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THE CONSTITUTIONALITY OF “SPECIAL NEED” LAWS

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INTRODUCTION	122
I. COURTS ARE DIVIDED AS TO WHETHER “SPECIAL NEED” LAWS ARE CONSTITUTIONAL.....	125
A. <i>Heller’s Application Outside the Home is Ambiguous</i>	125
B. <i>The Interstitial Analytical Framework Has Generated Varying Holdings</i>	127
1. Holding 1: Requiring that Gun License Applicants Demonstrate “Good Reason to Fear Injury” in Order to Carry a Firearm in Public Does Not Implicate the Second Amendment Because Such Regulations Are “Longstanding” and Thus Presumptively Lawful Under <i>Heller</i> . Therefore, No Level of Scrutiny Need Be Applied.	128
2. Holding 2: Yes, Requiring that Gun License Applicants Demonstrate a “Special Need” in Order to Carry a Firearm in Public for Self-Defense Burdens the Second Amendment, but Such a Regulation Implicates a Right Outside Its Core. Therefore, Intermediate Scrutiny Is Appropriate.....	130
3. Holding 3: Yes, Requiring that Gun License Applicants Demonstrate a “Special Need” in Order to Carry a Firearm in Public for Self-Defense Implicates the Core of the Second Amendment, Constituting in Effect a Total Ban on Firearm Ownership, Which Is Categorically Unconstitutional.	134
II. DOES THE SECOND AMENDMENT’S “CORE” PROTECT THE PUBLIC CARRIAGE OF GUNS FOR SELF-DEFENSE?	141

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A. <i>Textual Analysis</i>	142
B. <i>Historical Review</i>	146
1. English Law.....	147
2. The Framers' Intent	150
3. Post-Civil War Discourse	153
4. Counterarguments.....	155
C. <i>Judicial Precedent</i>	158
1. Historical Judicial Interpretations of the Right to Bear Arms	158
2. Modern Caselaw on the Right to Bear Arms.....	165
D. <i>Structural Argument</i>	167
E. <i>Prudential Considerations</i>	170
III. IDENTIFICATION AND APPLICATION FOR MEANS-END SCRUTINY	172
A. <i>What Is the Appropriate Means–End Scrutiny to Apply?</i>	173
B. <i>Does the Law Survive Application of Strict Scrutiny?</i>	174
1. Compelling Interest.....	174
2. Narrow Tailoring.....	175
CONCLUSION.....	176

INTRODUCTION

Gun violence is an epidemic in the United States. One hundred Americans are killed with guns every day; hundreds more are injured.¹ Mass shootings are a regular occurrence: since Sandy Hook, there have been nearly 2500 mass shootings.² This means that on average, there is nearly one mass shooting every day.³ What's more, gun violence is a uniquely American problem. The United States leads the developed world in gun deaths, with the civilian gun death rate in the United States nearly four times greater than Switzerland's, five times that of Canada, thirty-five times the U.K.'s, and fifty-three times higher than Japan's.⁴ The United States gun suicide rate is eight times greater and its gun homicide rate twenty-five times higher than that of other high-

¹ *Gun Violence in America*, EVERYTOWN FOR GUN SAFETY (Feb. 20, 2020), https://everytownresearch.org/gun-violence-america/#foot_note_13 [<https://perma.cc/6K97-NMA3>].

² German Lopez & Kavya Sukumar, *Mass Shootings Since Sandy Hook*, in *One Map*, VOX, <https://www.vox.com/a/mass-shootings-america-sandy-hook-gun-violence> [<https://perma.cc/EW6Q-A2VM>] (last visited Apr. 25, 2020). According to the Gun Violence Archive, mass shootings are “events in which four or more people, excluding the shooter, were shot . . . at the same general time and location.” German Lopez, *In the Year After Parkland, There Was Nearly One Mass Shooting a Day*, VOX (Feb. 14, 2019), <https://www.vox.com/2019/2/14/18223613/parkland-mass-shootings-gun-violence-map-charts-data> [<https://perma.cc/8F98-6THR>].

³ *Id.*

⁴ See Mohsen Naghavi, *Global Mortality from Firearms, 1990–2016*, 320 JAMA 792, 797–806 (2018) (comparing the mortality rate per 100,000 people of all 195 countries).

income countries.⁵ American women in particular are nearly sixteen times more likely to be killed with a gun than women in other high-income countries.⁶

This epidemic has led several states to implement “proper cause” regulatory regimes, under which individuals may not carry firearms in public unless they have a valid statutory reason. Although self-defense is one such sanctioned reason for an unrestricted license to carry, applicants may not simply assert a general desire to protect themselves; rather, they must demonstrate a “special need” for self-defense in order to receive an unrestricted license to carry firearms in public. Hence, these regulations are called “special need,”⁷ “justifiable need,”⁸ “good cause,”⁹ “good reason to fear injury,”¹⁰ and “good and substantial reason”¹¹ laws.

⁵ Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries*, 129 AM. J. MED. 266, 268–69 (2010).

⁶ *Id.* at 270.

⁷ In New York, to establish proper cause to obtain a license without any restrictions, an applicant must “demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (citation omitted).

⁸ Under New Jersey’s Handgun Permit Law, applicants must demonstrate a justifiable need in order to carry a handgun in public. *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013). “Justifiable need” means “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.” N.J. ADMIN. CODE § 13:54–2.4(d)(1) (2020).

⁹ Hawaii limited the open carry of firearms to those “engaged in the protection of life and property” and the concealed carry of firearms to those who can demonstrate an “exceptional case,” when an applicant shows reason to fear injury to the applicant’s person or property. *Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (citing HAW. REV. STAT. § 134-9 (2019)).

¹⁰ Massachusetts may issue a license to carry as long as “the applicant can demonstrate a ‘proper purpose’ for carrying a firearm,” which includes good reason to fear injury. *Gould v. Morgan*, 907 F.3d 659, 663 (1st Cir. 2018) (citing *Ruggiero v. Police Comm’r*, 464 N.E.2d 104, 107 (1984)). This “requir[es] that an applicant furnish some information to distinguish his own need for self-defense from that of the general public . . . above and beyond a generalized desire to be safe.” *Id.* The District of Columbia limited licenses for the concealed carry of handguns (the only type of permissible carriage) to those showing a “good reason to fear injury to [their] person or property” or “any other proper reason for carrying a pistol.” *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (citing D.C. CODE § 22-4506(a)–(b) (2015)). “To receive a license based on the first prong—a ‘good reason to fear injury’—applicants must show a ‘special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant’s life.’” *Id.* (citing D.C. CODE § 7-2509.11(1)(A)).

¹¹ Maryland issues gun permits upon finding “the applicant has [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 v. Gallagher*, 712 F.3d 865, 869 (4th Cir. 2013) (citing MD. CODE ANN., PUB. SAFETY § 5–306(a)(5)(ii) (West 2020)).

Because current Supreme Court caselaw on the Second Amendment technically concerns the right to keep arms in the home,¹² the lawfulness of “special need” laws—which restrict public carriage—is uncertain. Part I of this Comment reveals that circuit court holdings addressing the constitutionality of these regulations run the gamut. Utilizing a clear framework approved by the Supreme Court, circuit courts first determine whether “special need” laws and their ilk burden a Second Amendment right. If so, they select and apply the appropriate means–end scrutiny in determining whether or not these regulations pass constitutional muster. Through these straightforward steps, one circuit court has held that “special need” laws do not implicate the Second Amendment at all, given their “longstanding” history; three circuit courts have assumed for analytical purposes that the Second Amendment grants the right to carry firearms in public for self-defense, but have upheld the burden on this “noncore” right through application of intermediate scrutiny; another court has held outright that the Second Amendment has some application outside the home, but has nevertheless upheld the regulation under intermediate scrutiny; two circuits have found not only that “special need” laws burden the “core” Second Amendment right of self-defense, but that these regulations constitute total bans that are *per se* unconstitutional under any level of scrutiny. Despite the variety of conclusions on the constitutionality of “special need” laws by the circuit courts, however, no court, I argue, has thus far gotten it right.¹³

I explain why that is in Parts II and III. The crux of this issue is whether the “core” of the Second Amendment protects the right to carry a firearm in public for the purpose of self-defense. Through textual, historical, doctrinal, structural, and prudential analyses, I show that it does. Yet the next step is not to unilaterally declare these discretionary permitting regimes as complete and unconstitutional prohibitions on the right to bear arms in public for self-defense, as I argue in Part III. Rather, strict scrutiny is the proper test to apply in evaluating the constitutionality of “special need” laws. Applying this test, I conclude that, while upon first glance “special need” regimes appear to fail strict scrutiny, creative analysis suggests these laws may in fact meet the narrow tailoring requirement.

¹² See *infra* Section I.A (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

¹³ Given the circuit split, it is only a matter of time before the Supreme Court answers this question. See *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018) (ruling that premises licensing, which limits handgun owners’ ability to remove handguns from their homes, does not violate the Second Amendment), *cert. granted*, 139 S. Ct. 939 (2019); see also *Malpasso v. Pallozzi*, 767 F. App’x 525 (4th Cir. 2019), *petition for cert. filed*, 2019 WL 4795673 (U.S. Sep. 26, 2019) (No. 19-423) (affirming dismissal of a Second Amendment challenge to Maryland’s requirement that those seeking handgun carry licenses have a good and substantial reason to carry).

I. COURTS ARE DIVIDED AS TO WHETHER “SPECIAL NEED” LAWS ARE CONSTITUTIONAL

A. *Heller’s Application Outside the Home is Ambiguous*

The controlling Supreme Court case on the Second Amendment is *District of Columbia v. Heller*.¹⁴ At the time, a District of Columbia law prohibited handgun possession, including in the home.¹⁵ “It also require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.”¹⁶ Dick Heller, a D.C. police officer, was denied a license to keep a handgun in his home, and subsequently challenged the District’s regulation insofar as it prohibited the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibited the use of “functional firearms within the home.”¹⁷

The key issue in *Heller* was whether the Second Amendment conferred an broad individual right to keep and bear arms, or whether that right was granted only in relation to militia service.¹⁸ To answer this question, Justice Scalia—writing for the majority—first undertook a thorough textual analysis followed by a lengthy historical review. Explaining that the Second Amendment could be broken down into its prefatory clause (“A well regulated Militia, being necessary to the security of a free State,”) and operative clause (“the right of the people to keep and bear Arms, shall not be infringed.”), the Court proceeded to analyze each.¹⁹ The original meaning of “bear,” the majority stated, was to “carry,” not necessarily in connection with militia service.²⁰ Thus the operative clause “guarantee[d] the individual right to possess and carry weapons in case of confrontation.”²¹ But did that individual right to bear arms fit with the prefatory clause, given that it explicitly mentions a militia? Justice Scalia answered:

¹⁴ *Heller*, 554 U.S. 570.

¹⁵ *Id.* at 574–75.

¹⁶ *Id.* at 628.

¹⁷ *Id.* at 575–76.

¹⁸ As the Court explained,

The two sides in this case have set out very different interpretations of the [Second] Amendment. Petitioners . . . believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

Id. at 577 (citations omitted).

¹⁹ *Id.* at 577.

²⁰ *Id.* at 584.

²¹ *Id.* at 592.

It is . . . entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the *only* reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.²²

Thus, for the first time, the Court held firmly that the Constitution did indeed recognize a right of “law-abiding, responsible citizens” to keep and bear arms for lawful purposes, unconnected with participation in military service.²³

Having recognized this right, the Court proceeded to ask whether District of Columbia law impermissibly violated it. The handgun ban, the Court found, prohibited an entire class of firearms on which the American people rely for self-defense.²⁴ And the requirement that any firearm in the home be rendered inoperable made it impossible for citizens to use their weapons for that “core lawful purpose of self-defense.”²⁵ The fact that this ban and these requirements extended to the home, the Court reasoned, “where the need for defense of self, family, and property is most acute,” meant that the law would fail constitutional muster under *any* level of scrutiny.²⁶

Although *Heller* made clear that the use of firearms in defense of hearth and home was protected by the core of the Second Amendment, the scope of the right to keep and bear arms outside the home was left in doubt. This confusion is compounded by the explicit assurance in *Heller* that “the right secured by the Second Amendment is not unlimited. . . . [It is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”²⁷

Nevertheless, both sides of the debate surrounding “special need” laws claim *Heller* for themselves. States with such regulations point to the Court’s observation that “the need for defense of self, family, and property is *most acute*” in the home.²⁸ By characterizing the right to use firearms in self-defense as most acute in the home, their argument goes, the Court “necessarily implied that that right is . . . *less* acute outside the home.”²⁹ In other words, how can a weaker right constitute a core Second Amendment protection?

²² *Id.* at 599 (emphasis added).

²³ *Id.* at 595, 635.

²⁴ *Id.* at 628.

²⁵ *Id.* at 630.

²⁶ *Id.* at 628–29.

²⁷ *Id.* at 626.

²⁸ *Id.* at 628 (emphasis added).

²⁹ *Wrenn v. District of Columbia*, 864 F.3d 650, 669 (D.C. Cir. 2017) (Henderson, J., dissenting) (citations omitted) (emphasis in original).

On the other hand, “the fact that the need for self-defense is most pressing in the home doesn’t mean that self-defense at home is the only right at the Amendment’s core.”³⁰ Rather, *Heller* only mentions the home because the law at issue required that firearms in the home be rendered inoperable at all times. In actuality, much of the opinion focused on the “core lawful purpose of self-defense,” agnostic of where that need arose.³¹

In sum, “[w]hat we do not know is the scope of [the Second Amendment] right beyond the home and the standards for determining when and how the right can be regulated by a government.”³² “This vast ‘*terra incognita*’ has troubled courts since *Heller* was decided.”³³ Given their murky guideposts, it is unsurprising that circuit courts have taken varying approaches to evaluating “special need” laws.³⁴

B. The Interstitial Analytical Framework Has Generated Varying Holdings

Six cases have considered whether states may require an individual demonstrate a “special need” for self-defense to receive a license to carry a firearm in public.³⁵ In the circuit courts, a two-step approach to this question has developed.³⁶ First, courts determine whether the regulation at issue burdens conduct protected by the Second Amendment. If so, courts secondly select the proper standard of means–end scrutiny to use in evaluating that regulation.

Yet, while this approach is described as a two-part test, the inquiry is in reality comprised of several interstitial steps. First, there is a threshold question: does a law requiring applicants demonstrate a valid need for self-defense to receive a license to carry in public burden a Second Amendment right at all? Second, if yes, what is the extent of that burden? Third, with that

³⁰ *E.g., Id.* at 657.

³¹ *Heller*, 554 U.S. at 630.

³² *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).

³³ *Id.* (citing *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)).

³⁴ *See generally* Justine E. Johnson-Makuch, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 *FORDHAM L. REV.* 2757 (2015) (analyzing federal circuit court decisions related to “challenges to statutory restrictions on concealed carry of handguns” post-*Heller*).

³⁵ *Young v. Hawaii*, 896 F.3d 1044, 1053 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019); *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018); *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017); *Woollard v. Gallagher*, 712 F.3d 865, 869 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013); *Kachalsky*, 701 F.3d at 89. Other circuit cases have considered similar questions but are not directly on all fours. *See, e.g., Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) (considering an Illinois law that completely banned the public carriage of firearms in public).

³⁶ *See, e.g., Gould*, 907 F.3d at 668–69 (citing numerous circuit court cases utilizing a two-step approach).

in mind, what is the appropriate means–end scrutiny to apply? And fourth, does the law survive application of that scrutiny? Using this “four-step” approach, there are numerous possible outcomes. Circuit courts have produced three major holdings.

1. Holding 1: Requiring that Gun License Applicants Demonstrate “Good Reason to Fear Injury” in Order to Carry a Firearm in Public Does Not Implicate the Second Amendment Because Such Regulations Are “Longstanding” and Thus Presumptively Lawful Under *Heller*. Therefore, No Level of Scrutiny Need Be Applied.

On one end of the spectrum, the threshold question of whether “proper purpose” laws burden the Second Amendment at all is answered in the negative, immediately ending the constitutional inquiry. This route is based entirely on one sentence in *Heller*:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.³⁷

In a footnote, the Court clarified: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”³⁸

Several circuit courts since *Heller* have interpreted this language as carving out exceptions to the right to keep and bear arms, involving conduct beyond the reach of the Second Amendment entirely.³⁹ This was the approach

³⁷ District of Columbia v. *Heller*, 554 U.S. 570, 626–27 (2008).

³⁸ *Id.* at 627 n.26; *see also* McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (reiterating *Heller*’s note that that it “did not cast doubt on such longstanding regulatory measures”).

³⁹ *See* United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010) (finding “presumptively lawful” to mean a prohibition that regulates conduct “outside the scope of the Second Amendment,” a “better reading, based on the text and the structure of *Heller*,” than one that would require “lawful” regulations to satisfy every level of constitutional scrutiny); *see also* *Wrenn*, 864 F.3d at 659 (noting that in *Heller*, the Supreme Court held that “legal regulations of possession or carrying that are ‘longstanding’ . . . reflect limits to the . . . right protected by the [Second] Amendment.”); *Drake*, 724 F.3d at 431 (“[C]ertain 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 Amendment.”); United States v. Huet, 665 F.3d 588, 600 (3d Cir. 2012) (“[T]he longstanding limitations mentioned by the Court in *Heller* are exceptions to the right to bear arms.”), *overruled on other grounds by* *Binderup v. Att’y Gen.*, 836 F.3d 336 (3d Cir. 2016); United States v. Barton, 633 F.3d 168, 172 (3d Cir. 2011) (“[T]he

taken by the Third Circuit in *Drake v. Filko*,⁴⁰ which considered the constitutionality of New Jersey’s “justifiable need” law.⁴¹ The requirement that applicants demonstrate such need, the court reasoned, constituted “a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller*,” and thus “regulates conduct falling outside the scope of the Second Amendment’s guarantee.”⁴²

In reaching this conclusion, the Third Circuit engaged in a simple comparative analysis. For a regulation to qualify as “longstanding,” the court asserted, did not require that it date back to the Founding.⁴³ As the D.C. Circuit noted in *Heller v. District of Columbia (Heller II)*, the Supreme Court “considered ‘prohibitions on the possession of firearms by felons’ to be ‘longstanding,’” but states did not enact those laws until the early twentieth century.⁴⁴ Laws identical to New Jersey’s “justifiable need” requirement were “adopted in the same era that states began adopting the felon in possession statutes that *Heller* explicitly recognized as being presumptively lawful longstanding regulations.”⁴⁵ Thus, if passage in the early twentieth century was enough to confer historical legitimacy on one firearm law

Supreme Court’s discussion in *Heller* of the categorical exceptions to the Second Amendment was not abstract and hypothetical; it was outcome-determinative.”); *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (resting the conclusion that the ban of juvenile possession of handguns did not violate the Second Amendment’s right to bear arms “on the existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns,” obviating the need to subject the regulation to any form of scrutiny).

⁴⁰ *Drake*, 724 F.3d 426.

⁴¹ N.J. ADMIN. CODE § 13:54–2.4(d)(1) (2020) (defining “justifiable need” 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”).

⁴² *Drake*, 724 F.3d at 434.

⁴³ *Id.*

⁴⁴ *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011); *see also Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196–97, 203 (5th Cir. 2012) (holding that a statute prohibiting the sale of handguns to buyers under twenty-one was consistent with the “longstanding tradition of age- and safety-based restrictions” on access to weapons, which Congress did not adopt until 1968); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 90 n.11 (2d Cir. 2012) (noting that the laws listed as “presumptively lawful” in *Heller* were not enacted until the early twentieth century (citations omitted)); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (“The first federal statute disqualifying felons from possessing firearms was enacted in 1938.”); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (“[L]egal limits on the possession of firearms by the mentally ill . . . are of 20th Century vintage; § 922(g)(4), which forbids possession by a person ‘who has been adjudicated as a mental defective or . . . committed to a mental institution’, was not enacted until 1968.” (citations omitted)).

⁴⁵ *Drake*, 724 F.3d at 433 (citations omitted).

(banning felony possession), then surely that presumptive legality held for others enacted during the same era (including “proper cause” requirements).⁴⁶

Taking a more general perspective, the Third Circuit noted, yields the same result. Although “special need” laws may only date back to the early twentieth century, there is a “longstanding tradition of regulating the public carrying of weapons for self-defense,” involving even older laws.⁴⁷ In the mid to late nineteenth century, “most states enacted laws banning the carrying of concealed weapons, and some states went even further . . . banning concealable weapons (subject to certain exceptions) altogether whether carried openly or concealed.”⁴⁸ Thus, broadening the category to regulations on public carriage *generally*, as opposed to “special need” regulations *specifically*, provides even further support for the assertion that such laws are sufficiently “longstanding” to confer presumptive legality. As such, the court upheld New Jersey’s “justifiable need” law.⁴⁹

It is worth reiterating that the Third Circuit’s conclusion was, in and of itself, dispositive of the law’s constitutionality; when the four-step framework is resolved at this threshold inquiry, there is no need to apply any level of scrutiny. In other words, finding that the “justifiable need” law regulates an area excepted by the Second Amendment means that the regulation does not burden the Second Amendment’s guarantees. At the risk of stating the obvious, without a burden on a constitutional right in the first place, there is no way to investigate the extent of that burden.

2. Holding 2: Yes, Requiring that Gun License Applicants Demonstrate a “Special Need” in Order to Carry a Firearm in Public for Self-Defense Burdens the Second Amendment, but Such a Regulation Implicates a Right Outside Its Core. Therefore, Intermediate Scrutiny Is Appropriate.

Most circuit courts, however, *do* proceed to the next interstitial step, deciding whether the public carriage of firearms in self-defense is a core Second Amendment right. Some opinions assume for analytical purposes that “special need” laws burden a constitutional right, meaning that courts accept, without deciding, that the Second Amendment has some application outside

⁴⁶ *Id.* at 434.

⁴⁷ *Id.* at 433.

⁴⁸ *Id.* (citing *Kachalsky*, 701 F.3d at 95–96) (internal quotation marks omitted).

⁴⁹ The Third Circuit could have concluded its analysis at this dispositive first step. See *Drake*, 724 F.3d at 430 (“[W]e need not move to the second step.”). It nevertheless chose to further bolster its holding “because of the important constitutional issues presented,” *id.*, proceeding to the second and third interstitial steps. *Supra* notes 40–48 and accompanying text.

the home for the purpose of self-defense.⁵⁰ Another has held outright that the Second Amendment protects public carriage in some circumstances.⁵¹ Since “the appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right,” courts in this category then proceed to ask whether the right to carry firearms outside the home in self-defense is a core Second Amendment right.⁵²

The First, Second, Third, and Fourth Circuits have held that it is not.⁵³ In *Kachalsky v. County of Westchester*,⁵⁴ the Second Circuit considered the issue of whether New York could “limit handgun licenses to those demonstrating a special need for self-protection.”⁵⁵ The “critical difference” between the “special need” requirement and the law struck down in *Heller*, the court reasoned, was that the former limited the ability to carry firearms in *public*, whereas the latter banned guns in the *home*.⁵⁶ The law thus affected conduct that fell “outside the core Second Amendment protections identified in *Heller*.”⁵⁷

The Fourth Circuit considered an identical issue in *Woollard v. Gallagher*, determining whether Maryland’s regulation requiring that applicants demonstrate “good and substantial reason” in order to receive handgun permits violated the Second Amendment.⁵⁸ The court “refrain[ed] from any assessment of whether Maryland’s [rule] implicate[d] Second Amendment protections,” but

⁵⁰ *Drake*, 724 F.3d at 435; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky*, 701 F.3d at 89.

⁵¹ The First Circuit explained:

[T]he *Heller* Court stated that prohibitions on carrying firearms in ‘sensitive places’ are ‘presumptively lawful’—a pronouncement that would have been completely unnecessary if the Second Amendment right did not extend beyond the home at all. Reading these tea leaves, we view *Heller* as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home.

Gould v. Morgan, 907 F.3d 659, 670 (1st Cir. 2018) (citations omitted).

⁵² *Id.* at 670–71.

⁵³ *See id.* at 671 (“We make explicit today . . . that the core Second Amendment right is limited to self-defense in the home.”); *Drake*, 724 F.3d at 431 (“We do, however, recognize that the Second Amendment’s individual right to bear arms *may* have some application beyond the home.”); *Woollard*, 712 F.3d at 874 (interpreting the “core protection” in *Heller* as “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008))); *Kachalsky*, 701 F.3d at 94 (“The proper cause requirement falls outside the core Second Amendment protections identified in *Heller*.”).

⁵⁴ *Kachalsky*, 701 F.3d 81 (2d Cir. 2012).

⁵⁵ *Id.* at 91.

⁵⁶ *Id.* at 94.

⁵⁷ *Id.*

⁵⁸ *Woollard*, 712 F.3d at 869 (citing MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (2020)).

stuck to the narrow view that the “core protection” described in *Heller* was only “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁵⁹ Thus, to the extent that an outside-the-home regulation burdened the Second Amendment at all, it restricted a noncore protection.

In *Drake*, after the Third Circuit found New Jersey’s “justifiable need” regulation constituted a longstanding exception to the Second Amendment’s protection,⁶⁰ it nevertheless proceeded to the next interstitial step, given the “critical importance” of the constitutional matters.⁶¹ Like the Second and Fourth Circuits, the court found that if “the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is *not* part of the core of the Amendment.”⁶²

The First Circuit was the most recent court to consider a “special need” licensing scheme in *Gould v. Morgan*.⁶³ Unlike the Second, Third, and Fourth Circuits, the First Circuit held that the “right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home.”⁶⁴ Nevertheless, the court made “explicit . . . that the *core* Second Amendment right is limited to self-defense in the home.”⁶⁵

Each one of these circuit courts, after finding that public carriage for self-defense is, at most, a noncore Second Amendment right, proceeded to hold in the third interstitial step that intermediate scrutiny was the proper means–end test to evaluate the constitutionality of “special need” laws.

By way of background, courts arriving at the third interstitial step select the appropriate means–end scrutiny review from three options: rational basis, intermediate scrutiny, and strict scrutiny. Rational basis review entails a presumption that the regulation at issue is lawful and asks simply whether the statute bears a rational link to a legitimate public interest.⁶⁶ But the *Heller* Court ruled out rational basis review in Second Amendment cases because it “would be redundant with the separate constitutional prohibitions on irrational laws.”⁶⁷ That leaves intermediate scrutiny and strict scrutiny as the available tests. Intermediate scrutiny necessitates a substantial relationship between the regulation at issue and an important governmental interest, whereas strict scrutiny demands that a law be narrowly tailored to achieve a

⁵⁹ *Id.* at 874, 876 (citation omitted).

⁶⁰ *Supra* notes 40–48 and accompanying text.

⁶¹ *Drake*, 724 F.3d at 434–35.

⁶² *Id.* at 436 (emphasis added) (citations omitted).

⁶³ *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018).

⁶⁴ *Id.* at 670.

⁶⁵ *Id.* at 671 (emphasis added).

⁶⁶ *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (defining rational basis review).

⁶⁷ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

compelling public interest.⁶⁸ In choosing between the two tests, the First Circuit explained in *Gould*:

[T]he appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right. A law or policy that burdens conduct falling within the core of the Second Amendment requires a correspondingly strict level of scrutiny, whereas a law or policy that burdens conduct falling outside the core of the Second Amendment logically requires a less demanding level of scrutiny.⁶⁹

In other words, the level of heightened scrutiny to apply turns on whether the law at issue impinges on the core of the Second Amendment’s protections:⁷⁰ If it does, strict scrutiny is warranted; if it does not, intermediate scrutiny is appropriate. Since the First, Second, Third, and Fourth Circuits all found the public carriage of firearms in self-defense to constitute a noncore right, all four courts elected to apply intermediate scrutiny.⁷¹

In the final step of the four-part framework, each of these circuit courts found that the “special need” laws survived application of intermediate scrutiny. The asserted governmental interest of protecting public safety and preventing crime (particularly violent crime committed with handguns), the courts concluded, is indisputably important.⁷² The bulk of the application in

⁶⁸ See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010)) (defining strict scrutiny); *Gould*, 907 F.3d at 674 (defining intermediate scrutiny).

⁶⁹ *Gould*, 907 F.3d at 670–71 (citations omitted).

⁷⁰ Analogizing to First Amendment jurisprudence provides further support for the key core versus noncore distinction in selecting between strict and intermediate scrutiny, respectively. Just as policies regulating speech outside the core protections of the First Amendment are subject to intermediate, not strict, scrutiny, so too must intermediate scrutiny be triggered for those firearm regulations implicating rights outside the core of the Second Amendment. Compare *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny to content-based restrictions on noncommercial speech), with *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (applying intermediate scrutiny to regulations on commercial speech).

⁷¹ *Gould*, 907 F.3d at 672; *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

⁷² See *Gould*, 907 F.3d at 673 (“It cannot be gainsaid that Massachusetts has compelling governmental interests in both public safety and crime prevention.”); *Drake*, 724 F.3d at 437 (“The State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens’ safety.”); *Woollard*, 712 F.3d at 877 (“Appellees concede that ‘a compelling government interest in public safety’ generally exists”); *Kachalsky*, 701 F.3d at 97 (“As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.”).

these opinions thus focused on the “fit” piece of the inquiry, analyzing whether the limitation on the public carriage of firearms to those with a demonstrable need for self-defense substantially furthers the objective of safety. Emphasizing that the connection need only be “reasonable” and deferring to the judgment of state legislatures, the circuit courts found that the relationship was adequately substantial.⁷³ Thus, all four “special need” firearm policies passed constitutional muster.

3. Holding 3: Yes, Requiring that Gun License Applicants Demonstrate a “Special Need” in Order to Carry a Firearm in Public for Self-Defense Implicates the Core of the Second Amendment, Constituting in Effect a Total Ban on Firearm Ownership, Which Is Categorically Unconstitutional.

Like the previous group of opinions, the third and final resolution on the constitutionality of “special need” laws reaches the second and third interstitial steps of the framework. But in this category, courts have instead held that the right to carry a firearm in public for the purpose of self-defense *does* constitute a core Second Amendment protection. Rather than apply strict scrutiny, however, the D.C. and Ninth Circuits have characterized the “special need” regulations as total bans on gun ownership, declaring them *per se* unconstitutional.

In *Wrenn v. District of Columbia*,⁷⁴ the D.C. Circuit considered a law confining the public carriage of handguns to those with a “special need” for self-defense. The court found that the core of the Second Amendment protects the right to keep and bear arms for self-defense—regardless of where that need arises.⁷⁵ Recognizing that it was alone in this holding, the opinion criticized other circuits for failing to engage in the sufficiently rigorous historical analysis required by *Heller*.⁷⁶ Despite this encroachment on a core Second Amendment right, however, the court declined to apply strict

⁷³ See *Gould*, 907 F.3d at 674 (“[T]he fit between the asserted governmental interests and the means chosen to advance them is close enough to pass intermediate scrutiny.”); *Drake*, 724 F.3d at 439 (“As to the requirement that the ‘justifiable need’ standard not burden more conduct than is reasonably necessary, we agree with the District Court that the standard meets this requirement.”); *Woollard*, 712 F.3d at 880 (“[T]here is a reasonable fit between the good-and-substantial-reason requirement and Maryland’s objectives of protecting public safety and preventing crime.”); *Kachalsky*, 701 F.3d at 100 (granting deference to New York’s determination that “limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety”).

⁷⁴ *Wrenn v. District of Columbia*, 864 F.3d 650, 664–67 (D.C. Cir. 2017).

⁷⁵ *Id.* at 661.

⁷⁶ *Id.*

scrutiny.⁷⁷ Rather, because the regulation permitted only a small minority of applicants to carry firearms in public for self-defense, the “special need” requirement was akin to a total ban for the average, law-abiding citizen.⁷⁸ Analogizing D.C.’s regulation to the “complete prohibition[.]” struck down in *Heller*, the D.C. Circuit held that such total bans were “always invalid.”⁷⁹

Similarly, in *Young v. Hawaii*, the Ninth Circuit evaluated the constitutionality of a Hawaii statute limiting open carry of firearms to those “engaged in the protection of life and property.”⁸⁰ It is worth noting that this case differs slightly from others that have considered “special need” laws because of the emphasis placed by the Ninth Circuit on open versus concealed carry.⁸¹ Nevertheless, the court’s holding that *Heller* recognized a core Second Amendment right of self-defense—both inside and outside the home—is relevant. Like the D.C. Circuit, the Ninth Circuit noted that “[a] law that imposes such a severe restriction on [a] core right [of the Amendment] that it ‘amounts to a destruction of the . . . right,’ is unconstitutional under any level of scrutiny.”⁸² Finding that Hawaii’s “special need” law restricted “open carry to a small and insulated subset of law-abiding citizens,” it thus constituted, in effect, a total destruction of a core right, automatically violating the Second Amendment.⁸³

C. Despite Six Cases, No Circuit Court Has Gotten It Right

Each one of these three approaches taken by six Circuit courts is vulnerable to criticism.

First, the contention that “special need” laws do not burden the Second Amendment at all, while perhaps logically convincing, is intuitively mistaken. A cursory glance at the text supports this intuition. How can a law

⁷⁷ *Id.* at 665–67.

⁷⁸ *Id.* at 667.

⁷⁹ *Id.* at 665 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)).

⁸⁰ *Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (quoting HAW. REV. STAT. § 134-9 (2019)).

⁸¹ In a prior decision, *Peruta v. Cty. of San Diego (Peruta II)*, 824 F.3d 919 (9th Cir. 2016) (en banc), the Ninth Circuit held that “the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.” *Id.* at 939. But the court explicitly left unresolved the question of whether the Second Amendment encompasses a right to open carry. *See id.* (“There may or may not be a Second Amendment right for a member of the general public to carry a firearm *openly* in public. The Supreme Court has not answered that question, and we do not answer it here.” (emphasis added)).

⁸² *Young*, 896 F.3d at 1068 (quoting *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)).

⁸³ *Id.* at 1071.

limiting who may carry a gun in public constitute an “exception” to the Second Amendment, which makes explicit the right to bear arms? Even accepting the argument that conduct outside the home is appropriately subject to stronger state regulation, to assert that the public domain is *entirely* beyond the reach of the Second Amendment’s guarantees seems, *prima facie*, a bridge too far.⁸⁴

Perhaps the Third Circuit’s conclusion would be less dubious if its comparative analysis were more airtight. The court’s juxtaposition of the enactment dates of laws deemed by *Heller* as “longstanding” with the enactment dates of “special need” regulations is an admittedly enticing oversimplification. It is true that states did not begin enacting prohibitions on firearm possession by felons—described in *Heller* as a “longstanding” rule—until the early twentieth century. But these prohibitions had “historical pedigrees that originated with the founding generation.”⁸⁵ Indeed, “[d]ebates from the Pennsylvania, Massachusetts and New Hampshire ratifying conventions, which were considered ‘highly influential’ by the Supreme Court in *Heller*, also confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.”⁸⁶ Although “a precise founding-era analogue,”⁸⁷ may not be strictly necessary⁸⁸ to label a firearm regulation as longstanding, “*Heller* requires, at a minimum, that a regulation be rooted in history.”⁸⁹ This historical foundation is missing from the *Drake* majority’s contention that “special need” laws are longstanding.

The court’s invocation of concealed carry bans to support its assertion that the regulation of public carriage generally is a “longstanding tradition,” is also flawed. For one, laws that banned the carriage of concealed firearms

⁸⁴ See *Drake v. Filko*, 724 F.3d 426, 447 (3d Cir. 2013) (Hardiman, J., dissenting) (“Our hesitance to recognize additional exceptions is unsurprising in light of the fact that by doing so we are 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.”).

⁸⁵ *Id.* at 450.

⁸⁶ *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (citation omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008)); see also *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (“Many of the states [in the eighteenth century], whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of crime.”).

⁸⁷ *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012).

⁸⁸ See Adam Winkler, *The Secret History of Guns*, ATLANTIC, (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/8U9H-WJTZ>] (noting that the Founders “had no laws resembling Scalia’s list of Second Amendment exceptions”).

⁸⁹ *Drake*, 724 F.3d at 450 (Hardiman, J., dissenting).

“have little bearing on laws that now regulate both concealed and open carry,”⁹⁰ as do “special need” laws. What’s more, this kind of “longstandingness analysis is conducted at too high a level of generality.”⁹¹ The reference category is not “special need” laws, the regulations at issue, but rather laws regulating public carriage generally. But this is “akin to saying that because the government traditionally could prohibit defamation, it can also prohibit speech criticizing government officials.”⁹² Such a broad inquiry has no support in constitutional law. For instance, when evaluating whether a law is sufficiently longstanding in First Amendment cases, the Supreme Court has looked to that particular type of regulation, not to a broader general category.⁹³ Proving that there has been a “longstanding tradition of regulating the public carrying of weapons for self-defense,”⁹⁴ in reality sheds no light on whether “special need” laws in particular are sufficiently longstanding to confer presumptive legality.

Plus, *Heller* simply established a *presumption* that longstanding regulations were lawful. A presumption is, by definition, rebuttable. The *Heller* Court therefore “did not invite courts onto an analytical off-ramp to avoid constitutional analysis.”⁹⁵ The Third Circuit, in simply juxtaposing “special need” requirements with felony possession laws and observing that some of these laws were enacted in the same era, hastily took this forbidden off-ramp.

In actuality, the “presumptively lawful” passage in *Heller*, like the rest of the opinion, is ambiguous. It “does not suggest that a presumption of constitutionality attaches to the [listed] exceptions. An equally valid, if not better, reading of the language is that the Court presumed that it would find the *Heller* exceptions constitutional *after applying* some analytic

⁹⁰ *Id.* at 451; *see also infra* notes 211–15 and accompanying text (explaining the “ample alternative channels” theory).

⁹¹ *Drake*, 724 F.3d at 451 (Hardiman, J., dissenting).

⁹² *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1294 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

⁹³ *See Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 795 (2011) (considering a First Amendment challenge to a ban on the sale of violent video games: “California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none”); *United States v. Stevens*, 559 U.S. 460, 469 (2010) (considering a First Amendment challenge to a ban on depictions of animal cruelty: “the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. But we are unaware of any similar tradition excluding *depictions* of animal cruelty from ‘the freedom of speech’ codified in the First Amendment . . .” (citations omitted)).

⁹⁴ *Drake*, 724 F.3d at 433.

⁹⁵ *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 686 (6th Cir. 2016).

framework.”⁹⁶ What that framework looks like, however, and which tier of scrutiny it demands, were left up in the air.

Not only is the framework for *evaluating Heller*’s “longstanding exceptions” unclear, but “the approach for *identifying* . . . additional restrictions is also unsettled.”⁹⁷ While the exceptions listed in *Heller* were not purported to be exhaustive, “prudence [nevertheless] counsels caution when extending these recognized exceptions to novel regulations” not explicitly mentioned in the opinion.⁹⁸ To carve out entirely from the Second Amendment’s guarantee an area as vast as the right to bear arms in public for self-defense—when no court has “excepted” this exercise before—is therefore an overreach.

Second, the hasty decisions by the First, Second, Third, and Fourth Circuits that the Second Amendment’s core protections exclude public carriage are likewise faulty. The D.C. Circuit aptly criticized these courts for abandoning the “historical digging” that would have revealed their inferences as faulty.⁹⁹ While the bulk of this Comment is devoted to rigorous constitutional analysis to determine whether the Second Amendment’s core protects the right to carry firearms outside the home for the purpose of self-defense, these circuit courts spill little ink on the issue. The First and Third Circuits provide hardly any historical reasoning.¹⁰⁰ The Second and Fourth Circuits provide little more support, maintaining simply that “outside the home, firearm rights have always been more limited,” and “our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public.”¹⁰¹ Perhaps recognizing its vulnerability to the criticism lobbed in *Wrenn*, the Second Circuit chalks up this gap to alleged historical inconsistencies, pronouncing simply that “[h]istory and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms”¹⁰² Such cursory treatment of

⁹⁶ *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 775 F.3d 308, 324 (6th Cir. 2014), *reh’g en banc granted, vacated* (Apr. 21, 2015), *reh’g en banc*, 837 F.3d 678 (6th Cir. 2016).

⁹⁷ *United States v. Marzzarella*, 614 F.3d 85, 93 (3d Cir. 2010) (emphasis added).

⁹⁸ *Id.*; see also *United States v. Huet*, 665 F.3d 588, 602 (3d Cir. 2012) (“[W]e must tread carefully when deciding whether to find conduct not explicitly identified by the *Heller* Court as subject to ‘presumptively lawful’ restrictions as unprotected by the Second Amendment.”).

⁹⁹ *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017).

¹⁰⁰ *Gould v. Morgan*, 907 F.3d 659, 671–73 (1st Cir. 2018); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013).

¹⁰¹ *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012) (quoting *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011)); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (quoting *Masciandaro*, 638 F.3d at 470).

¹⁰² *Kachalsky*, 701 F.3d at 91.

history and momentary attention to original meaning is especially damning in light of *Heller*’s emphasis on these canons.¹⁰³

Yet the D.C. Circuit is not off the hook, either. Although *Wrenn* was much more rigorous in its historical analysis, its holding that the District’s “special need” law constitutes a total ban falls prey to the same kind of commonsense criticism levied against the Third Circuit’s “presumptively lawful” conclusion. *Wrenn* cited to *Heller* for the rule that “total bans are always invalid”;¹⁰⁴ but *Heller*, unlike *Wrenn*, unequivocally involved a true and complete ban on handguns.¹⁰⁵

By design, “special need” laws and their ilk do not wholly prohibit, but rather explicitly authorize, the public carriage of firearms. To be sure, applicants who fail to demonstrate “good reason to fear injury” may not receive licenses to carry a gun in public whenever they would like to do so. But the fact that some people are permitted to carry guns in public for self-defense, while others are prohibited from doing so, proves only that “special need” laws are discretionary, and thus inherently distinctive from total bans. Stated plainly, a policy that gives certain people *X* while withholding *X* from others cannot, by definition, be characterized as a total ban on *X*.

Recognizing this obvious difference, the D.C. Circuit attempted to recast the ban struck down in *Heller* as somewhat discretionary too, noting the “minor exceptions” the law made for certain owners.¹⁰⁶ But the exceptions in *Heller* were just that: exceptions to the rule, with the rule being a complete prohibition. That is an entirely different animal than the discretionary licensing promulgated under “special need” laws. Under “special need” laws, all licensees may keep and bear arms in the home, a significant portion of applicants are authorized to carry firearms in public for self-defense, and even more are permitted to use guns for hunting, target practice, sport, or transport.¹⁰⁷

¹⁰³ See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (“We look to [the historical background of the Second Amendment] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”).

¹⁰⁴ *Wrenn*, 864 F.3d at 664.

¹⁰⁵ Compare *Heller*, 554 U.S. at 574–75 (“The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited.”), with *Wrenn*, 864 F.3d at 655 (“[R]egulations limit[] licenses for the concealed carry of handguns . . . to those showing a good reason to fear injury to [their] person or property’ or ‘any other proper reason for carrying a pistol.” (internal quotation marks omitted)).

¹⁰⁶ See *id.* (“Of course, the good-reason law isn’t a ‘total ban’ for the D.C. population as a whole of the right to bear common arms under common circumstances.”).

¹⁰⁷ See, e.g., *Gould v. Morgan*, 907 F.3d 659, 664 (1st Cir. 2018) (noting that, under Massachusetts’ “special need” regulation, 35–40% of all licenses in the relevant cities are issued without restrictions).

In fact, the D.C. Circuit's attempt to equate the District's earlier complete prohibition on handguns with its newer discretionary "special need" licensing regime threatens to swallow the rule against total bans. By that logic, *any* law that prohibits some (but not all) citizens from exercising their core Second Amendment right is categorically unconstitutional. Yet that categorical approach flies in the face of the two-step approach adopted by nearly every circuit court after *Heller*, which would "ask first whether a particular provision" burdens a Second Amendment right and then, "if it does, . . . go on to determine whether the provision passes muster *under the appropriate level of constitutional scrutiny*."¹⁰⁸

The D.C. Circuit put forth one final, clever argument in response to these reasonable critiques. Even if the District's "good reason" law differed from the complete prohibition on handguns struck down in *Heller*,¹⁰⁹ the court reasoned, it should nevertheless be considered a total ban from the vantage point of ordinary, law-abiding, responsible citizens.¹¹⁰ In other words, the District's "good reason" law, by requiring that applicants demonstrate a "special need for self-protection distinguishable from the general community," necessarily and completely barred, by design, any "ordinary" citizens (i.e. those lacking extraordinary need) from carrying firearms in public.¹¹¹

But from where exactly the D.C. Circuit devised this vantage point is unclear. While it is true that *Heller* emphasized the right of "law-abiding, responsible citizens,"¹¹² it did not specify that these citizens be "ordinarily situated" or "commonly situated." The Court's repeated reference to firearm possession by "law-abiding, responsible citizens" should not be read to require some sort of "average joe" benchmark, but simply to distinguish between the gun rights of competent, innocent individuals versus, for example, felons and the mentally ill. Contrary to the D.C. Circuit's contention, the *Heller* Court made clear that its reasoning did not "suggest the invalidity of laws" that "do not remotely burden the right of self-defense as much as an absolute ban on handguns."¹¹³ Thus, there is a lack of support for the D.C. Circuit's choice to limit the pool to average citizens—without any particular need for self-

¹⁰⁸ *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (emphasis added); *see also, e.g., Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (recognizing that several circuits have adopted a two-step test and collecting cases).

¹⁰⁹ *See Wrenn*, 864 F.3d at 665 ("Of course, the good-reason law isn't a 'total ban' for the D.C. population as a whole of the right to bear common arms under common circumstances.").

¹¹⁰ *Id.* at 666 ("[I]f *Heller I* dictates a certain treatment of 'total bans' on Second Amendment rights, that treatment must apply to total bans on carrying (or possession) by ordinarily situated *individuals* covered by the Amendment.").

¹¹¹ *Id.* at 655 (citing D.C. CODE § 7-2509.11(1)(A) (2015)).

¹¹² *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

¹¹³ *Id.* at 632.

defense—when determining whether a “good reason” law constitutes a total ban; its radical reading of the Second Amendment to equate discretionary licensing policies with total bans is likewise unfounded.

Even *Young* did not go as far as *Wrenn*. Rather, the Ninth Circuit’s characterization of the “exceptional case” law in *Young* as a total ban was actually valid, considering that Hawaii’s firearms regulations “created a regime under which not a single unrestricted license for public carriage had ever been issued.”¹¹⁴ In fact, the Ninth Circuit took pains to distinguish the Hawaii law from other states’ “special need” regulations under which the “good cause” standard “did not disguise an effective ban on the public carry of firearms.”¹¹⁵ For this reason, *Young* is an outlier among cases to consider “special need” laws; it is most instructive for its extensive textual and historical analysis of the Second Amendment’s core protections.

II. DOES THE SECOND AMENDMENT’S “CORE” PROTECT THE PUBLIC CARRIAGE OF GUNS FOR SELF-DEFENSE?

As the overview of judicial precedent on “special need” laws demonstrates, a key inquiry in the four-step interstitial framework is whether the right to carry firearms in public constitutes the core of the Second Amendment.¹¹⁶ As the controlling precedent, “*Heller* and *McDonald* set the goalposts for our inquiry, which require determining the scope of the Second Amendment with respect to public carry.”¹¹⁷ Undertaking a textual,

¹¹⁴ See *Gould v. Morgan* 907 F.3d 659, 674 (1st Cir. 2018) (discussing *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018)). It is worth noting that numbers matter here. Hawaii’s regulatory regime operated as a total ban because it completely prohibited public carriage by failing to issue a single unrestricted license. Thus, there are cases in which “special need” laws can and should be struck down as unconstitutional under any level of scrutiny. *Wrenn*, considering the District of Columbia’s “good reason” law, was not such a case. In the context of *Wrenn* and its companion case *Grace*, the District had issued 61 unrestricted licenses in the nearly three months since the “good reason to fear injury” rule was promulgated by the Chief of Police. Brief for Plaintiffs-Appellees at 7, *Wrenn v. District of Columbia*, 864 F.3d 650, 124 (D.C. Cir. 2017) (No. 16-7067).

¹¹⁵ *Young*, 896 F.3d at 1072.

¹¹⁶ Commentators have interpreted *Heller* as taking “a categorical approach in which ‘core’ Second Amendment interests receive something close to absolute protection, while more penumbral interests are subject to greater regulation.” Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 444 (2011).

¹¹⁷ *Young*, 896 F.3d at 1051.

historical, doctrinal, structural, and prudential analysis,¹¹⁸ I argue that the right to keep and bear arms in self-defense—irrespective of location—is at the core of the Second Amendment, completing the first two steps of the interstitial framework.

Our lodestars in this analysis are “text and history,”¹¹⁹ since “they bear most strongly on what the right was understood to mean, at the time of enactment, to the public.”¹²⁰ Thus, this Section begins with a textual and historical evaluation of the Second Amendment. Both of these canons of constitutional construction show that public carriage in self-defense is a core Second Amendment right. The plain meaning of the phrase “bear arms”—to carry for the purpose of defending oneself—compels this conclusion. Likewise, the rigorous historical analysis required by *Heller* demonstrates that the Framers understood the Second Amendment to codify their pre-existing right to carry firearms in self-defense.

This Section next considers less weighty, yet nonetheless important, modalities: judicial precedent, structural arguments, and prudential considerations. Although *Heller* and *McDonald* do not directly address the public carriage of firearms in self-defense, both opinions make clear that self-defense is at the core of the Second Amendment. The rest of this Section considers, and ultimately rejects, the structural and prudential considerations which assert that public carriage, even in self-defense, is at most a noncore Second Amendment right.

A. Textual Analysis

As Judge O’Scannlain of the Ninth Circuit stated in *Young*: “We start, as we must, with the text.”¹²¹ The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹²² This language, particularly the right not just to “keep” but also to “bear” arms, must be read to recognize a right to carry a firearm in public. As the Supreme Court explained in *Heller*, “[a]t the time of the founding, as now, to ‘bear’ meant to

¹¹⁸ See generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (identifying six methods, or “modalities,” of constitutional interpretation: historical, textual, doctrinal, prudential, structural, and ethical). Ethical analysis, including, for example, considerations of national ethos, are not included in this Comment.

¹¹⁹ *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

¹²⁰ *Young*, 896 F.3d at 1051.

¹²¹ *Id.* at 1052.

¹²² U.S. CONST. amend. II.

‘carry.’”¹²³ With this plain meaning in mind, the right to bear arms in the Second Amendment quite obviously implies a right to carry firearms in public. For “[t]o speak of ‘bearing’ arms within one’s home,” as Judge Posner commonsensically reasoned, “would . . . have been an awkward usage.”¹²⁴ Put more directly, the Second Amendment does not only protect the right to carry arms “from the bedroom to the living room.”¹²⁵

Even without the Supreme Court’s use of dictionary definitions to indicate that “bear” means “carry,” this construal of the Second Amendment’s language is supported by historical accounts. *Heller*’s “review of founding-era sources,” proves this “natural meaning.”¹²⁶ State constitutional provisions from the eighteenth and early nineteenth centuries, the Court reasoned, codified the right of individuals to “‘bear arms in defense of themselves and the state’” or “‘bear arms in defense of himself and the state.’”¹²⁷ The phrase “bear arms,” therefore, referred to carrying firearms generally, not only by militia members, but by individuals outside of military service as well.¹²⁸

¹²³ *Heller*, 554 U.S. at 584 (citing THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1796); NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprinted 1989); 1 SAMUEL JOHNSON, JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE 161 (4th ed.) (reprinted 1978); THE OXFORD ENGLISH DICTIONARY 20 (2d ed.1989)). As Halbrook explains,

Webster was certainly in a position to know what the second amendment phrase “bear arms” meant. A prominent federalist, he wrote the first major pamphlet in support of the Constitution when it was proposed in 1787, in which he stated: “Before a standing army can rule, the people must be disarmed; as they are in almost every Kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed”

Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms,”* 49 LAW & CONTEMP. PROBS. 151, 157 (1986). Of the circuit courts that have found “special need” laws constitutional, only two—the First Circuit, in *Gould v. Morgan*, 907 F.3d 659, 667 (1st Cir. 2018), and the Third Circuit, in *Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013)—quoted this key textual analysis from *Heller*.

¹²⁴ *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

¹²⁵ Rosenthal & Malcolm, *supra* note 116, at 443 n.33.

¹²⁶ *Heller*, 554 U.S. at 584.

¹²⁷ *Id.* at 584–85 (citing ALA. CONST. art. I, § 23 (1819); CONN. CONST. art. I, § 17 (1818); IND. CONST. art. I, § 20 (1816); MISS. CONST. art. I, § 23 (1817); MO. CONST. art. XIII, § 3 (1820); OHIO CONST. art. VIII, § 20 (1802); PA. CONST. ch. I, § XIII (1776); VT. CONST., ch. I, § XV (1793)).

¹²⁸ *See id.* (“Although the phrase implies that the carrying of the weapon is for the purpose of ‘offensive or defensive action,’ it in no way connotes participation in a structured military organization.”).

As Second Amendment scholars have posited,¹²⁹ that to “bear arms” meant and means merely to carry firearms was evident in game legislation written by Thomas Jefferson and presented by James Madison in the Virginia legislature. The proposed legislation imposed fines on those who killed or hunted deer beyond the defined season and required they post a bond to “be bound to their good behaviour.”¹³⁰ If the individual “shall *bear a gun* out of his inclosed ground, unless whilst performing military duty,” within a year of his violation, “it shall be deemed a breach of the recognizance.”¹³¹ Moving forward, the law would deem “every such bearing of a gun” as a new breach, requiring another bond.¹³² Thus, Thomas Jefferson and James Madison (a draftsman of the Second Amendment) believed that “to ‘bear’ a gun meant to carry it about in one’s hands or on one’s person, as for instance a deer hunter would do.”¹³³

Had the “bear-means-carry” explication been the end of the Supreme Court’s textual analysis in *Heller*, the scope of the Second Amendment’s core protections may well have remained unsettled. But the opinion went on to clarify that in the context of the Second Amendment, to “bear,” when paired with “arms,” means not just to *carry* weapons, but rather to do so “‘for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’”¹³⁴ As Second Amendment scholar

¹²⁹ Halbrook, *supra* note 123, at 153.

¹³⁰ *A Bill for Preservation of Deer* (Oct. 31, 1785), in 2 THE PAPERS OF THOMAS JEFFERSON 443–44 (Julian P. Boyd ed. 1950).

¹³¹ *Id.* at 444 (emphasis added). It is also clear from this language that “bearing arms” is not a phrase solely associated with militia duty, for the legislation’s language refers to the “‘bearing of a gun’ by any person when *not* ‘performing military duty.’” Halbrook, *supra* note 123, at 153.

¹³² *A Bill for Preservation of Deer*, *supra* note 130, at 444.

¹³³ Halbrook, *supra* note 123, at 153. Importantly, although this game bill would have prohibited the public carriage of “scatterguns and other long guns for hunting, it would not have prohibited carrying pistols for self-defense,” because “[a]t that time, ‘one species of fire-arms, the pistol[,] [was] never called a gun.’” *Id.*

¹³⁴ *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (citing *Muscarello v. United States*, 524 U.S. 125, 130 (1998) (Ginsburg, J., dissenting) (quoting *Carry Arms or Weapons*, BLACK’S LAW DICTIONARY (6th ed. 1990))). But Kaplan explains

[I]t’s simpler to blame any “confrontation” meaning on extra words, for example in the Kentucky [constitutional] provision, the words “in defence of themselves.” It is not clear why Scalia makes this “for confrontation” claim, since he later writes, “If ‘bear arms’ means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage (‘for the purpose of self-defense’ or ‘to make war against the King’)

Jeffrey P. Kaplan, *Unfaithful to Textualism*, 10 GEO. J.L. & PUB. POL’Y 385, 420–21 (2012). Even though “the phrase implies that the carrying of the weapon is for the purpose of

Michael O’Shea stated, “It verges on the superfluous to note that this passage *supports* the interpretation that the Second Amendment protects a right to carry a handgun outside the home to have it available for self-defense against unlawful assault: the passage is essentially an announcement of that interpretation.”¹³⁵ This is because the potential for confrontation is not limited to within one’s home and curtilage.¹³⁶ Therefore, carrying firearms beyond the home for the purpose of self-defense “fits comfortably within *Heller*’s definition of ‘bear.’”¹³⁷

Yet even without this controlling passage from the Supreme Court, the fact that the Second Amendment speaks of both a right to “keep” arms and a right to “bear” arms necessarily implies not just the right to carry in public, but the right to do so in case of confrontation. This implication stems from the rule against surplusage.¹³⁸ As the Ninth Circuit syllogized:

A right to “keep” arms, on its own, necessarily implies a right to carry those arms to some extent. For instance, in order to “keep” arms, one would have to carry them home from the place of purchase and occasionally move them from storage place to storage place. The addition of a separate right to “bear” arms, beyond keeping them, should therefore protect something more than mere carrying incidental to keeping arms. Understanding “bear” to protect at least some level of carrying in anticipation of conflict outside of the home provides the necessary gap between “keep” and “bear” to avoid rendering the latter guarantee as mere surplusage.¹³⁹

In sum, the Supreme Court has interpreted “the right . . . to . . . bear arms” in the Constitution to mean the right to carry guns outside the home for the purpose of self-defense, and a reading via the surplusage canon of

‘offensive or defensive action,’” the Court emphasized that “it in no way connotes participation in a structured military organization.” *Heller*, 554 U.S. at 584.

¹³⁵ 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, 613 (2012); see also *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (7th Cir. 2017) (“That definition shows that the Amendment’s core must span, in the Court’s own words, the ‘right to possess *and carry* weapons in case of confrontation.’” (quoting *Heller*, 554 U.S. at 592)).

¹³⁶ See *Wrenn*, 864 F.3d at 657 (“After all, the Amendment’s core lawful purpose is self-defense, and the need for that might arise beyond as well as within the home.” (internal quotation marks and citations omitted)); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (“[T]he interest in self-protection is as great outside as inside the home.”).

¹³⁷ *Young v. Hawaii*, 896 F.3d 1044, 1052 (9th Cir. 2018).

¹³⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

¹³⁹ *Young*, 896 F.3d at 1052–53 (citations omitted).

the text compels that interpretation. If that is indeed the plain meaning, it is difficult to fathom how a regulation affecting an individual's ability to carry firearms outside the home in self-defense fails to implicate a core Second Amendment right.

B. Historical Review

[I]f you could ask Thomas Jefferson, Alexander Hamilton, or John Hancock after the adoption of the Bill of Rights whether they had an individual right to carry arms and use them for self-defense . . . they would have laughed at you. Of course they had that right, they would have said. The Second Amendment didn't give it to them; it simply recognized a right Americans had always had in common law and protected it.¹⁴⁰

As the Court repeatedly emphasized in *Heller*, “the Second Amendment was not intended to lay down a ‘novel principl[e]’ but rather codified a right ‘inherited from our English ancestors.’”¹⁴¹ We therefore must look to the historical background of the Second Amendment to determine that pre-existing right.¹⁴² Tracing this right from fourteenth century England, to the founding of the United States, through the Civil War and the ratification of the Fourteenth Amendment, it is clear that the right of self-defense, wherever the need may arise, is at the core of the Constitution's protections. As St. George Tucker, the first prominent commentator on the U.S. Constitution,¹⁴³ wrote roughly a dozen years after the ratification of the Second Amendment, the right to keep and bear arms “may be considered as the true palladium of liberty . . . [t]he right of self defence is the first law of nature.”¹⁴⁴ That this law of nature could be confined to one's home is unreasonable.

¹⁴⁰ CRAIG R. WHITNEY, *LIVING WITH GUNS: A LIBERAL'S CASE FOR THE SECOND AMENDMENT* 147 (2012).

¹⁴¹ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (alteration in original) (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

¹⁴² *Id.* at 592.

¹⁴³ O'Shea, *supra* note 135, at 637. Tucker was a law professor at the College of William & Mary and eventually became a judge on the federal district court and the Virginia Court of Appeals. *Id.*

¹⁴⁴ ST. GEORGE TUCKER, *1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* app. 140 n.D (1803). The Supreme Court looked to

1. English Law

The earliest law cited in the debate on the scope of the Second Amendment is the Statute of Northampton, which restricted the English right to bear arms beginning in 1328.¹⁴⁵ As the D.C. Circuit jested, reading the law is like “studying *Canterbury Tales*—in the original.”¹⁴⁶ The statute prohibited any ordinary Englishman¹⁴⁷ from “bring[ing] . . . force in affray of the peace, [or] . . . rid[ing] armed by night [or] by day, in Fairs, Markets, [or] in the presence of the Justices or other Ministers, [or] . . . elsewhere.”¹⁴⁸ Advocates for “special need” laws assert that this language effectively banned the carriage of weapons in “densely populated areas.”¹⁴⁹ Since laws modeled after the Statute of Northampton were adopted by the colonies and eventually by the states in the mid to late 1800s,¹⁵⁰ a more limited understanding of the Second Amendment maintains that it could not have codified, at its core, a preexisting right to carry firearms outside the home in densely populated areas.¹⁵¹

But this argument is foreclosed by *Heller*, which accepts Blackstone’s understanding of the Northampton Statute prohibiting only

Tucker as a source for the original understanding of the Second Amendment in both *Heller* and *McDonald*. *Heller*, 554 U.S. at 594–95, 606; *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010). In *Heller*, the Court labeled Tucker’s version of Blackstone’s *Commentaries* “the most important early American edition of Blackstone’s *Commentaries*.” 554 U.S. at 594.

¹⁴⁵ *Wrenn v. District of Columbia*, 864 F.3d 650, 659 (D.C. Cir. 2017).

¹⁴⁶ *Id.*

¹⁴⁷ The statute excepted the King’s servants and ministers. Statute of Northampton 1328, 2 Edw. 3 c. 3 (Eng.).

¹⁴⁸ *Id.*

¹⁴⁹ *Wrenn*, 864 F.3d at 659; *see also* *Young v. Hawaii*, 896 F.3d 1044, 1063 (9th Cir. 2018) (interpreting the language in the Statute of Northampton to prohibit “concealed carry”).

¹⁵⁰ *Compare* Statute of Northampton 1328, 2 Edw. 3 c. 3 (Eng.) (providing that no one shall “come before the King’s justices, or other of the King’s ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers . . .”) *with*, e.g., ACTS AND LAWS PASSED BY THE GREAT AND GENERAL COURTS OF ASSEMBLY OF THEIR MAJESTIES PROVINCE OF THE MASSACHUSETTS-BAY 18 (1692) (“That every Justice of the Peace . . . may cause to be Staid and Arrested all . . . [who] shall Ride, or go Armed offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, or elsewhere, By Night or by Day, in Fear or Affray of Their Majesties Liege People . . .”), *and* FRANCOIS-XAVIER MARTIN, A COLLECTION OF STATUTES OF PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 60–61 (Newbern 1792) (providing that no person shall “nor ride armed by night nor by day, in fairs, markets nor in the presence of the King’s Justices, or other ministers, nor in no part elsewhere”).

¹⁵¹ *Wrenn*, 864 F.3d at 659.

“dangerous and unusual weapons.”¹⁵² There is further evidence that the Statute of Northampton was interpreted to bar people from carrying arms with some sort of mal-intent, in order to “terrify the King’s subjects.”¹⁵³ Unless the bearing of arms was done in a manner “apt to terrify the People,” Serjeant William Hawkins wrote, normal individuals carrying “common Weapons” were “in no Danger of Offending . . . [the] Statute.”¹⁵⁴ Thus, early English law did not, as supporters of “special need” regulations claim, prevent “Englishmen from carrying common (not unusual) arms for defense (not terror).”¹⁵⁵ To the contrary, the arms provision of the English Bill of Rights conferred one of the “absolute rights of every Englishman”:¹⁵⁶ “the

¹⁵² District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149)). Blackstone explained that “going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.” 5 WILLIAM BLACKSTONE, COMMENTARIES *149. *Heller*’s historical analysis also relied upon other early writers who made this same connection between carry and affray. See JOHN DUNLAP, THE NEW-YORK JUSTICE 8 (1815) (“It is likewise said to be an affray, at common law, for a man to arm himself... in such manner as will naturally cause terror to the people.”); CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822) (making “[r]iding or going armed with dangerous or unusual weapons” a “crime against the public peace”); ELLIS LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 64 (1847) (stating that open carry of weapons “in such a manner as will naturally cause a terror” as having always been “an offence at common law”); 1 SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (1831) (defining “going armed” as an affray in the same language as Blackstone); HENRY J. STEPHEN, SUMMARY OF THE CRIMINAL LAW 48 (1840) (discussing the Northampton statute); 3 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 79 (1804) (“[T]here may be an affray . . . as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.”); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 726 (1852) (describing affray under the aforementioned circumstances as “always an offence at common law” and “strictly prohibited by . . . statute”). Historical state court opinions echo this interpretation. See O’Neill v. State, 16 Ala. 65, 67 (1849) (stating that it is an offence to arm oneself with “deadly or unusual weapons for the purpose of an affray”); State v. Lanier, 71 N.C. 288, 289 (1874) (“The elementary writers say that the offence of going armed with dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land”); State v. Langford, 10 N.C. (1 Hawks) 381, 383 (1824) (stating that it has always “been an offence at common law” to carry dangerous and unusual weapons (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 § 4 (1716))); English v. State, 35 Tex. 473, 476 (1871) (“Blackstone says, the offense of riding or going around with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land.”).

¹⁵³ Sir John Knight’s Case (1686), 87 Eng. Rep. 75, 76 (K.B.).

¹⁵⁴ HAWKINS, *supra* note 152, at 136 § 9. Serjeant William Hawkins was “an English legal commentator praised by Blackstone.” Young v. Hawaii, 896 F.3d 1044, 1064 (9th Cir. 2018).

¹⁵⁵ *Young*, 896 F.3d at 1064.

¹⁵⁶ 2 WILLIAM BLACKSTONE, COMMENTARIES *122, *127 (1803).

natural right of resistance and self-preservation,”¹⁵⁷ and “the right of having and using arms for self-preservation and defence.”¹⁵⁸

Even if the Statute of Northampton’s proscriptions *were* ambiguous, however, that ambiguity is of little relevance in this American debate.¹⁵⁹ For one, there is “scholarly consensus” that the English right to keep and bear arms was less comprehensive than its American counterpart.¹⁶⁰ *Heller* notes as much.¹⁶¹ Moreover, for the purposes of determining original meaning, the critical question is not so much what the statute actually meant, but rather what the Framers understood it to mean. And “[t]o the extent the Framers considered the Statute of Northampton as instructive of the pre-existing right to bear arms, they took a narrow view of its prohibitions.”¹⁶² James Wilson, considered by some scholars to be the true “Father of America’s Constitution,”¹⁶³ cited Hawkins in interpreting the Statute of Northampton as barring the public carriage of only “dangerous and unusual weapons, in such a manner, as

¹⁵⁷ *Id.* at *143.

¹⁵⁸ *Id.* at *144.

¹⁵⁹ See *Wrenn v. District of Columbia*, 864 F.3d 650, 660 (D.C. Cir. 2017) (“Happily, though, the state of the law in Chaucer’s England—or for that matter Shakespeare’s or Cromwell’s—is not decisive here.”).

¹⁶⁰ *Young*, 896 F.3d at 1065 (citing Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1500 (2014); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 120–21 (1994)). As Tucker observed, it would have been inappropriate to impose in the United States an English law that created a rebuttable presumption that any gathering of armed men was treasonous, because “the right to bear arms is recognized and secured in the [American] constitution itself.” See 5 TUCKER, *supra* note 144, at 19 app. n.B. Indeed, Tucker reasoned, “[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.” *Id.*; see also THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 270 (1880) (noting that the Second Amendment “was adopted with some modification and enlargement from the English Bill of Rights”); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 126 (2d ed. 1829) (writing that the English right, unlike the Second Amendment, “is allowed more or less sparingly, according to circumstances”).

¹⁶¹ *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008) (explaining that the English right was “not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament”).

¹⁶² *Young*, 896 F.3d at 1065 (citing Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009)).

¹⁶³ Nicholas Pedersen, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257, 335–36 (2010).

will naturally diffuse a terrour [sic] among the people.”¹⁶⁴ William Rawle, “a prominent lawyer” and “member of the Pennsylvania Assembly that ratified the Constitution,”¹⁶⁵ agreed, explaining that the right to keep and bear arms could not “be abused to the disturbance of the public peace.”¹⁶⁶ Citing Hawkins, Rawle theorized that the Second Amendment would not prohibit, for example, a law penalizing an individual for carrying arms “attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them”¹⁶⁷ And more to the point, *Heller* made clear that by the time of the Founding, the “preexisting right” codified by the Second Amendment had developed to unambiguously safeguard the right to carry firearms more broadly than that granted by even a generous reading of the Statute of Northampton.¹⁶⁸

2. The Framers’ Intent

That the Second Amendment guaranteed the right to bear arms for self-defense is evidenced by the words of the Founding Fathers themselves.¹⁶⁹ In his argument for the defense during the Boston Massacre trial,¹⁷⁰ John Adams quoted Hawkins, reasoning that “the killing of dangerous rioters may be justified by any private persons, who cannot otherwise suppress them or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the purposes aforesaid.”¹⁷¹ Likewise, Adams went on to explain, in the colonies, “every private person is authorized to arm himself;

¹⁶⁴ 2 JAMES WILSON, THE WORKS OF JAMES WILSON 654 (Robert G. McCloskey ed. 1967); see also Volokh, *The First supra* note 162, at 101 (“American benchbooks for justices of the peace echoed [Wilson’s observation], citing Hawkins . . .”).

¹⁶⁵ *Heller*, 554 U.S. at 607.

¹⁶⁶ RAWLE, *supra* note 160, at 126.

¹⁶⁷ *Id.*

¹⁶⁸ *Heller*, 554 U.S. at 602 (“[P]re-Second Amendment state constitutional provisions . . . secured an individual right to bear arms for defensive purposes.”).

¹⁶⁹ Halbrook, *supra* note 123, at 155 (“Bearing arms for personal protection was an unquestioned right in the minds of the Founding Fathers.”). It was evidenced by their conduct as well; the Founding Fathers’ frequent carriage of firearms for self-defense demonstrates their belief that such usage was part and parcel of the right codified by the Second Amendment. *Infra* notes 179–185 and accompanying text.

¹⁷⁰ The 1770 Boston Massacre trial, or Wemms trial (after one of the British soldiers accused), involved the criminal prosecution of British soldiers for firing on a harassing crowd. See John Adams, *The Boston Massacre: First Day’s Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770*, in 6 MASTERPIECES OF ELOQUENCE 2569–93 (Mayo W. Hazeltine et al. eds., 1905) (providing Adams’ argument for the defense).

¹⁷¹ *Id.* at 2577–78 (quoting HAWKINS, *supra* note 152, at 71 § 14).

and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence”¹⁷²

Thomas Jefferson, in his *Legal Commonplace Book*,¹⁷³ copied verbatim eighteenth century criminologist Cesare Beccaria’s condemnation of “[l]e leggi, che proibiscono di portar le armi,” which translates to laws that forbid one to “wear”¹⁷⁴ arms. Such laws, Beccaria argued in the passage copied by Jefferson, “disarm[] those only who are not disposed to commit the crime which the laws mean to prevent.”¹⁷⁵ After the battles of Lexington and Concord, North Carolina’s delegation to the Continental Congress stated that “It is the Right of every *English* Subject to be prepared with Weapons for his Defense.”¹⁷⁶ In his book defending the various state constitutions that had been written since the Revolution, Adams affirmed the right of “arms in the hands of citizens, to be used at individual discretion . . . in private self-defense”¹⁷⁷

Importantly, none of these statements or actions affirming an individual right to bear arms for self-defense reference the home; in fact, to read them as such would be awkwardly and illogically restrictive. And when the home *was* specifically mentioned in delineating the scope of the right to keep and bear arms, it was listed as something—but not the *only* thing—worth defending. For example, considering the ratification of the Second Amendment, James Wilson interpreted the Pennsylvania

¹⁷² *Id.* at 2578.

¹⁷³ Jefferson’s *Commonplace Book* “may well be considered as the source-book and repertory of Jefferson’s ideas on government.” Gilbert Chinard, *Introduction to THE COMMONPLACE BOOK OF THOMAS JEFFERSON* 1, 4 (Gilbert Chinard ed., 1926).

¹⁷⁴ CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 161 (Mons de Voltaire trans., 1767). This translation was reproduced in the 1809 edition of Beccaria’s text, CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 124 (Stephen Gould trans., 1809), which Jefferson owned. *Laws that Forbid the Carrying of Arms... (Spurious Quotation)*, THOMAS JEFFERSON MONTICELLO, <https://www.monticello.org/site/research-and-collections/laws-forbid-carrying-armsspurious-quotation> [<https://perma.cc/35TU-F843>] (last visited Mar. 17, 2020).

¹⁷⁵ BECCARIA, *supra* note 174, at 161; CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 124 (Stephen Gould trans., 1809).

¹⁷⁶ Halbrook, *supra* note 123, at 155 (citing Hooper et al., *To the Committees*, N.C. GAZETTE, July 7, 1775, at 2).

¹⁷⁷ 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1788) (“To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defence, or by partial orders of towns . . . is a dissolution of the government.”). Adams acknowledged the “individual right to use arms for personal protection, but looked askance at the kind of armed protest exemplified in Shays’ Rebellion.” Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131, 165 (1991).

Constitution as recognizing the natural right of defense “of one’s person or house”—what he deemed the law of “self preservation.”¹⁷⁸

Bearing arms in public for personal protection was a right evidenced by the Framers’ conduct in addition to their words.¹⁷⁹ “[W]hen George Washington traveled between Alexandria and Mount Vernon he holstered pistols to his saddle, ‘as was then the custom.’”¹⁸⁰ Another Founding Father, Patrick Henry, lived “just north of Hanover town, but close enough for him to walk to court, his musket slung over his shoulder to pick off small game . . .”¹⁸¹ Thomas Jefferson was known to carry pocket pistols (on display today at Monticello), and advised his nephew to do much the same.¹⁸² In fact, Jefferson “once left his pistol at an inn between Monticello and Washington, D.C. and asked two friends—both members of Congress—to retrieve it and bring it to him at the White House.”¹⁸³ William Henry Drayton, Chief Justice of the South Carolina Supreme Court and the State’s delegate to the Continental Congress, “always had about his person, a dirk and a pair of pocket pistols; for the defense of his life . . .”¹⁸⁴ Ethan Allan, Revolutionary war leader and founder of the State of Vermont, and his friends “never walked out without at least a case of pistols.”¹⁸⁵

¹⁷⁸ WILSON, *supra* note 164, at 1142 (quoting PA. CONST., art. IX, § 21, *amended by* PA. CONST., art. I, § 21 (“The right of the citizens to bear arms in defence of themselves shall not be questioned.”)). Pre-Second Amendment state constitutional provisions, furthermore, shed light on the original meaning of the U.S. Constitution’s language. *See* District of Columbia v. Heller, 554 U.S. 570, 602–03 (2008) (describing “Second Amendment analogues” in the framework of eighteenth and early nineteenth century state constitutions).

¹⁷⁹ In fact, in many areas of the nascent nation, the public carriage of arms was not only common, but required. *See* NICHOLAS J. JOHNSON ET. AL., FIREARMS LAW AND THE SECOND AMENDMENT 183 (2d. ed. 2018) (“The majority of the colonies required arms-carrying in certain circumstances.”).

¹⁸⁰ *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016) (quoting BENJAMIN OGLE TAYLOR, IN MEMORIAM 95 (1872)).

¹⁸¹ HARLOW GILES UNGER, LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION 30 (2010).

¹⁸² Halbrook, *supra* note 123, at 154; *see also* Letter from Thomas Jefferson to Peter Carr (Aug. 10. 1787), in 8 THE PAPERS OF THOMAS JEFFERSON 407 (Julian P. Boyd ed., 1953) (“Let your gun therefore be the constant companion of your walks.”).

¹⁸³ *Grace*, 187 F. Supp. 3d at 137 (citations omitted).

¹⁸⁴ Halbrook, *supra* note 123, at 155 (citing 1 JOHN DRAYTON, MEMOIRS OF THE AMERICAN REVOLUTION 378 (1821)).

¹⁸⁵ *Id.* (citing 1 JAMES BENJAMIN WILBUR, IRA ALLEN: FOUNDER OF VERMONT 1751–1814, at 44 (1928)).

3. Post-Civil War Discourse

Finally, as did the Court in *Heller*, we must consider the interpretation of the right to bear arms following the Civil War.¹⁸⁶ Although “considering materials that post-date the Bill of Rights by at least seventy-five years might stretch the term ‘original public meaning,’”¹⁸⁷ the Court in *Heller* specifically noted the importance of this era, explaining that, “[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves.”¹⁸⁸ Thus, even though such discussions “do not provide as much insight into [the Second Amendment’s] original meaning as earlier sources,” they are nevertheless instructive.¹⁸⁹

Especially pertinent to the question of whether the Second Amendment protects the right to carry firearms in public are the “systematic efforts” of Southern states to disarm and subjugate African-Americans after the Civil War.¹⁹⁰ Gripped with anxiety about an uprising among the newly freed slaves and seeking to retain white supremacy,¹⁹¹ many states enacted Black Codes, which barred African-Americans from possessing firearms altogether.¹⁹² Throughout the South, armed gangs seized firearms from newly freed slaves in a systematic effort to disarm African-American communities.¹⁹³ “Without

¹⁸⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 614–16 (2008) (discussing the public debate over the meaning of the Second Amendment in the period following the Civil War).

¹⁸⁷ *Young v. Hawaii*, 896 F.3d 1044, 1059 (9th Cir. 2018) (citing *Heller*, 554 U.S. at 614).

¹⁸⁸ *Heller*, 554 U.S. at 614.

¹⁸⁹ *Id.*

¹⁹⁰ *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010).

¹⁹¹ Representative Thaddeus Stevens reportedly pondered, “when it was first proposed to free the slaves, and arm the blacks, did not half the nation tremble? The prim conservatives, the snobs, and the male waiting-maids in Congress, were in hysterics.” *Id.* at 846 (Thomas, J., concurring in part and concurring in the judgment) (quoting KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877*, at 104 (1965)).

¹⁹² Emblematic of these efforts was an 1865 law in Mississippi that declared “no freedman, free negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife.” *Id.* at 771 (quoting 1 WALTER L. FLEMING, *DOCUMENTARY HISTORY OF RECONSTRUCTION* 289 (1950)); see also *An Act Concerning Free Persons of Color, their Guardians, and Colored Preachers*, 155 § 7, 1833 Ga. Laws 808 (repealed) (“[I]t shall not be lawful for any free person of color in this State, to own, use, or carry fire-arms of any description whatever.”); *The Freedman’s Bureau Bill*, *EVENING POST*: N.Y., May 30, 1866 (“In South Carolina and Florida the freedmen are forbidden to wear or keep arms.”).

¹⁹³ *McDonald*, 561 U.S. at 847 (Thomas, J., concurring in part and concurring in the judgment). To enforce the gun ban, white men riding in posses would terrorize black communities, “seiz[ing] every gun and pistol found in the hands of the (so called) freedmen” *The Labor Question at the South*, 10 *HARPER’S WKLY.*, Jan. 13, 1866, at 17, 19. “The

federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror” against newly-freed slaves.¹⁹⁴ Justice Thomas provides a harrowing account of such atrocities in his *McDonald* concurrence, detailing, *inter alia*, the Hamburg Massacre of 1876 and the murder of Emmett Till.¹⁹⁵ In former Confederate States, “[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence.”¹⁹⁶

These widespread inequalities and acts of barbarism drove Congress to enact the Freedmen’s Bureau Act of 1866 and the Civil Rights Act of 1866 to protect African-Americans in the Reconstruction South.¹⁹⁷ And even congressmen who *opposed* such federal actions recognized the fundamental constitutional protections at stake as including the right to carry firearms in public: Senator Davis of Kentucky noted the right “for every man bearing his arms about him *and* keeping them in his house, his castle, for his own defense,” but contended that congressional measures would usurp the traditional state role in caring for its own citizens.¹⁹⁸

But as the mob violence continued, Congress “ultimately deemed these legislative remedies insufficient” and approved the Fourteenth Amendment.¹⁹⁹ Viewed against this backdrop of widespread violence against and disarmament of African-Americans in the Reconstruction South, it is clear that the drafters of the Fourteenth Amendment considered that the individual right to use firearms in self-defense—granted by the Second Amendment and reinforced by the Fourteenth—was “essential to the preservation of liberty.”²⁰⁰

most infamous of these disarmament posses, of course, was the Ku Klux Klan.” Winkler, *supra* note 88.

¹⁹⁴ *McDonald*, 561 U.S. at 856 (Thomas, J., concurring in part and concurring in the judgment).

¹⁹⁵ *Id.* at 856–58. In the Hamburg Massacre, “a white citizen militia sought out and murdered a troop of black militiamen for no other reason than that they had dared to conduct a celebratory Fourth of July parade through their mostly black town.” *Id.* at 856. Emmett Till “was killed in 1955 for allegedly whistling at a white woman.” *Id.* at 857.

¹⁹⁶ *Id.* One victim of this violence, Eli Cooper, reportedly said that the “Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.” *Id.* (quoting *Whites Apply Torches to Lodge Halls and Temples of Worship; Celebrate with Lynching*, CHI. DEFENDER, Sept. 6, 1919, at 1.)

¹⁹⁷ *McDonald*, 561 U.S. at 773–74.

¹⁹⁸ *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008) (citing CONG. GLOBE, 39th Cong., 1st Sess. 371 (1866)) (emphasis added).

¹⁹⁹ *McDonald*, 561 U.S. at 775.

²⁰⁰ *Id.* at 858 (Thomas, J., concurring in part and concurring in the judgment). Senator Jacob Howard of Michigan, a major drafter of the Fourteenth Amendment, stated that its

4. Counterarguments

There are two primary historical arguments put forth to counter the notion that the original intent behind the Second Amendment protected the public carriage of firearms in self-defense: surety laws and prohibitions on concealed carry.

The first argument contends that the Second Amendment’s core excludes carrying (absent some demonstrably elevated need for self-defense) because such public carriage was always hemmed in by “surety laws” dating back to fourteenth century England and replicated in the nineteenth century by several states.²⁰¹ As the D.C. Circuit explained:

These laws provided that if Oliver carried a pistol and Thomas said he reasonably feared that Oliver would injure him or breach the peace, Oliver had to post a bond to be used to cover any damage he might do, unless *he* proved he had reason to fear injury to his person or family or property.²⁰²

If an arms carrier gave someone “reasonable cause to fear an injury, or breach of the peace,” that person could file a complaint with his local magistrate, who in turn would evaluate the complaint and, if he found it valid, could require the potentially hazardous carrier “to find sureties for keeping the peace”—in other words, post a bond to ensure their good behavior.²⁰³ But if the carrier himself had “reasonable cause to fear an assault or other injury,” he could be relieved from posting the bond, notwithstanding the valid complaint against him.²⁰⁴

States cite these surety laws as founding-era precursors to the “special need” regulations on the books today.²⁰⁵ Given their historical pedigree, proponents argue, laws requiring individuals demonstrate “good reason to

“privileges and immunities” guaranteed, *inter alia*, “the right to keep and bear arms.” CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Professor Akhil Reed Amar affirmed this background behind the Fourteenth Amendment: “between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman.” AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 266 (1998).

²⁰¹ See, e.g., REV. STAT. MASS. tit. 2, ch. 134, § 16 (1836) (warning that a person may “be required to find sureties for keeping the peace” if he invoked reasonable fear in others by carrying an “offensive and dangerous weapon”); REV. STAT. MICH. tit. 31, ch. 163, § 16 (1846) (warning that a person may “be required to find sureties for keeping the peace” if he invoked reasonable fear in others by carrying an “offensive and dangerous weapon”).

²⁰² *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017).

²⁰³ Usually “for a term not exceeding six months.” REV. STAT. MASS. tit. 2, § 16.

²⁰⁴ *Id.*

²⁰⁵ See, e.g., *Wrenn*, 864 F.3d at 659 (explaining the District’s reliance on surety laws to bolster its argument for its “special needs” regulation).

fear injury” in order to carry firearms in public demonstrate that public carriage—even for self-defense—has always been understood to fall outside the core of the Second Amendment’s protections.²⁰⁶ But early surety laws are not on all fours with today’s “special need” regulations. Surety laws did not require that anyone who sought to carry a firearm in public demonstrate a reasonable cause to fear injury; only those who posed a credible threat were asked to prove this particular need, and even then, only to avoid posting a bond.²⁰⁷ As the D.C. Circuit explained:

Under surety laws, put simply, everyone started out with robust carrying rights. Those reasonably accused were then burdened. And only *then* did self-defense needs make a difference, by exempting even the accused from that burden. A showing of special need did not expand carrying for the responsible; it shrank burdens on carrying by the (allegedly) reckless.²⁰⁸

Thus, surety laws did not restrict the right of law-abiding, responsible citizens to bear arms in self-defense and do nothing to refute the argument that this right is at the core of the Second Amendment’s protections.²⁰⁹

The second historical argument made to support the claim that public carriage for the purpose of self-defense must fall outside the Second Amendment’s core protections involves the long historical record of bans on concealed carry. Such prohibitions, which date back to the nineteenth century, are cited as evidence that the right of public carriage generally—even for self-defense—must fall outside the Second Amendment’s core protections.²¹⁰ But

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 661.

²⁰⁸ *Id.*

²⁰⁹ And even if surety laws had required all citizens demonstrate a special need for self-defense in order to carry firearms (or otherwise post bonds), such regulations, longstanding as they may be, are largely irrelevant to the scope of the right to bear arms. This is because the Supreme Court has rejected the contention that laws imposing only “a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail)” carry much weight in defining the natural right codified by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 633 (2008). Such minor penalties (like sureties) are “‘akin to modern penalties for minor public-safety infractions like speeding or jaywalking,’ which makes them (in the Court’s view) poor evidence of limits on the [Second] Amendment’s scope.” *Wrenn*, 864 F.3d at 661 (quoting *Heller*, 554 U.S. at 633–34). And sureties can be considered even less burdensome than small fines, since a potentially hazardous carrier, once he posted his bond, could “go on carrying without criminal penalty,” and, without incident, eventually get back that money. *Id.*

²¹⁰ *See, e.g., Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 90 (2d Cir. 2012) (observing that, although several nineteenth-century courts struck down complete bans on carrying, three upheld bans on bearing concealed weapons); *see also Drake v. Filko*, 724 F.3d 426, 433 (3d Cir. 2013) (citing concealed carry bans to support the claim of a “longstanding

there is a straightforward way to reconcile this widespread and tolerated restriction on concealed carry with the notion that bearing arms in public for self-defense is indeed a core Second Amendment protection: the “ample alternative channels” theory.²¹¹

In First Amendment cases, for example, the government may lawfully impose “time, place, or manner” restrictions on protected speech, permitted they, *inter alia*, “leave open ample alternative channels for communication of the information.”²¹² The same principle applies in the context of the Second Amendment: “[t]he rights to keep and to bear, to possess and to carry, are equally important inasmuch as regulations on each must leave alternative channels for both.”²¹³ Focusing on the right to bear arms specifically, laws restricting the carriage of firearms are tolerable insofar as they leave “ample opportunities for bearing arms.”²¹⁴ Following this outlet principle, the Court has “favorably treated cases allowing bans on concealed carry only so long as open carry was allowed.”²¹⁵ As articulated by Judge Hardiman in dissent, the principle

tradition of regulating the public carrying of weapons for self-defense”); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (quoting *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011), for the claim that “as we move outside the home, firearm rights have always been more limited,” as is evidenced by court decisions upholding bans on concealed carry).

²¹¹ See *Wrenn*, 864 F.3d at 662 (citing *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011)) (describing *Heller II* as “analogizing certain gun laws deserving modest review to regulations that leave ‘ample alternative channels’ for speech”).

²¹² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); see also *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (quoting *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (noting that there were “ample alternative channels for communication of the information” in upholding a law limiting solicitation on state fairgrounds).

²¹³ *Wrenn*, 864 F.3d at 662 (citing *Heller II*, 670 F.3d at 1262).

²¹⁴ *Id.* For example, bans on carrying firearms in small, specified areas of the outside world (e.g., in “sensitive places, such as schools and government buildings,” *Heller*, 554 U.S. at 626) impose very little on most people’s ability to “bear arms” in public, because they can “preserve an undiminished right of self-defense by not entering those places” *Wrenn*, 864 F.3d at 662 (citing *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012)).

²¹⁵ *Wrenn*, 864 F.3d at 662. As Judge Hardiman explained,

This distinction is significant because courts have long distinguished between these two types of carry, holding that although 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 and analogous state constitutional provisions.

Drake, 724 F.3d at 449 (Hardiman, J., dissenting). Although the Court in *Heller* acknowledged that “the majority of the 19th-century courts to consider the question held

underlying these precedents “is that a prohibition against both open and concealed carry without a permit is different in kind, not merely in degree, from a prohibition covering only one type of carry.”²¹⁶ Thus, antebellum laws that banned only concealed carry cannot be interpreted to suggest that the Second Amendment fails to protect, at its core, *all* public carriage. To the contrary, such laws have only passed constitutional muster because they left a viable outlet for the exercise of the right to bear arms.

C. Judicial Precedent

The Supreme Court’s Second Amendment jurisprudence implicitly recognizes a right to publicly bear arms in self-defense.²¹⁷ In fact, it is only through very large blinders that *Heller*, and subsequently, *McDonald*, can be read *not* to confer this protection.²¹⁸ Moreover, the early state court decisions considering the right to bear arms, cited in *Heller*, confirm this interpretation.

1. Historical Judicial Interpretations of the Right to Bear Arms

Heeding *Heller*’s emphasis on historical import, we first consider nineteenth century judicial interpretations of the right to bear arms, evaluating both the Second Amendment and its state constitutional equivalents. In fact, most of the caselaw Justice Scalia references to conclude that the Second Amendment protected an individual right to keep and bear arms for self-defense likewise supports the marginally extended

that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues,” it noted that antebellum nineteenth century cases had interpreted the Second Amendment to guarantee a right to carry firearms openly. Rosenthal & Malcolm, *supra* note 116, at 440–41 (citing *Heller*, 554 U.S. at 626, 612–13).

²¹⁶ *Drake*, 724 F.3d at 449 (Hardiman, J., dissenting).

²¹⁷ This Section discusses *Heller* and *McDonald*, because they are the Supreme Court cases that most directly bear on the constitutionality of “special need” laws. For a review of pre-*Heller* Second Amendment jurisprudence, see Kyle Hatt, *Gun-Shy Originalism: The Second Amendment’s Original Purpose in District of Columbia v. Heller*, 44 SUFFOLK U. L. REV. 505, 507–09 (2011) (discussing and *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876); and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

²¹⁸ See Megan Ruebsamen, *The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 80–81 (2013) (criticizing courts for “interpret[ing] *Heller* and *McDonald* as narrowly as possible by grasping onto select passages of text to preserve existing gun regulations”).

argument that the right to carry arms for self-defense *in public* is equally protected.²¹⁹

Proceeding in chronological order, we start the review with *Bliss v. Commonwealth*,²²⁰ the first reported case to consider the right to bear arms. In *Bliss*, the Kentucky Court of Appeals held that a state statute prohibiting concealed carry²²¹ violated the right to bear arms provision of the Kentucky constitution,²²² despite the continued permissibility of open carry. Declaring that the right to bear arms in self- and public-defense was absolute, the court concluded that any attempt to restrict that ability—even only partly—was unconstitutional.²²³ Thus, the first court to consider a constitutional provision analogous to the Second Amendment “had no doubt that any law restricting the public carry of firearms would ‘import a restraint on the right of the citizens to bear arms.’”²²⁴ Although the *Bliss* Court’s strict approach—allowing virtually no regulation of the right to carry firearms—constitutes an outlier in Second Amendment jurisprudence,²²⁵ its finding that public

²¹⁹ *District of Columbia v. Heller*, 554 U.S. 570, 585 n.9 (citing *State v. Reid*, 1 Ala. 612, 616–17 (1840); *Nunn v. State*, 1 Ga. 243, 250–51 (1846); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91–92 (1822); *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850); *State v. Shoultz*, 25 Mo. 128, 155 (1857); *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422–23 (1843); *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 360 (1833)).

²²⁰ 12 Ky. (2 Litt.) 90 (1822) (cited in *Heller*, 554 U.S. at 585 n.9).

²²¹ *Id.* at 90 (“The act provides, that any person in this commonwealth, who shall . . . wear a pocket pistol . . . concealed as a weapon, unless when travelling on a journey, shall be fined in any sum not less than one hundred dollars . . .”).

²²² “[T]he right of the citizens to bear arms in defence of themselves and the state, shall not be questioned.” *Id.*

²²³ As *Bliss* explains:

That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defence of themselves and the state, will not be controverted by the court; for though the citizens are forbid wearing weapons concealed in the manner described in the act, they may, nevertheless, bear arms in any other admissible form. But . . . whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.

Id. at 91–92.

²²⁴ *Young v. Hawaii*, 896 F.3d 1044, 1055 (9th Cir. 2018) (quoting *Bliss*, 12 Ky. (2 Litt.) at 90–92).

²²⁵ Scholars have depicted this categorical approach as “the road not taken,” and it has remained rare in American jurisprudence. O’Shea, *supra* note 135, at 597 (quoting Robert J. Cottrol & Raymond T. Diamond, “Never Intended to Be Applied to the White Population”: *Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1321 (1995)).

carriage generally is protected has never been overruled.²²⁶ To the contrary, the Supreme Court cited *Bliss* for the argument that the preexisting right codified by the Second Amendment conferred an individual right to keep and bear arms unrelated to militia service.²²⁷

Over a decade later, in *Simpson v. State*, the Tennessee Supreme Court similarly interpreted the right of freemen “to keep and to bear arms for their common defence,” included in the Tennessee Constitution.²²⁸ The court reversed Simpson’s conviction for affray (i.e. disturbing the peace), after he had been armed in public.²²⁹ To constitute affray, there must be proof of fighting between two or more people, the court reasoned, or else it would run afoul of the state’s constitutional arms provision.²³⁰ Without proof of violence, no such criminal statute could survive given the guarantee “secured to all the free citizens of the State to keep and bear arms for their defence”²³¹ *Simpson* thus echoed *Bliss* in its interpretation of the right to bear arms as an absolute right of individuals to carry weapons in public.

The Alabama Supreme Court entered the fray seven years later, taking a more flexible stance on the right to bear arms in *State v. Reid*.²³² The court ultimately found Alabama’s prohibition on “carrying weapons secretly” permissible under the Alabama Constitution, which granted every citizen the right “to bear arms, in defence of himself and the State.”²³³ That provision, the court held, did not “den[y] to the [Alabama] Legislature, the right to enact laws in regard to the manner in which arms shall be borne.”²³⁴ Rather, the state’s constitutional text left “the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals.”²³⁵ As long as an Alabamian remained capable of carrying a weapon in public for self-defense, such a concealed carry ban was permissible.²³⁶ Yet, the court made sure to note that “[a] statute which, under the pretence of regulating, amounts to a destruction of the right

²²⁶ Kentucky eventually amended its constitution to allow the legislature to “pass laws to prevent persons from carrying concealed arms.” KY. CONST. art. XIII, § 25. But “the Kentucky constitutional convention left untouched the premise in *Bliss* that the right to bear arms protects *open* carry.” *Young*, 896 F.3d at 1055.

²²⁷ *District of Columbia v. Heller*, 554 U.S. 570, 585 n.9 (2008).

²²⁸ 13 Tenn. (5 Yer.) 356, 360 (1833) (quoting TENN. CONST. art. XI § 26 (1796)) (cited in *Heller*, 554 U.S. at 585 n.9).

²²⁹ *Id.* at 360–62.

²³⁰ *Id.* at 359–60.

²³¹ *Id.* at 360.

²³² 1 Ala. 612 (1840) (cited in *Heller*, 554 U.S. at 629).

²³³ *Id.* at 615.

²³⁴ *Id.* at 616.

²³⁵ *Id.* at 616.

²³⁶ *Id.* at 621.

[to bear arms], or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”²³⁷ Thus, *Reid* allowed for a substantial amount of regulation of the right to bear arms, but firmly recognized that that right extended to the public arena for self-defense.

Six years later, the Georgia Supreme Court ruled firmly in favor of an individual right to carry arms openly.²³⁸ In *Nunn v. State*, the court struck down a Georgia law that banned “wearing or carrying” any weapons, including pistols.²³⁹ As Georgia’s constitution did not include a provision granting the right to bear arms, *Nunn* directly interpreted the Second Amendment. Beginning with a clear statement of the constitutional guarantee, which the *Heller* court would quote in full over a century and a half later, the court clarified:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree²⁴⁰

The Second Amendment, the court concluded, protected the “natural right of self-defence.”²⁴¹ Since Georgia’s law prohibited “bearing arms openly,” i.e., carrying firearms in public, it impermissibly abridged that right.²⁴² Of note, *Nunn*’s interpretation of the Second Amendment is particularly persuasive, because, as *Heller* mentions, “[i]ts opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause”²⁴³

The holding in *Nunn* was affirmed a few years later in *State v. Chandler*,²⁴⁴ in which the Louisiana Supreme Court likewise upheld a concealed carry ban as consistent with the Second Amendment. In *Chandler*, the defendant was convicted of manslaughter after the judge refused to instruct the jury “that to carry weapons, either concealed or openly, is not a crime in the State of Louisiana; that the Constitution which guarantees to the citizen the right to bear arms cannot be restricted by the

²³⁷ *Id.* at 616–17.

²³⁸ *Nunn v. State*, 1 Ga. 243 (1846) (cited in *Heller*, 554 U.S. at 612, 626, 629).

²³⁹ *Id.* at 246.

²⁴⁰ *Id.* at 251 (emphasis omitted).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ 554 U.S. 570, 612 (2008); see also O’Shea, *supra* note 135, at 627 (“No case, historic or recent, is discussed more prominently or positively in *Heller* than the Georgia Supreme Court’s 1846 decision in *Nunn v. State*.”).

²⁴⁴ 5 La. Ann. 489 (1850) (cited in *Heller*, 554 U.S. at 613, 626).

action of the Legislature.”²⁴⁵ Considering this instruction on appeal, the court noted approvingly of Louisiana’s concealed carry ban, holding that it was permissible under the Second Amendment.²⁴⁶ This was because the law did not restrict “a man’s right to carry arms . . . ‘in full open view,’” for the purpose of self-defense, which the court pronounced as “the right guaranteed by the Constitution of the United States.”²⁴⁷

Finally, the Supreme Court’s decision in *Dred Scott v. Sandford*²⁴⁸—shameful in its conclusion that African Americans could not claim U.S. citizenship—inadvertently supported the proposition that the Constitution guaranteed the right to carry firearms in public for self-defense. Writing for the majority, Chief Justice Taney, both racist and flawed in his analysis, reasoned that because black people could not be citizens, Scott could not sue in an Article III court.²⁴⁹ The Court came to this conclusion, in part, by what it saw as a “*reductio ad absurdum*” argument: it enumerated several important ‘privileges and immunities’ enjoyed by American citizens, and argued that it would be inconceivable that blacks would enjoy such liberties; therefore, blacks could not be citizens.”²⁵⁰ These privileges and immunities that black people would possess if granted citizenship included, *inter alia*, the right “to keep and carry arms wherever they went,” demonstrating an understanding of the Second Amendment that protected public carriage.²⁵¹

Of course, not all antebellum caselaw explicitly affirmed the right to carry firearms in public for self-defense. In fact, quite a few opinions reject this claim, upholding severe restrictions on carrying weapons in public.²⁵²

²⁴⁵ *Id.* at 489.

²⁴⁶ *Id.* at 490.

²⁴⁷ *Id.* at 489–90.

²⁴⁸ See *Scott v. Sandford*, 60 U.S. 393 (1857) (describing which people qualify as citizens and the constitutional rights and protections that are afforded to them).

²⁴⁹ *Id.* at 407.

²⁵⁰ O’Shea, *supra* note 135, at 630.

²⁵¹ *Scott*, 60 U.S. at 417.

²⁵² See *State v. Buzzard*, 4 Ark. 18 (1842) (upholding an Arkansas ban on the concealed carry of dangerous weapons, such as pistols); *Hill v. State*, 53 Ga. 472, 474 (1874) (upholding law preventing anyone from carrying “deadly weapon[s] to any court of justice or any election ground or precinct, or any place of public worship, or any other public gathering . . . except militia muster grounds.”); *English v. State*, 35 Tex. 473, 473 (1871) (holding that Texas statute “prohibiting the carrying of pistols, dirks, and certain other deadly weapons, [was] not repugnant to the second amendment to the constitution of the United States”); *State v. Workman*, 35 W. Va. 367, 371 (1891) (upholding state law that prohibited the carrying of deadly weapons unless the defendant could show that he was “a quiet and peaceable citizen, of good character and standing in the community” and “had good cause to believe . . . that

But critically, most of these contradicted the main holding of *Heller*: that the Second Amendment codified an individual right to bear arms for self-defense, unconnected with militia participation.²⁵³ The state courts’ rejection

he was in danger of death or great bodily harm at the hands of another person”); *cf.* *State v. Huntly*, 25 N.C. (3 Ired.) 418, 420–22 (1843) (upholding a conviction for “going about armed with unusual or dangerous weapons, to the terror of the people,” in part because the North Carolina Constitution conferred the right to bear arms only “in defence of the state”); *Cockrum v. State*, 24 Tex. 394, 401–03 (1859) (holding that the Texas constitution—which conferred the right to bear arms “in the lawful defense of himself or the state”—protected the right to carry a Bowie knife in public for personal self-defense, but allowed the legislature to penalize its abuse, as long the regulation did not “deter a citizen from its lawful exercise”). Some cases took a more flexible approach, crafting what has been deemed a “hybrid right.” O’Shea, *supra* note 135, at 641–56; *see Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 182 (1871) (reasoning that the “wearing . . . arms may be prohibited if the [state] Legislature deems proper, absolutely, at all times, and under all circumstances,” notwithstanding the private right to *keep* arms) (emphasis added); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840) (holding that the “legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence”).

²⁵³ “Although the phrase implies that the carrying of the weapon is for the purpose of ‘offensive or defensive action,’ it in no way connotes participation in a structured military organization.” *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008); *compare id.*, with *Buzzard*, 4 Ark. at 22 (arguing that the right to bear arms does not “enable each member of the community to protect and defend by individual force his private rights against every illegal invasion”); *Hill*, 53 Ga. at 476 (“The right to bear arms [is granted so] that the state may, when its exigencies demand, have at call a body of men, having arms at their command, belonging to themselves and habituated to the use of them, [yet] is in no fair sense a guarantee that the owners of these arms may bear them at concerts, and prayer-meetings, and elections.”); *Huntly*, 25 N.C. (3 Ired.) at 418 (“While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised. If he employ those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege, with which he has been invested.”); *Andrews*, 50 Tenn. (3 Heisk.) at 177–78 (“What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of the land? It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end”); *Aymette*, 21 Tenn. (2 Hum.) at 156 (interpreting the Tennessee constitution’s provision guaranteeing “free white men [the] . . . right to keep and bear arms for their common defence” as primarily a collective and public, rather than individual and private, right); *English*, 35 Tex. at 474–77 (holding that the Second Amendment protected keeping and bearing only those arms that are “useful and proper to an armed militia,” but not “deadly weapons” such as pistols and bowie knives); *Cockrum*, 24 Tex. at 401–03 (noting that the objective of the Second Amendment is “the perpetuation of free government, and is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed;” and distinguishing the Second Amendment from the Texas right-to-arms provision, which “has the same broad object in relation to the government, and in addition thereto, secures a personal right to the citizen.”); *Workman*, 35 W.Va. at 371 (holding that the Second Amendment was a “popular right” that protected

of that understanding underlays their conclusions that the right to bear arms did not encompass a strong right to carry firearms in public. “[W]ith *Heller* on the books,” such cases “furnish us with little instructive value”²⁵⁴ in determining whether the individual right to bear arms in self-defense protected by the Second Amendment confers a right to public carriage.

If those opinions that conceive of the right to bear arms as rooted in a militia service are excluded, there remain only two nineteenth century cases that tolerated state regulation of open carry akin to today’s “special need” laws.²⁵⁵ The first, *State v. Duke*,²⁵⁶ involved a law not unlike today’s “special need” regulations. Texas prohibited individuals from carrying weapons in public—thus excluding personal property and place of business—unless they had “reasonable grounds for fearing an unlawful attack on his person, and . . . such ground of attack shall be immediate and pressing.”²⁵⁷ The Texas Supreme Court ultimately upheld the statute as valid under the Texas constitution, concluding that the regulation on “where, and the circumstances under which, a pistol may be carried . . . respected the right to carry . . . openly when needed for self-defense.”²⁵⁸ As the *Young* court pointed out, however, “[o]ne need only take a peek at the Texas constitutional provision that served as the basis for the court’s decision” to fully comprehend the Texas Supreme Court’s rationale: the Texas constitution’s right-to-arms provision provided that “[e]very person shall have the right to keep and bear arms in the lawful defense of himself or the State, *under such regulations as the Legislature may prescribe.*”²⁵⁹ This “restrictive proviso”²⁶⁰ is obviously not present in the Second Amendment; its “very substance,” therefore, while “surely tolerat[ing] some degree of regulation . . . is not so explicitly limited by such a regulatory caveat.”²⁶¹

Unlike *Duke*, the second case, *Walburn v. Territory*, directly interpreted the Second Amendment. In that case, the Supreme Court of the Territory of Oklahoma held that a state law banning all public carriage: “violates none of the inhibitions of the constitution of the United States, and

“public liberty” through the use of “weapons of warfare to be used by the militia,” but not “other weapons as are usually employed in” acts of public violence).

²⁵⁴ *Young v. Hawaii*, 896 F.3d 1044, 1057 (9th Cir. 2018).

²⁵⁵ *Id.* at 1058 (citing *State v. Duke*, 42 Tex. 455 (1874); *Walburn v. Territory*, 59 P. 972 (Okla. Terr. 1899)).

²⁵⁶ 42 Tex. 455 (1874).

²⁵⁷ *Id.* at 456. The court construed that exception as applying to “any one having reasonable grounds to fear an attack.” *Id.* at 460.

²⁵⁸ *Id.* at 459.

²⁵⁹ *Young*, 896 F.3d at 1058 (citing *Duke*, 42 Tex. at 458).

²⁶⁰ O’Shea, *supra* note 135, at 655.

²⁶¹ *Young*, 896 F.3d at 1058. The court then added: “We shouldn’t pencil one in.” *Id.*

that its provisions are within the police power of the territory.”²⁶² Despite this bold conclusion, the court appeared to water down its holding, noting that, the defendant asserted that “the law under which he was convicted is in conflict with the constitution of the United States,” but “[n]o authorities are cited in support of this position, nor is the proposition very earnestly urged.”²⁶³ It is unwise to give much credence to this short opinion, especially in light of its explicit acknowledgment that the holding was not thoroughly argued and considered.

2. Modern Caselaw on the Right to Bear Arms

We turn next to twenty-first century caselaw. The touchstone of *Heller* is self-defense. The opinion makes clear that the ability to defend oneself—especially in, but not strictly confined to, the home—is at the heart of the Second Amendment’s protections.²⁶⁴ As explained in the textual analysis above,²⁶⁵ *Heller* concluded that the meaning of “bear arms” is to “carry [weapons] . . . for the purpose . . . of being armed and ready . . . in a case of conflict with another person.”²⁶⁶ Thus, the aim of self-defense is inherent in the very act of bearing arms.

Moreover, the historical language cited in *Heller* for the proposition that the Second Amendment’s protections include an *individual* right to keep and bear arms also compels the conclusion that it includes a *public* exercise of that right. St. George Tucker’s emphasis on the importance of self-defense, cited throughout the opinion, supports an individual-rights interpretation of the Second Amendment, yes, but suggests a right to carry in public, too.²⁶⁷ *Heller*’s

²⁶² 59 P. 972, 973 (Okla. Terr. 1899).

²⁶³ *Id.* at 972.

²⁶⁴ See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (describing the “core lawful purpose of self-defense”).

²⁶⁵ *Supra* Section II.A.

²⁶⁶ *Heller*, 554 U.S. at 584 (citing *Muscarello v. United States*, 524 U.S. 125, 139 (1998) (Ginsburg, J., dissenting)).

²⁶⁷ As the *Heller* Court explained,

St. George Tucker’s version of Blackstone’s Commentaries . . . conceived of the Blackstonian arms right as necessary for self-defense. He equated that right . . . with the Second Amendment . . . Tucker elaborated on the Second Amendment: “This may be considered as the true palladium of liberty . . . The right to self defence is the first law of nature.”

Id. at 606 (citing TUCKER, *supra* note 144). The Court claimed that the Framers understood the Second Amendment as granting “the right to enable individuals to defend themselves,” citing Tucker in support: Tucker “made clear . . . [that] Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[l] force by force’ when ‘the intervention of

reference to Charles Sumner's 1856 speech about Bleeding Kansas²⁶⁸ likewise requires an outside-the-home understanding of the Second Amendment. In his comments, Sumner describes a "rifle" as the "tutelary protector against the red man and the beast of the forest," the use of which was guaranteed by "at least one article in our National Constitution."²⁶⁹ It is difficult to believe "that either Senator Sumner or Justice Scalia imagined the frontiersman encountering 'the red man' or 'the beast of the forest' . . . only in his home."²⁷⁰

Certain circuit courts' emphasis on the home is especially puzzling in light of *Heller*'s explicit language elevating self-defense as the core Second Amendment right. The majority criticized as "profoundly mistaken" Justice Breyer's argument, in dissent, that the "individual self-defense is merely a 'subsidiary interest' of the right to keep and bear arms."²⁷¹ To the contrary, the majority clarified, "self-defense . . . was the *central component* of the right itself."²⁷² It is worth noting that the word "home" does not appear in that description of the right's "central component."²⁷³

The centrality of self-defense was affirmed by the same Court nearly two years later in *McDonald*,²⁷⁴ the first sentence of which states that "[t]wo years ago, in *District of Columbia v. Heller*, . . . we held that the Second

society in his behalf, may be too late to prevent an injury.'" *Id.* at 594–95 (quoting TUCKER, *supra* note 144, at 145–46 n.42).

²⁶⁸ "Bleeding Kansas" refers to an era of violence in the mid-1800s as pro- and anti-slavery factions fought to control Kansas. *See, e.g., Bleeding Kansas*, NAT'L PARK SERV., <https://www.nps.gov/fosc/learn/historyculture/bleeding.htm> [<https://perma.cc/YUG6-2JGV>] (last updated Apr. 23, 2020).

²⁶⁹ *Id.* at 609 (quoting Charles Sumner, *The Crime Against Kansas*, in AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR 553, 606–07 (Ted Widmer ed. 2006)).

²⁷⁰ Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 227 (2008).

²⁷¹ *Heller*, 554 U.S. at 599.

²⁷² *Id.*

²⁷³ In addition to the general use of the phrase "self-defense" throughout the opinion, it's worth mentioning that the longstanding regulations mentioned in *Heller* as "presumptively lawful" include "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626. If the Second Amendment did not protect the right to carry firearms in public in the first place, there would be no need clarify the legality of such prohibitions.

²⁷⁴ *McDonald* concerned another handgun ban, this time by the city of Chicago, Illinois. Since Chicago's law was identical to the District of Columbia regulation struck down in *Heller*, the sole question was whether the individual right to keep and bear arms was incorporated against state and local governments via the Fourteenth Amendment. The Supreme Court found that it was both "fundamental to *our* scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," and thus must apply equally to the federal government and the states. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (citations omitted).

Amendment protects the right to keep and bear arms for the purpose of self-defense”²⁷⁵ Thus, the same Court that issued *Heller* later interpreted that opinion as defining the core of the Second Amendment to protect the use of firearms in self-defense.²⁷⁶ Although the significance of the home is mentioned throughout the opinion, it is the general right of self-defense²⁷⁷ that dominates the Court’s reasoning in concluding that the Second Amendment is “fundamental to our scheme of ordered liberty.”²⁷⁸

Heller’s and *McDonald*’s repeated references to the home do not imply a restricted construal of the Second Amendment’s core protections, which abruptly cease the moment one steps out the door; rather, these mentions are merely a function of the laws that were challenged before the Court. Both cases involved laws which, *inter alia*, banned handguns in the home.²⁷⁹ The appellant in *Heller* challenged only his right to use a handgun at home for self-defense, not the capacity to do so in public.²⁸⁰ In actuality, the right recognized in *Heller* and *McDonald* was much broader—protecting the right to keep and bear arms for the purpose of self-defense, regardless of where that need arises.

D. Structural Argument

In response to the rather clear conclusions that follow from textual and historical analyses of the Second Amendment, some structural arguments have been made to claim that the core right recognized in *Heller* is limited to self-defense in the home by analogizing to the sacred place of the home found in other Constitutional guarantees. As the Second Circuit noted, “[t]reating

²⁷⁵ *Id.* at 749–50.

²⁷⁶ *See id.* at 767 (“[I]n *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”).

²⁷⁷ *See id.* (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day”).

²⁷⁸ *Id.* (emphasis omitted).

²⁷⁹ *See McDonald*, 561 U.S. at 750 (“[Petitioners] are Chicago residents who would like to keep handguns in their homes for self-defense but are prohibited from doing so by Chicago’s firearms laws.”); *Heller*, 554 U.S. at 575 (“[Respondent] applied for a registration certificate for a handgun that he wished to keep at home, but the District refused.”).

²⁸⁰ In *Heller*, the appellant

filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of ‘functional firearms within the home.

554 U.S. at 575–76.

the home as special and subject to limited state regulation is not unique to firearm regulation; it permeates individual rights jurisprudence.”²⁸¹ Rather, the “privilege of the home works a kind of alchemy with the Constitution.”²⁸²

The Bill of Rights explicitly mentions the home in two places—the Third and Fourth Amendments. The home is therefore given sacrosanct status in cases involving unreasonable searches and seizures.²⁸³ Yet, importantly, structural proponents point out that the Constitution need not say the magic word for the Supreme Court to recognize the implicit protection of the home. Like the Second Amendment, nothing in the language of the First Amendment suggests that its guarantees should have a more superior force inside the home than outside it. Nevertheless, the Supreme Court has found that the Bill of Rights as a whole supports this proposition. In *Stanley v. Georgia*, for example, the Supreme Court held that the right to process information and ideas “takes on an added dimension” when considered “in the privacy of a person’s own home.”²⁸⁴ Thus, the States could not criminalize the possession of obscenity in the home.²⁸⁵ Similarly, in *Lawrence v. Texas*, the Court noted that State efforts to regulate private sexual conduct is particularly suspect when it intrudes into the home: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.”²⁸⁶

In these First Amendment cases, the home is the clear dividing line between permissible and impermissible government intervention. After *Stanley*, States retained the authority to ban obscenity in the public domain; likewise, “[*Lawrence*] le[ft] undisturbed the states’ authority to prohibit

²⁸¹ *Kachalsky v. Cty. Of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012); *see also* *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018) (“This sort of differentiation is not unique to Second Amendment rights. Many constitutional rights are virtually unfettered inside the home but become subject to reasonable regulation outside the home.” (citations omitted)).

²⁸² Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1305 (2009).

²⁸³ *See* *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” (citation omitted)); *see also id.* at 37 (“In the home, our [Fourth Amendment] cases show [that] the entire area is held safe from prying government eyes.”).

²⁸⁴ 394 U.S. 557, 564–65 (1969).

²⁸⁵ *Id.* at 568.

²⁸⁶ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *see generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (deriving a general right to privacy from the penumbras of several rights enumerated in the Bill of Rights, which protected the “sensitive area of privacy of the home”).

sexual conduct that occurs in a public—rather than private—arena.”²⁸⁷ This private versus public distinction has led some scholars to advocate for treating the “Second Amendment right to keep and bear arms for self-defense the same as the right to own and view adult obscenity under the First Amendment—a robust right in the home, subject to near-plenary restriction by elected government everywhere else.”²⁸⁸ Just as the right to view obscenity or engage in sex in one’s own home does not entitle her to take either of these intimate behaviors outside, nor does the right to use a gun to defend hearth and home entail a right to carry firearms in public, the argument goes.

Importing the hallowed status of the home from First Amendment and Fourth Amendment jurisprudence into the Second Amendment arena is not a novel idea.²⁸⁹ In fact, *Heller* can be viewed as readying this private versus public distinction in the context of firearms. Given how frequently the opinion mentions the word (seventy-three times, by my count), it is at least plausible to suggest that the home is the touchstone of gun rights.²⁹⁰

Furthermore, the analogy makes intuitive sense: like obscenity and sex, in fact even more-so, guns are considered harmful to others. This threat underlies the private versus public distinction: “obscenity and sexual activity lose their protected status in public because they cause harm in public—they offend the sensibilities of others, including minors—that they do not cause in private.”²⁹¹ The same argument applies for

²⁸⁷ *Stanley*, 394 U.S. at 565 (“Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”); *Miller*, *supra* note 282, at 1305 n.185 (citing *Singson v. Commonwealth*, 621 S.E.2d 682, 687–88 (Va. Ct. App. 2005) (upholding conviction for solicitation of sodomy)); *see also* *Bowers v. Hardwick*, 478 U.S. 186, 213 (1986) (Blackmun, J., dissenting) (“Intimate behavior may be punished when it takes place in public.”); *State v. Thomas*, 891 So. 2d 1233, 1236 (La. 2005) (upholding conviction for solicitation of “unnatural oral copulation” because “*Lawrence* specifically states the [C]ourt’s decision does not disturb state statutes prohibiting public sexual conduct or prostitution”).

²⁸⁸ *Miller*, *supra* note 282, at 1278.

²⁸⁹ *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 580–82 (2008) (referencing the First Amendment protection provided to modern media to demonstrate that the Second Amendment should extend to modern weaponry); *id.* at 591 (noting that both the First and Second Amendment use the singular “right” to protect multiple rights); *id.* at 595 (asserting that early limits on weapons possession do not undermine the Court’s interpretation of the Second Amendment, since there were limits on the First Amendment at the Founding, too); *id.* at 625–26 (pointing out that the first Supreme Court case to strike down a law as violative of the First Amendment was issued almost 150 years after its ratification); *id.* at 634–35 (asserting that the Second Amendment, like the First Amendment, does not tolerate interest-balancing and is subject to historical exceptions).

²⁹⁰ *See id.* at 628 (criticizing the law for prohibiting the possession of firearms in “the home, where the need for defense of self, family, and property is most acute.”).

²⁹¹ *Dorf*, *supra* note 270, at 232–33.

firearms. Guns carried and used in public pose an inherent danger to others that they do not present when kept in the home, where they can harm only the inhabitants or intruders.²⁹² Finally, gut instinct supports the private versus public distinction: “the notion of D.C. residents walking the streets, including the streets just beyond the Supreme Court grounds, with visible sidearms, could well be upsetting to the Justices in a way and to a degree that Mr. Heller’s night-table handgun was not.”²⁹³

Yet, there are several foundational problems with translating the unique constitutional dispensation of the home into the Second Amendment arena. Viewing obscene materials and engaging in same-sex intercourse within one’s home is protected because that is a *private* space. As the Court expounded in *Griswold v. Connecticut*, “specific guarantees in the Bill of Rights have penumbras,” one of which is *privacy*.²⁹⁴ But privacy is not the value undergirding the use of firearms in the house; rather, guns are used for safety and protection. That difference collapses the First Amendment analogy. As Judge Posner wryly put it: “the interest in having sex inside one’s home is much greater than the interest in having sex on the sidewalk in front of one’s home. But the interest in self-protection is as great outside as inside the home.”²⁹⁵

E. Prudential Considerations

Prudential considerations have also been raised to suggest that the public carriage of guns may fall outside the core protections of the Second Amendment.²⁹⁶ As already explained, whereas using a gun within the confines

²⁹² But Dorf states that

as a strictly doctrinal matter, the analogy between *Heller* and *Stanley* remains strong because in fact, the doctrinal distinction between home possession and public possession of obscenity does not turn on the ostensible harm that obscenity does outside the home. If it did, then there would be a First Amendment right to carry obscene materials in public, so long as they were concealed. Yet the Supreme Court has clearly rejected this extension of *Stanley*, a case now best understood as protecting the privacy of the home against excessive government snooping. We can make the most sense of *Stanley* as a case in which the Court invoked values marked by the text of the Fourth Amendment to inform its understanding of the First Amendment.

Id. at 233.

²⁹³ *Id.* For more support for the “home-bound” approach to the Second Amendment, see Miller, *supra* note 282, at 1279 (noting, *inter alia*, the method’s “benefit of simplicity”).

²⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

²⁹⁵ *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012).

²⁹⁶ *See, e.g., Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) (“Societal considerations also suggest that the public carriage of firearms, even for the purpose of self-defense, should be regarded as falling outside the core of the Second Amendment right.”).

of one’s home threatens only the residents (plus any unwelcome intruders), the same cannot be said for use outside the home, where countless innocent bystanders could fall victim to one’s weaponry.²⁹⁷ But there are additional societal reasons to differentiate the inside and outside the home.

For one, we are most vulnerable inside the home. It is a “high-value target,” where our nearest and dearest live, keep their most prized possessions (whether measured in monetary or sentimental value), and let down their guard (particularly while sleeping at night).²⁹⁸ Conversely, we are more protected outside the home. In public, society provides protections which are not present in private. As the First Circuit summarized:

Outside the home, society typically relies on police officers, security guards, and the watchful eyes of concerned citizens to mitigate threats. This same panoply of protections is much less effective inside the home. Police may not be able to respond to calls for help quickly, so an individual within the four walls of his own house may need to provide for the protection of himself and his family in case of emergency.²⁹⁹

With these disparities in mind, the need for—and thus presumably the right to—self-defense seems at its zenith inside the home, yet more constrained outside of it.

Yet there are valid counterarguments to each of these pragmatic assertions. Although firearms pose a threat to more people when they are carried in public, as Judge Posner posited, “there is also a possibility that criminals will be more timid with the knowledge that law-abiding citizens may be carrying a gun.”³⁰⁰ Add to that suggestion the NRA’s favorite slogan—the only thing that stops a bad guy with a gun, is a good guy with a

²⁹⁷ See *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[O]utside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”). These truths are especially evident in densely populated urban areas like Boston and Brookline. See Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82, 108 (2013) (explaining that “American cities have traditionally had much more stringent gun control than rural areas”).

²⁹⁸ O’Shea, *supra* note 135, at 611. “More than sixty percent of home invasion[s], or ‘hot,’ burglaries (that is, those that occur when the home’s occupants are present) occur at night, when potential victims are likely to be asleep or otherwise unwary, which makes these intrusions especially dangerous.” *Id.* at 612.

²⁹⁹ *Gould*, 907 F.3d at 671–72. It is worth noting that organized police forces did not exist at the Founding. Citizens protected themselves, their homes, and their families, and served as police officers for their neighbors. Brian Enright, *The Constitutional “Terra Incognita” of Discretionary Concealed Carry Laws*, 2 *U. ILL. L. REV.* 909, 932 (2015) (citations omitted).

³⁰⁰ Kevin Behne, *Packing Heat: Judicial Review of Concealed Carry Laws Under the Second Amendment*, 89 *S. CAL. L. REV.* 1347, 1366 (2016) (citing *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012)).

gun³⁰¹—and there exists at least *some* ground for a court sympathetic towards gun rights to doubt the contention that the public carriage of firearms poses an increased threat to others.

The notion that we are most vulnerable inside of our homes is likewise pervasive.³⁰² To begin with, most violent crimes occur outside the home, making it a “critical zone for armed self-defense.”³⁰³ It is not difficult to imagine a scenario in which one would feel safer within the fortress of one’s home than outside on the street. *Heller* “conjures the image of the homeowner needing to reach for the handgun in her night table to stop the rapist climbing through the window,” but it is just as easy to envision a “late-shift worker walking home through a deserted alley in the wee hours of the morning.”³⁰⁴ Parallel situations abound:

A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.³⁰⁵

To reference again the sardonic reasoning of Judge Posner: “a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.”³⁰⁶

III. IDENTIFICATION AND APPLICATION FOR MEANS-END SCRUTINY

The majority of circuit court opinions are unhelpful regarding the proper selection of means-end scrutiny, having applied intermediate scrutiny only after determining that “special need” regulations do not burden a core Second Amendment right. Having determined that “special

³⁰¹ FreedomsLighthouse, *NRA Director: “The Only Thing that Stops a Bad Guy with a Gun is a Good Guy with a Gun,”* YOUTUBE (Dec. 21, 2012), <https://youtu.be/UjrdDAcaQq0> [<https://perma.cc/BP5C-JQZV>].

³⁰² See *Young v. Hawaii*, 896 F.3d 1044, 1052 (9th Cir. 2018) (“The prospect of confrontation is . . . not limited to one’s dwelling.”); *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017) (“After all, the Amendment’s ‘core lawful purpose’ is self-defense, and the need for that might arise beyond as well as within the home.” (citation omitted)); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (“[T]he interest in self-protection is as great outside as inside the home.”).

³⁰³ O’Shea, *supra* note 135, at 612.

³⁰⁴ Dorf, *supra* note 270, at 229 (citations omitted).

³⁰⁵ *Moore*, 702 F.3d at 937.

³⁰⁶ *Id.*

need” laws do in fact burden a core Second Amendment right, it is therefore essential to identify the appropriate means-end scrutiny to evaluate the constitutionality of this burden.

A. What Is the Appropriate Means–End Scrutiny to Apply?

It is not always the case that laws burdening the core of a right demand strict scrutiny.³⁰⁷ However, I argue that “special need” laws do, in fact, warrant application of strict scrutiny. A useful analogy is voting laws, which implicate another constitutional guarantee under the Fourteenth Amendment. A total ban is a law that says no one can vote. That is clearly unconstitutional. Instead, imagine a law that prohibits someone from voting unless she satisfies some criterion that is not necessarily feasible or within her control. The law might prohibit anyone from voting who, for instance, lacks property or children.³⁰⁸ That law would receive strict scrutiny.³⁰⁹ Contrast the criteria in those cases with voting conditions that everyone could (in theory) satisfy, such as the identification requirements in voter ID laws.³¹⁰ As such, those laws typically receive lesser scrutiny.³¹¹ The “special need” requirement resembles neither the first nor third category, but rather the second. In other words, “special need” laws do not constitute total bans;³¹² nor do they operate like voter ID laws. Rather, they act in the Second Amendment setting like property or child custody qualifications do in the voting context. Like the condition that individuals own property or have children in order to vote, the requirement that an applicant demonstrate a “special need” for self-defense is intended to screen out most people from exercising the right at issue. Unlike voter identification, it is not a prerequisite that everyone (in theory) ought to be able to meet if they simply put in the effort. Analogizing to voting jurisprudence thus confirms that

³⁰⁷ Circuit courts appear to assume without question this binary “if/then” relationship between noncore versus core rights, and the application of intermediate versus strict scrutiny, respectively. *See supra* notes 67–73 and accompanying text (describing the different levels of scrutiny and when they are applied).

³⁰⁸ *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969) (reviewing a New York law that limited school board voting rights based on those two criteria).

³⁰⁹ *Id.* at 627 (“[T]he Court must determine whether the exclusions are necessary to promote a compelling state interest.”).

³¹⁰ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (“For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”).

³¹¹ *Id.* at 189–91 (articulating a “balancing approach” to weigh “relevant and legitimate state interests” against burden on voters).

³¹² For my critique of this approach, *see supra* Subsection I.B.iii.

“special need” laws, which burden a core Second Amendment right, should receive strict scrutiny.

B. Does the Law Survive Application of Strict Scrutiny?

The final question is whether “special need” laws survive strict scrutiny. Strict scrutiny, the highest standard of review that a court applies to evaluate the constitutionality of a regulation, demands that a law be narrowly tailored to achieve a compelling governmental interest.³¹³ The government need not demonstrate this relationship to a scientifically certain degree; a common-sense intuition is often sufficient.³¹⁴ Less legislative deference is allowed under strict scrutiny than under rational basis review or intermediate scrutiny, but some deference is granted to the government’s narrow tailoring conclusion.³¹⁵ Although the argument is a difficult one, I believe that these regulations do satisfy strict scrutiny.

1. Compelling Interest

The governmental interest of protecting public safety and preventing crime (particularly violent crime committed with handguns), is indisputably compelling.³¹⁶

³¹³ See *supra* note 68.

³¹⁴ See, e.g., *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (considering “long history, a substantial consensus, and simple common sense” to determine whether a law survives strict scrutiny).

³¹⁵ See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (deferring, while applying strict scrutiny, to the government’s judgments on national security and foreign affairs). In *Grutter v. Bollinger*, the Court was similarly deferential despite applying strict scrutiny:

The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.

539 U.S. 306, 328 (2003).

³¹⁶ See *United States v. Salerno*, 481 U.S. 739, 749-50 (1987) (describing “the government’s interest in preventing crime” as “compelling”); *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.” (quoting *De Veau v. Braisted*, 363 U.S. 144, 155 (1960))); see also, e.g., *Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018) (“It cannot be gainsaid that Massachusetts has compelling governmental interests in both public safety and crime prevention.”); *Woollard v.*

2. Narrow Tailoring

The tougher sell is narrow tailoring. From an empirical standpoint, the relationship between “special need” regulations and firearm violence has not been studied extensively; the extent to which self-defense firearm use would be required among those who would fail to demonstrate that need in “special need” licensing regimes remains unclear. Preliminary research, however, shows that the general need to use guns for the purpose of self-defense is overestimated, suggesting that “special need” regulations would affect an extremely narrow slice of the population.³¹⁷

In the absence of available empirical evidence, intuition, logic, and common sense are worth investigating. On the one hand, the special need requirement may appear on its face to be overbroad, given the harm it is designed to avert (gun violence). This is because, of those who would choose to carry firearms in public, plenty would not use them to harm others. But, it’s important to remember that the right to bear arms does not simply protect the literal carrying around of a weapon at any time, to any place, for any reason; it protects the right to carry a firearm *for the purpose of self-defense*.³¹⁸ In other words, the firearm is the vessel by which the right of self-defense is executed. Put another way, carrying the firearm itself is not in and of itself the right; the Constitution offers that protection only to serve the purpose of, or to promote, the core right—the right of self-defense.³¹⁹

Gallagher, 712 F.3d 865, 877 (4th Cir. 2013) (“Appellees concede that ‘a compelling government interest in public safety’ generally exists”); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (“As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.”).

³¹⁷ See, e.g., David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREVENTIVE MED. 22, 23-24 (2015) (finding that self-defense gun use occurs in fewer than one percent of contact crimes).

³¹⁸ Compare, e.g., *Heller*, 554 U.S. at 616 (“It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms *for self-defense*.”), and *id.* at 628 (“[T]he inherent *right of self-defense* has been central to the Second Amendment right.”), and *id.* at 630 (referring to the Second Amendment’s “core lawful purpose of self-defense”), with *id.* at 626 (explaining that the Second Amendment protection is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

³¹⁹ An analogy to the First Amendment context is once again helpful. There, too, restrictions are tolerated on the exercises of the right to freedom of speech that are unlikely to serve the relevant purpose. Specifically, the question of whether speech is on a matter of public concern is used as a test to determine how much protection it should receive in at least a couple of different contexts. For example, if a public employee’s speech is not a matter of public concern, it is unlikely to receive much First Amendment protection (even though it

With this narrow construal of the right to bear arms in mind, “special need” laws do not seem overbroad after all. To the contrary, they appear narrowly tailored, as those who can satisfy the special needs requirement are those most likely to exercise the right to self-defense. That’s not to say that some gun owners who *do* ultimately have a need for self-defense in public won’t be excluded. The formula set out by “special need” laws will inevitably fail to capture those who could not demonstrate the elevated need for self-defense compared to the general population required to receive an unrestricted license, but who nevertheless find themselves in a situation in which that need for self-defense does in fact arise. But these exceptions are tolerated, even expected, by the relevant caselaw. The Supreme Court has stated that strict scrutiny requires only narrow tailoring, not perfect tailoring.³²⁰ In fact, the latter would set an impossible standard.³²¹

CONCLUSION

The Supreme Court recently heard oral arguments in a case that some postulated could have required it to confront the exact scope of the Second Amendment’s “core.”³²² The Court ultimately avoided assessing the extent

obviously still qualifies as speech). The Court typically excludes it because it is considered less valuable—less likely to promote the public’s interest in democratic deliberation and informed civic discussion. For example, in *Garcetti v. Ceballos*, the Court held that there are two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises.

547 U.S. 410, 418 (2006) (citations omitted). There is a similar approach in defamation and libel law, where speech on a matter of public concern receives more protection. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (“When the speech is of public concern but the plaintiff is a private figure . . . the Constitution . . . supplants the standards of the common law . . .”).

³²⁰ *See, e.g., Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (explaining that the Constitution “requires that [a regulation] be narrowly tailored, not that it be ‘perfectly tailored.’”) (citation omitted); *Burson v. Freeman*, 504 U.S. 191, 191 (1992) (“A State is not required to prove empirically that a[] . . . regulation is perfectly tailored to secure such a compelling interest.”).

³²¹ *See, e.g., Williams-Yulee*, 575 U.S. at 454 (“The impossibility of perfect tailoring is especially apparent when the State’s compelling interest is . . . intangible . . .”).

³²² *See N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 883 F.3d 45, 52 (2d Cir. 2018) (assessing whether New York City’s prohibition on transporting a licensed, locked and unloaded handgun to a home or shooting range outside the city limits is permissible

and strength of the Second Amendment’s applicability outside the home, concluding that the case was moot.³²³ Nevertheless, some of the justices may wish to “address what some have characterized as consistent underenforcement of the Second Amendment in the lower courts.”³²⁴ In the future, any reasoning that recognizes a Second Amendment right to carry firearms outside the home would spell trouble for “special need” laws nationwide, undercutting the logic employed by the plurality of circuit courts that the right to carry firearms outside the home—even for self-defense—is at most a noncore Second Amendment protection.

Constitutional text, history, structure, and precedent, coupled with prudential considerations, suggest that the Second Amendment’s core protects the right to carry arms in self-defense outside the home, reasoning the Court’s conservative majority is likely to adopt. This will, no doubt, trigger a flurry of Second Amendment litigation throughout the lower courts. Some courts, heeding *Wrenn*’s example, may strike down “special need” regimes as *per se* unconstitutional. Others may finally proceed to apply the appropriate means-end test, strict scrutiny. In such cases, whether “special need” laws will pass constitutional muster depends on whether they can be credibly cast as narrowly tailored regulations designed to protect, rather than restrict, the right of self-defense for those most likely to exercise it.

under the Second Amendment), *cert. granted* 139 S. Ct. 939 (2019); *see also* Brief for Appellants at 19, *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 883 F.3d 45 (2d Cir. 2015) (No. 15-638) (arguing that New York City’s regulation “burdens the ‘core’ right to keep and bear arms for self-defense in the home”); *id.* at 38 (asserting “no desire to carry their handguns on their person in the City.”); Brief for Respondents at 36, *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 883 F.3d 45 (2d Cir. 2019) (No. 18-280) (“It would make no sense to recognize a generalized right to carry rooted in a right to bear arms outside the home where petitioners have never challenged the State’s separate licensing regime that regulates carrying handguns in public.”).

³²³ *See* *N.Y. State Rifle & Pistol Ass’n v. City of N.Y.*, 140 S. Ct. 1525, 1526-27 (2020). After determining that the case was not moot, Justice Alito, in dissent, argued that New York’s law was unconstitutional because it burdened the core right recognized in *Heller*—“the right to keep a handgun in the home for self-defense,” which included the right “to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly.” *Id.* at 1541 (Alito, J., dissenting) (citations omitted).

³²⁴ Joe Davis & Nick Reaves, *Symposium: So What Exactly Are the Parties Still Fighting About in NYSRPA v. City of New York?*, SCOTUSBLOG (Nov. 19, 2019, 1:00 PM), <https://www.scotusblog.com/2019/11/symposium-so-what-exactly-are-the-parties-still-fighting-about-in-nysrpa-v-city-of-new-york/> [<https://perma.cc/QGQ9-KHA5>]; *see also* *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. at 1527 (Kavanaugh, J., concurring) (“I share Justice Alito’s concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court.”).