NOTE

Concealed Carry Through Common Use: Extending *Heller*'s Constitutional Construction

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ABSTRACT

Since the Supreme Court decided District of Columbia v. Heller *in 2008, federal courts have disagreed about (1) the proper standard of review for Second Amendment questions, and (2) whether the Amendment confers a constitutional right to concealed carry a firearm in public. The same "common use" test the Supreme Court used in* Heller *to define the scope of the term "arms" in the Second Amendment should be applied to the term "bear" in conferring a constitutional right to concealed carry a handgun in public. The new originalist distinction between constitutional interpretation and construction reveals the methodology used by the majority in* Heller *to create the common use test. Extended to concealed carry, the common use test places this right within the categorical scope of the Second Amendment's protection. In adopting* Heller*'s categorical standard of review, courts should invalidate state regulations that ban or functionally prohibit rights falling within the scope of the Second Amendment. Applying the common use test to the question of concealed carry appropriately mirrors* Heller*'s method of constitutional construction as opposed to the competing "alternative outlet" approach.*

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Introduction

In 2015, two Justices of the Supreme Court indicated a willingness to break nearly five years of silence on the Second Amendment[1] since the Court's incorporation of the right to bear arms in *McDonald v. City of Chicago*.[2] As the federal circuits vigorously debated the proper interpretation of the Court's intentions in the watershed case *District of Columbia v. Heller*,[3] Justices Thomas and Scalia decided that the moment for the Court to hear another Second Amendment case had finally arrived.[4] Within the span of a few months, the two Justices

1 "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.

2 561 U.S. 742 (2010).

3 554 U.S. 570 (2008).

4 *See id.*; Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari); Jackson v. City & County of

voiced their dissent against writ of certiorari denials in two Second Amendment cases.[5] Although they were unsuccessful in garnering the four necessary votes to grant the petitions, their dissents indicated that these members of the *Heller* majority believed lower courts are misinterpreting *Heller*—they are doing it wrong.[6]

In *Heller*, the Supreme Court interpreted the Second Amendment for the first time since the 1939 case of *United States v. Miller*.[7] The Court invalidated a District of Columbia ban on handgun ownership in the home under the jurisprudential philosophy known as "new originalism."[8]Relying on text, history, and tradition, the Court interpreted the Second Amendment to include the right to keep and bear "arms" in the home for self-defense and construed the Amendment to protect "arms" in "common use" for lawful purposes.[9] The problem for lower courts, however, was that *Heller* did not expressly state the standard of review to be applied in future Second Amendment cases and only addressed handgun possession *inside* the home.[10]

After *Heller* and *McDonald*, the circuit courts began hearing various challenges to state laws regulating the practice of carrying a handgun in public.[11] Variations between the circuit holdings centered on two points of contention: (1) what standard of review did *Heller* establish, and (2) as applied, does the Second Amendment contain a right

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San Francisco, 746 F.3d 953 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari).

5 *See generally Friedman*, 136 S. Ct. at 447 (Thomas, J., dissenting from denial of certiorari); *Jackson*, 135 S. Ct. at 2799 (Thomas, J., dissenting from denial of certiorari).

6 *See Friedman*, 136 S. Ct. at 447 (Thomas, J., dissenting from denial of certiorari) ("Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari . . . ."); *Jackson*, 135 S. Ct. at 2799 (Thomas, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it.").

7 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not guarantee the right to keep and bear a sawed-off shotgun); Luis Acosta, *United States: Gun Ownership and the Supreme Court*, LIBR. CONGRESS (July 2008), https://www.loc.gov/law/help/second-amendment.php [https://perma.cc/HFT5-EUDU] (last updated June 26, 2015).

8 *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 924, 940, 954 (2009); Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 609 (2008).

9 District of Columbia v. Heller, 554 U.S. 570, 627, 635 (2008).

10 *See id.* at 617–18; Lindsay Colvin, Note, *History,* Heller*, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1056–57 (2014).

11 *Compare* Peruta v. County of San Diego, 742 F.3d 1144, 1171, 1179 (9th Cir. 2014) (invalidating a good-cause requirement for concealed carry permits), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016), *with* Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013) (upholding a good-cause requirement for concealed carry permits).

to concealed carry a handgun in public?[12] Courts and scholars alike have disagreed about the standard of review question.[13] The majority of circuits have argued that *Heller* opens the door to Second Amendment analysis based on an interest-balancing approach similar to other constitutional rights, applying forms of means-end scrutiny such as intermediate or strict scrutiny.[14] Some judges and scholars, however, have argued that *Heller* interpreted and construed the Second Amendment uniquely, using a stricter categorical approach concerned only with infringement of the right itself as opposed to balancing the right against state interests.[15] Applied to concealed carry, these various approaches have upheld outright bans on the practice, allowed for strict regulation, and, conversely, defended a right to concealed carry.[16] A recent Ninth Circuit panel addressing the concealed carry question, for example, did so according to a constitutional construction known as the "alternative outlet" doctrine, which acknowledges a right to carry a handgun in public, but permits the state to choose whether an individual must conceal the handgun from sight or display it openly for all to see.[17]

This Note argues that the correct understanding of *Heller*'s categorical standard of review leads to a Second Amendment right to concealed carry a handgun in public. When reviewing its next Second Amendment case, the Court should mirror its approach in *Heller* and engage in the process of constitutional construction to extend the "common use" test for "arms" to the question of "bearing" arms through the mode of concealed carry. Part I summarizes the salient aspects of *Heller*, explains an evolving topic of originalist discussion exemplified in that case known as the interpretation-construction distinction, and describes the current status of two separate circuit splits over standard of review and concealed carry. Part II explains why a categorical standard of review for Second Amendment questions should be adopted over an interest-balancing approach. Part III applies this categorical test to the question of concealed carry. This Note

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12 *See, e.g.*, *Woollard*, 712 F.3d at 874–75.

13 *Compare* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 708 (2012) (advocating an interest-balancing approach), *with* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 380 (2009) (conceding that *Heller* imposes a categorical test).

14 *See infra* Section I.D.2.

15 *See id.*

16 *See infra* Section I.D.3.

17 *See* James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 918–19 (2012).

argues that the right to concealed carry turns not on constitutional interpretation but rather on constitutional construction as modeled by *Heller*'s "common use" test. This Note then outlines the shortcomings of a competing approach known as the "alternative outlet" doctrine and illustrates how a categorical test permits both a broader scope of the right to concealed carry and broader opportunities for the state to regulate the practice.

I. *HELLER* AND CONCEALED CARRY IN THE UNITED STATES

A. District of Columbia v. Heller

Second Amendment jurisprudence is one of the youngest categories of constitutional law, only recently introduced by the Supreme Court's decision in *District of Columbia v. Heller* in 2008.[18] The majority used *Heller* as a vessel to communicate and champion originalist jurisprudential philosophy based on an original public meaning of the Constitution and the Second Amendment.[19] This originalist approach rejected the decades-old argument that the Second Amendment lingers as an outdated constitutional provision meant to facilitate state militias.[20] Instead, the opinion created a legal framework for Second Amendment constitutional law premised on the holding that the right to bear arms is an individual right.[21] *Heller* faced the difficult challenge, however, of evaluating *modern* firearm usage through the lens of originalist history and tradition.

Today, privately owned firearms generally fall into three categories: rifles, shotguns, and handguns.[22] Owners commonly use or carry their firearms in three settings: within the home or on private property, beyond the home for recreational purposes, such as hunting or

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18 Before *Heller*, the Supreme Court last heard a Second Amendment case in 1939. *See* United States v. Miller, 307 U.S. 174, 174 (1939); Acosta, *supra* note 7; *see also* 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, 587 (2012) (anticipating "important issues of Second Amendment interpretation and application to become increasingly amenable to resolution" following *Heller*); Bishop, *supra* note 17, at 917 ("[T]he individual right to keep and bear arms announced by *Heller* is still in its infancy . . . .").

19 *See* Solum, *supra* note 8, at 940 ("[I]t is hard to imagine finding a clearer example of original public meaning originalism in an actual judicial decision.").

20 *See* McDonald v. City of Chicago, 561 U.S. 742, 787 (2010) ("[W]e rejected [in *Heller*] the suggestion that the right was valued only as a means of preserving the militias.").

21 *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); O'Shea, *supra* note 18, at 590.

22 *See, e.g.*, B. Gil Horman, *Choosing a Home-Defense Gun*, AM. RIFLEMAN (Oct. 16, 2015), http://www.americanrifleman.org/articles/2015/10/16/choosing-a-home-defense-gun/ [https://perma.cc/GAA4-XHSU].

target shooting, and beyond the home in the public square. There are two modes of carrying a firearm in public: openly for all to see—referred to as "open carry"—or concealed and hidden from sight—referred to as "concealed carry."[23]

In 2008, District of Columbia resident and police officer Dick Heller challenged a city regulation criminalizing the possession of a handgun within the home.[24] The Supreme Court held the law to be facially unconstitutional, asserting that the original public meaning of the Second Amendment recognized a preexisting individual right to possess a handgun within the home for the purpose of self-defense.[25] Soon after *Heller*, in 2010, the Court incorporated this individual right to the states in *McDonald v. City of Chicago*.[26]

Heller constituted a unique and important opportunity for the Roberts Court to craft a new area of constitutional law from scratch while showcasing its template for original public meaning originalism.[27] As Professor Joseph Blocher has explained, the critical aspect of *Heller*'s legal framework is not the holding, but rather the test indicated by the Court for current and future Second Amendment questions.[28] The Court had the challenge of establishing the guiding principles for a new area of the law while avoiding the temptation to conquer all conceivable Second Amendment questions in a single blow.[29]

B. Originalism's Interpretation-Construction Distinction

Professor Lawrence Solum aptly frames *Heller*'s undertaking through the lens of an ongoing academic discussion of so-called "new originalism" and the "interpretation-construction distinction."[30] Evolving from, but also contrasting with, original intent originalism, new originalists contend that "the original meaning of the Constitution is the original *public* meaning of the constitutional text."[31] New

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23 *See* Bishop, *supra* note 17, at 910.

24 *Heller*, 554 U.S. at 574–75.

25 *See id.* at 636.

26 *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

27 *See* Blocher, *supra* note 13, at 380; Solum, *supra* note 8, at 940.

28 *See* Blocher, *supra* note 13, at 377.

29 *Compare* United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) ("The whole matter strikes us as a vast *terra incognita* . . . ."), *with* Blocher, *supra* note 13, at 404 ("But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?" (citing Transcript of Oral Argument at 44, *Heller*, 554 U.S. 570 (No. 07-290) (statement of Roberts, C.J.))).

30 *See* Solum, *supra* note 8, at 933.

31 *Id.*; *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599,

originalists acknowledge "that when the original public meaning of the text 'runs out,' application of the linguistic meaning of the constitutional case to a particular dispute must be guided by something other than original meaning."[32] In other words, new originalists concede that even after determining the original public meaning of the constitutional text, such a definition might not provide a solution to a modern constitutional question, requiring the Court to further specify a guiding rule.[33] This is known as the interpretation-construction distinction.[34] Constitutional *interpretation* discerns "the linguistic meaning" and "semantic content" of the text to resolve problems of ambiguity—instances where terms can have more than one sense.[35] Constitutional *construction* specifies how the text applies to individual cases "when the original public meaning of the text is vague or underdeterminate."[36] Construction is therefore the process by which judges create tests to resolve problems of vagueness—instances where terms have an indeterminate scope, boundary, or borderline.[37]

C. Heller *and the Interpretation-Construction Distinction*

First, through the process of *interpretation*, the *Heller* majority determined the linguistic meaning of the Second Amendment's clauses and individual words, holding that it guarantees a preexisting "individual right to possess and carry weapons in case of confrontation."[38] The Court interpreted the militia-focused prefatory clause of the Amendment as a mere preamble to the right as truly defined by "the semantic content of [the terms] 'the people,' 'keep,' 'bear,' and 'arms.'"[39] Next, the Court engaged in constitutional *construction* to address a vague-

609 (2004) ("[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted.").

32 Solum, *supra* note 8, at 933–34. Professor Barnett explains that a text "runs out" when the "communicative meaning is not sufficiently determinate to dictate a unique application." Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013).

33 *See* Solum, *supra* note 8, at 933–34.

34 *See id.* at 933.

35 *Id.* at 973–74. Professor Solum uses the example of the word "cool," which is facially ambiguous because it can have a sense of "cold" or "hip." *Id.* at 974.

36 *See id.* at 933. Professor Solum goes on to elaborate that "[c]onstruction allows us to draw a line—making the vague provision more specific—or gives us a decision procedure, such as a procedure that allows case-by-case resolution of the vagueness." *Id.* at 974.

37 *See id.* Professor Solum uses the example of the word "tall," which is facially vague because the word has borderline cases creating a problem of scope: "there is no bright line between those individuals who are tall and those who are not." *Id.*

38 District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

39 Solum, *supra* note 8, at 939; *see also Heller*, 554 U.S. at 577–78, 592.

ness problem in the word "arms."[40] Although the Court was able to determine, through the process of interpretation, that the sense of the word meant "all instruments that constitute bearable arms,"[41] there was still a need to determine the scope of the word's application to borderline cases, such as military grade weapons, which are "bearable" under the linguistic meaning.[42]

In response to this vagueness problem, the Court articulated the common use test, which limited the scope of the word "arms" to only those weapons "typically possessed by law-abiding citizens for lawful purposes."[43] Just as muskets were in common use at the time of the Second Amendment's passage, the Court similarly determined that Mr. Heller's twenty-first century handgun fell within the scope of "arms," as it was "the most popular weapon chosen by Americans for self-defense in the home . . . ."[44] At no point in the opinion, however, did the Court explicitly announce a standard of review or lay out in plain terms the test lower courts would be required to follow for Second Amendment questions.[45] Professor Solum argues that while Justice Scalia formally endorsed new originalism for the process of constitutional interpretation, he "did not endorse a particular method of constitutional construction."[46]

The possible approaches to constitutional construction are demonstrated in the contrast between the majority and dissenting opinions in *Heller*.[47] The majority used a formalist approach under which constitutional tests established during construction must be "constrained by the semantic content of the provision that is being construed. In other words, constitutional construction is constrained

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40 *See Heller*, 554 U.S. at 581–82, 627; Solum, *supra* note 8, at 976.

41 *Heller*, 554 U.S. at 582. According to Professor Randy Barnett, the Court's resolution of the ambiguity problem through interpretation reveals that "arms" "refers to weapons, not the limbs to which our hands are attached." Barnett, *supra* note 32, at 419.

42 *See Heller*, 554 U.S. at 624.

43 *Id.* at 625. The *Heller* majority adopted the language for the common use test from the 1939 *Miller* opinion, holding that the construction of "arms," used narrowly in that case to outlaw sawed-off shotguns, is also appropriate for future Second Amendment questions concerning "arms." *See id.* at 627. Because the *Miller* Court was not endeavoring to establish a constitutional construction beyond the facts of that case, *see generally United States v. Miller*, 307 U.S. 174 (1939), this Note credits *Heller* with the establishment of the common use test as relevant to the question of concealed carry.

44 *Heller*, 544 U.S. at 629.

45 *See* Colvin, *supra* note 10, at 1056–57.

46 Solum, *supra* note 8, at 980. Professor Barnett has stated that Justice Scalia would not likely define the *Heller* opinion according to the interpretation-construction distinction despite its embodiment of the framework. *See* Barnett, *supra* note 32, at 423.

47 *See* Solum, *supra* note 8, at 977.

by constitutional interpretation."[48] In contrast, as a living constitutionalist, Justice Breyer advocated that, even assuming original public meaning governs interpretation, construction should be guided by a judge who balances a party's burdened interest against that of the state in carrying out its police power.[49] Such attempts, described by the majority as "freestanding 'interest-balancing,'" are not suited for the Second Amendment right because its ratification was itself "the very *product* of an interest balancing by the people," one that a court cannot override after the fact.[50] "[T]he enshrinement of constitutional rights," according to the majority, "necessarily takes certain policy choices off the table."[51] The Court rejected Justice Breyer's construction because "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[52] It similarly declined to establish any of the traditional levels of scrutiny as appropriate for Second Amendment questions.[53] Even though the Court was not defining the "full scope of the Second Amendment," it listed categories of presumptively constitutional longstanding regulations, which included banning felons and the mentally ill from firearm possession, excluding firearms from sensitive places, and regulating commercial sales.[54]

Professor Blocher describes *Heller*'s construction conflict as one between the majority's "categorical" test and Justice Breyer's "balancing" approach.[55] "Rather than adopting one of the First Amendment's many Frankfurter-inspired balancing approaches," he argues, "the majority endorsed a categorical test under which some types of 'Arms' and arms-usage are protected absolutely from bans and some types of 'Arms' and people are excluded entirely from constitutional coverage."[56] Contrast the categorical approach with Justice Breyer's interest-balancing approach or any level of means-end scrutiny, which "set the individual's interest in asserting a right against the government's interest in regulating it, attach whatever weights are appropriate for

48 *Id.* at 978; *see also id.* at 959 (arguing that it is possible that Justice Scalia would fall into the formalist camp); Barnett, *supra* note 32, at 419 ("[C]onstruction is constrained by the original meaning of the text . . . .").

49 *See Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting); Solum, *supra* note 8, at 978–79.

50 *Heller*, 554 U.S. at 634–35; *see also* Blocher, *supra* note 13, at 405.

51 *Heller*, 554 U.S. at 636.

52 *Id.* at 634.

53 *Id.*

54 *Id.* at 626–27.

55 Blocher, *supra* note 13, at 380.

56 *Id.*

the context, and determine which is weightier."[57] By categorically determining that the District's regulation prohibited Mr. Heller's protected interest and invalidating the ban per se, the Court refused to employ any form of traditional means-end scrutiny or interest-balancing approach.[58] Because the Court failed to explicitly announce a formal standard of review, despite rejecting Justice Breyer's approach, circuit courts have varied in their assessment of the majority's intended framework for future Second Amendment questions.[59]

*D. The Second Amendment Post-*Heller

Given the Court's failure in *Heller* to expressly articulate its intended standard of review and its limited evaluation of handgun use *inside* the home, the circuits have varied not only in their determinations about a right to concealed carry, but also the appropriate test for such a decision. This Section first pauses to review the current status of state laws governing concealed carry to provide context for the various state law challenges giving rise to the two relevant post-*Heller* circuit splits. This Section then summarizes these two circuit splits, which center on *Heller*'s intended standard of review and, as applied, whether the Second Amendment protects a right to concealed carry a handgun in public.

1. State Carry Laws

To understand the challenges faced by the circuits in their attempts to identify *Heller*'s standard of review, it is important to outline the various state law regimes currently governing the carry of firearms in public. While the societal debate continues over the utility of openly carrying long guns, such as rifles,[60] this Note concentrates on the public carry of handguns as they constitute the vast majority of firearms carried in public as well as the most common and likely type of firearm to be used in a confrontation.[61] More specifically, this Note

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57 *Id.* at 381.

58 *See Heller*, 554 U.S. at 634.

59 Blocher, *supra* note 13, at 378 ("The general consensus is that *Heller* failed to provide a framework by which lower courts could judge the constitutionality of gun control.").

60 *See, e.g.*, Mark Follman, *Open-Carry Gun Laws Make It Harder to Protect the Public, Police Chiefs Say*, MOTHER JONES (Nov. 4, 2015, 1:58 PM), http://www.motherjones.com/politics/2015/11/open-carry-mass-shooting-colorado-police-chiefs [https://perma.cc/DR3Y-5D8A].

61 *See* VIOLENCE POLICY CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE 15 (June 2015), http://vpc.org/studies/justifiable15.pdf (showing that handguns are used in justifiable homicides more than all other types of firearms combined); *see also* Peruta v. County of San Diego, 742 F.3d 1144, 1152 (9th Cir. 2014) (arguing that that the notion of concealed carry "brings to mind scenes such as a woman toting a small handgun in her purse

focuses on the mode of *concealed* carry of handguns, taking care to distinguish, both legally and practically, this mode from that of open carry.

In 2012, the Seventh Circuit overturned the last remaining state ban on concealed carry, making concealed carry now legal, to some degree, in all fifty states.[62] Eleven states currently allow their residents to publicly carry concealed handguns without a permit.[63] These "constitutional carry" states now include Alaska, Arizona, Arkansas, Idaho, Kansas, Maine, Missouri, Mississippi, Vermont, Wyoming, and West Virginia.[64] The remaining thirty-nine states require an individual to obtain a state-issued permit before carrying a concealed handgun in public.[65] Thirty-one of these states, known as "shall-issue" states, *require* state permitting agencies to issue a license to concealed carry without a prerequisite of particularized cause or need for self-defense protection.[66] While many of these states ban permits for felons or require the applicants to take firearm safety courses, the underlying premise is that so long as the applicant goes through the particular state process and meets minimum requirements, they *shall* be issued a permit without any subjective determination of need.[67] The remaining

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as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site"), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

62 Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); Ciara McCarthy, *Concealed Carry Is Now Legal in All 50 States, and the NRA Doesn't Want Us to Know What that Really Means*, SLATE: CRIME (July 11, 2013, 3:06 PM), http://www.slate.com/blogs/crime/2013/07/11/illinois_concealed_carry_carrying_guns_in_public_is_legal_in_all_50_states.html [https://perma.cc/6Z48-SF9W].

63 *See generally Right-to-Carry: 2016*, GUN NUTTERY (Sept. 15, 2016), http://gun-nuttery.com/maps/2016.gif [https://perma.cc/T9N3-757Q] (providing a summary map of each state concealed carry doctrine by type). Due to ambiguous interpretations of some state statutes, many sources disagree about the concealed carry doctrines for some states. This Section merely indicates a general distribution of the state concealed carry approaches.

64 *Id.*

65 *See id.*

66 *See id.*; Bishop, *supra* note 17, at 912. Professor Michael O'Shea compares an example of a Michigan statute "stating that county concealed weapons licensing boards 'shall issue' a carry permit to all applicants who meet stated requirements" with a Massachusetts "may issue" law "granting local officials broad discretion to issue permits only to individuals they deem 'suitable.'" O'Shea, *supra* note 18, at 593 n.22.

67 Idaho is one of the most recent states to adopt a constitutional carry framework, rejecting its previous permit requirement under which "[t]he sheriff . . . must, within ninety (90) days after the filing of a license application by any person who is not disqualified . . . issue a license to the person to carry concealed weapons," excluding, inter alia, felons, fugitives, the mentally ill, and illegal aliens. IDAHO CODE § 18-3302(7), (11) (2015); Christina Coleburn, *No Permit Required: New Law Allows Concealed Guns in Idaho Cities*, NBC NEWS (Mar. 28, 2016, 3:40 PM), http://www.nbcnews.com/news/us-news/no-permit-required-new-law-allows-concealed-guns-idaho-cities-n546756 [https://perma.cc/KVD5-YUSX].

eight states that require a concealed carry permit are classified as "may-issue" states.[68] These states build on the objective requirements of the shall-issue states and allow permitting agencies to utilize discretion in granting permits to individuals who demonstrate good character or good cause in the face of a credible threat of injury or death substantiating the need for self-defense in public.[69] As discussed below, a large portion of the litigation following *Heller* and *McDonald* has focused on "may-issue" states' permitting regulations and whether such laws violate the Second Amendment.

2. *Circuit Holdings on* Heller*'s Intended Standard of Review*

Since *Heller* and its incorporation in *McDonald*, the circuit courts have been split on two important, yet distinct, issues: (1) what standard of review or constitutional test *Heller* requires for Second Amendment questions, and (2) whether *Heller*'s individual right to self-defense extends beyond the home in the form of public carry. Focusing first on the standard of review split, the circuits disagree about which standard of review is required by the holding in *Heller*. Even circuits affirming a right to publicly carry a firearm disagree over which standard of review makes it possible.[70]

The current circuit approach favors a two-prong interest-balancing test that first asks whether the challenged law burdens a right or conduct falling within the historical scope of the Second Amendment.[71] If the law burdens a right or conduct that falls *outside* of the historical scope of the Amendment's protection, then the law is presumptively constitutional.[72] If the law or regulation burdens a right or conduct that falls *within* the scope of the Second Amendment's protection, then the government must justify the regulation under some

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68 *See Right-to-Carry: 2016*, *supra* note 63.

69 *See* Bishop, *supra* note 17, at 913.

70 *Compare* Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012) (holding that Illinois had not made a strong enough showing to justify a concealed carry ban), *with* Peruta v. County of San Diego, 742 F.3d 1144, 1167 (9th Cir. 2014) (refusing to engage in interest-balancing), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

71 *See* Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("We accordingly adopt, as have other circuits, a two-step approach to determining the constitutionality of the District's gun laws."); *see also, e.g.*, NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*BAFTE*), 700 F.3d 185, 194–95 (5th Cir. 2012); United States v. Decastro, 682 F.3d 160, 164 (2d Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 702–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

72 *See, e.g.*, *BATFE*, 700 F.3d at 195.

form of means-end scrutiny, most commonly intermediate scrutiny.[73] Contrary to the majority of circuits, the Fourth Circuit and a D.C. District Court recently applied strict scrutiny against laws burdening the "core" of the Second Amendment.[74] Under either level of scrutiny, even if a court determines that the state regulation burdens conduct falling *within* the Second Amendment's scope of protection, the court nonetheless engages in some form of means-end scrutiny to determine if the government's interest in enacting the law outweighs the individual right.[75]

The first circuit court to apply means-end scrutiny relied on one sentence in the *Heller* opinion, which has been the source of much of the standard of review confusion to date.[76] In *Heller*, the majority wrote that "[u]nder any of the standards of scrutiny the Court has applied to enumerated constitutional rights, [this prohibition] . . . would fail constitutional muster."[77] The Third Circuit interpreted this argument in the alternative as an invitation to utilize means-end scrutiny for regulations falling short of the District's unconstitutional handgun ban.[78]

While the circuits have adopted the two-prong means-end scrutiny approach, a small contingent first championed by Judge Kavanaugh of the D.C. Circuit has argued that "courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[79] Because the D.C. Circuit rejected Judge Kavanaugh's argument that *Heller* intended such a categorical test, the only circuit panel to successfully implement this approach was led by Judge O'Scannlain of the Ninth Circuit in 2014.[80] This success was short-lived, however, as the Ninth Circuit overruled the case en banc in 2016.[81]

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73 *See, e.g.*, *Ezell*, 651 F.3d at 703 (evaluating "the regulatory means the government has chosen and the public-benefits end it seeks to achieve"); *Marzzarella*, 614 F.3d at 98 (requiring a reasonable fit between the regulation and the important governmental interest).

74 *See* Kolbe v. Hogan, 813 F.3d 160, 179 (4th Cir. 2016) (requiring a compelling state interest and a restriction narrowly tailored to achieve the interest); Grace v. District of Columbia, No. 15-2234 (RJL), 2016 WL 2908407, at *13 (D.D.C. May 17, 2016) ("[T]he District's 'good reason' requirement burdens core Second Amendment conduct . . . .").

75 *See BATFE*, 700 F.3d at 195.

76 *Marzzarella*, 614 F.3d at 89.

77 District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

78 *Marzzarella*, 614 F.3d at 89.

79 Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also* Colvin, *supra* note 10, at 1044.

80 Peruta v. County of San Diego, 742 F.3d 1144, 1168 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

81 Peruta v. County of San Diego, 824 F.3d 919, 942 (9th Cir. 2016).

In *Peruta v. County of San Diego*,[82] a San Diego ordinance required persons seeking a concealed carry permit to demonstrate good cause, a determination either approved or denied by the local sheriff's department.[83]Because California bans the open carry of firearms, this left Mr. Peruta with no mode of public carry because he lacked any proof that he met the high bar of good cause required by the local sheriff's department for a concealed carry permit.[84] After engaging in a lengthy study of the text, history, and tradition of the Second Amendment to affirm a right to carry arms in public for the purpose of self-defense, Judge O'Scannlain departed from the majority circuit approach in refusing to apply any means-end scrutiny to a regulation which burdened conduct falling within the scope of the Second Amendment's protection.[85] Because the San Diego ordinance, in concert with the California open carry ban, constituted a "near-total prohibition on bearing" arms, the state interest in enacting the regulation was irrelevant because the law went "too far."[86] Although there is some indication that the *Peruta* court might have been willing to engage in means-end scrutiny analysis for less burdensome regulations, it nonetheless rejected the two-prong interest-balancing approach for core Second Amendment rights in that case.[87] As discussed below, however, most circuits have applied means-end scrutiny to uphold good-cause requirements.

3. Circuit Holdings on Concealed Carry

Applying means-end scrutiny, five circuits have upheld good-cause requirements for concealed carry permits in "may-issue" states.[88] In overturning a prohibitive concealed carry ban, the Seventh

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82 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

83 *Id.* at 1148.

84 *Id.* Sufficient proof, according to the San Diego good-cause requirement, required actual documentation "such as restraining orders, letters from law enforcement agencies or the [district attorney] . . . ." *Id.* (alteration in original).

85 *Id.* at 1172 ("[C]oncealed carry *per se* does not fall outside the scope of the right to bear arms; but insistence upon a particular mode of carry does.").

86 *Id.* at 1170, 1177 (affirming that the interest-balancing approach taken by many of the other circuits "ignores the *Heller* [C]ourt's admonition that 'the very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.'" (alteration in original)).

87 *Id.* at 1170 (asserting that per se invalidation is a rare occurrence).

88 Peruta v. County of San Diego, 824 F.3d 919, 942 (9th Cir. 2016) (holding that concealed carry falls outside the scope of Second Amendment protection and, even if it did, the court would apply intermediate scrutiny to uphold laws banning the practice); Drake v. Filko, 724 F.3d 426, 429–30 (3d Cir. 2013) ("[W]e conclude that the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense qualifies as a 'presumptively law-

Circuit indicated willingness to uphold a good-cause requirement in the alternative.[89] Prior to being overruled en banc, the Ninth Circuit panel in *Peruta* applied a per se categorical test to San Diego's good-cause requirement, invalidating the law under what has become known as the alternative outlet doctrine, arguing that because California also bans open carry, the plaintiff had no alternative outlet for public carry.[90] Finally, the D.C. District Court recently invalidated a local good-cause requirement under strict scrutiny.[91] In summary, five circuits upheld good-cause requirements under interest-balancing, one circuit invalidated a concealed carry ban under interest-balancing, and one district court recently invalidated a good-cause requirement under interest-balancing.[92]

II. *HELLER*'S CATEGORICAL TEST

As Part I demonstrated, there are two key pillars to *Heller*'s new originalist framework that are binding for future Second Amendment questions regarding concealed carry. First, courts must determine the scope of the Second Amendment right in the face of vague terms in the Constitution's text.[93] In *Heller*, this inquiry was embodied in the interpretation-construction distinction that resulted in the common use test.[94] Second, the court must determine how to evaluate a challenged government regulation in light of the right's scope.[95] Because the second pillar focuses on the standard of review applicable to all future Second Amendment questions,[96] Part II evaluates the interest-

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ful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee."); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (choosing to refrain "from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections. That is, we merely assume that the *Heller* right exists outside the home" because the requirement passes intermediate scrutiny); Peterson v. Martinez, 707 F.3d 1197, 1201 (10th Cir. 2013) ("In light of our nation's extensive practice of restricting citizens' freedom to carry firearms in a concealed manner, we hold that this activity does not fall within the scope of the Second Amendment's protections."); Kachalsky v. County of Westchester, 701 F.3d 81, 94 (2d Cir. 2012) ("The proper cause requirement falls outside the core Second Amendment protections identified in *Heller*.").

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

90 *See Peruta*, 742 F.3d at 1171; Bishop, *supra* note 17, at 918.

91 Grace v. District of Columbia, No. 15-2234 (RJL), 2016 WL 2908407, at *15 (D.D.C. May 17, 2016) ("[T]he District's law is likely vastly over-inclusive, burdening substantially more of the Second Amendment right than is necessary to advance public safety.").

92 *See supra* notes 88–91 and accompanying text.

93 *See* O'Shea, *supra* note 18, at 589–90.

94 *See supra* Section I.C.

95 *See* Colvin, *supra* note 10, at 1044.

96 *See id.*

balancing and categorical approaches and argues that future courts should follow the categorical approach.

Justice Thomas's 2015 dissents indicate that, if given the opportunity to hear another Second Amendment case, the conservative wing of the Court would reiterate its rejection of judicial interest-balancing tests and invalidate the current majority circuit approach. Justice Thomas acknowledged the current disagreement "about whether and to what extent the tiers-of-scrutiny analysis should apply to burdens on Second Amendment rights."[97] Between *Peruta*'s panel opinion and subsequent en banc reversal, a different Ninth Circuit panel applied intermediate scrutiny to a San Francisco regulation imposing strict storage requirements on handguns within the home and held "that the law served 'a significant government interest by reducing the number of gun-related injuries and deaths from having an unlocked handgun in the home' and was 'substantially related' to that interest."[98] Justice Thomas pointedly argued that "[t]he Court should have granted a writ of certiorari to review this questionable decision and to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights."[99] His language explicitly targeted the intermediate scrutiny utilized by the Ninth Circuit that weighed the governmental interest of a right falling within the scope of the Second Amendment's protection.[100] Justice Thomas echoed similar objections in his dissent against another certiorari petition denial only months later.[101]

Advocates of the means-end scrutiny approach nonetheless argue that *Heller* only rejected the "free-standing" aspect of Justice Breyer's interest-balancing approach as distinguished from traditional means-end scrutiny.[102] They argue that free-standing interest-balancing is

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97 Jackson v. City & County of San Francisco, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari). The Ninth Circuit decided *Jackson* the same year as *Peruta*. *See* Jackson v. City & County of San Francisco, 746 F.3d 953 (9th Cir. 2014); Peruta v. County of San Diego, 742 F.3d 1144, 1168 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016). Since then, the Ninth Circuit has chosen the *Jackson* approach over the *Peruta* approach. *See* Peruta v. County of San Diego, 824 F.3d 919, 949 (9th Cir. 2016).

98 *Jackson*, 135 S. Ct. at 2800 (Thomas, J., dissenting from denial of certiorari) (quoting *Jackson*, 746 F.3d at 966).

99 *Id.* at 2802 (Thomas, J., dissenting from denial of certiorari).

100 *See id.* at 2800–01 (Thomas, J., dissenting from denial of certiorari).

101 Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) ("If a broad ban on firearms can be upheld based on conjecture that the public might *feel* safer (while being no safer at all), then the Second Amendment guarantees nothing.").

102 *See* Rostron, *supra* note 13, at 757 (arguing that "in the end, judges cannot avoid essen-

more problematic to the *Heller* majority because, under that approach, the judge selects which level of scrutiny to apply to a Second Amendment regulation based on a case-by-case determination of the burden imposed rather than a standardized level of scrutiny for all cases.[103] This argument does not accurately reflect, however, to which aspect of the Justice Breyer approach the majority was actually objecting Although the majority would no doubt minimize attempts at "judge-empowering" in general, its rejection of the Breyer approach is more broadly opposed to courts asking whether an individual protected interest is burdened *out of proportion* to governmental interests.[104] Because the right to self-defense within the home is a core right of the Second Amendment, even the Supreme Court should not have "the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[105] This criticism is true not only for free-standing interest-balancing, but likewise for traditional means-end scrutiny.[106] Even under strict scrutiny, certain governmental interests can be so compelling as to justify the curtailment of a constitutional right.[107] It is this broader notion that the majority rejects because the interest-balancing between rights and governmental interests already took place at the time of the ratification—the Second Amendment "is the very *product* of an interest balancing by the people . . . ."[108]

Another counterargument is that *Heller*'s categorical test only applies to "core" rights.[109] The notion of a core right stems from H. L. A. Hart's longstanding distinction between "core" rights and "penumbral" rights.[110] Imagine a circle constituting the scope of the Second Amendment right. As Professor Solum notes, "[t]erritory that is not in

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tially weighing the advantages and disadvantages of sustaining the government actions being challenged").

103 *See* District of Columbia v. Heller, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting); *see also* Heller v. District of Columbia, 670 F.3d 1244, 1265 (D.C. Cir. 2011) (arguing that "heightened scrutiny is clearly not the 'interest-balancing inquiry' proposed by Justice Breyer"). Professor Blocher argues that free-standing interest-balancing relies on "elements of purposivism, historical analysis, reasonableness, and deference to legislative judgment." Blocher, *supra* note 13, at 412.

104 *See Heller*, 554 U.S. at 634; *see also* Colvin, *supra* note 10, at 1059.

105 *Heller*, 554 U.S. at 634.

106 *See* Colvin, *supra* note 10, at 1062–63 (citing *Heller*, 670 F.3d at 1271–72, 1280 (Kavanaugh, J., dissenting)).

107 *See Heller*, 670 F.3d at 1278 (Kavanaugh, J., dissenting).

108 *Heller*, 554 U.S. at 635.

109 *See* Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 Nw. U. L. Rev. 437, 444 (2011).

110 Solum, *supra* note 8, at 976 (citing H. L. A Hart, The Concept of Law 123 (2d ed. 1994)).

dispute is the 'core.'"[111] Penumbral rights, which are disputed as being within the scope of the Second Amendment, would therefore be at the "borderline" of the circle.[112] Using this framework, the argument would be that *Heller* used history, text, and tradition to determine that self-defense within the home is a core right under the Constitution. In contrast to core rights, *Heller* does not proscribe interest-balancing for penumbral rights.[113] Under this counterargument, whether a categorical test is appropriate for a Second Amendment question would therefore turn on whether the right is a core right.[114]

Whether this distinction between core and penumbral rights was intended by the Court is likely inconsequential to the concealed carry question because the Court would likely hold that concealed carry falls under the umbrella of "personal defense," already recognized as a core right in *Heller*.[115] *Peruta* interpreted concealed carry as falling under the broader core right of "self-defense, which necessarily 'take[s] place wherever [a] person happens to be,' whether in a back alley or on the back deck."[116] Even scholars opposed to the policy consequences of *Heller*, such as Professor Blocher, concede, "the 'self-defense' constitutionalized in *Heller* is not simply the traditional conception of resisting an attack, but something more like a right to make self-defense-related decisions regarding guns."[117]

The categorical approach is therefore the correct test for the question of concealed carry because it recognizes the fixed nature of

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111 *Id.*

112 *Id.*

113 *See* Rosenthal & Malcolm, *supra* note 109, at 444.

114 *See id.*

115 *See* Michael P. O'Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359, 363 (2014) ("Personal defense, not hunting, is the right's 'core lawful purpose.'" (quoting District of Columbia v. Heller, 554 U.S. 570, 571 (2008))).

116 Peruta v. County of San Diego, 742 F.3d 1144, 1153 (9th Cir. 2014) (alteration in original) (quoting 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, 1515 (2009)), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016); Grace v. District of Columbia, No. 15-2234 (RJL), 2016 WL 2908407, at *11 (D.D.C. May 17, 2016) ("[T]he text and purpose of the Second Amendment demonstrate that the right of law-abiding, responsible citizens to carry arms in public for the purpose of self-defense does indeed lie at the core of the Second Amendment.").

117 Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 16 (2012). Further analysis of the core right determination exceeds the scope of this Note. Some courts could foreseeably apply the same arguments in holding the Second Amendment categorically excludes concealed carry altogether by arguing that it is not a core right. *Compare* Grace v. District of Columbia, No. 15-2234 (RJL), 2016 WL 2908407, at *13 (D.D.C. May 17, 2016) ("[T]he District's 'good reason' requirement burdens core Second Amendment conduct . . . ."), *with Peruta*, 824 F.3d at 942 ("[T]he Second Amendment does not protect, in any degree, the right of a member of the general public to carry a concealed weapon in public.").

the Second Amendment's scope of protection and rejects interest-balancing for any right falling within that scope.[118] Because the citizens who ratified the Bill of Rights engaged in their own interest-balancing of the right to keep and bear arms and determined that it flatly should not be infringed, no judge has the power to override that determination.[119] Furthermore, Justice Thomas's two recent dissents indicate support of the categorical approach in contrast to interest-balancing.[120]

III. Concealed Carry Through Common Use

Part II demonstrated how the categorical test is *Heller*'s intended method of evaluation for regulations that burden conduct falling within the Second Amendment's scope of protection. Part III demonstrates how *Heller*'s process of constitutional interpretation and construction defines the scope of the Second Amendment and confers a right to concealed carry.

In *Heller*, the Court first analyzed text, history, and tradition through the process of constitutional *interpretation* to determine the semantic content and linguistic meaning of the Second Amendment.[121] Second, the Court engaged in constitutional *construction* in establishing the common use test when the original public meaning of the text faced a vagueness problem.[122] By mirroring *Heller*'s method of interpretation and construction in determining the Second Amendment's boundary of categorical protection, this Note demonstrates that the scope of the Second Amendment encompasses a constitutional right to concealed carry. As applied, this bifurcated approach reveals that the word "bear" in the Second Amendment faces the same scope problem as did "arms" in *Heller*. Just as the Court established the common use test to cure the scope problem of "arms," the Court should similarly apply the common use test to cure the vagueness of

118 *See* Blocher, *supra* note 13, at 381 (explaining the characteristics of the categorical approach but endorsing the interest-balancing approach); *see also* Colvin, *supra* note 10, at 1071 (arguing that Judge Kavanaugh's adoption of the categorical approach offers "increased judicial flexibility, predictability of result, ease of use, and adherence to established Supreme Court precedent").

119 *See* Blocher, *supra* note 13, at 382.

120 *See supra* notes 97–101 and accompanying text.

121 *See* Solum, *supra* note 8, at 975 ("The essence of Justice Scalia's position is that the semantic content of the operative clause furnishes the parameters of the rule of constitutional law.").

122 *See id.* at 976 ("[The District of Columbia ordinance] regulates 'arms' because handguns are within the core meaning of weapon, as confirmed by usage at the time the Second Amendment was adopted.").

"bear" and find a constitutional right to concealed carry a handgun in public for the purpose of self-defense.

A. Heller*'s Model of Interpretation-Construction Should Apply to Concealed Carry*

Because the majority in *Heller* implicitly relied on the interpretation-construction distinction in framing the holding, future questions facing vagueness problems in the Second Amendment text should mirror the same approach.[123] The majority interpreted the original public meaning of the word "arms" and held that it constituted bearable weapons.[124] The problem for the majority lay in the question of what sort of bearable weapons the Second Amendment protects.[125] The original public meaning of "arms" had run out because the notion of bearable weapons has a scope problem.[126] Sawed-off shotguns, machine guns, and grenade launchers are all bearable weapons in the literal sense. And yet, grenade launchers surely do not fall within the scope of the Amendment's protection.[127] Without scope limitations on the notion of bearable weapons, however, grenade launchers would be protected. In response to this problem, the Court endeavored to determine what sort of original meaning applicable at the time of ratification could define boundaries for bearable weapons today.[128]

The Court concluded that only weapons in "common use" "by law-abiding citizens for lawful purposes" are protected by the Second Amendment.[129] The Court's establishment of this test was a form of constitutional construction constrained by the amendment's semantic content and linguistic meaning discovered and adopted during interpretation.[130] As the *Heller* majority noted, the alternative would lead to outlandish applications, limiting the Second Amendment right to only those weapons in existence at the time of ratification.[131] The

123 *See* Randy Barnett, *Interpretation vs. Construction in* Heller, VOLOKH CONSPIRACY (July 3, 2008, 1:28 PM), http://volokh.com/posts/1215106086.shtml [https://perma.cc/MCG2-3WDU].

124 District of Columbia v. Heller, 554 U.S. 570, 581–82 (2008).

125 *See id.*

126 *See* Solum, *supra* note 8, at 976.

127 *See Heller*, 554 U.S. at 627 ("*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" (citation omitted)).

128 *See id.* at 624–28.

129 *See id.* at 625, 627; *see also supra* note 43 and accompanying text.

130 *See infra* Section III.C.

131 *Heller*, 554 U.S. at 582.

question of concealed carry should therefore mirror *Heller*'s implicit employment of the interpretation-construction distinction.

B. Step One: Interpreting "Bear Arms" and Identifying the Scope Problem

Under the right to "keep and bear arms," the concealed carry question turns on the word "bear" as the verb of significance.[132] The Court in *Heller* already completed the first step of constitutional interpretation of the word "bear."[133] Using text, history, and tradition, the Court determined that the original public meaning of the word "bear" was to simply "carry."[134] Just as "arms" had a scope problem in terms of Mr. Heller's handgun as a possible borderline case, "bear" has a scope problem as well.[135] Common sense indicates that the Second Amendment does *not* encompass a right to walk around in public with a handgun pointed straight in the air with a finger on the trigger. And yet, this is an extreme example that falls within the conceivable scope of the textual definition of "bear." If *Heller*'s analytical framework is binding, then constitutional construction must be utilized to overcome the vagueness of the word "bear."[136] And according to *Heller*'s categorical approach, the chosen method of construction must be constrained by the "text, history, and tradition" of the Second Amendment.[137] If that process of construction leads to a result in which concealed carry falls within the scope of the Second Amendment, then concealed carry would be categorically protected, free from the scrutiny of judicial interest-balancing against government attempts to ban or functionally prohibit the practice through regulation.[138]

C. Step Two: Construing the Common Use Test for Concealed Carry

Having determined that construction is necessary to overcome the vagueness of "bear," courts should mirror *Heller*'s formula for

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132 *See* Peruta v. County of San Diego, 742 F.3d 1144, 1151–53 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

133 *See Heller*, 554 U.S. at 584–92.

134 *Id.*; Blocher, *supra* note 117, at 14.

135 *See* Solum, *supra* note 8, at 976.

136 *See id.* at 975–76.

137 *See* Heller v. District of Columbia, 670 F.3d 1244, 1275, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[T]he range of potential answers will be far more focused under an approach based on text, history, and tradition . . . ."); Colvin, *supra* note 10, at 1074–75.

138 *See* Blocher, *supra* note 13, at 424 ("[I]t could be said that the Second Amendment categorically prohibits laws that ban the use of arms for personal self-defense . . . .").

construction of constitutional terms lacking an apparent scope. Professors Solum and Randy Barnett, among other new originalists, are still in the process of defining the criteria for a particular method of construction to qualify as "originalist."[139] Two key components for originalist construction include the "fixation thesis" and the "constraint principle."[140] The fixation thesis simply holds that the semantic content and linguistic meaning of the Constitution is fixed according to the original public meaning of the text at the time of ratification.[141] Living constitutionalists, in contrast, apply modern definitions and linguistic meaning to the words of the Constitution—their meaning is not fixed but fluid through time.[142] The constraint principle argues that for a construction to qualify as originalist, the test created to remedy a scope problem must be constrained by the semantic content and linguistic meaning derived during the interpretation phase.[143] Professor Solum argues that construction is constrained when it is "consistent" with the original meaning of the text.[144] The problem is that there are varying degrees to which construction can be "consistent" with semantic content and original meaning.[145]

For a court to successfully evaluate the question of concealed carry, it need not articulate which level of consistency best embodies originalism, but instead must simply mirror the majority's level of consistency in *Heller*.[146] Because the Court did not describe the opinion in these explicit terms, but rather embodied them implicitly,[147] the binding level of consistency for future construction must be gleaned from *Heller*'s text. When the time came to engage in construction, the *Heller* majority justified its application of the common use test with the single-sentence explanation that it "accords with the historical understanding of the scope of the right . . . ."[148] In resolving the scope prob-

139 *See* Ethan J. Ranis, Note, *Loose Constraints: The Bare Minimum for Solum's Originalism*, 93 TEX. L. REV. 765, 772–80 (2015).

140 *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459–61 (2013).

141 *Id.* at 459.

142 *See id.* at 526.

143 *See id.* at 460; *see also* Solum, *supra* note 8, at 954.

144 Solum, *supra* note 140, at 461.

145 *See* Ranis, *supra* note 139, at 773–75. Ethan Ranis, for example, argues that such consistency could alternatively "mirror the text exactly," merely be logically consistent with the text, or be consistent with the "underlying principles of the text." *Id.*

146 *See* Solum, *supra* note 8, at 953 ("The majority assumes that in the absence of controlling precedent, the linguistic meaning of constitutional text must provide some of the content of the corresponding doctrines of constitutional law.").

147 *See supra* note 46 and accompanying text.

148 District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

lem for "bear," a construction would therefore be sufficiently constrained if it accords with the historical understanding of the right. Before determining which construction best mirrors *Heller*'s level of consistency, it is important to first articulate the common use test as applied to "bear."

If extended to concealed carry, the common use test would construe the word "bear" to define the categorical scope of the Second Amendment's protection to include *modes of carry* in common use by law-abiding citizens for lawful purposes. Replacing *Heller*'s own references to handguns with references to concealed carry reveals how common use is aptly suited for the concealed carry question:

> It is enough to note, as we have observed, that the American people have considered [concealed carry] to be the quintessential self-defense [mode of carry]. There are many reasons that a citizen may prefer [concealed carry] for [public] defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker . . . . Whatever the reason, [concealed carry is] the most popular [mode of carry] chosen by Americans for self-defense . . . .[149]

Just as the Court recognized the quintessential role of handguns in self-defense, a plaintiff seeking a right to concealed carry would have a similarly strong case.[150] 12.8 million Americans held concealed carry permits in 2015.[151] Concealed carry is more respectable to the community and persons made uncomfortable by the sight of a weapon.[152] Indeed, open carry is now the *uncommon* mode of carry in the United States.[153]

While the common use test mirrors the consistency level adopted by the *Heller* majority to fulfill the constraint principle under new

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149 *Heller*, 554 U.S. at 629.

150 There is minimal data available concerning the popularity of modes of carry. *See* Bishop, *supra* note 17, at 923–25. Professor Eugene Volokh and James Bishop, among other scholars, have already put forward arguments that concealed carry is preferred among most Americans and is the preferable mode of carry from a policy perspective. *See infra* note 152 and accompanying text.

151 This does not include people in states requiring no permit for concealed carry. CRIME PREVENTION RESEARCH CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES 6 (July 16, 2015), http://crimeresearch.org/wp-content/uploads/2015/07/2015-Report-from-the-Crime-Prevention-Research-Center-Final.pdf. This represents a 15.4% increase in concealed carry permits in a single year, resulting in approximately one in twenty American adults having a permit. *See id.* at 4.

152 *See* Volokh, *supra* note 116, at 1523; Bishop, *supra* note 17, at 925–27.

153 Volokh, *supra* note 116, at 1523.

originalism, other originalists have proposed alternative constructions to account for the vagueness of "bear" in the Second Amendment.[154] The most prominent example, the alternative outlet doctrine, fails to mirror *Heller*'s approach to construction.

D. Problems with the Alternative Outlet Doctrine

Recall that the alternative outlet doctrine construes "bear" to include a limitation in which states may dictate the mode of publicly carrying a firearm, whether open or concealed.[155] This construction employs a more restrictive approach to the constraint principle when compared to the common use model set forth in *Heller*. Advocates for the alternative outlet doctrine, such as Professors Michael O'Shea and David Kopel, constrain their construction of "bear" primarily according to a series of nineteenth century Southern antebellum state court cases.[156] These Southern states constituted a vocal minority of states employing one of the most restrictive understandings of the Second Amendment at the time: the alternative outlet approach.[157] Alternative outlet proponents argue that any construction accounting for the scope problem of "bear" must be consistent with these Southern cases.[158] By attempting to establish a test consistent with the Southern cases, however, the alternative outlet doctrine becomes governed by the lowest common denominator of a vocal minority of states whose political backdrop for gun control has drawn scrutiny from both scholars and courts.[159] On the contrary, a large number of states in the North and West legally allowed for concealed carry in the nineteenth century.[160] This would explain why there were no cases addressing

154 *See* Bishop, *supra* note 17, at 921–22 (arguing that the alternative outlet doctrine is an originalist approach).

155 *See supra* text accompanying note 17.

156 *See, e.g.*, O'Shea, *supra* note 18, at 624–37 (relying on antebellum state supreme court cases).

157 *See, e.g.*, *id.* at 640 ("[M]ost, but not all, judges concluded that concealed carrying of common weapons could be prohibited as long as open carry remained legal . . . .").

158 *Id.* at 623 (attributing "clear weight" to the authority of the Southern antebellum cases).

159 *See, e.g.*, *infra* notes 161–62.

160 *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359, 1403 [hereinafter Kopel, *The Second Amendment*] (noting that "outside the Southeast and the state of Indiana, there were no concealed weapons laws or any other sort of gun control at all"). Numerous states adopted near-identical statutes permitting public carry of any kind so long as the carrier did not cause another citizen to reasonably fear injury or breach of the peace. *See* David B. Kopel, *The First Century of Right to Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y 127, 175 n.345 (2016) [hereinafter Kopel, *The First Century*]; Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. F. 121, 130–33 (2015) (citing 1836 Mass. Acts 750).

concealed carry in these states—they did not ban the practice. The only major historic legal opinions addressing the question arise from the states who banned concealed carry and whose courts were ruling against a political backdrop of slave uprisings and racial strife.[161] Indeed, scholars and judges have indicated hesitation in giving dispositive weight to these decisions based on concerns of endemic racial discrimination,[162] peculiar customs of Southern masculinity,[163] and distinction from the historical majority of states.[164]

Contrary to the alternative outlet approach, the common use test better fulfills the criteria for an originalist construction when applied to concealed carry because it mirrors the constraint principle as applied in *Heller* itself. In *Heller*, the term "arms" had a simple interpretation of bearable weapons, creating a scope problem later solved by the common use test.[165] Although many of the Southern cases cited in *Heller* (and now also by the alternative outlet approach) construed the Second Amendment to only protect the types of weapons used in "civilized warfare," the Court nonetheless rejected those cases as suitable constraints for the common use test construction of "arms."[166] This, however, was not a problem for the majority because the common use test for "arms" nonetheless "accords with the historical understanding of the scope of the right" despite Southern antebellum cases holding otherwise.[167] Because the common use test for "arms" better coin-

161 *See* Kopel, *The First Century*, *supra* note 160, at 140–84. Following the Nat Turner slave revolt in Virginia, "[a]mong the measures that slave states took was to further restrict the right to carry and use firearms." Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 338 (1991); *see also* Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 18 (1995) ("Nat Turner's Rebellion in 1831 caused the South to become increasingly irrational in its fears.").

162 One Ohio Supreme Court judge dissented when that court relied on the Southern cases, arguing that "Southern States have very largely furnished the precedents. *It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions*." Cramer, *supra* note 161, at 21 (quoting State v. Nieto, 130 N.E. 663, 669 (Ohio 1920)). Another judge in Florida commented that an 1893 handgun regulation "was never intended to be applied to the white population and in practice has never been so applied." *Id.* (quoting Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially)).

163 *See, e.g.*, State v. Chandler, 5 La. Ann. 489, 489–90 (1850) (citing the state's motivation in banning concealed carry in accordance with the Second Amendment's purported purpose "to incite men to a manly and noble defence of themselves . . . without any tendency to secret advantages and unmanly assassinations.").

164 *See supra* note 160 and accompanying text.

165 *See* District of Columbia v. Heller, 554 U.S. 570, 581–82, 627 (2008).

166 *E.g.*, Kopel, *The First Century*, *supra* note 160, at 185; Kopel, *The Second Amendment*, *supra* note 160, at 1421 (quoting Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840)).

167 *See Heller*, 554 U.S. at 625.

cided with a *plain* original public meaning, it superseded contradictions with the civilized warfare precedent cases cited throughout the opinion.[168] If *Heller* had employed a consistency level as restrictive as the alternative outlet construction, it would have never applied the common use test, and instead would have forced itself to construe "arms" according to the civilized warfare cases. This would have forced the Court to evaluate whether Mr. Heller's handgun is the type necessary for modern civilized warfare rather than common use for lawful purposes.

E. Is the Common Use Test Circular?

Another counterargument against *Heller*'s common use test, as applied to Second Amendment questions in general, focuses on possible scenarios of circularity.[169] Under this theory, for example, the legislature could prevent a new firearm from rising to the level of common public use by banning its production immediately upon invention.[170] Despite such a possibility, the Court nonetheless introduced the common use test. Either the Court simply failed to consider a circularity outcome and the opinion suffers from a fatal flaw or, as applied, the test is sufficiently limited to avoid circularity. Here, the text of the opinion indicates that the Court constrained its construction of the Second Amendment according to an underlying principle based on "the *reliance* of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms."[171] The facts of *Heller* limited the application of the common use test to a category of firearm ownership—handguns—that a substantial portion of the populace was already *relying* on as their chosen instrument of self-defense.[172] The Court did not apply the common use framework to a fact pattern involving a recent technological development not yet relied upon. While the circularity argument no doubt presents some interesting hypotheticals for Second Amendment questions about 3D-printed firearms or other future developments, it does not apply to the narrow facts of *Heller* nor would it for concealed carry. The notion of concealed carry is not novel. This, like *Heller*, is

168 *See, e.g.*, *id.* at 613 (citing *Aymette*, 21 Tenn. (2 Hum.) at 158); Kopel, *The First Century*, *supra* note 160, at 185.

169 *See* Michael P. O'Shea, *The Right to Defensive Arms After* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 384–86 (2009).

170 *See id.* at 384–85.

171 *Heller*, 554 U.S. at 624 n.24 (emphasis added).

172 *See id.* at 628 (labeling handguns as "an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense]").

not an instance where the legislature has prevented the practice from becoming a common use. Pistol owners have been able to easily conceal them from sight since the advent of the flintlock mechanism in the seventeenth century.[173]

The common use test resolves the scope problem of "bear" with better finality and consistency than the alternative outlet approach. In the case of a may-issue challenge, for example, the Court would only need to determine whether concealed carry is a mode of carry in common use by law-abiding citizens for lawful purposes. The Court should adopt *Heller*'s interpretation of "bear," meaning to simply carry.[174] In response to the scope problem left unresolved by interpretation, the Court should then engage in construction according to the same constraints used in *Heller*. Under a common use construction, the parties would present evidence based on text, history, and tradition as to whether concealed carry has been and remains a common mode of carry. This approach does *not* ask the court to weigh a mode of carry against another mode, but instead to objectively determine, like the Court did in *Heller,* whether the mode of carry is sufficiently common among Americans for self-defense.

If the Supreme Court extends the common use test to concealed carry, the scope of a citizen's constitutional right to bear arms for self-defense would be uniform across the states. Under the alternative outlet approach where each state determines the legal mode of carry, the scope of someone's right to public carry would likely never be uniform across the states. One person who reasonably believes that open carry is too dangerous could be left with no recourse to publicly defend herself in a may-issue state, while someone with the same beliefs could exercise her right in a shall-issue state.

Conclusion

Proponents of gun control should not fear the categorical approach—it relieves states of their burden to justify gun regulations under heightened scrutiny or interest-balancing. So long as the regulation does not ban or functionally prohibit a right within the scope of the Second Amendment, the state has expansive power to impose a wide array of requirements. Under a categorical approach, the burden on the right is the only consideration. So if the state wanted to require

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173 Dennis Adler, *Blackpowder Pistols & Revolvers*, RealWorldSurvivor: Am. Frontiersman (Sept. 24, 2014, 9:03 AM), http://www.realworldsurvivor.com/2014/09/24/blackpowder-pistols-revolvers/#wheelock-mechanism [https://perma.cc/DQ3G-Q45A].

174 *Heller*, 554 U.S. at 584.

a permit qualification course over three weekends of training, for example, so long as a court does not hold the training to be so burdensome that it constitutes a functional ban, the state can require this. In addition, *Heller* still supports presumptive constitutionality of restrictions on carrying firearms in sensitive places and restricting access for criminals and the mentally ill.[175]

The right to concealed carry for many is synonymous with the right to self-defense itself. This mode of carry is rapidly growing in popularity among numerous demographics, with women permit holders increasing by 270% since 2007.[176] In the wake of Justice Thomas's 2015 indication of wanting to resolve the apparent circuit misinterpretation of *Heller*'s standard of review, the possibility of the Court taking on a Second Amendment case only grows stronger. Whether the Court is able to build upon *Heller*'s originalist framework will likely turn on the new composition of the Court following Justice Scalia's passing and on Justice Kennedy's willingness to expand or curtail the scope of the Second Amendment.[177] Regardless of one's opinion of *Heller* and gun control issues, it is critical to objectively determine the controlling doctrinal framework established by the majority in order to prepare the most persuasive arguments for future Second Amendment questions.

175 *See id.* at 626.

176 Crime Prevention Research Ctr., *supra* note 151, at 10.

177 *See* Solum, *supra* note 8, at 980–81.