadly. An extreme reaction to this incident might be to ban access to firearms altogether. However, state laws that limit access to firearms typically have been challenged by citizens in defense of their Second Amendment rights.⁹ Nevertheless, the laws that enabled these men to carry concealed weapons had life-ending consequences and thus deserve critical analysis.

This Note reviews how federal circuit courts have analyzed challenges to states' statutory restrictions on carrying concealed weapons. Specifically, it considers how various circuit courts have come to either accept or reject more stringent requirements for obtaining a concealed carry permit. When evaluating the constitutionality of a concealed carry law, most courts employ the same two-prong test;¹⁰ however, courts have reached varying conclusions due to factors such as legislative deference and the stringency of a particular state's regulation.

Part I of this Note begins by providing a historical summary of the Second Amendment as discussed by both legal scholars and the U.S. Supreme Court in *District of Columbia v. Heller*.¹¹ This part next examines the history of concealed carry laws in the United States. It then provides a snapshot of current state concealed carry laws. Part I concludes by articulating a two-part test used by courts when evaluating the constitutionality of a firearm regulation. Part II summarizes three different conclusions courts have reached when analyzing the first prong of this test: whether or not the Second Amendment right extends beyond the home. Part III first identifies the appropriate standard of review when courts consider a challenge to a state's heightened requirement for obtaining a concealed carry permit. It then analyzes a split among five circuits by evaluating courts' differing results in their application of the second prong of the two-step inquiry: whether or not the statute in question survives under the appropriate level of scrutiny. Part IV evaluates the competing

6. See MICH. COMP. LAWS ANN. § 28.425b (West 2012).

7. See Stuart, *supra* note 4.

8. See CRIME PREVENTION RESEARCH CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES 5 (2014).

9. This Note will discuss five such challenges, including those against the concealed carry laws of New York, Maryland, New Jersey, California, and Illinois.

10. See *infra* note 151 and accompanying text.

11. 554 U.S. 570 (2008).

circuits' views and ultimately concludes that courts should defer to the legislature only after exercising critical judgment. This can be achieved by demanding that the state satisfy its burden of proof by referencing empirical evidence the state legislature used in making its policy decision.

I. THE EVOLUTION OF THE SECOND AMENDMENT AND FIREARM REGULATIONS

This part begins by providing a brief history of the Second Amendment, referencing both scholarly literature as well as the Supreme Court's historical analysis in *Heller*. This part then reviews the *Heller* decision itself, considering both the majority's and dissent's conclusions. Next, this part reviews the history of concealed carry laws, indicating a longstanding practice of firearm regulation in public. It then surveys current concealed carry statutes relevant for this Note's discussion in Part III; these statutes define specific terms under which citizens may carry concealed weapons. This part concludes by defining the two-prong test many courts use to analyze a plaintiff's challenge to state firearm regulations, including challenges to state requirements for obtaining a concealed carry permit.

A. *Heller and the Historical Basis of the Second Amendment*

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.¹²

Prior to *District of Columbia v. Heller*, the last time the Supreme Court interpreted the Second Amendment was in *United States v. Miller*¹³ nearly seventy years earlier. In *Miller*, the Court held that possession of weapons is a constitutionally protected right only if it has "some reasonable relationship to the preservation or efficiency of a well regulated militia."¹⁴ *Heller* was a pivotal case in that it fundamentally changed the Court's orientation toward the Second Amendment. Under *Miller*, the Second Amendment afforded protection only for those arms having a nexus to militia, while under *Heller*, that nexus became self-defense.¹⁵ While *Heller*

12. U.S. CONST. amend. II.

13. 307 U.S. 174 (1939).

14. *Id.* at 178.

15. Compare *id.* (holding arms must have a connection to "preservation or efficiency of a well regulated militia"), with *Heller*, 554 U.S. at 635 (holding individuals have the right to bear arms in their homes for the purpose of self-defense). In *Heller*, the plaintiff sought an injunction against (1) enforcement of the ban on handgun registration, (2) the licensing requirement that prohibited the carrying of a firearm in the home without a license, and (3) the trigger-lock requirement that prohibited the use of "functional firearms within the home." *Id.* at 575–76. The District of Columbia's statute was not an explicit ban on firearms; however, in practice, the laws barred any citizen from carry a handgun. D.C. prohibited people from having handguns if the weapons were not registered, and a different provision of the code prohibited registration of handguns. See D.C. CODE §§ 7-2502.01(a), .02(a)(4) (LexisNexis 2008). Another provision outlawed the carrying of handguns in public without a license, but D.C. would not issue licenses. See D.C. CODE § 22-4504(a) (LexisNexis 2001); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1554 (2009) ("It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable.")

held that the Second Amendment codified a right to bear arms for the purpose of self-defense, it quite explicitly limited this holding to the home.¹⁶

In *Heller*, the Supreme Court emphasized the importance of history.¹⁷ Ultimately, the key question in the debate was: “Did the Founders seek to protect the right of citizens to bear arms in a well-regulated militia controlled by the states, or did they seek to codify the common law right of self-defense?”¹⁸ Thus, understanding the Framers’ rationale for the Second Amendment and its meaning in the historical setting may help to illuminate the current firearms landscape.

During the Constitutional Convention in Philadelphia in 1787, most delegates welcomed a nationalist model of a stable and strong federal army as our nation’s primary means of defense.¹⁹ The Anti-Federalists advocated for state control over militias to protect against an overbearing federal government that could infringe upon individual liberties.²⁰ The Convention reached a compromise, allowing the states to oversee and train their militias while reserving power for the federal government to organize and arm the militias.²¹ The Second Amendment’s protection of the right to keep and bear arms was born out of this political debate over federalism versus state rights.²²

Two theories have emerged regarding the type of right secured by the Second Amendment: (1) the individual rights theory and (2) the collective rights theory.²³ A proponent of the individual rights theory believes that the Second Amendment’s prefatory clause²⁴ indicates that a militia preserves

(alteration in original) (citing *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994)). One critic noted the irony, in that “it is a bit like having a right to free speech, but being barred from opening your mouth.” Winkler, *supra*, at 1554.

16. See *Heller*, 554 U.S. at 635; see also Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1494 (2014).

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

18. Saul Cornell & Nathan Kozuskanich, *Introduction: The D.C. Gun Case, in THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER 9* (Saul Cornell & Nathan Kozuskanich eds., 2013) [hereinafter *THE SECOND AMENDMENT ON TRIAL*].

19. See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 39–41 (2006).

20. See *id.* at 3, 40.

21. See *id.* at 43 (making the militia a “creature of both the states and the new national government”).

22. See *id.* at 41.

23. See *id.* at 1–2 (“Partisans of gun rights argue that the Second Amendment protects an individual right to keep and bear arms for self-defense, recreation, and, if necessary, to take up arms against their government. Gun control advocates also claim to have history on their side and maintain with equal vigor that the Second Amendment simply protects a collective right of the states.”); Benjamin H. Weissman, Note, *Regulating the Militia Well: Evaluating Choices for State and Municipal Regulators Post-Heller*, 82 FORDHAM L. REV. 3481, 3492–93 (2014) (noting that the “Second Amendment clearly guarantees some sort of right that can be enforced by individuals,” but that the conflict is specifically over the *scope* of that right).

24. The Second Amendment is divided into two clauses: the prefatory clause (“A well regulated Militia, being necessary to the security of a free State”) and the operative clause (“the right of the people to keep and bear arms, shall not be infringed”). U.S. CONST. amend. II.

individual liberties more than a standing army does.²⁵ In addition, an individual rights theorist believes that individuals have a right to keep and bear arms for many reasons, one of which may be to participate in a militia.²⁶ Individual rights theorists also argue that the Second Amendment confers individual rights because both the First Amendment and the Fourth Amendment, which award individual rights, invoke “the people” language.²⁷ If one reads the Second Amendment to establish merely the right of an individual to participate in a militia as opposed to an individual’s right to keep and bear arms, then Article 1, Section 8 of the U.S. Constitution²⁸ would essentially place control of militias within the federal government’s grasp—the opposite of the intended consequence.²⁹

Collective rights theorists would argue that the Second Amendment was in fact intended to counter congressional power granted by Article 1, Section 8.³⁰ Therefore, according to the collective rights theory, the right conferred by the Second Amendment should be viewed as restricting Congress’s power by providing for a well-regulated militia *of the people*.³¹ In the eyes of collective rights theorists, the fact that the Second Amendment is placed in the Bill of Rights next to the First Amendment is further evidence that Second Amendment was intended to restrict the power of Congress rather than the power of states and their respective militias.³²

Individual rights advocates, however, substantiate their view with state court decisions and state legislative actions from the nineteenth century in which the individual rights interpretation prevails.³³ The historical discussion over individual versus collective rights is unsettled and has spawned fervent commentary,³⁴ notwithstanding the Supreme Court majority’s explicit endorsement of the individual rights theory in *Heller*.³⁵

25. See BRIAN DOHERTY, GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT 9 (2008).

26. See *id.*

27. See *id.*

28. U.S. CONST. art. I, § 8, cl. 16 (“The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”).

29. See DOHERTY, *supra* note 25, at 10.

30. See PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 23–24 & n.50 (2009).

31. See *id.*; see also *Petrovski v. Fed. Express Corp.*, 210 F. Supp. 2d 943, 949 n.5 (N.D. Ohio 2002) (explaining that because the Second Amendment “applies only to the right of the State to maintain a militia . . . the Amendment only guarantees a ‘collective’ right rather than an ‘individual’ right” (citation omitted)).

32. See CHARLES, *supra* note 30, at 16 (explaining that because “the First Amendment reads ‘Congress shall make no law’ . . . the [Second Amendment] was initially intended to be a restriction on Congress, not an individual right” (quoting U.S. CONST. amend. I)).

33. See DOHERTY, *supra* note 25, at 11–13 (citing *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91–92 (Ct. App. 1822)).

34. See Cornell & Kozuskanich, *supra* note 18, at 8 (citing former Chief Justice Burger’s rejection of the individual rights theory: “the NRA’s individual rights interpretation of the Second Amendment ‘has been the subject of the greatest pieces of fraud

Professor Saul Cornell posits that these categorizations misinterpret history and that the original understanding of the Second Amendment was a civic right guaranteeing citizens the ability to keep and bear the arms necessary “to meet their legal obligation to participate in a well-regulated militia.”³⁶ In fact, restoring the Founder’s understanding of the Second Amendment would involve intrusive gun regulation that neither individual rights nor collective rights theorists would welcome.³⁷

The majority and dissenters in *Heller* fervently came to opposite conclusions; both sides operated under the premise that *their* interpretation of the amendment was consistent with the original intent of its authors.³⁸ Justice Scalia adopted the individual rights view that the “protected right is that of individual citizens to keep and bear their privately owned weapons,” while Justice Stevens’s dissent adopted the collective rights view that the “protected right is the right of state governments to maintain military organizations.”³⁹

Scalia’s majority opinion has been hailed as a “triumph of originalism.”⁴⁰ He invokes the previously articulated argument in which the Second Amendment confers an individual right because “the people” language contained in the operative clause appears in other provisions of the Constitution that confer individual rights.⁴¹ Specifically, the First Amendment’s Assembly and Petition Clause⁴² and the Fourth Amendment’s Search and Seizure Clause⁴³ both contain the phrase “the people” and both “unambiguously refer to individual rights, not collective rights.”⁴⁴ The Second Amendment’s prefatory clause containing this language asserts the purpose of the right’s codification—“to prevent elimination of the militia.”⁴⁵ It does not follow, however, that maintaining

. . . on the American public by special interest groups that I have ever seen in my lifetime.” (quoting *The MacNeil/Lehrer NewsHour* (PBS Television Broadcast Dec. 16, 1991)).

35. See *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

36. CORNELL, *supra* note 19, at 2.

37. *Id.* (referencing mandatory gun registration, inspection of privately owned weapons by government officials, requirement that all able citizens purchase personal military-style assault weapons, etc.).

38. Linda Greenhouse, *Sidebar: 3 Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4.

39. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1348 (2009).

40. Greenhouse, *supra* note 38. Originalism can be defined as the “original meaning . . . of the constitutional text [that] is fixed at the time each provision is framed and ratified.” Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013). Judges “ought to be constrained by the original meaning when they engage in constitutional practice.” *Id.*

41. *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008).

42. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

43. U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . .”).

44. *Heller*, 554 U.S. at 579.

45. *Id.* at 599.

the militia was the *only* reason Americans valued the right to bear arms.⁴⁶ Rather, Justice Scalia's opinion indicates that the prefatory clause confirms and supports the operative clause,⁴⁷ which "guarantee[s] the individual right to possess and carry weapons in case of confrontation."⁴⁸

Heller instructs that to discern a right's original meaning, "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"⁴⁹ The Court clarified that, at the time of the founding, to "bear" meant to "carry," not in the ordinary sense of conveying or transporting an object but to "carry[] for a particular purpose—confrontation."⁵⁰ Several constitutional treatises circulated at the time of Second Amendment ratification support this "commonsense" reading of "bear Arms."⁵¹ William Blackstone noted that the "right of having and using arms for self-preservation and defence" was rooted in "the natural right of resistance and self-preservation."⁵² St. George Tucker, a law professor and former Anti-Federalist, echoed Blackstone, insisting that the right to "armed self-defense . . . is the 'first law of nature,' and any law 'prohibiting any person from bearing arms' crossed the constitutional line."⁵³ The Court's holding that the Second Amendment confers a personal right to bear arms led to the finding that citizens may possess firearms in the home for self-defense; this decision is consistent with the traditionally understood "home-as-castle" theory.⁵⁴

Stripped to its mere essentials, Justice Scalia's argument can be summarized as: the operative clause ("the right of the people") of the Second Amendment implies a private right in the same way as it does in the First and Fourth Amendments.⁵⁵ Because the other words used in this operative clause ("keep and bear Arms") were also used in nonmilitary contexts and established well before the Bill of Rights, the operative clause

46. *See id.*

47. *See* Weissman, *supra* note 23, at 3492–93 (citing *Heller*, 554 U.S. at 598).

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

49. *Id.* at 576 (alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

50. *Id.* at 584; *see also* *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting).

51. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1154 (9th Cir. 2014) (citing *Heller*, 554 U.S. at 582–83, 592–93).

52. 1 WILLIAM BLACKSTONE, COMMENTARIES *144.

53. *Peruta*, 742 F.3d at 1154 (quoting 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 289 (1803)).

54. *Moore v. Madigan*, 702 F.3d 933, 943–44 (7th Cir. 2012) (Williams, J., dissenting). The home-as-castle theory is a metaphor in which "irrespective of actual size or composition, a person's residence is considered a fortress that promotes defense against violent injury." Mark R. Hinkston, *Home Safe Home: Wisconsin's Castle Doctrine and Trespasser Liability Laws*, 86 WIS. LAW. 18, 20 (2013). This longstanding tradition dates as far back as Blackstone: the law "has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity." 4 WILLIAM BLACKSTONE, COMMENTARIES *223.

55. *See* Lund, *supra* note 39, at 1348.

does not restrict the Second Amendment to military purposes.⁵⁶ In addition, the prefatory clause (“[a] well regulated militia”) merely explains *why* the preexisting right was codified in the Constitution and did not change the nature of the right to be exclusively militia-related.⁵⁷

However, many have critiqued Justice Scalia’s opinion, stating that, in fact, his decision centers on the *modern* understanding of the Second Amendment, i.e., the “living Constitution.”⁵⁸ Ironically, Justice Scalia acknowledges that interpretation of a living Constitution “allows the personal value choices of the judge to decide the case and diminishes respect for the Court.”⁵⁹ Some go so far as to say that “*Heller* should be seen as an embarrassment for those who joined the majority opinion.”⁶⁰ Judge Posner of the Seventh Circuit branded Scalia’s opinion as “faux originalism.”⁶¹ He further asserts that a purely originalist analysis would have reached the opposite result—that the Second Amendment was largely concerned with preserving the militia.⁶² Some members of the judiciary believe that the historical evidence on both sides of the debate was equally compelling, so the Court should have deferred to the legislature.⁶³

Some historians have found Justice Stevens’s dissent more persuasive.⁶⁴ Justice Stevens’s dissent can be summarized as: the term “bear arms” in the operative clause strongly suggests a military purpose and does not, as the majority purports, imply a private right for self-defense.⁶⁵ The prefatory clause specifying the need to maintain a “well-regulated militia” as well as the legislative history confirm the exclusive military purpose of the Second Amendment.⁶⁶

56. *Id.*

57. *Id.*

58. See Cornell & Kozuskanich, *supra* note 18, at 16 (“Scalia embraced a theory of the living Constitution but dressed it up in originalist clothing.”); Winkler, *supra* note 15, at 1552–53, 1560–61; see also Pauline Maier, Op-Ed., *Justice Breyer’s Sharp Aim*, N.Y. TIMES, Dec. 22, 2010, at A31.

59. Winkler, *supra* note 15, at 1558 (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–55, 863–64 (1989)).

60. Lund, *supra* note 39, at 1345.

61. See Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 33.

62. *Id.*

63. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 266–67 (2009). The concept of legislative deference is founded on the idea that the legislature is in a better position than the judiciary to make “sensitive public policy judgments.” *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quotations omitted) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)). As such, a court’s role is only “to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.” *Id.* (quoting *Turner*, 512 U.S. at 666). *But see infra* note 215 (discussing the unreliability of evidence regarding firearm regulation).

64. See Cornell & Kozuskanich, *supra* note 18, at 12. *But see* Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens’s Heller Dissent*, 39 FORDHAM URB. L.J. 1503 (2012) (critiquing Justice Stevens’s dissent).

65. See Lund, *supra* note 39, at 1348–49.

66. *Id.* at 1349.

Some question whether the Supreme Court's holding could have been decided any other way, given that a significant portion of the country overwhelmingly believes that the Constitution guarantees an *individual's* right to keep and bear arms.⁶⁷ The Ninth Circuit noted that *Heller* validated the Second Amendment's original meaning in two respects: (1) the right to keep and bear arms is, "*and has always been,*" an individual right, and (2) that this right is oriented to self-defense.⁶⁸ The *Heller* decision did recognize, however, that the "right secured by the Second Amendment [was] not unlimited" and listed examples of "presumptively lawful regulatory measures" that restrict possession of firearms under certain circumstances.⁶⁹

The Supreme Court's holding in *McDonald v. City of Chicago*⁷⁰ two years later was a logical outgrowth of the *Heller* decision.⁷¹ The question presented in *McDonald* was whether a state government must recognize a citizen's Second Amendment right.⁷² The answer to this inquiry depended upon whether the right identified in *Heller* was "deeply rooted in this Nation's history and tradition" and "fundamental to *our* scheme of ordered liberty."⁷³ Because self-defense had been recognized as a basic right and *Heller* determined that this right was the central component of the Second Amendment guarantee, the *McDonald* Court determined that both the federal government *and* the states, through the Fourteenth Amendment, are subject to its restrictions.⁷⁴

The Court in *Heller* and *McDonald* never intended to clarify Second Amendment jurisprudence in its entirety.⁷⁵ The Court did make clear that "Second Amendment guarantees are at their zenith within the home."⁷⁶ However, *Heller* left in its wake a considerable degree of uncertainty with regard to Second Amendment rights *beyond* the home.⁷⁷ Both *Heller* and *McDonald* dealt specifically with overturning absolute bans on handguns,

67. See, e.g., Winkler, *supra* note 15, at 1559–60 (opining that the rule of individual right is strong precisely because it does not actually exist, and therefore cannot be repudiated). Popular understanding of the Second Amendment (i.e., an individual right to bear arms in nonmilitary contexts) is at odds with a longstanding judicial practice of limiting the Second Amendment right to military use of guns. Cass R. Sunstein, *Second Amendment Minimalism: Heller As Griswold*, 122 HARV. L. REV. 246, 252, 269–70 (2008).

68. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1155 (9th Cir. 2014).

69. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008) ("[N]othing 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, or laws imposing conditions and qualifications on the commercial sale of arms.").

70. 561 U.S. 742 (2010).

71. See Cornell & Kozuskanich, *supra* note 18, at 19 ("[T]he notion that incorporation follows logically from *Heller* is hard to dispute as a matter of existing legal doctrine.").

72. See *Peruta*, 742 F.3d at 1149 (citing *McDonald*, 561 U.S. at 766–67).

73. *McDonald*, 561 U.S. at 767 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

74. See *Peruta*, 742 F.3d at 1149 (citing *McDonald*, 561 U.S. at 748–51).

75. See *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (citing *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

76. *Id.* (citing *Heller*, 554 U.S. at 628–29).

77. See *United States v. Macsiandaro*, 638 F.3d 458, 467 (4th Cir. 2011).

as opposed to the less restrictive regulations dealing with concealed carry at issue in this Note. The Court left the task of evaluating the constitutionality of firearm regulations up to the lower courts.

B. History of Concealed Carry Laws

When evaluating the legitimacy of current regulations that restrict citizens' ability to carry firearms in public, courts often discuss the longstanding tradition of states regulating both concealed and open carry in public for protection of public safety.⁷⁸ Concealed carry is the wearing of a firearm under clothing or in a pocket, whereas open carry is visibly exposing a firearm on a belt holster. While this Note later analyzes lower court decisions related only to concealed carry laws, both forms of carry are relevant to the history of firearm regulations.

Some states prohibited public carry of firearms “on certain occasions and in certain locations” as far back as the Founding era.⁷⁹ This practice in fact is a vestige of fourteenth century English law, primarily drawn from the 1328 Statute of Northampton which states in relevant part that “no man could ‘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.’”⁸⁰ This statute essentially prohibited being armed in public, regardless of whether the arms were visible or concealed.⁸¹ Leading scholars influential during the Founding era relied on the Statute of Northampton when discussing criminal offenses, and states such as Massachusetts, North Carolina, and Virginia incorporated this statute into their own laws in the years following the Constitution’s adoption.⁸² For example, North Carolina’s statute nearly quoted the Statute of Northampton, prohibiting the carry of arms during the day and night “in fairs, markets, [and] in the presence of the King’s Justices, or other ministers, [and] *in no part elsewhere.*”⁸³

The early nineteenth century saw an increase in the individualist identity, with a rise in the number of individuals carrying weapons for self-defense.⁸⁴ One journalist attributed the increase of concealed weapons to the Jacksonian, Anti-Federalist political doctrine that fueled “extravagant

78. See *Kachalsky*, 701 F.3d at 84–85, 95–96, 97; see also Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 502–16 (2004).

79. *Kachalsky*, 701 F.3d at 95 (citing Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 *CLEV. ST. L. REV.* 1, 31–32 (2012)).

80. *Moore v. Madigan*, 702 F.3d 933, 944 (7th Cir. 2012) (Williams, J., dissenting) (quoting 2 *Edw. III*, c. 3 (1328)).

81. See *id.*

82. See *id.*; Charles, *supra* note 79, at 31–32.

83. See Charles, *supra* note 79, at 32 (citing FRANCOIS-XAVIER MARTIN, *A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA* 61 (Newbern 1792)).

84. See CORNELL, *supra* note 19, at 137.

notions of ‘personal rights and personal independence.’”⁸⁵ This rise in individualism spawned fears that handguns posed a threat to society, so legislatures enacted the first comprehensive laws limiting handguns and concealed weapons.⁸⁶ The first state to have adopted a concealed weapon statute was Kentucky in 1813, with Louisiana, Indiana, Georgia, Tennessee, Virginia, and Alabama following soon thereafter.⁸⁷ During this time, laws regulating the use of firearms in public “became commonplace and far more expansive in scope than regulations during the Founding Era.”⁸⁸ For example, Georgia “criminalized the sale of concealable weapons, effectively moving toward their complete prohibition.”⁸⁹ Virginia’s ban on concealed carry “explicitly rejected a self-defense exception.”⁹⁰

These restrictions quickly prompted backlash, producing the “first systematic defense of an individual right to bear arms in self-defense.”⁹¹ The first court to consider the issue of concealed carry regulations held that restrictions on an individual’s right to keep and bear arms were unconstitutional.⁹² The highest court in Kentucky invalidated restrictions on carrying concealed weapons.⁹³ However, most nineteenth-century courts found comprehensive restrictions on firearms in public to be constitutional.⁹⁴

Some nineteenth-century state courts found that a state may regulate open carry *or* concealed carry of handguns but not *both*. The Supreme Court of Alabama in *State v. Reid*⁹⁵ upheld a prohibition on concealed carrying of “any species of fire arms” but noted that the state’s regulation of firearms could not “amount[] to a destruction of the right” to bear arms by also banning open carry.⁹⁶ Relying on this finding, the Supreme Court of Georgia found that the prohibition on carrying concealed pistols was unconstitutional because the statute “contain[ed] a prohibition against bearing arms *openly*” and therefore amounted to a destruction of the right.⁹⁷ Interestingly, at least four states once banned the carrying of firearms in

85. *See id.* at 139 (quoting Joseph Gales, *Prevention of Crime*, in *EARLY INDIANA TRIALS: AND SKETCHES* 465, 476 (Oliver Hampton Smith ed., 1858)).

86. *See id.* at 4.

87. *See* CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 2–3 (1999).

88. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 95 & n.21 (2d Cir. 2012) (referring to twenty nineteenth-century state statutes).

89. *Id.* at 96 (citing Act of Dec. 25, 1837, 1837 Ga. Laws 90, *invalidated by Nunn v. State*, 1 Ga. 243 (1846)).

90. *Id.* (citing ch. 101, 1838 Va. Acts 76).

91. CORNELL, *supra* note 19, at 138.

92. *See Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

93. *See id.*

94. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *Kachalsky*, 701 F.3d at 90.

95. 1 Ala. 612 (1840).

96. *Id.* at 614, 616.

97. *Nunn v. Georgia*, 1 Ga. 243, 251 (1846).

both a concealed *and* open manner in public,⁹⁸ and three of these statutes survived constitutional challenges.⁹⁹

The rise of restrictive gun carrying laws may have been fueled, at least in part, by racial motivations.¹⁰⁰ These laws were intended to keep guns out of the hands of free blacks.¹⁰¹ After the Civil War, significant debate in Congress and in public discourse took place over “how to secure constitutional rights for newly freed slaves.”¹⁰² Statutes limiting privileges of constitutional citizenship to newly freed men were largely modeled on Mississippi’s 1865 “Act to Regulate the Relation of Master and Apprentice Relative to Freedmen, Free Negroes, and Mulattoes,” which stated in part that “no freedman, free negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition.”¹⁰³ Notwithstanding racial motivations, courts generally upheld restrictive concealed carry laws in order to promote public safety.¹⁰⁴ Many states in the North did not pass laws regulating the concealed carry of weapons until the 1920s.¹⁰⁵ In 1897, the Supreme Court granted its stamp of approval on concealed carry laws by finding that “the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons.”¹⁰⁶

Today, the Ninth Circuit finds that states have the right to “prescribe a particular manner of carry” and need not allow both open and concealed carry, but states must make provisions to allow at least one of these options.¹⁰⁷ Providing such wide discretion to the state, however, may in

98. See *Kachalsky*, 701 F.3d at 90–91 (citing Law of Apr. 1, 1881, ch. 96, §§ 1–2, 1881 Ark. Acts 191–92; Law of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Terr. Comp. Laws 352; Act to Preserve the Peace and Prevent Homicide, ch. 13, § 1, 1870 Tenn. Acts 28; Act to Regulate the Keeping and Bearing of Deadly Weapons, Law of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25 (substantially modified by TEX. GOV’T CODE ANN. §§ 411.171–.208 (West 1997))).

99. See, e.g., *Fife v. State*, 31 Ark. 455 (1876); *Andrews v. State*, 50 Tenn. 165 (1871); *English v. State*, 35 Tex. 473 (1871).

100. See CRAMER, *supra* note 87, at 9.

101. *Id.* (noting that the location and timing of the concealed carry restrictions suggest that they were intended for “social control of free blacks”).

102. See *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1161 (9th Cir. 2014) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)).

103. See *Peruta*, 742 F.3d at 1161–62 (citing Law of Nov. 22, 1865, ch. 23, § 1, 1866 Miss. Laws. 165). The act was rigorously enforced and led to a “thorough confiscation” of black-owned guns, “whether found at home or on the person.” *Id.* at 1162 (citing HARPER’S WEEKLY, Jan. 13, 1866, at 19, col. 2).

104. See, e.g., *City of Salina v. Blaksley*, 83 P. 619, 621 (Kan. 1905) (upholding statute); *Fife*, 31 Ark. at 461 (upholding statute); *Nunn v. Georgia*, 1 Ga. 243, 251 (1846) (upholding statute); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 161–62 (1840) (upholding statute); see also Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1135 n.43 (2011) (citing *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) (“The presumption which the law establishes, that every man who goes armed in the midst of a peaceable community is of vile character . . . is in consonance with the common law, and is a perfectly just and proper presumption.”)).

105. See CRAMER, *supra* note 87, at 4.

106. *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897).

107. See *Peruta*, 742 F.3d at 1172 (noting that the state has freedom to decide its regulatory scheme, “provided that it does not ‘cut[] off the exercise of the right of the citizen altogether to bear arms, or, under the color of prescribing the mode, render[] the right itself

fact follow from an unfaithful reading of *Heller*; according to a recent article, the historical sources consulted by the Supreme Court in *Heller* unequivocally indicate that the Second Amendment protects only open carry of weapons.¹⁰⁸ On the other hand, open carry may not be in line with today's custom because many believe open carry incites fear and may create undue panic.¹⁰⁹

Some courts use this rich history of regulating firearms in public to demonstrate that regulation of concealed carry is a valid state practice because “states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public.”¹¹⁰

C. Current State Restrictions on Carrying Concealed Firearms

States greatly differ over the requisite conditions and circumstances under which citizens may carry a firearm on their person in public. Some states require a permit to lawfully carry a gun while others allow open or concealed carry of handguns without a permit.¹¹¹ In addition, state statutes vary as to where a handgun may be legally carried.¹¹²

States also differ in the amount of discretion given to officials who issue carry permits.¹¹³ The level of discretion is different for “shall-issue” versus

useless.” (alteration in original) (quoting *Numm*, 1 Ga. at 243)); see also *Drake v. Filko*, 724 F.3d 426, 449 (3d Cir. 2013) (Hardiman, J., dissenting) (“[A]lthough a State may prohibit the open or concealed carry of firearms, it may not ban *both* because a complete prohibition on public carry violates the Second Amendment.”). While only the Ninth Circuit has explicitly stated this, scholars and prominent gun rights lawyers agree. See Meltzer, *supra* note 16, at 1525.

108. See Meltzer, *supra* note 16, at 1490.

109. See *id.* While Meltzer notes that open carry may not “jibe with modern sensibilities,” he ultimately believes that “because the Court has committed to an originalist methodology for the Second Amendment, complaints about open carry’s [inconsistency] with modern practice ought to have very little sway.” *Id.* at 1490–91. Meltzer believes open carry must be accepted as a consequence of the Court’s method of interpretation. *Id.* at 1518–19, 1522. Common law tradition (such as North Carolina’s common law rule named “Going Armed to the Terror of the People”) does in fact indicate that open carry may be limited because of the terror it incites. See Symposium, *Panel Two: Aligning the Sights: A Practical Discussion on the Accuracy and Clarity of Gun Control*, 5 CHARLOTTE L. REV. 247 (2014).

110. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012). For further discussion of the Second Amendment’s scope, see Part II.D.1.

111. Compare MINN. STAT. ANN. § 624.714 (West Supp. 2014) (requiring a state-issued permit to lawfully carry a gun), with ARIZ. REV. STAT. ANN. §§ 13-3102, 13-3112 (Supp. 2013) (allowing open or concealed carry of handguns without a permit but also making available an optional permit).

112. Compare LA. REV. STAT. ANN. § 40:1379.3(N)(8) (Supp. 2014) (prohibiting permit holders from carrying firearms in places of worship), with ARIZ. REV. STAT. ANN. § 13-3102(A)(11) (prohibiting permit holders from carrying firearms in polling places), with OKLA. STAT. ANN. tit. 21, § 1277(A)(4) (West Supp. 2014) (prohibiting permit holders from carrying firearms at professional sporting events).

113. Compare MICH. COMP. LAWS ANN. § 28.425b(7) (West 2012) (stating that county concealed weapons licensing boards “shall issue” a carry permit to all applicants who meet stated requirements), with MASS. ANN. LAWS ch. 140, § 131 (LexisNexis Supp. 2014) (granting local officials broad discretion to issue permits only to individuals they deem “suitable”).

“may-issue” states. In shall-issue states, a licensing agent must issue a permit to an individual who satisfies the requirements articulated in the state’s statute.¹¹⁴ As of July 2014, thirty-seven states have shall-issue concealed carry laws.¹¹⁵ In may-issue states, individuals are required to obtain a concealed carry permit; however, the licensing agent has wide discretion to deny a permit even if the applicant meets all the requisite criteria.¹¹⁶ For example, one discretionary determination is that “the authority believes the applicant lacks good character or lacks a good reason for carrying a weapon in public.”¹¹⁷ As of July 2014, nine states use may-issue concealed carry laws.¹¹⁸ Only four states allow citizens to carry a concealed weapon without obtaining a permit or license.¹¹⁹ All of the statutes discussed in Part IV of this Note, except for Illinois’s, qualify as may-issue laws.¹²⁰

State concealed carry laws exist on a spectrum from more restrictive to less restrictive.¹²¹ State legislatures impose certain standards more frequently than others—eleven states require applicants to demonstrate a particularized need or a proper purpose as to why the applicant needs a permit, eight states require that the applicant be of good character, and about half of all states require an applicant to demonstrate a knowledge of firearm use and safety.¹²²

Of relevance for this Note are the requirements from the eleven states that place a heightened burden on applicants to demonstrate a unique reason

114. See Steven W. Kranz, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 *HAMLIN L. REV.* 637, 649 (2006).

115. See *Concealed Weapons Laws in America from 1981 to Today*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/wp-content/uploads/2012/05/ccw-factsheet.pdf> (last visited Mar. 25, 2015) [hereinafter *Concealed Weapons*] (including all states not mentioned *infra* note 118 and note 119). In seventeen of these thirty-seven states, the issuing authority has no discretion to deny a permit to a person who meets these requirements, but in the other twenty states, authorities have some discretion, such as having a “reasonable suspicion to believe that the applicant is a danger to self or others.” LAW CTR. TO PREVENT GUN VIOLENCE, *REGULATING GUNS IN AMERICA: A COMPREHENSIVE ANALYSIS OF GUN LAWS NATIONWIDE* 218 (2014). This latter group of states falls between the pure shall-issue and pure may-issue states. See *id.*

116. Sarah Steers, *Survey of State Open and Concealed Carry Laws*, JURIST (July 17, 2014, 11:02 PM), <http://jurist.org/feature/2014/07/survey-of-state-firearms-laws---dnp.php>.

117. LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 115, at 216.

118. See *Concealed Weapons*, *supra* note 115 (including Hawaii, California, New York, Maryland, Delaware, New Jersey, Connecticut, Massachusetts, and Rhode Island).

119. See *id.* (including Alaska, Arizona, Vermont, and Wyoming).

120. See *infra* notes 124, 131–32, 136, 138, 144. Illinois’s statute amounted to a wholesale ban on carrying concealed weapons rather than a set of application criteria.

121. Compare ARIZ. REV. STAT. ANN. § 13-3112 (Supp. 2013) (allowing concealed carry permits to U.S. citizens above the age of twenty-one who have not been convicted of a felony or qualify as mentally ill and who demonstrate proficiency with firearms), with N.J. STAT. ANN. § 2C:58-4 (West 2005), § 2C:58-3(c) (West Supp. 2014) (requiring applicant to demonstrate good character, a justifiable need, no prior history of crime, no dependence on drugs or alcohol, the issuance of such a permit would not be contrary to public health or safety, etc.).

122. See LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 115, at 218–20.

why they are entitled to a concealed carry permit.¹²³ The exact requirement, whether demonstrating a “justifiable need” or a “proper cause,” depends upon the particular state’s statutory language. Part III of this Note analyzes five challenges to the constitutionality of these state regulations. The state statutes in effect at the time of the respective challenges are summarized below.

New York’s concealed carry permit law provided: “A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to . . . (f) have and carry concealed, without regard to employment or place of possession, by any person when *proper cause* exists for the issuance thereof.”¹²⁴ Under New York law, an individual was entitled to a concealed carry permit, notwithstanding a showing of proper cause, through employment or place of possession.¹²⁵ In the context of concealed carry for self-defense, as opposed to for target practice or hunting, New York courts defined “proper cause” as a “special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”¹²⁶ Proper cause was not satisfied by establishing a “generalized desire to carry a concealed weapon,”¹²⁷ or by simply living or being employed in a high-crime neighborhood.¹²⁸ Further, licensing officers had considerable discretion in determining whether proper cause existed, and this licensing decision was upheld unless found arbitrary and capricious.¹²⁹ Additional, less controversial requirements included that the applicant be over the age of twenty-one, have good moral character, and not have a history of crime or mental illness.¹³⁰

Maryland law required that the issuing party first find that the applicant did not have a disqualifying criminal record, alcohol or drug addiction, or propensity for violence before issuing a concealed carry permit.¹³¹ In addition, the applicant had to establish a “*good and substantial reason* to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.”¹³² A Handgun Permit Unit determined “whether the applicant’s reasons for seeking a permit ‘[were] good and substantial,’ whether ‘the applicant [had] any alternative available to him for protection other than a handgun permit,’ and whether ‘the permit [was] necessary as a reasonable precaution for the

123. These states include: California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, Rhode Island, Indiana, New Hampshire, and North Dakota. *See id.* at 218–19.

124. N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2008) (emphasis added) (current version at N.Y. PENAL LAW § 400.00(2)(f) (McKinney Supp. 2014)).

125. *See id.* § 400.00(2)(a)–(e).

126. *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 256 (App. Div. 1980).

127. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (citation omitted).

128. *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (App. Div. 2002).

129. *See Kachalsky*, 701 F.3d at 87.

130. *See id.* at 86 (citing N.Y. PENAL LAW § 400.00(1)(a)–(d), (g)).

131. *Woollard v. Gallagher*, 712 F.3d 865, 869 (4th Cir. 2013) (citing MD. CODE ANN., PUB. SAFETY § 5-306(a)(1)–(5)(i) (LexisNexis 2011) (current version at MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis Supp. 2013))).

132. *Id.* (quoting MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (emphasis added)).

applicant against apprehended danger.”¹³³ The existence of an apprehended danger to the applicant was an objective inquiry but could not be established by a “vague threat” or a general fear of “liv[ing] in a dangerous society.”¹³⁴ However, failure to meet the apprehended threat criterion did not automatically preclude an applicant from obtaining a concealed carry permit; the Permit Unit also considered factors such as

- (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 . . . ; (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.¹³⁵

New Jersey’s permit law stated that the permitting authority shall not approve a permit application unless the applicant is “not subject to any of the disabilities set forth in 2C:58-3c [which includes criminal history, age, and mental health requirements], that he is thoroughly familiar with the safe handling and use of handguns, and that he has a *justifiable need to carry a handgun*.”¹³⁶ Justifiable need was defined as “the 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

California’s statutory requirement for obtaining a permit to carry a concealed weapon stated that the issuing authority may issue a permit to an applicant upon his showing that: “(1) The applicant is of good moral character. (2) *Good cause* exists for issuance of the license. (3) The applicant is a resident of the county or a city within the county (4) The applicant has completed a course of training.”¹³⁸

Each licensing authority (i.e., the county sheriff or municipal police department) had to publish a written policy that provided its own definition of “good cause.”¹³⁹ San Diego County’s good cause requirement was similar to New York’s, defining “good cause” as “[a] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm’s way.”¹⁴⁰ Exceptions were made for particular classes of people or in particular situations.¹⁴¹ California courts have

133. *Id.* (citation omitted).

134. *Id.* at 870 (alteration in original) (quoting *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137, 1148 (Md. Ct. Spec. App. 2005)).

135. *Id.*

136. N.J. STAT. ANN. § 2C:58-4(c) (West 2005) (emphasis added).

137. N.J. ADMIN. CODE § 13:54-2.4(d)(1) (Supp. 2011).

138. CAL. PENAL CODE § 26150 (West 2012) (emphasis added).

139. See Alan Gura, *The Second Amendment As a Normal Right*, 127 HARV. L. REV. F. 223, 223 n.3 (2014) (citing CAL. PENAL CODE §§ 26160, 26202 (West 2012)). San Diego’s interpretation of “good cause” was found unconstitutional by the Ninth Circuit. See *infra* Part III.C.1.

140. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1148 (9th Cir. 2014) (citation omitted).

141. See, e.g., CAL. PENAL CODE § 25450 (West Supp. 2014) (peace officers), § 25455 (retired peace officers), § 25620 (military personnel), § 25650 (retired federal officers), § 26035 (on private property or place of business), § 26040 (where hunting is allowed), § 26045 (when faced with “immediate, grave danger” in the “brief interval before and after

acknowledged that good cause may arise in situations related to personal safety, as well as situations relevant for business or occupations; however, concern for personal safety alone did not suffice.¹⁴²

Illinois's law amounted to a wholesale ban on carrying firearms in public, similar to D.C.'s ban in *Heller*.¹⁴³ The Illinois statute forbade a person from carrying a firearm in any location other than his home or business, or in the home of another when invited, unless the firearm was "broken down in a non-functioning state; or [was] not immediately accessible; or [was] unloaded and enclosed in a case."¹⁴⁴ This sweeping requirement was found unconstitutional,¹⁴⁵ and the Illinois legislature has since enacted a new concealed carry law that allows people to carry concealed weapons with a license.¹⁴⁶ This licensing scheme does not have a heightened permit requirement similar to the "justifiable need," "proper cause," or "good and substantial reason" language found in the New Jersey, New York, and Maryland statutes, respectively. Rather, an applicant for a concealed carry permit must possess a Firearm Owner's Identification (FOID) card,¹⁴⁷ submit to a background check, not be a convicted felon, not have a violent misdemeanor within the past five years, and not have two or more violations for driving while under the influence.¹⁴⁸

D. Defining the Two-Prong Marzzarella Test

After the Supreme Court handed down its decision in *Heller* establishing that the Second Amendment protects an *individual* right to bear arms for self-defense, courts were faced with a flood of challenges to other firearm regulations.¹⁴⁹ In the wake of this chaos, the Third Circuit in *United States v. Marzzarella*¹⁵⁰ articulated a two-prong test to evaluate Second Amendment challenges: (1) "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment" and (2) if so, whether the law survives under some form of means-end scrutiny.¹⁵¹ If

the local law enforcement agency . . . has been notified of the danger and before the arrival of its assistance"), § 26050 (attempting to make a lawful arrest).

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

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

144. 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4)(i)-(iii) (West Supp. 2010), *invalidated by Moore*, 702 F.3d at 933.

145. See *infra* Part III.C.2.

146. See Firearm Concealed Carry Act, 430 ILL. COMP. STAT. ANN. 66/1 (West 2014).

147. See *id.* 65/2, 65/8 (requiring qualifications such as U.S. citizen, over the age of twenty-one (or eighteen, with parental consent), not mentally impaired, not addicted to controlled substances, etc.).

148. See *id.* 66/30.

149. See *McDonald v. City of Chicago*, 561 U.S. 742, 887 & n.30 (2010) (Stevens, J., dissenting) (noting that *Heller* unleashed a "tsunami of legal uncertainty, and thus litigation" and that amicus curiae briefs estimated 190 Second Amendment challenges were brought within the first eighteen months after *Heller*).

150. 614 F.3d 85 (3d Cir. 2010).

151. *Id.* at 89 (formulating the test in the context of a federal prohibition on firearms with obliterated serial numbers); see also Joan H. Miller, *The Slow Evolution of Second Amendment Law*, 37 SEATTLE U. L. REV. SUPRA 1, 4 (2014), <http://seattleuniversitylawreview.com/files/2014/03/MillerArticleUpdateFINAL.pdf> (citing

the challenged law is not protected by the Second Amendment (i.e., it does not fall within the amendment's scope), then the analysis ends and the law is upheld.¹⁵² However, if the statute in question does implicate the Second Amendment, then the court progresses to the second prong and "balance[s] 'the nature of the conduct being regulated and the degree to which the challenged law burdens the right.'"¹⁵³ The *Marzzarella* test can be applied to any challenge to a firearm regulation, but this Note is concerned with state regulations that restrict an individual's ability to carry a concealed weapon in public.

II. THE SCOPE OF THE SECOND AMENDMENT BEYOND THE HOME: THREE INTERPRETATIONS

This part summarizes circuit courts' differing answers to the first prong of the *Marzzarella* test: whether or not the Second Amendment right extends beyond the home. In other words, does the right to keep and bear arms for the purpose of self-defense include the right to carry handguns outside of the home? A circuit split has emerged over this inquiry between (1) those that found the scope of the Second Amendment does extend beyond the home (the Second, Seventh, and Ninth Circuits),¹⁵⁴ (2) those that found the Second Amendment does not extend beyond the home (the Tenth Circuit),¹⁵⁵ and (3) those that explicitly chose to avoid this constitutional question by proceeding directly to the second prong of the analysis (the Third and Fourth Circuits).¹⁵⁶

A. *Second Amendment Extends Outside of the Home*

Some legal scholars and lower courts agree that Second Amendment protection extends beyond the home. In analyzing challenges to the various state statutes restricting public carry, the Seventh and Ninth Circuits affirmatively determined that Second Amendment protection does extend beyond the home.¹⁵⁷ The Second Circuit did not make such a definitive statement, but instead conceded "the Amendment must have *some* application in the very different context of the public possession of

courts that have applied the two-prong test: *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)).

152. See *Miller*, *supra* note 151, at 4 (citing *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 194).

153. *Id.* (quoting *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 194).

154. See *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012).

155. See *Peterson*, 707 F.3d at 1197.

156. See *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

157. See *Peruta*, 742 F.3d at 1155 ("[T]he right to carry in case of confrontation means nothing if not the general right to carry a common weapon outside the home for self-defense."); *Moore*, 702 F.3d at 936 ("[O]ne doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home.").

firearms.”¹⁵⁸ While neither *Heller* nor *McDonald* spoke precisely to the scope of the Second Amendment right outside of the home, the Seventh and Ninth Circuits found that the Supreme Court’s reasoning in *Heller* “points in a general direction.”¹⁵⁹

Michael O’Shea, a professor of constitutional law, believes that judicial authority over the past two hundred years illuminates a personal right to bear arms for self-defense which necessarily creates a right to carry a handgun outside of one’s home.¹⁶⁰ Judge Wilkinson of the Fourth Circuit speculated that “[t]here may or may not be a Second Amendment right in some places beyond the home” and the whole issue “strikes [the court] as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.”¹⁶¹ O’Shea, based on his extensive review of state case law, asserts that judges who express such a concern ignore substantial state precedent supporting the right to carry arms in public.¹⁶² Furthermore, Judge Posner of the Seventh Circuit responded to Judge Wilkinson: “Fair enough; but that ‘vast *terra incognita*’ has been opened to judicial exploration by *Heller* and *McDonald*.”¹⁶³

Four features of *Heller* and *McDonald* suggest that the Second Amendment does protect individuals’ rights to carry handguns outside of the home: (1) the centrality of self-defense, (2) the definition of “bear arms,” (3) the focus on handguns, and (4) the identification of “presumptively lawful, longstanding” regulations. First, individual self-defense is at the heart of the Second Amendment’s protection.¹⁶⁴ In *Heller*, the majority held that the military purpose implied by the prefatory clause does not alter the “traditionally understood content of the right” (i.e., self-defense).¹⁶⁵ The Seventh Circuit’s reasoning in *Moore v. Madigan*¹⁶⁶ comports with O’Shea’s interpretation that the right to bear arms outside of the home underlies the *Heller* opinion because the Court emphasized self-defense as the fundamental core of Second Amendment rights.¹⁶⁷ The Supreme Court recognized that “‘the need for defense of self, family, and property is *most acute*’ in the home,”¹⁶⁸ but Judge Posner extends this concept, noting that self-defense is equally important, if not more

158. *Kachalsky*, 701 F.3d at 89.

159. *Peruta*, 742 F.3d at 1150 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011)).

160. Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 589 (2012). O’Shea conducted an extensive review of state case law in which courts affirm that the right to bear arms extends outside of the home. *See id.* at 623–64.

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

162. O’Shea, *supra* note 160, at 589–90.

163. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

164. O’Shea, *supra* note 160, at 609.

165. *Id.* at 609–10 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

166. 702 F.3d 933 (7th Cir. 2012).

167. *See id.* at 935–37.

168. *Id.* at 935 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 766–67 (2010)).

important, outside the home.¹⁶⁹ Confining the Second Amendment to the home “divorce[s] the Second Amendment from the right of self-defense.”¹⁷⁰

Second, the Second Amendment protects an individual right to carry a concealed firearm in public because of the definition of “bear arms.”¹⁷¹ The natural meaning of the phrase “bear arms” was to “wear, bear, or carry [weapons] 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.”¹⁷² Thus, keeping a firearm in one’s home is merely a “subset of a right” extending to citizens “who must move among other persons in public to live.”¹⁷³ The Seventh and Ninth Circuits agree that because “‘bearing’ arms within one’s home would at all times have been an awkward usage,” it implies a right to carry a weapon outside the home.¹⁷⁴ Further, Judge Hardiman in *Drake v. Filko*¹⁷⁵ stated that “to speak of ‘bearing’ arms solely within one’s home . . . would conflate ‘bearing’ with ‘keeping,’ in derogation of the Court’s holding that the verbs codified distinct rights.”¹⁷⁶ Judge Posner also articulated a common sense reading of the Second Amendment: allowing a woman who obtained a protective order against a violent ex-husband to sleep with a loaded gun under her mattress but prohibiting her from carrying a firearm in public “creates an arbitrary difference.”¹⁷⁷

Third, the fact that handguns were given particular attention in *Heller* implies that individuals have the right to carry these firearms in public pursuant to the Second Amendment.¹⁷⁸ The handgun is the “most preferred firearm in the nation.”¹⁷⁹ Thus, the Court’s strong protection of handgun ownership and discussion of this firearm in particular suggests that the “defensive role for which handguns are uniquely suited—routine carry outside the home”—is protected under the Second Amendment.¹⁸⁰

Fourth, *Heller* identifies “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” as being presumptively lawful regulations.¹⁸¹ The Ninth Circuit notes that “[w]ere the right restricted to the home, the constitutional invincibility of such

169. *Id.* at 942. *Heller* “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *Heller*, 554 U.S. at 592. And “[c]onfrontations are not limited to the home.” *Moore*, 702 F.3d at 936; *see also* *Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting).

170. *Moore*, 702 F.3d at 937.

171. O’Shea, *supra* note 160, at 609.

172. *Id.* at 613 (quoting *Heller*, 554 U.S. at 584) (alteration in original).

173. *Id.* (citing *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011)).

174. *Moore*, 702 F.3d at 936; *see also* *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1152 (9th Cir. 2014).

175. 724 F.3d 426 (3d Cir. 2013).

176. *Id.* at 444 (Hardiman, J., dissenting).

177. *Moore*, 702 F.3d at 937.

178. *See* O’Shea, *supra* note 160, at 609.

179. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

180. O’Shea, *supra* note 160, at 615.

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

restrictions would go without saying.”¹⁸² The Ninth Circuit criticized courts, such as the Second, Third, and Fourth Circuits, for failing to explicitly recognize a Second Amendment right outside the home by “evading an in-depth analysis of history and tradition . . . [and] miss[ing] a crucial piece of the Second Amendment analysis.”¹⁸³

In sum, the *Heller* and *McDonald* decisions gave rise to four compelling arguments supporting the idea that the Second Amendment applies to firearms in public places.

B. *Second Amendment Does Not Extend Outside of the Home*

The Tenth Circuit found that the Second Amendment is only applicable inside the home because the country has a longstanding practice of banning concealed carry of firearms, and the Supreme Court in *Heller* instructed that nothing in its opinion should cast doubt on longstanding prohibitions.¹⁸⁴ In articulating this position, the court noted *Heller* and *McDonald*'s use of nineteenth-century cases that approved of such restrictions¹⁸⁵ and well-established statutory restrictions on concealed carry within the United States.¹⁸⁶

Some argue that the Second Amendment does not extend beyond the home because the laws challenged and struck down by the Supreme Court in *Heller* involved possession of handguns only within the home and did not confront the question of concealed carry in public.¹⁸⁷ Further, the

182. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1153 (9th Cir. 2014).

183. *Id.* at 1174–75 (discussing *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 875–76 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012)). Interestingly, the dissent in *Moore* critiqued the Seventh Circuit majority, which also refrained from engaging with history and tradition when considering whether the Second Amendment includes a right beyond the home. *See Moore v. Madigan*, 702 F.3d 933, 943 (7th Cir. 2012) (Williams, J., dissenting). Judge Williams stated that the court should have *repeated* the methodology and analysis applied in *Heller* to address the question of firearm possession in public as opposed to the home. *Id.* at 943. The majority believed that the state, in asserting that the Second Amendment right to self-defense does not extend to the public, was asking the court to “repudiate *Heller*'s historical analysis.” *See id.* However, the dissent points out that *Heller* did not consider whether a preexisting right to carry firearms in public for self-defense existed, and by asking the court to make this assessment, the state was in fact “embrace[ing] *Heller*'s method of analysis” by requesting that the court embark on the same analysis but for the different right being asserted. *Id.*

184. *See Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013). Some historical sources indicate that *only* open carry, not concealed carry, is protected by the Second Amendment. *See supra* note 108 and accompanying text. In *Peterson*, a Washington state resident applied for a concealed handgun license in Colorado; however, Colorado law states that such licenses may only be issued to state residents. *See Peterson*, 707 F.3d at 1201. After being denied the license, the Washington resident brought suit alleging that the Colorado statute violated the Second Amendment. *See id.*

185. *See Peterson*, 707 F.3d at 1210–11 (citing *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Nunn v. State*, 1 Ga. 243, 251 (1846)).

186. *See id.* at 1211. For discussion of the history of concealed carry laws, see *supra* notes 78–110 and accompanying text.

187. *See O'Shea*, *supra* note 160, at 589 (citing *People v. Aguilar*, 944 N.E.2d 816, 827 (Ill. App. Ct. 2011); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011)). *But see Drake*, 724

history of the Founding era indicates that there was no right to travel with a weapon in public under English law.¹⁸⁸ As such, *Heller* and *McDonald* cannot be invoked to support a finding that the Second Amendment protects public carrying of handguns.¹⁸⁹

C. Silence on Whether the Second Amendment Extends Beyond the Home

Some lower courts chose to avoid deciding the constitutional issue under the first prong of the *Marzzarella* test and instead proceeded directly to the second prong of the analysis.¹⁹⁰ These court opinions found that *even assuming* the Second Amendment right extends outside of the home, the regulation, for example, a justifiable-need standard for issuing permits, survives the second prong inquiry.¹⁹¹ Justifiable-need standards have “survived intermediate scrutiny even when the court has punted on the question of whether the concealed carry of firearms in public places is conduct protected by the Second Amendment.”¹⁹² The Fourth Circuit took this approach in *Woollard v. Gallagher*.¹⁹³ It noted that other courts have “deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step.”¹⁹⁴ As such, the Fourth Circuit refrained

F.3d at 445 (Hardiman, J., dissenting) (“Describing the holding [as encompassing a general right to self-defense]—first establishing the legal principle embodied in the Second Amendment and then explaining how it was applied—demonstrates that the legal principle enunciated in *Heller* is not confined to the facts presented in that case.”).

188. See Saul A. Cornell & Nathan Kozuskanich, *Appendix A: The Scholarly Landscape Since Heller*, in *THE SECOND AMENDMENT ON TRIAL*, *supra* note 18, at 393.

189. See O’Shea, *supra* note 160, at 589.

190. See, e.g., *Drake*, 724 F.3d at 430 (“It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home.”); *United States v. Mahin*, 668 F.3d 119 (4th Cir. 2012); *Hightower v. City of Boston*, 693 F.3d 61, 72 (1st Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (expressing belief that this issue is a “vast *terra incognita*” that courts should enter only upon necessity). For analysis of the second prong of the *Marzzarella* test, see Part III.B–C.

191. See *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“[W]e merely assume that the *Heller* right exists outside the home and that such right of . . . *Woollard* has been infringed. We are free to make that assumption because the good-and-substantial-reason requirement passes constitutional muster under . . . intermediate scrutiny.”).

192. *Miller*, *supra* note 151, at 5–6 (citing *Woollard*, 712 F.3d at 876).

193. 712 F.3d at 876; see also William Young, Jr., *Woollard v. Gallagher: Normalizing the Fourth Circuit’s Approach to Second Amendment Challenges*, 73 MD. L. REV. ENDNOTES 35, 64 (2014), available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1029&context=endnotes> (endorsing the Fourth Circuit’s judicial restraint when using, in Young’s opinion, the appropriate “measure of deference to legislative judgments”).

194. *Woollard*, 712 F.3d at 875; see also *Mahin*, 668 F.3d at 123 (refraining from recognizing Second Amendment protections outside of the home because the court could assume that *Mahin* “engaged in activity which implicates the Second Amendment” and still “uphold [his] conviction”); *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) (“Although we are inclined to uphold the challenged federal laws at step one of our analytical framework, in an abundance of caution, we proceed to step two.”); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (“Although the Supreme Court’s cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home, the Court’s analysis suggests . . . that the Amendment must have *some* application in the very different context of the public possession of firearms. Our analysis proceeds on this assumption.”).

from determining whether Maryland's heightened requirement for obtaining a handgun permit implicated Second Amendment rights.¹⁹⁵ Instead, the court was entitled to merely assume that the right identified in *Heller* existed outside of the home because the good-and-substantial reason requirement passed constitutional muster under intermediate scrutiny.¹⁹⁶ The Second Circuit also determined that the "proper cause requirement falls outside the core Second Amendment protections identified in *Heller*" because the "state's ability to regulate firearms and . . . conduct, is qualitatively different in public than in the home."¹⁹⁷

The Third Circuit upheld New Jersey's restrictive "justifiable need" requirement for obtaining a concealed carry permit.¹⁹⁸ The court found that this requirement fell outside the scope of the Second Amendment because it is a "presumptively lawful" and "longstanding" restriction on firearm possession.¹⁹⁹ In its analysis through the two-prong test, the court "decline[d] to definitively declare that the individual right to bear arms for the purpose of self-defense extend[ed] beyond the home, the 'core' of the right as identified by *Heller*."²⁰⁰

In brief, the above circuit courts disagreed on the first prong of the *Marzzarella* test, namely whether the Second Amendment right extends to carrying handguns in public. The Seventh and Ninth Circuits endorsed the constitutional right to keep and bear arms outside of the home, whereas the Tenth Circuit did not. The Third and Fourth Circuits avoided the question entirely, while the Second Circuit merely assumed that the right exists in public. With the exception of the Tenth Circuit, all circuit courts proceeded to prong two of the *Marzzarella* test to determine the constitutionality of the statutes.

III. CONSTITUTIONALITY OF STATUTORY RESTRICTIONS ON CONCEALED CARRY

This part begins by identifying the appropriate standard of review for challenges to states' statutory restrictions on concealed carry. Identifying this standard of review is a prerequisite for the analysis under the second prong of the *Marzzarella* test: whether a given law survives under the predetermined level of scrutiny. It then summarizes a circuit split that has developed in the wake of *Heller* over whether concealed carry laws survive under the appropriate level of scrutiny or impermissibly infringe on a citizen's Second Amendment right to keep and bear arms. The Second, Third, and Fourth Circuits have found that laws requiring applicants to

195. See *Woollard*, 712 F.3d at 876; *supra* notes 131–32 and accompanying text (discussing Maryland's heightened statutory requirement for obtaining a concealed carry permit).

196. See *Woollard*, 712 F.3d at 876; *infra* Part III.B.2.

197. *Kachalsky*, 701 F.3d at 94.

198. See *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013).

199. *Id.* at 433 ("The 'justifiable need' standard fits comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense.").

200. *Id.* at 431.

demonstrate a heightened need for a firearm *are* constitutional under the Second Amendment.²⁰¹ On the other hand, the Seventh and the Ninth Circuits held that state laws limiting an individual's ability to carry a concealed firearm in public, either through heightened permit requirements or through what amounts to a flat-out ban, are not constitutional.²⁰²

A. *The Appropriate Standard of Review*

Means-end scrutiny examines the methods (means) chosen to further the purposes (ends) that the regulation is designed to serve.²⁰³ This method of scrutiny evaluates the sufficiency of a governmental body's justification for its law.²⁰⁴ Three levels of means-end scrutiny are available to courts when evaluating a regulation that infringes on the Second Amendment: rational basis review, intermediate scrutiny, and strict scrutiny.²⁰⁵ The level of scrutiny applied in a given case is dependent upon "the regulation's burden on the Second Amendment right to keep and bear arms."²⁰⁶ The more fundamental a right is, the higher level of scrutiny must be applied, but "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense," and a lower level of scrutiny is permissible.²⁰⁷ The Supreme Court in *Heller* instructed that an individual's right to bear a firearm within his home for the purpose of self-defense is fundamental,²⁰⁸ and any restriction thus would be subject to a high level of scrutiny.²⁰⁹ However, an individual's right to carry firearms in public, even if one finds that the Second Amendment does extend beyond the home, is more limited and

201. *See id.*; *Woollard*, 712 F.3d at 865; *Kachalsky*, 701 F.3d at 81.

202. *See* *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

203. *See* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 *LOY. L.A. L. REV.* 449, 449 (1988).

204. *See id.* ("If a sufficient justification exists, the action may be permitted despite the applicability of the limit. If the courts find the justification insufficient, . . . the limit . . . is unconstitutional.").

205. *See* *Drake*, 724 F.3d at 435 (citing *United States v. Marzzarella*, 614 F.3d 85, 95–99 (3d Cir. 2010)); *see also id.* at 451–61.

206. *Peruta*, 742 F.3d at 1167 (quoting *Nordyke v. King*, 681 F.3d 1041, 1045–46 (9th Cir. 2012)); *see also* *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (requiring a "strong justification" for regulations imposing a "substantial burden upon the core right of self-defense"); *Ezell v. City of Chicago*, 651 F.3d 684, 706, 708 (7th Cir. 2011) (applying more demanding scrutiny to "severe burdens on the core Second Amendment right"); *United States v. Masciandaro*, 638 F.3d 458, 469–70 (4th Cir. 2011) (requiring "strong justification[s]" for "severe burden[s] on the core Second Amendment right" (quoting *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010))); *Marzzarella*, 614 F.3d at 97 (calibrating the level of scrutiny to the "severity" of the burden imposed).

207. *Masciandaro*, 638 F.3d at 470; *accord* *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012) ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

208. *See* *Heller v. District of Columbia*, 554 U.S. 570, 628 (2008).

209. *See* *Masciandaro*, 638 F.3d at 470.

would be subjected to a lower level of scrutiny because the state has a legitimate interest to promote public safety.²¹⁰

Under the least intense standard of review, rational basis review, a court presumes the challenged law is valid and determines “only whether the statute is rationally related to a legitimate state interest.”²¹¹ While *Heller* expressly avoided determining the appropriate standard of review,²¹² *Heller* did condemn the use of rational basis review for challenges to firearm regulations.²¹³

The most rigorous standard of review, strict scrutiny, demands that the regulation be “narrowly tailored to promote a compelling Government interest.”²¹⁴ Under this standard, the government must choose the least restrictive means for achieving the state’s purpose.²¹⁵ Strict scrutiny may be triggered if a regulation threatens a right at the *core* of the Second Amendment: for example, the right of a law-abiding citizen to keep and use a handgun in his home.²¹⁶ In regards to concealed carry, however, courts agree that “[i]f the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment.”²¹⁷ The distinction between self-defense inside versus outside the home calls for use of a standard less rigorous than strict scrutiny when evaluating firearm regulations limiting use outside of the home.²¹⁸ As such, strict scrutiny is also an inappropriate standard of review for evaluating challenges to concealed carry regulations.

In between these two standards of scrutiny lies intermediate scrutiny, under which the state’s interest must be “more than just legitimate but need

210. *Id.*

211. *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013) (quoting *Marzzarella*, 614 F.3d at 95–96 n.13).

212. *See Heller*, 554 U.S. at 628 (refraining from determining appropriate level of scrutiny because the D.C. handgun ban was unconstitutional “[u]nder any of the standards of scrutiny . . . applied to enumerated constitutional rights”).

213. *See id.* at 629 n.27.

214. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

215. *See id.* Identifying the least restrictive means, however, is challenging because individuals staunchly disagree over whether increased gun control reduces danger to society. *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, 1465–66 (2009). Gun control proponents argue that banning guns is the only effective way to prevent crime, while gun control opponents argue that firearm restrictions will not prevent crimes because those who misuse guns are the individuals who do not comply with the law. *See id.* at 1465. Volokh points out the empirical black hole that surrounds firearm-related statistics by citing methodological critiques of many studies that purport to demonstrate a relationship between gun control and crime statistics. *See id.* at 1466. He further notes that “because of this uncertainty,” lower courts’ analyses of gun regulations often turn on how they “evaluate empirical claims of likely danger reduction.” *Id.* at 1467.

216. *See Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012).

217. *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (quoting *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 834 (D.N.J. 2012)).

218. *See Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (citing *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

not be compelling.”²¹⁹ Under this standard, the government must put forth a “significant, substantial, or important interest,” which has a “reasonable fit” to the “challenged law, such that the law does not burden more conduct than is reasonably necessary.”²²⁰ Such fit must merely be “substantial, ‘not perfect.’”²²¹ The state bears the burden of proof; its “justification must be genuine, not hypothesized or invented post hoc in response to litigation.”²²² However, the state may rely on “a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense” to satisfy its burden.²²³ In cases where firearm regulations burden an individual’s right to keep and bear arms in public rather than in the home, intermediate scrutiny applies.²²⁴

Other courts have rejected this framework and instead employed the reasonableness test²²⁵ or an undue burden test.²²⁶ Professor Eugene Volokh suggests that courts, rather than employing one of the previously constructed tests, should instead consider four categories of justifications for restricting rights: (1) scope, (2) burden, (3) danger reduction, and (4) government as proprietor, and use these to determine the proper scope of government authority.²²⁷ A group of judges led by Judge Kavanaugh of the D.C. Circuit, the dissenting judge in *Heller*’s appellate court opinion, rejected balancing tests and instead relied on the “common use test” outlined in *Heller*.²²⁸

219. *Drake*, 724 F.3d at 436.

220. *Id.* (citing *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010)). Intermediate scrutiny is subject to the same weaknesses as strict scrutiny in that empirical data necessary to establish a reasonable fit between the challenged law and the government interest is severely lacking. *See supra* note 215.

221. *Kachalsky*, 701 F.3d at 97 (quoting *Marzzarella*, 614 F.3d at 97).

222. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

223. *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012).

224. *See Kachalsky*, 701 F.3d at 93 n.17 (citing cases that all applied intermediate scrutiny: *Heller II*, 670 F.3d 1244, 1261–64 (D.C. Cir. 2011); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010); *Marzzarella*, 614 F.3d at 97; *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641–41 (7th Cir. 2010)); *see also Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1317 (M.D. Ga. 2011) (noting it joins the “majority of other courts” in concluding that “intermediate scrutiny is the appropriate standard of scrutiny”); *Miller, supra* note 151, at 4 n.19.

225. *See Tina Mehr & Adam Winkler, The Standardless Second Amendment*, AM. CONSTITUTION SOC’Y FOR LAW & POLICY 6–7 (Oct. 2010), <http://www.acslaw.org/files/Mehr%20and%20Winkler%20Standardless%20Second%20Amendment.pdf>.

226. *See Kiehl, supra* note 104, at 1148 (citing *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009); *People v. Flores*, 86 Cal. Rptr. 3d 804, 809 n.5 (Ct. App. 2008)).

227. Volokh, *supra* note 215, at 1446–47.

228. The common use test establishes the class of weapons protected by the Second Amendment; weapons commonly used include handguns, shotguns, and rifles, while “dangerous and unusual weapons” such as fully automatic machine guns do not receive constitutional protection. *See District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). *See, e.g., Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1118–19 (N.D. Ill. 2012) (employing an analysis of the text, history, and tradition of the challenged statute and the Second Amendment).

Of the five circuits discussed in Part III of this Note, the Second, Third, and Fourth Circuits chose to adopt the intermediate standard of scrutiny.²²⁹ The Seventh and Ninth Circuits did not explicitly reject intermediate scrutiny, but they chose not to apply any particular standard of heightened scrutiny.²³⁰ The Seventh Circuit decided that degrees of scrutiny were irrelevant because the state simply failed to justify “the most restrictive gun law of any of the 50 states.”²³¹ The Ninth Circuit wanted to “parallel[] the analysis in *Heller* itself” in which the Court chose not to apply a particular level of scrutiny.²³²

B. *Statutory Restrictions on Concealed Carry Are Constitutional*

Of the five circuit courts that considered the constitutionality of restrictions on a citizen’s ability to obtain a concealed carry permit, the Second, Third, and Fourth Circuits found such restrictions constitutional. The state legislatures in each state used different language to implement a heightened requirement;²³³ however, the Second and Fourth Circuits’ opinions mirrored each other while the Third Circuit’s decision followed different reasoning.

1. Second Circuit: Upholding a Showing of “Proper Cause”

In *Kachalsky v. County of Westchester*,²³⁴ the Second Circuit held that New York legislation restricting full-carry concealed-handgun licenses to applicants demonstrating “proper cause” was constitutional.²³⁵ The Second Circuit established that the proper cause requirement was substantially related to important governmental interests in public safety and crime prevention.²³⁶ The court noted that its “role is only to ‘assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence.’”²³⁷

The Second Circuit provided a mere four-sentence explanation of whether there was a reasonable fit between New York’s statute and the government interest.²³⁸ The court determined that restricting possession in

229. See *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013); *Kachalsky*, 701 F.3d at 96; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

230. See *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1175 (9th Cir. 2014); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012).

231. *Moore*, 702 F.3d at 941.

232. *Peruta*, 742 F.3d at 1175.

233. See *supra* Part I.C for description of relevant state laws.

234. 701 F.3d 81 (2d Cir. 2012).

235. *Id.* at 101 (finding N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2008) constitutional: “A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to . . . (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof”). See *supra* notes 124–30 and accompanying text for summary of the New York statute.

236. See *Kachalsky*, 701 F.3d at 97.

237. *Id.* (alteration in original) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

238. See David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1449 n.89 (2014) (citing *Kachalsky*, 701 F.3d at 98–99).

this manner “is substantially related to New York’s interests in public safety and crime prevention.”²³⁹ Contrary to the plaintiff’s assertion, the court held that this regulation was not an “arbitrary licensing regime no different from limiting handgun possession to every tenth citizen.”²⁴⁰

The Second Circuit cited New York’s longstanding tradition of restricting handgun use to endorse the legislature’s decision to limit firearm possession to only those showing proper cause.²⁴¹ Specifically, “New York’s legislative judgment” regarding limiting firearms in public was born over one hundred years ago, with the enactment of the Sullivan Law identifying “dangers inherent in the carrying of handguns in public.”²⁴² In 1913, the legislature determined that a legitimate method for guarding against these dangers was to restrict handgun possession to only individuals showing proper cause, a regulation that still stands today.²⁴³

The court recognized inconsistent results of studies put forth by the opposing parties, some showing that increased handgun ownership by lawful citizens does not increase crime and others showing that “widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces.”²⁴⁴ Notwithstanding this conflicting evidence, the court ultimately deferred to the legislature’s judgments because “[i]t is the legislature’s job, not [the court’s], to weigh conflicting evidence and make policy judgments.”²⁴⁵

2. Fourth Circuit: Permitting Proof of a “Good and Substantial Reason”

In *Woollard v. Gallagher*, the Fourth Circuit held that Maryland legislation restricting concealed carry permits to applicants demonstrating a “good and substantial reason” was constitutional.²⁴⁶ The court split its analysis into two primary inquiries. First, “whether the governmental interest asserted by the state constitutes a ‘substantial’ one.”²⁴⁷ Second, “whether the good-and-substantial-reason requirement . . . is ‘reasonably adapted’ to Maryland’s significant interests.”²⁴⁸ In other words, has the

239. *Kachalsky*, 701 F.3d at 98.

240. *Id.*

241. *See id.* at 84–85, 97.

242. *Id.* at 97 (citing Sullivan Law, ch. 195, 1911 N.Y. Laws 442). However, New York began regulating general firearm usage as far back as 1785. *See id.* at 84 (citing Law of Apr. 22, 1785, ch. 81, 1785 N.Y. Laws 152; Law of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627).

243. *Id.* at 97 (citing Sullivan Law, ch. 608, 1913 N.Y. Laws 1627–30).

244. *Id.* at 99.

245. *Id.*

246. *See Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013). *See supra* notes 131–35 and accompanying text for summary of the Maryland statute. The applicant must establish a “good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.” *Woollard*, 712 F.3d at 869 (quoting MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (LexisNexis 2011) (emphasis added)).

247. *Woollard*, 712 F.3d at 876.

248. *Id.* at 878 (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)).

state demonstrated a “reasonable fit” between the heightened permit requirement and the government interest of protecting public safety?²⁴⁹

The court first tackled whether the governmental interest constituted a substantial one.²⁵⁰ Maryland’s legislature explained that the permitting requirements were meant to serve the state’s interest in “protecting public safety and preventing crime.”²⁵¹ When enacting the good-and-substantial-reason requirement, the legislature codified its findings 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; (4) current law has not been effective in curbing the more frequent use of handguns in committing crime; and (5) additional regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of the public.²⁵²

This includes the finding that in 2009, Maryland had the “eighth highest violent crime rate, the third highest homicide rate, and the second highest robbery rate of any state.”²⁵³ In that same year, 97.4 percent of all homicides involving firearms were committed with handguns, and 83.5 percent of law enforcement officers who died in the line of duty died as a result of “intentional gunfire, usually from a handgun.”²⁵⁴ Given these findings, the court noted that it could understand the state’s “impetus to enact measures aimed at protecting public safety and preventing crime” and that such goals constitute a “substantial governmental interest.”²⁵⁵

Next, the court found that the good-and-substantial-reason requirement was substantially related to these government interests. The requirement ensures “access to handgun permits for those who need them while preventing a greater-than-necessary proliferation of handguns in public places.”²⁵⁶ The good-and-substantial-reason requirement reduces the prevalence of handguns in public,²⁵⁷ but it still allows “persons in palpable

249. *Id.* (citing *Chester*, 628 F.3d at 683). See *supra* notes 219–24 and accompanying text for an overview of intermediate scrutiny.

250. See *Woollard*, 712 F.3d at 876.

251. *Id.*

252. MD. CODE ANN., CRIM. LAW § 4-202 (LexisNexis 2002).

253. *Woollard*, 712 F.3d at 877 (quotations omitted).

254. *Id.*

255. *Id.*; see also *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (referring to the “significant governmental interest in public safety”); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (characterizing “the Government’s general interest in preventing crime” as “compelling”); *United States v. Chapman*, 666 F.3d 220, 227 (4th Cir. 2012) (relying on *Schenck* and *Salerno* in holding that “reducing domestic gun violence is a substantial governmental objective”).

256. *Woollard*, 712 F.3d at 880.

257. *Id.* at 879.

need of self-protection [to] arm themselves in public places where Maryland's various permit exceptions do not apply."²⁵⁸

In view of the legislature's deliberations related to the concealed carry statute, the court elected to defer to the legislature.²⁵⁹ Relying on a combination of legislative findings, testimony, and legislative deference, the Fourth Circuit concluded that Maryland's statute survived intermediate scrutiny.²⁶⁰ Although the court assumed the heightened requirement burdened the plaintiff's Second Amendment right, such burden was constitutionally permissible; under intermediate scrutiny, the state had sufficiently demonstrated that the good-and-substantial-reason requirement was "reasonably adapted" to the state's interest in public safety and preventing crime.²⁶¹

3. Third Circuit: Sustaining a "Justifiable Need" Requirement

In *Drake v. Filko*, the Third Circuit found that New Jersey legislation restricting concealed carry permits to applicants demonstrating a "justifiable need" was constitutional.²⁶² The Third Circuit's conclusion differed from both the Second and Fourth Circuit's conclusions discussed above in that the court found that New Jersey's permitting requirement "qualifies as a presumptively lawful, longstanding regulation,"²⁶³ which *Heller* identified as a separate category of handgun restrictions.²⁶⁴ This decision was reached without proceeding through the two-prong test; however, given the "important constitutional issues presented," the court still decided to evaluate whether the justifiable need standard survived the intermediate level of scrutiny.²⁶⁵ Ultimately, the court found that *even if* the heightened requirement did not qualify as a presumptively lawful, longstanding regulation, the justifiable need standard would still pass intermediate scrutiny and stand as constitutional.²⁶⁶

The court's dual analysis began by determining that the state's heightened requirement qualifies as a presumptively lawful regulation. The Third Circuit had previously established that certain "longstanding regulations are 'exceptions' to the right to keep and bear arms, such that the conduct they regulate is not within the scope of the Second

258. *Id.* at 880. Maryland's permit exceptions allowed individuals to wear, carry, or transport handguns in his own home or personal business property, as well as some public locations. See MD. CODE ANN., CRIM. LAW § 4-203(b) (LexisNexis Supp. 2011).

259. *Woollard*, 712 F.3d at 881 (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)).

260. See *Young*, *supra* note 193, at 62.

261. *Woollard*, 712 F.3d at 882.

262. *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013). See *supra* notes 136–37 and accompanying text for a summary of the New Jersey statute.

263. *Drake*, 724 F.3d at 429 (citations and quotations omitted).

264. See *supra* note 69 and accompanying text.

265. *Drake*, 724 F.3d at 430.

266. See *id.*

Amendment.”²⁶⁷ *Heller* noted that its 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,” and that these identified regulations are not an exhaustive list.²⁶⁸ The Court did not, however, provide guidance on how to determine what qualifies as a presumptively lawful regulation.²⁶⁹

The court previously had warned “prudence counsels caution when extending [the] recognized [*Heller*] exceptions to novel regulations unmentioned in *Heller*.”²⁷⁰ However, the court in *Drake* nevertheless determined that New Jersey’s justifiable need requirement qualifies as a presumptively lawful, longstanding regulation under *Heller*.²⁷¹ The court looked to the historical roots of the justifiable need standard to qualify it as presumptively lawful, as the standard had existed in some form for nearly ninety years.²⁷² Since 1924, New Jersey “directed that no persons (other than those specifically exempted such as police officers and the like) shall carry [concealed] handguns except pursuant to permits issuable only on a showing of need.”²⁷³ Although the permit law underwent multiple revisions, the requirement of demonstrating “need” was present in every version; the present-day “justifiable-need” standard “became statutorily enshrined” in 1978.²⁷⁴ This heightened need requirement “fits comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense.”²⁷⁵

While all the exceptions named in *Heller* “derived from historical regulations,” the court found that such “pre-ratification presence” is not a prerequisite for a statute to qualify as a categorical exception to the Second Amendment.²⁷⁶ The court drew an analogy between New Jersey and New York’s concealed carry statute.²⁷⁷ In New York, the statute was “adopted in the same era that states began adopting the felon in possession statutes that *Heller* explicitly recognized as being presumptively lawful longstanding regulations.”²⁷⁸ In fact, the Supreme Court “considered

267. *Id.* at 431 (citing *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012); *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011)); *see also* *United States v. Marzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

268. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008).

269. *See Drake*, 724 F.3d at 432.

270. *Marzarella*, 614 F.3d at 93.

271. *See Drake*, 724 F.3d at 432.

272. *See id.* (citing *Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971)).

273. *Id.* (alterations in original) (quoting *Siccardi*, 284 A.2d at 538).

274. *Id.*

275. *Id.* at 433 (noting that the New Jersey standard is in fact *less* restrictive than historical limitations).

276. *Id.* at 432 (quoting *United States v. Marzarella*, 614 F.3d 85, 93 (3d Cir. 2010)) (preempting criticism that all “presumptively lawful” regulations found in *Heller* had a longstanding historical presence, and thus in order for a restriction to fall within this category, it must have been present prior to ratification of the Constitution).

277. *See id.* at 433.

278. *Id.* (quoting *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 830–31 (D.N.J. 2012)). The court is inferring that because the New Jersey statute has been established equally as long as

prohibitions on the possession of firearms by felons to be longstanding although states did not start to enact them until the early 20th century.”²⁷⁹ For a statute to be considered presumptively lawful, the court concluded that a regulation requiring a “particularized showing of objective justification to carry a handgun” need not have existed at the time of the adoption of the Bill of Rights.²⁸⁰

The dissent fervently disagreed with the majority’s determination that the justifiable need requirement qualifies as a presumptively lawful regulation.²⁸¹ Judge Hardiman noted that the court’s hesitancy in recognizing such longstanding regulations was legitimate, as it creates a bold precedent in which the judiciary is determining that a “certain regulation is *completely outside the reach* of the Second Amendment, not merely that the regulation is a permissible burden on the Second Amendment right.”²⁸² Equally dangerous, the majority conducted its “longstandingness analysis” at “too high a level of generality.”²⁸³ The majority chose laws that generally have regulated the public carry of firearms as its reference point, when the court should have considered whether a longstanding tradition exists of “condition[ing] the issuance of permits on a showing of a *greater need* for self-defense.”²⁸⁴

In response to the majority’s defense that pre-ratification presence is not a prerequisite to categorizing a regulation as presumptively lawful, the dissent noted “[a]lthough ‘a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue,’ *Heller* requires, at a minimum, that a regulation be rooted in history.”²⁸⁵ The dissent further noted that regulations without a “clear historical pedigree” have not been found by courts to fit within this “longstandingness” exception.²⁸⁶ If such regulations are upheld as constitutional, it is because the statute survived

the New York statute, and the New York statute was created around the same time as other laws *Heller* recognized as presumptively lawful, then New Jersey’s statute has been established long enough such that pre-ratification presence should not preclude its status as a longstanding regulation.

279. *Id.* at 433–34 (quoting *Heller II*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (quotations omitted)).

280. *Id.* at 434.

281. *See id.* at 447–51 (Hardiman, J., dissenting).

282. *Id.* at 447.

283. *Id.* at 451.

284. *Id.* (emphasis added).

285. *Id.* at 450 (quoting *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012)).

286. *Id.* at 447 (citing *Heller II*, 670 F.3d 1244, 1255 (D.C. Cir. 2011) (declining to recognize as longstanding a multitude of District of Columbia handgun registration requirements, including laws requiring re-registration after three years and requiring applicants to demonstrate knowledge about firearms, be fingerprinted and photographed, take firearms training or safety courses, meet a vision requirement, and submit to a background check); *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010) (declining to recognize as longstanding a law prohibiting firearm possession by domestic violence misdemeanants because historical data were inconclusive)).

constitutional scrutiny, not because it was categorized as presumptively lawful.²⁸⁷

The majority did, however, continue its analysis in the event the heightened requirement was not in fact presumptively lawful.²⁸⁸ The State of New Jersey “undoubtedly” has a “significant, substantial and important interest” in ensuring public safety.²⁸⁹ Therefore, the court framed its inquiry as “whether there is a ‘reasonable fit’ between this interest in safety and the means chosen by New Jersey to achieve it: the Handgun Permit Law and its ‘justifiable need’ standard.”²⁹⁰ The court conceded that the state failed to present the court with evidence to show why or how the legislators arrived at their judgment.²⁹¹ However, the court stated that “New Jersey’s inability to muster legislative history indicating what reports, statistical information, and other studies its legislature pondered . . . is unsurprising.”²⁹² When New Jersey enacted its concealed carry statute, *Heller* had not yet found that the Second Amendment protected an *individual* right to bear arms, so the legislature “could not have foreseen that restrictions on carrying a firearm outside the home could run afoul” of this amendment.²⁹³ The court “refuse[d] to hold that the fit here is not reasonable” simply because the state was unable to present data or statistics upon which it based its decision.²⁹⁴ Rather than relying on evidence, the legislature made “reasonable inference[s]” in light of the lethal nature of handguns and felt that requiring an applicant to demonstrate a “particularized need for a permit” legitimately serves the state’s interest.²⁹⁵ The legislature made no attempt to defend the statute, but instead “made a policy judgment” that the justifiable need requirement burdened Second Amendment rights no more than was “reasonably necessary” to ensure public safety.²⁹⁶ The Third Circuit in effect “excuse[d] the state from putting forth evidence to support the legislature’s judgment” and afforded the New Jersey legislature substantial deference.²⁹⁷

The dissent again disparaged both the substance and form of the majority’s analysis.²⁹⁸ First, the state bears the burden of “justifying its restrictions” and therefore must “affirmatively establish the reasonable fit [the court] require[s].”²⁹⁹ The court should only consider the reason offered by the state, which was merely that “the justifiable need requirement is

287. *See id.* at 447 (Hardiman, J., dissenting) (citing *United States v. Marzzarella*, 614 F.3d 85, 95–101 (3d Cir. 2010)).

288. *See id.* at 437–40 (majority opinion).

289. *Id.* at 437 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

290. *Id.*

291. *See id.*

292. *Id.*

293. *Id.* at 437–38.

294. *Id.* at 438.

295. *Id.* (quoting *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 835 (D.N.J. 2012)).

296. *Id.* at 439.

297. Young, *supra* note 193, at 62 (citing *Drake*, 724 F.3d at 436–69) (noting that the court essentially relied on “common sense, legislative history, and reasonable inferences”).

298. *See Drake*, 724 F.3d at 453–54 (Hardiman, J., dissenting).

299. *Id.* at 453 (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)).

designed to combat the dangers and risks associated with the misuse and accidental use of handguns.”³⁰⁰ New Jersey presented no support for “how or why its interest in preventing [abuse] of handguns is furthered by limiting possession to those who can show a greater need for self-defense than the typical citizen.”³⁰¹ Unable to present “any study, empirical data, or legislative findings,” the state argued that “the fit [i]s a matter of common sense.”³⁰² The majority in effect had applied rational basis review, a standard rejected by the Court in *Heller*, under the guise of intermediate scrutiny.³⁰³ Put bluntly, “The majority err[ed] in absolving New Jersey of its obligation to show fit,” because it is the court’s duty “to evaluate the State’s proffered evidence, not to accept reflexively its litigation position.”³⁰⁴

Ultimately, the majority held that the heightened justifiable need requirement to carry a handgun for self-defense qualified as a presumptively lawful, longstanding regulation and as such did not burden conduct protected by the Second Amendment.³⁰⁵ Further, even if this regulation failed to qualify as presumptively lawful, it passed intermediate scrutiny and was constitutional.³⁰⁶ While the Third Circuit here reached the same conclusion as the Second and Fourth Circuits discussed above, it did so through a very different analysis and relied on nearly no evidence put forth by the State.³⁰⁷ Thus, the dissent convincingly attacked both modes of the majority’s analysis, leaving the decision on weak footing for subsequent challenges.

C. Statutory Restrictions on Concealed Carry Are Unconstitutional

The Ninth and Seventh Circuits, the two remaining courts to have considered the constitutionality of restrictions on carrying a concealed firearm, both found the respective county or state requirements unconstitutional.

300. *Id.* (citation omitted).

301. *Id.*

302. *Id.* at 454 (alteration in original) (quoting *United States v. Carter*, 669 F.3d 411, 419 (4th Cir. 2012)).

303. Alex Poor, *Bearing the Burden of Denial: Observations of Lower Court Decisions Misapplying Supreme Court Precedent in Second Amendment Cases*, 67 SMU L. REV. 401, 423–24 (2014).

304. *Drake*, 724 F.3d at 454 (citing *Heller II*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (holding that the government had not borne its burden under intermediate scrutiny because “the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments”); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (holding that the government had not borne its burden under intermediate scrutiny because “the government has offered numerous plausible reasons why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient evidence to establish a substantial relationship between [18 U.S.C.] § 922(g)(9) and an important governmental goal”)).

305. *Id.* at 439–40 (majority opinion).

306. *Id.*

307. *See supra* notes 271, 291 and accompanying text.

1. Ninth Circuit: Striking Down a “Good Cause” Requirement

In *Peruta v. County of San Diego*, San Diego’s “good cause” requirement for obtaining a concealed carry permit was struck down by the Ninth Circuit as unconstitutional.³⁰⁸ Open carry is completely prohibited in San Diego County,³⁰⁹ and it is against this generally restrictive regime that the “unconstitutionality of the County’s restrictive interpretation of ‘good cause’ becomes apparent.”³¹⁰ Although the Second Amendment does not require states to allow concealed carry, it does “require that the states permit *some form* of carry for self-defense outside the home.”³¹¹ Historically, social convention has dictated which form of carry a state allows.³¹² California’s preference for concealed carry as opposed to open carry is constitutional, “so long as it allows one of the two.”³¹³

Although the county’s regulation did not deny all individuals the right to bear arms in public,³¹⁴ the court noted its inquiry does not end merely because a small group of individuals may exercise this right.³¹⁵ Thus, the court determined *not* whether San Diego’s interpretation of the state’s good cause requirement “allow[ed] *some* people to bear arms outside the home in *some* places at *some* times” but whether the “typical responsible, law-abiding citizen” was able to carry a firearm in public for self-defense.³¹⁶ In San Diego, good cause was defined as “[a] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm’s way.”³¹⁷ The court found that in San Diego, a “*typical*” law-abiding citizen “fearing for his personal safety—by definition—cannot

308. See *supra* notes 138–42 and accompanying text for summary of the California statute. A license may be issued if: “(1) The applicant is of good moral character. (2) *Good cause* exists for issuance of the license. (3) The applicant is a resident of the county or a city within the county (4) The applicant has completed a course of training” CAL. PENAL CODE § 26150 (West 2012) (emphasis added).

309. CAL. PENAL CODE §§ 25850, 26350.

310. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1171 (9th Cir. 2014). The dissent believes the majority misidentifies the conduct at issue because the majority puts too much weight on the fact that California prohibits *open* carry of firearms in public (making the right to carry concealed firearms that much more imperative). It frames the issue as “whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense,” while the dissent asserts that the conduct at issue is more narrow—carrying a *concealed* firearm in public, notwithstanding prohibitions on open carry. *Id.* at 1181–82 (Thomas, J., dissenting).

311. *Id.* at 1172 (majority opinion).

312. *Id.* See also *supra* notes 96–99, 107–09 and accompanying text for discussion on preference of concealed versus open carry.

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

314. See, e.g., CAL. PENAL CODE § 25450 (West Supp. 2014) (peace officers), § 25455 (retired peace officers), § 25620 (military personnel), § 25650 (retired federal officers), § 26035 (on private property or place of business), § 26040 (where hunting is allowed), § 26045 (when faced with “immediate, grave danger” in the “brief interval before and after the local law enforcement agency . . . has been notified of the danger and before the arrival of its assistance”), § 26050 (attempting to make a lawful arrest).

315. *Peruta*, 742 F.3d at 1169.

316. *Id.*

317. *Id.* at 1148.

distinguish [himself] from the mainstream.”³¹⁸ Thus, San Diego County’s heightened permit requirement “impermissibly infringe[d] on the Second Amendment right to bear arms in lawful self-defense.”³¹⁹

The Ninth Circuit disagreed with the Second, Third, and Fourth Circuit’s determinations that their respective state’s heightened requirements were substantially related to governmental interests.³²⁰ The court offered two reasons why these circuits inappropriately applied intermediate scrutiny.³²¹ First, their analyses were “near-identical to the freestanding ‘interest-balancing inquiry’” explicitly rejected by the majority in *Heller*.³²² According to the Ninth Circuit, the courts improperly relied on the “legislatures’ determinations weighing the government’s interest in public safety against an individual’s interest in his Second Amendment right to bear arms.”³²³ Second, the circuit courts deferred to the state legislature too readily.³²⁴ The Ninth Circuit asserted that the Second, Third, and Fourth Circuits misinterpreted and misapplied their citation to *Turner Broadcasting System, Inc. v. FCC*³²⁵ “for the proposition that courts must afford deference to legislative findings.”³²⁶ The Ninth Circuit explained that *Turner* instructs courts to apply deference only when determining whether a “real harm” exists that amounts to an “important government[al] interest.”³²⁷ But when “assessing ‘the *fit* between the asserted interests and the means chosen to advance them’” (i.e., prong two of the *Marzzarella* test), the *Turner* court did not afford the legislature such deference.³²⁸ Instead, the Court required the state to “prove that the statute did not burden the right ‘substantially more . . . than is necessary to further [the government’s legitimate] interests.’”³²⁹ The Ninth Circuit asserted that in

318. *Id.* at 1169 (internal quotation marks omitted).

319. *Id.* at 1179.

320. *See id.* at 1175–78 (critiquing *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012)). Recall that the Second Circuit concluded it “owed ‘substantial deference to the predictive judgments of [the legislature]’ regarding the degree of fit between the regulations and the public interest they aimed to serve.” *Id.* at 1176 (alteration in original) (quoting *Kachalsky*, 701 F.3d at 97). The Third Circuit “deferred to the legislature’s judgment that the permitting regulations would serve its interest in ensuring public safety even though ‘New Jersey [could not] present[] [the court] with much evidence to show how or why its legislators arrived at this predictive judgment.’” *Id.* (alteration in original) (quoting *Drake*, 724 F.3d at 437). The Fourth Circuit “relied on the legislature’s judgment that ‘reduc[ing] the number of handguns carried in public’ would increase public safety and prevent crime, despite conflicting evidence on the issue.” *Id.* (alteration in original) (quoting *Woollard*, 712 F.3d at 879–82).

321. *See id.* at 1176–77.

322. *Id.* at 1176 (citing *District of Columbia v. Heller*, 554 U.S. 570, 634–35, 689–90 (2008) (Breyer, J., dissenting)).

323. *Id.* (citing *Drake*, 724 F.3d at 439; *Woollard*, 712 F.3d at 880; *Kachalsky*, 701 F.3d at 100).

324. *Id.* at 1177.

325. 520 U.S. 180 (1997).

326. *Peruta*, 742 F.3d at 1177.

327. *Id.* (citing *Turner*, 520 U.S. at 195).

328. *Id.* (quoting *Turner*, 520 U.S. at 213) (emphasis added).

329. *Id.* (quoting *Turner*, 520 U.S. at 214) (alteration in original).

all three circuit courts, the state failed to satisfy this burden, and the heightened permit requirements should have been held unconstitutional.³³⁰

In the end, the Ninth Circuit held that because a citizen's ability to carry firearms in public was restricted by a dual regulation (i.e., heightened requirements for concealed carry permits and full ban on open carry), a citizen in effect had no ability to carry firearms in public.³³¹ Thus, the good cause requirement, as interpreted by San Diego County, was found unconstitutional.³³²

2. Seventh Circuit: Dismantling a Wholesale Ban

The Seventh Circuit in *Moore v. Madigan* found that Illinois's law regarding carrying firearms in public, which in effect constituted a "flat ban," was an unconstitutional burden on the Second Amendment.³³³ This law differed significantly from those discussed in the previous four cases, as the statute did not include a heightened permit requirement per se. Rather, the statute at issue here was reminiscent of the District of Columbia's stringent law at issue in *Heller*.³³⁴ Judge Posner acknowledged that the state faced a high burden in justifying such a Draconian law.³³⁵ The court referenced a previous case, *United States v. Skoien*,³³⁶ in which the government had to make a "strong showing" that a restriction on firearm possession was essential, and not merely a rational means, for protecting public safety.³³⁷ The state in *Moore* had a greater burden for this showing than in *Skoien*, where the regulation curtailed gun rights of individuals convicted of domestic violence;³³⁸ here, the regulation curtailed the rights of "the entire law-abiding adult population of Illinois."³³⁹ Given the stringency of this statute, the court rejected adopting a particular level of scrutiny.³⁴⁰ Rather, a restriction with the breadth of Illinois's law had to be

330. See *id.* at 1177–78.

331. See *supra* notes 312–19 and accompanying text.

332. See *Peruta*, 742 F.3d at 1179.

333. See *Moore v. Madigan*, 702 F.3d 933, 940, 942 (7th Cir. 2012). See *supra* note 144 and accompanying text for summary of the Illinois statute.

334. The Illinois statute forbade a person from carrying a firearm in any location other than his home or business, or in the home of another when invited, unless the firearm was "broken down in a non-functioning state; or [was] not immediately accessible; or [was] unloaded and enclosed in a case . . ." 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4)(i)–(iii) (West Supp. 2010), *invalidated by Moore*, 702 F.3d at 933.

335. See *Moore*, 702 F.3d at 940 ("[S]o substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would. In contrast, when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need.").

336. 614 F.3d 638 (7th Cir. 2010).

337. See *Moore*, 702 F.3d at 940 (discussing *Skoien*, 614 F.3d at 641–44).

338. See *Skoien*, 614 F.3d at 639.

339. *Moore*, 702 F.3d at 940.

340. See *supra* note 231 and accompanying text.

upheld on a positive showing of legitimacy, not “merely on the ground that it’s not irrational.”³⁴¹

The parties presented empirical evidence in an attempt to illustrate the connection between substantial firearm regulation and increased public safety, but Judge Posner concluded that the relationship was unclear.³⁴² Indeed, scholars have found no conclusive evidence from “national law assessments, cross-national comparisons, and index studies” to determine whether stringent firearm regulation is related to decreased violence.³⁴³ Some scholars have gone so far as to comment that even if the concealed carry laws were weakened, it is unlikely that the net effect on crime would be large.³⁴⁴ In addition, the court notes that minimal impact on public safety would occur if courts invalidated restrictive permit requirements because (1) gun possession is concentrated in rural and suburban areas where crime rates are relatively low, (2) these populations are at a lower risk of victimization than individuals in urban areas, and (3) permit holders are at a relatively low risk of misusing guns.³⁴⁵ While Judge Posner conceded that some studies found that an increase in gun *ownership* may cause increased murder rates,³⁴⁶ he notes that the issue in *Moore* was not ownership, but public *carry*.³⁴⁷ Furthermore, an increase in gun ownership is not necessarily a consequence of allowing concealed carry.³⁴⁸ Ultimately, the court was unconvinced that “the empirical literature on the effects of allowing the carriage of guns in public . . . establish[es] a pragmatic defense of the Illinois law.”³⁴⁹

On the other hand, the dissent pointed out “the legislature acted within its authority” when it enacted a ban, as opposed to a permitting system, on concealed carry because empirical evidence, albeit conflicted, supported this conclusion.³⁵⁰ Consistent with the deferential conclusions reached by

341. *Moore*, 702 F.3d at 939 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011)). The state had to provide the court with “more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety.” *Id.* at 942.

342. *See id.* at 936–39.

343. *Id.* at 937 (quoting Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTIVE MED. 40, 59 (2005) (noting that the net effect of crime rates by permitting the carry of firearms in public is inconclusive)).

344. *Id.* at 938 (citing Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009)).

345. *See id.* at 937–38 (citing Cook, Ludwig & Samaha, *supra* note 344, at 1082).

346. *See id.* at 938 (citing Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1106–07 (2001)).

347. *See id.*

348. *See id.* (citing Duggan, *supra* note 346, at 1106–07).

349. *Id.* at 939 (citing James Bishop, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 922–23 (2012)).

350. *Id.* at 953 (Williams, J., dissenting). “[G]un possession by urban adults was associated with a significantly increased risk of being shot in an assault.” *Id.* at 951 (citing Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (2009)). “[I]n states with broad concealed-carry laws there is an increased chance that one will be a victim of violent crime.” *Id.* (referencing three studies in particular).

the Second, Third, and Fourth Circuits, the dissent's opinion stated that "the possibility of drawing two inconsistent conclusions from the evidence' does not prevent a finding from being supported by substantial evidence."³⁵¹

However, the Seventh Circuit's majority may not have been in absolute disagreement with the Second, Third, and Fourth Circuits, as Judge Posner called upon the Illinois legislature to create a new gun law that imposed reasonable limitations.³⁵² The Seventh Circuit appeared partial to New York's "moderate [regulatory] approach" reviewed in *Kachalsky v. County of Westchester*.³⁵³ The Seventh Circuit commented that other jurisdictions found proper balance between individual rights and public safety by "limit[ing] the right to carry a gun to responsible persons rather than to ban public carriage altogether"³⁵⁴ New York, for example, placed the burden on the *applicant* to demonstrate a particularized need.³⁵⁵ Because the court believed that *some* statute was necessary to regulate the state's firearm regime, the court stayed its mandate for 180 days and directed the legislature to enact a new law that would "impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public."³⁵⁶ The Illinois legislature enacted a new law in 2013.³⁵⁷ However, this licensing scheme may not have been the regulation Judge Posner had in mind when endorsing "reasonable limitations" because the new statute imposes no heightened permit requirement.³⁵⁸

IV. TAKING AIM AT THE STRENGTHS AND WEAKNESSES OF THE CIRCUIT COURTS' DECISIONS

This part evaluates and critiques the analysis of the circuit courts in their decisions regarding concealed carry permit requirements. One common theme emerges: courts must defer to legislative policy decisions only after exercising critical judgment and not blindly rely on legislatures' determinations. A key strategy for exercising critical judgment is to demand that the legislature put forth empirical evidence that the state may use to satisfy its burden of proof. A citizen's Second Amendment right should not be restricted for the sake of public safety unless empirical evidence demonstrates that this infringement benefits the greater public.

351. *Id.* at 952 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997)); *see also* *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 98–99 (2d Cir. 2012) (acknowledging various studies on the relationship between handgun access, violent crime, safety, and character of public places before noting "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments").

352. *Moore*, 702 F.3d at 942 (majority opinion). *See supra* notes 146–48 and accompanying text discussing the permit requirement after *Moore*.

353. *See Moore*, 702 F.3d at 940–41 (discussing *Kachalsky*, 701 F.3d at 81).

354. *Id.* at 940.

355. *Id.* at 941.

356. *Id.* at 942.

357. *See* Firearm Concealed Carry Act, 430 ILL. COMP. STAT. ANN. 66/10 (West 2014).

358. *See supra* note 146 and accompanying text.

This Note does not assert that the judiciary itself should embark on a policy inquiry over the benefit or harm of firearm restriction, but rather that the judiciary should hold state legislatures accountable for *their* policy considerations.

The Third Circuit decision of *Drake v. Filko* illustrates an instance where the court blindly deferred to the legislature and ignored precedents dictating that the burden of proof is on the *state* to demonstrate that the statute's restriction is reasonably linked to public safety.³⁵⁹ The New Jersey legislature offered no evidence that a justifiable need requirement in the state's concealed carry statute would enhance public safety, and thus the state was unable to satisfy its burden of proof.³⁶⁰ However, the court still deferred to the legislative finding.³⁶¹ The dissent pointed out that this deference was completely unwarranted and that the court was remiss in its duties by accepting the state's argument without question.³⁶² The state bore the burden of proof³⁶³ but failed to present an ounce of evidence to support the link between a "justifiable need" requirement and public safety, yet the court still upheld the statute.³⁶⁴

The Fourth Circuit, on the other hand, deferred to the legislature after the state proffered legitimate reasons based on empirical evidence for the legislature's policy decision.³⁶⁵ The Maryland legislature had codified findings to defend the "good and substantial reason" requirement for obtaining a concealed carry permit, demonstrating that the House gave significant thought to its policy decision.³⁶⁶ The court undertook a thorough analysis of the concealed carry statute and applied a textbook intermediate scrutiny analysis to ultimately find the law constitutional.³⁶⁷ Similarly, the Second Circuit deferred to the legislature only after acknowledging that empirical research was inadequate to invalidate the current law.³⁶⁸ The state satisfied its burden by demonstrating that a relationship existed between the "proper cause" requirement and public safety.³⁶⁹ Because both of these courts explicitly adopted intermediate scrutiny, the state did not face an extremely high hurdle in order to justify its laws. Nonetheless, the courts adequately scrutinized the legislatures' decisions, ensuring that citizens' Second Amendment rights were burdened to the least extent possible.

The Seventh Circuit also considered empirical evidence in favor of restricting concealed carry but came to the opposite conclusion—that the

359. *See supra* note 299 and accompanying text.

360. *See supra* notes 222, 291 and accompanying text.

361. *See supra* notes 292–97 and accompanying text.

362. *See supra* notes 298–304 and accompanying text.

363. *See supra* note 222 and accompanying text.

364. *See supra* note 300 and accompanying text.

365. *See supra* notes 259–60 and accompanying text.

366. *See supra* notes 251–55 and accompanying text.

367. *See supra* Part III.B.2. The court first identified whether public safety was a legitimate state interest and then determined whether the heightened permit requirement was substantially related to this interest.

368. *See supra* notes 244–45 and accompanying text.

369. *See supra* notes 243–45 and accompanying text.

statute banning concealed carry was unconstitutional.³⁷⁰ However, these circuit court decisions are not irreconcilable; the stringency of Illinois's statute was the determinative factor in it being found unconstitutional because the state would have had to provide very compelling evidence to justify a wholesale ban on public carry.³⁷¹ The concealed carry statute was simply too restrictive to justify for the sake of public safety.³⁷² Despite the fact that a simplistic analysis could have invalidated this law, Judge Posner chose to consider research presented by both parties.³⁷³ Ultimately, reliable evidence demonstrating a positive relationship between concealed carry and violence did not exist to justify a complete ban on carrying firearms in public. Had the Seventh Circuit's concealed carry statute not been a wholesale ban on firearms in public but rather a "proper cause" or "justifiable need" requirement found in other circuits, it is quite possible that the Seventh Circuit would have found such a statute constitutional.³⁷⁴

The Ninth Circuit's outcome was most similar to the Seventh Circuit in that it invalidated San Diego County's concealed carry regulation;³⁷⁵ however, the opinion in fact is an outlier among the cases reviewed in this Note because the Ninth Circuit approached the challenge to a concealed carry law in a fundamentally different way. Rather than viewing the Second Amendment right as one that may be infringed for the sake of public safety, the court did not consider any state interest at all. By not engaging in any level of constitutional scrutiny, the court had no potential to identify any important government end.³⁷⁶ Furthermore, California is not the only jurisdiction explicitly prohibiting open carry, a determinative fact in the court's holding that restrictions on concealed carry were unconstitutional.³⁷⁷ New York, for example, also prohibited open carry, so it is curious why California placed such great emphasis on this restriction while the Second Circuit found it insignificant. It may stem from a fundamentally different understanding of the Second Amendment altogether. The Ninth Circuit's holding implies that all law-abiding citizens have the right to carry a firearm in public if they desire to do so,³⁷⁸ while the Second Circuit is willing to compromise a citizen's right if it enhances public safety.³⁷⁹ Because of this belief, the Ninth Circuit did not consider

370. *See supra* Part III.C.2.

371. *See supra* notes 337–43 and accompanying text; *see also* Young, *supra* note 193, at 63.

372. *See supra* notes 339–49 and accompanying text.

373. *See supra* notes 342–49 and accompanying text.

374. *See supra* notes 353–56 and accompanying text. Judge Posner states that New York's proper cause requirement struck a proper balance between individual rights and public safety. *See supra* note 354 and accompanying text.

375. *See supra* Part III.C.1.

376. *See supra* note 232 and accompanying text.

377. Two other states considered in this Note also prohibit open carry of firearms: New York and Illinois. *See* N.Y. PENAL LAW § 400.00(2) (McKinney 2008) (permitting system did not have a category allowing for open carry); *see also* 430 ILL. COMP. STAT. ANN. 66/10(c)(1) (West 2014) (allowing individual with a license to carry a loaded or unloaded firearm fully or partially concealed only).

378. *See supra* note 316 and accompanying text.

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

evidence in support of a heightened restriction and in fact criticized the other circuits for deferring to the state legislatures.³⁸⁰

A legislature's assessment of empirical evidence will help legitimize its policy decision to impose a particular restriction. Bolstering a legislative decision with factual data better equips a court to assess the constitutionality of such a statute. Moreover, a court that holds the legislature to a high standard by requiring justification for its decision ensures an appropriate level of legislative deference. While the court should not impose its own judgment upon policy decisions reserved for the legislature, it is important for courts to retain their analytic integrity and exercise a degree of skepticism when evaluating a legislature's reasoning for adopting such a statute. Research conflicts over the issue of gun control and public safety; however, courts' thorough review of a legislature's decisions increases the chance that Second Amendment rights will only be infringed when such regulation does in fact enhance public safety.

CONCLUSION

After *Heller*'s landmark decision establishing the Second Amendment's *individual* right to bear arms for self-defense in the home,³⁸¹ lower courts have struggled to interpret this holding for application to the vast frontier outside of the home. In the case of concealed firearms, five circuit courts have spoken on the constitutionality of statutory restrictions on concealed carry, with three of them finding that heightened requirements for obtaining a permit are constitutional.³⁸² However, with many similar challenges brewing in lower courts, it remains to be seen whether the trend of validating such regulations will continue.

380. See *supra* notes 324–30 and accompanying text.

381. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

382. See *supra* Part III.B.