March 2022

Circuit Split on Constitutionality of Public Carry Statutes: Why the Supreme Court Should Hold That States and Municipalities Know Best

Nick McLaughlin
Suffolk University Law School

Follow this and additional works at: https://dc.suffolk.edu/jtaa-suffolk

Part of the Litigation Commons

Recommended Citation
CIRCUIT SPLIT ON CONSTITUTIONALITY OF PUBLIC CARRY STATUTES: WHY THE SUPREME COURT SHOULD HOLD THAT STATES AND MUNICIPALITIES KNOW BEST

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

I. INTRODUCTION

As mass shootings² occur on what seems like a monthly basis, the topic of gun control in the United States is a hot button issue covered by media outlets across the country.³ From elementary and high schools to

¹ U.S. CONST. amend. II.
movie theaters to concerts to bars and nightclubs, mass shootings can occur anywhere. Due in part to the rise in mass shootings, a majority of Americans favor stricter laws governing the sale of firearms. The rest of the world believes stricter legislation is the simple resolution to the United States’ “gun problem.” Stricter gun legislation can take many forms, such as requiring universal background checks for purchasers of firearms, raising the purchasing age of shotguns and rifles to twenty-one years old, or placing restrictions on individuals who wish to procure public carry permits—the focus of this Note. The debate about firearms and the Second Amendment will continue for generations as Republicans and Democrats, and rural and urban populations differ drastically in their opinions about the extent to which the government should regulate the ownership of and right to carry firearms.

See sources cited supra note 3 (showing harsh reality of how mass shootings can occur anywhere).


The extent of the Second Amendment’s protection of an individual’s right to gun ownership was unclear until about a decade ago when the Supreme Court issued two landmark decisions on the issue. In 2008, the Court, in *Heller*, held that D.C.’s “ban on handgun possession in the home violate[d] the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” In 2010, the Court in *McDonald* held that the Due Process Clause of the Fourteenth Amendment incorporated *Heller’s* holding on the states. Although the *Heller* and *McDonald* Courts clearly established an individual right to gun ownership for the purpose of self-defense in the home, circuits have grappled with and disagreed as to whether the Second Amendment provides individuals with an unfettered right to carry their firearms, whether concealed or open, in public. Some circuits have determined that the right does extend outside the home; thus, statutes effectively banning public carry are unconstitutional. Other circuits have determined that virtually identical


See *Heller*, 554 U.S. at 635 (requiring D.C. to permit Heller to register his handgun and issue him license for self-defense purposes).

See *McDonald*, 561 U.S. at 791 (forcing all states to abide by Court’s holding in *Heller*).

*Compare* Gould v. Morgan, 907 F.3d 659, 662 (1st Cir. 2018), petition for cert. filed, (U.S. Apr. 1, 2019) (No. 18-1272) (finding Massachusetts firearm licensing statute restricting public carry as constitutional under Second Amendment), and *Drake* v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (concluding applicants required to demonstrate “justifiable need” to publicly carry handgun does not burden Second Amendment), and *Woollard* v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013) (holding good-and-substantial-reason requirement burdened Second Amendment, but significant governmental interest permitted it), and *Kachalsky* v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) (holding that proper cause requirement was constitutional restriction on Second Amendment), with *Young* v. Hawaii, 896 F.3d 1044, 1074 (9th Cir. 2018), *reh’g* granted, 915 F.3d 681 (9th Cir. 2019) (holding that Second Amendment protects right to openly carry firearm in public for self-defense), and *Wrenn* v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (reasoning that core right of Second Amendment is to carry firearms — concealed or openly — for “personal self-defense outside home”), and *Moore* v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (holding Second Amendment confers right to bear arms for self-defense, which extends outside home).

See *Young*, 896 F.3d at 1074 (“[F]or better or for worse, the Second Amendment does protect a right to carry a firearm in public for self-defense.”); *Wrenn*, 864 F.3d at 667 (“At the Second Amendment’s core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions.”); *Moore*, 702 F.3d at 942 (“The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”).
statutes are constitutional.14 These circuits, in applying intermediate scrutiny, conclude that the decision is ultimately in the hands of the legislature, and that the statutes do not violate the Second Amendment because it is not an outright ban, but rather a requirement to show a need for an open-carry permit.15

When starting the research for this Note, the Court had continued to allow for a circuit split to exist regarding whether states had the right to restrict a person’s right to carry a firearm in public.16 In fact, the Court had not addressed a Second Amendment issue since McDonald.17 In 2017, Justice Clarence Thomas and Neil Gorsuch dissented in the Court’s decision not to grant certiorari to a case where the Ninth Circuit validated a statute, which restricted individuals’ right to carry a concealed firearm.18 With the

14 See Gould, 907 F.3d at 672 (“Public carriage of firearms for self-defense falls outside the perimeter of this core right.”); Drake, 724 F.3d at 431 (“[w]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home . . . .”); Woollard, 712 F.3d at 876 (“we merely assume that the Heller right exists outside the home and that such right of Appellee Woollard has been infringed. We are free to make that assumption because the good-and-substantial-reason requirement passes constitutional muster under what we have deemed to be the applicable standard—intermediate scrutiny.”); Kachalsky, 701 F.3d at 96 (“The historical prevalence of the regulation of firearms in public demonstrates that while the Second Amendment’s core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public.”).

15 See cases cited supra note 14 (noting reasoning of circuits that hold permitting statutes constitutional).

16 See cases cited supra note 12 (emphasizing Court’s allowance of existing split).

17 See generally McDonald v. City of Chicago, 561 U.S. 742 (2010) (pointing to most recent Supreme Court decision of Second Amendment issue).

18 See Peruta v. California, 137 S. Ct. 1995, 1997 (2017) (Thomas, J., dissenting from denial of certiorari) (arguing Ninth Circuit improperly “limit[ed] its review to whether the Second Amendment protects the right to concealed carry—as opposed to the more general right to public carry—was untenable.”). Justice Thomas sharply rebuked the Ninth Circuit’s decision to reverse a panel of judges by way of an en banc hearing, pointing out that this decision reframed the issue to whether concealed carry was constitutional when the complaint “called into question the State’s regulatory scheme as a whole[,]” which would encompass open carry as well. Id. Imploring the Court to give the Second Amendment its due, Justice Thomas provided the following statistics:

Since [McDonald], we have heard argument[s] in . . . roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments.

Id. at 1999. See Silvester v. Becerra, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari) (arguing that Court’s refusal to grant certiorari undermined Heller and McDonald because “double standard [in applying intermediate scrutiny in Second Amendment cases] is apparent from other cases where the Ninth Circuit applies heightened scrutiny.”). Justice Thomas labeled the Second Amendment as “this Court’s constitutional orphan. And the lower courts seem
appointment of Justice Brett Kavanaugh in 2018, the Court has a new member who will likely join Thomas and Gorsuch in granting certiorari to a case, which could (1) determine whether the Second Amendment provides individuals with a right to carry a firearm outside the home, and (2) declare a standard of scrutiny that should be applied in determining the constitutionality of state statutes that restrict the right to public carry. In fact, the Court heard oral arguments regarding an appeal pertaining to the Second Amendment on December 2, 2019. On April 27, 2020, the Court issued an opinion. Even though the Court chose to vacate and remand due to mootness instead of addressing the merits of the case, the Court’s willingness to hear a Second Amendment case means it could likely hear another Second Amendment case where it could explain the following: (1) whether an individual’s Second Amendment right to bear arms for the
to have gotten the message.” Id. at 952. Justice Thomas found it inexcusable that the Court overlooked the Ninth Circuit’s improper application of heightened scrutiny, essentially reviewing Second Amendment issues under a rational basis standard. Id.; but see Darrell A. H. Miller, The Second Amendment and Second-Class Rights, HARV. L. REV. BLOG (Mar. 5, 2018), https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights/ [https://perma.cc/GB3X-H64Z] (“Just days before Justice Thomas dissented in Silvester, seventeen people were killed with a legally purchased AR-15 in yet another school shooting. Despite the mobilization of the survivors of that tragedy, and despite overwhelming polling that something, something needs to be done about gun violence; early indications are that — like every time before — no meaningful regulation will materialize. Indeed, the right to keep and bear arms may expand as a result. If that’s how a right is treated in second class, I can’t imagine how it’s treated in first.”).

19 See Tell Your Senators to Confirm Justice Brett Kavanaugh to the U.S. Supreme Court, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION, https://www.nraila.org/campaigns/2018/brett-kavanaugh/ (last visited May 6, 2020) [https://perma.cc/X7XN-FXSD] (showing NRA endorsement of Kavanaugh nomination due to his previous support of Second Amendment); Memo: Supreme Court Certiorari Grant in N.Y. State Rifle & Pistol Ass’n v. City of New York, GIFFORDS L. CTR. (Jan. 24, 2019), https://giffords.org/2019/01/nysrpa-memo/ [https://perma.cc/AA9C-KXNM] (“Under Justice Kavanaugh’s interpretation of the Second Amendment, judges should play no role in assessing the ‘costs and benefits of gun regulations.’ This radical view would allow judges to pick and choose which gun regulations have adequate historical support and invalidate all other laws.”).


21 See generally N.Y. State Rifle & Pistol Ass’n v. City of New York, No. 18-280, 2020 WL 1978708, at *1 (U.S. Apr. 27, 2020) (holding issue was moot, so Court did not reach merits of case).
purposes of self-defense extends outside the home; or (2) what standard of
scrutiny lower courts should apply in Second Amendment cases.22

This Note will analyze the current public carry circuit split that exists
with a particular focus on Young, a case that may possibly find its way to the
Supreme Court in the future.23 The Ninth Circuit has granted an en banc
hearing in Young and appears primed to overturn the majority decision that
deemed Hawaii’s gun ownership statute unconstitutional.24 Young
represents a case where the Supreme Court may grant certiorari after the
panel’s opinion is overturned by an en banc panel that could clarify: (1)
whether the right to carry firearms for the purpose of self-defense extends
outside of the home; and (2) whether courts should apply intermediate or
strict scrutiny to determine the constitutionality of a state statute restricting
the public carrying rights of gun owners.25 Prior to laying out the details of
Young, it is critical to understand the historical analysis that the Court
conducted in Heller and McDonald because some circuit courts, as well as
the majority in Young, conducted a similar analysis in striking down state
statutes.26

22 See id. (“Petitioners’ claim for declaratory and injunctive relief with respect to the City’s
old rule is therefore moot. Petitioners now argue, however, that the new rule may still infringe their
rights. . . . We do not here decide that dispute about the new rule; . . . The judgment of the Court of
Appeals is vacated, and the case is remanded for such proceedings as are appropriate.”); see also
Bernie Pazanowski, Supreme Court to Hear First Gun Case in Years, BLOOMBERG L. (Jan. 22,
case-in-years [https://perma.cc/GU2V-RNU9] (highlighting how Court could determine level of
scrutiny to apply in Second Amendment cases).

23 See discussion infra Section II (discussing Young opinion); see also Young v. Hawaii, 896
F.3d 1044, 1071 (9th Cir. 2018) (pointing to focus of this Note), reh’g granted, 915 F.3d 681 (9th
Cir. 2019).

24 See Jonathan Stempel, U.S. Appeals Court to Revisit Open Carrying of Guns, REUTERS
revisit-open-carrying-of-guns-idUSKCN1PX2A9 [https://perma.cc/2D2D-5WJ4] (discussing how
Ninth Circuit granted en banc hearing).

25 See Young, 896 F.3d at 1071 (laying out two-part test that Supreme Court should clarify);
id. at 1082–83 (Clifton, J., dissenting) (showing majority’s failure to apply and dissent’s application
of intermediate scrutiny).

26 See McDonald v. City of Chicago, 561 U.S. 742, 803–05 (2010) (Scalia, J., concurring)
(“Historical analysis can be difficult; it sometimes requires resolving threshold questions, and
making nuanced judgments about which evidence to consult and how to interpret it.”); District of
historical sources analyzed in opinion); Young, 896 F.3d at 1054–69 (discussing extensive history);
see also infra Part II.
II. HISTORY

In interpreting the text of the Constitution, the guiding principle is that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from their technical meaning . . . ."²⁷ After conducting a textual and historical analysis, the majority in Heller rejected the dissent's view that the right to bear arms was a collective right and, instead, held it was an individual right.²⁸ Justice Stevens's dissent accurately predicted the difficulty that the holding would cause federal courts, which were tasked with determining the extent to which states could regulate firearms.²⁹ The Heller Court proclaimed that the Second Amendment guaranteed an individual right to keep a handgun in one's home for self-defense purposes, and the McDonald Court further stressed that self-defense was at the heart of the Second Amendment and was a right deeply rooted in the nation's history and tradition.³⁰ Since Heller and McDonald each discussed at length the embodiment of self-defense in the Second Amendment, seven circuits have addressed whether the right to carry for the purpose of self-defense extends outside the home.³¹

The Heller and McDonald Courts reviewed historical documents and state statutes spanning from the Founding Era until after the Civil War.³² Since Heller and McDonald conducted such an analysis, it is reasonable to

---

²⁷ See United States v. Sprague, 282 U.S. 716, 731 (1931) (citations omitted) (expressing that language should be understood as ordinary citizens would construe it).

²⁸ See Heller, 554 U.S. at 577 (explaining dissent's collective right argument). Justice Stevens's main argument was that "the preamble of the Second Amendment suggests that the uses of the phrase ['the people'] in the First and Second Amendments are the same in referring to a collective activity." Id. at 645–46 (Stevens, J., dissenting).

²⁹ See id. at 679 (dissenting, J., Stevens) ("Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations."); see also cases cited supra note 13 (pointing to circuit split).

³⁰ See Young, 896 F.3d at 1050–51 (summarizing Heller and McDonald).

³¹ See cases cited supra note 12 (exhibiting circuit split). The D.C., Seventh, and Ninth Circuits examined the history of Second Amendment jurisprudence, essentially mirroring the analysis done in Heller and McDonald, and arrived at the conclusion that individuals have a right to openly carry firearms in public. See cases cited supra note 13. The First, Second, Third, and Fourth Circuits argued that the history of state regulation is unclear; thus, they applied the intermediate scrutiny test/review in arriving at the decision that states have a compelling interest to regulate the open and concealed carry of their constituents. See cases cited supra note 14.

³² See McDonald, 561 U.S. at 767–78 (engaging in historical analysis conducted by Heller Court); Heller, 554 U.S. at 605–19 (performing extensive historical analysis of Second Amendment jurisprudence).
believe that the Court will similarly analyze whether the right to carry
extends outside the home; thus, it is essential to lay out a brief history of how
the Court arrived at its decision that the right to bear arms within an
individual’s home for the purpose of self-defense is indeed an individual
right encompassed by the Second Amendment.33 The Heller Court examined
an individual’s right to bear arms by interpreting many historical documents,
including (1) the English Bill of Rights, which preceded the Second
Amendment, (2) legal commentaries utilized by the Framers of the
Constitution, including the works of William Blackstone, St. George Tucker,
and Joseph Story, (3) Founding-era statutes, and (4) Nineteenth Century state
court opinions—specifically from the period which the Court refers to as the
Antebellum South.34 Additional sources cited by circuit courts since
McDonald and Heller will also be discussed.35 It is critical to glean as much
information from the sources cited in Heller in order to determine if those
sources speak to whether the right to carry extends outside the home, or
whether history shows that states have a right to restrict individuals’ Second
Amendment rights once a gun owner brings or wants to bring that gun
outside their home.36

A. Pre-Founding and Founding-Era Sources

The English Bill of Rights recognized the following right: “[t]he
Subjects which are Protestants may have Arms for their Defence suitable to
their Conditions and as allowed by Law.”37 Through its historical analysis,
the Heller Court determined that the English Bill of Rights provided an
individual right to bear arms.38 However, legal historians still argue (1)
whether the English right guaranteed an individual right to bear arms, and
(2) that the English right was less expansive than its American counterpart.39

33 See Jonathan Meltzer, Open Carry for All: Heller and Our Nineteenth-Century Second
Amendment, 123 YALE L.J. 1486, 1489–90 (2014) (positing that Court will apply analysis similar
to Heller in potential Second Amendment case).
34 See Heller, 554 U.S. at 605–619 (examining historical documents).
35 See cases cited supra note 12.
36 See Meltzer, supra note 33, at 1490 (“The Court’s (and, for that matter, the dissents’) use of
history to determine the existence of an individual right to firearms suggests that elaboration of the
extent of the right will require further expeditions into the past.”).
37 See Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.).
38 See Heller, 554 U.S. at 593 (“This right has long been understood to be the predecessor to
our Second Amendment. It was clearly an individual right, having nothing whatever to do with
service in a militia . . . it was secured to [Protestants] as individuals, according to ‘libertarian
political principles,’ not as members of a fighting force.” (internal citations omitted)).
39 Compare Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-
American Right 120–34 (1994) (arguing English right included self-defense component), with
Although the majority in *Heller* recognized that the Second Amendment affords an individual right to bear arms for the purpose of self-defense within the home, the Court did not hint at whether that right extends outside the home.40

Both the Court in *Heller* and the Ninth Circuit in *Young* sought guidance from William Blackstone’s *Commentaries on the Laws of England*, which *Heller* deemed as the “preeminent authority on English law for the founding generation.”41 The *Heller* Court stated that Blackstone’s view was that the 1689 Declaration of Rights enshrined “the natural right of resistance and self-preservation” and “the right of having and using arms for self-preservation and defence.”42 *Heller* concluded that because of Blackstone’s view that “by the time of the founding [the right was] understood to be an individual right protecting against both public and private violence[,]” the Ninth Circuit in *Young* reiterated this conclusion.43 Like most of the historical interpretations conducted in *Heller*, there are historians who disagree with the Court’s analysis of Blackstone’s and St. George Tucker’s works.44

St. George Tucker, an American law professor at the College of William & Mary and a Blackstone scholar, argued that the right to armed

---

40 See *Heller*, 554 U.S. at 635–36 (limiting holding to right to bear arms with one’s home).

41 See id. at 593–94 (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)) (emphasizing influence of Blackstone’s works); Young v. Hawaii, 896 F.3d 1044, 1053–54 (9th Cir. 2018) (examining Blackstone’s work and acknowledging its significance in *Heller*), reh’g granted, 915 F.3d 681 (9th Cir. 2019).

42 See *Heller*, 554 U.S. at 594 (discussing Blackstone’s description of arms provision); see also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 140 (Oxford, Clarendon Press 1765) (showing how Blackstone believed self-defense was incorporated into 1689 Declaration of Rights).

43 See *Heller*, 554 U.S. at 594 (reasoning basis for individual right found in Blackstone’s work); *Young*, 896 F.3d at 1054 (quoting *Heller*, 554 U.S. at 594) (stressing support for individual right).

44 See Saul Cornell, St. George Tucker’s Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment, 103 N.W.U.L. REV. 1541, 1552 (2009) [hereinafter Lecture Notes] (“Tucker’s earliest writings on the Second Amendment support neither... individual-rights views of the Second Amendment nor the majority opinion in *Heller*. Tucker’s vision of the Second Amendment is not consistent with either the modern gun control or gun-rights view of the Second Amendment.”); Saul Cornell, St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings, 47 WM. & MARY L. REV. 1123, 1124 (2006) [hereinafter Original Understandings] (“The individual rights misreading of Tucker is merely the latest example of how constitutional scholarship has been hijacked for ideological purposes in this bitter debate.”).
self-defense is the “first law of nature” and that “the right of the people to keep and bear arms” is the “true palladium of liberty.”45 *Heller* found that Tucker’s writings clearly supported an individual right to self-defense.46 Whereas the majority in *Heller* used Blackstone and Tucker’s writings to show that the Second Amendment encompassed an individual right to bear arms, Justice Stevens argued that “[t]here is not so much as a whisper in [former Justice Story’s writings] that [he] believed that the right secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense.”47

45 See 1 HENRY ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 300 (Phil. William Young Birch & Abraham Small 1803) (arguing for right to bear arms as essential show of one’s liberty). Tucker further stated that “[i]f, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts . . . would be able to pronounce decidedly upon the constitutionality of these means.” *Id.* at 289. See McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (asserting Tucker’s notes as descriptive of founding-era understanding); 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, 638 (2012) (“Tucker thus perfectly fits the antebellum pattern: early American sources that treated self-defense as an important purpose of the right to bear arms accordingly viewed it as protecting presumptive carry rights.”). But see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1361 (2009) (“In some American jurisdictions today, for example, openly carrying a firearm might plausibly be thought to violate the ancient common law prohibition against ‘terrifying the good people of the land’ by going about with dangerous and unusual weapons.” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148 (Oxford, Clarendon Press 1765))).

46 See *Heller*, 554 U.S. at 594–95, 606 (showing Tucker’s commentaries as supportive of right to bear arms for self-defense). But see id. at 666 n.32 (Stevens, J., dissenting) (“Tucker suggested that the [Second] Amendment should be understood in the context of the compromise over military power . . . .”); see also Original Understandings, supra note 44, at 1148–49 (opining Court oversimplified Tucker’s views on gun rights). Cornell postulated that prior to *Heller*, “[w]eapons intended primarily for self-defense with little utility for military engagement would not have enjoyed constitutional protection but would have enjoyed some limited protection under common law, subject to state regulation.” Original Understandings, supra note 44, at 1149. Cornell also argued that “traveling armed, even with militia weapons, would have still been subject to reasonable regulations and some types of common law constraints.” *Id.* Finally, Cornell in arguing that the right to bear arms coincided with militia service, stated that “[a]tten ding [a formal gathering of troops] with arms would have enjoyed robust constitutional protection.” *Id.*

47 See *Heller*, 554 U.S. at 668 (Stevens, J., dissenting) (citing Justice Story emphasizing “paramount importance” of militia). The majority argued that Justice Stevens’s interpretation of Story’s writings was incorrect because Story equated the English Bill of Rights inclusion of a right to bear arms—a right which the majority stated had “nothing to do with militia service”—with the Second Amendment in the following passage:

A similar provision [to the Second Amendment] in favour of protestors . . . is to be found in the bill of rights of 1688, it being declared, “that the subjects . . . may have arms for their defence suitable to their condition, and as allowed by law.” But under various
B. Colonial Laws

There is a longstanding tradition of state regulation of firearm possession and public use because of the dangers those activities pose. In 1692, the colony and province of Massachusetts Bay enacted a statute that allowed the justice of the peace to arrest those who “shall ride or go armed offensively before any of [t]heir [m]ajesties’ [j]ustices . . . or elsewhere, by [n]ight or by [d]ay, in [f]ear or [a]ffray of [t]heir [m]ajesties’ [l]iege [p]eople . . .” Four states adopted a right to bear arms prior to the ratification of the Second Amendment. Massachusetts’ Declaration of Rights protected the right of the people to “keep and bear arms for the common defence.” In Heller, the majority interpreted art. XVII, along with the three other state constitutional provisions, as encompassing an individual right. During the Founding Era, a number of colonies and states enacted laws regulating firearms in order to promote public safety. Additionally,
some scholars look at laws promoting public safety as narrowly focused on preventing fires or restricting guns in special areas, such as markets. Other scholars emphasize how the Second Amendment is “particularly suited for local tailoring.” The type of “local tailoring” that occurred in the Founding Era also occurred in Kansas over a century later.

C. Antebellum South Period

After the Second Amendment was ratified, nine states adopted constitutional provisions, which provided citizens with a right to keep and bear arms. The majority in *Heller* focused heavily on this time period because many state supreme courts explained that the Second Amendment encompassed a right to carry firearms for the purpose of self-defense. Despite many states’ recognition of the right to openly carry outside the

---

54 See Meltzer, supra note 33, at 1504–09 (pointing to Meltzer’s explanation of narrow regulations). Meltzer points out that these state laws do not specifically address the carrying of firearms, but, as Blocher points out, it shows the divide between urban and rural areas on how states addressed the unique dangers that firearms and the storage of gunpowder posed. *Id.*; Blocher, *supra* note 53, at 112–20 (emphasizing merits of constitutional localism).

55 See *Blocher, supra* note 53, at 112–20 (describing how laws were tailored to specific city interests).

56 See DODGE CITY, KAN., CITY ORDINANCES no. 16, § 11 (Sept. 22, 1876) ("[A]ny person who shall in the City of Dodge City, carry concealed, or otherwise, about his or her person, any . . . dangerous or deadly weapon, except United States Civil Officers, State, County, Township or City officers shall be fined . . . Seventy-Five Dollars.").

57 See *Heller*, 554 U.S. at 585 n.8, 602 (listing states that adopted such provisions).

58 See State v. Reid, 1 Ala. 612, 616 (1840) (upholding concealed weapon ban because legislature still regulates “manner in which arms shall be borne”); State v. Buzzard, 4 Ark. 18, 18 (1842) (holding that ban on concealed carry did not violate either state constitution or Second Amendment); Nunn v. State, 1 Ga. 243, 250 (1846) (concluding that Second Amendment protects broad right of all citizens to keep and bear arms); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 90 (1822) (holding statute prohibiting concealed carry of weapons violated “right of the citizens to bear arms in defense of themselves and the state”); State v. Chandler, 5 La. Ann. 489, 489 (1850) (upholding concealed carry ban but interpreting Second Amendment as protecting carry for purposes of self-defense); Aymette v. State, 21 Tenn. (2 Hum.) 154, 161 (1840) (upholding concealed weapons ban and adding that arms “must necessarily be borne openly”); Simpson v. State, 13 Tenn. (5 Yer.) 356, 362 (1833) (reversing Simpson’s conviction of affray because being armed in public did not constitute punishment); State v Duke, 42 Tex. 455, 458 (1874) (holding concealed carry not Second Amendment right).

59 See *Heller*, 554 U.S. at 585–86 (demonstrating majority’s consultation of state court holdings to determine whether Second Amendment encompassed individual right).
home, concealed carry bans were often upheld. Relying on the Georgia Supreme Court’s *Nunn* opinion, Justice Scalia explained how the court “perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right.” The focus on this time period by *Heller* sparked criticism from Justice Stevens in his dissent. However, although Justice Stevens would not lend credence to this time period, it is unlikely that the Court will disregard this time period if it hears another case concerning the Second Amendment; instead, it will likely follow the groundwork laid out in *Heller*.

**D. Gun Laws in the South: Pre and Post Civil War**

In *Young*, the majority acknowledged that prior to the Civil War, southern states were emboldened to restrict the Second Amendment rights of African Americans because of the Court’s disgraceful decision in *Dred

---

60 See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523 (2009) (“For over 150 years, the right to bear arms has generally been seen as limited in its scope to exclude concealed carry.”); see also *Reid*, 1 Ala. at 612 (upholding Alabama’s ban on concealed weapons); *Aymette*, 21 Tenn. (2 Hum.) at 154 (upholding Tennessee’s ban on concealed weapons).

61 See *Heller*, 554 U.S at 612 (admiring Georgia Supreme Court’s explanation of individual’s right to bear arms). Scalia references the following passage:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!

*Id.* at 612–13 (quoting *Nunn*, 1 Ga. at 251).

62 See *Heller*, 554 U.S at 662 n.28 (Stevens, J., dissenting) (explaining how sources that majority relied upon are inherently unreliable). Stevens particularly did not like the use of (1) post-enactment commentary on the Second Amendment, and (2) post-Civil War legislative history because “both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intent of any provision’s drafters.” *Id.*

63 See *Meltzer*, supra note 33, at 1510–11 (citing *Heller*, 554 U.S at 605) (emphasizing majority use of this time period to understand “immediate aftermath of [the Second Amendment’s]ratification”).
Scott v. Sanford,64 where it held that Dred Scott, a freedman, had no rights under the Constitution since African Americans had never been recognized as sovereign peoples of the U.S.65 Due to the fear of rebellions and obvious overt racism with the intent to dehumanize African Americans, southern states enacted laws that stripped African Americans of their right to bear arms.66 In explaining why self-defense was at the core of the Second Amendment, the McDonald Court pointed to instances of racism in the South after the Civil War where bands of ex-Confederate soldiers disarmed and, in some instances, murdered African Americans.67 After losing the Civil War, Confederate soldiers served in state militias and acted as an “overbearing” force violently disarming and murdering newly-freed slaves.68 The Report of the Joint Committee on Reconstruction catalogued these abuses.69 States, such as Mississippi, enacted laws after the Civil War that stated: “no freedman, free negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife.”70 This type of legislation by southern states, leading up to and following the Civil War, necessitated Congress to discuss newly-freed slaves’ right to bear arms, and Congress

64 60 U.S. 393 (1857).
65 See Young v. Hawaii, 896 F.3d 1044, 1059–60 (2018) (providing background to laws enacted by Southern states), reh’g granted, 915 F.3d 681 (9th Cir. 2019).
66 See id. at 1059–60 (highlighting how African Americans were stripped of right to bear arms); see also McDonald v. City of Chicago, 561 U.S. 742, 771 (2010) (quoting CERTAIN OFFENSES OF FREEDMEN, 1865 MISS. LAWS p. 165, § 1, in 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 289 (W. Fleming ed. 1950)) (providing statute that prohibited minority groups from “keeping” or “carrying” weapons, including knives and guns).
67 See McDonald, 561 U.S. at 770 (describing how some congressmen argued freedmen had Second Amendment right to protect themselves); see also Clayton Cramer, The Racist Roots of Gun Control, 4 KAN. J.L. & PUB. POL’Y 17, 20 (1995) (“Unlike whites, however, free blacks and slaves were required to have a license to carry weapons.”); Nicholas Johnson, The Arming and Disarming of Black America, SLATE (Feb. 10, 2018, 7:00 AM), https://slate.com/human-interest/2018/02/what-reconstruction-and-its-end-meant-for-black-americans-who-had-fought-for-the-right-to-keep-and-bear-arms.html [https://perma.cc/Z4XQ-4PPR] (“The Black Code restrictions were a piece with violent attempts to disarm blacks perpetrated by local police, white state militias, and Klan-type organizations that rose during Reconstruction to wage a war of Southern ‘redemption.’ The formal Ku Klux Klan emerged out of Tennessee in 1866. But across the South, similar organizations cropped up under names like the White Brotherhood, the Knights of the White Camellia, the Innocents, and the Knights of the Black Cross. Black disarmament was part of their common agenda.”).
68 See McDonald, 561 U.S. at 772 (citing CONG. GLOBE, 39th Cong., 1st Sess. 40 (1865)) (highlighting racism and hypocrisy of Confederacy).
69 See H.R. REP. NO. 39–30, pt. 2, pp. 219, 229, 272, pt. 3, pp. 46, 140, pt. 4, pp. 49–50 (1866) (showing Congressional discussion on former confederates disarming freedmen); S. EXEC. DOC. NO. 39–2, at 23–24, 26, 36 (1865) (same).
70 See McDonald, 561 U.S. at 771 (quoting CERTAIN OFFENSES OF FREEDMEN, 1865 MISS. LAWS p. 165, § 1, in 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 289 (W. Fleming ed. 1950)) (highlighting statute restricting African Americans’ Second Amendment rights).
ensured that African Americans were afforded the right to bear arms through the enforcement of § 14 of the Freedmen’s Bureau Act of 1866.71

E. Failure to Establish Standard of Review

The Heller Court did not need to address a standard of review because D.C.’s law failed “any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights.”72 Since Heller, circuit courts have generally applied intermediate scrutiny.73 Although no standard was adopted, the Court rejected rational basis scrutiny, as it “could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right.”74 Justice Thomas argues that lower courts claim to apply intermediate scrutiny when reviewing Second Amendment cases, but instead conducted rational basis review, which to Justice Thomas is despicable treatment of the Second Amendment.75 Lamenting that “[l]esser rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text[,]” Justice Thomas has consistently dissented in Second Amendment cases where the Court has denied certiorari, and in December 2019—due in part to his dissents—the Court finally heard a case pertaining to the Second Amendment.76

Since Heller, circuit courts have arrived at various conclusions as a result of the Supreme Court’s failure to declare the proper standard of review

71 See 14 Stat. 176–77 (1866) (“[T]he right . . . to have full and equal benefit of all laws . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery.”). Furthermore, the Civil Rights Act of 1866 sought to protect the right of all citizens to bear arms by stating that “full and equal benefit of all laws . . . for the security of person and property, as is enjoyed by white citizens.” 14 Stat. 27 (1866); see AKHL AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION 264–265 (Yale Univ. Press, 60059th ed. 2000) (noting core purpose of Civil Rights Act of 1866 and Fourteenth Amendment to “affirm the full and equal right of every citizen to self-defense”).

72 See District of Columbia v. Heller, 554 U.S. 570, 580–600, 628 (2008) (highlighting why such standard has not been addressed).


74 See Heller, 554 U.S. at 628, n.27 (explaining why rational basis standard is inappropriate for enumerated right).

75 See Silvester v. Becarra, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari) (recognizing that “[i]ntermediate scrutiny also requires that a law not burden substantially more protected activity than is necessary to further the government’s interest.” (internal quotations omitted)).

76 See id. at 951 (highlighting Justice Thomas's anger at Court’s indifference to Second Amendment constitutional issues).
in Second Amendment cases. Some circuits have applied intermediate scrutiny and upheld statutes that restricted individuals’ right to carry in public. Other circuits have not announced a standard, recognizing instead that the right to carry is at the core of the Second Amendment, and even restrictive statutes fail the rational basis review.

III. YOUNG V. HAWAII

George Young, a citizen of the County of Hawaii, applied for a license to carry a handgun on two occasions; the application was either for a concealed or open carry permit. The County of Hawaii’s Chief of Police denied his application on both occasions because Young failed to satisfy the requirements set forth in Hawaii’s Revised Statute § 134-9. Section 134-9 provides that

In an exceptional case, when an applicant shows reason to fear injury to the applicant’s person or property, the chief of police . . . may grant a license to an applicant . . . to carry a pistol or revolver and ammunition therefor concealed on the person . . . [w]here the urgency or need has been sufficiently

---

77 See cases cited supra note 12 (highlighting circuit split regarding individual right to carry).

78 See Gould v. Morgan, 907 F.3d 659, 677 (1st Cir. 2018), petition for cert. filed, (U.S. Apr. 1, 2019) (No. 18–1272) (applying intermediate scrutiny in determining legislature’s authority to refuse to grant unrestricted gun carrying licenses); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (“[W]e conclude that the ‘justifiable need’ standard withstands intermediate scrutiny.”); Woolard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013) (“[U]nder the applicable intermediate scrutiny standard, the State has demonstrated that the good-and-substantial-reason requirement is reasonably adapted to Maryland’s significant interests in protecting public safety and preventing crime.”); Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012) (“Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.”).

79 See Young v. Hawaii, 896 F.3d 1044, 1071 (9th Cir. 2018) (“Notwithstanding the fact that section 134-9 eviscerates a core Second Amendment right—and must therefore be unconstitutional—the dissent would uphold the law under intermediate scrutiny. [This court does not wish to dive into the weeds of intermediate scrutiny, but it does feel obligated to note a few aspects of the dissent’s analysis that are patently inconsistent not only with intermediate scrutiny, but with the judicial role itself.”), reh’g granted, 915 F.3d 681 (9th Cir. 2019); Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (analyzing levels of scrutiny to decide that law is equivalent to total ban on carrying firearms and therefore, unconstitutional); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (“Illinois had to provide [this court] with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden.”).

80 See Young, 896 F.3d at 1048 (outlining origin of case before Ninth Circuit).

81 See id. (listing factors police chief may consider when issuing license to carry).
indicated [and the applicant] . . . is engaged in the protection of life and property.82

The County of Hawaii implemented regulations clarifying what proper open carry consisted of when the license holder is “in the actual performance of his duties or within the area of his assignment.”83 Without a license under § 134-9, Young was forced to “transport an unloaded firearm, in an enclosed container . . . and [could] only use those firearms while actually engaged in hunting or target shooting.”84

The district court dismissed Young’s action on the merits, finding that § 134-9 did not “implicate activity protected by the Second Amendment” because the Amendment only protected the individual right to “keep an operable handgun at home for self-defense.”85 The Ninth Circuit, abiding by the Court’s holding in Heller, stated that it must determine the scope of the Second Amendment not as it appeared to them in present time, but rather as within the scope understood by the Founders who promulgated it.86 The Ninth Circuit applied a two-step approach in assessing Young’s Second Amendment challenge.87 The court first determined “whether the challenged law burdens conduct protected by the Second Amendment.”88 If the law did burden Young’s Second Amendment right, then the court “appl[ied] an appropriate level of scrutiny.”89 After conducting a

83 See Police Dep’t of Cty. of Hawaii, Rules and Regulations Governing the Issuance of Licenses 10 (Oct. 22, 1997) (reflecting on strict requirements to attain gun permit).
84 See Young, 896 F.3d at 1048 (internal quotation marks omitted) (considering statutes effect on Young).
85 See Young v. Hawaii, 911 F. Supp. 2d 972, 989 (D. Haw. 2012), rev’d, 896 F.3d 1044 (9th Cir. 2018), reh’g granted, 915 F.3d 681 (9th Cir. 2019) (highlighting subsequent history and why trial court dismissed case on merits).
86 See Young v. Hawaii, 896 F.3d 1044, 1051 (2018) (citing District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008)) (emphasizing that courts should not construe scope of Second Amendment based on present day concerns), reh’g granted, 915 F.3d 681 (9th Cir. 2019). The Ninth Circuit emphasized that text and history are “[o]ur lodestars.” Id. at 1051.
87 See Jackson v. City of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014) (stating origin of two-step Second Amendment approach from Ninth Circuit).
88 See id. (quoting United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013)) (stating first issue court addressed).
89 See id. (demonstrating that first part of test must be satisfied for level of scrutiny to be applied). Furthermore, Heller explained that rational basis review is inappropriate when evaluating restrictions on individual’s Second Amendment rights. Heller, 554 U.S. at 628 n.27. Thus, a more heightened scrutiny is required, “such as intermediate or strict scrutiny.” Young, 896 F.3d at 1051. The Court in McDonald implored courts not to treat the Second Amendment differently from other constitutional rights because it is not “a second-class right.” McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).
comprehensive textual and historical analysis, the Ninth Circuit concluded that the "right to bear arms must guarantee some right to self-defense in public."90

In determining the appropriate level of scrutiny to apply, the court considered "(1) how close the law [came] to the core of the Second Amendment right, and (2) the severity of the law's burden on the right."91 There are two ends of the spectrum: on one end, a law so severe that it destroys the Second Amendment right, which is unconstitutional under any level of scrutiny; on the other end, where the challenged law "does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right[,]" intermediate scrutiny may be applied.92 The Ninth Circuit in Young acknowledged how other circuits93 limited the core right to within the home, but ended up finding that Heller implied a core purpose of self-defense not limited to the home.94 The Ninth Circuit held in a two-to-one decision that "the Second Amendment does protect a right to carry a firearm in public for self-defense," and because § 134-9's "limitation on the open carry of firearms to those 'engaged in the protection of life and property' violates the core of the Second Amendment and is void; the County may not constitutionally enforce such a limitation on applicants for open carry licenses."95 The Ninth Circuit has since vacated the Young decision and was pending an en banc hearing until New York State Rifle & Pistol Ass'n decision.96 Since New York State Rifle & Pistol Ass'n was decided by the Supreme Court, the en banc hearing has been scheduled for September 21, 2020.97

90 See Young, 896 F.3d at 1068 (concluding existence of some public carry right even though Peruta struck down concealed carry right).
91 See Jackson, 746 F.3d at 963 (announcing two-part test).
92 See id. at 960–61 (discussing constitutionality of statutes).
93 See cases cited supra note 13 (describing how some circuits limited Heller's holding to apply only within home).
94 See Young, 896 F.3d at 1069 (recognizing how Young majority disagreed with other circuits). The Ninth Circuit noted Heller's reference to seven state constitutional provisions that unequivocally protected a citizen's right to self-defense. Id. Thus, the Ninth Circuit followed Heller and McDonald's "admonition that citizens be allowed to use firearms 'for the core lawful purpose of self-defense.'" Id. (citations omitted).
95 See Young, 896 F.3d at 1071, 1074 (emphasizing holding in Young).
96 See Hawaii v. Young, 915 F.3d 681, 682 (9th Cir. 2019) ("The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit.").
IV. ANALYSIS

In New York State Rifle & Pistol Ass’n, the Supreme Court let the circuit split persist concerning whether open or concealed carry outside the home is a core right of the Second Amendment. In the near future, the Court will likely grant certiorari to a case similar to Young or Gould and reach the constitutionality of a public carry statute. The Heller Court described the right to bear arms as “most acute” in the home; however, the Court’s language does not limit the right to only inside the home. When the Court hears a public carry case, it will have to grapple with the breadth of the right; one can expect that the Court will recognize open carry as a core

---

98 See N.Y. State Rifle & Pistol Ass’n v. City of New York, No. 18-280, 2020 WL 1978708, at *1 (U.S. Apr. 27, 2020) (ruling issue moot; thus, did not reach constitutionality issue); see also Young, 896 F.3d at 1081–82 (Clifton, J., dissenting) (highlighting interrelation between core right issue and scrutiny standards). In his dissent, Judge Clifton decided that intermediate scrutiny was proper.

Because [he] conclude[d] that Hawaii’s regulatory framework [did] not “impose[] such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right,” the most demanding level of review that can be applied to Hawaii’s regulatory framework is intermediate scrutiny. Young, 896 F.3d at 1081 (Clifton, J., dissenting (citations omitted). The majority held that the law is “unconstitutional under any level of scrutiny . . . [because it] eviscerates a core Second Amendment right.” Id. at 1070–71 (majority opinion).

99 See Memo: Supreme Court Certiorari Grant in N.Y. State Rifle & Pistol Ass’n v. City of New York, supra note 19 (“What’s more, court watchers have anticipated that the Supreme Court is fairly likely to grant review in one or more cases addressing public concealed carry laws; the leading contenders are cases called . . . Gould v. Morgan.”); see also Gould v. Morgan, 907 F.3d 659, 674 (1st Cir. 2018), petition for cert. filed, (U.S. Apr. 1, 2019) (No. 18-1272) (“The sockdolager, of course, is that the defendants have forged a substantial link between the restrictions imposed on the public carriage of firearms and the indisputable governmental interests in public safety and crime prevention.”). The First Circuit, in applying intermediate scrutiny, explained:

[I]t is the legislature’s prerogative—not ours—to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments. In dealing with a complex societal problem like gun violence, there will almost always be room for reasonable minds to differ about the optimal solution. It follows, we think, that a court must grant the legislature flexibility to select among reasonable alternatives. It would be foolhardy—and wrong—to demand that the legislature support its policy choices with an impregnable wall of unanimous empirical studies.

Gould, 907 F.3d at 676. Much like the First Circuit in Gould, the Ninth Circuit en banc hearing is likely to arrive at the same conclusion as Gould and point to the problems associated with guns. See id. (“The problems associated with gun violence are grave. Shootings cut short tens of thousands of American lives each year. Massachusetts has made a reasoned attempt to reduce the risks of gun violence on public streets . . . .”).

right of the Second Amendment and refuse to recognize concealed carry as such. However, in recognizing open carry as a core right, the Court will have to carefully craft a rule to prevent overbroad interpretations, as the *Heller* Court has already acknowledged the right's constitutional limits. Following *Heller*'s historical analysis, one should expect the Court to put the same emphasis on the state court cases from the Antebellum South period, which typically ruled concealed carry laws unconstitutional and open carry laws constitutional. In analyzing the issue, the Court should take a closer look at Colonial and Founding Era gun restrictions, specifically those in Boston, which provide an example of how a city regulated guns prior to and during the time the Second Amendment was drafted.

A. Open Carry for All? Not So Fast

It is undisputable that *Heller* and *McDonald* determined that self-defense is the core of the Second Amendment. If the Supreme Court applies the same analysis as the *Heller* and *McDonald* Courts, especially considering the Court’s current makeup, the Court will likely declare that self-defense is a core right of the Second Amendment that extends outside the home; however, due to states historically restricting concealed carry, specifically in the Antebellum South—the time period *Heller* relied on for its analysis—it is a monumental task to draft a rule to determine how broadly to interpret an individual’s right to carry outside the home. The *Heller*

---

101 See Meltzer, supra note 33, at 1528 (“The Court’s methodology in *Heller* and its reliance on the nineteenth-century case law suggest that there must be some right to carry, and that open carry, not concealed carry, is protected by the Second Amendment.”); see also Volokh, supra note 60, at 1524 (“If *Heller* is correct to read the Second Amendment in light of post-enactment tradition and not just Founding-era original meaning, this exclusion of concealed carry would be part of the Second Amendment’s scope as well.”).

102 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.”).

103 See Meltzer, supra note 33, at 1530 (“Given *Heller*’s reliance on modernity-accommodating carve-outs, however, perhaps we should prepare ourselves for just such an unsatisfying and unprincipled resolution for the right to carry weapons outside the home.”).

104 See discussion supra Section II.A (highlighting arms’ regulations during Founding era).

105 See cases cited supra note 8 (exhibiting how *McDonald* built upon *Heller*’s emphasis on self-defense being at heart of Second Amendment).

106 See Meltzer, supra note 33, at 1518 (“The argument for a Second Amendment that guarantees the right to carry, but to carry only openly, is straightforward and grounded in fidelity to *Heller*.”).

107 See id. at 1519 (“[The Antebellum South courts’] understanding of the right to carry for self-defense explicitly encompassed a view that [open and concealed carry was] different, and that
Court particularly focused on the Antebellum South period, providing the Court with what appears to be two simple holdings: (1) open carry is a core right of Second Amendment; and (2) concealed carry is not; however, if the Court were to supplement the analysis conducted in *Heller* and *McDonald*, not only will the Court understand that states have always been leery of licensing individuals seeking concealed carry permits, but also, that states, such as Massachusetts, have limited the carrying of weapons in markets dating back to the Colonial and Founding era and have also adopted good cause statutes since 1836.

### B. *Heller*'s Oversight of History of State Regulation of Firearms

The *Heller* Court and some scholars do not directly address the fact that states and cities, prior to the passage of the Second Amendment, promoted public safety by instituting laws to prevent guns from being stored and carried in particular areas within a city’s limits. Furthermore, Texas’s original Constitutional provision regarding the right to bear arms explicitly stated that the right is dependent on the restrictions enacted by the legislature. The majority in *Young* gets engrossed in explaining how the outcome of *State v. Duke* depended on the clause of Texas’s Constitutional right to bear arms, which allowed for government regulation; however, what it should have focused on is that the Texas’s Constitution drafters understood the Second Amendment to only go so far as the “legislature may

---

108 See id. (emphasizing logical conclusion stemming from *Heller*’s analysis).

109 See *Young v. Hawaii*, 896 F.3d 1044, 1078 (9th Cir. 2018) (Clifton, J., dissenting) (citing 1836 Mass. Laws 748, 750, ch. 134, § 16) (“[Massachusetts’] law provided an exception to its limitation on public carry for those with ‘reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property.’”), reh’g granted, 915 F.3d 681 (9th Cir. 2019); see also sources cited supra note 45 (showing Colonial era regulation of arms). Judge Clifton further explained that in *Peruta*, the Ninth Circuit recognized that regulation of public carry has roots in English law, which date back to the thirteenth century as “England regulated public carry of firearms, including both concealed and concealable weapons.” *Young*, 896 F.3d at 1077.

110 See *Heller*, 554 U.S. at 683–84 (Breyer, J., dissenting) (emphasizing states’ history of regulating Second Amendment); see also sources cited supra note 97 (showing state regulation of firearms in late 1600s to mid-1800s).

111 See *Young*, 896 F.3d at 1058 (explaining why *State v. Duke* court concluded that legislature could confine carry of firearms to certain places). In *Young*, the majority explained this outcome by pointing to the language of Texas Constitutional provision, which allowed the legislature to restrict right: “every person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe.” *Id.* (emphasis added).
prescribe.” This indicates an understanding by the drafters of state laws and constitutions that guns present a particular safety issue that requires, as scholar Joseph Blocher puts it “local tailoring.” Furthermore, Southern states restricted individuals’ right to concealed carry because the states viewed it as devious behavior. This long history of states’ restricting individuals’ Second Amendment right shows that the Court must acknowledge and allow for this regulation to continue and also shows the importance of drafting a rule that will preserve the right for states to restrict individuals’ public carrying rights.

The historical analysis conducted in Heller and discussed by subsequent scholars indicates how each side can embrace different interpretations of the meaning of state constitutional provisions or statutes at various time periods in American and English history. States have restricted Second Amendment rights both rightfully and wrongfully. In the past, the right to bear arms for the purpose of self-defense acted as a check in protecting African Americans and their communities to a certain extent in the Jim Crow South; since community racism bled into police departments, the knowledge that African Americans had the right to bear arms sometimes tempered excessive police tactics. The Second Amendment and racial justice have been inextricably intertwined throughout history, as some southern states prohibited African Americans from owning

---

112 Contra Young, 896 F.3d at 1058 (discussing State v. Duke to elaborate how majority went awry).
113 See Blocher, supra note 53, at 145 (“Firearm localism suggests that whenever [concealed carry] cases involve municipal restrictions, extra deference is due.”). Firearm localism supposes that guns have been regulated in cities for a long period of time, and due to this regulation, national uniformity to individuals’ Second Amendment Right should not be a goal, but instead local tailoring should be allowed in instances where cities enact a law for safety purposes. Id. at 140–46.
114 See sources cited supra note 60 (pointing out that held concealed carry is not constitutional right).
115 See supra notes 12, 50, and accompanying text (showing courts evaluating various state statutes which restrict rights of individuals).
117 See sources cited supra notes 56 & 57 (showing states during Antebellum South period restricting right to concealed carry).
119 See Johnson, supra note 67 (“But even as it became impractical for black Americans to advance their rights through political violence, gun ownership could provide them an essential means of private self-defense.”).
firearms prior to and after the Civil War, which prompted Congress to protect freedmen’s right to carry.\textsuperscript{120} To conclude: the core right of the Second Amendment was and is self-defense, which extends in some way outside the home, but cities and states should still have ultimate power to restrict that right.\textsuperscript{121}

To ignore statistics in an age of data is unwise: Gabrielle Giffords, a senator that survived an assassination attempt, founded a legal research center, which grades states based on the strengths and weaknesses of their gun laws.\textsuperscript{122} When comparing states’ gun death rates with the given strength of gun laws grade, there is a correlation outside of a few outliers: the stronger a state’s gun laws, the less gun violence.\textsuperscript{123} States—eager to strengthen their gun laws—must emphasize such statistics in the future, especially if the Court were to hold that the right to possess a firearm outside the home is a core right.\textsuperscript{124} The Supreme Court failed to address whether the Second Amendment extends outside the home in\textit{New York State Rifle & Pistol Ass'n} due to its focus on other issues at the oral argument hearing; in a future case, if the Court declared a strict scrutiny standard, it would alter the public carry landscape by forcing states to construe statutes narrowly enough to achieve their purpose, which would effectively prohibit states from enacting statutes limiting citizens’ gun rights, which is why the Court should establish intermediate scrutiny as the proper standard.\textsuperscript{125}

\textsuperscript{120} See sources cited supra note 71 (highlighting Congressional action to protect newly freed slaves’ Second Amendment right to bear arms).

\textsuperscript{121} See cases cited supra note 13 (showing four circuits that allowed states to regulate firearms because of compelling state interest).

\textsuperscript{122} See Annual Gun Law Scorecard, supra note 5 (showing direct correlation between weak gun laws and higher gun violence).

\textsuperscript{123} See id. (highlighting section of webpage named: “Fewer People Die From Gun Violence In States With Strong Gun Laws”). For instance, in the ten states that the Giffords Law Center rate as having the strongest gun laws, seven are amongst states with the lowest gun death rate in the country. Id. Also, of the ten states with the lowest score on their gun laws, five are in the top ten highest gun death rates in the country. Id.

\textsuperscript{124} See Young v. Hawaii, 896 F.3d 1044, 1082 (9th Cir. 2018) (Clifton, J. dissenting) (showing how dissent highlights arguments made by Hawaii in wanting court to uphold statute), reh’g granted, 915 F.3d 681 (9th Cir. 2019).

\textsuperscript{125} See cases cited supra note 12 (highlighting how circuits applied strict scrutiny in striking down statutes that burdened Second Amendment right). Strict scrutiny is difficult to overcome because a statute must pass the following three pronged test: (1) it must be justified by a compelling state interest; (2) it must be narrowly tailored to achieve that goal; and (3) the law or policy must be the least restrictive means. See Citizens United v. FEC, 558 U.S. 310, 340 (2010).
C. Standard of Scrutiny and Why it Matters?

Overcoming strict scrutiny is particularly challenging, as no court that has applied strict scrutiny to a statute restricting the Second Amendment has upheld such a statute. That is why declaring open carry as a core right of the Second Amendment is problematic; it would not allow states or cities to adopt statutes they see fit in protecting the public’s safety. The Court must adopt a rule establishing intermediate scrutiny as the correct standard and outline the proper approaches for circuits to apply the standard. Without well-defined guidance from the Supreme Court, it will be up to federal district and circuit courts to dive deep into all the evidence that district attorneys and attorney generals provide reasons for the intent of their municipalities’ or states’ statute to restrict Second Amendment rights.

V. CONCLUSION

Due to political beliefs and differences in interpretation of historical texts, some legal scholars will always argue that the right to bear arms is a collective right and not an individual one, and Heller’s outcome was erroneous. Furthering such an argument after Heller and McDonald ignores the legal landscape of Second Amendment jurisprudence. Thus, perceiving the right to bear arms as an individual right with self-defense at its core, the debate becomes much more poignant, turning on whether that right extends outside the home. One thing is clear from researching the cases and historical references cited in Heller and McDonald—that the history predating and post-enactment of the Second Amendment is muddled. Self-defense is at the core of the Second Amendment, and one can argue that it extends outside the home; however, although this right exists in some form, it is ignorant to ignore the plethora of state constitutional amendments and statutes from the Colonial Era to the late nineteenth century, which show how states never hesitated to restrict individuals’ Second Amendment rights to carry outside the home. Texas’s original Constitutional provision creating

126 See cases cited supra note 12 (showing how application of strict scrutiny in Second Amendment cases leads to striking down of legislation).
127 See SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, POST-HELLER SECOND AMENDMENT JURISPRUDENCE 15–16 (2019) (emphasizing how rigorous and difficult it is to overcome strict scrutiny standard).
128 See id. (pointing to guidance necessary for circuits to uniformly apply intermediate scrutiny); see also Silvester v. Becarra, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari) (pleading that Court should clarify standard which is to be applied).
129 See generally Annual Gun Law Scorecard, supra note 5 (showing statistical data that has and will be presented to courts to prove governmental interest).
a right to bear arms stated: "under such regulations as the Legislature may prescribe." Cities, specifically the colonial and founding era city of Boston, adopted statutes, which promoted public safety and severely limited the carrying of firearms in public places. The Court should continue to allow cities and states to restrict individuals’ public carry rights as they see fit, so long as the state or city.

Today, the smallest towns can have public markets as large as the market located in the city of Boston during the Founding Era. Any strip mall, outdoor mall, or local Walmart, such as the one in my Massachusetts’ hometown, is larger than the markets of Boston during that time. If the city of Boston during that era was concerned about the carrying of firearms in special areas, like a market, then when considering the population explosion since then in urban, suburban, and even rural America, it would be improper to prevent state and local governments from instituting laws they believe are in the best interest of the public’s safety. Thus, when the Supreme Court addresses an issue regarding the public carry of firearms, it should institute a clear intermediate scrutiny, not a strict scrutiny, standard for lower courts to apply to state statutes that restrict the carrying of firearms outside the home. Moreover, the Court should recognize that state and municipal enactments are owed greater deference due to the Second Amendment being a prime candidate for "local tailoring." The makeup of the Court suggests that gun rights will be expanded; however, in this day and age, it is difficult to ignore the danger guns pose to Americans in public places. Due to this danger, the Court should draft a rule that allows states and municipalities to continue to restrict gun carrying rights in public as they see fit within the parameters set by \textit{Heller} and \textit{McDonald}.

\textit{Nick McLaughlin}