SECOND AMENDMENT REALISM

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In District of Columbia v. Heller*, the Supreme Court declared a constitutionally protected individual right to keep and bear arms. Subsequently, the scope of the right has been hotly debated, resulting in circuit splits and lingering questions about what, exactly, the right entails. Despite these splits, the Court has denied certiorari to the myriad gun cases to land on its doorstep. But the balance of the Court has shifted and, so too, has its willingness to hear these cases. Among the most pressing questions in Second Amendment jurisprudence is the constitutionality of public carry restrictions. With the Court set to rule on Second Amendment protections beyond the home, the issue demands scrutiny not simply for the outcome but for how the Justices consider the question in light of a growing gun violence epidemic. This Article argues against a rights-as-trumps approach that focuses on history, instead using a population-based perspective to shift the focus from the scope of the right and properly place the rights and liberties of the general public into the equation. This Article uses public health law principles, such as social determinants, balancing the protection of the public with safeguarding individual rights, and empirics, to examine the true burden on self-defense in comparison to the state's ability to protect the wider community. In doing so, this analysis proposes a constitutional approach anchored in the realities of our time as opposed to competing historical research methodologies, which more appropriately respects both the individual right declared in* Heller *and the state's interest in protecting its citizens from a public health crisis.*

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INTRODUCTION

In granting certiorari for *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court seems poised to finally address whether and to what degree the Second Amendment exists in the public sphere.[1] With *District of Columbia v. Heller* focused on the Second Amendment right in the home, evaluating the right in the public sphere is the logical next step.[2] Despite all its opacity, *Heller* appears to indicate that a total ban on carrying firearms in public is unconstitutional.[3] In an attempt to balance the interests of the public and Second Amendment rights, some cities and states have limited carrying firearms in public to those who

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1 141 S. Ct. 2566 (2021) (mem.) (cert. granted).

2 Rogers v. Grewal, 140 S. Ct. 1865, 1867–68 (2020) (Thomas, J., dissenting) (finding the circuit split over the right to public carry means "it is clearly time for us to resolve the issue").

3 *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (finding the D.C. handgun ban unconstitutional under any standard of review).

> And under *Heller I*, "complete prohibition[s]" of Second Amendment rights are always invalid. . . . We would flout this lesson of *Heller I* if we proceeded as if some benefits could justify laws that necessarily destroy the ordinarily situated citizen's right to *bear* common arms—a right also guaranteed by the Amendment, on the most natural reading of *Heller I*.

Wrenn v. District of Columbia, 864 F.3d 650, 665 (D.C. Cir. 2017) (alteration in original); *see also* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (striking down Illinois's public carry ban); Young v. Hawaii, 896 F.3d 1044, 1072 (9th Cir. 2018) (declaring Hawaii's concealed carry law unconstitutional in part because no concealed carry license had ever been granted).

truly need it—those who have a "good cause."[4] Circuit courts split over the constitutionality of these laws, how to analyze them, and the degree to which *Heller* provides any guidance in determining their validity.[5] Despite the underdeveloped status of the Second Amendment and the circuit courts attacking one another's methodologies and conclusions, the Supreme Court had been reluctant to wade into these troubled waters.[6] But this changed with a new composition of the Court.

The only consensus in Second Amendment discourse is its lack of clarity.[7] Debates have raged over nearly every aspect of the protections the Amendment affords, including who qualifies as a rights holder, what garners protection, when individuals can demand access, and where the rights can be exercised.[8] With each open question—and the list is quite lengthy—the entirety of the legal academy has searched through historical records,[9] various legal theories,[10] empirical

4 *See, e.g.*, N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2021) ("A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to . . . have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof.").

5 *See infra* Section I.A.

6 *See Rogers*, 140 S. Ct. at 1865 (denying certiorari); *see also* Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting) ("This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments.").

7 *See, e.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 88 (2d Cir. 2012) ("*Heller* provides no categorical answer to this case. And in many ways, it raises more questions than it answers."); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 681 ("On the one hand, the *Heller* Court recognized, for the first time, that the Second Amendment protected the fundamental right of 'law-abiding, responsible citizens' to own firearms. On the other, it recognized that this right was not 'unlimited' and observed that longstanding prohibitions on the possession of firearms by felons and the mentally ill are 'presumptively lawful.'" (internal citations omitted)); *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 378 (2009) ("The general consensus is that *Heller* failed to provide a framework by which lower courts could judge the constitutionality of gun control."); Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009) ("What theory, if any, can explain the Court invalidating the District of Columbia handgun ban, while simultaneously upholding the laws referenced in the exceptions?").

8 *See* Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053, 1063–70 (2020) (describing the uncertainty and various debates among the lower courts).

9 *See, e.g.*, Larson, *supra* note 7, at 1374–78 ("One searches in vain through eighteenth-century records . . . .").

10 *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192 (2008) (explaining how *Heller* contains elements of both originalism and living constitutionalism); Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 248 (2008) (describing *Heller* as "a narrow ruling with strong minimalist features"); Blocher, *supra* note 7, at 404–13 (observing both categoricalism and

methodologies,[11] other established doctrines,[12] and especially the Supreme Court's opinion in *Heller* for some clear rationale to address the issue at hand.[13] As the lower courts' disarray suggests, the reliance on these sources has been unhelpful in developing a cogent doctrine. The contradictory logic and conclusions of *Heller* make it difficult to use as guidance with any consistency.[14] Meanwhile, a search through history for consensus on the exact boundaries of the Second Amendment right has been fraught with inconsistency.[15] The result has been constitutional clutter.

Second Amendment doctrine needs clarity, especially with respect to public carry, and the Court's probable focus on history is unlikely to help—as the current chaos in the lower courts demonstrates. This Article provides a straightforward and pragmatic path informed by empirical data and public health law principles. Instead of searching through historical documents to determine the boundaries of the Second Amendment right, this Article accepts *Heller*'s proclamation that the Constitution protects an individual right to keep and bear arms

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balancing in *Heller*); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 90 (2013) [hereinafter Blocher, *Firearm Localism*] ("[F]irearm localism might address ongoing Second Amendment debates . . . ."); Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 337 (2021) (noting that Justice Scalia invited constitutional borrowing by invoking First Amendment principles in *Heller*).

11 *See, e.g.*, Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1285–86 (2003); Ian Ayres & John J. Donohue III, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977–2006*, 6 ECON. J. WATCH 218 (2009); John J. Donohue, Abhay Aneja & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198, 240 (2019) (using panel data and synthetic control estimates to undermine the more guns, less crime hypothesis).

12 The First Amendment has been the most popular destination for guidance. *See, e.g.*, Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479 (2014); Joseph Blocher, Response, *Second Things First: What Free Speech Can and Can't Say About Guns*, 91 TEX. L. REV. SEE ALSO 37 (2012); Joseph Blocher & Bardia Vaseghi, *True Threats, Self-Defense, and the Second Amendment*, 48 J.L. MED. & ETHICS 112 (2020); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014); Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Jordan E. Pratt, *A First Amendment-Inspired Approach to* Heller*'s "Schools" and "Government Buildings,"* 92 NEB. L. REV. 537 (2014); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009). But it is certainly not the only doctrine that has been looked to for guidance. *See, e.g.*, Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013).

13 *See infra* Section I.A.

14 *See* David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1447–53 (2014).

15 *See infra* Section I.A.

and presumes, as a starting point, that the right is quite broad. As a result, rather than fight over the elusive scope of the right, the analysis then shifts to the state's interest in limiting that right in light of a growing gun violence epidemic.[16] Courts should not view Second Amendment struggles through a lens of individual rights versus an oppressive government.[17] A more precise interpretation is a conflict of rights between those who wish to carry firearms and those who ask their elected officials to protect their freedoms and liberties by reducing the threat of gun violence in shared public spaces.[18]

This framing is particularly important because it diminishes the significance of history and the scope of the right, which is essential to a "rights-as-trumps" approach to the Second Amendment. At its simplest, the rights-as-trumps view is that the existence of a right limits the ability of the government to justify limiting that right.[19] As Ronald Dworkin—most commonly associated with this framework—argued, to subject a right to limitations based on the common good is to deny the right's existence altogether.[20] This conceptualization would be particularly useful to those arguing for a strong right to public carry. But, as Professor Jamal Greene states, it ignores the fact that "[o]ur rights culture cannot constitute us unless all rights count, and all rights cannot count if all rights are absolute."[21] As Professor Greene accurately puts it, "Because the rights-as-trumps frame cannot accommodate conflicts of rights, it forces us to deny that our opponents have them."[22]

A public health–informed perspective provides a potential path forward.[23] Public health is about finding a balance between risks and

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16 Then-Judge Amy Coney Barrett argued for this approach in her *Kanter v. Barr* dissent:

> In other contexts that involve the loss of a right, the deprivation occurs because of state action, and state action determines the scope of the loss . . . . So too with the right to keep and bear arms: a state can disarm certain people (for example, those convicted of crimes of domestic violence), but if it refrains from doing so, their rights remain constitutionally protected.

919 F.3d 437, 452–53 (7th Cir. 2019). In Justice Barrett's reading, "[T]he 'scope of the right' approach is at odds with *Heller* itself." *Id.* at 453.

17 *See* District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (discussing the connection between the right to keep and bear arms and a concern over an oppressive government).

18 Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS 11, 12 (2020) (describing the connection between protecting people from gun violence and their ability to exercise other freedoms and rights); *see also* Ulrich, *supra* note 8, at 1073 (connecting health with the ability to enjoy other rights).

19 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191 (1977).

20 *Id.* at 192.

21 Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 34 (2018).

22 *Id.*

23 *See* Ulrich, *supra* note 8, at 1057.

rights.[24] A population-based perspective informed by empirical research shapes a more informed analysis, one that acknowledges the limitations of personal responsibility in protecting and promoting one's well-being. This lens benefits from limiting the power of constitutional rhetoric detached from real-world complexity and incorporating essential public health tenets such as social determinants. The constitutional question then is whether a state is authorized to take proactive measures—such as limiting, but not eliminating, firearms in public—or whether they must rely on reactive criminal enforcement to address gun violence.[25]

This Article argues for the importance of a population-based analysis informed by empirics in three Parts. Part I examines the current disagreements among lower courts regarding the right to carry. It then highlights the manner in which a reliance on history contributes to the uncertainty and stalled development of Second Amendment jurisprudence. Part II reframes the analysis by placing the Second Amendment in a contemporary context. It utilizes a population-based view to highlight the tension between gun owners' rights to carry in public and the impact a proliferation of firearms in community settings can have on the larger populace. Finally, Part III investigates the claims on each side of the equation. Rather than rely on the problematic tendency of courts to employ a rights-as-trumps approach, which obscures the reality of this country's gun violence problem, public health reminds us that all people are rights-bearers. Using empirics to investigate the true burden of a public carry restriction, this Part concludes that the individual burden is likely outweighed by the government's compelling interest in protecting the public, justifying at least some public carry restrictions. In doing so, this Article presents a balanced approach that looks not merely for the scope of the right but investigates the justification the state has for limiting that right to protect the broader public.

I. THE PUBLIC CARRY PROBLEM

Though the D.C. law challenged in *Heller* did prohibit carrying handguns in public, the Court limited its examination to the regulation of handguns in the home. But in attempting to define the contours of

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24 WENDY K. MARINER, GEORGE J. ANNAS, NICOLE HUBERFELD & MICHAEL R. ULRICH, PUBLIC HEALTH LAW 3 (3d ed. 2019) ("Public health is all about finding a balance between risks and rights—how to identify, characterize, classify, quantify, prevent, or least control risks to the public without negatively affecting human rights.").

25 *See infra* Part III.

an individual Second Amendment right, the *Heller* majority wrote that the right to carry a firearm was grounded not simply in self-defense, but "for a particular purpose—confrontation."[26] Confrontations can occur anywhere and certainly outside of the home.[27] Yet, the Court left the question of whether, or to what degree, the right of self-defense extends beyond the home for lower courts to decide.[28] Unanimity was unlikely and, as expected, was not the result. As the next Section will demonstrate, the only consensus that emerged from the circuit courts in determining the right to carry firearms in public is that *Heller* provides little in terms of definitive guidance.[29] And lower courts' efforts to find guidance from the annals of history has proven similarly unhelpful.[30]

A. *Lower Court Chaos*

The manner in which states handle carrying firearms in public essentially falls into three categories: permitless carry, shall-issue, and may-issue.[31] The least restrictive is permitless carry because an

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26 District of Columbia v. Heller, 554 U.S. 570, 584 (2008). The majority actually used language from a prior Justice Ginsburg opinion to further support this holding: "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in case of conflict with another person.'" *Id.* (alterations in original) (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

27 Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012) ("Confrontations are not limited to the home.").

28 *Heller*, 554 U.S. at 635 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . .").

29 Kachalsky v. County of Westchester, 701 F.3d 81, 88 (2d Cir. 2012). The word "definitive" is important. The *Heller* opinion has been criticized for the ambiguous and often contradictory statements made within it. Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald, 21 CORNELL J.L. & PUB. POL'Y 489, 499–507 (2012). While one particular aspect of the opinion might provide guidance in one direction or another with regard to gun rights in the public sphere, there is inevitably another point in the opinion that could be construed as suggesting just the opposite. *See* Larson, *supra* note 7, at 1386 (explaining that the originalist analysis the Court uses at times cannot be used to explain the presumptively lawful exceptions listed in the same opinion).

30 *See infra* Section I.A.

31 Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1923 (2017). Giffords Law Center categorizes the laws in four groups, distinguishing between shall-issue states with no discretion and shall-issue states with limited discretion. *Guns in Public: Concealed Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/#state [https://perma.cc/6VXB-EV7K]. This distinction is ultimately less

individual does not need a permit to carry a firearm in public.[32] Instead, the primary restriction comes from determining who is able to legally own a firearm.[33] However, there may be restrictions such as limiting permitless carry to state residents or prohibiting carry in certain spaces.[34]

A slightly more restrictive public carry regime is a shall-issue law. Under shall-issue statutes, a license is required to carry a firearm in public.[35] However, the licensing authority has no discretion in providing these licenses.[36] The law lays out the criteria for who is eligible, and as long as an individual qualifies, the state must grant them a license for public carry.[37] The requirements vary by state but may include minimum age, residency, background checks, safety training, and payment of fees. How restrictive the shall-issue law is varies based on state requirements, where a state might mandate all of the requirements listed above or none of them.

Because these two prior categories are considered permissive, their constitutionality is not the focus of those who wish to carry their firearms in public more easily. Gun rights advocates consider the may-issue permitting scheme unconstitutionally restrictive because it grants discretion to those who issue carry permits—typically members of law enforcement—to determine whether an individual warrants a permit.[38] Again, the exact mechanics of this type of public carry regime vary by state. Some may-issue regulations have installed appeal processes and require the state to provide reasons for denial. Other states have neither. Still, other may-issue states act essentially as shall-issue states by removing the discretion in practice.[39]

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relevant for purposes of this Article, where the focus is on requirements above a general desire for self-defense.

32 *See Guns in Public: Concealed Carry*, *supra* note 31.

33 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3102 (2010).

34 Some states may allow firearms to be carried in public without a permit but restrict their ability to be used by mandating they be unloaded and in a container, for example. Given that this Article is focused on the constitutionality of public carry with regard to weighing the right to self-defense against the potential risk to the public, states allowing public carry but not in a manner in which it is ready for use in self-defense are not considered permitless states.

35 *See, e.g.*, ALA. CODE § 13A-11-75(a)(1)a (2019).

36 *See, e.g.*, *id.*

37 For example, the Alabama statute specifies factors the sheriff may consider, but they all relate to mental health. *Id.*

38 Kachalsky v. County of Westchester, 701 F.3d 81, 86–87 (2d Cir. 2012).

39 *See, e.g.*, IND. CODE § 35-47-2-3(f) (2019). While the statute requires "a proper reason" for an individual to be eligible to carry a firearm, a desire to carry a gun for self-defense qualifies and cannot be evaluated by the licensing individual or body. Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980).

Though the focus of this Article is on public carry generally, it also addresses a specific type of may-issue permitting known as good cause or proper cause regulations. These laws are of particular interest most obviously because they are at the heart of *New York State Rifle & Pistol Ass'n v. Bruen*, the most important Supreme Court Second Amendment case since *Heller*.[40] But more generally, these laws are critical to examine because they highlight the essential question in every gun-related regulation: how to balance protecting the public and individual rights. These restrictions require individuals who wish to carry a firearm in public to show why they need the permit, which typically must be a need above a general desire for self-defense that distinguishes them from the general public.[41] And it is the fact that the general desire for self-defense does not qualify that has brought into focus the constitutional tension between individual rights and state authority to restrict public carry for the good of the community.

These good cause regulations have been upheld and struck down by circuit courts, with a variety of justifications and analytical tools used. The lack of consensus, not only in terms of outcome but how to approach the question, demonstrates the vast ambiguity left by *Heller*. The courts could not agree on what *Heller* says about the core of the Second Amendment and its scope of protections outside the home. They could not agree on the standard of review or how history should factor into constitutional analysis of proper cause restrictions. The courts could not even agree on what category this type of law should fall into, with some judges evaluating the restrictions as a complete ban despite the fact that the regulation does not actually ban all individuals from carrying firearms in public. And, most importantly for this Article, the degree to which these decisions discuss gun violence, if at all, varies greatly.

In *Kachalsky v. County of Westchester*, one of the first cases to address one of these restrictions, the Second Circuit upheld New York's handgun-licensing plan that required applicants to show proper cause to obtain a license to carry a concealed firearm in public.[42] It is important to note that New York prohibited open carry completely as well, though *Kachalsky* focused strictly on the right to carry a concealed weapon in public.[43] As discussed below, some courts address both methods of carry—concealed and open—in tandem, stressing that the critical constitutional question is to what degree the Second

40 N.Y. Rifle & Pistol Ass'n, Inc. v. Beach, 818 F. App'x 99 (2d Cir. 2020) (mem.), *cert. granted sub nom.*, N.Y. Rifle & Pistol Ass'n, Inc. v. Corlett, 141 S. Ct. 2566 (2021).

41 *Kachalsky*, 701 F.3d at 86.

42 *Id.* at 84.

43 *Id.* at 86.

Amendment right extends beyond the home.[44] Other courts, such as the Second Circuit in *Kachalsky*, simply looked at what the challenged law specifically regulated. This Article focuses on the broader category of public carry because, while each may have unique impacts on public health and safety, both place the public at risk.[45]

Since 1913, individuals in New York who wish to carry a concealed firearm in public must show proper cause, which over time courts have held is "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession," as determined by a licensing officer (often local judges).[46] Though the statute did not define "proper cause," state courts determined that "[g]ood moral character plus a simple desire to carry a weapon [was] not enough. Nor [was] living or being employed in a 'high crime area.'"[47] The Second Circuit found no guidance from *Heller* in determining the constitutionality of the "proper cause" regulation.[48] The court rejected the notion that it must rely solely on text, history, and tradition to determine constitutionality; but, more importantly, the court found that even if it believed this were the proper approach, the historical record is ambiguous because there is no apparent consensus with regard to good cause restrictions.[49] The court even went so far as to question the validity of relying on historical analogues to determine the constitutionality of modern statutes: "Analogizing New York's licensing scheme (or any other gun regulation for that matter) to the array of statutes enacted or construed over one hundred years ago has its limits."[50]

Instead, the court opted for a more traditional form of constitutional analysis, utilizing heightened scrutiny because the regulation places "substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public."[51] However, the Second Circuit's interpretation of *Heller* and *McDonald* is that "Second Amendment guarantees are at their zenith within the home."[52] As a

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44 *E.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 663 (D.C. Cir. 2017).

45 For example, concealed carry makes it more difficult for people who wish to minimize their presence near firearms to take proactive steps to do so. Meanwhile, open carry has the potential to cause stress, anxiety, and other mental duress for those intimidated and fearful of guns as well as those who have had prior traumatic exposure to them.

46 *Kachalsky*, 701 F.3d at 86–87.

47 *Id.* at 87 (internal citations omitted).

48 *Id.* at 88 ("*Heller* provides no categorical answer to this case.").

49 *Id.* at 91. The court found nothing in the record that directly addressed the constitutionality of proper cause restrictions. *Id.*

50 *Id.*

51 *Id.* at 93.

52 *Id.* at 89.

result, it did not believe strict scrutiny was the applicable standard here and instead applied intermediate scrutiny.[53] The court ultimately determined the state's decision to limit public carry to those with proper cause was substantially related to the state's interest in protecting public safety.[54]

But while public safety is mentioned as the state's interest, the Second Circuit's primary analysis still revolved around historical digging and its interpretation of *Heller*. In fact, while the court rejected the notion that analyzing history is the applicable analytical standard, most of the opinion is spent looking to the past.[55] The court actually spent no time on the state's interest in protecting the public and the current threat of gun violence. They simply accepted the state's interest in public safety and crime prevention as compelling and moved on.[56] And, perhaps surprisingly, the court again went back to the historical record to find the state's justification. The court discussed the legislative record for the statute and emphasized the importance of judicial deference to legislative assessments of conflicting evidence for public policy choices.[57] But, while the original legislative record and deference to legislative judgment may be relevant, the analysis of such a hotly debated constitutional question would seem to warrant more than what policymakers thought over a century ago.

In *Woollard v. Gallagher*, the Fourth Circuit agreed with much of the Second Circuit's reasoning.[58] When looking to *Heller*, the Fourth Circuit also found carrying firearms in public to be outside core Second

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53 *Id.* at 93. The court cited to cases from the First, Third, Fourth, Tenth, and D.C. Circuits in reaching this conclusion, though none of the cases it mentioned are for public carry. *See id* at 93 n.17. The court also made a point to note that infringing on an enumerated right does not always trigger strict scrutiny, using the regulation of commercial speech as an example. *Id.* at 93–94 ("It is also consistent with jurisprudential experience analyzing other enumerated rights. For instance, when analyzing First Amendment claims . . . laws regulating commercial speech are subject to intermediate scrutiny."). For more on this common misconception, see Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006). For more on how this applies in cases involving public health and safety, as public carry certainly does, see Ulrich, *supra* note 8, at 1079–84.

54 *Kachalsky*, 701 F.3d at 98.

55 *Compare id.* at 89 n.9, *with id.* at 89–91. The court looks back to history again to justify the use of intermediate scrutiny by discussing historical evidence of states regulating firearms in public. *Id.* at 94–96 ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

56 *Id.* at 97 ("As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention. The only question then is whether the proper cause requirement is substantially related to these interests." (internal citations omitted)).

57 *Id.* at 97–98.

58 *See* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

Amendment protections.[59] And citing *Kachalsky*, it held that historical research supported the notion that firearm rights have been more limited outside of the home due to concerns of public safety.[60] Therefore, it also applied intermediate scrutiny.[61]

The Fourth Circuit, however, did provide slightly more detail about the state's interest, and the connection between the good cause restriction at issue and that government interest. Relying on legislative findings, the court focused primarily on reducing harm caused by criminals.[62] While this is no doubt important, it obscures the broader risk of harm presented by a potential proliferation of firearms in public.[63] The court did mention one other state interest that is particularly relevant: "[A]dditional regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the *rights and liberties of the public*."[64]

Here, the court properly framed the tension as not simply one of individual rights versus government regulation, and not simply about individual self-defense versus public safety. Rather, this stated interest makes clear that limiting gun violence is a means of defending other constitutionally protected rights and liberties of the public.[65] Unfortunately, the Fourth Circuit did not analyze or discuss this interest in any detail and did not return to it during the second step of the intermediate scrutiny analysis. Instead, the court concluded that the good cause restriction advanced the state's objectives, largely by decreasing the number of handguns carried in public.[66]

Each of these cases upheld the power of the state to limit carrying firearms in public to those who can demonstrate a specific need to do so, but the cases did so by primarily looking back in time. Each spent the bulk of its analysis examining historical records of what the Second

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59 *Id.* at 874.

60 *Id.* at 876.

61 *Id.*

62 *Id.* at 876–77.

63 *See infra* Section III.A.

64 *Woollard*, 712 F.3d at 876–77 (emphasis added).

65 *See infra* Section II.B.

66 *Woollard*, 712 F.3d at 879–80. Specifically, the court listed that reducing the number of handguns in public decreases availability of handgun theft by criminals, lessens the likelihood of basic confrontations turning deadly, averts consequences that can result from a third party during a confrontation between officer and criminal, reduces handguns during routine encounters between police and citizens, minimizes the number of handgun sightings that must be investigated, and facilitates the identification of individuals carrying handguns who pose a threat. *Id.*

Amendment protects to support its interpretation that *Heller* finds the core of the right to be within the home.

The Third Circuit, by contrast, came to the same conclusion in *Drake v. Filko*, but eschewed a historical examination and refused to determine whether and to what degree the Second Amendment protections extend into the public sphere.[67] Even if Second Amendment protections do extend beyond the home, the Third Circuit argued that *Heller*'s references to presumptively lawful, long-standing prohibitions established that there are exceptions to the right.[68] Here we have yet another variation of a *Heller* interpretation. The Third Circuit interpreted the Supreme Court's declaration that long-standing prohibitions are presumptively lawful to mean limitations that are long-standing are exceptions to the right and are not within the scope of the Second Amendment.[69]

In *Heller*, one of the long-standing prohibitions listed is the prohibition of possession of firearms by felons.[70] However, the Supreme Court noted the list of long-standing prohibitions was not exhaustive. The Third Circuit identified that New York's proper cause restriction was adopted in the same era as the felon-in-possession laws identified in *Heller*.[71] Since New Jersey's regulation is substantially similar to New York's—and was adopted only eleven years later—the Third Circuit considered this a long-standing prohibition.[72] Consequently, the Third Circuit determined that a justifiable need requirement—the language used in the New Jersey statute—for carrying in public did not burden conduct within the scope of the Second Amendment's protections

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67 *See* Drake v. Filko, 724 F.3d 426, 429–31 (3d Cir. 2013). Still, the court agreed with the assessment in *Kachalsky* that the historical record does not speak with one voice. *Id.* at 431.

68 *Id.* at 431–32. The portion of the *Heller* opinion the Third Circuit relied on reads:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). Then in a footnote, the court clarified that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

69 *Drake*, 724 F.3d at 432.

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

71 *Drake*, 724 F.3d at 433.

72 *Id.* at 432–34.

regardless of whether it was open or concealed carry.[73] This provides yet another method for interpreting *Heller* in evaluating public carry restrictions.

The Ninth Circuit's handling of good cause restrictions is particularly interesting given the tension among its own judges. After initially striking down a good cause requirement, an en banc panel reversed the decision in *Peruta v. County of San Diego*.[74] Rather than use a standard of review as the Second and Fourth Circuits did, the Ninth Circuit held that "the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public."[75] While the conclusion is similar to that of the Third Circuit, the path to that conclusion was, yet again, quite different.

The Ninth Circuit found direct support from *Heller* and its long-standing prohibitions, where the Supreme Court noted that the Second Amendment had not been understood to protect the right to concealed carry.[76] And given *Heller*'s reliance on a historical review, the Ninth Circuit went through the historical record and determined there was no evidence to suggest the Second Amendment protected a right to concealed carry at all.[77] Thus, any limitation on concealed carry was inherently constitutional.[78] Importantly, the court refused to consider the restriction on concealed carry in conjunction with the complete prohibition on open carry.[79] Instead, it made clear that *if* there is a right to public carry, it is only a right to do so openly.[80]

The narrow focus of *Peruta* on concealed carry led to *Young v. Hawaii*, where the Ninth Circuit initially declared a constitutionally

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73 *Id.* at 429; *see also id.* at 433 ("[T]he 'justifiable need' standard . . . in New Jersey must be met to carry openly *or* concealed . . . ."). The Third Circuit went on to say that the restriction would survive intermediate scrutiny analysis, though it came to this conclusion with no data or evidence to support the connection between the state interest and the regulation. *Id.* at 437–40. Instead, the court presumed there is a substantial connection and emphasized the importance of deferring to legislative judgment. *Id.*

74 Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016) (en banc). An individual requesting a license for concealed carry had to demonstrate "a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way." *Id.* at 926. A simple fear for one's safety would not suffice. *Id.*

75 *Id.* at 924.

76 *Id.* at 928. The Ninth Circuit pointed out that later in the *Heller* opinion the Court made clear that, despite striking down the D.C. law, the District was left with a variety of tools, and the Ninth Circuit referred the reader back to the portion of the opinion that states: "For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.*

77 *Id.* at 929.

78 For concealed carry, "any prohibition or restriction a state may choose to impose . . . is necessarily allowed." *Id.* at 939.

79 *Id.* at 941–42.

80 *See id.* ("If there is such a right, it is only a right to carry a firearm openly.").

protected right to open carry.[81] Looking to text, history, and *Heller*, the panel in *Young* found that the Second Amendment's protections must extend beyond the home.[82] Given that *Peruta* closed off the possibility that the Second Amendment protects concealed carry, the protection must be for open carry.[83] Central to the *Young* panel's holding was the fact that to keep and bear arms must be equally protected, and if the Second Amendment codifies self-defense in matters of confrontation, such a threat is not confined to one's dwelling.[84]

With this holding established, dismissing the good cause restriction was simple because the record demonstrated that no cause had ever met the standard and resulted in a public carry license being issued by the State of Hawaii.[85] While the panel in *Young* spent most of its opinion on the historical record, the constitutional analysis was brief. The panel saw the good cause restriction as essentially a ban because this was indeed how it had operated.[86]

But *Young* was reheard en banc, and this time the Ninth Circuit sided with the State.[87] Again, though, we see an opinion steeped in historical analysis, where the court analyzed an array of restrictions on the right to carry firearms in public.[88] According to the en banc panel, the good cause restriction is consistent with those restrictions found in English and American legal history.[89] Consequently, the court held the good cause restriction was "within the state's legitimate police powers" and did not impact a right within the scope of the Second Amendment.[90] Thus, *Young* joins *Peruta* in demonstrating the difficulty—if not impossibility—of finding an objective consensus in what history tells us about the Second Amendment, its scope of protections, or how to interpret the laws from generations prior.

The Court of Appeals for the D.C. Circuit, however, saw the good cause regulation in much the same way the initial *Young* panel did: as a ban for law-abiding citizens. The D.C. Circuit struck down a "good cause" law in *Wrenn v. District of Columbia*, disagreeing strongly with

81 Young v. Hawaii, 896 F.3d 1044, 1074 (9th Cir. 2018).

82 *Id.*

83 *Id.* at 1068.

84 *Id.* at 1070.

85 *Id.*

86 *Id.* at 1071.

87 *See* Young v. Hawaii, 992 F.3d 765, 773 (9th Cir. 2021) (en banc).

88 *Id.* at 784–826.

89 *Id.* at 826.

90 *Id.*

the Second Circuit's prior analysis.[91] The court explicitly rejected the Second Circuit's "hasty inference[s]" in *Kachalsky* that rights merit less protection outside the home, finding instead that the government is obligated to leave alternative channels for an individual to protect themselves in public spaces.[92] The D.C. Circuit looked to *Heller* to determine the scope of the Second Amendment's core protections, focusing on the protection of "individual self-defense" by "law-abiding, responsible citizens."[93] The D.C. Circuit found the *Heller* language about the need being most acute in the home to be no limit on the core, because the underlying value of the Second Amendment right is self-defense, and "the need for that might arise beyond as well as within the home."[94] As the Ninth Circuit ruled in *Young*, the D.C. Circuit also believed that excluding public carry from the core did not treat each aspect of the amendment—to keep *and* bear arms—equally.[95]

Given the finding that public carry was a core right, the *Wrenn* court determined that the D.C. law amounted essentially to a ban for most law-abiding citizens.[96] The D.C. Circuit read *Heller* as requiring a categorical approach to bans, removing its ability to proceed "as if some benefits could justify laws that necessarily destroy the ordinarily

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91 Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017). To carry a concealed weapon in the District, an individual was required to show "'good reason to fear injury to [their] person or property' or 'any other proper reason for carrying a pistol.'" *Id.* at 655 (alteration in original) (quoting D.C. CODE § 22-4506 (2015), *invalidated by* Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017)). The law required "evidence of specific threats or previous attacks that demonstrate a special danger." *Id.* (quoting D.C. CODE § 7-2509.11 (2015), *invalidated by* Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017)). Similar to the New York law upheld in *Kachalsky*, "living or working 'in a high crime area shall *not* by itself establish a good reason' to carry." *Id.* at 656 (quoting D.C. MUN. REGULS. tit. 24, § 2333.4 (2015), *invalidated by* Grace v. District of Columbia, 187 F. Supp. 3d 124 (D.C. Cir. 2016)). The applicant must show a "special need for self-protection distinguishable from the general community." *Id.* at 655 (quoting D.C. CODE § 7-2509.11 (2015), *invalidated by* Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017)).

92 *Id.* at 662. In the opinion of the D.C. Circuit, this analogy to speech-rights doctrine helps to explain the *Heller* acceptance of carry restrictions in sensitive places since individuals would be free to carry in most other settings and avoid those with restrictions. *Id.*

93 *Id.* at 657.

94 *Id.* Looking to *Heller*, "in the Court's own words, the 'right to possess *and carry* weapons in case of confrontation,'" requires such a reading. *Id.* at 658 (quoting District of Columbia v. Heller, 554 U.S. 570 (2008)). However, others have questioned whether self-defense can truly be the sole or even core value of the right as interpreted in *Heller*. *See* Blocher, *supra* note 7, at 413 ("[I]t is difficult to discern the principles or values behind *Heller*'s carve-outs."). "*Heller*'s categoricalism neither reflects nor enables a clear view of the Second Amendment's core values—whatever they may be—and . . . *Heller* therefore fails to justify the constitutional categories it creates." *Id.* at 377–78.

95 *Wrenn*, 864 F.3d at 662.

96 *Id.* at 666.

situated citizen's right to *bear* common arms."[97] This makes it apparent that, according to the D.C. Circuit's interpretation of the Second Amendment, what matters is the individual right and not the rights of others. The court's categorical methodology is a narrow, individualistic approach that ignores both the fact that the regulation is meant to limit firearms in public, not completely ban them, and limit the potential risk to public safety that stems from its approach to constitutional analysis.[98]

The First Circuit then took aim at the historical interpretation found in *Wrenn*, starting another fight over history. Reviewing another "good cause" restriction in *Gould v. Morgan*, the First Circuit said that *Wrenn* relied too heavily on historical information derived from the antebellum South, which it did not believe reflected a national consensus.[99] The First Circuit did not find public carry to be a part of the Second Amendment's core protections, in part because—similarly to the Second Circuit—it held that constitutional rights receive less protection outside the home.[100] But in considering the issue of self-defense specifically, the First Circuit also factored in that outside of the home, "society typically relies on police officers, security guards, and the watchful eyes of concerned citizens to mitigate threats."[101]

The First Circuit found no support in history and no guidance from *Heller* and, therefore, applied intermediate scrutiny to the good cause restrictions, recognizing that "few interests are more central to a state government than protecting the safety and well-being of its

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97 *Id.* at 665. "And under *Heller I*, 'complete prohibition[s]' of Second Amendment rights are always invalid." *Id.* (alteration in original) (quoting *Heller*, 554 U.S. at 629).

98 For the court to determine that the restriction constitutes a ban, it must avoid looking at the statute from a population perspective. Instead, it narrows the focus to the challengers alone. But in doing so, it disregards the state interest for passing the legislation in the first place. It is not to ban these individuals, but to limit the firearms in public to those who truly need it, in an effort to reduce the risk of gun violence in the public sphere. This narrow categorical approach to the rights and interests at stake enables a form of judicial activism. As Professor Joseph Blocher puts it:

> Far from limiting judicial power, categorical opinions like *Heller* tend to increase it by giving judges the extraordinary responsibility of striking down popularly enacted legislation. While limiting judicial discretion is the very purpose of categoricalism, it inevitably increases the power of those who establish the categories in the first place. And since it is usually higher courts—particularly the Supreme Court—that create categorical rules, categoricalism does not reduce the power wielded by the judiciary as a whole but simply takes it away from trial judges weighing interests in individual cases and gives it to appellate judges.

Blocher, *supra* note 7, at 437.

99 Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018). Unlike *Wrenn*, which "relied primarily on historical data derived from the antebellum South," the First Circuit found "no national consensus, rooted in history, concerning the right to public carriage of firearms." *Id.*

100 *Id.* at 671.

101 *Id.*

citizens."[102] Referencing more data than the prior cases had, the First Circuit acknowledged that there was evidence that the restriction was effective in advancing the state's interest in safety, but that this evidence was still open to debate.[103] But, in the court's view, the question was not one of definitive efficacy: "It would be foolhardy—and wrong—to demand that the legislature support its policy choices with an impregnable wall of unanimous empirical studies. Instead, the court's duty is simply 'to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'"[104] According to the First Circuit, the state had made a reasonable choice by providing "a substantial link between the restrictions imposed on the public carriage of firearms and the indisputable governmental interests in public safety and crime prevention."[105]

What we see in the cases above are courts that cannot agree on the historical record, the meaning of *Heller*, the core of the Second Amendment, or the standard of review. Courts that reach the same conclusion do so with different interpretations of critical aspects of the analysis. Those using similar methods come to drastically different conclusions.

Contrary to any claims of objective guidance that history and tradition provide, these cases make it apparent that relying on historical examination is quite fraught. Even the courts who believe history is not dispositive on the outcome of the cases spend much of their opinions mired in historical research methodology and justifying their own analyses and interpretations of documents from centuries ago.[106] Both proponents of gun control and gun rights are unhappy with the uncertainty and inconsistency currently plaguing the Second Amendment doctrine. While some may describe a historical analysis as more objective,[107] the truth is that the indeterminate direction of Second Amendment jurisprudence is more likely a feature than a bug of a

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102 *Id.* at 673. "*Heller* simply does not provide a categorical answer" to the issue of public carry, and "nothing in *Heller* 'impugn[s] legislative designs that comprise . . . public welfare regulations aimed at addressing perceived inherent dangers and risks surrounding the public possession of loaded, operable firearms.'" *Id.* at 668 (alterations in original) (quoting Powell v. Tompkins, 783 F.3d 332, 346 (1st Cir. 2015)).

103 *Id.* at 675–76.

104 *Id.* at 676 (alteration in original) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994)).

105 *Id.* at 674.

106 *See supra* notes 49–57 and accompanying text.

107 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring) (describing a historical test as "less subjective because it depends upon a body of evidence susceptible of reasoned analysis").

reliance on history. And, perhaps more importantly, as seen in other areas of jurisprudence, the centrality of history in Second Amendment interpretation is far from essential.

B. *Trapped in History*[108]

Ambiguity around the constitutionality of gun regulations can lead to inaction and rancor between policymakers and the public.[109] The Supreme Court will likely clarify at least some aspects of the Second Amendment right in its upcoming decision in *Bruen*, and it is already apparent that history will play a central role. During the *Bruen* oral argument, history was discussed at great length by the Justices and attorneys for each party. And the focus on history by the advocates should come as no surprise, as a significant number of the Supreme Court Justices had made it clear that they believe the policy options available to address the gun violence we are witnessing today are constrained by history.

Some Justices have been quite explicit in their belief that not only does history have a role to play in Second Amendment jurisprudence, but that history is the *only* method to determine the constitutionality of laws implicating Second Amendment rights. Justice Thomas has been perhaps the most vocal that the Supreme Court take another Second Amendment case to alleviate lower courts' "defiance" of what he believes was a declaration from *Heller* and *McDonald* to focus on history, writing several dissents from the Court's denials of certiorari.[110] He has been particularly troubled by the use of intermediate scrutiny and, in an opinion joined by Justice Gorsuch, has maintained that courts must look to the "relevant history . . . . [including] sources from England, the founding era, the antebellum period, and Reconstruction."[111] Ignoring the vast array of cases using the tiers of scrutiny to evaluate constitutional rights, Justice Thomas believes the Second Amendment has been "singled out for special—and specially

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108 "Joyce is right about history being a nightmare—but it may be the nightmare from which no one *can* awaken. People are trapped in history and history is trapped in them." JAMES BALDWIN, *Stranger in the Village*, *in* NOTES OF A NATIVE SON 163, 166–67 (1955).

109 *See* Greene, *supra* note 21, at 84.

110 *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting) ("Our continued refusal to hear Second Amendment cases only enables this kind of defiance."), *denying cert. sub nom. to* Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016).

111 Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting), *denying cert. sub nom. to* Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016). In *Silvester*, Justice Thomas expressed his support for judges who have used a historical analysis. *Silvester*, 138 S. Ct. at 947 (Thomas, J., dissenting).

unfavorable—treatment," labeling the right the Supreme Court's "constitutional orphan."[112]

Before a shift in the Court's personnel, a petition for certiorari to consider New Jersey's "justified need" requirement for public carry—which the Third Circuit upheld in *Woollard*, discussed above—was denied.[113] In dissent, Justice Thomas stated definitively that "text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms," as required by the Court's decision in *Heller*.[114] According to Thomas, "States can impose restrictions on an individual's right to bear arms that are consistent with historical limitations."[115] Thus, the analysis begins and ends with historical analogues.

Justice Kavanaugh joined this part of the dissent, which is no surprise considering he wrote largely the same thing as a judge on the D.C. Circuit. In the D.C. Circuit's follow-up case to *Heller*, then-Judge Kavanaugh wrote a dissent not simply because he came to a different conclusion but also because he disagreed with the use of intermediate scrutiny.[116] Instead, he argued that "the proper test to apply is *Heller*'s history- and tradition-based test" and not any tiers-of-scrutiny review standards.[117] Justice Kavanaugh made his stance clear again when he agreed with another dissent from Justice Alito—in a per curiam opinion declaring that the first Second Amendment case taken up since *McDonald* was moot—that also endorsed a review standard that must look to "laws in force around the time of the adoption of the Second Amendment."[118] During the *Bruen* oral argument, Justice Kavanaugh again reiterated his concern about courts using any review method other than text, history, and tradition.[119]

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112 *Silvester*, 138 S. Ct. at 952.

113 Rogers v. Grewal, 140 S. Ct. 1865, 1865 (2020), *denying cert. to* No. 18-2366, 2018 WL 10808705 (3d Cir. Sept. 21, 2018) (mem.).

114 *Id.* at 1866 (Thomas, J., dissenting).

115 *Id.* at 1874.

116 Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

117 *Id.* at 1295.

118 N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1526–27, 1541 (2020) (Alito, J., dissenting).

119 Transcript of Oral Argument at 53, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 333 (2021) (No. 20-843), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-843_f2q3.pdf [https://perma.cc/ADX2-R6K7]. Justice Kavanaugh again equated all tiers-of-scrutiny review standards as "balancing tests," which he believes would "make it a policy judgment basically for the courts." *Id.* Justice Kavanaugh did not explain whether his negative view of the tiers of scrutiny extends beyond the Second Amendment, but at the same time he does appear to indicate jurisprudence of other rights is worthy of consideration. *Id.* at 116.

Another history-centric opinion as a lower court judge came from Justice Barrett. In *Kanter v. Barr*, then-Judge Barrett dissented from a ruling upholding a prohibition for felons from possessing firearms.[120] A substantial majority of Justice Barrett's dissent focused on a historical excavation to determine whether the legislature was able to strip the Second Amendment right of nonviolent felons.[121] This is because, in Justice Barrett's opinion, the options left to the legislature are limited to those policies that can be traced as "lineal descendants" of historical laws.[122] Justice Barrett did question, during the *Bruen* argument, whether there would always be historical analogs to use.[123]

While Chief Justice Roberts has not specifically written an opinion emphasizing the role of history in Second Amendment cases, he did raise questions during *Heller*'s oral argument.[124] He expressed doubts about the tiers of scrutiny, noting that "none of them appear in the Constitution."[125] The Chief Justice went on to describe these traditional standards of review as "baggage that the First Amendment picked up."[126] Instead, Chief Justice Roberts asked whether it was more useful to examine the founding era to "look at the various regulations that were available at the time" to see how the challenged regulation compares.[127] Though, during the oral argument for *Bruen*, the Chief Justice hinted that the Court may no longer need to look back further than 2008: "[T]he first thing I would look to in answering this question

120 *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

121 *See id.* at 452–63. Justice Barrett clarified that her opinion is that the Second Amendment analysis should proceed under the framework that "all people have the right to keep and bear arms but that history and tradition support Congress's power to strip certain groups of that right." *Id.* at 452. She distinguished this from an approach that there are certain groups of individuals who fall entirely outside of Second Amendment protections. *Id.* at 451. Though both methods center on historical analysis, the former identifies the scope of legislative authority to restrict Second Amendment rights, and the latter is used to determine the scope of the right. *Id.* at 452.

122 *Id.* at 465.

123 Transcript of Oral Argument, *supra* note 119, at 55.

124 *See* Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

125 *Id.* This point was reiterated later by Justice Thomas in multiple dissents from certiorari denial for Second Amendment cases. *See* Silvester v. Becerra, 138 S. Ct. 945, 948 n.4 (2018) (Thomas, J., dissenting) ("I, too, have questioned this Court's tiers-of-scrutiny jurisprudence."); Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting) ("[T]he Constitution does not prescribe tiers of scrutiny." (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016))).

126 Transcript of Oral Argument, *supra* note 124, at 44. This sentiment was echoed by Justice Kavanaugh in the *Bruen* oral argument, where he questioned why the Court should "smuggle" these standards into Second Amendment doctrine. Transcript of Oral Argument, *supra* note 119, at 53.

127 Transcript of Oral Argument, *supra* note 124, at 44.

is not the Statute of Northampton, it's *Heller* . . . ."[128] Given the overwhelming support for a historical-review standard, each of the attorneys participating in the *Bruen* oral argument focused on history as well.[129]

But relying solely on historical analysis is problematic for two very important reasons. The first is relatively simple and straightforward: judges are not historians.[130] Second Amendment historian Saul Cornell, for example, states that neither Justice Scalia's majority opinion nor Justice Stevens's dissent in *Heller* meets the standards of historical scholarship.[131] This may not necessarily be a catastrophic problem, but it certainly comes closer to one if the entirety of Second Amendment analysis boils down to judges looking through historical documents in search of consensus.

Justice Kavanaugh argued in his *Heller II* dissent that a historical test would be less subjective than standard forms of scrutiny.[132] But Judge Richard Posner vehemently disagrees. Judge Posner believes that the vast resources of the Supreme Court enable Justices to find evidence that will support either side of a case[133]: the very thing that Justices Scalia

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128 Transcript of Oral Argument, *supra* note 119, at 93–94.

129 Paul Clement, representing the challengers, requested the Court "say that text, history, and tradition is the test, not part of the test but the test inside and outside the home." *Id.* at 47. Solicitor General Underwood argued for New York that history and tradition supported the state's regulation. *Id.* at 63. And Deputy Solicitor General Fletcher, arguing on behalf of the Department of Justice, stated that he believed all parties were on the same page: "As to the general question about *Heller*, we agree completely that the Court ought to apply the method from *Heller*, which we, like I think all the parties, take to be look to the text, history, and tradition of the Second Amendment right . . . ." *Id.* at 95.

130 *See generally* Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why* Heller *Is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171 (2008) (arguing that, while *Heller* is described as an opinion based in originalism, it gets many aspects of historical understanding incorrect).

131 Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 627 (2008).

132 Heller v. District of Columbia, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting Justice Scalia's concurrence in *McDonald* that historical analysis "depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor" (quoting McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring))).

133 Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), https://newrepublic.com/article/62124/defense-looseness [https://perma.cc/LP6P-94LB] ("When the clerks are the numerous and able clerks of Supreme Court justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.").

and Kavanaugh suggest a historical test prevents.[134] Indeed, in commenting on the *Heller* decision, Judge Posner was critical of both Justice Scalia's and Justice Stevens's opinions.[135]

Perhaps what is most troubling about this monopolistic reliance on history is the misleading notion that it is objective and straightforward. Most historians appear to agree that there was little consensus to be uncovered during the founding era, with disagreements over most constitutional issues.[136] Therefore, picking among these various viewpoints to determine which was the true "meaning" invariably requires making value choices.[137] As Professor Reva Siegel aptly puts it, "Claims about the past express contemporary identities, relationships, and concerns, and express deep normative convictions."[138]

For example, Justice Thomas, a fervent proponent of using history, questioned which states to look to.[139] Justice Alito raised doubts about the use of decisions and statutes in the late nineteenth century and early twentieth century, despite *Heller* itself not only relying on this history but labeling as presumptively lawful laws that did not emerge until the twentieth century.[140] Even deciding how literal to take history is extremely relevant to the question of a right to carry in public. The challengers in *Bruen* argue for a right to concealed carry but, as Justice Kagan pointed out, history provides more support for a right to open carry because concealed carry was thought to be nefarious.[141] Thus, a strict reliance on history would provide support for completely different

134 *Heller*, 670 F.3d at 1274.

135 Posner, *supra* note 133 ("The majority (and the dissent as well) was engaged in what is derisively referred to—the derision is richly deserved—as 'law office history.'").

136 Cornell, *supra* note 131, at 631; *see also* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1197–1204 (2015) (describing the difficulty in lower courts of relying on *Heller*'s originalism and historical evidence).

137 Even Justice Scalia admitted as much in his *McDonald* concurrence: "Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it. I will stipulate to that." *McDonald*, 561 U.S. at 803–04.

138 Reva B. Siegel, Heller *& Originalism's Dead Hand—in Theory and Practice*, 56 UCLA L. REV. 1399, 1420 (2009).

139 Transcript of Oral Argument, *supra* note 119, at 92–93. Justice Thomas questioned the use of Western states when examining history because "the west is different." *Id.*

140 *Id.* at 107. General Fletcher rightfully pointed this out in response: "I think it's fairly read to extend the analysis into the 20th Century for the reason that Justice Kagan identified, that [*Heller*] validated as presumptively lawful felon-in-possession requirements, bans on the possession of firearms by the mentally ill that date to much later than the 19th Century." *Id.*

141 *Id.* at 40–41.

Second Amendment protections than those arguing for a right to concealed carry.[142]

Here, though, those arguing for a right to carry firearms in public ask for "contextual sensitivity."[143] But this is the point. Determining when, where, and how much flexibility to grant is not an objective exercise.[144] Indeed, this is one of the primary difficulties in looking solely to history for answers to contemporary problems.[145] Though part of the discussion at the *Bruen* oral argument focused on what areas or types of places might warrant firearm restrictions, again the suggestion was to look back. Yet, determining where to look and how to interpret what is found are inherently imbued with subjective decision-making.

Even the core of the Second Amendment right—self-defense—can hardly be considered static through our nation's history.[146] The law of self-defense was historically used as a defense for a crime, not an overt right to harm others.[147] It included in it a duty to retreat, thereby incorporating a specific requirement to avoid lethal violence if at all possible.[148] This conception of self-defense has evolved over time, especially with the growth of stand-your-ground laws.[149] And even the use of self-defense historically as a permissible defense has been inconsistent, often unavailable to marginalized populations such as women and people of color.[150]

What this portends is not history's irrelevance, but rather its limitations. Or, perhaps more accurately, the limitations of judges to access all the relevant documents, understand each completely and accurately, and make a critical legal determination based on those

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142 *Id.* at 41–42.

143 *Id.* at 43–44.

144 As Justice Kagan asked, "[W]ith what sense of flexibility do you look?" *Id.* at 41.

145 *Id.* at 40. Though, acknowledging the difficulty is not to suggest that context should not be taken into consideration, as the "original meaning can be distorted when framing-era practice is consulted without reference to historical context." Rosenthal, *supra* note 136, at 1208.

146 *See generally* CAROLINE E. LIGHT, STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE (2017).

147 *See* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 82 (2020).

148 *Id.* at 86.

149 *See* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 93 (2019) ("Florida passed the first so-called stand-your-ground law in the United States in 2005. Within ten years, thirty-three states had followed Florida's lead, transforming the concept of self-defense and use of deadly force in the United States."). The American Bar Association has recommended states repeal stand-your-ground laws because the empirical evidence shows that states with these laws have increased rates of homicide. AM. BAR ASS'N, NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS: FINAL REPORT AND RECOMMENDATIONS 2 (Sept. 2015), https://www.americanbar.org/content/dam/aba/administrative/diversity/SYG_Report_Book.pdf (last visited Mar. 13, 2022).

150 FRANKS, *supra* note 149, at 89–99.

documents objectively.[151] But this is not a standard to which judges should be held. It is unreasonable to expect judges and their clerks to produce research and historical analysis to the quality of historians. It is simultaneously unreasonable then to rely so heavily—or entirely—on historical interpretation. More importantly, it is unnecessary. As public health crises evolve and emerge over time, the police power authority to protect the public's health, safety, and welfare must be empowered to respond to those changes.[152] Indeed, to maintain a fixed understanding of the Second Amendment and the limitations it places on government action would be exceptionalism that distinguishes the right from others that have evolved over time.[153]

Take, for example, the Fourth Amendment. Unlike the Second Amendment, the language of the Fourth is fairly clear in its requirements for reasonableness and a warrant based on probable cause.[154] But the Court has introduced a number of exceptions over the years, likely due to the consequence of a warrantless search being that the evidence obtained is no longer available for prosecution.[155] Whether these exceptions truly represent what the Founders had in mind when they drafted the Fourth Amendment is a valid question. But even these exceptions and their boundaries continuously evolve to correspond to technological advances.[156] Now, the Fourth Amendment's exceptions take into consideration cell phone contents,[157] DNA evidence,[158] GPS tracking,[159] and cell-tower data.[160]

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151 *See* Cornell, *supra* note 131, at 639.

152 Michael R. Ulrich, *Revisionist History? Responding to Gun Violence Under Historical Limitations*, 45 AM. J.L. & MED. 188, 200 (2019).

153 *See* Ulrich, *supra* note 8, at 1079–84 (demonstrating that other rights have been limited to protect the public).

154 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

155 Greene, *supra* note 21, at 126 (labeling these a "patchwork of ad hoc exceptions").

156 *Id.* at 36–37 (discussing the Fourth Amendment doctrine's need for the Court's "constant care" by "jerry-rigg[ing]" precedent onto "unforeseen circumstances").

157 *See* Riley v. California, 573 U.S. 373, 385–86 (2014) (finding that police may not search through a cell phone seized during an arrest).

158 *See* Maryland v. King, 569 U.S. 435, 465–66 (2013) (holding that police may take DNA swabs at arrest).

159 *See* United States v. Jones, 565 U.S. 400, 404–05 (2012) (considering the attachment of a GPS tracking device to a suspect's vehicle a search within the meaning of the Fourth Amendment).

160 *See* Carpenter v. United States, 138 S. Ct. 2206 (2018) (holding that acquisition of cell-tower data constituted a Fourth Amendment search). In writing for the majority, Chief Justice

This leads to a second objection to a stringent reliance on historical analysis to determine the constitutionality of firearm regulations; it ignores the inherent responsiveness that lies within the police powers.[161] A historical investigation may be useful in determining what the scope of the right may have meant when it was ratified, but this should not be conflated with an impenetrable boundary that can never be breached. As Professor Cornell notes, the right to carry arms for self-defense was historically always balanced against public safety, with public safety finding greater weight in most circumstances.[162] Thus, history itself supports taking into consideration both the right to keep and bear arms and the potential impact this right has on the safety and well-being of others.[163] The evaluation of the right to self-defense has never been limited solely to the scope of the right itself. Nor has it been for other rights.[164]

The threats and needs of a community change and evolve over time. If police powers authorize government action to protect the public's health, safety, and welfare, what this may require is unlikely to remain constant over decades and centuries. History supports factoring in the needs of self-defense and the need to protect the public, but this does not mean a state is limited to how that calculus was made in the late eighteenth century and early nineteenth century. What history tells us is that balancing did occur, but that balance can and does change over time. It would substantially undermine the central authority of police power—to effectively protect the public—to limit policy options to the balancing that was done centuries ago.

Gun violence, as a threat to the public, shares little resemblance to how gun violence may have been viewed in the founding era. A rights-

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Roberts made a point to discuss the manner in which advancement in technology must be taken into consideration by the Court:

> The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today.

Id. at 2219.

161 Ulrich, *supra* note 152, at 196–97.

162 Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11, 13 (2017).

163 *Id.* at 14 ("Something analogous to a balancing exercise was fundamental to the way Anglo-American law dealt with arms throughout [the founding] period.").

164 Blocher, *supra* note 7, at 425 ("[M]any enumerated constitutional rights—including the right to free speech—are subject to balancing.").

as-trumps view of the Second Amendment limits policymakers' options to tackle this modern problem and protect the rights and well-being of the public.[165] While the rights that act to limit oppressive and arbitrary government measures may remain constant over time, the justifications for infringing on those rights do not.[166]

One of the important aspects of recognizing gun violence as a public health problem is to remove the notion that it is somehow random and sporadic.[167] To make such a claim is to suggest little can be done to proactively minimize the harm. Framing gun violence as chaotic strengthens an individual's claim that their rights should not and cannot be limited prospectively. But public health research, with its growing collection of data on gun violence, makes clear that this is not simply a matter of personal responsibility.[168] The law does and can have an impact on this growing threat.[169]

Heller declared that individual self-defense is the underlying value in the Second Amendment right.[170] When considering the right to carry firearms in public, this is certainly a salient consideration. But self-defense is not one sided, nor is an individual solely reliant on themselves for safety.[171] Again, the issue is not merely an individual's right to self-defense and the government attempting to limit that right.

The Supreme Court has recognized that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic."[172] And we are in the midst of a gun violence epidemic, where increased firearms in public threatens others in the community.[173] To protect the entire community, people must be subject to restraints in certain circumstances; otherwise, "organized society could not exist with safety to its members."[174] Consequently, "[r]estrictions on who may bear weapons, of what types, and where

165 Greene, *supra* note 21, at 37 ("[T]he categorical frame's fixation on policing the borders of political authority can deny the protection of rights at just the point when protection is most urgent.").

166 For a contemporary example, consider a mandate for people to wear masks in public. Despite the relatively minor burden this would entail, it very likely may have been struck down due to a lack of justification in 2019. But in 2020, after the emergence of Covid-19, the state has a stronger justification for requiring masks in public settings. The rights of the individual have not changed but the circumstances and threats to the public have and, therefore, so too has the state's authority to infringe on individual rights by mandating masks in certain locations.

167 *See infra* text accompanying notes 339–41.

168 *See infra* Section III.B.

169 *See infra* Section III.B.

170 District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

171 Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018).

172 Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905).

173 Donohue, Aneja & Weber, *supra* note 11, at 199.

174 *Jacobson*, 197 U.S. at 26.

cannot, ipso facto, violate the constitution of a functioning society."[175] Attempts to interpret the Second Amendment through a rigid historical framework has led to the confusing mess seen in the lower courts and has done little to determine how we move forward in balancing the self-defense interests of the entire community.[176]

In an effort to protect itself against the broad harm caused by firearms, a community may wish to limit—not eliminate entirely—the number of firearms in public. To do so, the people may elect officials who promise to reduce gun violence. Limiting the community's options for self-defense to policies that can be directly tied to founding era legislation ignores the drastic changes that have taken place in the centuries that have followed.[177]

To wit: On August 4, 2019, Connor Stephen Betts, a twenty-four-year-old white man, opened fire in downtown Dayton, Ohio.[178] He could only fire his weapon for thirty seconds before police officers on patrol stopped him by returning fire.[179] Armed with a magazine that held one hundred rounds of ammunition, Betts was able to strike twenty-six people, nine of whom died.[180] This scenario could hardly have been imagined at the founding.[181]

Urbanization has created much more densely populated areas.[182] Requiring that citizens be allowed an unfettered right to carry firearms

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175 Greene, *supra* note 21, at 52.

176 *Id.* (describing how application of a rights-as-trumps framing to Second Amendment rights has "produced considerable confusion").

177 Posner, *supra* note 133 (noting that the Second Amendment is a "constitutional provision ratified more than two centuries ago, dealing with a subject that has been transformed in the intervening period by social and technological change, including urbanization and a revolution in warfare and weaponry").

178 Adeel Hassan, *Dayton Gunman's Friend Bought Body Armor and Ammunition, Authorities Say*, N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/us/connor-betts-ethan-kollie.html [https://perma.cc/8GE2-HHT3].

179 *Id.*

180 Tresa Baldas, Rachel Berry & Monroe Trombly, *Who Is the 24-Year-Old Man Police Say Killed 9—Including His Own Sister—in Dayton, Ohio?*, USA TODAY (Aug. 5, 2019, 9:46 AM), https://www.usatoday.com/story/news/nation/2019/08/04/ohio-shooting-connor-betts-identified-police-dayton-gunman/1916170001 [https://perma.cc/GUR6-ZY2V]; Bill Hutchinson, *Families of Dayton Mass Shooting Victims Sue Maker of 100-round Magazine Used by Gunman*, ABC NEWS (Aug. 2, 2021, 6:14 PM), https://abcnews.go.com/US/families-dayton-mass-shooting-victims-sue-maker-100/story?id=79219747 [https://perma.cc/B28C-A5WP].

181 *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 110 (2000) ("[B]ecause eighteenth-century firearms were not nearly as threatening or lethal as those available today, we similarly cannot expect the discussants of the late 1780s to have cast their comments about keeping and bearing arms in the same terms that we would.").

182 *See* Posner, *supra* note 133 (describing the importance of urbanization in altering the social landscape since the founding era).

in public spaces clearly raises different safety issues today—specifically in urban areas—than it did near the turn of the nineteenth century.[183] Changes in technology have made firearms significantly more lethal.[184] People can purchase bullets that are designed to expand once they strike a person to maximize damage.[185] Large-capacity magazines can enable a person to fire dozens, or even hundreds, of bullets in a matter of seconds, placing bystanders at risk.[186] Firearms can even be modified with relative ease to increase their lethality.[187] This is especially troubling when considering firearms in densely populated public settings.

To suggest this has no relevance in determining the constitutionality of state action, due to disagreements over any direct lineal descendant, disregards that the underlying reasons for the state's police power authority is to protect its people.[188] This approach also renders emerging empirical data practically irrelevant. Public health research on gun violence, and the impact the law can have on minimizing or exacerbating that harm, has grown in recent years. But the impact this knowledge can have is suppressed if laws are limited to historical analogues. Ignoring empirical data, or minimizing its relevance, avoids the real-world impact of Second Amendment

183 Blocher, *Firearm Localism*, *supra* note 10, at 115 ("[G]un violence simply was not the problem then that it would later become."). Though, as Professor Blocher notes, there was still a considerable amount of firearm regulation during this era. *Id.*; *cf.* Michael Siegel et al., *The Impact of State Firearm Laws on Homicide Rates in Suburban and Rural Areas Compared to Large Cities in the United States, 1991–2016*, 36 J. RURAL HEALTH 255, 262 (2020) (describing the differences in firearm laws in urban versus rural areas).

184 Bindu Kalesan et al., *A Multi-Decade Joinpoint Analysis of Firearm Injury Severity*, 3 TRAUMA SURGERY & ACUTE CARE OPEN 1, 5–6 (2018); *see also* Anthony A. Braga & Philip J. Cook, *The Association of Firearm Caliber with Likelihood of Death from Gunshot Injury in Criminal Assaults*, 1 JAMA NETWORK OPEN 1, 7 (2018) (finding a connection between injury severity and caliber of firearms).

185 *See* Melissa Chan, *They Survived Mass Shootings. Years Later, the Bullets Are Still Trying to Kill Them*, TIME (May 31, 2019, 7:00 AM), https://time.com/longform/gun-violence-survivors-lead-poisoning [https://perma.cc/N77L-6Y6G] (describing the health troubles of individuals with bullet fragments left in their bodies from bullets that have exploded inside of them).

186 *See supra* note 180 and accompanying text; Hutchinson, *supra* note 180.

187 Jeremy White, *When Lawmakers Try to Ban Assault Weapons, Gunmakers Adapt*, N.Y. TIMES (July 31, 2019), https://www.nytimes.com/interactive/2019/07/31/us/assault-weapons-ban.html [https://perma.cc/X4CL-U92N].

188 Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

constitutional determinations and simultaneously produces a misleading, if not inaccurate, constitutional analysis.[189]

II. REFRAMING THE ANALYSIS

The Second Amendment doctrine's current state of disorder could find some relief with an upcoming decision from the Supreme Court in *Bruen*. But given the likely reliance on history, a clear path forward may remain elusive. As discussed above, the focus on history has not helped build consensus in the lower courts, and history does not provide the objective, straightforward answers that some proponents of this methodology might suggest. More importantly, this backward-looking review standard ignores the realities of our time and the impact that gun violence has had across the country.

A shift from the unending search for truth in the annals of history to an approach that contextualizes the analysis within the current gun violence epidemic is what the Second Amendment needs.[190] Utilization of history can present a false objectivity that creates a veil for modern beliefs and contemporary concerns.[191] Instead, placing the discussion in the current context can increase transparency and better inform the public as to the stakes of the debate.[192] Rather than perpetuate the conflict as one of freedom versus an overzealous government,

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189 Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1067 (2006) (discussing the relevance that practical implications should have on judicial decisions).

190 Siegel, *supra* note 138, at 1403 ("The living advocate their normative views by appeal to historical narratives the community shares, and through these practices of constitutional dispute sustain community in disagreement.").

191 *Id.* at 1421 ("Claims on the founding not only express contemporary concerns; they express contemporary conflicts."). According to Professor Siegel, even the *Heller* opinion does not, in fact, reflect an originalist interpretation of the right based solely on historical interpretation, but instead "arises out of a quite contemporary and still persisting dispute about the nature and scope of our constitutional freedoms." *Id.* at 1402. Judge J. Harvie Wilkinson was even more critical in his assessment of the *Heller* majority, believing it "encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009).

192 Greene, *supra* note 21, at 33 ("[L]ack of transparency about the basis for decision is a rule-of-law problem that the rights-as-trump frame invites."); *see also* Blocher, *supra* note 7, at 428 ("[B]alancing approaches may be better equipped to deal with a pluralism of values and with areas where underlying values are disputed."). If the balancing of interests continues to result in the same outcome, a categorical approach may emerge: "Balancing approaches, on the other hand, give courts the opportunity to weigh competing values in a series of cases, and if one value consistently outweighs the other, a categorical rule may develop." *Id.* at 429. But this emergence comes from continued evaluation and consensus, rather than a decree from a higher court.

incorporating gun violence and the potential harm from a proliferation of firearms in public provides a more accurate depiction of the what is actually at issue.[193]

To be sure, the Court has emphasized the importance of context with regard to other fundamental rights. Consider the First Amendment right to free speech, a popular area for Second Amendment guidance.[194] In *Virginia v. Black*, the Court considered limitations on cross burning, an act previously deemed protected by the First Amendment as expressive conduct.[195] But, recognizing that First Amendment protections are not absolute, the Court held that the context in which the cross burning occurred could be used to determine a motive of intimidation, thereby removing constitutional protection.[196] Despite a prior ruling protecting this conduct, its use to intimidate altered the Court's analysis.[197] The right had not changed, but the context in which it was exercised and the effects of exercising that right had changed. Therefore, the conduct could be limited because the First Amendment permitted content regulation when the benefit is "clearly *outweighed by the social interest* in order and morality."[198]

Similarly, an increase in guns in the public sphere has the potential to cause fear, apprehension, mental duress, and changes in lifestyle of those who seek to avoid firearms and the risk they entail.[199] While this may not be dispositive of a constitutional analysis, it certainly seems relevant—at least the Court thought so with regard to First Amendment considerations.[200] To incorporate those concerns places everyone's rights and interests on equal footing. It is important that people begin to see themselves as cohabitors of the polity, as opposed to enemies on the constitutional battleground: one with a right worth protecting and

193 Greene, *supra* note 21, at 30 (describing a rights-as-trumps framing that focuses entirely on the scope of the right as one that "has special pathologies that ill prepare its practitioners to referee the paradigmatic conflicts of a modern, pluralistic political order").

194 Even Paul Clement, arguing against New York's good cause restriction in *Bruen*, stated that "there is a lot of useful teaching in the First Amendment." Transcript of Oral Argument, *supra* note 119, at 56.

195 *See* Virginia v. Black, 538 U.S. 343 (2003).

196 *Id.* at 358–59.

197 *Id.* at 363.

198 *Id.* at 358–59 (emphasis added) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

199 Sarah R. Lowe & Sandro Galea, *The Mental Health Consequences of Mass Shootings*, 18 TRAUMA, VIOLENCE, & ABUSE 62, 62 (2017).

200 *See Black*, 538 U.S. at 360 (weighing First Amendment protections against the state's effort to "'protect[] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur'" (internal citations omitted)).

the other aggressively seeking to destroy that right.[201] To simplify constitutional determination to the founding makes this goal much more difficult because, as Professor Jamal Greene puts it, "[w]hen rights are trumps, constitutional validity can turn on a contested interpretive judgment that flattens a rich set of empirical questions and normative judgments into a dull heuristic."[202]

A. *Second Amendment in Context*

The heated debate over the contours of the Second Amendment right, both in the public arena and within the legal academy, focuses heavily on terms such as long-standing, fundamental, self-defense, and law-abiding citizen. But the use of these terms in the abstract can obscure the real-world impact of these constitutional determinations. The judiciary—as well as the broader legal academy—cannot and should not discuss these issues in isolation from the broader context of what it means to declare certain conduct with firearms not simply protected but completely outside of the reach of government regulation. For public carry, this is particularly relevant.

Consider, for example, shopping at a local Walmart when a man walks into the store with a tactical rifle slung across his chest and carrying a handgun. What would the average citizen do? Call the police? Flee the store or pull out their own firearm? Allow the individual to walk about the store to shop? More pointedly, how can a person know whether this man is a law-abiding citizen or someone who intends to commit an act of violence?

On August 8, 2019, in Springfield, Missouri, twenty-year-old Dmitriy Andreychenko entered Walmart armed with a rifle, believing he was simply exercising his Second Amendment right to carry a firearm openly in public.[203] Five days prior, on August 3, in El Paso, Texas, it was Patrick Crusius, a twenty-one-year-old white man, who was armed and entered Walmart with the intent to kill Latinx

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201 Greene, *supra* note 21, at 131 (arguing for a judicial approach where all citizens understand that they are rights-bearers who must share space within a working ecosystem).

202 *Id.* at 119.

203 Neil Vigdor, *Armed Man Who Caused Panic at Missouri Walmart Said It Was 2nd Amendment Test, Authorities Say*, N.Y. TIMES (Aug. 9, 2019), https://www.nytimes.com/2019/08/09/us/missouri-walmart-terrorist-threat.html [https://perma.cc/R23U-TDNC]; Chris Perez, *Man Who Walked into Walmart with "Tactical Rifle" Says He Was Testing 2nd Amendment*, N.Y. POST (Aug. 9, 2019, 11:52 PM), https://nypost.com/2019/08/09/man-who-walked-into-walmart-with-tactical-rifle-says-he-was-testing-2nd-amendment [https://perma.cc/9DZC-DMKF].

immigrants.[204] Both men were law-abiding citizens until the point when one decided to pull the trigger.

Carrying a high-powered firearm and hundreds of rounds of ammunition may seem like the rare, extreme scenario. Many seeking public carry would be likely to carry handguns.[205] Yet, a change in weapon hardly solves the problem of an individual trying to determine who may or may not use a handgun for violence. Thus, the question remains, how can the average individual shopper be expected to know the difference?

The theoretical framing of the law-abiding citizen has rhetorical force but is disconnected from the reality of gun violence. It ignores the ability of the average citizen to distinguish who is *and will remain* a law-abiding citizen. This framing also fails to recognize that the presence of firearms can create more harmful violence from everyday occurrences like road rage, arguments, and fights.[206] Not to mention that the average person's assessment and judgment in any given situation is inevitably going to be imbued with biases.[207] When dealing with lethal weapons, these decisions have deadly consequences.

But complications arise not only from the average person trying to discern which armed individuals may pose a threat. In Portland, Oregon, in July 2018, a concealed carry permit holder attempted to break up a fight, but when the police arrived and saw his weapon drawn, they shot and killed him by mistake.[208] In a November 2017 shooting in Colorado, the police had difficulty determining the "good guys with guns" from the "bad guys with guns" after a number of Walmart shoppers pulled out their weapons in response to a shooting.[209] Trained law enforcement are sometimes unable to decipher who is law abiding and who is not. This creates risk not only for the "good Samaritan" who

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204 Anya van Wagtendonk, Sean Collins & German Lopez, *El Paso Walmart Shooting: What We Know*, VOX (Aug. 6, 2019, 9:15 AM), https://www.vox.com/2019/8/3/20753049/el-paso-walmart-cielo-vista-mall-shooting-what-we-know [https://perma.cc/5WVW-AFLU].

205 District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (referring to handguns as the preferred firearm in the nation to use for protection).

206 Donohue, Aneja & Weber, *supra* note 11, at 204.

207 "[T]he most common stereotype applied to blacks appears to involve linking them to crime and violence. Moreover, this latter association appears to be bidirectional: 'Black faces and Black bodies can trigger thoughts of crime, [just as] thinking of crime can trigger thoughts of Black people.'" Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 40 (2010) (alteration in original) (footnotes omitted).

208 Donohue, Aneja & Weber, *supra* note 11, at 212.

209 *Id.* This point was raised by Solicitor General Underwood as one of the justifications for New York's good cause law. Transcript of Oral Argument, *supra* note 119, at 70.

may be trying to help, but for the broader public given the complications this can create for apprehending criminals as well.[210]

But these facts are noticeably absent in far too many Second Amendment discussions and judicial opinions, both those striking down and those upholding statutes such as good cause restrictions. And when public impact does garner some discussion, it is nearly always far less than the historical record.[211] This results in a rights-centric framework that does not take into account the manner in which rights can be limited.[212] The scope of a right is not—and historically has not been—dispositive in determining whether a law is constitutional.[213] Even if rights may not evolve and change over time, the state's justification for infringing on rights can and indeed does ebb and flow.[214] Consequently, an analysis of a public carry restriction such as a good cause law that does not thoroughly factor in the current state of gun violence and why a good cause restriction may have a chance to mitigate that violence is flawed.

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210 Another incident involved a concealed carry permit holder at an Alabama mall who the police shot and killed because he had his gun drawn, while the actual suspect escaped. Donohue, Aneja & Weber, *supra* note 11, at 212.

211 For example, in doing a rough, unscientific examination of the *Kachalsky* opinion, it appears that over 2,600 words are spent on history while less than 800 are spent on the public's and the state's interest in protecting their health and safety. And this opinion stated definitively that it rejected the centrality of history in reaching its conclusion. *See* Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012).

212 Greene, *supra* note 21, at 72 (explaining that a rights-centric approach often lacks the understanding that government regulation can be done to further constitutional rights as opposed to simply aiming to limit them).

213 *See id.* at 34 ("The U.S. Supreme Court balances pervasively, and what categories it maintains are riddled with exceptions."). This has historically been the case for the right to carry firearms in public as well. Cornell, *supra* note 162, at 43 ("A systematic survey of popular guides to the law aimed at justices of the peace, constables, and other peace officers provides an excellent set of sources for exploring how the concepts of self-defense, the right to keep or travel with arms, and the need to balance these claims against the preservation of the peace evolved in the more than two centuries following the Glorious Revolution.").

214 "[O]rdinary judicial scrutiny hardly handicaps governmental responses to public health emergencies, largely because most modern constitutional standards of review turn on some assessment, whether explicitly or implicitly, of proportionality—'the idea that larger harms imposed by government should be justified by more weighty reasons.'" Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 188–89 (2020); *see also* Siegel, *supra* note 138, at 1423 ("Collective memory thus constitutes community and then supplies a language for its members to argue with one another about the community's grounds and aims, enabling it to evolve in history.").

Rights-only rhetoric is damaging not only to constitutional law, but to the public's understanding of their rights as well.[215] A gun-rights advocate such as Andreychenko, the twenty-year-old who walked into a Missouri Walmart armed like a man ready to go to war, may believe his Second Amendment right is absolute. As a result, he may argue that while the shooting in El Paso was tragic, one man's misuse of firearms should not impact his own constitutional rights.[216] But as the comparison of the armed Walmart customers demonstrates, this view ignores the constitutionally relevant consideration of the government's authority to protect the public, as well as the limitations the public has in protecting themselves. Moreover, this ignores the impact the judicial rulings from a rights-as-trumps approach would have on the rights and liberties of the rest of the community.[217] In sticking with this frame, it furthers the individualistic approach to rights that only stands to create more ardent animosity between proponents of gun rights and gun control.[218]

The law-abiding citizen language used to protect Second Amendment rights also limits the state to reactive measures—ones in which the government, for the most part, must wait until someone pulls a trigger and takes themselves out of the law-abiding category. Not only has the reactive approach—relying on criminal enforcement—been unsuccessful, but it places the onus on the average citizen to make difficult decisions. They can place themselves at some unknown risk in public spaces, limit their right to move freely by staying out of the public, or perhaps more concerning, choose to take proactive measures

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215 Greene, *supra* note 21, at 33 ("Constitutional law is not just a set of foundational rules and standards that govern the structure of the constituted government and the behavior of its actors. It is also a style of—a grammar for—political argument.").

216 A more extreme stance, though one that is certainly not hard to find, is that incidents like the El Paso shooting mean that *more* individuals *should* be armed in public to help stop the harm as quickly as possible. *See, e.g.*, Lindsey Bever, *These GOP Lawmakers Are Pushing for More Gun Rights After Baseball Shooting*, WASH. POST (June 19, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/06/19/these-gop-lawmakers-are-pushing-for-more-gun-rights-after-baseball-shooting [https://perma.cc/C486-CRC5].

217 Siegel & Blocher, *supra* note 18, at 13 ("[G]un violence can dramatically restrict exercise of a wide range of freedoms, many of them constitutionally guaranteed liberties.").

218 *See* Greene, *supra* note 21, at 34. As Professor Greene puts it, the connection between societal views of rights and constitutional debates are connected to the manner in which the Court evaluates constitutional questions. The rights-as-trumps approach takes us further from finding common ground because "[t]he frame requires us to formulate constitutional politics as a battle between those who are of constitutional concern and those who are not. It coarsens us, and by leaving us farther apart at the end of a dispute than we were at the beginning, it diminishes us." *Id.*

for their own protection.[219] Encouraging people to arm themselves if they fear the risk of gun violence could lead to a proliferation of armed civilians in public spaces, which has the potential to exacerbate gun violence rather than minimize it.[220]

B. *A Population-Based View of Protection*

A major discrepancy between the circuits has been over grounding the right in self-defense. The need for self-defense could arise anywhere at any time, a point acknowledged even by the Second Circuit despite upholding the state limitation on public carry.[221] This is because the Second Circuit, along with some other courts, believes that this fact alone does not negate the ability to regulate gun rights anywhere that confrontation may occur.[222] The *Wrenn* court clearly disagrees. In its framing, if the core of the right is self-defense, the state must enable access to firearms in spaces where self-defense might be necessary.[223]

This latter understanding is difficult to square with many of the long-standing prohibitions that *Heller* expressly labels presumptively lawful. The D.C. Circuit attempted to explain away the sensitive-places prohibition due to alternative channels for public carry,[224] by claiming this restriction is justifiable because those who wish to carry can simply avoid those sensitive places, representing only a minimal impact on most people's right to bear arms in public.[225] But this reasoning actually highlights the narrow perspective the court uses.[226] The court focused

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219 *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 45 (2012) ("[C]oncealed carry laws affect the self-defense interests not only of those who wish to carry guns, but also of those who wish to avoid keeping them."). Professor Blocher has also raised the question of whether the Second Amendment contains some right to avoid firearms, similar to the right not to speak protected by the First Amendment. *Id.*

220 *See infra* Section III.B.

221 Kachalsky v. County of Westchester, 701 F.3d 81, 100 (2d Cir. 2012).

222 *Id.*

223 *See* Wrenn v. District of Columbia, 864 F.3d 650, 657 (D.C. Cir. 2017).

224 District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .").

225 *Wrenn*, 864 F.3d at 662.

226 This also ignores the other prohibitions mentioned in *Heller*. For example, it would seem unconstitutional to insist that any person with a mental illness has no right to firearms for self-defense anywhere, at any time. And there are no alternative channels left for their ability to protect themselves with firearms to ensure their own safety. The accepted prohibitions based on convictions of a felony or sales to minors raise similar questions of this core need for self-defense. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1499–1508 (2009). And

only on the those who wish to carry firearms and how a restriction on public carry impacts them.

Just as restrictions on public carry may impact where those who wish to be armed may go, so too can widespread public carry influence the behavior of those who prefer to avoid firearms. Yet, the *Wrenn* opinion paid no attention to the rights of others who may no longer feel they can move freely throughout their community due to a fear of firearms proliferation in public.[227] And in ignoring this consideration, they discounted the state's interest in protecting the rights and liberties of the broader population.[228] This helps to illustrate why a population-based view—which factors in the rights and well-being of all the people affected—is essential to a complete constitutional analysis.[229]

Indeed, the presumptively lawful prohibitions included in Justice Scalia's *Heller* opinion seem to indicate a concern for the public's well-being. No justification, citation, or constitutional value is provided for accepting the stated prohibitions as presumptively lawful.[230] Some may point to an originalist justification that these were present or understood to be accepted at the time of the Amendment's ratification. However, bans on felons and the mentally ill possessing firearms arose in the twentieth century.[231] As then-Judge Barrett pointed out in *Kanter v. Barr*, to suggest that felons and the mentally ill are simply outside of the scope of Second Amendment protections would be "an unusual way of thinking about rights."[232] Rather than simply identifying the scope of the right—and who or what is excluded at the time of ratification—

despite the D.C. Circuit's quick dismissal of the sensitive-places ban, an individual could certainly need self-defense in certain "sensitive" locations, and avoiding them limits their access to certain important spaces. *See id.* at 1530.

227 Blocher, *supra* note 219, at 45.

228 "That *feeling* of security is part of the argument for a broad right to keep and bear arms. . . . [T]he argument goes both ways: advocates of gun regulation seek the same freedom and security through the democratic politics." Siegel & Blocher, *supra* note 18, at 15.

229 In addition to its protection of individual rights, constitutional law is also "concerned with the structure and organization of government, subjects that necessarily implicate the political question of how to organize groups and arrange power between them." WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 55–56 (2009). Population-based legal analysis helps to resist an "unsophisticated and overly deferential stance to public health evidence" as well as reconcile "public health protections with important legal safeguards." *Id.* at 44.

230 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). "[T]he Court's discussion of presumptively lawful gun-control measures is in considerable tension with its conclusions regarding the original meaning of the Second Amendment's operative clause." Rosenthal, *supra* note 136, at 1194.

231 Larson, *supra* note 7, at 1376.

232 Kanter v. Barr, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

Judge Barrett suggested the better approach was to consider the scope of the authority to limit that right.[233]

Following this approach, a simpler and clearer explanation would be that while all people have a Second Amendment right, that right may be limited for some people in certain circumstances under a concern for public safety.[234] Indeed, given the fact that most gun control measures, if not all of them, are passed in accordance with the government's interest in protecting the public, this conclusion seems logical. Long accepted as a compelling government interest,[235] protecting the public provides a clear justification for regulating gun rights, at least to some degree. *Heller* seems to recognize that while the Second Amendment provides an individual right, lawmakers can limit this right in certain circumstances in the interest of safety.[236] Consequently, protecting the public appears to be an acceptable—if not the only justifiable—reason for limiting that right.

This raises doubt that defining the exact boundaries of the Second Amendment should end the analysis, or how central this determination should be to the outcome. In many of the cases discussed above—both those that upheld good cause restrictions and those that struck them down—the focus was almost entirely on the scope of the right. For the D.C. Circuit, for example, the question was simply whether public carry was at the core of the right.[237] This was, in essence, the beginning and the end of the analysis.[238] But *Heller* recognizes authority to limit the right.[239] So, too, does history.[240] In that sense, focusing solely on the core of the right is too narrow a lens.

Regardless of the scope of Second Amendment protections, the key questions are when and how Second Amendment rights, including the right to public carry, can be limited to protect the public. The D.C.

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233 *Id.* at 452–53. Chief Justice Roberts has made this point as well: "The Constitution gives you that right. And if someone's going to take it away from you, they have to justify it." Transcript of Oral Argument, *supra* note 119, at 94.

234 Whether these restrictions have empirical justifications for protecting safety is another matter.

235 *See* Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017) ("[G]un laws almost always aim at the most compelling goal—saving lives . . . .").

236 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

237 *Wrenn*, 864 F.3d at 664–65.

238 *See id.* at 665.

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

240 According to Justice Sotomayor, the only way to avoid the fact that states have historically enacted regulations on these rights is to "sort of mak[e] it up and say[] there's a right to control states that has never been exercised in the entire history of the United States as to how far they can go in saying this poses a danger." Transcript of Oral Argument, *supra* note 119, at 19. Justice Barrett also suggested the historical record demands accepting that states outlawed guns in certain areas. *Id.* at 30–31.

Circuit has drawn the line at infringing on "law-abiding citizens." But this type of analysis lacks the necessary examination of whether the government has a justification for limiting the right to public carry. In short, these decisions fail to conduct half of the analysis.

Heller describes the Second Amendment as codifying a preexisting right of self-defense, providing historical grounding for the fundamental nature of this right.[241] But, looking to the other side of the equation, there is an equally strong historical foundation for state action to protect the public from individuals exercising their rights in a manner that may place others at risk,[242] including the right to bear arms.[243] Indeed, the police powers, which authorize the state to protect public health and safety, predate the Constitution.[244] Yet, this fact is frequently absent from the historical examination found in nearly every Second Amendment opinion.

Police powers are the sovereign authority of each state to restrict rights—including fundamental rights—under certain circumstances to protect the public.[245] This is largely because organized society requires those who take part to sacrifice some freedoms for the benefit of all who are a part of the political community.[246] This creates an inherent partnership, a connection that recognizes that pursuit of the common good benefits everyone.[247] In more specific terms, the social contract means that in return for sacrificing unfettered freedom, individuals can rightly expect the governing body to protect and provide for all in some manner.[248] Consequently, the government's legitimacy is strongly tied to the protection and promotion of public health and safety.[249] As the gun violence epidemic grows, this means that citizens may rightly call for elected officials to take some action to mitigate the growing threat.

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241 *Heller*, 554 U.S. at 603.

242 Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 312–14 (1992) (explaining the importance of the state protecting public health in the Framing Era).

243 Cornell, *supra* note 162, at 43 ("The notion that the right of self-defense had to be balanced against the necessity to keep the peace was central to the way the common law dealt with arms.").

244 Parmet, *supra* note 242, at 272 (describing the police power as a plenary source of state authority).

245 Jacobson v. Massachusetts, 197 U.S. 11, 25–26 (1905).

246 *See generally* Parmet, *supra* note 242, at 308–12.

247 *See Jacobson*, 197 U.S. at 27 ("[I]t was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good' . . . .").

248 Parmet, *supra* note 242, at 309.

249 *See Jacobson*, 197 U.S. at 26 ("There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.").

This helps to demonstrate the importance of a population-based perspective. In any particular challenge, the plaintiff is almost certain to claim they pose little to no risk to the public. And that may in fact be true. Even acknowledging the state has police power authority to proactively minimize harm to the public, there is difficulty in predicting with any accuracy whether any specific individual will cause that harm. This creates a powerful argument for any individual claim where the burden on the right is apparent—especially if considered juxtaposed with the theoretical notion that self-defense needs *could* arise at any moment—while the benefits to the public of that burden are difficult to ascertain.

But while any individual would contend that their probability of generating harm is quite small, in the aggregate that probability grows significantly. For while it may be impossible to accurately predict which individuals will misuse their firearms and when, it is a certainty that many will. Moreover, risk is not simply a question of probability, but magnitude as well. And the magnitude of the harm generated by firearms is unquestionably significant.

Harm, too, takes on a different meaning under a population-based lens. If a challenger were to misuse their firearm, the harm from that person could undoubtedly be substantial. But at a population level, especially for vulnerable, marginalized, and underserved communities, the harm is even greater. For example, firearms are responsible for eighty-seven percent of homicides for youths ten to nineteen years of age.[250] Black people suffer firearm injuries at four times the rate of their white counterparts.[251] And gun violence tends to be disproportionately located in impoverished communities.[252]

While being shot, whether injured or killed, is certainly tragic, these are not the only harms caused by firearms. Those who are fortunate enough to survive a gunshot wound suffer from chronic complications and many will ultimately die specifically from those complications.[253] Not to mention the burden on the caregivers who tend

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250 Scott R. Kegler, Linda L. Dahlberg & James A. Mercy, *Firearm Homicides and Suicides in Major Metropolitan Areas—United States, 2012–2013 and 2015–2016*, 67 MORBIDITY & MORTALITY WKLY. REP. 1233, 1234 (2018).

251 Bindu Kalesan et al., *The Hidden Epidemic of Firearm Injury: Increasing Firearm Injury Rates During 2001–2013*, 185 AM. J. EPIDEMIOLOGY 546, 550 (2017).

252 David A. Larsen et al., *Spatio-Temporal Patterns of Gun Violence in Syracuse, New York 2009–2015*, 12 PLOS ONE 1, 2 (2017).

253 Kalesan et al., *supra* note 251, at 546; *see also* Katherine A. Fowler, Linda L. Dahlberg, Tadesse Haileyesus & Joseph L. Annest, *Firearm Injuries in the United Sates*, 79 PREVENTATIVE MED. 5, 9 (2015) (finding firearms to be the leading cause of spinal cord injuries and more likely to result in paraplegia than other causes). Lead poisoning from bullet fragments lodged inside victims has now become an increasing problem. *See* Chan, *supra* note 185.

to these victims.[254] Even for those who escape the bullets, there is growing evidence of the deleterious mental health impact from exposure to shootings.[255] Posttraumatic-stress, anxiety, depression, and trauma are common for those who are exposed to gun violence.[256]

There is also the fear generated from this national crisis. A majority of high school students now report concerns about a shooting taking place in their school or community.[257] A proper examination of a firearm regulation should consider the probability and magnitude of harm in the context of the population to whom it applies. Whether it is a city, county, state, or nation, the probability of harm grows when the analysis looks beyond those challenging the law. When doing so, the probability and magnitude—the risk—of harm will undoubtedly look quite different.

When discussing firearms in public, this data seems particularly relevant, yet it is rarely, if ever, mentioned. It seems reasonable to suggest that shootings in public spaces are especially likely to increase these exposure-based harms. An increase in apprehension, even for those who are not directly exposed, also seems probable if an unconstrained right to public carry becomes a Supreme Court decree. There may be a growing number of people who fear for their safety in schools, stores, movie theaters, concerts, churches, and other public gatherings. This exhibits how a broad right to carry can impact the freedoms of others. The circuit courts disagreed over the general

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254 The organization Everytown for Gun Safety estimates individuals, families, and communities lose $51.2 billion annually in income due to gun violence. This includes the wages lost for unpaid caregiver work for victims. EVERYTOWN RSCH. & POL'Y, THE ECONOMIC COST OF GUN VIOLENCE (2021), https://everytownresearch.org/report/the-economic-cost-of-gun-violence/#conclusion [https://perma.cc/W9C9-Q7EM].

255 *See The Uninjured Victims of the Virginia Tech Shootings*, NPR (Apr. 14, 2017, 3:12 PM), https://www.npr.org/transcripts/523042249 [https://perma.cc/49B4-DCRF].

256 *Id.*

257 GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, PROTECTING THE PARKLAND GENERATION: STRATEGIES TO KEEP AMERICA'S KIDS SAFE FROM GUN VIOLENCE 12 (2018). This occurs through media coverage as well as the increasing prevalence of active shooter drills, which often create feelings of trauma more so than safety and preparedness. *See* Adam K. Raymond, *How Active Shooter Drills Became a Big (and Possibly Traumatizing) Business*, MEDIUM: GEN (Sept. 12, 2018), https://gen.medium.com/the-response-to-school-shootings-may-be-a-misfire-active-shooter-drills-teachers-students-6acb56418062 [https://perma.cc/9W8K-JZMN]; Alia E. Dastagir, *"Terrified": Teachers, Kids Hit Hard by Shooter Drills*, USA TODAY (Mar. 22, 2019, 8:06 PM), https://www.usatoday.com/story/news/investigations/2019/03/22/indiana-shooter-drill-lockdowns-mock-active-shooters-traumatic/3247173002 [https://perma.cc/8GWS-FASG]; Michael O'Connor, *"She Literally Thought She Was Going to Die": Short Pump Middle School Held Unannounced Active Shooter Drill Tuesday*, RICHMOND-TIMES DISPATCH (May 31, 2018), https://fredericksburg.com/news/state_region/she-literally-thought-she-was-going-to-die-short-pump-middle-school-held-unannounced-active/article_25285f0b-40fc-590d-a81b-b8715f8980b1.html [https://perma.cc/BF47-2BXU].

historical treatment of rights inside the home as compared to in public.[258] But no one can disagree that shootings in public expose more people than do tragedies that occur inside a residence. In the public setting, many may also feel greater fear, anxiety, and stress than they do in their own home due to the lack of control over the actions of strangers.

Historically speaking, the state has had greater authority to act when the public is less able to protect themselves.[259] As discussed, the public's ability to decipher who may be a threat and who may be a law-abiding citizen is limited. An unassailable right to concealed carry would make it even more difficult for people to take protective actions. With firearms hidden from plain sight, those seeking to limit their exposure to firearms would be unable to take proactive measures.[260]

It is this knowledge that should be considered when examining restrictions on guns in public spaces. Laws are meant to govern the masses, and to narrow them to a microexamination of the burdens and risks of an individual claimant discounts this truism. Therefore, the individual right is but one aspect of the evaluation. The manner in which that right can and does impact others is constitutionally germane as well. In realizing this, the search for the Second Amendment's historical truth should be less essential. Instead, the issue is whether there is enough justification for government action in public to warrant a greater limitation on the Second Amendment right.

III. BATTLE OVER THE PUBLIC SQUARE

If we were to reject the categorical, rights-as-trumps approach to the Second Amendment that narrowly focuses on history, we could instead rightly focus on the burden on the individual and the

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258 *See supra* Section I.A.

259 In terms of distinguishing between regulating inside and outside of the home, Justice Kagan found that "history is replete with that distinction." Transcript of Oral Argument, *supra* note 119, at 44. Distinguishing between when individuals can protect themselves and when they cannot also has logic in other areas of public health. For example, the state has less authority to quarantine for HIV because people can take protective measures themselves such as abstinence or using condoms. The state would have greater authority for a contagious disease that is airborne and can spread between individuals prior to becoming symptomatic. Under this circumstance, the public has less ability to protect themselves.

260 Blocher, *supra* note 219 (describing how concealed carry laws impact individuals who wish to avoid firearms).

justification of the state.[261] Some might look to *Heller* and suggest this sounds exactly like the type of balancing that Justice Scalia rejected in his majority opinion.[262] But it is important to remember that this assertion is neither the holding of *Heller*, nor is it accurate that other constitutional rights have not been subject to balancing, as Justice Scalia claimed.[263] If we are to think of the traditional tiers of scrutiny as balancing tests, as Justice Kavanaugh has asserted we should,[264] they have been applied for decades to some of our most protected constitutional rights.

The emergence of the modern standards of review developed in large part as a rejection of the *Lochner*-era notion that there could be clearly delineated lines between private rights and where the government was able to act.[265] Prior, the Court viewed its responsibility as marking conceptual boundaries as opposed to weighing competing rights and interests, similar to how lower courts are approaching the Second Amendment currently.[266] But the Court came to realize that most constitutional cases are conflicts between competing values, interests, and rights, which a balancing approach recognizes and is better equipped to handle.[267]

In a recent case, the Court expressly acknowledged the difficulty of striking a proper balance between competing rights and interests, but still maintained the constitutional requirement to do so. In *Masterpiece*

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261 It is worth noting that Judge Barrett found that history supports this approach as well: "Legislative power to strip the right from certain people or groups was nonetheless a historically accepted feature of the pre-existing right that the Second Amendment protects." Kanter v. Barr, 919 F.3d 437, 453 n.3 (7th Cir. 2019) (Barrett, J., dissenting).

262 *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

263 *See id.* (stating there is "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach").

264 Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

265 *See* RICHARD H. FALLON JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 16 (2019) (describing how the *Lochner*-style review had become "practically and politically untenable, in part because the classical assumption that clear, apolitical boundaries separated the sphere of governmental powers from that of private rights had ceased to be credible").

266 *Id.* at 14.

267 *Id.* at 18. As Professor Richard Fallon points out, the large question of balancing during its emergence was whether it stripped the separation between the legislature and the judiciary:

> If the Court was simply going to *balance* interests, much as the legislature presumably had balanced interests when it enacted a challenged statute, then why should the Court not defer to the legislative judgment about how the balance should be struck as much in free speech cases as in those involving economic liberties?

Id. But this ultimately is what led to various degrees of balancing for certain rights, where the Court provided added protection for those that warranted heightened scrutiny for legislative action. *Id.* at 22.

Cakeshop v. Colorado Civil Rights Commission, the Supreme Court considered the tension between an individual's First Amendment rights and a Colorado civil rights law that protected people from discrimination on the basis of sexual orientation in places of public accommodation.[268] The case was not simply an issue of the plaintiff's First Amendment rights and determining the scope of constitutional protections. The Supreme Court stated quite clearly that this case involved reconciling two competing principles: "[T]he authority of a State and its governmental entities to protect the rights and dignity of gay persons" and "the right of all persons to exercise fundamental freedoms under the First Amendment."[269]

The Court ultimately remanded the case for further consideration but was clear in its direction to the lower court—a balance between the two must be struck.[270] While the plaintiff was free to exercise and express his beliefs in private, it was the harm from exercising those beliefs in public that the state sought to prevent.[271] Here, we have enumerated, fundamental rights—freedom of speech and free exercise of religion—balanced against the state's effort to protect the community from harm that may stem from an individual exercising those rights in the public sphere.[272] To suggest that striking a similar balance for Second Amendment rights exercised in public renders the right second-class status ignores the manner in which other constitutional rights are treated.[273]

In seeking to strike the proper balance between these competing interests, it is necessary to examine the burden on the right as well as what interest the government has. An individual likely will claim that carrying firearms in public is necessary for self-defense and deterrence and, on an individual level, produces little risk of misuse. But the

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268 Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

269 *Id.*

270 *Id.* at 1732 ("While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections . . . .").

271 *Id.* at 1725.

272 *Id.* at 1723.

273 "Since fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights." Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011). But this assertion fails to recognize the vast array of cases applying less than strict scrutiny to laws infringing on First Amendment speech rights, for example, when there are incidental burdens. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179 (1996). Or when the law deals with commercial speech. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980). Then there is the more deferential standard applied to content-neutral regulations. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

validity of this claim looks different from a population-based view. When evaluating the state's justification for regulation from this perspective, predicting harm on an individual level becomes less consequential and the interest in proactively preventing gun violence from getting worse moves to the fore.

A. *The "Good Guys with Guns" Claim*[274]

Framing the Second Amendment analysis solely in terms of an individual right to self-defense and ignoring the real-world consequences of broadly protecting this right presumes that externalities are entirely irrelevant to the constitutional consideration.[275] But this approach is difficult to justify once you consider even *Heller*'s proclamation that the Amendment does not afford protections to "dangerous and unusual weapons."[276] As Professors Joseph Blocher and Darrell Miller accurately point out, "To say something is unreasonably dangerous is to suggest that the costs of bearing it outweigh the benefits."[277] For example, while a machine gun may be useful for self-defense, it does not receive Second Amendment protection. Thus, even *Heller* is implicitly taking practical considerations into account.

Therefore, practical considerations and empirical evidence must be taken into account when assessing the claim that good guys with guns are an acceptable, even desired, way to counter bad guys with guns. The law-abiding citizen argument relies on the common refrain used by proponents of gun rights: "[G]uns don't kill people; people kill

274 In response to the Newtown shooting, the CEO of the National Rifle Association, Wayne LaPierre, stated that "[t]he only thing that stops a bad guy with a gun, is a good guy with a gun." Peter Overby, *NRA: "Only Thing that Stops a Bad Guy with a Gun Is a Good Guy with a Gun*," NPR (Dec. 21, 2012, 3:00 PM), https://www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun [https://perma.cc/ESA2-68N5].

275 Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279, 296 (2016). They compare this to free speech, which cannot be limited simply because it is or may be construed as offensive. *Id.* However, there are other areas of free speech where the harm or potential harm, as opposed to simply offensiveness, is constitutionally relevant. Simple examples include fighting words and real threats, which receive no protection. But commercial speech receives less First Amendment protection at least in part because of the harm that may come to the public. *See, e.g.*, *Zauderer*, 471 U.S. at 651 (allowing broader government regulation to prevent commercial harms).

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

277 Blocher & Miller, *supra* note 275, at 297.

people."[278] But this personal-responsibility framing belies the inherent danger of firearms and the data that suggests firearms are more likely to increase danger and harm than to deter or minimize it.[279] To be sure, as the D.C. Circuit noted in *Wrenn*, confrontations occur outside the home.[280] But to suggest that this unequivocally supports a broad right to carry firearms in public is, again, only looking at it from an individual standpoint. Whether an increase in public carry would in fact make confrontations more likely and more deadly should be a consideration as well.

Evidence shows us that the presence of firearms can escalate common occurrences into confrontations with deadly consequences. In some circumstances, the presence of the gun itself can provoke a potentially harmful confrontation. For example, as more states pass shall-issue laws, and more people carry firearms, there is evidence that road rage incidents are rising.[281] Specifically, research suggests those with guns in their vehicles are more likely to engage in road rage incidents.[282] This research also indicates that individuals carrying guns may act more aggressively or, equally problematic, that aggressive individuals are more likely to carry firearms.[283] The tragic shooting of Trayvon Martin by George Zimmerman, a permit holder, is a high-profile example of an individual who may have been emboldened to lethal action because he carried a firearm.[284]

For another example, in 2012, a concealed carry permit holder in Pennsylvania was asked to leave a bar. He became angry, argued, and shot two men, killing one, before another concealed carry permit holder ultimately subdued him.[285] Both were law-abiding citizens until one shot two men in anger, and the other shot that individual to protect themselves and the other bar patrons. What we see here is that people who would have fallen into the "good guys with guns" category can shift to the "bad guys with guns" category quickly and with deadly results. We know these incidents will happen and the question is whether states are empowered to take proactive measures to reduce gun violence by limiting the number of firearms in public spaces. These examples

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278 *See* James Downie, Opinion, *The NRA Is Winning the Spin Battle*, WASH. POST (Feb. 20, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/02/20/the-nra-is-winning-the-spin-battle [https://perma.cc/J2ZU-NSWB].

279 *See infra* notes 304–15 and accompanying text.

280 *See* Wrenn v. District of Columbia, 864 F.3d 650, 659 (D.C. Cir. 2017).

281 Donohue, Aneja & Weber, *supra* note 11, at 204.

282 *Id.*

283 *Id.*

284 *Id.* at 205. This is not to suggest that race did not play a factor in the attack, but simply to focus on the fact that the presence of the firearm is what made the confrontation lethal.

285 *Id.* at 201.

demonstrate how the presence of firearms can escalate confrontations as opposed to deterring them.

This potential for escalating violence translates to criminals as well. In a survey of convicted criminals conducted for Wright and Rossi's *Armed and Dangerous*, there is significant evidence that broader public carry of firearms is ineffective in deterring crime and may in fact exacerbate the harm that occurs.[286] The primary justifications for carrying a firearm cited by those surveyed were the related motives of efficiency and a reduced need to hurt those who were targeted.[287] What the survey intimates is that criminals using firearms hoped the presence of a gun would make the victim acquiesce so the objective could be completed as quickly as possible. According to those surveyed, having a firearm makes a victim less likely to draw out the process.[288]

Contrary to the argument that more guns will reduce crime, criminals stated that the chance a victim would be armed was a significant factor in their decision *to acquire and carry a firearm*.[289] In addition to efficiency considerations, self-preservation was a strong motivator in a criminal's decision to carry a firearm.[290] The presence of a firearm on a potential victim complicates both efficiency and self-preservation and more likely serves to incentivize rather than discourage criminals from carrying firearms.[291] The chance that a potential victim would be armed was an important factor for a majority of criminals who were armed themselves.[292] In fact, this was a much more important reason than the fact that police have firearms.[293]

This data reveals that the manner in which self-defense is contemplated in Second Amendment analyses is incomplete. While some may find it loathsome to do so, if Second Amendment constitutionality is to weigh the impact on crime, it is vital that the motivations and behavior of criminals be more accurately considered. We often think of self-defense for the "law-abiding citizen," but it is undoubtedly an important concern of those who commit crimes as well.

And social determinants help to reveal why increased firearms in the hands of the public lacks a significant deterrent effect. Part of the persuasiveness of an individual using self-defense to challenge a firearm

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286 JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS (2d ed. 2008).

287 *Id.* at 129–31.

288 *Id.* at 129 ("[I]f you carry a gun your victim doesn't put up a fight, and that way you don't have to hurt them.").

289 *Id.* at 141.

290 *Id.* at 131.

291 *Id.* at 150.

292 *Id.*

293 *Id.*

restriction, and public carry restrictions in particular, is the theoretical assumption that people are rational actors; law-abiding citizens will remain law-abiding, and criminals are those who only act with criminal intent. But in reality, many considerations influence people's behavior.

Extreme poverty created by inequitable wealth distribution, poor public education, substandard housing, lack of jobs with livable wages, living in communities plagued with violence, and substance use disorders are some of the key factors that can drive people to commit crimes.[294] The survey of those convicted of gun crimes—much more informative than relying on the theoretical criminal mind—supports the social-determinants view that broad public carry laws are unlikely to deter criminal activity. Those surveyed by Wright and Rossi resemble the state prison population: "[P]redominantly young, poorly educated, and disproportionately nonwhite."[295] They grew up around guns, using them most of their lives.[296] On average, the surveyed population first fired a gun at thirteen years of age.[297]

With many of these people living in dangerous environments likely plagued by violence, the habit of carrying a firearm for personal protection becomes routine and about self-preservation rather than for the purpose of committing a crime. Wright and Rossi state that "it is misleading to look at strictly criminal behaviors as divorced from the broader day-to-day style of life that characterizes the criminal population."[298] Nearly thirty percent of those surveyed said they carried weapons all of the time, with fear being a significant reason for doing so.[299] This leads to opportunistic criminal attempts, which are less likely to be influenced by a broad Second Amendment protection for public carry: "[M]any of the men in our sample were not calculating, 'rational' criminals but rather strict opportunists whose 'strategic choice,' when they made one, was to commit some crime that was suddenly there for them to commit."[300]

The "more guns, less crime" theory assumes that the criminal who knows that more individuals are carrying firearms in public will choose not to commit crimes out of fear for their safety and well-being.[301] But

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294 *See, e.g.*, Daniel Kim, *Social Determinants of Health in Relation to Firearm-Related Homicides in the United States: A Nationwide Multilevel Cross-Sectional Study*, 16 PLOS MED. 1 (2019).

295 WRIGHT & ROSSI, *supra* note 286, at 12.

296 *Id.*

297 *Id.*

298 *Id.* at 126–27.

299 *Id.* at 126.

300 *Id.* at 127. Only thirty percent of those surveyed acquired a firearm specifically to use in committing a crime. *Id.* at 126.

301 *Id.* at 127.

recognizing the influence social determinants have on criminal behavior makes it difficult to accept this logic.[302] If anything, the evidence intimates that a rise in armed civilians may only stand to increase the likelihood that criminals are armed. Taken together, criminal behavior and the social determinants indicate the likelihood of a result contrary to the intended outcome often cited by proponents of broad public carry rights. An increase in armed civilians is unlikely to deter criminal activity. Therefore, while there may be other justifications for a broad right to public carry, an understanding of social determinants suggests deterrence is not one.

But the fact that public carry is unlikely to deter criminal behavior and could potentially even incentivize those with criminal intent to carry firearms could still be used to argue for broader carry laws. However, the use of a gun to successfully stop a crime is an exceedingly rare occurrence.[303] Assailants injured those who used a firearm in self-defense at the same rate as those who took other protective actions, such as running away, screaming, arguing, struggling, cooperating, or trying to attract attention.[304] One study even found that being armed during an assault was associated with an increased risk of being shot, which tracks with the survey data of criminals and their priority of self-preservation.[305]

Even those who are indeed law abiding and aim to help may contribute more to morbidity and mortality than they do to safety.[306] The potential for misfiring and hitting innocent bystanders, especially in public spaces, is a serious risk. In one shooting analysis, police officers, who have undergone extensive training, were accurate only 18% of the time.[307] And even police officers, who presumably would be

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302 Kim, *supra* note 294.

303 *See, e.g.*, Donohue, Aneja & Weber, *supra* note 11, at 202 ("A five-year study of such violent victimizations in the United States found that victims reported failing to defend or to threaten the criminal with a gun 99.2 percent of the time . . . .").

304 David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREVENTIVE MED. 22, 25 (2015).

305 Charles C. Branas, Therese S. Richmond, Dennis P. Culhane, Thomas R. Ten Have & Douglas J. Wiebe, *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (2009).

306 Philip J. Cook & John J. Donohue, *Saving Lives by Regulating Guns: Evidence for Policy*, 358 SCIENCE 1259, 1260–61 (2017) ("There are documented cases in which well-intentioned actions of private individuals with guns ended with the death of an innocent person.").

307 BERNARD D. ROSTKER ET AL., EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE REVIEW PROCESS 14 (2008), https://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG717.pdf [https://perma.cc/9SK3-S5VT].

more effective than an untrained permit holder, struggle to subdue active shooters.[308]

Yet, many Americans tend to overestimate their ability to use their firearms and underestimate their misuse.[309] In a survey of nearly five thousand people, 82.6% said they were less likely than the average person to use their gun in anger.[310] In that same survey, 50% believed they were in the top 10% of those able to own a handgun responsibly, and 23% thought they were in the top 1%.[311] Research shows that overconfidence increases risk-taking, leading to more individuals attempting to use their firearms when it may not be warranted or safe.[312] And a plainclothes individual also puts themselves at risk of being misidentified by police on the scene as the active shooter.[313] These complications raise doubts about the efficacy of the law-abiding citizen to increase individual or public safety.

These complications do not begin to contemplate the critically important issue of implicit bias, which causes havoc for persons of color, who already suffer disproportionately from gun violence.[314] We have seen the manner in which law enforcement overact with firearms toward people of color, despite their training.[315] A shift toward privatized lethal enforcement of the law—a consequence that seems likely but is not nearly discussed as much as self-defense—could have particularly devastating consequences for communities of color.[316]

In moving from the theoretical to reality, we see an altered version of burden when considering the most prevalent arguments for an

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308 Donohue, Aneja & Weber, *supra* note 11, at 206. In an FBI study, in nearly half the instances where "police engaged the shooter to end the threat, law enforcement suffered casualties." *Id.* That same study only found one incident where a private armed citizen, other than an armed security guard, was successful in stopping a shooter, but that one individual was an active-duty marine. *Id.*

309 *Id.* at 203.

310 *Id.*

311 *Id.*

312 *Id.*

313 *Id.* at 212.

314 Benforado, *supra* note 207, at 8–10 (linking biases against minorities and the Second Amendment).

315 *See* Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [https://perma.cc/U6VD-XPHP].

316 The shooting of Ahmaud Arbery provides a tragic example. Though the killers were convicted of murder, the men who tracked and shot Mr. Arbery still attempted to justify their actions as crime prevention. Tariro Mzezewa, *The Defense Cites a Citizen's Arrest Law that Has Been Largely Repealed*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/2021/11/05/us/citizens-arrest-law-arbery-murder-trial.html [https://perma.cc/5LGK-7FP5].

unencumbered right to carry firearms in public. The paradigmatic "good guys versus bad guys" framing begins to lose its persuasiveness as the line between the two becomes more blurred.[317] Meanwhile, both deterrence and self-defense become much weaker when social determinants are incorporated. If true consideration were paid to the interests on both sides, these factors would leave proponents of a broad right to public carry with an uphill battle to counter evidence the state might produce demonstrating that restricting public carry may mitigate gun violence and protect the public's health, safety, and freedoms.

B. *Protecting the Rights of All*

After assessing the strongest arguments for a broad right to public carry, it is important to evaluate state justification for burdening that right. A vague mention of public safety creates a hollowed-out counterpoint to an individual's right to a firearm. As a result, the risk of harm at issue becomes abstract and easily ignored, and attention shifts to the more personalized, concrete claims from individual challengers claiming needs for a firearm. But this misunderstands both risk and harm, which are more accurately portrayed at the population level, and the state's interest in minimizing them. Absent scrutiny of the state's real interest, the courts ignore the real-world implications of their decisions. Public health research, with its population-based view, provides a useful resource here. The most recent research suggests that legal regimes making it easier for individuals to carry firearms in public are more likely to increase gun violence than protect the public.[318] Shall-issue concealed carry permit laws, for example, have been associated with higher rates of firearm-related homicide and handgun-specific homicide when compared with states that had the stricter may-issue permit laws.[319] As the authors of one study put it, the "finding that the association between shall-issue laws and homicide rates is specific to handgun homicides adds plausibility to the observed relationship."[320]

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317 *See* Susan B. Sorenson & David Hemenway, *Beyond the Good Guy Versus Bad Guy Worldview*, *in* SOC. POL'Y AND SOC. JUST. 112 (John L. Jackson Jr. ed., 2017) (describing the limits of this type of dichotomous thinking in the gun debate).

318 Siegel et al., *supra* note 31, at 1928.

319 *Id.*; *see also* Michael Siegel, Molly Pahn, Ziming Xuan, Eric Fleegler & David Hemenway, *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991–2016: A Panel Study*, 34 J. GEN. INTERNAL MED. 2021 (2019) (finding shall-issue laws associated with a significant increase in the homicide rate).

320 Siegel et al., *supra* note 31, at 1928.

The adoption of shall-issue laws is also associated with a persistent, long-term increase in handgun sales.[321] This is troublesome given that the corresponding increase in handgun-specific homicides showed the largest effect under shall-issue regimes.[322] A narrower example of the impact on homicide is that shall-issue laws are associated with a significantly greater risk of firearm workplace homicides.[323]

Conversely, there is data supporting the association between may-issue laws and lower firearm homicide rates, specifically in large cities.[324] One study shows differing effects on laws in urban versus suburban and rural areas, which may suggest the state could justify different laws for different regions in the state.[325] The data related to each type of public carry regime lends credence to the fact that the law can indeed impact gun violence. Specifically, this supports the suggestion that limiting firearms in public and the number of people who are able to carry them can reduce the harm to the community.

The theoretical underpinning of the "more guns, less crime" argument was questioned above, and research increasingly supports that doubt. Early on, there was at least some inconsistency regarding a correlation between lax regimes for public carry and increased gun violence.[326] Yet, as time has passed, more states enacted permissive firearm carry laws, datasets have grown, and statistical methodologies have become more sophisticated.[327] Consequently, the research has become more robust. The changes in state laws make it easier for researchers to study the impact public carry laws—or lack thereof—can have on gun violence. Current evidence strongly supports the proposition that regulations making it easier to carry firearms outside of the home are more likely to increase, rather than decrease, harm to the public.[328]

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321 *Id.*

322 *Id.*

323 Mitchell L. Doucette, Cassandra K. Crifasi & Shannon Frattaroli, *Right-to-Carry Laws and Firearm Workplace Homicides: A Longitudinal Analysis (1992–2017)*, 109 AM. J. PUB. HEALTH 1747, 1751 (2019) (citing a twenty-nine-percent increase in these incidents). States that passed shall-issue laws from 1992 to 2017 averaged a twenty-four-percent increase in firearm workplace homicides after the law was implemented. *Id.*

324 Siegel et al., *supra* note 183, at 262.

325 *See id.* The specificity of the impact in the study for may-issue carry laws indicates that a more localized effort could be an appropriate manner in which to balance between state and local laws. *See generally* Blocher, *Firearm Localism*, *supra* note 10.

326 Siegel, Pahn, Xuan, Fleegler & Hemenway, *supra* note 319, at 2026 ("[H]istorically the literature on the impact of concealed carry–permitting laws has been inconsistent and several studies have found an association between 'shall issue' laws and reduced murder rates . . . .").

327 Donohue, Aneja & Weber, *supra* note 11, at 199.

328 Siegel, Pahn, Xuan, Fleegler & Hemenway, *supra* note 319, at 2026 ("[T]he three most recent studies to examine [shall-issue] laws found a positive association with homicide rates.").

A study led by John Donohue used both panel data and synthetic control estimates to examine whether there was any contradiction in the results based on methodology.[329] According to Donohue and his coauthors, their findings "uniformly undermine the 'More Guns, Less Crime' hypothesis."[330] Focusing on crime more broadly—as opposed to homicide specifically—their research finds a substantial increase in violent crime in the ten years after a state adopts shall-issue laws.[331] In support of the association between the two, the authors cite the observed increase in the percentage of robberies committed with a firearm, while having no association with limiting the overall number of robberies.[332] The authors believe the results are likely biased in a downward manner because their study does not account for the impact these laws have on increasing firearms in public spaces that are subsequently stolen and then used in other states that do not have may-issue laws in place.[333]

This data does not mean that the definitive cause of violent crime or homicides is shall-issue laws. An association between these laws and increases in violence does not equate to causation.[334] But the research does suggest that elected representatives endeavoring to minimize or prevent gun violence have at least a substantial empirical base to support stricter public carry laws. This typically results in judicial deference to the legislature, which must answer to the electorate.

Given the data described, a broad right to public carry could generate a proliferation of firearms and gun violence in public spaces. A brief summary linking key data points already discussed may be of use. Shall-issue states are associated with a long-term increase in handgun sales.[335] The presence of firearms can increase the likelihood that someone becomes emboldened to act more aggressively, either in anger or in defense of themselves or others.[336] Meanwhile, people tend to overestimate their skills with a firearm and underestimate their likelihood of misuse, which increases risk-taking behavior.[337] More armed civilians are unlikely to deter criminal behavior and may increase

329 *See* Donohue, Aneja & Weber, *supra* note 11, at 199.

330 *Id.* at 240. The authors go on to say that "[t]here is not even the slightest hint in the data from any econometrically sound regression that RTC laws reduce violent crime." *Id.*

331 *Id.*

332 *Id.*

333 *Id.* at 217–18.

334 A detailed discussion of association versus causation is beyond the scope of this Article.

335 Siegel et al., *supra* note 31, at 1928.

336 Donohue, Aneja & Weber, *supra* note 11, at 205.

337 *Id.* at 203–04.

the number of those with criminal intent to both carry and use their own firearms.[338]

What this describes is a potential arms race that is much more likely to exacerbate and increase gun violence than it is to minimize the epidemic. As more civilians and criminals arm themselves, this will only lead to more individuals of both groups—as flawed as this binary may be—to continue to feel the need to carry guns. What we see here is a snowball effect where the proliferation of firearms results in the need to acquire more firearms.

Empirics support the propensity for firearms and gun violence to spread. One of the more interesting areas of emerging research is how gun violence and contagious diseases can propagate in a similar manner.[339] The two are comparable because just as exposure to a contagious pathogen makes a person more likely to become infected, exposure to firearms and gun violence makes someone more likely to become a victim of gun violence.[340] This is not to insinuate that gun violence actually spreads biologically exactly like a virus. But it does imply that exposure to firearms and gun violence can increase the chance that someone will experience gun violence themselves. And given that the research data indicates that broad rights to public carry seem nearly certain to increase exposure to gun violence, the spread could escalate. Perhaps more importantly, this data also supports the assertion that gun violence is far from random and sporadic. Thus, research supports the idea that gun violence is more likely to respond to preventive regulatory measures.

The data may also demonstrate how gun culture can spread and contribute to the growth in gun violence. Social contagion is about culture and behavior, not biology.[341] Social contagion explains behavioral patterns in groups of people that may seem counterintuitive to the average person. For firearms, cultural norms can perpetuate violence through inflated ideas of individual rights, honor, and freedom, while disrespecting others' rights, well-being, and lives.[342] A

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338 WRIGHT & ROSSI, *supra* note 286, at 141.

339 *See* Charles C. Branas, Sara Jacoby & Elena Andreyeva, *Firearm Violence as a Disease—"Hot People" or "Hot Spots"?*, 177 JAMA INTERNAL MED. 333, 333 (2017).

340 Andrew V. Papachristos, Christopher Wildeman & Elizabeth Roberto, *Tragic, but Not Random: The Social Contagion of Nonfatal Gunshot Injuries*, 125 SOC. SCI. & MED. 139, 147 (2015).

341 However, some studies "suggest that the diffusion of gun violence might occur through person-to-person interactions, in a process akin to the epidemiological transmission of a blood-borne pathogen." Ben Green, Thibaut Horel & Andrew V. Papachristos, *Modeling Contagion Through Social Networks to Explain and Predict Gunshot Violence in Chicago, 2006 to 2014*, 177 JAMA INTERNAL MED. 326, 327 (2017).

342 *See* Donohue, Aneja & Weber, *supra* note 11, at 209.

rights-as-trumps approach to the Second Amendment only stands to intensify this problem.[343]

Such cultural norms and peer pressure may help to explain why we cannot simply rely on law-abiding citizens to remain law abiding and peaceful. A broad right to public carry reinforces conceptions of violence as a legitimate means of self-protection and the idea that individuals can and should be responsible for their self-defense.[344] A spread of pro-gun culture in tandem with broader Second Amendment rights could also contribute significantly to issues of toxic masculinity, as well as perpetuate the inequitable division between populations whose guns rights are protected and communities who bear the brunt of gun violence.[345]

If we take seriously the relevant interests on both sides of the constitutional equation—the individual's interest in self-defense *and* the state's interest in protecting the public—then this data is indeed constitutionally salient.[346] While the Second Amendment's underlying values remain unclear, safety appears to be a strong consideration, both individual and societal.[347] Simply put, the empirical research available currently suggests that a proliferation of firearms in the hands of private citizens in public spaces is unlikely to further either of those interests. With that in mind, an unfettered right to carry in public for any and all who want it seems like an unnecessarily broad and dangerous proposition that ignores the state's interest in protecting the public.

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343 *See* Greene, *supra* note 21, at 37 (comparing the rights-as-trumps frame to an approach that enables partisans to recognize the rights and interests on both sides).

344 LIGHT, *supra* note 146, at 58 (describing how changes in self-defense law enabled, if not endorsed, the use of violence outside of the home).

345 *See generally* Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929; C.D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 WM. & MARY J. WOMEN & L. 477 (2017). Take, for example, the tragic murder of Philando Castile, a Black man who had a permit to carry a gun and announced this fact to the officer, before the officer shot and killed him. *See* Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html [https://perma.cc/B6QR-4933].

346 Siegel & Blocher, *supra* note 18, at 15.

347 Even the approach of a rigid scope at the founding must acknowledge the importance of safety. Any exclusion of actors from the right, such as felons and the mentally ill, would presumably have been due to danger. "Scope justifications rest on a conclusion that some past authorities responsible for the scope of the constitutional provision . . . view certain people as untrustworthy (presumably because they are dangerous)." Volokh, *supra* note 226, at 1497.

C. *Good Cause for Proactive State Action*

The primary goal of this Article is not to answer definitively the scope of the Second Amendment or whether there is a historical right to concealed or open carry. The aim is to shift the focus from the unending search for Second Amendment certainty, to suggest that an attempt to find such certitude—especially with regard to an impenetrable scope for the right—may ultimately further the division and increase the improbability of finding a balance between respecting the Second Amendment and protecting the public.[348] Instead, this Article implores a balanced approach to this contentious area, where the judiciary and broader legal academy may help to lead the public to see the issue as one with valid concerns and considerations on both sides. This methodology has not only the benefit of respecting both interests, but it also grounds the analysis in reality. Rather than narrowly examining only a theoretical need for self-defense, a balanced consideration that takes into account the state's justification for limiting the right respects and appreciates the lived realities of those suffering from gun violence. And, indeed, by reframing the analysis as contemplating both the individual's Second Amendment right and the state's interest in protecting the public—incorporating within that consideration the rights and liberties of the public—the constitutional evaluation looks considerably different.

The incorporation of empirical data, too, is not meant to imply that it definitively answers all questions. To be sure, empirical research on the law's impact on gun violence, health disparities, social determinants of health, and the difficulty of successful firearm self-defense does not answer all Second Amendment questions plaguing the legal academy. But the data does suggest that some areas that garner much of the focus are not necessarily critical to Second Amendment constitutional analysis—or at least not as critical as courts currently consider them. The data also provides a way to inform a controversial debate. And, perhaps most important, data offers a path for flexibility.

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348 As Professor Greene convincingly states, when the "contours of that right are treated as predetermined by text, structure, history, and precedent, its contact with the imperatives of modern life [are] artificially severed." Greene, *supra* note 21, at 78. This renders irrelevant "the particulars of the government's behavior, the acts it passes, the players' motivations, the evidence the legislature or agencies gather, or the policy objectives they pursue, and more about the abstracted right the government is alleged to have violated." *Id.* This approach places the entirety of the power to determine the course of action with the judiciary, leaving the people and their elected officials on the sideline, with no avenue for action other than to scream ceaselessly that the other side is at best mistaken, and at worst unconcerned about rights.

Reliance on strict categories often loses its luster over time. Inevitable challenges to the rigidity result in categorical exceptions to the categorical rules.[349] Even categorical approaches incorporate balancing on the front or back end, with balancing better able to handle quarrels in a pluralistic society.[350] Regardless, it seems likely that both will play a role over the long course of the Second Amendment's development.[351] And an empirically informed development allows for transparency and an accurate depiction of the state's justification, which could even diminish over time.[352]

While the constitutional fate of good cause restrictions is in doubt, it must be said that they are, at the very least, an attempt to respect both the right to self-defense and protect the rights and liberties of the entire community.[353] Recognition of both interests suggests a balanced approach—as this Article has supported—which intermediate scrutiny bests represents. Though the *Bruen* oral argument indicates the decision will likely focus on history, this fails to appropriately acknowledge the realities of our time and the state's authority to tackle the current threat of gun violence in contemporary terms. A detailed analysis under the intermediate scrutiny framework—one that grants respect to interests on both sides and demands an examination of modern empirics to more skillfully calculate the burdens to the right and the benefits to the public—would better reflect the Court's modern constitutional jurisprudence and the serious tension that lies with evaluating gun legislation.

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349 *See* Blocher, *supra* note 7, at 434–35 (discussing the exceptions in Fourth Amendment categoricalism arising from the social cost of suppressing evidence).

350 *Id.* at 388–89.

351 *Id.* at 413 ("Second Amendment doctrine will eventually become, like First Amendment doctrine, a patchwork of balancing and categorical tests.").

352 Wiley & Vladeck, *supra* note 214, at 188–89.

353 At the *Bruen* oral argument, the suggestion was made that a location-based sensitive-places restriction would be a more appropriate regulation, especially given *Heller*'s presumptively lawful label of such restrictions. Transcript of Oral Argument, *supra* note 119, at 25–26. While a discussion of the location-based restriction on public carry is beyond the scope of this Article, the attempts to detail the boundaries of such a restriction during the oral argument make clear the difficulty of relying on this method to satisfy concerns of individual self-defense and protecting the public. For example, Paul Clement, arguing for the petitioners, suggested determining whether "weapons are out of place" in a given location, though it is difficult to understand who would make such a subjective determination and what guidelines they would use. *Id.* at 27. As Solicitor General Underwood pointed out in her argument for New York, it would be difficult to determine a rule that appropriately considers the wide range of spaces and the evolving threats within each that appropriately takes into account the changing needs for self-defense and public safety. *Id.* at 81. As she then stated, "[T]hat's one of the things that I think is hard about the suggestion that a sensitive place regime could replace a [good-cause] system like this." *Id.* at 81–82.

Even if carrying a firearm in public were at the core of Second Amendment protections and strict scrutiny analysis were determined to be the applicable standard of review—which also seems unlikely—there is sufficient evidence to demonstrate that balanced gun safety measures, such as good cause restrictions, can satisfy this test as well. Strict scrutiny requires a compelling state interest, and the state must narrowly tailor its action to further that interest.[354] While most, if not all, courts would recognize reducing gun violence as a compelling state interest, it is important to keep in mind the broad scope of the harm caused by gun violence.

To simply state that gun violence is a problem, or that public health and safety are worthy goals, is to downplay the true threat that gun violence poses in this country. The harm goes far beyond the already-tragic deaths and nonfatal injuries sustained each year. But the harm is indeed preventable. Accepting a public health perspective—with its focus on upstream preventive measures to minimize risk—in Second Amendment jurisprudence will ensure that the state is not limited to merely reactive, criminal measures that are not working. Courts must allow a state to take some proactive, preventive measures.[355]

As previously mentioned, a decision that the Second Amendment ensures nearly everyone has the right to carry a firearm in public has the potential to exacerbate an already-growing public health crisis. As more individuals decide to purchase and carry firearms, others may be fearful for their own safety and do the same. This could include those who commit crimes. The increased violence that shall-issue laws are associated with may continue a snowball effect with more individuals taking up arms in response to others increasingly carrying firearms in public. The proliferation of public armament can escalate any confrontation and put innocent bystanders at risk.

This is not a thought experiment. Not only does research suggest these are likely outcomes, but we have seen similar circumstances before. Many often attribute the increased gun violence in the 1980s and 1990s to the crack epidemic, but more recent analysis suggests that flooding the market with cheap guns may be a better explanation of the changes in gun violence.[356] This position is supported by the fact that the increased murder rate for young Black males has continued despite

354 District of Columbia v. Heller, 554 U.S. 570, 688 (2008) (Breyer, J., dissenting).

355 *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

356 William N. Evans, Craig Garthwaite & Timothy J. Moore, *Guns and Violence: The Enduring Impact of Crack Cocaine Markets on Young Black Males* 24 n.21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24819, 2018).

the crack epidemic abating.[357] And given that shall-issue laws are associated with a long-term increase in handgun sales, these laws may incentivize distributors to flood the market again with affordable handguns.[358]

Incidents of gun violence are not distributed equitably throughout the country. Data from the crack epidemic illustrates how a proliferation of firearms has the potential to increase gun violence and target communities of color who already suffer disproportionately. Young Black males face firearm homicide rates ten times higher than young white males.[359] The disparate impact for youth helps explain why life expectancy for Black males is five years lower than white males, with firearm homicide accounting for 14.5% of the life years lost before age 65 for Black males and only 1.2% of the life years lost for white males.[360] And if violence were indeed to increase, there would almost certainly be a response to increase policing efforts, which would likely target low-socioeconomic settings and communities of color. The already strained relationship between law enforcement and these communities would suffer further tension, decreasing trust and safety and increasing harm and health disparities.

As we attempt to move forward in society with gun safety and in the legal academy with Second Amendment doctrine, it is essential that we keep these facts in mind. For good cause laws, for example, the question would then be whether the state narrowly tailors their restriction to both prevent a rise in gun violence and health disparities, as well as to mitigate harm. There is evidence that may-issue laws are associated with a reduction in gun violence and that the alternative shall-issue laws are associated with increased gun violence.[361] Given the data, it is difficult to determine a narrower measure that would properly balance the rights of those who seek to carry firearms for self-defense and the rights of those who wish to avoid firearms.[362] The state would be able to minimize the number of firearms in public, while allowing those who have a specific need for self-defense measures to arm themselves in public spaces.

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357 *Id.* at 4 (finding murder rates for young Black males are seventy percent higher than if they had followed historic trends).

358 Siegel et al., *supra* note 31, at 1928.

359 Green, Horel & Papachristos, *supra* note 341, at 327.

360 Fowler, Dahlberg, Haileyesus & Annest, *supra* note 253, at 10.

361 Siegel et al., *supra* note 31, at 1928. Discussion of shall-issue laws in relation to the potential to increase gun violence inherently suggests a risk that no licensing law for public carry, which is even less restrictive, would have a similar directional effect, if not greater in magnitude.

362 For good cause restrictions specifically, "if the history warrants taking local conditions and local population density and so forth into account, it's hard to think of another way to . . . effectively do that." Transcript of Oral Argument, *supra* note 119, at 77.

This does not mean that the specifications of a good cause law cannot be challenged. Some definitions of a good cause may be too narrow, or the statute may lack due process requirements.[363] Or a facially valid law may operate unconstitutionally in practice by denying a permit to everyone who applies.[364] But what should be important as an initial matter is that good cause laws aim to minimize firearms in public by narrowing the permissibility only to those who can demonstrate a real need.

Gun violence is a complex public health problem that involves many factors. There is no silver bullet. Therefore, courts should not hold states to a standard of definitive proof for success of any specific statute. This is especially true in an area where research is constantly evolving. Typically, this would indicate the importance of deference to the legislature, which is better equipped to respond to new findings and accountable to the public, as opposed to having the courts "make the choice for the legislature."[365]

Gun rights proponents may decry such an assessment. But this type of analysis does not require legislators to disregard self-defense. Nor does this analysis suggest that the right to self-defense in public is less important than the right to self-defense in the home. Instead, it merely indicates that the factors to be considered come out differently in the public setting. The average individual's safety in public is not dependent solely on their ability to protect themselves through lethal force. In public, there are law enforcement and safety officers and the "watchful eyes" of other citizens.[366] Public spaces also increasingly feature other safety features, such as physical barriers, metal detectors, and video cameras. These factors are relevant to constitutional consideration of public carry restrictions as well. To reduce the analysis to a binary of self-defense or helpless vulnerability is a false dichotomy.

Moreover, the risk to others is inarguably greater in a public setting than in the home. An individual may increase their risk of harm by entering the home of someone who owns a firearm. At the very least, they have some control over their level of risk in that circumstance. But

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363 Guidance can be found in public health law with quarantine regulations, which are an extreme and proactive limitation on fundamental rights. Quarantine, which has been upheld as constitutional, involves holding an individual involuntarily because they are suspected of having a contagious disease. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 428–29 (rev. & expanded 2d ed. 2008). This is distinguishable from isolation, which is when an individual is *known* to be infected. *Id.* Though this has been upheld, there are certain due process requirements that are necessary to ensure constitutionality. *See* Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391, 403–12 (2018).

364 *See, e.g.*, Young v. Hawaii, 896 F.3d 1044, 1070 (9th Cir. 2018).

365 Transcript of Oral Argument, *supra* note 119, at 20.

366 Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018).

a proliferation of firearms carried in public would place many at increased risk with little they can do to protect themselves, other than being forced to limit their time in public.

Gun control proponents may also be unhappy with this policy option. The absolute limitation of firearms in public would perhaps be preferable, and, almost certainly, more effective in accomplishing the state's goals. But a flat prohibition of ready-to-use firearms in public would not survive an intermediate or strict scrutiny analysis, let alone survive *Heller*'s dismissal of general bans.[367] Moreover, it would not fully respect the self-defense right that *Heller* declared anchors the Second Amendment right.

A search for balance in a pluralistic society should mean that each side of a debate rarely gets everything it asks for. Second Amendment jurisprudence should reflect this principle. As we have seen with the First Amendment's fight between categorical protections and balancing tests, the doctrine evolved into one primarily of balancing. With more Second Amendment cases likely to come before the Court in the near future, there is no need to delay the inevitable. A continued search through history will not create consensus, and decisions based on centuries-old documents are unlikely to provide the public with an understanding of the Court's rationale, nor are they likely to engender trust in their ability to protect the rights of everyone. Thus, this Article is not an endorsement of the "living Constitution," but it is concerned with those who live under the Constitution, and how constitutional determinations can and do impact their health and safety.

CONCLUSION

A continued reliance on law-abiding citizens to continuously abide by the law ignores the stark reality of what is taking place in this country. When Amnesty International is issuing warnings about the risk of traveling to the United States due to gun violence—and specifically stating that those who do visit the country should avoid public spaces where the risk is greater—we should recognize that there is a problem that needs to be addressed.[368] Public health teaches us that

367 District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008).

368 *See Travel Advisory: United States of America*, AMNESTY INT'L (Aug. 7, 2019), https://www.amnestyusa.org/our-work/government-relations/advocacy/travel-advisory-united-states-of-america [https://perma.cc/2SC3-LY8X] (suggesting those visiting the United States "[a]void places where large numbers of people gather"); *Global Human Rights Movement Issues Travel Warning for the U.S. Due to Rampant Gun Violence*, AMNESTY INT'L (Aug. 7, 2019),

we cannot rely on individuals to simply improve their behavior and minimize all risks to themselves or others. Research has demonstrated that "changing the environmental context within which health problems occur is essential and at times may be more effective than focusing only on individuals."[369] This applies as much to gun violence as any other public health or safety problem.

May-issue, "good cause," requirements are specifically aimed at changing the environmental context. While they may be declared unconstitutional, the Court should not ignore the fact that a confined examination of history and the right alone will have considerable ramifications. It is long past time for courts and policymakers to take a pragmatic approach to balancing protecting Second Amendment rights and protecting the public. To limit the discussion of public health and safety to a mere assertion that the state has an interest in protecting its citizens does a disservice to the devastation that has taken place in this country due to gun violence. Rather than continue to focus primarily on the Second Amendment right, the constitutional debate must move forward by properly balancing this right against the state's undoubtedly compelling interest in trying to stem the tide of gun violence to further enable the safe enjoyment of other constitutional rights. Just as individuals have the right to defend themselves, so, too, does the community have the right to defend itself against this growing epidemic. Restricting—as opposed to eliminating—the number of firearms in public is a reasonable approach to a serious societal ill, and one that a public health–law-influenced analysis demonstrates is clearly constitutional and historically supported.

https://www.amnestyusa.org/press-releases/global-human-rights-movement-issues-travel-warning-for-the-u-s-due-to-rampant-gun-violence [https://perma.cc/6EWP-FEYU]. The organization described the gun violence epidemic in the United States as "a human rights crisis" because the government is "willfully and systemically failing on multiple levels and ignoring its international obligations to protect people's rights and safety." *Id.*

369 Branas, Jacoby & Andreyeva, *supra* note 339, at 334.