THE SECOND AMENDMENT BEYOND THE DOORSTEP: CONCEALED CARRY POST-*HELLER*

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This Note examines the approaches used by the Second and Seventh Circuits when weighing the constitutionality of concealed carry statutes. Moeller defines and explains the four differing types of concealed carry statutes that have been used in the United States, then tracks the use of those statutes through the country's history. Next, he considers the precise reasoning of the Second and Seventh Courts and analyzes the Supreme Court's precedent on the question, particularly in Heller. Additionally, he explores the understanding of the Second Amendment and its connection to concealed carry at the amendment's ratification before closing with a look at the empirical arguments for and against concealed carry. Finally, Moeller recommends adoption by the Supreme Court of the Second Circuit standard, acknowledging the limited nature of any right to carry a weapon in public and reserving the question of concealed carry to state legislatures.

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I. INTRODUCTION

Concealed firearms bring up drastically different thoughts for gun advocates and their opponents. For the supporters of concealed carry, it calls to mind scenes like that of Salt Lake City on April 26, 2012. It was early evening when a man purchased a knife at a supermarket and began stabbing people in the store.[1] He had stabbed two random people and attempted to stab others when another man pulled out his loaded handgun.[2] Upon seeing the gun, the stabber dropped his knife and bystanders were able to restrain him until police arrived.[3] No one else was harmed.[4] The gun owner who stopped the stabbing spree held a concealed carry permit.[5]

For concealed carry's opponents, the policy stirs up images like that of Lancaster, Ohio, on August 10, 2013. On that day, an instructor was teaching a gun safety course to individuals seeking concealed carry permits.[6] While demonstrating the weapon to the class, the instructor accidentally fired a .38 caliber bullet.[7] The shot glanced off a desk and into a student's arm.[8]

The two differing visions of concealed carry help explain the differing reactions to recent mass shootings. Surveys taken days after the Sandy Hook Elementary School shootings showed that those supporting stricter gun control significantly outnumbered those opposed for the first time in five years.[9] Months later, however, classes sprung up in Florida offering concealed carry training for teachers.[10] When a shooter opened

1. *Gun Carrying Man Ends Stabbing Spree at Salt Lake Grocery Store*, ABC4UTAH, (Apr. 27, 2012, 1:26 PM), http://www.4utah.com/content/about_4/bios/story/conceal-and-carry-stabbing-salt-lake-city-smiths/d/story/NDNrL1gxeE2rsRhrWCM9dQ.

2. *Id.*

3. *Id.*

4. *See id.*

5. *See id.*

6. Mary Beth Lane, *Instructor Shoots Student in Gun-Safety Class*, COLUMBUS DISPATCH (Aug. 13, 2013, 6:03 AM), http://www.dispatch.com/content/stories/public/2013/08/12/concealed-carry-accidental-shooting.html.

7. *Id.*

8. *Id.*

9. Paul Steinhauser, *New Polls Suggest Elementary School Shootings May be Changing Public Opinion*, CNN POLITICS (Dec. 17, 2012, 2:15 PM), http://politicalticker.blogs.cnn.com/2012/12/17/new-poll-suggests-elementary-school-shootings-may-be-changing-public-opinion/.

10. Peter Jamison, *In Wake of Sandy Hook, Pinellas Teachers Signing up for Concealed-Carry Training,* TAMPA BAY TIMES (Feb. 4, 2013, 10:30 PM), http://www.tampabay.com/news/publicsafety/in-wake-of-sandy-hook-pinellas-teachers-signing-up-for-concealed-carry/1273747.

fire on a theater in Aurora, Colorado, the question for many became whether concealed-carry would have ended or exacerbated the danger.[11]

The public is not debating concealed carry alone; recently, the courts have taken up the question. For thirty years, states across the nation had been moving towards more liberal concealed-carry laws.[12] In 2008 and 2010, gun lobbyists saw major victories in the Supreme Court. In *District of Columbia v. Heller*, the Court held that the Second Amendment protected guns for self-defense in the home, striking down a D.C. handgun ban in the process.[13] Two years later the Court held that the Second Amendment applied to the states, striking down Chicago's handgun ban.[14]

The question became: can concealed carry regulations continue after *Heller*? The Second Circuit answered first: yes.[15] But then the Seventh Circuit took up the question and held that Illinois could not ban the concealed carry of handguns.[16] More troubling was the fact that both had used different tests to determine if the statutes in question had been constitutional.[17] The Seventh Circuit's test was stricter, almost guaranteeing that prohibitions could not stand.[18] Then the Tenth Circuit weighed in: there is no right to carry a concealed weapon at all under the Second Amendment.[19] More courts have taken up the question and will soon provide their own answers, potentially widening the circuit split.

This Note examines the approaches used by the Second and Seventh Circuits when weighing the constitutionality of concealed carry statutes. Part II defines and explains the four differing types of concealed carry statutes that have been used in the United States. It then tracks the use of those statutes through the country's history. Part III explains the precise reasoning of the Second and Seventh Courts. It then analyzes the Supreme Court's precedent on the question, particularly in *Heller*. Additionally, Part III explores the understanding of the Second Amendment and its connection to concealed carry at the amendment's ratification before closing with a look at the empirical arguments for and against concealed carry. Finally, Part IV recommends adoption by the Supreme Court of the Second Circuit standard, acknowledging the limited nature of any right to carry a weapon in public and reserving the question of concealed carry to state legislatures.

11. *E.g.*, Chris Good, *Rep. Gohmert: Did No One Else in Aurora Theater Have a Gun?* ABC NEWS (July 20, 2012, 2:31 pm), http://abcnews.go.com/blogs/politics/2012/07/rep-gohmert-did-no-one-else-in-aurora-theater-have-a-gun/; David Weigel, *Could an Armed Person Have Stopped the Aurora Shooting? A Second Opinion*, SLATE (July 20, 2012, 4:13 PM), http://www.slate.com/blogs/weigel/2012/07/20/could_an_armed_person_have_stopped_the_aurora_shooting_a_second_opinion_.html.

12. *See infra* Part II.B.

13. 554 U.S. 570 (2008).

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

15. Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012).

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

17. *See infra* Part III.A.

18. *See infra* Part III.A.2.

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

II. BACKGROUND

In examining the different approaches the circuit courts have had in addressing concealed carry regulation, one first must recognize that there is a wide spectrum of regulation systems that have been employed by various states. Beginning in 1980, a wave of changing statutes shifted most state laws to the more permissive end of that spectrum. By 2012, Illinois was the last state with a statutory prohibition against the carrying of concealed firearms, while most of the country maintains the much more liberal "shall issue" standard. Further complicating matters, in 2008, the Supreme Court handed down a landmark case broadening the Second Amendment's protection leading to a showdown in gun law ideologies that has left the circuit courts in disagreement. This Part will first discuss the different forms of concealed carry regulation present in the United States. It will then explore the history of those regulation schemes as they were adopted or rejected by the various states. Finally, it will briefly discuss *District of Columbia v. Heller*, a recent Supreme Court case, and the impact *Heller* has had upon concealed carry laws leading up to a circuit split as courts struggle to apply the landmark case.

A. Concealed Carry Schemes

To understand the evolution of concealed carry laws in the United States, one must first understand the different types of regulation available. There are four separate categories of concealed carry laws used across the country throughout its history: full prohibitions, unrestricted jurisdictions, "shall issue" laws, and "may issue" laws.[20] Full prohibition jurisdictions, as the name implies, criminalize the carrying of concealed firearms and do not issue permits to allow carrying.[21] At the other extreme, some jurisdictions do not criminalize the carrying of a concealed firearm, allowing such carrying without a permit.[22] These jurisdictions are sometimes popularly called "constitutional carry" jurisdictions.[23] The remaining two regulatory schemes allow citizens to carry concealed weapons upon receiving a permit. In both shall issue and may issue jurisdictions, the law designates a local official, often a law enforcement officer, who is responsible for issuing permits to qualifying citizens.[24] The two jurisdictions differ in the amount of discretion given to that issuing official.

20. *See* HARRY HENDERSON, GUN CONTROL 37–38 (2000); James Bishop, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 91114 (2012).

21. *See* Bishop, *supra note* 20, at 912; *see, e.g.*, 720 ILL. COMP. STAT. 5/24-1 (2012) (ruled unconstitutional by Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012)).

22. Within these states, gun owners are still bound by federal gun regulations. Bishop, *supra* note 20, at 911. Furthermore, unrestricted states do criminalize the possession of a concealed weapon with the intent to injure another. *See, e.g.*, VT. STAT. ANN. tit. 13, § 4003 (2013).

23. 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, 600 (2012).

24. *See* Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 19602001*, 26 CONTEMP. ECON. POL'Y 198, 198–99 (2008).

In shall issue jurisdictions the agent has no discretion. Statutes in these jurisdictions set out a list of objective qualifications, such as background checks and gun safety classes, that once met by an applicant guarantee a permit.[25] The issuing authority may not withhold the permit once these statutory elements are met based on subjective beliefs.[26] Typically, though, there are disqualifying factors built into statutes that can bar an applicant from obtaining a permit, such as being a convicted felon.[27]

Florida is one example of a shall issue jurisdiction.[28] The Florida Department of Agriculture and Consumer Services must issue a permit if an applicant is a citizen or permanent resident of the United States, is twenty-one years old, completes an approved firearm safety course or can show equivalent skill, and follows the procedures set forth in the statute including providing finger prints and color photos.[29] Applicants are ineligible for a permit if they have committed a felony, have been convicted of domestic abuse in the past three years, have been committed for drug abuse or charged for a drug offense within three years, are addicted to alcohol, or have been found an incapacitated person or committed to a mental institution in the past five years.[30] The Florida statute is typical of most shall issue jurisdictions.[31]

In contrast to the shall issue model, may issue states allow issuing agents to grant permits using wide discretion. Like shall issue jurisdictions, may issue statutes provide various criteria necessary to obtain a permit, but in these jurisdictions the permit is not guaranteed.[32] In some cases, these jurisdictions require an applicant to show good cause, an element not met by an undistinguished desire for self-defense.[33] Actual application of the may issue regime can range from permissive jurisdictions, where for all practical the purposes permits are shall issue, to heavily restricted jurisdictions, where the licensing authorities refuse almost all permit applications.[34] In the most restrictive of these states, permits are only issued to wealthy, famous, or politically-connected individuals.[35]

Alabama was among the more permissive of the may issue states, before adopting a shall issue statute in May of 2013.[36] The state's old statute required that an applicant "ha[ve] good reason to fear injury to

25. David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 519 (2009).

26. *Id.* at 519–20.

27. *See* Grossman & Lee, *supra* note 24, at 198–99.

28. FLA. STAT. ANN. § 790.06 (West 2013).

29. *Id.*

30. *Id.*

31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3112 (2013); OHIO REV. CODE ANN. § 2923.125 (West 2013); TEX. GOV'T CODE ANN. § 411.172 (West 2013).

32. HENDERSON, *supra* note 20, at 111.

33. *See id.*

34. *See* Ryan S. Andrus, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity*, 42 ARIZ. L. REV. 129, 135 (2000).

35. Jonathan Zimmer, *Regulation Reloaded: The Administrative Law of Firearms After* District of Columbia v. Heller, 62 ADMIN. L. REV. 189, 213 (2010).

36. *See* ALA. CODE § 13A-11-75 (2006); ALA. CODE § 13A-11-75 (2013).

his or her person or property or has any other proper reason for carrying a pistol, and that he is a suitable person to be so licensed.[37] By its language, the statute appeared to give much discretion to the county sheriff to determine if a person was "suitable" and had "good reason" for a gun permit; in practice, however, almost all adults who applied received permits in the state creating a *de facto* shall issue.[38] New Jersey is an example of one of the more restrictive may issue jurisdictions. The state's statute requires an applicant have a "justifiable need to carry a handgun."[39] While New Jersey's "justifiable need" language seems similar to the "good reason" required by the Alabama jurisdiction, the application is much different. In New Jersey "it is essentially impossible for anyone except a retired police officer to obtain a permit."[40]

May issue jurisdictions also differ from shall issue jurisdictions in their application across a state. In some states, notably California and New York, may issue laws have resulted in areas of a state being for all practical purposes shall issue, while other areas are practically full prohibition.[41] Typically, this division arises from stricter gun laws in urban areas with more permissive applications of the law as the area becomes more rural.[42] New York is the more extreme example, as gun permits granted in one area of the state are not automatically valid in others.[43] While some see this form of may issue jurisdiction as a model for compromise,[44] critics decry the opportunity for discrimination and favoritism the discretion allows.[45]

The complexity of concealed gun laws across the country can be seen in the spectrum of regulation schemes that have developed, ranging from the completely restrictive jurisdictions with full prohibition on concealed carry to the completely permissive jurisdictions that require no permit at all. Further complicating matters are the varying levels of restriction within each category. The next Section will track the shifting balance between these different categories of regulation throughout the history of the United States.

37. ALA. CODE § 13A -11-75 (2006).

38. Kopel, *supra* note 25, at 5204 n.14.

39. N.J. STAT. ANN. § 2C:58-4 (West 2013).

40. Kopel, *supra* note 25, at 520.

41. *See* Kelsey M. Swanson, *The Right to Know: An Approach to Gun Licenses and Public Access to Government Records*, 56 UCLA L. REV. 1579, 1592 (2009); *see also* Monique Garcia, *On Concealed Carry Gun Issue, Illinois Looks to N.Y. Gun Laws*, CHI. TRIB. (Dec. 30, 2012), http://articles.chicagotribune.com/2012-12-30/news/ct-met-illinois-concealed-carry-models-20121230_1_gun-laws-gun-issue-typical-gun-owner.

42. *See* Garcia, *supra* note 41.

43. *Id.*

44. *Id.* ("New York may provide a road map for Democrats who have long opposed guns on Illinois streets and are looking to craft a measure that includes tough restrictions.").

45. Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 685 (1995); Swanson, *supra* note 41, at 1591.

B. Concealed Carry Throughout U.S. History

In the United States, the first bans on concealed firearms predate the Civil War.[46] In 1813, Kentucky and Louisiana became the first states to ban the carrying of concealed handguns.[47] Over the next sixty years, Indiana, Tennessee, Virginia, Alabama, and Ohio would follow, passing their own statutes prohibiting concealed carry.[48] Texas, Florida, and Oklahoma also followed suit.[49]

Legislatures passed the statutes to curb high murder rates.[50] Many lawmakers at the time reasoned that gentlemen carried their guns in the open; only criminals needed to hide their weapons.[51] In 1897, the Supreme Court declared such restrictions on gun rights constitutional, stating in dicta that such regulation was one of the well-recognized exceptions to constitutional rights that had been acknowledged since "time immemorial."[52] Yet, the laws had problems due to poor writing by the legislature.[53] Some of the bans on the concealed carrying prohibited even police and other officers of the state from carrying concealed firearms when on duty.[54] The rules were also typically ineffective, having no real effect on the high violence rates in the South.[55] Not all states moved towards restrictive concealed carry laws. In direct contrast to the U.S. Supreme Court decision, Vermont's Supreme Court ruled that such a restriction violated Vermont's state constitution, creating the first unre-unrestricted state.[56]

The next chapter in concealed carry laws came between the First and Second World Wars. The Twenties and Thirties brought the age of the gangster, and the violence of the Prohibition era sparked both federal and state governments to pass new gun control legislation.[57] Many states looked to a model code, "A Uniform Act to Regulate the Sale and Pos-

46. Cramer & Kopel, *supra* note 45, at 681.

47. Clayton E. Cramer, *Converted Weapon Laws of the Early Republic*, CLAYTON CRAMER'S WEBPAGE 7 n.19, http://www.claytoncramer.com/popular/duelinganddeliverance.pdf (Last visited June 5, 2014).

48. Jill Lepore, *Battleground America: One Nation, Under the Gun*, NEW YORKER (Apr. 23, 2012), http://www.newyorker.com/reporting/2012/04/23/120423fa_fact_lepore?currentPage=all.

49. *Id.*

50. *See Concealed Guns*, PROCON.ORG (Feb. 5, 2013), http://concealedguns.procon.org/.

51. *See, e.g.*, Philip J. Cook et. al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1080 (2009) ("[A]n 1850 decision from Louisiana lauded 'a manly and noble defence' with unconcealed weapons while disparaging 'secret advantages and unmanly assassinations' with concealed weapons.") (quoting State v. Chandler, 5 La. Ann. 489, 490 (1850)).

52. *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

53. Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 157 (2001) ("Many of these concealed weapons acts were written in vague and even contradictory form.").

54. MARCUS NIETO, CONCEALED HANDGUN LAWS AND PUBLIC SAFETY 2 (1997), *available at* http://www.library.ca.gov/crb/97/07/97007.pdf.

55. CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 139–41 (1999).

56. State v. Rosenthal, 55 A. 610, 611 (1903).

57. Jay Buckey, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 VT. L. REV. 957, 959 (2011).

session of Firearms," as an alternative to the complete prohibition of concealed weapons that had failed to quell violence in the South.[58] Following the passage of a rigidly restrictive concealed carry ban in New York, the United States Revolver Association drafted the more lenient model uniform law with the hopes of "forestall[ing] laws which might seriously interfere with the privileges of pistol shooting and hunting."[59] The model statute prohibited unlicensed concealed carry rather than a total ban.[60] The National Conference of Commissioners on Uniform State Laws adopted the Act along with many states.[61] Supporters of the model act believed that circumstances existed where civilians would have genuine need for carrying a concealed firearm.[62] States typically adopted versions of the act without specific requirements for the issuing of a license, giving the licensing agent significant discretion in choosing who could and could not carry a concealed gun.[63] These were the first may issue statutes.

Following World War II, a new type of concealed carry law emerged: shall issue statutes.[64] The shall issue statutes first arose in New Hampshire, Washington, and Connecticut.[65] Beginning in 1980, they began to take hold. Indiana passed a shall issue statute in 1980 and was followed by nine other states in the next decade.[66] During the 1990s, "'shall issue' laws spread rapidly to all sections of the country."[67] By 2003, thirty-three states maintained shall issue jurisdictions along with Vermont's unrestricted jurisdiction.[68] In 2003, Alaska became the second state, next to Vermont, to allow unrestricted concealed carry.[69] It was followed by Arizona in 2010[70] and Wyoming in 2011.[71] Between 2002 and 2011, six states passed shall issue permits.[72] Wisconsin was the last state to voluntarily change from outright prohibition of concealed carry in 2011, after two previous attempts had been blocked by gubernatorial ve-

58. *See* NIETO, *supra* note 54, at 2.
59. John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 403 (1933).
60. *Id.* at 404.
61. NIETO, *supra* note 54, at 2.
62. *Id.*
63. *Id.*; *see* Brabner-Smith, *supra* note 59, at 404.
64. *See* NIETO, *supra* note 54, at 5.
65. *See* Grossman & Lee, *supra* note 24, at 200.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Alaska Passes Broad Right to Carry*, NRA-ILA (June 13, 2003), http://www.nraila.org/news-issues/news-from-nra-ila/2003/alaska-passes-broad-right-to-carry-law.aspx.
70. Kevin Kiley, *Arizona's Concealed Weapon Law Takes Effect*, ARIZ. REPUBLIC (July 29, 2010, 12:00 AM), http://www.azcentral.com/arizonarepublic/local/articles/2010/07/29/20100729arizona-concealed-weapons-law.html?nclick_check=1#ixzz1vdtqwIqC.
71. Joan Barron, *Concealed-carry Gun Law Goes into Effect Today in Wyoming*, BILLINGS GAZETTE (June 30, 2011, 11:45 PM), http://billingsgazette.com/news/state-and-regional/wyoming/concealed-carry-gun-law-goes-into-effect-today-in-wyoming/article_968f59ca-f3f7-538d-a878-556d3aeb26c4.html.
72. JOSEPH A. WEGENKA, CONCEALED HANDGUN LAWS IN THE UNITED STATES 8 (2008).

to.[73] That left Illinois as the last state with a full prohibition against concealed carry. As of 2012, only ten states maintained may issue statutes, mostly in the Northeast and California.[74]

C. District of Columbia v. Heller *and Its Ramifications*

"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."[75] Through much of the twentieth century, there was no question that the right to arms under the Second Amendment was tied to those first words: a well regulated militia.[76] It was not until later in the century that scholars began to question whether the amendment was meant to be extended beyond those words to include other reasons, like self-defense.[77] Soon scholars and the circuit courts were divided, and it fell to the Supreme Court to decide where the rights under the Second Amendment ended.[78]

The Court broached the subject in *District of Columbia v. Heller*, a challenge to the District's ban on handguns.[79] In the opinion for the Court, Justice Scalia writes, "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."[80] Justice Scalia then explains that the prefatory clause in the amendment seeks only to give the reason the amendment was codified, not to define the right described.[81] The militia 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."[82] Thus, the question was answered: self-defense "was the *central component* of the right itself."[83]

73. Mark R. Hinkston, *Wisconsin's Concealed Carry Law*, 85 WIS. LAW. (July 2012), *available at* http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=85&Issue=7&ArticleID=8710.

74. U. S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-717, GUN CONTROL: STATES' LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION 11 (2012), *available at* http://www.gao.gov/assets/600/592552.pdf.

75. U.S. CONST. amend. II.

76. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 708 (2012).

77. *Id.*

78. *See id.* at 708–09.

79. *See generally* D.C. CODE § 7-2502.02(a)(4) (2001); Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

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

81. *Id.* at 599. There is extensive literature examining Justice Scalia's historical argument in Heller. *See, e.g.*, Sanford Levinson, *For Whom Is the Heller Decision Important and Why?*, 13 LEWIS & CLARK L. REV. 315, 315 (2009); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1171 (2009); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626 (2008). The Court acknowledged these criticisms in *McDonald*. McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 3048 (2010) ("To begin, while there is certainly room for disagreement about *Heller's* analysis of the history of the right to keep and bear arms . . . .").

82. *Heller*, 554 U.S. at 599.

83. *Id.*

The Court then ruled the handgun ban unconstitutional.[84] Two years later the Court expanded its ruling to the states in *McDonald v. City of Chicago*.[85]

With two victories in the Supreme Court, gun activists turned their attention to concealed carry laws.[86] The new question was: could concealed carry prohibitions and may issue statutes continue under Heller? The Second Circuit approached the question first. In *Kachalsky v. County of Winchester*, the court upheld New York's concealed carry licensing scheme as constitutional despite its requirement that an applicant "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[87]

The question next came up in Illinois, where the Seventh Circuit considered the state's full prohibition on concealed carry.[88] There the court struck down Illinois' ban of concealed carry, explaining that "[a] 'vast terra incognita' has been opened to judicial exploration by *Heller* and *McDonald*. There is no turning back by the lower federal courts . . . ."[89] The Seventh Circuit denied Illinois' request for an *en banc* decision.[90]

After that, the question arose in the Tenth Circuit. In *Peterson v. Martinez*, the court held that a Colorado law refusing concealed carry permits to out-of-state residents was constitutional.[91] The court concluded "that the carrying of concealed firearms is not protected by the Second Amendment."[92]

Other circuits have also contended with the issue. For instance, Maryland's may issue statute is currently under review in the Fourth Circuit.[93] In that case, with an opinion expected in early 2013, the Fourth Circuit will examine a district court's holding that Maryland's requirement of "a good and substantial reason" for a permit.[94] The Ninth Circuit has taken on the concealed carry laws of both California and Hawaii. Given the number of cases reaching the courts of appeals, it is clear that

84. *Id.* at 635.

85. *See McDonald*, 561 U.S. 130 S. Ct. at 3050.

86. *See, e.g.*, Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1524 (2009) ("[A] ban on concealed carry should indeed be seen as a presumptively unconstitutional substantial burden on self-defense.").

87. 701 F.3d 81, 86 (2d Cir. 2012) (quoting Klenosky v. N.Y. City Police Dep't, 75 A.D.2d 793, 793 (1st Dept. 1980)).

88. Moore v. Madigan, 702 F.3d 933, 938 (7th Cir. 2012).

89. *Id.* at 942 (responding to United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir.2011)).

90. Martha Neil, *Appellate Decision Striking Illinois Concealed-Carry Law Won't Be Reviewed by Full 7th Circuit*, A.B.A. J. (Feb. 25, 2013, 8:55 AM), http://www.abajournal.com/news/article/full_7th_circuit_declines_to_review_appellate_decision_striking_illinois_co/.

91. 707 F.3d 1197, 1201 (10th Cir. 2013).

92. *Id.*

93. Ann E. Marimow, *Appeals Court Considers Key Provision of Maryland's Gun-Control Law*, WASH. POST (Oct. 24, 2012), http://www.washingtonpost.com/local/crime/appeals-court-considers-key-provision-of-marylands-gun-control-law/2012/10/24/bf659238-1e09-11e2-b647-bb1668e64058_story.html.

94. *Id.*

questions remain as to whether *Heller* reaches beyond the home and into the realm of concealed carry.

III. ANALYSIS

The constitutional permissibility of concealed carry laws is analyzed differently across the courts of appeals. Part III discusses the approaches utilized in the federal jurisdictions that have examined concealed carry laws. First, in *Kachalsky v. County of Westchester*, the Second Circuit used intermediate scrutiny to determine that discretionary concealed carry laws survived under the Second Amendment.[95] Second, in *Peterson v. Martinez*, the Tenth Circuit ruled that the Second Amendment did not apply to concealed carry and thus Colorado's law did not require any scrutiny.[96] Finally, the Seventh Circuit used a stricter formulation of intermediate scrutiny to invalidate Illinois' concealed carry prohibition in *Moore v. Madigan*.[97] This Part will first analyze each case before exploring the underlying assumptions and policy implications the cases rely upon.

A. The Circuit Split

1. The Second and Tenth Circuits: Heller *in the Home*

The Second Circuit got its chance to interpret *Heller* when plaintiff Alan Kachalsky and four other residents of Westchester County, New York, applied for handgun permits under New York's may issue statute.[98] All were denied a permit under the state's strict "proper cause" requirement.[99] The lower court granted summary judgment for the defendant *sua sponte*, disposing of the case.[100] The plaintiffs appealed, arguing before the Second Circuit that the Second Amendment, under *Heller*, "guarantee[d] them a right to possess and carry weapons in public to defend themselves from dangerous confrontation and that New York cannot constitutionally force them to demonstrate proper cause to exercise that right."[101] The plaintiffs further contended that following *Heller*'s analysis of history and tradition, there is a "'fundamental right' to carry handguns in public, and though a state may regulate open or concealed carrying of handguns, it cannot ban *BOTH*."[102]

Yet, the court distinguished the history addressed in *Heller* from a history of concealed-carry:

95. 701 F.3d 81, 93 n.17 (2d Cir. 2012).
96. *See* 707 F.3d at 1208.
97. 702 F.3d 933, 940 (7th Cir. 2012).
98. Kachalsky v. Cacace, 817 F. Supp. 2d 235, 241-44 (S.D.N.Y. 2011) *aff'd sub nom.* Kachalsky v. Cnty. of Westchester, 701 F.3d, *cert. denied*, 133 S. Ct. 1806 (2013).
99. *Kachalsky v. Cacace*, 817 F. Supp. 2d. at 240.
100. *Id.* at 273.
101. *Kachalsky*, 701 F.3d at 88.
102. *Id.* at 89.

> It seems apparent to us that unlike the situation in *Heller* where "[f]ew laws in the history of our Nation have come close" to D.C.'s total ban on usable handguns in the home, New York's restriction on firearm possession in public has a number of close and longstanding cousins. History 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, whether the right was embodied in a state constitution or the Second Amendment.[103]

Emphasizing the fact that *Heller* focused its discussion on the home, the court discussed the precedent in the Supreme Court for treating the home as special when considering personal liberties.[104] It then went on to discuss how regulation of concealed weapons, similar to New York's, was a "longstanding tradition."[105] Given the strong weight of history in favor of "a substantial role for state regulation of the carrying of firearms in public," the Second Circuit determined that intermediate scrutiny was the proper metric for testing New York's statute.[106]

Thus in the Second Circuit, a restriction on concealed carry "passes constitutional muster if it is substantially related to the achievement of an important governmental interest."[107] When applying the test, precedent requires that "substantial deference" be made to the legislature's determination.[108] It was unquestioned that New York had a substantial and compelling interest in public safety and crime prevention;[109] the regulation of concealed weapons was based on a "belief that it would have an appreciable impact" on that goal.[110] The court found that New York's highly discretionary method of limiting who received permits was irrelevant to the intermediate scrutiny test.[111] New York's determination that the need to limit handguns in public outweighs an individual's need for self-defense while in public, according to the court, "did not run afoul of the Second Amendment.[112] Again turning to history, the court "decline[d] Plaintiffs' invitation to strike down New York's one-hundred-year-old law and call into question the state's traditional authority to extensively regulate handgun possession in public."[113]

Within months, the Tenth Circuit followed the Second Circuit's lead. In *Peterson v. Martinez*, a Washington state resident was denied a concealed handgun license by the Denver Sheriff.[114] Colorado has a shall

103. *Id.* at 91 (citation omitted).
104. *Id.* at 94.
105. *Id.* at 94–96.
106. *Id.* at 96.
107. *Id.*
108. *Id.* at 97.
109. *Id.*
110. *Id.* at 98.
111. *See id.* at 99 ("That New York has attempted to accommodate certain particularized interests in self defense does not somehow render its concealed carry restrictions unrelated to the furtherance of public safety.").
112. *Id.* at 100.
113. *Id.* at 101.
114. 707 F.3d 1197–1201 (10th Cir. 2013).

issue statute, but it is only applicable to Colorado residents.[115] Open carry is also illegal in the City of Denver.[116] In addressing the suit, the court concluded that the Second Amendment does not provide the right to carry a concealed firearm.

Looking to Supreme Court dicta in both *Robertson* and *Heller*, the court explained that "jurisprudence . . . strengthens . . . the statement that concealed carry restrictions do not infringe the Second Amendment right to keep and bear arms."[117] In support, the court cites *Heller*'s discussion of the history of concealed carry regulation alongside similar historical surveys by scholars to determine that the longstanding restrictions were "presumptively lawful regulatory measures."[118] In deciding that the Second Amendment did not apply to concealed carry, the court did not even reach the question of intermediate scrutiny.[119]

The Tenth Circuit's decision is stronger than the Second's ruling. While the Second Circuit acknowledged there might be some right to concealed carry, it was outweighed by the state's interest in public safety.[120] The Tenth Circuit stated there was no right to concealed carry;[121] importantly, this right did not exist even in the absence of any alternative method of carrying a firearm.[122] In the Second Circuit, there is still a question of whether the carrying of a firearm could fully be banned. The Second Circuit Court specified that New York had not forbidden everyone from carrying weapons in public, only most.[123] Yet, it is unclear that this distinction makes any difference to the court's reasoning. The Circuit's test only required substantial relation to public safety interests; it stated that New York'ns narrowing of concealed carry to certain people did not affect the fact that restricting guns was substantially related to public safety.[124] Following that logic, further restricting concealed weapons to the point where none can carry them still would not affect the relationship between restricting guns and public safety. Furthermore, the court's evaluation standard in New York City makes it virtually impossible to obtain a concealed carry license.[125] In a population of almost eight million people, only 36,652 permits have been issued.[126] That works out to about half of a percent of the city's population. Given the practical effect of the law the Second Circuit upheld, it seems quite reasonable that a full prohibition could also be upheld.

115. COLO. REV. STAT. ANN. § 18-12-203 (West 2013).
116. DENVER REV. MUN. CODE § 38–117(a), (b), & (f).
117. *Peterson*, 707 F.3d at 1210.
118. *Id.* at 1210–11.
119. *Id.*; *see also* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) (discussing the two part test).
120. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 98 (2d Cir. 2012).
121. *Peterson*, 707 F.3d at 1211.
122. Open carry is prohibited in Denver, where the plaintiff spent his time in Colorado. *Id.* at 1201; *see* DENVER REV. MUN. CODE § 38–117 (b).
123. *Kachalsky*, 701 F.3d at 98.
124. *Id.* at 99.
125. *See* Garcia, *supra* note 41.
126. *See id.*

2. The Seventh Circuit: Into the Vast Terra Incognita

Gun control advocates experienced a large defeat in December, 2012. The Seventh Circuit took on concealed carry in *Moore v. Madigan*.[127] In a 2-1 opinion penned by Judge Richard Posner, the court struck down Illinois' concealed carry ban as unconstitutional.[128] The court then suspended its judgment for one hundred and eighty days, giving the Illinois legislature time to draft a new law.[129]

In the opinion, the court first addressed the history of the Second Amendment and its precedents in English law.[130] It acknowledged that historical evidence existed to show that there was no general right to carry arms in public at the time the amendment was ratified.[131] Yet, the court then went on to state that a similar argument had failed before the Supreme Court in *District of Colombia v. Heller*.[132] As such, the court held it was bound by the Supreme Court's historical analysis and the conclusion that the Second Amendment "protects the right to keep and bear arms for the purpose of self-defense."[133] Judge Posner then went on to explain that that right to self-defense cannot rationally be confined to the home.[134]

The opinion briefly touches on a textual argument for expanding the Second Amendment beyond the doorstep:

> The Second Amendment states . . . that ". . . the right of the people to keep *and bear* Arms, shall not be infringed." The right to "bear" as distinct from the right to "keep" arms is unlikely to refer to the home. To speak of "bearing" arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.[135]

Judge Posner then begins a quasi-historical survey of the right to carry weapons in the United States' and England's past.[136] He distinguishes the American past of the "wild west—the Ohio Valley" from that of England, where "there was no wilderness and there were no hostile Indians and the right to hunt was largely limited to landowners, who were few."[137] That difference, the court explains, is why the early English laws against the carrying of weapons cannot be read into the Second Amendment.[138]

This distinction between dangerous and safe places carries over into the next portion of the opinion that offers a more practical argument

127. 702 F.3d 933 (7th Cir. 2012).
128. *Id.* at 942.
129. *Id.*
130. *Id.* at 935.
131. *Id.*
132. *Id.*
133. *Id.* (quoting McDonald v. City of Chicago, 561 U.S 742 (2010)).
134. *Id.* at 936.
135. *Id.*
136. *Id.*
137. *Id.* (citation omitted).
138. *See id.* at 936–37.

against the Illinois law.[139] The court states, "[t]wenty-first century Illinois has no hostile Indians. But 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."[140] Illinois bars the carrying of a gun in the first case, but must allow it in the second under *McDonald*; a distinction the court found arbitrary.[141]

Furthermore, Judge Posner writes that Illinois has not gone far enough to show that the law is necessary as the broad ban "can't be upheld merely on the ground that it's not irrational."[142] After surveying the existing literature on concealed carry, the court found the evidence inconclusive for either side.[143] The blanket ban on self-defense outside the home "requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment."[144]

Finally, the court states that Illinois is the only state that completely bans the carrying of concealed weaponry, though Washington, D.C., does.[145] The court reasons that even Massachusetts and New York have found it necessary to allow some form of concealed carry; therefore, "[t]here is no suggestion that some unique characteristic of criminal activity in Illinois justifies the state's taking a different approach from the other 49 states. If the Illinois approach were demonstrably superior, one would expect at least one or two other states to have emulated it."[146]

The Seventh Circuit does not use intermediate scrutiny as the Second Circuit did; rather, the test put forth in *Moore* is "that the government had to make a 'strong showing' that a gun ban was vital to public safety."[147] Judge Posner, however, is taking the test from an earlier Seventh Circuit Case.[148] In *United States v. Skoien*, the court referred to this "strong showing" test as intermediate scrutiny.[149] The problem is that intermediate scrutiny is not a single, uniform standard.[150] The standard can range from a judge requiring strong, empirical proof that a law will achieve its purpose, as the Seventh Circuit did, to a judge requiring "a logically plausible theory of danger reduction" which seems more akin to the Second Circuit approach.[151] According to at least one commentator, the first approach will all but guarantee a law's invalidation while the

139. *Id.*
140. *Id.* at 937.
141. *Id.* ("Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference. To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.").
142. *Id.* at 939.
143. *Id.* at 938–39.
144. *Id.* at 940.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* (citing United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010)).
149. 614 F.3d at 641.
150. Rostron, *supra* note 76, at 746.
151. Volokh, *supra* note 86, at 1467–68.

second will bring the opposite result.[152] The circuit split then comes down to which of these forms of intermediate scrutiny should be used.

B. Reading Heller*: A Right to Arms in the Home or Beyond?*

In order to evaluate which conception of intermediate scrutiny best serves the concealed carry question, one must first judge the underpinnings of each circuit's analysis. Each circuit's form of intermediate scrutiny is based on their reading of *Heller* and their understanding of the history of concealed carry regulations.[153] Therefore, one must look to the opinion in *Heller* to determine just how wide the Second Amendment is to be read.

While the Seventh Circuit deemed it irrational not to extend the right to self-defense outside of the home,[154] numerous times in *Heller* the Supreme Court sees fit to distinguish the home, rather than reference self-defense in general. The Supreme Court described the home as "where the need for defense of self, family, and property is most acute."[155] When discussing the District of Colombia's ban on handguns, the Court notes:

> It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; . . . it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.[156]

The Court first describes the handgun in terms of general self-defense; however, it then *narrows* the discussion to self-defense in the home when discussing the invalid prohibition.[157] If *Heller* was meant to apply to all self-defense, it seems odd that the Supreme Court would feel the need to then specify that it was because of self-defense in the home that the prohibition was unconstitutional and not because of self-defense generally.

In *Robertson v. Baldwin*, the Supreme Court actually stated in dicta that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . ."[158] The Supreme Court cites to *Robertson* in the *Heller* opinion while de-

152. *Id.* at 468.

153. *See, e.g.*, Peterson v. Martinez, 707 F.3d 1197, 1207–09 (10th Cir. 2013); Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 94 (2d Cir. 2012).

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

155. Dist. of Columbia v. Heller, 554 U.S. 570, 628 (2008).

156. *Id.* at 629.

157. *Id.* at 628.

158. 165 U.S. 275, 281–82 (1897).

scribing the history behind the Second Amendment.[159] Justice Breyer, in dissent, uses the case to demonstrate that the Second Amendment "is not absolute, but instead is subject to government regulation."[160] In fact, multiple times in the *Heller* opinion, Justice Scalia writes that the Second Amendment is not unlimited.[161] The Court explicitly mentions concealed carry of weapons, noting that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[162] Then in the very next sentence the Court explains:

> [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.[163]

In the accompanying footnote, the Court assures that the list is not exhaustive of the limits to the Second Amendment.[164] A reasonable reading of *Heller* shows that the Court intended a narrow reach for the case; otherwise, the opinion would not spend so many pages explaining its many limits. The reach of *Heller* is best explained by the Supreme Court in *McDonald v. City of Chicago*.[165] In applying *Heller* to the states through the Fourteenth Amendment, the Court stated, "[i]n *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense."[166]

C. Concealed Carry at the Founding

In crafting their separate intermediate scrutiny tests, each circuit relied upon a historical analysis of concealed carry rights at the time of the Second Amendment's passing. The Second Circuit discussed eighteenth century limitations on firearms outside the home, including bans of both concealed and open carry.[167] The Seventh Circuit dismissed this analysis, explaining that it was bound by the Supreme Court's historical analysis in *Heller*.[168] Yet, as Judge Ann Williams explained in dissent, "[t]he historical inquiry here is a very different one. *Heller* did not assess whether there was a pre-existing right to carry guns in public for self-defense."[169]

159. *Heller*, 554 U.S. at 599.
160. *Id.* at 683 (Breyer, J., dissenting).
161. *Id.* at 595, 626–27.
162. *Id.* at 626.
163. *Id.* at 626–27.
164. *Id.* at 627 n.26.
165. 561 U.S. 742 (2010).
166. *Id.*
167. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 94–96 (2d Cir. 2012).
168. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).
169. *Id.* at 943 (Williams, J., dissenting).

In order to judge what is and is not meant by the Second Amendment, courts must look to 1791, the year the amendment was enacted.[170] The regulation of guns in public is "part of our Anglo-American tradition."[171] In *Moore*, the Seventh Circuit criticized defendants for citing to a fourteenth-century law, the Statute of North Hampton, to support their case that firearms were not guaranteed in public.[172] Yet, this dismissal overlooks the fact that several states expressly adopted the statute at the time of the Constitution's ratification.[173] The Statute of North Hampton prohibited unauthorized individuals from going or riding "armed by night nor by day, in Fairs, markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere."[174] An English Chief Justice interpreted the statute to separate the right to have firearms in one's home from "any other place," but the Seventh Circuit states that his real distinction was "that the statutory limitation of the right of self-defense was based on a concern with armed gangs, thieves, and assassins rather than with indoors versus outdoors as such."[175] This is a stretched reading of the Chief Justice, who makes his distinction expressly about whether or not one is defending their house, stating "for a man's house is his castle . . . for where shall a man be safe, if it be not in his house."[176]

Other restricting statutes were also in place at the time the Second Amendment was enacted. The New Jersey Assembly seems to have passed the first in 1686, prohibiting "unusual and unlawful [w]eapons" in public.[177] Many of these early statutes "use . . . the phrase 'great fear' highlight[ing] the importance of the police power in preventing the dangers imposed by public carrying."[178] The Seventh Circuit latched onto this use of words like "fear" or "terrify" to conclude that the prohibitions were meant "to protect the public from being frightened or intimidated by the brandishing of weapons."[179] The court reasoned that people cannot see concealed weapons, so thus they cannot be frightened by them and the restrictions did not have them in mind.[180] But the laws were not

170. *Id.* at 935 (noting that "1791, the year the Second Amendment was ratified," is "the critical year for determining the amendment's historical meaning.") (citing *McDonald*, 561 U.S. at __).

171. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 35 (2012)

172. 702 F.3d, at 936 ("Defenders of the Illinois law reach back to the fourteenth-century . . . .").

173. Charles, *supra* note 171, at 31–32 ("The Statute was expressly incorporated by Massachusetts, North Carolina, and Virginia in the years immediately after the adoption of the Constitution. In the case of North Carolina, the statute read almost verbatim by prohibiting going armed at night or day 'in fairs, markets, nor in the presence of the King's Justices, or other ministers, *nor in no part elsewhere* . . . .'").

174. Statute of Northampton 1328 2 Edw. III, c. 3.

175. *Moore*, 702 F.3d at 936 (quoting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 162 (4th ed. 1669)).

176. COKE, *supra* note 175, at 162.

177. Charles, *supra* note 171, at 32.

178. *Id.* at 33.

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

180. *Id.* ("Some weapons do not terrify the public (such as well-concealed weapons), and so if the statute was (as it may have been) intended to protect the public from being frightened or intimidated by the brandishing of weapons, it could not have applied to all weapons or all carriage of weapons.").

about seeing weapons, "the act of riding or going armed among the people was deemed terrifying itself and considered a breach against the public peace."[181]

It is also important to recognize that in the founding era militia weapons and nonmilitary weapons were treated differently by the law.[182] Militia weapons had special legal protections that pistols were not granted.[183] Early Americans owned more long guns like rifles than they did handguns.[184] This was due largely to the fact that the first effective revolver was not invented until 1836 by Samuel Colt.[185] Before that point, handguns were expensive, inaccurate and impractical for most Americans.[186] When it came to self-defense, most Americans carried knives or blunt weapons.[187] Furthermore, "[i]nterpersonal violence, including gun violence, simply was not a problem in the Founding era that warranted much attention and therefore produced no legislation."[188] It is not until the nineteenth century, when handguns began to improve, that legislatures addressed the question of concealed carry.[189] Thus, it seems unlikely that the drafters of the Second Amendment would have had concealed carry in mind when they enacted it. When the issue of concealed handguns first really presented itself, the legislatures' response almost unequivocally was to regulate it.[190]

D. Concealed Carry: The Practical Arguments

One cannot divorce the practical effects of concealed carry on public safety from a discussion on how to regulate it. The Second Circuit refused to judge the factual sufficiency for New York's belief that its law would curb crime.[191] Recognizing the conflicting research on the connection between concealed carry and crime, the Second Circuit stated that it then fell to the legislature to weigh the evidence and use their discretion.[192] Such a review, in the court's eyes, would be akin to strict scru-

181. Charles, *supra* note 171, at 33.

182. Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1707–08 (2012).

183. *See id.* at 1709–10 ("Americans owned many more long guns and the law bestowed additional constitutional and legal protections on such weapons, including a right to travel to muster and train with these weapons, recognizing the utility of these weapons for militia activity. Yet, it is worth noting that even these militia weapons were subject to reasonable police power regulations.").

184. *Id.* at 1709; *see also* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 500 (2004).

185. *Colt Sells His First Revolvers to the U.S. Government*, HISTORY CHANNEL, http://www.history.com/this-day-in-history/colt-sells-his-first-revolvers-to-the-us-government (last visited Nov. 5, 2013).

186. *Id.*

187. *Id.*; *see also* Cornell & DeDino, *supra* note 184, at 500.

188. Cornell, *supra* note 182, at 1713.

189. *See supra* Part II.B.

190. *See supra* Part II.B.

191. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 98 (2d Cir. 2012).

192. *Id.* at 99 ("[A]ssessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives, as New York did, is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make.").

tiny.[193] In contrast, the Seventh Circuit held that the state had a burden to show empirically that its regulation would affect public safety.[194] The court concluded that "the net effect on crime rates in general and murder rates in particular of allowing the carriage of guns in public is uncertain both as a matter of theory and empirically."[195] This Section will first look to the empirical argument for concealed carry and analyze it. It will then examine and analyze the empirical argument against.

1. The Benefits of Allowing Concealed Carry

Empirical arguments for concealed carry tend to fall into two categories dealing with the prevention of crime: self-defense and deterrence. This Section will first discuss the self-defense argument for concealed carry before turning to the crime deterrence argument.

a. Self-Defense

The self-defense argument is fairly straightforward. If a criminal, say an armed robber, attempts a crime, permissive concealed carry would allow the would-be victim to defend themselves.[196] The criminal would then cease the crime and flee or else be wounded or detained until police could arrive.[197] Proponents argue that concealed guns will lower the number of successful crimes in relation to total crimes.[198] Estimates on the number of self-defense uses of firearms vary from as low as about 80,000 times a year to as high as two and a half million times a year.[199] In the latter survey, 400,000 of those victims stated that they believed "that using the gun 'almost certainly' saved a life."[200] Some commentators have argued that even if the lower estimate is used, the much smaller number of murders or other criminal deaths resulting from concealed carry shows that firearms do have a net benefit of saved lives in self-defense situations.[201]

The self-defense theory is not without its shortcomings, however. The theory depends on a significant increase in the number of people carrying a weapon, the benefit of a gun compared to other methods of

193. *Id.* at 98 ("This argument asks us to conduct a review bordering on strict scrutiny to ensure that New York's regulatory choice will protect public safety more than the least restrictive alternative.").

194. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) ("Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety.").

195. *Id.* at 937.

196. Cramer & Kopel *supra* note 45, at 686; Jens Ludwig, *Gun Self-Defense and Deterrence*, 27 CRIME & JUST. 363, 367 (2000); O'Shea *supra* note 23, at 594.

197. *See* Ludwig, *supra* note 196, at 384.

198. *See, e.g.*, GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 133 (1991) (stating that more than a third of criminals who had encountered armed victims been successfully scared off, captured, or wounded).

199. John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 2 (1997)

200. *Id.*

201. *Id.*

crime avoidance, and the risk analysis and behavior of those with firearms.[202] It is not yet certain whether shall issue jurisdictions actually see much of an increase in those carrying firearms.[203] In one survey, seventy-five percent of states that had implemented shall issue statutes saw less than two percent of adults obtain permits to carry weapons.[204] A further complication is that the use of permits may not even be responsible for that small increase.[205]

There is evidence that many of those who obtain permits once they are allowed by a state may have already been carrying concealed weapons in the first place. In North Carolina, for example, eighty-five percent of those who have obtained permits were already carrying weapons in their car without such a permit.[206] More than a third of them carried weapons on their person without a permit before North Carolina's law changed.[207] If the number of people carrying weapons does not increase, then the number of people who defend themselves with weapons cannot increase.

The self-defense argument also presents a substantial moral hazard problem. Those with weapons may overestimate the self-defense value of their weapons and behave in riskier ways.[208] The overstated belief in their safety may cause concealed carriers to place themselves in more dangerous situations and actually increase the rate of violent conflicts.[209] For example, a gun owner chooses to walk down an unlit alley knowing he or she has a gun for protection. The gun owner then runs into a robber that he or she never would have met had they stayed on the well-lit street. At least one survey of victims who used their weapon in self-defense suggests that one third of victims had the option of avoiding the confrontation but did not.[210]

b. Crime Deterrence

The crime deterrence argument is stronger than the self-defense argument because it does not rely upon the actual increase in the carrying of guns.[211] Rather, the deterrence argument is based on the fact that criminals will assume a higher prevalence of gun carrying and therefore

202. *See* Ludwig, *supra* note 196, at 391.
203. *Id.* at 390.
204. *Id.*
205. *Id.* at 391.
206. *Id.*
207. *Id.*
208. *See* Beau A. Hill, *Go Ahead, Make My Day: Revisiting Michigan's Concealed Weapons Law*, 76 U. DET. MERCY L. REV. 67, 74 (1998) ("Fears have been raised that innocent bystanders may potentially become gun shot victims because 'would-be tinhorns would shoot first and think later in an attempt to thwart a perceived crime.'") (citation omitted).
209. Ludwig, *supra* note 196, at 387.
210. *Id.*
211. The deterrent argument relies on the perception of more firearms by criminals, not an actual increase in firearm ownership. *See* John C. Lenzen, *Liberalizing the Concealed Carry of Handguns by Qualified Civilians: The Case for "Carry Reform"*, 47 RUTGERS L. REV. 1503, 1539 (1995).

be less likely to attempt a crime.[212] An analogous example: burglaries of homes with residents present occur much more often in England and Canada, with tight gun control, than in the United States, where laws regarding guns in the home are more liberal.[213] Criminals in the United States, it is argued, take more time to study and case potential crime settings to assure that they are not shot in the process of committing the crime.[214] Empirical studies have shown, at least in some counties, a decrease in murders, rapes, and other violent crimes following the institution of a concealed carry permit.[215] One study went so far as to predict that if all the United States had been subject to a shall issue law, then murders in the nation would have fallen by almost 1500.[216] Furthermore, research suggests that the deterrent effects may increase with time.[217]

Several questions have arisen in the study of crime deterrence related to concealed carry legislation. The lower crime levels may be just correlated to the change in gun laws rather than caused by them.[218] Critics point out that many variables may not be accounted for or fully understood, allowing for data to be skewed or misconstrued.[219] Furthermore, concerns arise that the crimes deterred do not just disappear, but are instead merely substituted for other types of crime.[220] While studies have shown that violent crime rates have fallen, property crime has risen.[221] This also may lead to a change in victim selection, rather than crime selection.[222] Criminals might seek out those who are less likely to carry weaponry, like the elderly or handicapped.[223] Moreover, many of the types of crime said to be deterred happen generally in the home or on other property where guns were already permitted for purposes of defense.[224] Thus, allowing concealed carry would not affect these crimes where gun deterrence was already in effect.

2. The Costs of Concealed Carry

The argument against allowing the concealed carry of firearms typically comes down to a simple proposition: more guns will lead to more violence. This Section will consider three facets of that argument: potentially increased instances of crimes of passion, accidental gun injuries and death, and an increase in the number of suicides.

212. *Id.*
213. Lott & Mustard, *supra* note 199, at 3.
214. *Id.*
215. *Id.* at 19.
216. *Id.*
217. *Id.* at 35.
218. Ludwig, *supra* note 196, at 404.
219. *See, e.g.*, *id.*
220. Lott & Mustard, *supra* note 199, at 5.
221. *Id.* at 24.
222. *See* JOHN R. LOTT, JR., THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG 9–10 (2003) (stating criminals would find a victim less likely to have a gun).
223. *Id.*
224. Lott & Mustard, *supra* note 199, at 7 n.26.

a. Crimes of Passion

A large fear on the minds of concealed carry opponents is the readily available gun on the hip of an incensed individual. As one Wisconsin judge stated, the "primary justification" for prohibiting citizens from carrying concealed weapons "is that it protects the public by preventing an individual from having a deadly weapon on hand of which the public . . . is unaware, which may be used in the sudden heat of passion."[225] Another commentator noted:

> To a great many people in America, regulating the concealed carrying of deadly weapons would seem like the most obvious sort of law. It is conventional wisdom in some circles that allowing people to carry deadly weapons is looking for trouble—that as more people carry guns, crimes of passion are sure to increase.[226]

Most of these arguments, however, tend to be largely anecdotal. This is partly due to the fact that crimes of passion are not easily traceable or categorized in compiled statistics.[227] Advocates of stricter concealed carry laws answer with the fact the spontaneous murders using a firearm might have been committed with another implement in the absence of a weapon.[228] They also argue that even if there was an increase in such crimes, it would be offset "by murders (including some spontaneous murders) that took place only because the gun control laws themselves caused the victims to be unarmed when they were attacked."[229] In reality, there is not enough evidence on either side to be able to really understand how crimes of passion are affected by gun control laws.[230]

b. Accidental Gun Deaths and Injuries

In a similar vein, those against concealed carry often argue that concealed carry increases the number of guns in public, which likely increases the number of gun accidents.[231] Critics fear not only self-inflicted wounds, but also injuries to innocent bystanders, especially from "would-be tinhorns [who] would shoot first and think later in an attempt to thwart a perceived crime."[232] One study found that the passing of a concealed carry law would increase the number of deaths by accident, but the rise was only half a percentage point.[233] Part of the issue is the rela-

225. State v. Hamdan, 665 N.W.2d 785, 820 (Wisc. 2003).

226. Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic*, CLAYTON CRAMER'S WEB PAGE 2, http://www.claytoncramer.com/popular/duelinganddeliverance.pdf (last visited Nov. 2, 2013).

227. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 66 (1996).

228. *Id.*

229. *Id.*

230. *See id.*

231. Hill, *supra* note 208, at 72.

232. *See id.* at 74 (citation omitted).

233. Lott & Mustard, *supra* note 199, at 62, 64.

tively miniscule number of accidental gun deaths that occur in the United States.[234]

Another study, however, found that more accidental deaths occur in states with restrictive gun control laws than in more permissive states, while still another study found no difference.[235] In the specific instance of an innocent bystander, one researcher estimated the probability of an innocent bystander being shot by a crime victim as one in over twenty-six thousand.[236]

c. Suicide

Some critics posit that the proliferation of concealed carry laws allows more guns to be on hand for individuals. The increased availability of guns may lead to an increase in cases of suicide, as "[s]uicide rates are . . . largely a function of the availability of firearms."[237] Gun ownership, some studies show, is not just the "strongest correlate" for homicides, but also suicide levels.[238] One estimate is that a ten percent reduction in firearm ownership in the United States would translate to 800 fewer suicides per year.[239] Since handguns are typically the firearm discussed in matters of concealed carry, it is interesting to look at the effects of Washington, D.C.'s handgun ban. In the decade following the D.C. ban, the district saw a twenty-three percent decrease in suicides.[240] A study in California showed that purchasers of a handgun were four times more likely to commit suicide during the first year following their purchase.[241] In Michigan, concealed carry permit holders have been shown to have a higher rate of suicide than those without permits.[242]

These arguments fall flat with many gun advocates. One study looked to over twenty Western countries, finding no correlation between gun ownership levels and total suicides.[243] Some argue that any decrease in gun-inflicted suicides could be virtually replaced by a rise in suicides by other means.[244] As one writer put it, "[i]t's as easy to commit suicide with a shotgun as with a handgun."[245]

In examining both the practical arguments for and against concealed carry, it is clear that Judge Posner was correct: the results are inconclusive. From a purely empirical study of the costs and benefits of al-

234. *Id.* at 64.
235. Hill, *supra* note 208, at 86.
236. Cramer & Kopel, *supra* note 45, at 734.
237. Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 150 (2009).
238. *Id.* (citation omitted).
239. *Id.*
240. *Id.* at 155.
241. *Id.* at 156.
242. *Michigan Concealed Handgun Licensees Have Suicide Rate Higher Than General Michigan Population--VPC Concealed Carry Killers November Update*, VIOLENCE POL'Y CENTER (Nov. 30, 2010), http://www.vpc.org/press/1011ccw.htm.
243. Volokh, *supra* note 86, at 1466.
244. *See id.* at 1538.
245. *Id.*

lowing or restricting concealed carry there is not a clear better choice. Given the number of studies that have reached conflicting results, it may be that concealed carry laws affect different areas in different ways.

IV. RECOMMENDATION

The Second and Seventh Circuits' standards for judging the constitutionality of concealed carry restrictions are two different ways to approach the same problem. In *Kachalsky*, the Second Circuit developed an intermediate scrutiny test to examine if the law was substantially related to achieving an important government interest.[246] The test, applied with great deference to the legislature, found the highly restrictive New York may issue statute to be constitutional.[247] In the following months, however, when the Seventh Circuit considered the question of concealed carry restrictions, that court's test required a "strong showing" that the law was "vital to public safety."[248] In practice, this meant Illinois had to prove empirically that its law would benefit public safety.[249]

The Tenth Circuit has followed the Second Circuit's result[250] and the Fourth Circuit is currently considering a concealed carry case.[251] The Ninth Circuit has heard arguments in three separate cases challenging concealed carry statutes in California and Hawaii.[252] The federal courts have failed to give a uniform procedure for judging the constitutionality of these laws. The Supreme Court has not given a solid answer on the subject. Therefore, to address the growing number of challenges to concealed carry legislation across the nation and the conflicting answers given by the courts of appeal, the Supreme Court must clarify what standard the courts are to apply in the wake of *Heller* and *McDonald*.

The stage is already set for the question to come before the Supreme Court. The plaintiffs in *Kachalsky* have already petitioned the Court for a writ of certiorari.[253] The Supreme Court itself seems to have considered future cases to clarify the limits of the Second Amendment. In *Heller*, the Court assured that no one should expect *Heller* to "clarify the entire field" of Second Amendment doctrine.[254] Foreseeing future challenges, Justice Scalia, for the Court, wrote that "there will be time enough to expound upon the historical justifications for the exceptions

246. Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012).

247. *See id.* at 97–98.

248. Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012).

249. *See id.*

250. Peterson v. Martinez, 707 F.3d 1197, 1221 (10th Cir. 2013).

251. Ann E. Marimow, *Appeals Court Considers Key Provision of Maryland's Gun-Control Law*, WASH. POST (Oct. 24, 2012), http://www.washingtonpost.com/local/crime/appeals-court-considers-key-provision-of-marylands-gun-control-law/2012/10/24/bf659238-1e09-11e2-b647-bb1668e64058_story.html.

252. Bobbie K. Ross, *Ninth Circuit to Hear Oral Arguments in Three Important Gun Cases*, A.B.A. (Nov. 2, 2012), http://apps.americanbar.org/litigation/committees/civil/news.html.

253. Ilya Shapiro, *The Second Amendment Protects Both Keeping and Bearing Arms*, CATO INST. (Feb. 11, 2013, 5:09 PM), http://www.cato.org/blog/second-amendment-protects-both-keeping-bearing-arms.

254. Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008).

we have mentioned if and when those exceptions come before us."[255] The time has come for the Court to rule on concealed carry regulation.

In considering such a case, the Court should affirm the Second Circuit's version of intermediate scrutiny. First, the Second Circuit offers a better reading of *Heller* and Supreme Court precedent, whereas the Seventh Court discounts *Heller*'s own language limiting it to the home. Second, historical analysis shows that the regulation of concealed firearms has always been deemed permissible and never been limited by the Second Amendment's protections. Finally, given the empirical stalemate between gun advocates and opponents, the Second Circuit's deferential standard allows legislatures to weigh legislative facts, rather than passing that duty on to ill-equipped courts.

The Seventh Circuit's ruling is based upon the idea that *Heller*'s principles extend into the public space.[256] Judge Posner stated several times that the court is bound by the Supreme Court's ruling in the area, but then misread *Heller*.[257] *Heller* does not require the lower courts to overturn the "longstanding prohibitions" on firearms.[258] The Court pointed to concealed weapons prohibitions as an example of the limits to the Second Amendment.[259] The Seventh Circuit seems to cast aside the numerous times the Supreme Court specifies they are talking about guns in the home, both in *Heller* and later in *McDonald*, for the idea that such a distinction is illogical.[260]

The Second Circuit acknowledges the limitations noted in *Heller*.[261] The limited nature of the Second Circuit's intermediate scrutiny is more suited to the limited right described in *Heller*. The Seventh Circuit's requirement for strong factual proof is a stronger test that is more proper for a stronger right. Given the existing literature on concealed carry, a factually based test like the one used in *Moore* will almost inevitably lead to a law being struck down.[262] The test appears more like strict scrutiny than intermediate and is meant for a stronger right than what is implied by Supreme Court precedent. Most importantly, the Seventh Circuit does not account for the dicta in *Robertson*, where the Supreme Court says prohibition of concealed carry is permissible.[263] The Supreme Court

255. *Id.*

256. *See supra* Part III.A.2.

257. While stating that the history is debatable, Judge Posner concludes "we are bound by the Supreme Court's historical analysis because it was central to the Court's holding in *Heller.*" Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012). Later addressing worries that the area of concealed- carry is a "vast *terra incognita,*" the opinion states "[f]air enough . . . but . . . [t]here is no turning back by the lower federal courts." *Id.* at 942.

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

259. *See id.*

260. *See* McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 3050 (2010) ("In *Heller*, we held that the Second Amendment protects the rights to possess a handgun in the home for the purpose of self-defense. . . . We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates *the Second Amendment right recognized in Heller*.") (emphasis added).

261. *See supra* Part III.A.1.

262. *See supra* note 152 and accompanying text.

263. *See* 165 U.S. 275, 281–82 (1897).

did not correct the dicta when it cited *Robertson* in *Heller*, so it seems odd that the Seventh Circuit feels bound to correct it.

The Seventh Circuit's test also relies on the historical analysis provided by the Supreme Court while reproaching the Second Circuit for not doing so.[264] But *Heller* did not discuss whether a right to carry firearms in public was held at the Second Amendment's adoption.[265] *Heller*'s historical analysis was focused on the home. When evaluating whether a right is protected by the Second Amendment, a court must look to historical analysis to fashion and craft the appropriate scrutiny to use.[266]

When the Second Amendment was enacted, there was less of a need for self-defense in public.[267] Interpersonal violence was not a large problem for early Americans, and when it came to defending themselves in public, they did not use handguns.[268] The Founders could not mean to enshrine in the Second Amendment a right to carry concealed firearms for self-defense when no one really did so until decades after the Amendment was ratified. Further historical evidence lies in the fact that there were prohibitions against concealed weapons as far back as the fourteenth century that had been adopted at the time of the founding.[269] After the Second Amendment, numerous states passed concealed carry prohibitions that were found constitutional by the majority of states to hear the issue.[270] There is a strong tradition of regulating concealed carry before, at the time of, and after the passing of the Second Amendment.

That longstanding tradition supports a lower standard of review, like the Second Circuit's version of intermediate scrutiny. The stricter Seventh Circuit test disregards the historical background for concealed carry regulations. While the Second Circuit does not go as far as the Tenth Circuit, which based on the history found there was no right at all to concealed carry, it gives history weight by putting forth a less restrictive test. The Supreme Court should apply the Second Circuit's intermediate scrutiny standard because at the historical analysis shows that any right to concealed carry was far more limited than other Second Amendment concerns.

Given the limited nature of any right to carry weapons in public, seen in both *Heller* and historical analysis, it is important to take the empirical arguments for and against concealed carry restrictions into account. If the evidence were clear that allowing the concealed carry of weapons drastically reduces crime without harming public safety in other ways, it would be hard to come up with a relationship between banning

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

265. *Id.* at 943 (Williams, J., dissenting).

266. *See* Peterson v. Martinez, 707 F.3d 1197 (10th Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012); United States v. Reese, 627 F.3d 792, 800 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010).

267. *See supra* notes 188–90.

268. *See supra* notes 184, 187–90.

269. *See supra* Part III.C.

270. *See supra* Part II.B.

concealed carry and the government's interest in public safety. Conversely, if concealed carry restrictions clearly lowered the number of deaths and injuries to the public without raising crime, it would be hard not to justify such restrictions. The issue is the facts are not clear. Different studies and different experts claim different things.[271]

When it comes to the factual support behind laws, there must be substantial deference to legislative predictive judgments.[272] Legislative institutions are far better equipped to address complex questions by gathering large amounts of data than the courts.[273] The question of concealed carry is complex. There is substantial evidence supporting and criticizing both sides. State legislatures are more capable to judge the facts of concealed carry and public safety in their localities than courts. A standard such as that of the Seventh Circuit takes away state legislatures' ability to determine fact questions for themselves. The Seventh Circuit would place courts in a supervisory role, deciding whether legislatures had made the proper factual findings. While this standard may be proper for an established and powerful constitutional right, it is unduly burdensome on legislatures for such a limited right as the carrying of weapons in public. The Second Circuit's deference to local legislatures is far more appropriate. Under its standard, legislatures can best weigh the conflicting evidence and its ramifications on their local jurisdictions. The modern trend of states liberalizing concealed carry laws speaks to the ability of states to weigh the facts and change their law accordingly.[274] In the case that evidence becomes so overwhelmingly clear that concealed carry is the benefit gun advocates claim without the costs gun opponents claim, the Second Circuit's test of substantial relationship would invalidate the law. Yet, while the evidence remains unclear, it is the job of the legislature to make the decision.

The Supreme Court narrowed its ruling in *Heller* to the home, acknowledging that the Second Amendment is not without limit and gun regulations are part of U.S. history. A historical analysis shows that concealed carry was not considered as part of the Second Amendment right at its ratification, and the regulation of concealed carry has carried on since the 1300s. From those two points, it becomes clear that any right to concealed carry would be a limited one. Given its limited nature, it is best left to the legislatures to decide how to proceed in the current empirical stalemate. The Second Circuit's intermediate scrutiny test is a law substantially related to the achievement of an important governmental interest, best recognizes the limits of *Heller* and history while deferring to state legislatures for factual judgments. The Supreme Court should adopt the Second Circuit's approach: a limited test for a limited right.

271. *See supra* Part III.D.
272. *See, e.g.*, Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 666 (1994).
273. *See id.* at 665.
274. *See supra* Part II.B.

V. CONCLUSION

The debate on guns in the United States is fiercely divided. Gun opponents look to tragedies like the Sandy Hook Elementary School shooting and call for reforms while gun advocates say guns save lives. Both sides have drastically different views on the meaning of the Second Amendment. Until 2008, the Supreme Court of the United States had only interpreted the Second Amendment specifically in three cases.[275] Gun rights advocates gained a victory with *Heller*, as the Second Amendment was expanded to encompass self-defense in the home. Still the question remained: what about beyond the home? Many thought *Heller* meant that laws limiting concealed carry would not last long.

The Second Circuit disagreed. In *Kachalsky*, the court held New York's restrictive may issue statute was constitutional under *Heller*.[276] Months later, the Seventh Circuit struck down Illinois' prohibition on concealed carry.[277] Both courts had very different tests for judging concealed carry laws. The Second Circuit's test asked only for a substantial relationship to an important government goal.[278] The Seventh Circuit required a factually intensive showing by the state that a prohibition was vital to public safety interests.[279]

Heller, itself, was a very narrow ruling.[280] The Supreme Court made clear that it was talking only of weapons in the home; it was not calling into doubt longstanding traditions of regulation beyond the doorstep.[281] Furthermore, historical analysis shows that concealed carry was not a concern in the minds of the drafters of the Second Amendment.[282] Concealed carry did not become a relevant question for decades.[283] For hundreds of years before, during, and after the Second Amendment's drafting, prohibition and regulation of concealed carry was commonplace.[284] Empirical studies do not make the concealed carry question any easier, as the literature is conflicting and uncertain.[285]

By taking up the concealed carry question, the Supreme Court can provide guidance to the many courts of appeals that are now faced with evaluating state concealed carry statutes. By adopting the Second Circuit's test, the Supreme Court would acknowledge the limited nature of the right described in *Heller*. It would conform to the meaning of the

275. These cases addressed the applicability of the Amendment to the states and the interstate transportation of unregistered weapons. 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 (1875). Other notable cases mention the Second Amendment, but do not actually rule under it. *See, e.g.*, Dred Scott v. Sanford, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

276. *See supra* Part III.A.1.

277. *See supra* Part III.A.2.

278. *See supra* Part III.A.1.

279. *See supra* Part III.A.2.

280. *See supra* Part III.B.

281. *See supra* Part III.B.

282. *See supra* Part III.C.

283. *See supra* Part III.C.

284. *See supra* Part III.C.

285. *See supra* Part III.D.

Second Amendment as seen through historical analysis and the history of concealed carry regulation in the United States. Finally, it would defer uncertain factual questions about the effects of concealed carry to local legislatures who are best situated to evaluate the question.