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"GOOD REASON" LAWS UNDER THE GUN: MAY-ISSUE STATES AND THE RIGHT TO BEAR ARMS

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INTRODUCTION

In an unexpected decision, the United States Court of Appeals for the District of Columbia Circuit—by a divided panel—struck down a District of Columbia ordinance that restricted carrying a handgun in public to individuals who could demonstrate a special need for self-defense.[1] The majority concluded (1) that the right of responsible citizens to publicly carry firearms for self-defense beyond the home lies at the "core" of the Second Amendment, subject to certain longstanding restrictions; (2) that these longstanding restrictions include licensing requirements, but not bans on carrying in urban areas or bans on carrying "absent a special need for self-defense"; and (3) that the District's good reason law amounted to a total ban on most District residents' constitutional right to keep and bear arms.[2] Therefore, following the approach used by the United States Supreme Court in *District of Columbia v. Heller*,[3] the court struck down the challenged law without applying means-end scrutiny.[4]

This decision was yet another daunting blow to the District's continued efforts to curtail the public carrying of firearms within its borders. In 1976, the District enacted an outright ban on handgun possession,[5] which was struck down by the United States Supreme Court in *Heller*.[6] In response, the District passed a law prohibiting anyone from publicly carrying

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1. Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

2. *Id.* at 667.

3. 554 U.S. 570, 628–29 (2008) ("Under any of the standards of scrutiny [the Court has] applied to enumerated constitutional rights, [total bans] . . . would fail constitutional muster.").

4. *Wrenn*, 864 F.3d at 666–67.

5. D.C. CODE § 7-2502.01(a) (2009) ("[N]o person . . . in the District of Columbia . . . shall possess or control any firearm . . . ."), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008).

6. 554 U.S. at 595 (holding that the Second Amendment "confer[s] an individual right to keep and bear arms").

a firearm within the District.[7] This too was struck down by the United States District Court for the District of Columbia in *Palmer v. District of Columbia*,[8] which led to the good reason law[9] challenged in *Wrenn v. District of Columbia*.[10] Thus, *Wrenn* marks the third time in forty years that the District has been unable to regulate firearm ownership and concealed carry within the confines prescribed by the Second Amendment.[11]

But what precisely does the Second Amendment protect? When does a law or regulation run afoul of it? Are Second Amendment challenges subject to the tiers of scrutiny? If so, which one? Every court to analyze a Second Amendment challenge has wrestled with these questions in some form. Not surprisingly, the answers differ significantly. This note focuses on the approach taken by the D.C. Circuit in striking down the District's good reason law; specifically, when a state law goes so far as to prohibit *most* people from exercising their fundamental Second Amendment right, the law does not warrant constitutional scrutiny and must categorically fail.[12]

Part I provides a background of the Supreme Court's "first in-depth examination of the Second Amendment,"[13] including its incorporation to the states.[14] Although the *Heller* Court held that the Second Amendment guarantees a pre-existing, individual right to keep and bear arms for self-defense, the Court left many questions unanswered, such as whether this right extends outside one's home, and whether it is applicable to the states. But because *Heller* had such widespread impact, it took only two years for the Court to answer the latter question. Thus, by 2010, the Second Amendment's "central component" was understood to protect "individual

7. D.C. CODE § 22-4504(a) (2013) ("No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, or any deadly or dangerous weapon capable of being so concealed."), *invalidated by* Palmer v. District of Columbia, 59 F. Supp. 3d 173 (D.D.C. 2014).

8. 59 F. Supp. 3d 173, 181 (D.D.C. 2014) (holding that the Second Amendment protects the right to carry an operable handgun outside the home for the lawful purpose of self-defense).

9. D.C. CODE § 22-4506(a) (2015) (a license may be issued to a District resident "to carry a pistol concealed upon his or her person within the District . . . if it appears that the applicant has good reason to fear injury to his or her person or property"), *invalidated by* Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017).

10. *Wrenn*, 864 F.3d at 655.

11. "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." U.S. CONST. amend. II.

12. *Wrenn*, 864 F.3d at 666 ("Bans on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test that was appropriately written and applied, so we strike down the District's law here apart from any particular balancing test.").

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

14. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding that the Second Amendment applies with "full force" to the states).

self-defense"[15] by all "law-abiding, responsible citizens," subject to certain "longstanding" regulations limiting the Amendment's scope.[16]

Part II then analyzes some of the limitations on the Amendment's scope. Specifically, this section addresses the non-absolute nature of constitutional rights.[17] In addition, now that every state allows some form of public carry—open or concealed—laws regulating permits to carry a firearm vary from state to state. Most jurisdictions issue permits on a non-discretionary basis,[18] some provide permits only upon a showing of cause,[19] and several others allow permitless carry.[20] This section concludes with a brief discussion of the constitutional challenges[21] against laws mandating that an applicant demonstrate a particular need to carry a concealed firearm.

Part III discusses the current circuit split concerning the constitutionality of good reason laws, while Part IV discusses the most recent case to consider the issue—which resulted in a permanent injunction enjoining the enforcement of the District of Columbia's good reason law.[22] This note argues that not only did the court properly find that the District's regulation ran afoul of the Second Amendment, but so too does every other state law requiring a showing of good cause as a prerequisite to obtaining a permit to

15. *Id.* at 767.

16. *Heller*, 554 U.S. at 626–27.

17. *See* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute?* McCutcheon*, Conflicts and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1537 (2015).

18. States that issue permits to carry concealed handguns on a non-discretionary basis are referred to as "shall-issue" states. In such a jurisdiction, any applicant who satisfies the determinate criteria will be issued a concealed carry permit. *See, e.g.*, 430 ILL. COMP. STAT. 66/10(a) (2015) ("The [Illinois Department of State Police] shall issue a license to carry a concealed firearm under this Act to an applicant . . . .").

19. States that issue permits upon a showing of cause are referred to as "may-issue" states. In the few jurisdictions that require such a showing, a permit is typically issued if the applicant demonstrates that he or she has a particular reason or need to carry a handgun. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2014) ("[T]he Secretary shall issue a permit within a reasonable time to a person who the Secretary finds . . . has good and substantial reason to . . . carry . . . a handgun . . . .").

20. Permitless carry is commonly referred to as "constitutional carry." Generally, these jurisdictions—Alaska, Arizona, Arkansas, Idaho, Kansas, Maine, Mississippi, Missouri, New Hampshire, North Dakota, Vermont, West Virginia, and Wyoming—allow individuals to carry a firearm without a license, subject to some exceptions. *See infra* Section II.B. In addition, the Oklahoma Legislature passed a bill that would recognize constitutional carry in Oklahoma; however, the governor vetoed the bill as the regular legislative session concluded, preventing the legislatures from potentially overriding the governor's veto. *See* Steve Byas, *Oklahoma Constitutional-carry Bill Author Vows to Fight Governor's Veto*, THE NEW AMERICAN (May 18, 2018), https://www.thenewamerican.com/usnews/politics/item/29078-oklahoma-concealed-carry-bill-author-vows-to-fight-governors-veto [https://perma.cc/7A3Y-TTVN].

21. See Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013), for a discussion of a Second Amendment challenge to Maryland's requirement that an applicant demonstrate a "good and substantial reason" for the issuance of a handgun permit.

22. Wrenn v. District of Columbia, 864 F.3d 650, 668 (D.C. Cir. 2017).

carry a concealed firearm. Here, I explain how and why federal appellate courts have misinterpreted *Heller* and improperly characterized the right to bear arms as warranting less protection than the right to keep arms. This section also attempts to address several practical concerns should the Supreme Court agree and declare discretionary permit requirements unconstitutional.

One final point before proceeding: A common theme surfaces throughout this note, namely, the lack of a uniform test for analyzing Second Amendment claims.[23] In other words, no court has settled on the proper form of means-end scrutiny for analyzing Second Amendment claims; in fact, some courts have gone to great lengths to dodge applying one altogether.[24] But with the increase in Second Amendment challenges post-*Heller*, a uniform test is necessary. And Part IV proposes a simple solution: Good cause requirements as a prerequisite to obtaining a concealed carry permit violate the Second Amendment, which guarantees to all law-abiding, responsible citizens the right to employ a firearm in self-defense,[25] and under *Heller* must categorically fail.

I. THE SECOND AMENDMENT PROTECTS SELF-DEFENSE

Prior to 2008, the Supreme Court had not specifically interpreted the scope of the Second Amendment since 1939 in *United States v. Miller*,[26] a span of nearly seventy years.[27] But the *Heller* Court recognized that *Miller* did not even purport to be a thorough examination of the Second Amendment's scope.[28] Rather, as the Court acknowledged, *Miller* only extended the right to keep and bear arms to certain types of weapons.[29] As a result, the Supreme Court considers *Heller* to be its "first in-depth examination of the Second Amendment."[30] This section focuses on individual right to keep

23. *See* Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 177 (2013) ("[T]he [federal district and appellate courts] have had to determine the appropriate analysis themselves, guided by the Supreme Court's approach in *Heller*. The courts have not taken a uniform approach.").

24. See Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald*?*, 21 CORNELL J.L. & PUB. POL'Y 489 (2012), for a discussion of the rapid influx of Second Amendment litigation since 2010.

25. McDonald v. City of Chicago, 561 U.S. 742, 767–78 (2010).

26. 307 U.S. 174, 178 (1939) (holding that possession of weapons is a constitutionally protected right only if it "has some reasonable relationship to the preservation or efficiency of a well regulated militia").

27. Linda Greenhouse, *Justices Rule for Individual Gun Rights*, N.Y. TIMES (June 27, 2008), http://www.nytimes.com/2008/06/27/washington/27scotuscnd.html [https://perma.cc/Y42J-LPF8].

28. District of Columbia v. Heller, 554 U.S. 570, 623 (2008).

29. *Id.*

30. *Id.* at 635.

and bear arms—as articulated by the *Heller* Court—and its incorporation to the states via *McDonald v. City of Chicago*.[31] These landmark cases unleashed widespread disagreement between advocates both for and against gun control and led to a significant increase in Second Amendment litigation in the United States.

A. Individual Self-Defense

In *Heller*, the District refused Dick Heller, a special police officer who was authorized to carry a handgun while on duty, a registration certificate for a handgun he wished to keep at his home.[32] Heller then challenged three District ordinances on Second Amendment grounds, seeking to enjoin their enforcement—one ordinance effectively prohibited private ownership of handguns; another precluded an individual from keeping an assembled, functional firearm in his or her home; and the last barred individuals from publicly carrying a firearm without a license.[33] The United States District Court for the District of Columbia dismissed Heller's claims,[34] but the Court of Appeals for the District of Columbia Circuit reversed.[35] It held that the Second Amendment protects an individual right to possess firearms and that the District's ban on handguns, and its requirement that firearms in the home be kept nonfunctional, violated that right.[36] The Supreme Court granted certiorari to decide whether a "prohibition on the possession of usable handguns in the home violates the Second Amendment."[37]

After dissecting the Second Amendment's text and trudging through its historical interpretation, the majority emphasized that the Second Amendment gives "all Americans" an individual right to "have weapons" and "wear, bear, or carry" them upon his or her person.[38] The Court further articulated that this right exists entirely independent of service in a militia,[39] emphatically rejecting the District's argument that the original understanding of the Second Amendment was neither an individual right of self-defense nor a collective right of the states, but rather a civic right that guaranteed citizens the ability to keep and bear those arms needed to meet their

31. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).
32. *Heller*, 554 U.S. at 575.
33. *Id.* at 575–76.
34. Parker v. District of Columbia, 311 F. Supp. 2d 103, 109 (D.D.C. 2004).
35. Parker v. District of Columbia, 478 F.3d 370, 401 (D.C. Cir. 2007).
36. *Id.* at 399–401.
37. *Heller*, 554 U.S. at 573.
38. *Id.* at 581–84.
39. *Id.* at 595–600.

legal obligation to participate in a well-regulated militia.[40] It then concluded that the Second Amendment codified a pre-existing right to self-defense and, therefore, held that the Amendment protects the right to keep and bear arms for self-defense.[41] The Court went on to invalidate the District's total ban on handguns as violating the Second Amendment.[42]

In dicta, the Court noted—and later reaffirmed—that "the need for defense of self, family, and property is *most* acute" in the home.[43] But this interpretation does not foreclose the possibility that the need for self-defense may in fact become necessary outside the confines of one's home. Rather, the *Heller* Court implied that the Second Amendment's interpretation must necessarily be broad; for the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[44] Therefore, since confrontations may not be confined to the home,[45] *Heller* suggests that weapons may be carried "anywhere a confrontation may occur."[46]

Finally, the Court made clear that, like most rights, the right secured by the Second Amendment is not unlimited.[47] In doing so, the Court recognized that some laws restricting the right to keep and bear arms should be presumed lawful, such as "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."[48] Weapons not "in common use at the time" or of a "dangerous" or "unusual" nature could be regulated as well.[49] However, the Court, by adopting a categorical approach to total bans, left an important stone unturned: the standard of scrutiny through which lower courts should analyze other Sec-

40. SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 176–77 (2006).

41. *Heller*, 554 U.S. at 603–09.

42. *Id.* at 629 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon.").

43. *Id.* at 628 (emphasis added); McDonald v. City of Chicago, 561 U.S. 742, 744 (2010).

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

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

46. Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1493 (2014). *See also* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 16 (2012) (emphasizing that *Heller* "recognizes a right to have and carry guns in case the need for such an action should arise").

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

48. *Id.* at 626–27.

49. *Id.* at 627.

ond Amendment claims going forward.[50] Most importantly, although the Court had no reason to consider whether individual states must recognize a citizen's Second Amendment right to keep and bear arms, it would do so almost two years later.

B. Incorporated Against the States

Illinois—but more specifically, Chicago—is one of the biggest advocates for gun control laws in the United States. Despite having some of the most restrictive laws, Chicago suffered record-breaking violence in 2016, officially recording 4,331 shootings and 762 homicides.[51] So where is the disconnect? Gun rights advocates argue that gun laws in Chicago only restrict law-abiding citizens and, as such, have "made citizens prey."[52] In other words, strict gun control policies have failed to deliver on their promise that denying law-abiding citizens access to the means of self-defense will somehow make them safer.[53] On the other hand, gun control advocates argue that Chicago's laws cannot make up for the easy access to guns in neighboring areas, including Indiana and Wisconsin, highlighting that gun violence is a national problem.[54] Because each argument has merit, the Supreme Court had to consider whether the individual right to keep and bear arms is applicable to the states. And two years after *Heller*, the Court held that the Second Amendment applies with full force to the states through the Due Process Clause of the Fourteenth Amendment.[55]

In holding that the Second Amendment right is fully applicable to the states, the Court made clear that the Second Amendment is just as fundamental as other Bill of Rights protections that have been incorporated through the Fourteenth Amendment.[56] Specifically, the Court noted that it may not be treated as a second-class right because it is among those neces-

50. *Id.* at 628–29 ("Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition . . . would fail constitutional muster.").

51. J.J. Gallagher & Emily Shapiro, *Chicago's 'Out of Control' Violence Produces 762 Homicides in 2016*, ABC NEWS (Jan. 3, 2017, 1:16 AM), http://abcnews.go.com/US/chicagos-control-violence-produces-762-homicides-2016/story?id=44402951 [https://perma.cc/Q2QK-VRJ9].

52. Monica Davey, *Strict Gun Laws in Chicago Can't Stem Fatal Shots*, N.Y. TIMES (Jan. 29, 2013), http://www.nytimes.com/2013/01/30/us/strict-chicago-gun-laws-cant-stem-fatal-shots.html [https://perma.cc/TH7D-LQGX].

53. David Rittgers, *National Review: Gun Control Doesn't Work*, NPR (June 29, 2010, 8:38 AM), http://www.npr.org/templates/story/story.php?storyId=128186209 [https://perma.cc/6LX6-WV2D].

54. Danielle Kurtzleben, *FACT CHECK: Is Chicago Proof That Gun Control Laws Don't Work?*, NPR (Oct. 5, 2017, 5:00 AM), https://www.npr.org/2017/10/05/555580598/fact-check-is-chicago-proof-that-gun-laws-don-t-work [https://perma.cc/7Y6H-5ZC5].

55. McDonald v. City of Chicago, 561 U.S. 742, 767–78 (2010).

56. *Id.* at 769.

sary to our system of ordered liberty.[57] In sum, the right to keep and bear arms may not be singled out for special or unfavorable treatment because "individual self-defense is 'the *central component*' of the Second Amendment."[58] But even with the broad, sweeping language in *Heller*, an open question still remains today: Whether individual self-defense extends beyond the home.[59]

C. First Signs of Public Self-Defense

In *Heller*, the Supreme Court did not address whether the Second Amendment creates a right of self-defense outside the home.[60] But by this point, many states already provide for some form of public carry, effectively allowing the use of a firearm in self-defense outside one's home. For a long time though, except in a very limited number of circumstances, Illinois prohibited individuals from publicly carrying a firearm altogether.[61]

But the *Heller* Court made two findings in particular from which the right to publicly carry a firearm for self-defense may reasonably be implied: first, that self-defense is "central to the Second Amendment," and second, that the need for self-defense is "most acute" in the home.[62] The former simply asserts that one has the right to use a firearm in self-defense. The latter, however, provides one example where the need for self-defense is particularly important: in one's home. It does not discount or reject the possibility that an individual may need to defend him or herself outside the home. And to interpret *Heller* to suggest that the only place where one may need to defend himself is within his home is too narrow of a reading than the Court likely intended.[63] Because this was a plausible interpretation of *Heller*, the Seventh Circuit struck down an Illinois law limiting possession of a firearm exclusively to the home.

57. *Id.*

58. *Id.* at 744 (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

59. A number of academic scholars, and even several courts, have come to a consensus that the right to publicly carry a firearm has some traction. *See, e.g.*, Meltzer, *supra* note 46, at 1493; Blocher, *supra* note 46, at 16; Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014), *vacated*, Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc); Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).

60. *Moore*, 702 F.3d at 935. *See also* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 256–60 (2017).

61. Illinois was the last state to adopt laws permitting residents to carry concealed firearms outside the home. This came about only after its ban on carrying was struck down by the United States Court of Appeals for the Seventh Circuit. *See Moore*, 702 F.3d at 935.

62. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

63. To be sure, the *Heller* Court emphasized that the Second Amendment guarantees the right to use firearms in anticipation of "confrontation." *Id.* at 592.

In *Moore v. Madigan*, the appellants[64] challenged several Illinois laws prohibiting virtually all persons from carrying a gun "ready to use"—loaded, immediately accessible, and uncased.[65] Both plaintiffs moved for injunctive relief, which the district courts denied, and the cases were dismissed.[66] On appeal, however, the Seventh Circuit reversed.[67] It drew a distinction between the right to "keep" and the right to "bear," concluding that the two were mutually exclusive.[68] In other words, a common understanding of drafting principles, including the rule against surplusage, would lead a reasonable person to conclude that the right to bear implicitly refers to the right to carry a firearm beyond one's home.[69] To be sure, the court noted that "a blanket prohibition on carrying a gun in public prevents a person from defending himself anywhere except inside his home." Because the court was skeptical of such a curtailment of the right to defend oneself, a showing that the public might benefit was insufficient to prove that it would.[70] In contrast, when a state bans guns merely in particular places, such as schools, a person can preserve an undiminished right of self-defense by not entering those places; in that instance, where the law imposes a lesser burden on the right to bear arms for self-defense, the state need not prove so strong a need.[71]

Today, every state allows its residents to publicly carry a firearm for self-defense in some form. Although the Supreme Court has yet to affirmatively answer whether the Second Amendment affirmatively protects this right, it seems that every state agrees that to some extent it indeed does so.[72] But states may place limits on who may exercise this right and proscribe locations in which a concealed firearm may not be carried. The next section addresses some of these limitations.

64. Two cases were consolidated on appeal. *See* Moore v. Madigan, 842 F. Supp. 2d 1092 (C.D. Ill. 2012) (denying injunctive relief); Shepard v. Madigan, 863 F. Supp. 2d 774 (S.D. Ill. 2012) (same).

65. Some exceptions exist mainly for law enforcement officers, hunters, and members of shooting clubs. 720 ILL. COMP. STAT. 5/24-2 (2012). An exception is also made for a person on his own property, in his home, in his fixed place of business, or on another's property with that person's permission. 720 ILL. COMP. STAT. 5/24-1(a)(4) (2010), *invalidated by* People v. Green, 2018 IL App (1st) 143874.

66. *Moore*, 702 F.3d at 934.

67. *Id.* at 933.

68. *Id.* at 936 ("The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage.").

69. *Id.*

70. *Id.* at 940.

71. *Id.*

72. For a more in-depth discussion as to why the right to bear arms outside one's home is protected by the Second Amendment to the same extent that the right to keep arms applies to firearms within the home, see Section IV.A.

II. STATES MAY STILL PLACE LIMITS ON THE RIGHT TO BEAR ARMS

Like most fundamental rights, the right to keep and bear arms is not absolute. Under the First Amendment, for example, the Supreme Court has held that some forms of speech will receive diminished protection, while others will receive no protection at all.[73] But the Second Amendment has little constitutional history compared to that of the First. Indeed, the *Heller* majority articulated a slew of regulations that would be presumptively lawful under the Second Amendment.[74]

A. Rights Absolutism

The Second Amendment dictates that the right to bear arms "shall not be infringed."[75] But, as is true with virtually all fundamental rights, this is misleading. Under contemporary doctrine, constitutional rights may be limited to serve, for example, a compelling governmental interest.[76] And, given the development of judicial review beyond strict scrutiny, these rights may be infringed upon for less compelling reasons.[77] Thus, rights are not "absolute," as their language would suggest.

Moreover, compelling governmental interests need not even be of "constitutional dimension."[78] Practically, this means that states have some ability to regulate rights that are guaranteed by the Constitution by means that do not rise to the level of a constitutional interest.[79] This brings us to the various permit schemes that states use to determine who is authorized to obtain a permit to carry a concealed firearm.

73. *E.g.*, United States v. Williams, 553 U.S. 285, 288 (2008) (holding that obscene speech is not protected by the First Amendment); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240 (2002) (child pornography may be proscribed).

74. These include prohibiting the mentally ill from possessing firearms, or banning firearms in sensitive places like schools and government buildings, or imposing conditions on the purchase or sale of firearms. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

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

76. See Korematsu v. United States, 323 U.S. 214 (1944), for a discussion of the Supreme Court's use of strict scrutiny to uphold an exclusion order directed at persons of Japanese ancestry.

77. Under intermediate scrutiny, a regulation need only further an important government interest by means that are substantially related to that interest, while rational basis review requires only that a law be rationally related to a legitimate government interest. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007), for a discussion of the various judicial review standards.

78. Rosen, *supra* note 17, at 1538.

79. *Id.* ("[E]ven strict scrutiny—generally recognized as the most difficult constitutional test for protecting rights—permits constitutional rights to be limited to achieve subconstitutional goals.").

B. Permit Schemes

Regulations vary considerably by state, but most policies for issuing concealed carry permits fall into three categories: (1) states where concealed carry is unrestricted; (2) states that shall issue permits to applicants; and (3) states that may issue permits to applicants.

Unrestricted states operate much like they sound: no permit is required to carry a concealed, operable handgun in public.[80] This system is more commonly referred to as "constitutional carry," deriving its name from the language of the Constitution itself: "the right of the people to keep and bear Arms, *shall not be infringed*."[81] As briefly discussed *supra*,[82] constitutional carry embodies the idea that fundamental rights are absolute and cannot be limited. As of today, thirteen states fall into this category, and more continue to adopt this scheme.[83] However, just because no permit is required to carry a concealed firearm, not all persons may do so. Those who wish to carry a firearm must still be of age[84] and legally permitted to own a firearm in their state.

A *shall-issue* state requires that individuals obtain a license to carry a concealed handgun, but the state gives a license to every individual who meets the determinate criteria set out in the law.[85] In other words, states that issue permits on this basis have no discretion in awarding a license, so long as the applicant satisfies the prerequisites to obtain it.[86] Typical license requirements include residency, minimum age, fingerprints, a background check, a safety or proficiency class, and a fee.[87]

80. *Right to Carry Laws*, NRA-ILA, https://www.nraila.org/gun-laws/ [https://perma.cc/G8SL-SH3A].

81. U.S. CONST. amend. II (emphasis added).

82. *See* Section II.B.

83. Charles C. W. Cooke, *Constitutional Carry Marches On*, NAT'L REV. (Jan. 25, 2017, 9:00 AM), http://www.nationalreview.com/article/444212/constitutional-carry-states-adopting-it-droves [https://perma.cc/Q6UC-UVTP].

84. Idaho, for example, requires that persons be over twenty-one years of age. *See* IDAHO CODE § 18-3302(4)(f)(i) (2017).

85. *Right to Carry Laws*, *supra* note 80.

86. *See, e.g.*, 430 ILL. COMP. STAT. 66/10(a) (2017) ("The [Department of State Police] shall issue a license to carry a concealed firearm under this Act to an applicant who: [meets each of the criteria listed]. . . .").

87. In Illinois, a permit shall be granted if an applicant, *inter alia*, is at least twenty-one years of age, holds a valid Firearm Owner's Identification Card, has not been convicted or found guilty of certain crimes, has not been the subject of a pending arrest warrant, has not received treatment for alcohol or drugs, and has completed a firearms training and education course. 430 ILL. COMP. STAT. 66/25 (2017).

Finally, *may-issue* jurisdictions, like shall issue ones, require a permit to carry a concealed firearm.[88] The difference, however, lies with the authority holding the power to grant licenses. An applicant in a may-issue state is typically required to show "good cause" before he or she will be issued a permit to carry a concealed firearm.[89] But the ultimate decision rests with the permit-granting authority. Arguably, this raises numerous concerns. What constitutes good cause?[90]

The most prominent concern with *may-issue* schemes is reconciling the ability to issue permits on a discretionary basis when the scope of the Second Amendment focuses on the right to use firearms for self-defense.[91] In these jurisdictions, applicants must distinguish themselves from the general community by demonstrating that they have a special need for self-defense.[92] If most people cannot make this showing, the pool of eligible citizens who may use a firearm for self-defense outside their home shrinks considerably. This creates an inconsistency insofar as the average, law-abiding citizen is unable to exercise his or her Second Amendment right.[93] To combat this, self-defense should always constitute good reason so that states cannot refuse concealed carry permits to those seeking to carry firearms for that purpose.[94] The next section recognizes that several courts disagree with this approach and uphold good reason requirements.

88. *Right to Carry Laws*, *supra* note 80.

89. *E.g.*, Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc) (upholding requirement that permit applicants provide "good cause" to publicly carry a firearm); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (upholding "justifiable need" requirement); Woollard v. Gallagher, 712 F.3d 865, 869 (4th Cir. 2012) ("good and substantial reason"); Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) ("proper cause").

90. Maryland, for example, recognizes four ways in which an applicant may provide a "good and substantial reason" to obtain a concealed carry permit: "(1) for business activities, either at the business owner's request or on behalf of an 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 v. Gallagher, 712 F.3d 865, 868–70 (4th Cir. 2013).

91. *See* District of Columbia v. Heller, 554 U.S. 570, 630 (2008) (concluding that the Second Amendment's "core lawful purpose" is self-defense).

92. *Right to Carry Laws*, *supra* note 80.

93. Jeff Preval, *Lawsuit filed over NY's concealed carry law*, WGRZ BUFFALO (Feb. 1, 2018, 7:14 PM), http://www.wgrz.com/article/news/local/lawsuit-filed-over-nys-concealed-carry-law/71-513629407 [https://perma.cc/DX7J-WC2Y].

94. Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. FORUM 218, 220 (2014).

III. THE CURRENT SPLIT—TO WHAT EXTENT MAY STATES LIMIT THIS RIGHT?

As discussed, few jurisdictions issue concealed carry permits upon a showing of cause. Not surprisingly, gun rights advocates frequently challenge these laws. The arguments, both for and against, are simple: Gun rights advocates argue that any restriction on the right to keep and bear arms is impermissible. In fact, one district judge agreed: "A citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs."[95] Gun control advocates, however, point to one of the many government interests underlying regulations on public carry.[96] Thus far, the District of Columbia Circuit is the only federal appellate court to hold that good reason laws cannot be justified by any governmental interest because they act as a total ban on most individuals' right to keep and bear arms.[97] But prior to this decision, no court of appeals had struck down this type of law.

Pre-*Wrenn*, the circuits to consider heightened restrictions on a citizen's ability to obtain a concealed carry permit have been one-sided. The Second Circuit upheld a New York law that restricted concealed carry permits to individuals who could demonstrate "proper cause."[98] After rejecting the argument that the regulation was an arbitrary licensing scheme designed to limit handgun possession to, say, every tenth citizen, the court determined that the law was substantially related to important government interests in public safety and crime prevention.[99]

The Fourth Circuit upheld a similar law, permitting Maryland to issue concealed carry permits to individuals who could articulate a "good and substantial reason" to carry a firearm.[100] Like the Second Circuit, the Fourth Circuit split its analysis into two parts,[101] subjecting the regulation

95. Woollard v. Sheridan, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom.* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

96. *See Woollard*, 712 F.3d at 879–80 (agreeing that fewer concealed carry permits furthers public safety and reduces crime by, *inter alia*, decreasing handgun thefts and fatal confrontations; avoiding confusion in situations with law enforcement personnel following confrontations with criminals and during routine traffic stops; reducing the number of "handgun sightings"; and making it easier for police to identify suspects in possession of handguns).

97. Wrenn v. District of Columbia, 864 F.3d 650, 666 (D.C. Cir. 2017).

98. Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012).

99. *Id.* at 97.

100. *Woollard*, 712 F.3d at 868–69.

101. Under the two-part analysis, a court first asks, "whether the challenged law imposes a burden on conduct falling within the Second Amendment's guarantee," and it makes this determination after conducting a historical inquiry. United States v. Marzzarella, 614 F.3d 85, 89 (7th Cir. 2010). Second, if

to intermediate scrutiny.[102] The court first asked "whether the government interest asserted by the state constitutes a 'substantial' one," and second, whether the good and substantial reason requirement was "'reasonably adapted' to Maryland's significant interests."[103] To the former, the court concluded that protecting public safety and alleviating crime were substantial governmental interests.[104] The court also found that the law was reasonably adapted to Maryland's interest in public safety, noting that there need only be a "reasonable, not perfect" fit between the regulation and Maryland's stated objectives.[105] Because Maryland's permit scheme allowed those who need to arm themselves in public to do so, "while preventing a greater-than-necessary proliferation of handguns in public places,"[106] the court held that the "good and substantial reason" requirement satisfied intermediate scrutiny.[107]

The Third Circuit, though using a different approach, reached the same conclusion. It upheld a New Jersey law that restricted concealed carry permits to applicants demonstrating a "justifiable need."[108] Like the *Heller* Court, the Third Circuit avoided the standards of scrutiny battle altogether, finding that New Jersey's regulation qualified as a "presumptively lawful, longstanding regulation" on the right to keep and bear arms.[109] However, even if the "justifiable need" standard did not qualify as "presumptively lawful," the court noted, it would still satisfy intermediate scrutiny because New Jersey had a significant interest in ensuring public safety; allowing only a small category of people to carry a handgun publicly reasonably served that interest.[110]

Initially, the three-judge panel for Ninth Circuit rejected a California law that prohibited open carry entirely and restricted concealed carry to individuals who could show "good cause."[111] The court noted that the Second Amendment requires some form of carry for self-defense outside the home, and California's preference for concealed carry in lieu of open was

the challenged regulation burdens conduct falling within the scope of the Second Amendment, a court must determine the appropriate level of scrutiny to be applied. *Id.*

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

103. *Id.* at 876, 878.

104. *Id.* at 877.

105. *Id.* at 878 (quoting *Marzzarella*, 614 F.3d at 98).

106. *Id.* at 880.

107. *Id.* at 882.

108. Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013).

109. *Id.* at 429.

110. *Id.* at 437–38.

111. Peruta v. County of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014), *vacated*, Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc).

permissible, "so long as [California] allow[ed] one of the two."[112] But San Diego County argued that the restriction did not deny all individuals the right to bear arms in public; a small group of individuals could still obtain a license.[113] The court emphatically rejected this argument, turning back to the central component of the Second Amendment: the right of the "typical responsible, law-abiding citizen" to carry a firearm in public for self-defense.[114] Because the typical law-abiding citizen could not exercise this right in the county, the law "impermissibly infringe[d] on the Second Amendment."[115] However, on rehearing en banc, the Ninth Circuit reversed; it held that all good reason requirements must necessarily be lawful because the Second Amendment does not grant any individual the right to carry a *concealed* firearm in public.[116]

It is worth noting that no federal appellate court has explicitly held that the Second Amendment does not extend beyond the home at all.[117] But with the tension between circuit courts building as to what extent the right to bear arms protects carrying firearms outside the home, the Supreme Court will eventually be asked to decide the constitutionality of good reason laws. When that time comes, the Court should give credence to the District of Columbia Circuit's reasoning in *Wrenn*. Good reason laws operate as total bans, prohibiting responsible citizens from exercising their constitutional right to carry a firearm for self-defense; as such, they cannot withstand the *Heller* test and must categorically fail.

IV. DISCRETIONARY, MAY-ISSUE PERMIT SCHEMES TRANSGRESS THIS LIMIT

Post-*Heller*, an individual has the right to carry a concealed firearm, assuming he or she satisfies the jurisdiction's enumerated criteria required to obtain the requisite permit. When a state imposes restrictions that require an applicant to articulate a special need to carry a concealed firearm, that state has overstepped the limit imposed by the Second Amendment.

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

113. *Id.* at 1169.

114. *Id.*

115. *Id.* at 1179.

116. *Peruta*, 824 F.3d at 942 (explicitly suggesting that "[t]here may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public"). *See also* Young v. Hawaii, 896 F.3d 1044, 1061 (9th Cir. 2018) (holding that "[t]he right to bear arms must include, at the least, the right to carry a firearm openly for self-defense").

117. Gould v. O'Leary, 291 F. Supp. 3d 155, 167–68 (D. Mass. 2017) (collecting cases), *appeal docketed*, No. 17-2202 (1st Cir. Dec. 15, 2017).

A. Public Self-Defense Revisited: Are the Rights to "Keep" and "Bear" Equal?

To strike down good reason laws without resorting to means-end scrutiny, the right to bear arms for self-defense must extend outside the home to the same extent that the right to keep arms protects self-defense within the home. In other words, if the "core" of the Second Amendment protects "individual self-defense,"[118] does it also extend to publicly carrying guns for self-defense?

Heller observed that the Second Amendment right of self-defense is at its peak when defending one's family inside the home.[119] But *Heller* framed the purpose of the Second Amendment around self-defense.[120] And since then, several courts have expressed concern that an individual may need to defend himself and his family in a variety of places, including outside the walls of his home.[121] As the *Wrenn* court observed, because the words "keep" and "bear" are both used in the text of the Second Amendment, they should be understood as mutually exclusive.[122] When taking into account both *Heller*'s attempt to define the purpose of the Second Amendment and the two, distinct rights conferred by the Amendment, it is "more natural" to interpret the Second Amendment as protecting a "law-abiding citizen's right to carry common firearms . . . beyond the home."[123]

This conclusion is bolstered by *Heller*'s own analysis. There, the Court emphasized that the public's understanding of the Second Amendment matters, even after its ratification. To be sure, "[t]he right to bear arms has always been the distinctive privilege of freemen."[124] And bearing arms "implies something more than keeping it," because one must be profi-

118. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

119. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

120. *Id.* at 630 (concluding that the Second Amendment's "core lawful purpose" is self-defense).

121. *E.g.*, Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012) ("Confrontations are not limited to the home."); Wrenn v. District of Columbia, 864 F.3d 650, 657 (D.C. Cir. 2017).

122. *Wrenn*, 864 F.3d at 657; Drake v. Filko, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting) ("To speak of 'bearing' arms solely within one's home not only would conflate 'bearing' with 'keeping,' in derogation of the [*Heller*] Court's holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court.").

123. *See* Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari) ("The most natural reading of this definition encompasses public carry. I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.").

124. *Heller*, 554 U.S. at 619 (quoting JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES: ITS ORIGIN, AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS, AND OF STATE LEGISLATURES 241 (1891)).

cient in his or her use in order to use them efficiently,[125] for the safety of the public depends on "[s]ome general knowledge of firearms."[126] Others thought that the right to bear arms need not have been granted in the Constitution because "it had always existed."[127] Thus, the Second Amendment's "core" must protect carrying firearms in public for self-defense, as is demonstrated by the District of Columbia Circuit's analysis of the most recent challenge to the constitutionality of discretionary "good reason" laws.

B. District of Columbia Circuit

In *Wrenn v. District of Columbia*, gun rights organizations and firearm owners who were denied concealed carry permits challenged the District's good reason law, which limited the issuance of carry permits to those with a special need for self-defense.[128] The plaintiffs challenging the regulation sought a preliminary injunction barring the District from enforcing the good reason provisions.

The challenged Code provisions directed the District's police chief to promulgate regulations limiting licenses for the concealed carry of handgun to those showing a "good reason to fear injury to [their] person or property" or "any other proper reason for carrying a pistol."[129] The Code further limited what the police chief may count as satisfying these two criteria.[130] To receive a license under the good reason prong, applicants must show, by written allegations,[131] a special need for self-protection distinguishable from the general community.[132] An applicant satisfies the "other proper reason" prong if he carries around cash or valuables as part of his job,[133]

125. *Id.* at 617–18 (quoting THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298 (1868)).

126. *Id.* at 619 (quoting BENJAMIN ABBOTT, JUDGE AND JURY: A POPULAR EXPLANATION OF LEADING TOPICS IN THE LAW OF THE LAND 333 (1880)).

127. *Id.* (quoting JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES: ITS ORIGIN, AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS, AND OF STATE LEGISLATURES 242 (1891)).

128. This case was a combined appeal of two conflicting lower court cases, both of which involved plaintiffs who were denied a concealed carry license solely for failing to show a special need for self-defense. *See* Grace v. District of Columbia, 187 F. Supp. 3d 124, 152 (D.D.C. 2016) (granting a preliminary injunction barring the Distract from enforcing the good reason law); Wrenn v. District of Columbia, 107 F. Supp. 3d 1, 14 (D.D.C. 2015) (denying injunction).

129. D.C. CODE § 22-4506(a)–(b) (2015).

130. D.C. CODE § 7-2509.11 (2015), *invalidated by* Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017).

131. *See* D.C. Mun. Regs. tit. 24 § 2333.2 (LexisNexis 2017).

132. The special need must be "supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life." D.C. CODE. § 7-2509.11(1)(A).

133. D.C. CODE § 7-2509.11(1)(B) (2015).

but not if he lives or works in a high crime area,[134] unless he has a close relative who is unable to meet his or her own special need for self-defense.[135]

Before discussing whether the plaintiffs had met their burden to show that their Second Amendment challenges were likely to prevail, the court prefaced its analysis with a simple premise left behind by *Heller*: "[T]he Second Amendment erects some absolute barriers that no gun law may breach."[136] Typically, regulations that impose on constitutional rights are subject to some form of means-end scrutiny.[137] But which tier applies depends on the right and the burden at stake. The challengers argued that the court need not apply any form of scrutiny because the District's regulation was analogous to the "total ban" struck down by the *Heller* Court.[138] The District agreed that the regulation did not warrant scrutiny, contending, though, that the law did not burden protected rights at all.[139] While dancing around the tiers of scrutiny, the court realized that it must first determine if the good reason law impinged on the Second Amendment's core—the right of law abiding, responsible citizens to keep and bear arms for individual self-defense.[140]

Citing *Heller*,[141] the District first argued that core did not extend to public carrying at all[142]—the same argument Judge Williams made while defending Illinois's ban on public carry.[143] But the court rejected this argument. Simply because self-defense is most pressing in the home, noted the court, does not mean that self-defense at home is "the only right" at the core.[144] Drawing from *Heller*'s historical analysis, the court concluded that

134. D.C. Mun. Regs. tit. 24 § 2333.4 (LexisNexis 2017).

135. D.C. Mun. Regs. tit. 24 § 2334.1 (LexisNexis 2017).

136. Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

137. If the end is legitimate, and the means, based on the tier of scrutiny employed, are sufficient to justify the end, a regulation will survive constitutional muster. *See, e.g.*, M'Culloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938) (discussing what later becomes heightened scrutiny).

138. *Wrenn*, 864 F.3d at 656.

139. *Id.*

140. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008); McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

141. *Heller*, 554 U.S. at 628 ("[T]he need for defense of self, family, and property is most acute [in the home].").

142. Brief for the District of Columbia and Metropolitan Police Department Chief Cathy Lanier at 29, Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017) (No. 16-7025) ("[A]ssuming the Second Amendment protects a right to carry outside the home, that right is not at its core . . . .").

143. *See* Moore v. Madigan, 702 F.3d 933, 943-53 (7th Cir. 2012) (Williams, J., dissenting).

144. *Wrenn*, 864 F.3d at 657 (noting that self-defense is the "core lawful purpose" of the Second Amendment).

the most "natural reading" of the Amendment treats the right to "keep" and the right to "bear" as separate but equal.[145] Thus, like the Seventh Circuit, the court found that the core does in fact protect the right to carry a firearm beyond the home.[146]

The District then argued that the good reason law fell within the certain "longstanding" regulations of possession or carrying that the Second Amendment permits.[147] Relying on a 14th-century English statute, the District asserted that the right to carry a firearm does not protect carrying in densely populated areas.[148] The court rejected this argument too, noting that *Heller*'s interpretation of the "preexisting right" to carry a firearm describes carrying more broadly than did a 14th-century statute.[149]

Finally, the District argued that the Second Amendment's core excludes carrying a firearm absent a special need for self-defense, finding support for this argument based on English surety laws.[150] The court again rejected this argument because surety laws only burdened someone "reasonably accused of posing a threat."[151] Surety laws thus burdened the reckless, irresponsible individual while providing robust carry rights to the responsible one.[152] The right to carry a firearm, in contrast, is "held by responsible, law-abiding citizens for self-defense," and "responsible" persons "must include those who are no more dangerous with a gun than law-abiding citizens generally are."[153]

Finding that the good reason law imposed on core Second Amendment conduct,[154] the court addressed several other circuits' conclusions that burdens on right to carry firearms trigger only intermediate scrutiny under the premise that the right to carry warrants less protection than the right to possess.[155] But none of these other courts delved into the historical analysis

145. *Id.* at 665.

146. *Id.* at 667.

147. *Id.* at 659.

148. *Id.* at 660.

149. *Id.* at 660–61.

150. Surety laws provided that "if Oliver carried a pistol and Thomas said he reasonably feared that Oliver would injure him or breach the peace, Oliver had to post a bond to be used to cover any damage he might do, unless [Oliver] proved he had reason to fear injury to his person or family or property." *Id.* at 661.

151. *Id.*

152. *Id.*

153. *Id.* at 664.

154. *Id.* at 661 ("Reading the [Second] Amendment, applying *Heller*['s] reasoning, and crediting key early sources, we conclude: the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections.").

155. *Id.* at 661–62.

like the *Heller* Court; had they done so, they would have found that the right to keep and bears are arms are on "equal footing."[156] Thus, the court declined to subject the regulation to any form of means-ends scrutiny because *Heller* held that laws resulting in a total ban on a right protected by the Second Amendment must categorically fail.[157]

C. A Categorical Approach to May-Issue Laws

It follows, then, that all responsible, law-abiding citizens have the right not only to keep firearms in the home for lawful self-defense, but to publicly "wear, bear or carry"[158] them for the same purpose. Although states have considerable say with regard to whom they must issue a concealed carry permit, states may not unduly burden a responsible, law-abiding citizen's right to carry his or her gun for self-defense. The goal of the Second Amendment is not that some people are able to defend themselves with a firearm, but rather that firearms ought to be available to every responsible citizen to do so.[159] Any total ban on ordinarily situated individuals must categorically fail.[160] And good reason laws act as total bans; they deprive the ordinarily-situated citizen the right to bear arms.

When states distinguish between a citizen with a special need for self-defense and an average, prudent citizen, and allow the former to carry a gun while preventing the latter from doing so, they have violated the Second Amendment.[161] Following the District of Columbia Circuit's judgment, the District declined to appeal its loss to the Supreme Court.[162] I speculate that it was to avoid the situation where, if the Supreme Court affirms, all

156. *Id.* at 663.

157. *Id.* ("[T]he rights to keep and bear arms are on equal footing . . . .").

158. District of Columbia v. Heller, 554 U.S. 570, 584 (2008).

159. *Wrenn*, 864 F.3d at 665–66. *See also* Patrick Henry, The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 2, 1788), *in* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 386 (Jonathan Elliot ed., 2d ed. 1836) ("The great object is, that every man be armed . . . . Every one who is able may have a gun.").

160. *Wrenn*, 864 F.3d at 666 (emphasizing that *Heller* "dictates a certain treatment of 'total bans' on Second Amendment rights, [and] that treatment must [also] apply to total bans on carrying . . . by ordinarily situated *individuals* covered by the Amendment").

161. *Id.* at 665–66 (noting that the point of a carry statute is to allow all responsible citizens the right to carry in public "as a rule").

162. *See, e.g.*, Ann E. Marimow & Peter Jamison, *D.C. will not appeal concealed carry ruling to Supreme Court*, THE WASHINGTON POST (Oct. 5, 2017), https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d_story.html?utm_term=.bcdf4f3a27b0 [https://perma.cc/X2R4-B4KK]; Cody Jacobs, *Do the Justices Look More Favorably on Gun Regulation than Many Fear?*, ISCOTUS NOW (Dec. 5, 2017), http://blogs.kentlaw.iit.edu/iscotus/justices-look-favorably-gun-regulation-many-fear/ [https://perma.cc/LTA5-BQLW].

states imposing may-issue regulations would be required to either switch to a shall issue system or create a new system altogether. Now that a circuit split exists regarding the constitutionality of good reason laws, the Supreme Court will likely be asked to weigh in. When it does, I argue that it adopt the same approach used in *Wrenn* to strike down good reason laws because they impose a total carry ban on most people.[163]

For instance, in a shall issue state, concealed carry permits are issued to applicants who satisfy the basic qualifications to obtain a permit. Each of those applicants are the responsible, law-abiding citizens that, under *Wrenn*, the Second Amendment guarantees the right to bear arms in self-defense.[164] But in a may-issue state, each of those applicants will then be screened so that the state can decide which, if any, have a special need for self-defense.[165] Thus, if I satisfy all the objective requirements in a may-issue state, I may still be denied a permit because I do not have some greater need to defend myself than the average person; had my state instead issued permits on a nondiscretionary basis, I could not have been denied.[166] Good reason laws thus "destroy[] the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations . . . but by design: [the laws search] precisely for needs 'distinguishable' from those of the community."[167]

Without guidance from the Supreme Court, the split among circuit courts can only grow wider. If the Court one day finds good reason laws *constitutional*, there may be a trend towards states adopting may-issue schemes in attempt to reduce the number of citizens carrying firearms in public. If, however, the Court find these laws *unconstitutional*, I can only speculate that some states will try to achieve the same result through different means.

163. *Wrenn*, 864 F.3d at 665 (emphasizing that total bans must be struck down without applying tiers of scrutiny "because no such analysis could ever sanction obliterations of an enumerated constitutional right").

164. *Id.* at 666.

165. *E.g.*, Peruta v. County of San Diego, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) (upholding requirement that permit applicants provide "good cause" to publicly carry a firearm); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (upholding "justifiable need" requirement); Woollard v. Gallagher, 712 F.3d 865, 869 (4th Cir. 2012) ("good and substantial reason"); Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012) ("proper cause").

166. This should not be taken to suggest that shall issue permit requirements must be uniform across the United States. To the contrary, as discussed in Section IV.D, there is a compelling case for nonuniform application of constitutional rights and, specifically, the Second Amendment. This example is simply meant to illustrate that may-issue states draw an impermissible distinction among citizens in any given state, and as such only the "good reason" requirement in an otherwise valid regulation fails the *Heller* test.

167. *Wrenn*, 864 F.3d at 666.

D. Practical Application and Considerations

Should the Supreme Court one day declare good reason requirements unconstitutional, state permit systems would, in all likelihood, operate as shall issue regimes.[168] But what is to stop a state from adding ten or one hundred objective, yet arbitrary requirements to the list of requirements that concealed carry permit applicants must satisfy? Take the District of Columbia, for example. Rather than requiring that applicants show cause, it could require that applicants live in a single-family home or own a business to be eligible for a concealed carry permit. Although these criteria are objective, practically, if states add enough requirements, they could achieve the same result as they would have under a may-issue system—thereby reducing the number of individuals who obtain permits to carry concealed firearms. The constitutionality of states proceeding in this fashion is outside the scope of this note, but it is a possible outcome in states that would prefer to issue as few carry permits as possible.

Finally, the note should not be taken to suggest that the "core"[169] of the Second Amendment is impenetrable or that all laws affecting this core must categorically fail. Rather, as several scholars have argued, interests vary by locality, and the application of constitutional doctrines can be tailored to reflect those differences.[170] Joseph Blocher notes that "the most prominent doctrinal example [of tailored localism] . . . is the First Amendment's treatment of obscenity" and the incorporation of "community standards" to define it.[171] From this, he suggests that, in the context of the Second Amendment, urban areas may have more compelling interests in regulating gun-related issues than rural areas,[172] absent state preemption of local laws.[173] Blocher grounds this justification, in part, on the longstanding differences in gun culture between urban and rural areas.[174]

168. Marimow & Jamison, *supra* note 162.

169. The right of the responsible, law-abiding citizen to use a firearm in self-defense. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

170. *See* Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1133 (1999) ("[G]eographic nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism."); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 108 (2013) ("[T]he Second Amendment need not be blind to the reality of our gun cultures, that urban gun control should receive increased deference and, symmetrically, that rural gun rights are entitled to increased protection.").

171. Blocher, *supra* note 170, at 125 ("[I]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.").

172. *Id.* at 108.

173. Most states preempt local firearm laws to achieve uniformity within a state. For example, in the Firearm Concealed Carry Act, Illinois declared the "regulation, licensing, possession, registration,

One criticism of Blocher's position is that the lack of state preemption could hinder both implementing localism and an individual's ability to comply with differences in laws from place to place.[175] To illustrate, someone transporting their firearm may drive from a town with no carry restrictions to within the limits of a town where vehicle carry is prohibited entirely. Arguably, however, these concerns can be reconciled given that we confront them every day when the speed limit periodically changes throughout our drive to work.[176] Tailoring discretionary restrictions to various municipalities is also outside the scope of this note, but it takes into account the reality that both critics and supporters of the Second Amendment may find common ground when comparing a city's interest in protecting the safety of its many citizens with a rural town's interest in promoting the traditional culture that firearms represent.

CONCLUSION

In sum, the Second Amendment guarantees individuals the right to keep and bear arms for self-defense. Indeed, every state allows its own citizens to publicly carry firearms for that purpose. But not every citizen may do so, and this note does not suggest that every citizen can or should be able to. In fact, only responsible, law-abiding citizens should be permitted to exercise this right. Nor does this note suggest that states should abandon strict permitting requirements. But there are no interests to balance where a state licensing scheme so drastically reduces an individual's ability to exercise a constitutional right. Thus, when states, through their permit schemes, isolate the most responsible citizens—who would otherwise be eligible to receive a concealed carry permit absent the discretionary requirement—then deny eligibility to those in that group who do not have some enhanced need for self-defense, they have impermissibly infringed upon the Second Amendment's guarantee that all responsible, law-abiding citizens may bear a firearm for self-defense.

and transportation of handguns and ammunition for handguns by licensees" to be exclusive powers and functions of the state. 430 ILL. COMP. STAT. 66/90 (2013).

174. Blocher, *supra* note 170, at 107.

175. *Id.* at 136.

176. *Id.*