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Constitutional Law - Don't Take Your Guns to Town: Maryland's Good-and-Substantial-Reason Requirement for Handgun Permits Passes Intermediate Scrutiny - Woollard v. Gallagher

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**CONSTITUTIONAL LAW – DON’T TAKE YOUR
GUNS TO TOWN: MARYLAND’S GOOD-AND-
SUBSTANTIAL-REASON REQUIREMENT FOR
HANDGUN PERMITS PASSES INTERMEDIATE
SCRUTINY – WOOLLARD V. GALLAGHER, 712 F.3D
865 (4TH CIR. 2013).**

The Second Amendment declares, “[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.”¹ The Supreme Court’s seminal decision in *District of Columbia v. Heller*² held that the Second Amendment secures an individual right to keep and bear firearms for the purposes of self-defense unconnected from militia service.³ *Heller* dealt only with the principal guarantee of the Second Amendment: the right to use a firearm in defense of one’s home.⁴ The Court did not articulate the boundaries of the right, such as whether it extends outside the home.⁵ In *Woollard v. Gallagher*,⁶ the Fourth Circuit considered whether Maryland’s handgun regulation requiring an applicant to show a “good-and-substantial-reason” for issuance of a permit violated the Second Amendment.⁷ The Fourth Circuit held that the “good-and-substantial-reason” requirement was constitutional because it was reasonably tailored to Maryland’s significant interests in public safety and crime prevention.⁸

Maryland proscribes the carrying of a handgun, openly or concealed, outside the home without a handgun permit.⁹ In order to receive a

¹ U.S. CONST. amend. II.

² 554 U.S. 570 (2008).

³ *See id.* at 592 (finding Second Amendment guarantees “individual right to possess and carry weapons in case of confrontation”).

⁴ *See id.* at 628-29 (recognizing need for use of firearms for self-defense is “most acute” in one’s home); *see also* *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (acknowledging Second Amendment rights are at “zenith within the home”).

⁵ *See Heller*, 554 U.S. at 635 (noting first detailed foray into Second Amendment cannot define entire scope of right); *see also* *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (remarking Supreme Court has not addressed whether Second Amendment rights extend outside the home); *Kachalsky*, 701 F.3d at 89 (describing scope of the Second Amendment as “vast ‘terra incognita’”); *United States v. Masciandaro*, 638 F.3d 458, 466 (4th Cir. 2011) (pointing to uncertainty surrounding Second Amendment rights beyond fundamental right recognized in *Heller*).

⁶ 712 F.3d 865 (4th Cir. 2013).

⁷ *See id.* at 868.

⁸ *See id.* at 880.

⁹ *See* MD. CODE ANN., PUB. SAFETY § 5-303 (LexisNexis 2011) (“A person shall have a

permit, an applicant must demonstrate to the Secretary of the Maryland State Police that he or she is an adult that has not been convicted of a disqualifying crime, does not have a drug or alcohol addiction, and does not have a propensity towards violence.¹⁰ Additionally, the applicant must show to the Secretary that he or she has a “good-and-substantial-reason,” such as a “reasonable precaution against apprehended danger.”¹¹ A handgun permit lapses on the “last day of the holder’s birth month following 2 years after the date the permit is issued” and may be extended for additional periods of three years if the permit holder once again demonstrates his or her qualifications for a permit.¹²

On Christmas Eve 2002, Raymond Woollard was at home with his family when a trespasser broke into his house.¹³ An altercation ensued, and Woollard’s wife called the police, who took nearly three hours to arrive at Woollard’s home.¹⁴ Woollard subsequently applied for and was granted a handgun permit in 2003, which he renewed in 2006; however, his permit was denied a renewal in 2009.¹⁵ Woollard and the Second Amendment

permit issued...before the person carries, wears, or transports a handgun.”). A person carrying a handgun without a permit risks imprisonment, a fine, or both. MD. CODE ANN., CRIM. LAW § 4-203(c) (LexisNexis 2012).

¹⁰ See MD. CODE ANN., PUB. SAFETY § 5-306(a)(1)-(6)(i) (LexisNexis Supp. 2013). If the Secretary finds that the applicant qualifies for a handgun permit, the Secretary is statutorily mandated to issue the handgun permit to the applicant. *Id.*

¹¹ MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (LexisNexis Supp. 2013). The Secretary has designated the Handgun Permit Unit the responsibility of issuing handgun permits. See *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 465 (D. Md. 2012). The Handgun Permit Unit is obligated to take into account during its review such factors as whether the applicant demonstrated good and substantial reasons, available alternatives to a handgun permit, and whether a handgun permit is reasonable to defend the permit holder against the apprehended threat. See *id.*; see also MD. CODE REGS. 29.03.02.04 (2013). There are four categories that qualify as “good-and-substantial-reason[s]:” “(1) for business activities, either at...business owner’s request or on behalf of...employee; (2) for regulated professions (security guard, private detective, armored car driver, and special police officer); (3) for ‘assumed risk’ professions (e.g., judge, police officer, public defender, prosecutor, or correctional officer); and (4) for personal protection.” *Woollard*, 712 F.3d at 869-70. To qualify under the personal protection category, the applicant must show that the permit is needed against “‘apprehended danger.’” *Id.* at 870. The Handgun Permit Unit looks objectively at whether there is “‘apprehended danger.’” See *Snowden v. Handgun Permit Review Bd.*, 413 A.2d 295, 298 (Md. Ct. Spec. App. 1980). An applicant who has been denied a permit can appeal the decision to the Handgun Permit Review Board. MD. CODE ANN., PUB. SAFETY § 5-312(a)(1) (LexisNexis 2011).

¹² MD. CODE ANN., PUB. SAFETY § 5-309(a)-(b) (LexisNexis 2011).

¹³ *Woollard*, 863 F. Supp. 2d at 465. The trespasser was Kris Lee Abbott, Woollard’s son-in-law, who was high on drugs and looking for his wife’s car keys so he could go purchase more drugs. *Id.*

¹⁴ *Id.* Abbott was sentenced to probation for the Christmas Eve incident but was later incarcerated for committing burglary and assaulting a police officer. *Id.*

¹⁵ *Id.* Woollard’s application for a renewal of his handgun permit was denied because he failed to produce a “good-and-substantial-reason” for needing a permit. *Id.* at 466. Woollard

Foundation sued, claiming that Maryland's "good-and-substantial-reason" requirement was unconstitutional under the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment.¹⁶

The district court found that the Second Amendment right to bear arms is not confined to the home.¹⁷ The district court further found that Maryland's "good-and-substantial-reason" requirement was unconstitutional as it failed to withstand intermediate scrutiny.¹⁸ On appeal, the Fourth Circuit overturned the "trailblazing" decision of the district court and found that the Maryland statute passed intermediate scrutiny.¹⁹ The Fourth Circuit held that the "good-and-substantial-reason" requirement was constitutional because it advanced Maryland's substantial interests of public safety and crime prevention.²⁰

The origins of the Second Amendment can be traced back to early English law.²¹ The English theories of firearm rights greatly influenced the

offered solely the Christmas Eve 2002 incident as his basis for requiring a handgun permit even though he had no contact with Abbott since the incident. *Woollard*, 712 F.3d at 871. *Woollard* appealed the decision to the Handgun Permit Review Board, who affirmed the decision. *Woollard*, 863 F. Supp. 2d at 465-66. The Board reasoned that *Woollard* did not offer proof of a current threat occurring beyond his residence, "where he [could] already legally carry a handgun." *Id.* at 466.

¹⁶ *Woollard*, 863 F. Supp. 2d at 466 (discussing argument Maryland handgun scheme facially violates Second Amendment and Due Process Clause); *Woollard*, 712 F.3d at 871 (challenging constitutionality of Maryland's "good-and-substantial-reason" requirement).

¹⁷ *Woollard*, 863 F. Supp. 2d at 471 (concluding right to keep and bear arms extends outside home). The district court acknowledged that "one should venture into the unmapped reaches of Second Amendment jurisprudence 'only upon necessity and only then by small degree.'" *Id.* at 469 (quoting *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)). However, in light of *Heller* and *Masciandaro*, the district court reasoned that there was substantial evidence indicating that the Second Amendment extends beyond the confines of the home. *See id.* at 469-71 (collecting evidence suggesting scope of Second Amendment extends outside home).

¹⁸ *Woollard*, 863 F. Supp. 2d at 474 (finding Maryland's "good-and-substantial-reason" requirement overly broad). The district court judge denounced the statute as a rationing system that would do "no more...than...a law indiscriminately limiting the issuance of a permit to every tenth applicant." *See id.* He also pointed out that issuing permits to those who demonstrate an increased probability of using them in public is inconsistent with Maryland's stated interest of public safety. *Id.* As such, the district court declared that "[a] law that burdens the exercise of an enumerated constitutional right by simply making that right more difficult to exercise cannot be considered 'reasonably adapted' to a government interest, no matter how substantial that interest may be." *Id.* at 475.

¹⁹ *See Woollard*, 712 F.3d at 868 (reversing district court's determination that Maryland's statute is unconstitutional).

²⁰ *See id.* at 879-80 (cataloging evidence demonstrating Maryland statute serves Maryland's interests of public safety and crime prevention).

²¹ *See generally* David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1009-19 (1994) (explaining early English history's influence on drafting of Second Amendment). King Alfred is credited for instituting the principle that all his subjects were his soldiers. *See id.* at 1009 (setting forth earliest roots of principles governing Second Amendment). Englishmen were charged with supplying their own weapons to carry out their obligation to the

views of the founding fathers.²² The Second Amendment embodied the founders' belief that an armed citizenry was the paramount safeguard against a tyrannical government.²³ Until recently, the Second Amendment had not developed as voluminous a body of case law as other amendments,

crown. *See id.* at 1009-10 (detailing early English origins of a militia). In 1181, King Henry II issued the Assize of Arms, which required the possession of weapons by his subjects and forbade any alienation of weapons. *See id.* at 1010 (describing formalization of subjects' duties). During the reign of the Tudors, Henry VIII decreed that fathers had to purchase longbows for their sons and instruct them in their use. *See id.* at 1010 (cataloging Tudor contributions to development of Second Amendment principles). During the Tudor period, the term militia came into use. *See id.* at 1011 (stating militia's entrance into English lexicon occurred during reign of Queen Elizabeth). During the Stuart period, the Catholic King Charles II used the Game Act of 1671, to reserve the right to hunt only to those earning a certain annual income and to disarm his Protestant adversaries. *See District of Columbia v. Heller*, 554 U.S. 570, 593 (2008) (explaining Game Act caused Englishmen to closely guard their arms); *see also* Vandercoy, *supra*, at 1016 (expounding on Game Act's disarmament provisions). Parliament required William and Mary to adopt the Declaration of Rights, which in part forbade the crown from disarming Protestants. *See Heller*, 554 U.S. at 593 (detailing reaction to disarmament and subsequent preventive measures taken to assure rights); *see also* Vandercoy, *supra*, at 1017 (detailing passage of English Declaration of Rights). In coetaneous legislation, Catholics were assured the right to use firearms in defense of self and home. Vandercoy, *supra*, at 1019 (explaining Declaration of Rights and related legislation). The English Declaration of Rights is acknowledged to be the forerunner to the Second Amendment of the United States Constitution. *See Heller*, 554 U.S. at 593 (explaining English Declaration of Rights and its influence on Second Amendment).

²² *See* Vandercoy, *supra* note 21, at 1025-26 (summarizing founders' reasoning behind adoption of Second Amendment). While the Federalists, who advocated a strong federal government, and the Antifederalists, who believed that liberty was best served by decentralized government, agreed that an armed populace was the best check on government tyranny, they disagreed on several related issues. *See id.* at 1027 (explaining disagreements between Federalists and Antifederalists over Bill of Rights and checks and balances). The Antifederalists insisted upon a bill of rights to secure certain rights while Federalists believed that there was no need. *See id.* at 1027.

²³ *See id.* at 1023-28 (setting forth positions of Antifederalists and Federalists). When the First Congress convened after the ratification of the Constitution, James Madison brought forth amendments that would eventually become the Bill of Rights. *See id.* at 1036 (detailing history of passage of Second Amendment and Bill of Rights). One of Madison's proposed amendments declared, "[t]he right of the people to keep and bear arms shall not be infringed, a well-armed and well-regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 608 (1986) (stating Madison's original proposed Second Amendment for Bill of Rights); *see also* Vandercoy, *supra* note 21, at 1036-37 (providing history of adoption of Bill of Rights). Madison's proposed Second Amendment was sent to a select committee who tweaked the proposed amendment so that it read: "[a] well regulated Militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." Vandercoy, *supra* note 21, at 1037. The Senate deleted the conscientious objector portion along with the "composed of the body of the people" portion. *See* Vandercoy, *supra* note 21, at 1037-38 (explaining Senate's modifications of proposed Second Amendment). The amendment that the states ratified is the Second Amendment, which is enshrined in the Bill of Rights. *See id.* at 1038 (detailing ratification of Second Amendment).

such as the First Amendment and Fourth Amendment, have.²⁴

The seemingly forgotten Second Amendment was cast into the spotlight in the *Heller* decision, which was the Supreme Court's first substantial expedition into the amendment.²⁵ *Heller* contended that the Second Amendment guarantees an individual right to carry firearms for the purposes of self-defense while the District of Columbia argued that the Second Amendment only confers the right to possess firearms in connection with militia service.²⁶ The *Heller* Court held that the Second Amend-

²⁴ See William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1239-40 (1994) (noting dearth of Second Amendment Supreme Court case law in comparison to other amendments). In two late nineteenth century cases, the Supreme Court held that the Second Amendment was not applicable to the states through the Fourteenth Amendment. See *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) ("This is one of the amendments that has no other effect than to restrict the powers of the national government...."); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress."). In *United States v. Miller*, the defendant was indicted for transporting an unregistered sawed-off shotgun across state lines in violation of the National Firearms Act. *United States v. Miller*, 307 U.S. 174, 175 (1939) (setting forth facts of case). *Miller* claimed that the Act violated his Second Amendment rights. *Id.* at 176. The Supreme Court held that the Act was constitutional as a sawed-off shotgun was not "part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* at 178 (finding possession of sawed-off shotgun not under protections of Second Amendment). In a subsequent case, the Supreme Court held that a statute prohibiting felons from possessing firearms was constitutional, as there was a rational basis for keeping firearms out of the hands of felons. See *Lewis v. United States*, 445 U.S. 55, 65 (1980).

²⁵ See generally *Heller*, 554 U.S. at 635 (noting *Heller* represents Supreme Court's first "in-depth examination of the Second Amendment"). At issue in *Heller* were Washington, D.C. statutes prohibiting the possession of handguns, making it a crime to possess an unregistered handgun and prohibiting the registration of handguns. See D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2012). However, a person could receive a license to carry a handgun from the chief of police for a one-year period. See D.C. CODE §§ 22-4504(a), 22-4506 (2012). An additional Washington D.C. law required legally owned firearms to either be locked or disassembled. See D.C. CODE § 7-2507.02 (2012). *Heller*, a special police officer, wished to keep a handgun at home but was denied registration. *Heller*, 554 U.S. at 574 (setting forth facts of case). *Heller* filed suit in the Federal District Court for the District of Columbia claiming the District's statutes violated his Second Amendment rights. *Id.* at 576. The district court dismissed his complaint but the Court of Appeals for the District of Columbia Circuit reversed and held that the statutes violated the Second Amendment. *Id.* (discussing procedural history of case).

²⁶ See *Heller*, 554 U.S. at 524 (setting forth arguments of parties). Both of the conflicting views of the meaning of the Second Amendment purport to interpret the amendment through an originalist lens. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1362 (1998) ("Despite the animosity that sometimes divides advocates and opponents of gun control, they share one important characteristic: almost unanimously, they are constitutional originalists."). The collective right view contends that the purpose of the Second Amendment was to proscribe Congress from disarming the states' militias and leaving the states powerless against federal oppression. See Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 212 (1983) (explaining conflicting interpretations of Second Amendment). They contend the Second Amendment protected the state militias from the federal government and would be the primary military force of the United

ment guarantees an individual the right to possess firearms for the purpose of self-defense in one's home and that the District of Columbia's ban violated Heller's Second Amendment rights.²⁷ Two years later, in *McDonald*

States. *See id.* (describing collective right theory of Second Amendment). Such an interpretation makes the Second Amendment obsolete in modern America. *See id.* (explaining collective right view following American Civil War). On the other hand, the individual right advocates point to the phrase "right of the people," which is also found in the First and Fourth Amendments, and argue that this phrasing should be interpreted as an individual right, just like the First and Fourth Amendments are interpreted. *See id.* at 213. Additionally, the individual right advocates concede the point that the Framers designed the Second Amendment to protect state militias, but via protecting the individual's right to bear arms. *See id.* ("[I]t was precisely by protecting the individual that the Framers intended to protect the militia.").

²⁷ *See Heller*, 554 U.S. at 635 (announcing holding of case). Writing for the Court, Justice Scalia began by analyzing and interpreting the text of the Second Amendment. *See id.* at 579-81. Justice Scalia began by interpreting the phrase "[r]ight of the people" and noted the similarly phrased First, Fourth, and Ninth Amendments, which all secure individual rights. *See id.* at 579 ("All three of these instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body."). As such, the phrase "[r]ight of the people" clashes with the collective right interpretation, which argues that the Second Amendment was only intended to protect the right to bear arms in connection with militia service. *See id.* at 579-81 (arguing collective right view clashes with natural reading of Second Amendment); *see also* Kates, Jr., *supra* note 26, at 212-13 (claiming collective right view untenable when considering phrasing of Second Amendment). Justice Scalia then interpreted the substantive portion of the amendment, "to keep and bear arms", the former interpreted as "to have weapons" and the latter as to carry weapons. *See Heller*, 554 U.S. at 584 (defining substantive portions of Second Amendment). The Court noted that several state constitutions enshrined the right to possess firearms unconnected from militia service. *See id.* at 584-85 ("[N]ine state constitutional provisions . . . enshrined a right of citizens to 'bear arms in defense of themselves and the state' or 'bear arms in defense of himself and the state.'"); *see also* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793-96 (1998) (comparing Second Amendment to similar state provisions to illustrate its meaning). The Court then turned to the beginning phrase, "[a] well regulated Militia, being necessary to the security of a free State . . ." and interpreted the militia to be a subset of the people and the adjective "well regulated" to mean that it shall be properly trained. *See Heller*, 554 U.S. at 595 (interpreting opening language of Second Amendment); *see also* *Miller*, 307 U.S. at 179 ("the Militia comprised all males physically capable of acting in concert for the common defense."). The Court found that once the interpretations were taken together, an individual right to possess firearms for the purposes of self-defense existed. *See Heller*, 554 U.S. at 598 (announcing Second Amendment secures right of people to keep and bear arms). The Court struck down the District's handgun ban as "[t]he prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute." *See id.* at 628 (explaining reasoning for striking down handgun prohibition). The Court declined to announce what level of scrutiny applies to laws burdening the Second Amendment, instead claiming that the handgun ban would fail to pass constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . ." *See id.* (leaving open level of scrutiny to apply to laws burdening Second Amendment rights). However, the Court ruled out rational basis review. *See id.* at 628 n.27 (forbidding rational basis review for Second Amendment claims); *see also* *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). In his dissent, Justice Stevens adopted the collective rights approach and relied on *Miller* to argue that there was no individual right to possess firearms. *See Heller*, 554 U.S. at 638 (Stevens, J., dissenting) (arguing *Miller* provided correct interpretation of Second Amendment). Justice Stevens argued that *Miller*

v. *City of Chicago*,²⁸ the Supreme Court considered whether the Second Amendment was applicable to the states through the Fourteenth Amendment.²⁹ The Court determined that the Second Amendment guarantees a fundamental right, thus fully binding on the states through incorporation of the Fourteenth Amendment.³⁰

In the aftermath of *Heller* and *McDonald*, lower courts have begun to traverse the uncharted territory of the Second Amendment.³¹ Among many of *Heller*'s unanswered questions is the appropriate level of scrutiny

held that the Second Amendment protects the right to use firearms for the military purposes and allows for the legislature to regulate their civilian use. *See id.* at 677 (Stevens, J., dissenting) (“the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’”). Justice Scalia retorted that *Miller* did not hold that the Second Amendment was inapplicable because the defendants possessed weapons estranged from militia service, but rather the type of weapon—for example, a sawed-off shotgun—was not eligible for Second Amendment protections. *See Heller*, 554 U.S. at 621-22 (arguing *Miller* did not adopt collective right interpretation). The Court also explained that like the other rights found in the Bill of Rights, the Second Amendment is not unlimited. *See Heller*, 554 U.S. at 626-27 (“[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.”). While *Heller* clarified the core right secured by the Second Amendment, it did not clarify the entire scope of the Second Amendment. *See id.* at 635 (declining to “clarify the entire field” of Second Amendment jurisprudence).

²⁸ 130 S. Ct. 3020 (2010).

²⁹ *See id.* at 3026 (setting forth issue to be decided in *McDonald*). At issue in *McDonald* was a Chicago statute and an Oak Park (a Chicago suburb) statute that were nearly identical to the firearm prohibition scheme in *Heller*. *See id.* (outlining facts of case). Chicago and Oak Park argued that the Second Amendment had no application to the States and that the Fourteenth Amendment incorporates rights enumerated in the Bill of Rights to the States, if those rights are essential to a civilized country. *See id.* at 3028 (“If it is possible to imagine a civilized country that does not recognize the right . . . that right is not protected by due process.”). *McDonald* asserted that the Fourteenth Amendment incorporated the Second Amendment and implored the court to reject its narrow interpretation of the Privileges and Immunities Clause. *See id.* (stating *McDonald*'s arguments that Second Amendment applies to states).

³⁰ *See id.* at 3047 (holding right recognized in *Heller* fully applicable to states). While the question of whether the Second Amendment is applicable to the states appeared to be answered by *Cruikshank* and *Presser*, they predated the Supreme Court's process of selective incorporation under the Due Process Clause of the Fourteenth Amendment. *See id.* (explaining why issue was still one of first impression for Supreme Court). The court rejected Chicago and Oak Park's civilized society argument. *See id.* at 3034 (“[T]he . . . inquir[y] [is] whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.”). The Court found that the right recognized in *Heller* was fundamental and thus fully binding upon the states. *See id.* at 3046 (“Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective . . . that guarantee is fully binding on the States and thus *limits* . . . their ability to devise solutions to social problems that suit local needs and values.”).

³¹ *See NRA of America v. Bureau of Alcohol, Tobacco, and Firearms*, 700 F.3d 185, 211 (5th Cir. 2012) (holding federal ban of sale of guns to people under age of twenty-one constitutional); *Bateman v. Perdue*, 881 F. Supp. 2d 709, 716 (E.D.N.C. 2012) (holding ban on possession of firearms outside home during state of emergency unconstitutional).

to apply to laws that burden a person's Second Amendment rights.³² Courts are now beginning to tussle with whether *Heller* has any application

³² See sources cited *supra* note 27 and accompanying text (noting *Heller* Court's refusal to announce level of applicable scrutiny). The Fourth Circuit has held that intermediate scrutiny applies to laws that regulate rather than prohibit firearms, while strict scrutiny would apply to laws burdening the core guarantee of the *Heller* right. See *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (adopting intermediate scrutiny as level of scrutiny for laws not burdening core Second Amendment protections). Under intermediate scrutiny, "the government must demonstrate . . . that there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective." See *id.* at 683 (explaining requirements needed to survive intermediate scrutiny). The nexus between the law and the objective need only be reasonable, not a perfect fit. See *id.* ("Significantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government."). In *Chester*, the defendant claimed that that a federal law banning the possession of firearms by those convicted of domestic violence offenses violated his Second Amendment rights. See *id.* at 677 (detailing legal arguments of defendant). In analyzing *Chester*'s Second Amendment claim, the Fourth Circuit adopted the two-part approach promulgated by the Third Circuit. See *id.* at 680 (approving Third Circuit's approach to analyzing Second Amendment issues); see also *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (establishing two-prong approach to analyzing Second Amendment claims). Under the Third Circuit's approach, the court must perform the following inquiry:

[D]etermine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then [the court] move[s] to the second step of applying an appropriate form of means-end scrutiny.

See *Chester*, 628 F.3d at 680 (explaining process of analyzing Second Amendment claims). The *Chester* Court declined to apply strict scrutiny to *Chester*'s claim because, although the law burdened his right to possess firearms in his home, the core right of the Second Amendment is for law-abiding citizens, not people like *Chester*—domestic violence misdemeanants—thus the court applied intermediate scrutiny. See *id.* at 683 (explaining reasoning behind applying intermediate scrutiny). The Fourth Circuit remanded the case to grant the government the opportunity to defend the law knowing the applicable level of scrutiny. See *id.* (announcing holding of case). The Fourth Circuit subsequently was afforded the opportunity to apply intermediate scrutiny to a Second Amendment challenge to a law prohibiting the possession of firearms in National Parks. See *United States v. Masciandaro*, 638 F.3d 458, 465 (4th Cir. 2011) (discussing constitutional challenge to federal law). Unlike the defendant in *Chester*, *Masciandaro* did not have a criminal record at the time of his arrest. See *id.* at 470. The Fourth Circuit found that while strict scrutiny would apply to any law burdening the right to possess firearms to defend one's home, intermediate scrutiny would apply to laws burdening the right to possess firearms outside the home. See *id.* ("But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."). The Fourth Circuit held that the law passed constitutional muster under intermediate scrutiny. See *id.* at 471 (announcing holding of case). However, several courts abstain from the first prong of the test, and assume the claimed right exists. See *Petition for Writ of Certiorari* at 40, *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013) (No. 12-1443), 2013 U.S. S. Ct. Briefs LEXIS 2646, at *39-40 (collecting cases where court declines to issue ruling as to first prong); see also *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("[T]he Amendment must have *some* application Our analysis proceeds on this assumption."); *Masciandaro*, 638 F.3d at 475 (Wilkinson, J., concurring in part) (declining to expound on whether *Heller* has any application outside home).

outside of the home.³³

³³ See *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) (finding Second Amendment does not extend beyond home); see also *Kachalsky*, 701 F.3d at 88 (considering whether right recognized in *Heller* extends outside home). The court in *Kachalsky* was called upon to consider whether New York's handgun permit regulations violated the Second Amendment by requiring applicants to demonstrate "proper cause" to possess a concealed handgun in public. See *Kachalsky*, 701 F.3d at 88 (stating issue to be decided). The Second Circuit noted that history and case law offered conflicting views on the constitutionality of such statutes. See *id.* at 90-91 (cataloging sources offering differing views on constitutionality of possession of handguns outside home). The Second Circuit adopted the two-part test set forth in *Marzzarella, Chester, and Masciandaro*, and applied intermediate scrutiny. See *id.* at 93-94 (setting forth standard of review). The Second Circuit applied intermediate scrutiny because the law fell outside the core guarantee of the Second Amendment as recognized in *Heller*. See *id.* at 94 (explaining reasoning for applying intermediate scrutiny). The Second Circuit found that New York's handgun licensing scheme survived intermediate scrutiny as it was "substantially related" to New York's interests in public safety and crime prevention. See *id.* at 98. (stating holding of case). But see James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 914 (2012) (criticizing *Kachalsky* and New York's proper cause requirement). "Mr. Kachalsky's application demonstrates the same nebulous concern about unlikely catastrophes that leads people to buy life insurance and burglar alarms. . . ." See Bishop, *supra*, at 915; see also John R. Lott, Jr., *A Second Amendment Quartet: Heller and McDonald in the Lower Courts: What a Balancing Test Will Show for Right-to-Carry Laws*, 71 MD. L. REV. 1205, 1206 (2012) (arguing regulations banning publicly carrying firearms cannot pass intermediate or strict scrutiny). Of twenty-nine studies by economists and criminologists, eighteen found that shall-issue laws, which give local officials less discretion to reject firearm permit applications, cause a drop in crime, ten found no effect on crime, and one found a temporary increase in aggravated assaults. See Lott, Jr., *supra*, at 1206 (collecting results of studies on shall-issue laws). "If right-to-carry laws either reduce crime or leave it unchanged . . . regulations prohibiting people from carrying concealed handguns cannot withstand either strict or intermediate scrutiny." See *id.* Some courts have found that there is no right under the Second Amendment to carry a concealed firearm. See *Peterson v. Martinez*, 707 F.3d 1197, 1212 (10th Cir. 2013) ("[T]he concealed carrying of firearms falls outside the scope of the Second Amendment's guarantee . . ."). Similarly, in *Drake v. Filko*, the Third Circuit upheld a New Jersey statute requiring an applicant to show a "justifiable need" for a handgun permit. 724 F.3d 426, 440 (3d Cir. 2013). However, the Third Circuit differed substantially in its reasoning, finding that the "justifiable need" requirement for a handgun permit falls outside the scope of the Second Amendment. See *id.* at 431-32. The *Drake* court noted that the requirement's origins date back to a 1924 New Jersey law. See *id.* at 432. The *Drake* court categorized the requirement as a "longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller* and expanded upon in our Court's precedent." *Id.* at 434 (emphasis added). Nevertheless, the Third Circuit applied the second prong of the *Marzzarella* test as the "issues presented to us in this new era of Second Amendment jurisprudence are of critical importance." *Id.* at 434. The court found that the law passed intermediate scrutiny despite the fact that "New Jersey has not presented us with much evidence to show how or why its legislators arrived at this predictive judgment." *Id.* at 437. New Jersey's counsel acknowledged that "there is no available commentary which would clarify whether or not the Legislature considered statistical information to support the public safety purpose of the State's Carry Permit Law." *Id.* Despite the lack of evidentiary support, the Third Circuit expressed deference to the "New Jersey legislators, [who] have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a 'justifiable need' to carry a handgun to do so." *Id.* at 439. In his dissent, Judge Hardiman argued that the court erred by finding that the "justifiable need" requirement to be outside the scope of the Second Amendment. See *id.* at 446 (Hardiman, J., dissenting) ("[I]nterpreting the Second Amendment to extend outside the home is merely a

commonsense application of the legal principle established in *Heller* and reiterated in *McDonald*: that ‘the Second Amendment protects the right to keep and bear arms for the purpose of self-defense.’” (quoting *McDonald*, 130 S. Ct. at 3026)). Judge Hardiman also argued that the majority wrongly asserted that such a requirement dates back to the early twentieth century, as it was not until the 1960s that New Jersey regulated open-carry as well as concealed carry. *Id.* at 451. The majority’s application of intermediate scrutiny was also in error in Judge Hardiman’s opinion. *Id.* at 453-54 (Hardiman, J., dissenting). The majority’s application was flawed in that it excused New Jersey’s lack of evidentiary support and deferred to the legislature, thus applying rational basis scrutiny. *See id.* at 456-57 (“By deferring absolutely to the New Jersey legislature, the majority abdicates its duty to apply intermediate scrutiny and effectively applies the rational basis test, contrary to the Supreme Court’s explicit rejection of that test in the Second Amendment context.”). Other federal judges have held that the Second Amendment right recognized in *Heller* extends beyond the home. *See Masciandaro*, 638 F.3d at 467-68 (Niemeyer J., writing separately as to Part III.B.). Judge Niemeyer noted that *Heller* declared the right to possess handguns for self-defense is “most acute” in the home, implying that there is a Second Amendment right in places that are less acute. *See id.* (Niemeyer J., writing separately as to Part III.B.). Additionally, Judge Niemeyer observed that laws prohibiting firearms from sensitive areas would be redundant if the right to keep and bear arms was confined to the home. *See id.* (Niemeyer J., writing separately as to Part III.B.); *see also* Michael C. Dorf, Symposium, District of Columbia v. Heller: Does Heller Protect a Right to Carry Guns Outside the Home?, 59 SYRACUSE L. REV. 225, 227 (2008) (arguing *Heller* “clearly contemplates the carrying of firearms outside the home”). A federal district court has cited Judge Niemeyer’s reasoning with approval in finding that the Second Amendment’s scope reaches outside the home. *See United States v. Weaver*, No. 2:09-cr-00222, 2012 U.S. Dist. LEXIS 29613, at *12 (S.D.W. Va. Mar. 7, 2012) (“While it is true that the Fourth Circuit has so far stopped short of expressly recognizing a Second Amendment right to keep and bear arms outside the home, this Court has no such hesitation.”). The *Weaver* court admonished other courts for dragging their feet in recognizing the Second Amendment extends outside the home. *See Weaver*, 2012 U.S. Dist. LEXIS 29613, at *14 n.7 (“The fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment. Limiting this fundamental right to the home would be akin to limiting the protections of First Amendment freedom of speech to political speech or college campuses.”). In contrast to *Kachalsky*, the Seventh Circuit found a handgun permit scheme in Illinois unconstitutional and held that the Second Amendment right to keep and bear firearms extends outside the home. *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (reversing lower court determination that Second Amendment does not extend outside home). The *Moore* court noted that the phrase “bear arms” infers that the right to possess firearms extends beyond the home. *See Moore*, 702 F.3d at 936. The *Moore* court criticized *Kachalsky*’s dichotomy between self-defense in the home and self-defense in public. *See Moore*, 702 F.3d at 941 (“The interest in self-protection is as great outside as inside the home.”). Cases from the nineteenth century provide useful guidance for courts seeking to define the contours of the Second Amendment. *See State v. Reid*, 1 Ala. 612, 619 (1840) (“[T]he Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.”); *Nunn v. State*, 1 Ga. 243, 251 (1846) (declaring law prohibiting the carrying of firearms openly unconstitutional); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 90-92 (1822) (“Not merely all legislative acts, which purport to take it away; but all which diminish or impair it, as it existed when the constitution was formed, are void. . . . [I]t is the right to bear arms in defence of the citizens and the state, that is secured by the constitution, and 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.”); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187-88 (1871) (holding Tennessee law prohibiting both concealed and open carrying of weapons unconstitutional). *But see State v. Buzzard*, 4 Ark. 18, 27 (1842) (“It inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are

In *Woollard v. Gallagher*, the United States Court of Appeals for the Fourth Circuit considered whether Maryland’s “good-and-substantial-reason” requirement for the issuance of a handgun permit withstood intermediate scrutiny.³⁴ The court began its analysis by distinguishing the Maryland statutory scheme of regulating the carrying of handguns in public from *Heller*’s “core protection:” the right to keep and bear arms for the purposes of defense of hearth and home.³⁵ Like many sister circuits, the Fourth Circuit applied the two-prong test to *Woollard*’s Second Amendment claim.³⁶ However, the court declined to rule on the first prong—assuming without deciding that the Second Amendment extends outside the home—and moved to the analysis of *Woollard*’s Second Amendment claim under the second prong.³⁷ The court relied on their ruling in *Masciandaro* to apply intermediate scrutiny to Maryland’s handgun permitting scheme.³⁸ In applying intermediate scrutiny, the Fourth Circuit credited Maryland’s argument that the permitting scheme served its coexistent interests of public safety and crime prevention.³⁹

The court found that Maryland proved a reasonable fit between its interests—public safety and crime prevention—and the “good-and-substantial-reason” requirement by limiting the number of handguns in public.⁴⁰ In doing so, the Fourth Circuit criticized the district court’s char-

specified. The practice of so bearing them the legislative department of the government has determined to be wrong, or at least inconsistent with sound policy.”).

³⁴ See *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013) (announcing issue on appeal).

³⁵ *Id.* at 874-76 (distinguishing between statutes at issue in *Heller* and statutes at issue in instant case). The court reiterated the equivocality surrounding the reach of the Second Amendment. See *id.* at 874 (citing authority lamenting lack of guidance on determining scope of Second Amendment).

³⁶ *Id.* at 874-75 (noting several sister circuits apply two-prong test to Second Amendment claims).

³⁷ *Id.* at 875-76 (explaining reasoning for not addressing first prong of test). The court claimed to “hew to a judicious course” by declining consideration of whether the “good-and-substantial-reason” requirement implicated the Second Amendment. *Id.* at 876. Instead, the court assumed without deciding that the Second Amendment extends outside the home. *Id.* By doing so, it also assumed that *Woollard*’s rights were infringed by Maryland’s “good-and-substantial-reason” requirement. *Id.*

³⁸ *Id.* (citing *Masciandaro* case as basis for applying intermediate scrutiny).

³⁹ *Woollard*, 712 F.3d at 877 (approving Maryland’s argument that public safety and crime prevention constitute substantial government interests). The court took note of several troubling statistics: (1) violent crime in Maryland has increased exponentially; (2) the majority of violent crimes involved handguns leading to increased deaths and injuries; (3) current law has not curtailed the violence; and (4) more gun regulations are needed to curtail the violence. *Id.* at 876-77. Additionally, in 2009, nearly all firearm homicides—97.4%—involved a handgun. *Id.* at 877.

⁴⁰ *Id.* at 880. The court remarked that even without a permit, *Woollard* could still have a handgun in his house and transport it to and from several places, such as repair shops and target ranges. *Id.* at 879. In finding a reasonable fit between Maryland’s interests of public safety and

acterization of the permitting scheme as a “rationing system” that would not protect the public from all dangers posed by handguns.⁴¹ The Fourth Circuit also criticized the district court for what it saw as a “misapplication of the intermediate scrutiny standard.”⁴² Thus, the Fourth Circuit found that Maryland’s “good-and-substantial-reason” requirement passed intermediate scrutiny as it is reasonably tailored to Maryland’s interests in public safety and crime prevention.⁴³

In *Woollard v. Gallagher*, the Fourth Circuit incorrectly applied the two-prong test for Second Amendment claims to Maryland’s handgun permitting scheme.⁴⁴ Instead of assuming the *Heller* right extends beyond the home, the Fourth Circuit should have discussed the relevant case law and made a definitive ruling on whether the right *actually* extends beyond the home.⁴⁵ The court described its refusal to consider the first prong of the test as an example of “judicious” restraint, presumably due to the “vast ter-

crime prevention and the “good-and-substantial-reason” requirement, the court cited Maryland’s arguments that the requirement: (1) decreases the availability of handguns susceptible to theft; (2) decreases the probability of confrontations turning fatal due to the presence of handguns; and (3) curtails the presence of handguns in police stops. *Id.* at 879-80.

⁴¹ *Id.* at 881 (criticizing district court’s decision). The Fourth Circuit also expressed deference to the legislature on determining the best course in balancing gun rights with public safety. *Id.* (“The duty of the courts is to ensure that the legislature’s policy choice substantially serves a significant governmental interest.”).

⁴² *Id.* at 882 (denouncing district court’s application of intermediate scrutiny). The Fourth Circuit argued that the district court applied a test that was closer to strict scrutiny than to intermediate scrutiny. *Id.*

⁴³ *Woollard*, 712 F.3d at 882-83 (announcing holding of court).

⁴⁴ *See id.* at 874-75 (applying two-prong test to Maryland handgun permit scheme); *see also* *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (adopting two-part approach promulgated by Third Circuit); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (establishing two-prong approach to analyzing Second Amendment claims). The Fourth Circuit’s error lies in its refusal to address the first prong of the test—whether the challenged law burdens conduct protected by the Second Amendment. *See Woollard*, 712 F.3d at 875 (discussing reasoning for not ruling on first prong of test); *see also* *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 90 (2d Cir. 2012) (assuming without deciding Second Amendment extends outside home). Merely assuming the Second Amendment extends beyond the home and not issuing a ruling one way or the other allowed the court to ignore prior case law dealing with the Second Amendment beyond the home. *See* *Petition for Writ of Certiorari* at 40, *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013) (No. 12-1443), 2013 U.S. S. Ct. Briefs LEXIS 2646, at *43-47. Thus, this assumed right to possess firearms beyond the home does not have an iota of substantive content to it. *See id.* at *43-47 (No. 12-1443). The hollow assumed right to possess firearms beyond the home can then be easily repudiated. *See id.* at *43-47 (No. 12-1443).

⁴⁵ *See Woollard*, 712 F.3d at 875-76 n.5 (noting courts that have issued ruling on whether *Heller* right extends outside home). Footnote five merely acknowledges that some courts have found that the Second Amendment secures the right to carry a firearm in public, while others have found it does not. *Id.* The footnote, and the rest of the decision for that matter, is devoid of any analysis of the merits of either position, which is expected due to the court’s assumption. *Id.*

ra incognita” of the Second Amendment’s boundaries.⁴⁶

While the scope of the Second Amendment outside the core right is indeed unplumbed, *Heller* and *McDonald* have provided an opportunity for courts to explore the uncharted boundaries of the Amendment.⁴⁷ Doing so

⁴⁶ See *id.* at 875-76 (declining to rule on first prong and instead assuming existence of right); cases cited *supra* note 5 (noting ambiguity surrounding boundaries of Second Amendment); see also *United States v. Weaver*, No. 2:09-cr-00222, 2012 U.S. Dist. LEXIS 29613, at *13-14 n.5 (S.D.W. Va. Mar. 7, 2012) (observing Fourth Circuit has expressly declined to address first prong of test on several occasions). The *Weaver* Court argued that “constitutional avoidance” is unwarranted when federal courts are directly presented with a claim that a law violates the claimant’s Second Amendment rights. *Weaver*, 2012 U.S. Dist. LEXIS 29613, at *13-14 n.5; see also *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., writing for court except as to Part III.B) (arguing court obligated to address issue despite concerns of judicial restraint). Writing separately as to the issue of constitutional avoidance in *Masciandaro*, Judge Niemeyer asserted that courts are obliged to rule on claims of a law violating the claimant’s constitutional rights. See *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., writing for court except as to Part III.B). Moreover, he contended that the complex issue of whether the *Heller* right extends beyond the home is one the Supreme Court wishes to develop through the Court of Appeals. See *id.* Mere assumption of the right without any discussion or analysis of relevant case law and statutes does nothing to develop and resolve the issue. See *id.*

⁴⁷ See *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (arguing “no turning back by the lower federal courts” in wake of *Heller* and *McDonald*); see also Dorf, *supra* note 33, at 227 (arguing *Heller* “clearly contemplates” right to carry outside of home). In *Heller*, Justice Scalia referenced a nineteenth century senator’s speech lauding the rifle as the primary defense of the frontiersmen against wild animals and hostile Native Americans. See *District of Columbia v. Heller*, 554 U.S. 570, 609 (2008) (quoting Senator Sumner’s “Bleeding Kansas” speech). It would be rather unlikely for the nineteenth century frontiersman to chance upon a wild animal or a hostile Native American in his or her home, implying that the frontiersman, and citizens in general, had the right to use firearms outside the home to defend himself. See Dorf, *supra* note 33, at 227; see also *Kachalsky*, 701 F.3d at 89 (“[A]s Justice Stevens’s dissent in *Heller* and Defendants in this case before us acknowledge, . . . the Amendment must have *some* application in the very different context of the public possession of firearms.”). Furthermore, the plain meaning of the Second Amendment as interpreted by the *Heller* Court lends credence to the right having an application beyond the home. See U.S. CONST. amend. II. (setting forth text of Second Amendment); *Heller*, 554 U.S. at 584 (“At the time of the founding, as now, to ‘bear’ meant to ‘carry.’”). To carry weapons implies that such carrying is occurring outside the home as the *Heller* Court defined “keep arms” as to “have weapons.” See *Heller*, 554 U.S. at 582 (defining key terms of Second Amendment). Thus, reading the Second Amendment as conferring the right to carry within one’s home but not in public would be a bizarre interpretation. See *Moore*, 702 F.3d at 936 (“To speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage.”); *Kachalsky*, 701 F.3d at 89 n.10 (“The plain text of the Second Amendment does not limit the right to bear arms to the home.”). Some courts and commentators point to *Heller*’s proclamation that “nothing in our opinion should be taken to cast doubt on longstanding . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .” as additional support for the Second Amendment extending beyond the home. *Heller*, 554 U.S. at 626; see also Dorf, *supra* note 33, at 228 (asserting proclamation implies right to carry extends beyond home); *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., writing for court except as to Part III.B) (“If the Second Amendment right were confined to self-defense in the home, the Court would not have needed to express a reservation for ‘sensitive places’ outside of the home.”). Additionally, *Heller* recognized hunting and militia service are also engrained within the Second Amendment, neither of which is a homebound activity. *Heller*, 554 U.S. at 598-99 (describing purposes be-

would illustrate that there is a basis for the application of the right recognized in *Heller* outside the home.⁴⁸ Such an analysis would grant the right a substantive backbone that its assumed kin lacks, making it not so easily repudiated by the courts.⁴⁹

Furthermore, the Fourth Circuit's misapplication of the two-prong test poisoned its application of means-end scrutiny—more specifically, intermediate scrutiny.⁵⁰ While the Fourth Circuit rebuked the district court for its application of intermediate scrutiny—which was more akin to strict scrutiny in its estimation—its application of intermediate scrutiny more closely resembled rational basis review.⁵¹ This misapplication can be seen

hind Second Amendment).

⁴⁸ See sources cited *supra* note 47 (detailing support for right to carry beyond home in *Heller*). For example, Judge Niemeyer's analysis in *Masciandaro* finding that the Second Amendment extends outside the home has been approved by other courts. See *Bateman v. Perdue*, 881 F. Supp. 2d 709, 713-14 (E.D.N.C. 2012) (quoting Judge Niemeyer's separate analysis in finding Second Amendment right extends beyond home); *Weaver*, 2012 U.S. Dist. LEXIS 29613, at *12-13 (citing Judge Niemeyer's separate section with approval); *Woollard*, 863 F. Supp. 2d at 469 ("[T]he Court finds a ready guide in Judge Niemeyer's analysis in *Masciandaro*."). Additionally, there are nineteenth century cases that support the Second Amendment's applicability outside the home. See cases cited *supra* note 33 (detailing nineteenth century cases interpreting right to carry laws). However, present day case law is split between cases finding that there is such a right to carry, and others finding laws burdening the right to carry are constitutional. Compare *Woollard*, 863 F. Supp. 2d at *36 (finding Maryland handgun permitting scheme violates right to carry), and *Moore*, 702 F.3d at 942 (striking down Illinois ban on concealed carry), and *Bateman*, 881 F. Supp. 2d at 716 (finding North Carolina emergency declaration laws violate right to carry under Second Amendment), and *Weaver*, 2012 U.S. Dist. LEXIS 29613, at *11 ("While it is true that the Fourth Circuit has so far stopped short of expressly recognizing a Second Amendment right to keep and bear arms outside the home, this Court has no such hesitation."), with *Peterson v. Martinez*, 707 F.3d 1197, 1215-16 (10th Cir. 2013) (finding concealed carry not protected by Second Amendment), and *Kachalsky*, 701 F.3d at 101 (upholding New York's handgun permitting scheme). The evidence demonstrates a plethora of existing law that the Fourth Circuit declined to consider in its determination that Maryland's handgun permitting scheme was constitutional. See cases cited *supra* note 47 (tracing evidence supporting right to carry under Second Amendment).

⁴⁹ See Petition for Writ of Certiorari at 40, *Schrader*, 704 F.3d 980 (No. 12-1443), 2013 U.S. S. Ct. Briefs LEXIS 2646, at *40 (asserting assumptions under first prong make Second Amendment claims easily disposable).

⁵⁰ See *id.* ("It is far from obvious why intermediate scrutiny would be nearly presumptively fatal to claimants asserting a fundamental right."). The *Woollard* court echoed other courts' sentiment that as one moves outside the home, firearm rights are more limited due to public safety concerns. See *Woollard*, 712 F.3d at 880-81 (explaining assumed right to carry limited by public safety concerns); see also *Kachalsky*, 701 F.3d at 96 (noting state's substantial interest in regulating public carrying of handguns); *Masciandaro*, 638 F.3d at 470 (discussing out-of-the-home/in-the-home dichotomy). The Seventh Circuit took issue with this distinction and its implication that something less than strict scrutiny should apply to the challenged law. See *Moore*, 702 F.3d at 941 ("But the interest in self-protection is as great outside as inside the home.").

⁵¹ See Petition for Writ of Certiorari at 40, *Schrader*, 704 F.3d 980 (No. 12-1443), 2013 U.S. S. Ct. Briefs LEXIS 2646, at *43 (criticizing courts employing intermediate scrutiny standard in name only); see also *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long

in the Fourth Circuit's perfunctory analysis of Maryland's evidence offered in support of its handgun-permitting scheme.⁵²

In *Woollard v. Gallagher*, the Fourth Circuit Court of Appeals considered whether Maryland's handgun permitting scheme requiring an applicant to show a "good-and-substantial-reason" for issuance of a permit violated the Second Amendment. The Fourth Circuit erroneously abstained

as it bears a rational relation to some legitimate end."); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (adopting intermediate scrutiny as level of scrutiny for laws not burdening core Second Amendment protections). Indeed, the Fourth Circuit accepted the hypothetical evidence offered by Maryland in support of its handgun-permitting scheme and expressed deference toward the state legislature. *See Woollard*, 712 F.3d at 879-81; *see also Drake v. Filko*, 724 F.3d 426, 454 (3d Cir. 2013) (Hardiman, J., dissenting) ("Our role is to evaluate the State's proffered evidence, not to accept reflexively its litigation position."); *Petition for Writ of Certiorari at 40, Schrader*, 704 F.3d 980 (No. 12-1443), 2013 U.S. S. Ct. Briefs LEXIS 2646, at *41-45 (arguing courts have been misapplying intermediate scrutiny to Second Amendment claims).

⁵² *See Woollard*, 712 F.3d at 879-80; *see also* *Petition for Writ of Certiorari at 40, Schrader*, 704 F.3d 980 (No. 12-1443), 2013 U.S. S. Ct. Briefs LEXIS 2646, at *41-45 (arguing courts have been misapplying intermediate scrutiny to Second Amendment claims). While Maryland's evidence is rationally related to its undoubtedly legitimate end of public safety and crime prevention, one would be hard pressed to argue that the handgun permitting scheme is a "reasonable fit" where the empirical data is inconclusive at best or favors public carrying of firearms at worst. *See Moore*, 702 F.3d at 939 ("In sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law [banning concealed carry]."); *see also* Lott, Jr., *supra* note 33, at 1206 ("There have been a total of 29 peer reviewed studies by economists and criminologists, 18 supporting the hypothesis that shall-issue laws reduce crime, 10 not finding any significant effect on crime . . . and [one] . . . finding that right-to-carry laws temporarily increase . . . aggravated assaults."). If the public carriage of firearms either reduces crime, or has no discernible impact, such laws severely burdening the right to carry cannot pass constitutional muster. *See* Lott, Jr., *supra* note 33, at 1206 (asserting laws burdening right to carry should fail under any intermediate and strict scrutiny). Such empirical analysis is nowhere to be found in the *Woollard* court's consideration of Maryland's proffered evidence. *See Woollard*, 712 F.3d 865, at 879-80. Furthermore, the Fourth Circuit was wrong to criticize the district court's characterization of the Maryland handgun permitting scheme as a "rationing system." *See Woollard*, 712 F.3d at 880-81 (decrying district court's characterization of handgun permitting scheme); *see also Woollard*, 863 F. Supp. 2d at 474 (denouncing regulations as rationing system with the goal of "simply . . . reduc[ing] the total number of firearms carried outside of the home by limiting the privilege to those who can demonstrate 'good reason' beyond a general desire for self-defense."). While it may not be the intent of Maryland to ration the number of publicly carried handguns, it is beyond a shadow of a doubt the impact of the scheme. *See* Lott, Jr., *supra* note 33, at 1209 ("Maryland has granted concealed handgun permits, but obtaining permits has been exceedingly difficult. In 2007, the last year for which data is available from Maryland, only 36,755 permits were issued, implying merely 0.86 percent of the adult population had permits."). "A law that burdens the exercise of an enumerated constitutional right by simply making that right more difficult to exercise cannot be considered 'reasonably adapted' to a government interest, no matter how substantial that interest may be." *Woollard*, 863 F. Supp. 2d at 475 (criticizing Maryland's scheme for too broadly restricting right to carry); *see also Drake*, 724 F.3d at 455-56 ("[I]t is obvious that the justifiable need requirement functions as a rationing system . . . [e]ven assuming that . . . fewer guns means less crime, a rationing system that burdens the exercise of a fundamental constitutional right by simply making that right more difficult to exercise cannot be considered reasonably adapted to a governmental interest because it burdens the right too broadly.").

from addressing whether Woollard's claim was protected by the Second Amendment. Furthermore, its application of means-end scrutiny more closely resembled rational basis scrutiny than the intermediate scrutiny it purported to apply. While the boundaries of the Second Amendment have yet to be adequately defined and the Supreme Court may wish for the lower federal courts to further develop the issue, the lower courts' disinclination to traverse this "vast terra incognita" coupled with their disparate analyses may thrust the Supreme Court to address whether the *Heller* right extends beyond the home sooner than it may like.

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