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## Open Carry for All: *Heller* and Our Nineteenth-Century Second Amendment

**ABSTRACT.** In the aftermath of *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the most important frontier for defining the scope of the Second Amendment is the right to carry weapons outside the home. Lower courts have disagreed on the proper approach for resolving this issue, how to read the Supreme Court precedent, and the extent of the right protected by the Second Amendment. Not surprisingly, they have reached significantly different results. This Note argues that *Heller* and *McDonald* leave little doubt that courts should engage in a historical analysis when examining the right to carry. Such a historical examination—guided by the sources, methodology, and logic of *Heller*—yields two important conclusions: (1) the Second Amendment guarantees a right to carry outside the home, and (2) it guarantees only a right to carry openly. While much of the history examined by the Supreme Court gives little indication of early understandings of the right to carry, the one set of sources consulted by the Court that speaks unequivocally on the right to carry—antebellum state supreme court cases—suggests that only the open carry of weapons is protected. This conclusion, not yet advanced in the scholarship, differs from arguments by many advocates of gun control, which suggest that there should be no right to carry outside the home, and those suggested by many advocates of gun rights, which would allow states to choose between open and concealed carry, as long as one is guaranteed. Either of those results, while perhaps more practical for twenty-first century Americans, would be inconsistent with *Heller*'s approach and with the sources on which it relies. Instead, a faithful reading of *Heller* requires constitutionally protected open carry, and, strangely enough, a nineteenth-century conception of the right to carry weapons.

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## INTRODUCTION

Since the Supreme Court's landmark decisions in *District of Columbia v. Heller*<sup>1</sup> and *McDonald v. City of Chicago*<sup>2</sup> announced that the Second Amendment guarantees an individual right to keep and bear arms and incorporated that right against the states, courts and scholars have struggled to determine the reach of those opinions. The past five years have witnessed dozens of challenges to state and federal gun regulations of all kinds, from bans on gun ranges,<sup>3</sup> to laws preventing the sale of firearms to persons under twenty-one,<sup>4</sup> to section 1983 suits in response to temporary disarmament.<sup>5</sup> The most consequential cases in defining the contours of the Second Amendment, however, relate to the right to carry firearms outside the home. The issue is extraordinarily important to proponents and opponents of gun rights alike. For proponents, the only way to truly vindicate the right to self-defense is to allow law-abiding citizens to carry firearms on their person. According to opponents of gun rights, an individual right to carry would constitutionalize extreme behavior, allow for vigilantism, and undermine public safety.

The holdings of *Heller* and *McDonald* reached only the right to keep a handgun in the home, leaving the lower courts to sort out whether and how that right extends beyond the home. Provided with such minimal guidance, they have reached vastly different conclusions. Some have taken after *Heller*, conducting significant historical analysis to determine the extent of the Second Amendment right outside the home.<sup>6</sup> Others have concentrated on tiers of scrutiny, weighing the benefits of the gun regulation at issue against its intrusion on the right to keep and bear arms.<sup>7</sup> Others still have refused to

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1. 554 U.S. 570 (2008).

2. 130 S. Ct. 3020 (2010).

3. *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

4. *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185 (5th Cir. 2012).

5. *Embody v. Ward*, 695 F.3d 577 (6th Cir.), *cert. denied*, 133 S. Ct. 770 (2012).

6. *See, e.g., Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 90-91, 95-97 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

7. *See, e.g., Woollard v. Gallagher*, 712 F.3d 865, 876-82 (4th Cir. 2013) (applying intermediate scrutiny to Maryland's permitting system); *Nat'l Rifle Ass'n*, 700 F.3d at 205-11 (applying intermediate scrutiny to a federal law preventing licensed dealers from selling handguns to persons under the age of twenty-one).

extend the right outside the home absent further instruction from the Supreme Court.<sup>8</sup>

This circuit split has led to a number of different conclusions about the right to carry outside the home. In *United States v. Masciandaro*, Judge Wilkinson stated that “[t]he whole matter [of the right to carry outside the home] strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.”<sup>9</sup> In a similar vein, the Court of Appeals of Maryland stated that “[i]f the Supreme Court . . . meant its [*Heller*] holding to extend beyond home possession, it will need to say so more plainly.”<sup>10</sup> Other courts have found that the right to carry must extend beyond the home, relying on the historical evidence presented in *Heller*, as well as on the case’s dicta regarding the prime importance of self-defense, which they argue cannot be limited to the home.<sup>11</sup> These courts have emphasized the need for states to allow some type of carry, but have not expressed a view on the constitutionality of one type of carry of weapons over another. A third group of courts has determined that although the Second Amendment may well extend beyond the home, particular regulations on the right to carry—for example, laws banning the concealed carry of weapons—do not infringe on the right. Two recent cases in the Second and Tenth Circuits have followed this model.<sup>12</sup> Both of those opinions consulted extensive historical evidence regarding limitations on the right to carry in reaching their conclusions.

This Note, like the cases discussed above, attempts to understand the contours of the right to carry after *Heller* and *McDonald*. Like the panels of the Second and Tenth Circuits, I am particularly interested in what kind of carry of

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8. See *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011).

9. *Masciandaro*, 638 F.3d at 475. Judge Wilkinson’s opinion served as the opinion of the court for only a part of the holding. Judge Niemeyer’s opinion also served as a partial opinion of the court.

10. *Williams*, 10 A.3d at 1177.

11. See *Peruta v. Cnty of San Diego*, No. 10-56971, slip op. at 57-62 (9th Cir. Feb. 13, 2014) (holding that the Second Amendment guarantees a right to carry outside the home, but that a state can choose whether to allow open or concealed carry); *Moore v. Madigan*, 702 F.3d 933, 940, 942 (7th Cir. 2012) (Posner, J.) (holding Illinois’s general ban on the public carry of weapons unconstitutional because it does not permit gun possession outside the home for personal self-defense as required by *Heller*).

12. See *Peterson v. Martinez*, 707 F.3d 1197, 1212 (10th Cir. 2013) (finding that Denver’s concealed weapons ban did not run afoul of the Second Amendment); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (upholding New York State’s stringent concealed carry permitting regime).

weapons, if any, the Second Amendment protects. I argue that *Heller* and *McDonald* have left little doubt that a historical analysis is the proper method for defining the right guaranteed by the Second Amendment. The Court's (and, for that matter, the dissents') use of history to determine the existence of an individual right to firearms suggests that elaboration of the extent of the right will require further expeditions into the past.

The history relied upon by the Supreme Court, particularly in *Heller*, and the way the Court reads the historical sources, compel two important conclusions about the right to carry weapons. First, the logic, interpretive choices, and dicta of *Heller* suggest that the right to keep and bear arms must extend beyond the home. Second, the right to carry weapons that is guaranteed by the Second Amendment is the right to carry weapons *openly*. Much of the history of the right to carry is difficult to decipher. Only one set of sources consulted by the Supreme Court speaks comprehensively and unequivocally on this question: antebellum state supreme court decisions. They find almost uniformly, in upholding state concealed weapons bans, that the right to keep and bear arms protects the right to carry weapons openly—and only openly—in self-defense. The particular rationale in those decisions—that the only way to carry weapons defensively is to carry them openly—may not jibe with modern sensibilities. But these opinions are still windows, according to the *Heller* Court, into the historical understanding of the Second Amendment. Our modern right should reflect this understanding, meaning that the logical outgrowth of *Heller* would be a regime in which the concealed carry of firearms could be banned, but the open carry of the same weapons could not.

Such a holding would not sit well with either the opponents or proponents of the individual right to keep and bear arms. Opponents see open carry as the worst of the pro-gun movement—a practice aimed more at provocation and showmanship than at any legitimate safety goal.<sup>13</sup> Meanwhile, many proponents of gun rights recognize how unusual and fear-inducing open carry is in many situations, and how much many Americans prefer to carry weapons concealed. They worry that a constitutional right limited to open carry would prevent many law-abiding citizens from carrying weapons due to the stigma of carrying openly.<sup>14</sup> Still, even if this result is impractical and unpopular, it is the most loyal reading of *Heller*. And because the Court has committed to an

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13. See, e.g., Dahlia Lithwick & Christian Turner, *It's Not My Gun. It's "Free Speech."*, SLATE (Nov. 12, 2013, 6:28 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/open\\_carry\\_demonstrations\\_is\\_carrying\\_a\\_gun\\_to\\_a\\_protest\\_protected\\_by\\_the.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/open_carry_demonstrations_is_carrying_a_gun_to_a_protest_protected_by_the.html).

14. See *infra* Section III.A.

originalist methodology for the Second Amendment, complaints about open carry's lack of agreement with modern practice ought to have very little sway.

This Note proceeds in three Parts. Part I summarizes the holdings of *Heller* and *McDonald* with an eye to what they suggest about the right to carry. It also surveys current state laws regarding the right to carry. Part II examines historical evidence from the periods deemed crucial by *Heller* and *McDonald* to determine how it illuminates the original understanding of the right to carry. This Part notes the lack of clear evidence from the Founding era regarding the right to carry—a sharp contrast with the nineteenth-century case law, which concentrates heavily on the carry of weapons. Part III explores the implications of this historical analysis. It argues that the early nineteenth-century case law, which the *Heller* Court stated was critical to determining the public understanding of the right to carry, leaves little doubt that the Second Amendment was understood at that time to guarantee the right to carry outside the home, but only a right to do so openly. It also discusses other possible readings of the history provided by courts and scholars, and why they comport less well with this evidence. Finally, the Note concludes with a recognition that the Supreme Court may well avoid the finding compelled by this history, and it ties this possible, perhaps even likely, avoidance of an open carry regime to some of *Heller*'s shortcomings.

## **I. *HELLER*, *MCDONALD*, AND THE STATE OF GUN RIGHTS IN AMERICA**

*Heller* and *McDonald* upended Second Amendment jurisprudence by holding that the Amendment guarantees an individual right to keep and bear arms, and that this individual right is incorporated by the Fourteenth Amendment.<sup>15</sup> These cases have been analyzed and debated in detail in academic literature, an exercise I will not replicate in this Note. Instead, I will focus more narrowly on their application to the right to carry weapons outside the home. To supplement this analysis, I will also offer in this Part a short summary of the contemporary legal landscape of right to carry laws in the United States, in order to provide readers with the backdrop against which this legal battle will play out.

This Part and the next focus heavily on the history of the Second Amendment when discussing the right to carry arms beyond the home. *Heller*

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15. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035-36, 3050 (2010).

and *McDonald* made clear that originalism is the proper method for assessing the constitutionality of laws challenged under the Second Amendment. The majority and the dissents in *Heller* rested their conflicting arguments upon the history of the right to keep and bear arms, and the majority in *McDonald* once again performed a substantial historical inquiry on the question of incorporation.<sup>16</sup> Scholars on the left and right have questioned that choice of methodology as well as the way in which the Court employed it,<sup>17</sup> but there can be little doubt after *Heller* and *McDonald* that defining the Second Amendment right is a task that requires historical analysis.<sup>18</sup> This Note, without endorsing this methodology, operates within it.

### A. *Heller*, *McDonald*, and the Right to Carry

*Heller* conclusively established that the Second Amendment guarantees an individual right to keep and bear arms. The Court held that the Amendment did not bestow a new privilege, but simply codified a “pre-existing” right.<sup>19</sup> Analyzing the structure of the Amendment, the Court determined that the “operative clause,” which states that “the right of the people to keep and bear Arms shall not be infringed,” was not controlled by “the prefatory clause,” which refers to a “well regulated Militia.”<sup>20</sup> Having thus brushed aside the possibility that the prefatory clause might have limited the guarantee to some sort of collective or hybrid right, the Court then examined the language of the operative clause. The majority determined that it bestows an individual right to keep and bear arms.<sup>21</sup>

An individual right to keep and bear arms might be guaranteed for any number of reasons, and the Court determined that the Second Amendment

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16. *Heller*, 554 U.S. 570; *McDonald*, 130 S. Ct. at 3036–44.

17. See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356–68 (2009); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Jack Rakove, *Thoughts on Heller from a “Real Historian,”* BALKINIZATION (June 27, 2008, 8:02 PM), <http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html>.

18. For a discussion of the precedential value of interpretive methodology, see generally Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

19. *Heller*, 554 U.S. at 592 (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”).

20. *Id.* at 577–78.

21. *Id.* at 579–95.

grants “the individual right to possess and carry weapons in case of confrontation.”<sup>22</sup> It came to this conclusion upon finding “[t]his meaning . . . strongly confirmed by the historical background of the Second Amendment.”<sup>23</sup> The Court stated that although the prefatory clause indicated that preserving the militia was key to the right’s codification, self-defense “was the *central component* of the right itself.”<sup>24</sup>

Just how far the right to bear arms for self-defense stretches was not made clear in *Heller*. The Court’s language indicating that the Second Amendment protects “the individual right to possess and carry weapons in case of confrontation”<sup>25</sup> would seem to require some right to carry outside of the home. Without any right to carry outside the home at all, many (indeed, perhaps most) confrontations would occur outside the protection of the Amendment. Consequently, many commentators have argued that the only way to read *Heller* is as a guarantee of *some* right to carry a weapon anywhere a confrontation may occur.<sup>26</sup> Furthermore, at least one court has argued that the Supreme Court’s reference to “self-defense and hunting”<sup>27</sup> as purposes for bearing arms in *Heller* suggests that the right to carry firearms outside the home in order to hunt game is guaranteed.<sup>28</sup>

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22. *Id.* at 592.

23. *Id.*

24. *Id.* at 599.

25. *Id.* at 592.

26. See, e.g., Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 16 (2012) (claiming that *Heller* “recognizes a right to have and carry guns in case the need for such an action should arise”); Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 377 (2009) (noting that “*Heller* provides potent arguments that the Second Amendment protects a meaningful right to carry arms regularly for defense”); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009) (arguing that “self-defense has to take place wherever the person happens to be”).

27. *Heller*, 554 U.S. at 599.

28. *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (reading, on remand, the Supreme Court’s decision in *Heller* to hold that the Second Amendment protects the right to keep and bear arms for “lawful purposes,’ such as hunting”). This reading of the reference to hunting seems to overstate its role in the Court’s decision. See Akhil Reed Amar, *Heller*, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 179 n.129 (2008) (arguing that *Heller* recognized “an individual right to keep arms [limited] to situations of self-defense involving ‘confrontation’—that is, ‘conflict with another person’—as distinct from, say, hunting or recreation”). Instead, it is more likely that the reference to hunting is simply an acknowledgment that at the time of the Founding, hunting laws were lax, and that the constitutional protection of firearms for self-defense proved useful for hunters as well.



There are certain sections of *Heller*, however, that so clearly limit its holding to the home that it is premature to read the decision as a definitive guarantee of the right to carry. For example, the majority brushed aside a statute cited by Justice Breyer's dissent that regulated the use of guns on streets or in taverns, because it dealt with guns outside the home.<sup>29</sup> And in validating the right to keep a handgun in the home, the Court stated that whatever the Second Amendment might protect more broadly, it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."<sup>30</sup> The Court is best seen as purposefully using broad language to define the right but also making explicit efforts to prevent *Heller* from reaching the right to carry.

One further reason to question *Heller*'s reach with regard to the right to carry is the Court's explicit approval of certain contemporary gun regulations. Indeed, the most significant limits that the *Heller* Court places on the Second Amendment right are carve-outs that seem aimed at rescuing common and widely accepted laws. After its exhaustive historical analysis, the Court provided the following checks on the right it had just excavated:

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.<sup>31</sup>

Conservative critics of the *Heller* opinion have argued that regulations involving felons, the mentally ill, and sensitive places have no Founding-era analogues.<sup>32</sup> The Court supplemented this limitation on who could own guns with a further restriction on what types of weapons were protected. The majority limited the right to weapons "in common use at the time,"<sup>33</sup>

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29. *Heller*, 554 U.S. at 633.

30. *Id.* at 635.

31. *Id.* at 626-27.

32. See, e.g., Lund, *supra* note 17, at 1356-57, 1366-67 (claiming that all of the aforementioned exceptions, as well as the language on machine gun bans and concealed carry, were the result of activist judging in the style of living constitutionalism and are ahistorical and illegitimate).

33. *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

essentially legitimizing existing (or recently existing) bans on machine guns and certain assault weapons.<sup>34</sup>

Most important for understanding *Heller*'s lessons for the right to carry, however, was the opinion's statement about the concealed carry of weapons. After confirming the existence of the individual right, the first limitation the Court placed on it was the Court's recognition of the validity of concealed weapons bans: "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."<sup>35</sup> While this is not an explicit acknowledgement that bans on concealed carry are constitutional, it is about as close as dictum can get. Justice Scalia thus used the very same nineteenth-century opinions on which he relied to validate the right to limit its application to concealed carry.<sup>36</sup> *Heller*, then, clearly gestures at a right to carry firearms outside the home, but also acknowledges significant limitations on it.

The Court would follow a similar script in *McDonald*. In this follow-up case, the plurality reaffirmed the key holdings of *Heller* that individual self-defense was "'the central component' of the Second Amendment right,"<sup>37</sup> and that the right applied "most notably for self-defense within the home."<sup>38</sup> It further held that the right to keep and bear arms was incorporated against the states by the Fourteenth Amendment's Due Process Clause because it "is fundamental to *our* scheme of ordered liberty"<sup>39</sup> and "deeply rooted in this Nation's history and tradition."<sup>40</sup>

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34. It is, of course, worth pointing out that the only reason machine guns and other automatic weapons are not currently in common use is because of federal bans dating from the 1930s. For a discussion of the development of federal gun control and its relation to the desire to control mob access to the Tommy Gun, see ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 187-204* (2011). The history of federal gun control makes the Court's rationale odd. Given that the opinion purports to rest on the original understanding of the Second Amendment, there is little reason for the Court to be so deferential to a regime of gun ownership that is largely the result of efforts of the 1930s. This passage of *Heller* has also come under criticism from some originalist scholars. See, e.g., Lund, *supra* note 17, at 1362-67.

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

36. An in-depth examination of these cases follows in Section II.D.

37. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (quoting *Heller*, 554 U.S. at 599).

38. *Id.* at 3044 (plurality opinion).

39. *Id.* at 3036 (majority opinion).

40. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Like *Heller*, *McDonald* does not directly address whether there is a constitutional right to carry firearms outside the home. The Court's opinions—the plurality, concurrences, and dissents—do suggest, however, that it has begun to grapple with this issue. First, portions of the plurality opinion hint that the right to keep and bear arms is not limited to self-defense in the home.<sup>41</sup> More directly, Justice Stevens's dissent acknowledges that *Heller* contains “the possibility of a more expansive arms-bearing right, one that would travel with the individual to an extent into public places as ‘in case of confrontation.’”<sup>42</sup> Justice Stevens, doubtless hoping to stave off this interpretation in future cases, then explained why, in his view, the case for recognizing a right to possess firearms is “heightened in the home,” and why “[t]he historical case for regulation is likewise stronger outside [of it].”<sup>43</sup> Even as Justice Stevens tried to limit the right to carry, it is worth noting that *McDonald* omits *Heller*'s discussion of limits on concealed carry despite repeating nearly all of *Heller*'s other limitations of the Second Amendment right.<sup>44</sup>

Taken together, the two opinions begin to paint a picture of how the Court might examine restrictions on the right to carry. While the Court certainly limited the holdings of the opinions, the broad language it used is impossible to ignore. After all, if the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation,” surely that right cannot exist solely in the home. Confrontations can occur anywhere, and if the Second Amendment is truly meant to protect an individual who is being confronted, it ought to extend to locations outside of the home as well. There is the beginning of a scholarly consensus on this point, as well as a small number of judicial opinions that make the same argument.<sup>45</sup>

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41. See, e.g., *id.* at 3044 (plurality opinion) (reading *Heller* to acknowledge a “personal right to keep and bear arms for lawful purposes, *most notably* for self-defense within the home” (emphasis added)); *id.* at 3042 n.27 (majority opinion) (noting that state constitutional provisions in existence in 1868 reflected “a lack of law enforcement in many sections of the country” and “[t]he settlers’ dependence on game for food and economic livelihood”).

42. *Id.* at 3104 (Stevens, J., dissenting).

43. *Id.* at 3105 (noting the law’s longstanding “veneration of the domestic” and the state’s weaker interest in regulating what occurs in the home).

44. *Id.* at 3047 (plurality opinion).

45. See sources cited *supra* note 26; see also *Peruta v. Cnty of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014) (declaring that a scheme of gun laws must allow some right to carry, whether open or concealed); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding Illinois’s blanket ban on carrying weapons unconstitutional).

## B. The Current Gun Regulation Landscape

The timing of *Heller* and *McDonald* was not coincidental. The cases were decided against the backdrop of an extraordinary wave of gun rights scholarship over the previous three decades and an accompanying change in the firearm laws of many states. Because the decisions were so wrapped up with contemporary political and legal movements, some scholars have argued forcefully that *Heller* and *McDonald* are not in fact originalist decisions, but instead examples of popular constitutionalism.<sup>46</sup> This shifting Second Amendment landscape is important not only in the influence it might have had upon the Court's recent decisions, but also for the effect those decisions will have on contemporary gun laws. Thus, in order to gauge the real-world effect that *Heller* and *McDonald* may have on the right to carry, we must understand the regulations that Americans currently face.

State regulations on the carry of weapons fall into a few general categories. The vast majority of these statutes deal with concealed carry; while open carry is sometimes permitted in these states, nearly all of the laws focus on the right to carry a concealed weapon. The most restrictive laws, often called “no carry” restrictions, currently exist only in the District of Columbia.<sup>47</sup> People living in Washington, D.C., are not able to apply for permits to carry weapons—any carry simply is not allowed.<sup>48</sup> At the other extreme, four states—Alaska, Arizona, Vermont, and Wyoming—do not require permits at all, and any resident can carry a weapon openly or concealed, subject only to federal gun laws concerning type of weapon, sale to felons, and other similar restrictions.<sup>49</sup>

The vast majority of states, meanwhile, issue permits to those wishing to carry concealed weapons.<sup>50</sup> Most of these concealed carry laws were passed in

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46. See Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. (forthcoming 2014); Siegel, *supra* note 17.

47. D.C. CODE § 22-4504 (2013). The Illinois no-carry statute, 720 ILL. COMP. STAT. 5/24-1 (2010), was successfully challenged in *Moore*, 702 F.3d 933. The state has since adopted a “shall issue” regime. See Firearm Concealed Carry Act, 2013 Ill. Legis. Serv. P.A. 98-63 (West) (codified at scattered sections of ILL. COMP. STAT.).

48. D.C. CODE § 22-4504; see also James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 912 (2012).

49. ALASKA STAT. ANN. § 11.61.220 (West 2013); ARIZ. REV. STAT. ANN. § 13-3102 (2012); VT. STAT. ANN. tit. 13, §§ 4003-4016 (West 2013) (outlawing the carry and use of weapons in certain limited circumstances, but not requiring any license to possess and carry in other circumstances); WYO. STAT. ANN. § 6-8-104 (West 2013).

50. See Bishop, *supra* note 48, at 912-14.

the 1990s, and some, in addition to allowing concealed carry with a permit, also allow for open carry for the purposes of self-defense.<sup>51</sup> There is a crucial divide in these laws between those that issue permits essentially automatically to anyone who applies and those that employ a measure of discretion.<sup>52</sup> The majority of states fall into the former category, often called “shall issue,” giving states and municipalities no choice but to issue a permit so long as the person is not a felon, a domestic violence offender, or seriously mentally ill. Nine states are “may issue” states, requiring good character, good reason, or both, as judged by state or local officials, to carry a weapon.<sup>53</sup> How these laws are enforced varies considerably by state, but in most “may issue” states, the rules are exceedingly strict, and few licenses are issued.<sup>54</sup>

In the discussion of the right to carry that follows, this brief summary of current gun laws is worth keeping in mind. In over eighty percent of states, the right to either concealed or open carry is available to most people in most places. Most of these states have chosen to protect the right to concealed carry while only some have done the same for open carry. Any decision guaranteeing a right to carry would be felt most acutely in Washington, D.C., and the “may issue” states, where stringent restrictions on the right to carry are in force. But a decision specifying that open carry must be protected would also force changes in the “shall issue” states that currently allow only the right to concealed carry. Thus, the Supreme Court could issue a decision that does not change the status quo (by finding that there is no right to carry outside the home) or it could force dozens of states and countless municipalities to change their laws (by requiring protection for open carry).

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51. *Id. Compare, e.g.,* TEX. GOV'T CODE ANN. § 411.177 (West 2011), *and* TEX. PENAL CODE ANN. § 46.02 (West 2011) (setting out a concealed carry licensing regime while simultaneously banning the open carry of weapons), *with* N.D. CENT. CODE ANN. § 62.1-03-01 (West 2013) (allowing for concealed or open carry by anyone with a concealed weapons license from North Dakota or another state).

52. See Bishop, *supra* note 48, at 912-14.

53. See CAL. PENAL CODE § 26200 (West 2012); CONN. GEN. STAT. ANN. § 29-28 (West 2013); DEL. CODE ANN. tit. 11, § 1441 (West 2010); HAW. REV. STAT. § 134-9 (West 2013); MD. CODE ANN. PUB. SAFETY § 5-306 (West 2013); MASS. GEN. LAWS ANN. ch. 140, § 131 (West 2011); N.J. ADMIN. CODE 13:54-1.4 (2007); N.Y. PENAL LAW § 400.00 (McKinney 2013); R.I. GEN. LAWS ANN. § 11-47-11 (West 2013).

54. See Bishop, *supra* note 48, at 913-14; *cf.* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1553-54 (2009) (noting that local decisions about licenses are opaque and often make it impossible to own a weapon).

## II. THE RIGHT TO CARRY IN THE FOUNDING ERA AND THE NINETEENTH CENTURY

If the underlying logic of *Heller* and *McDonald* suggests that there is a right to carry, the natural next question is what kind of carry the opinions contemplate. Because, beyond *Heller*'s dictum regarding concealed carry bans, the opinions provide little clue of what a right to carry might entail, it is necessary to follow their lead and examine the historical understanding of the Second Amendment and its state analogues at and after the Founding. This Part follows the path forged by *Heller*, examining in turn the "preexisting" English right to keep and bear arms, the legal commentary relied upon by the Framers, Founding-era laws, and nineteenth-century state court cases that the Court used to determine the original meaning of the Second Amendment.

Perhaps the most striking aspect of the Founding-era sources is how little they say about the right to carry. Laws regulating firearms were far from rare before and at the time of the Founding.<sup>55</sup> Yet few laws explicitly addressed the carry of weapons. Similarly, the two most prominent legal commentators around the time of the Founding—William Blackstone and his principal American interpreter, St. George Tucker—did not write directly about the right to carry. Still, these laws and commentaries remain useful because of the window they provide into two issues that the Founding generation clearly did think about when it came to firearms: self-defense and public safety. These two principles animated much of the writing and legislating at the time of the Founding, and they both underlie any discussion of the right to carry. After all, a robust right to carry is justified by the need for personal self-defense, whereas a circumscribed right finds its rationale in enhancing public safety.<sup>56</sup> Thus, while Founding-era laws and legal commentaries themselves say little about weapons outside the home, the interests they address are crucial to any understanding of the right to carry.

Furthermore, *Heller* teaches us that historical inquiry into the Second Amendment must not end in the eighteenth century. Following its lead, this Part also looks beyond the Founding-era sources to the nineteenth-century case law. *Heller* stated that these later sources can clarify "*the public understanding of a legal text in the period after its enactment or ratification,*" and that examining

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55. See WINKLER, *supra* note 34, at 113–16.

56. There are, of course, those who argue for a right to carry on public safety grounds as well. See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING GUN CONTROL AND CRIME LAWS* (1998).

later sources is a “critical tool of constitutional interpretation.”<sup>57</sup> Just as the nineteenth-century sources provided crucial support for the Court’s conclusion in *Heller* that there was an individual right to keep and bear arms, so too these sources give the clearest picture of the right to carry in the time period the Court has deemed relevant for understanding the meaning of the Second Amendment.

Unlike in the Founding era, states did indeed attempt to ban the carry of certain weapons during the nineteenth century, and courts were forced to define the contours of the right to carry in deciding these cases. While the rulings were not entirely uniform, a clear pattern emerges from these cases: states were allowed to ban the concealed carry of weapons but not their open carry. This was not an arbitrary choice—instead, the dichotomy between open and concealed carry underscored antebellum understandings of permissible self-defense and public safety. Just as the nineteenth-century cases proved “critical” to the determination that the Second Amendment protects an individual right, so too are they critical to further explicating that right. And they ultimately suggest that open carry, but not concealed carry, is constitutionally protected.

### A. *The English Right*

The Second Amendment traces its origins to a provision of the English Bill of Rights that read: “[T]he subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.”<sup>58</sup> The text of the English right is less broad than the Second Amendment, and there is general scholarly consensus that the English right was less expansive in practice than its American analogue.<sup>59</sup> Indeed, there is some disagreement as to whether the English provision guaranteed an individual right at all,<sup>60</sup> but the

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57. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

58. Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.).

59. See, e.g., JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 120–21 (1994); Patrick J. Charles, “*Arms for Their Defence*”? *An Historical, Legal and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 374–79 (2009).

60. Compare Charles, *supra* note 59 (arguing that the English right was not understood to include an individual right to self-defense), with MALCOLM, *supra* note 59, at 128–34 (claiming that the right did include an individual self-defense component).

*Heller* majority concluded that it did.<sup>61</sup> Still, *Heller* indicates that the English right was held against the Crown,<sup>62</sup> and there is little indication in the majority opinion that the pre-existing right guaranteed the ability to carry a weapon outside the home in case of confrontation.

### *B. Legal Commentators at the Founding*

Throughout the past two decades, legal scholars have argued vociferously about the views of important legal commentators at the time of the Founding. In particular, the statements of William Blackstone and St. George Tucker have been analyzed exhaustively by academics looking for clues about how the English jurist and the foremost Founding-era American expert on his work understood the right to keep and bear arms. While the scholarship remains deeply divided, the Supreme Court in *Heller* found Blackstone and Tucker to support a robust right to individual self-defense.<sup>63</sup> This interpretation may well have significant consequences for the right to carry outside the home. If Blackstone and Tucker understood the right to keep and bear arms as guaranteeing individuals a right to protect themselves from public *and* private violence, then they could also be marshaled to support a right to carry outside the home to vindicate that guarantee.

#### *1. Blackstone's Commentaries*

In *Heller*, the Supreme Court declared that William Blackstone's *Commentaries on the Laws of England* "constituted the preeminent authority on English law for the founding generation."<sup>64</sup> Blackstone situated the right to bear arms within his larger discussion of the rights and liberties of Englishmen. He began this discussion by describing three absolute rights: the right to "personal security," the right to "personal liberty," and the right to "private property."<sup>65</sup> Because these rights would provide little protection of their own, Blackstone laid out five "auxiliary subordinate rights," which

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61. *Heller*, 554 U.S. at 593.

62. *See id.*

63. *See id.* at 594-95.

64. *Id.* at 593-94 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

65. 1 WILLIAM BLACKSTONE, COMMENTARIES \*125.



functioned to protect these three primary rights.<sup>66</sup> The “fifth and last” of these auxiliary rights, he explained, was

that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c. 2. [the English Bill of Rights] and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.<sup>67</sup>

Some scholars have interpreted this and other passages to mean that Blackstone understood that the right to keep and bear arms guarantees an individual right to self-defense.<sup>68</sup> Others have vehemently disagreed with this interpretation, claiming that Blackstone’s *Commentaries* contained two different English Enlightenment conceptions of self-defense: the civil and political right to self-defense and the natural right to personal self-defense.<sup>69</sup>

This second group argues that this passage dealt with the public right of English subjects to resort to arms if all other manners of peaceful redress have failed. Meanwhile, early Americans understood the right to personal self-defense as a common law question, which Blackstone and Tucker discussed in a different section of their treatises.<sup>70</sup> In his section on common law crimes, Blackstone noted numerous English limitations on the carrying of weapons, which has led some scholars to suggest that Blackstone would have favored strong regulations on the right to carry due to its common law pedigree.<sup>71</sup>

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66. *Id.* at \*136.

67. *Id.* at \*139.

68. See, e.g., MALCOLM, *supra* note 59, at 142-43.

69. See, e.g., SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 15-16 (2006); Charles, *supra* note 59, at 414-18; Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1322-24 (2009).

70. Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1144-46 (2006); see *infra* note 78.

71. See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 49 (2012) (stating that the Statute of Northampton, versions of which were adopted into the common law throughout colonial and early America, was explicitly identified by Blackstone as a lawful restraint on the right to keep and bear arms); Cornell, *supra* note 70, at 1144-46 (arguing that Blackstone’s fifth auxiliary right serves a public political function, not a private, self-defense one covered by the common law).

Blackstone's most notable comment on a limitation on the right to carry weapons was his paraphrasing of the Statute of Northampton, a 1328 law that allowed no person except the King's minions doing their official duties to "ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure."<sup>72</sup> He approvingly compared this law to the Laws of Solon in Athens that had barred men from walking in public in full armor,<sup>73</sup> and New York even reproduced it as an example of affray in a guide for common law judges.<sup>74</sup>

The Court in *Heller* did not make the distinction between political and common law self-defense drawn by Cornell, Miller, and Charles. Instead, the Court saw Blackstone as simply guaranteeing one right, "understood [at the Founding] to be an individual right protecting against both public and private violence."<sup>75</sup> By framing its discussion of Blackstone around the passage discussing the political right to self-defense, the Court may have limited the use of Blackstone's common law. If indeed there was only one right to self-defense articulated by Blackstone—as the *Heller* Court seemed to imply—a future decision on the right to carry might also emphasize Blackstone's discussion of self-defense over his common law-inspired focus on laws that aim to protect public safety.

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72. Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.); 4 WILLIAM BLACKSTONE, COMMENTARIES \*148-49. The extent to which this statute was enforced in England is subject to debate. Compare MALCOLM, *supra* note 59, at 104-05 (arguing that the statute was only enforced when men carried arms to frighten their neighbors and pointing to *Sir John Knight's Case*, (1686) 87 Eng. Rep. 75 (K.B.) (Eng.), as proof), and David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1532 & n.724 (arguing that *Sir John Knight's Case* allows public carry of arms unless it would frighten the public), with Charles, *supra* note 71 (arguing that the Statute of Northampton provided for strong regulation of the individual use of firearms outside the home in both England and revolutionary America), and Miller, *supra* note 69, at 1309 n.214 (stating that *Sir John Knight's Case* reaffirms the right of the King to ban public carry of weapons even though a jury found the defendant not guilty in the case).

73. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*149.

74. See JAMES PARKER & RICHARD BURN, CONDUCTOR GENERALIS: OR THE OFFICE, DUTY, AND AUTHORITY OF JUSTICES OF THE PEACE 10-11 (New York, Robert Hodge 1788).

75. *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008); Miller, *supra* note 69, at 1323.

## 2. *St. George Tucker*

St. George Tucker, America's first Blackstone scholar, has engendered equally contentious disagreement among contemporary scholars regarding his views of the Second Amendment.<sup>76</sup> Tucker both included his own annotations on Blackstone in the edition of the *Commentaries* he edited and wrote a series of unpublished lectures on the nature of the Second Amendment. The Supreme Court in *Heller* found that these writings supported an individual right to self-defense,<sup>77</sup> though, as with Blackstone, many scholars have alleged that the Court oversimplified Tucker's views.<sup>78</sup>

### C. *Founding-Era Constitutions and Laws*

While discussion of the proper role of firearms is omnipresent in contemporary society, the Founding generation did not share our fascination. Less than one-third of the states guaranteed a right to bear arms in their constitutions in 1789. Gun ownership was widespread, and while gun

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76. Compare David Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527, 1533-34 (2009) (arguing that Tucker's notes bolster the *Heller* majority's interpretation), and Joyce Lee Malcolm, *The Supreme Court and the Uses of History: District of Columbia v. Heller*, 56 UCLA L. REV. 1377, 1392-93 (2009) (declaring that Justice Scalia correctly tracked Tucker's views in finding an individual right to bear arms), with Charles, *supra* note 59, at 418-21 (arguing that the right Tucker addressed was given to the militia, as opposed to the individual), and Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1118-24 (2009) (defending Justice Stevens's reading of Tucker in *Heller*), and Cornell, *supra* note 70, at 1127-44 (placing Tucker within his eighteenth-century context and claiming that his writings do not suggest that the Second Amendment conferred an individual right).
77. *Heller*, 554 U.S. at 594-95, 606. Justice Stevens's dissent found Tucker's writings less definitive in what right they guaranteed. *Id.* at 666-67 & n.32 (Stevens, J., dissenting).
78. See, e.g., Cornell, *supra* note 70, at 1148-49. Like Blackstone, Tucker distinguished between the political right to bear arms and the personal, common law right to self-defense, and discussed them in different places in his 1803 commentary on Blackstone. In his discussion of the common law, he described the difference between the English and more expansive American common law right to bear arms for self-protection, as well as the differences between individual states. But even while acknowledging a more expansive American right, Tucker still appeared to be discussing a common law right to self-defense—meaning one that was judge-made and differed by state, as opposed to one that was uniformly constitutionally guaranteed. *Id.* Such an understanding, seemingly rejected by the Supreme Court, would suggest that at least many restrictions on the right to carry would be permissible.

regulation was minor by modern standards, it was still commonplace. Colonies, states, and cities were known to require gun ownership for militia service, prohibit the discharge of guns in populous areas, regulate the storage of powder, and sometimes even bar the storage of loaded weapons.<sup>79</sup>

It appears, however, that there were no direct statutory bans on the carry of arms. This leaves courts and scholars with a series of laws that regulated the discharge, storage, and aggressive use of firearms, as well as laws that disarmed people who were considered untrustworthy in some capacity. None of these laws closely tracks current restrictions on the right to carry, which limits their usefulness. Still, they remain quite important for two reasons. First, of course, is that they are the evidence we have from the Founding era. As disappointing as it may be that they are not more helpful, they form the base of the historical record for the era that *Heller* has established as all-important for a Second Amendment inquiry. Second, these sources show that even if the Founders did not regulate the carry of weapons, they engaged in significant gun regulation to protect public safety.

These laws, then, are open to two conflicting interpretations that will profoundly affect the debate over the constitutionality of limits on the carry of weapons. On the one hand, courts can point to the dearth of laws regulating the carry of weapons and argue that these laws did not exist because it was understood at the time that they infringed on an accepted right to carry. How could the Framers have clearly understood that proscribing the carry of weapons was permissible if there is not a single example of a law that did so? Alternatively, states regulated firearms for the sake of public safety rather robustly, making clear that limits on the right to keep and bear arms were well established and accepted. One scholar claims that these policies are best seen as time, place, and manner restrictions that made using a firearm more difficult in order to prevent serious hazards.<sup>80</sup> Limiting the open carry of weapons may not have been an imperative for any number of reasons, such as the lack of danger caused by weapons that could not quickly be reloaded, the relative lack of large urban areas, or, relatedly, the need to carry weapons in rural areas for hunting or protection. Courts could find that the lack of regulation was not due to a constitutional imperative but instead simply prudent lawmaking in a time when public safety would not be significantly enhanced by limiting the ability to carry weapons. The history provides no clear answer, but given that this core disagreement will likely be crucial to any evaluation of the right to

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79. CORNELL, *supra* note 69, at 27-28; WINKLER, *supra* note 34, at 113-14, 116-17.

80. See CORNELL, *supra* note 69, at 142.

carry, these Founding-era laws remain important to any examination of that right.

### 1. State Constitutions

Between the Declaration of Independence in 1776 and the ratification of the Bill of Rights in 1791, just four states adopted provisions analogous to the Second Amendment in their own constitutions. These provisions are important because they provide a contemporary view of how Revolutionary-era Americans conceived of the right to keep and bear arms. Unfortunately, however, the small number of state provisions offers a rather limited perspective. Furthermore, the formulations, as the *Heller* Court noted, differed subtly but significantly by state. Pennsylvania and Vermont both seemed to contemplate an individual right, stating that “the people have a right to bear arms for the defence of themselves and the state.”<sup>81</sup> Massachusetts, which guaranteed “a right to keep and to bear arms for the common defense,”<sup>82</sup> and North Carolina, which protected only the right to bear arms “for the defence of the State,”<sup>83</sup> appeared to enshrine a more collective understanding. Justice Scalia interpreted these state constitutions together as protective of an individual right to bear arms for defensive purposes.<sup>84</sup> As with much of the Court’s opinion; its analysis would seem to hold whether the defensive purpose exists in the home or outside of it.

The Court also pointed to Thomas Jefferson’s failed addition to the Virginia Declaration of Rights, which read: “No freeman shall ever be debarred the use of arms [within his own land or tenements].”<sup>85</sup> Justice Scalia used this language to buttress his view that the Second Amendment protects the right to bear arms within the home. Of course, that same failed provision—though its failure would seem to limit its force for any proposition—implicates more protection for firearms in and around the home than away from it. This could prove one piece of Revolutionary-era evidence that a court could use to distinguish *Heller*’s homebound ruling from a case involving right to carry outside of the home. Still, the different emphases of the Founding-era state

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81. *Heller*, 554 U.S. at 601.

82. *Id.*

83. *Id.*

84. *Id.* at 602.

85. *Id.* (alteration in original); CORNELL, *supra* note 69, at 20 (alteration in original).

constitutional provisions make it difficult to draw any meaningful conclusions about the Founders' views on the right to carry.

## 2. Gun Laws that Promoted Public Safety

Laws regulating the use and storage of firearms in the Founding era, while far from ubiquitous, were enacted across the colonies and states in the late eighteenth century. Similarly to today, the laws concentrated on cities and towns, where the danger from gun violence and fire from powder storage posed the greatest threat.<sup>86</sup> States and municipalities also passed time, place, and manner restrictions on the use of firearms. None of these laws regulated the right to carry explicitly, and none were ever challenged as violating the Second Amendment or state analogues.<sup>87</sup>

Most pertinent to the right to carry were the numerous colonial and early American derivatives of the Statute of Northampton, the 1328 English statute that became a fixture of the common law.<sup>88</sup> The wording of the individual laws varied by state and legal treatise, but the statute was generally imported into colonial and state law in a manner resembling its original decree that no one should “go nor ride armed by night nor by day in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.”<sup>89</sup> Some prohibited going “armed offensively,” perhaps implying a more aggressive form of conduct, while others referred to causing “terror” in bystanders.<sup>90</sup>

As previously noted, the statute and its implications for the Second Amendment are fiercely debated in the scholarship. In general, the disagreement pits those who read it more literally—and therefore as a significant limit on the right to carry—against those who instead focus on

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86. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 112-20 (2013).

87. As discussed in Subsection II.C.1, four states adopted constitutional protections for the right to keep and/or bear arms before the Second Amendment. In the thirty years that followed the proposal of the Bill of Rights, eight more states followed suit: Kentucky (1792), Ohio (1802), Indiana (1816), Mississippi (1817), Connecticut (1818), Alabama (1819), Maine (1820), and Missouri (1820). *Heller*, 554 U.S. at 584-85 & n.8; CORNELL, *supra* note 69, at 142-43.

88. See *supra* note 71 and accompanying text.

89. Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.).

90. Charles, *supra* note 71, at 33-34.

aggressive use and the intent to frighten, minimizing its applicability where a firearm is simply being carried.<sup>91</sup>

Scholars are correct to place great emphasis on the meaning of these statutes. Read broadly, they grant wide authority to officials to prevent the carrying of weapons, especially their open carry. Construed more narrowly, they would allow the proscription of open carry only if the carrier were engaged in some sort of particularly aggressive activity or was actively trying to scare those around him. Thus, their implications are enormous for the legality of the right to carry in twenty-first century America. Unfortunately, as with much of the Founding-era source material, the correct interpretation is far from clear.<sup>92</sup>

Also related to restrictions to the right to carry were laws that prevented individuals from using firearms in urban areas. The largest cities in revolutionary America—Boston, New York, and Philadelphia—all prohibited the shooting of guns within city limits.<sup>93</sup> Pennsylvania and New York extended these laws to all other cities in the colony, and Delaware also prevented the discharge of firearms in built-up areas except on “days of public rejoicing.”<sup>94</sup> Massachusetts banned the shooting of guns on Boston Neck (the only land access to colonial Boston), while Pennsylvania prevented the use of firearms on public highways, though it specified that the laws barred only the discharge and not the open carry of those arms.<sup>95</sup> And a 1790 Ohio law prevented the firing of guns within a quarter mile of any building or between sunset and sunrise.<sup>96</sup>

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91. Compare *id.* at 35 (arguing that American importation of the statute indicates a well-accepted norm of government regulation of the right to carry), with David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1127 (2010) (arguing that an act must be undertaken with specific intent to terrorize in order to run afoul of the Statute of Northampton), and Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009) (stating that the Framers understood the statute to cover only those situations in which the carrying of arms was unusual, and as a result, frightening).

92. See *supra* note 91 for the best arguments on both sides.

93. *District of Columbia v. Heller*, 554 U.S. 570, 683–84 (2008) (Breyer, J., dissenting); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 162 (2007).

94. Churchill, *supra* note 93, at 162–63.

95. *Id.*

96. Act of Aug. 4, 1790, ch. XIII, § 4, reprinted in 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY 104 (Salmon P. Chase ed., Cincinnati, Corey & Fairbank 1833).

The second provision of this Ohio law was quite typical—colonial and early American state governments regularly proscribed firing guns after dark. These widespread bans largely developed because discharging weapons in quick succession was the typical way of warning of an impending attack. As a result, firing guns for other purposes was frequently barred. Connecticut, Georgia, and New Hampshire all banned shooting guns after dark in the colonial period, and Rhode Island, after an accidental death in 1731, banned firing guns in towns at night.<sup>97</sup> North Carolina passed a law preventing hunting after dark in 1774.<sup>98</sup>

Cities also limited the right to keep and bear arms to enhance public safety through statutes meant to reduce the risk of fire. Cities large—Boston, New York, and Philadelphia, for example—and small often restricted the storage and transport of loaded weapons.<sup>99</sup> These laws took many forms: from limiting powder that could be kept in the home (and as a result the number of possible shots that an inhabitant could fire), to forcing gunpowder to be stored in particular parts of a home, to even preventing, as Massachusetts did in 1783, the storage of loaded firearms.<sup>100</sup>

While none of these laws expressly implicated the right to carry, they showed a robust willingness on the part of state and local officials to limit firearm use in order to enhance public safety. None ever appears to have raised any concern about violating the right to keep and bear arms. And in particular, the emphasis on preventing the use of firearms in cities and after dark shows a recognition that the right to bear arms could be limited in scenarios in which its exercise causes more harm than good. Perhaps courts might regard limits on the right to carry as modern-day equivalents passed in the same spirit. For example, a law barring the carry of weapons in a high-crime city or in particular public places might be justified as an appropriate limit on the Second Amendment due to the great harm the carry of weapons can do to the public and the police in such circumstances. These colonial laws might suggest, then,

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97. See Churchill, *supra* note 93, at 162.

98. See *id.*

99. District of Columbia v. Heller, 554 U.S. 570, 684–85 (2008) (Breyer, J., dissenting); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 511 (2004).

100. Cornell & DeDino, *supra* note 99, at 512. One final category of Founding-era public safety regulation that was quite prevalent, though not relevant to the question of the right to carry, consisted of laws that disarmed people who were not trusted by the state, including slaves, free blacks, people of mixed race, Indians, and Catholics. For a discussion of these laws, see CORNELL, *supra* note 69, at 28–29; and Churchill, *supra* note 93, at 157–61.



that the right to bear arms would have an inherent balancing of cost and benefit built into it. Still, it is worth noting that the Founding-era laws addressed the use, and not the carry, of firearms, and so they provide no direct support for upholding a ban on the right to carry.<sup>101</sup>

### 3. *The Founding Era as a Whole*

A dearth of regulations directly related to the right to carry during the late eighteenth century makes it difficult to glean too much from the era's history. States did, as discussed above, frequently regulate firearms for the sake of public safety, making clear that limits on the right to keep and bear arms were well established and accepted. Those state statutes that codified a version of the Statute of Northampton seem to provide a broad police power to the state, but their meaning is fiercely contested. Furthermore, it appears that not a single law was, at any point in the eighteenth century, struck down by a court as violating a state law right to keep and bear arms. At the same time, none of the Founding-era laws explicitly banned the carry of arms, and some even made exceptions for it. The result is a lack of clarity as to the meaning of the status of the right to carry at the time of the Founding.

### D. *The Antebellum Period*

This opacity of Founding-era views of the right to carry stands in contrast with the far more consistent interpretations during the first half of the nineteenth century. The *Heller* Court relied heavily on case law from this period, which was comparatively voluminous and almost uniform in its interpretation of the Second Amendment and its state analogues. *Heller's* use of this case law remains among its more controversial techniques,<sup>102</sup> but there is little reason to think the Court will discard this "critical tool"<sup>103</sup> for interpreting

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101. As Justice Scalia pointed out in *Heller*, the vast majority of Founding-era laws carried either fines or confiscation of the gun as penalty. Significantly tougher penalties might force a court to question whether modern laws are truly the heirs to these eighteenth-century regulations. See *Heller*, 554 U.S. at 633-34; Churchill, *supra* note 93, at 164.

102. For criticism of *Heller's* declaration that these nineteenth-century sources speak to the original understanding of the Second Amendment, see, for example, *Heller*, 554 U.S. at 662 n.28 (Stevens, J., dissenting); Siegel, *supra* note 17, at 196-98; and Mark Tushnet, *More on Heller*, BALKINIZATION (June 27, 2008, 9:57 AM), <http://balkin.blogspot.com/2008/06/more-on-heller.html>.

103. *Heller*, 554 U.S. at 605.

the public understanding of the Second Amendment in the immediate aftermath of its ratification. And with regard to the right to carry, this case law is particularly important: it provides the only clear and detailed discussions of the right to carry in the source material consulted by *Heller*. The cases, while differing subtly in their discussion of the right to carry, point decisively toward a robust right to carry weapons openly for self-defense but no right at all to carry such weapons concealed. Indeed, these cases are notable for their understanding of the right to keep and bear arms as *not* encompassing concealed carry. Thus, a faithful reading of the most telling source material on the right to carry should lead courts to the conclusion that *Heller's* conception of the Second Amendment protects open, but not concealed, carry.

Beginning in the years immediately after the end of the War of 1812 and continuing through the Jacksonian era, American culture—especially in the backcountry of the West and South—became more individualistic and more aggressive.<sup>104</sup> Explanations for the transformation—from the constant violence of slavery, to the culture of the Scots-Irish, to the presence of large numbers of young, single men—differ, but historians are largely uniform in their recognition of the growing presence of violence in early nineteenth-century Appalachia.<sup>105</sup> In response to this culture of violence, states began to, among other measures, regulate the carry of weapons. These restrictions were in turn challenged in state supreme courts, occasionally under the Second Amendment, though usually under the Second Amendment's variously worded state analogues. While these challenges were more successful in some states than others, courts generally upheld bans on concealed weapons but often overturned those on open carry.

Attempts to curb the increased violence began with anti-dueling measures, aimed at this ritual of formal, organized violence.<sup>106</sup> But more than any other contributor to homicides, it was the carrying of concealed weapons—pistols and knives both—that allowed ordinary arguments to escalate into fatal encounters at a moment's notice. In addition to safety grounds, legislators banning concealed weapons also justified the laws as preventing dishonorable acts.<sup>107</sup> In their understanding, those who relied on concealed weapons could

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104. See CORNELL, *supra* note 69, at 138-41; CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 17-19 (1999).

105. See, e.g., CORNELL, *supra* note 69, at 138-41; CRAMER, *supra* note 104, at 20-45.

106. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1416.

107. *Id.* at 1413.

not possibly be interested in self-defense, but instead must have an improper, aggressive motive. This view allowed lawmakers like New York Governor DeWitt Clinton to pitch bans on concealed carry in populist terms, arguing that the cowardly practice endangered “an essential right of every free citizen.”<sup>108</sup> Still, lawmakers knew their weapons bans would be unpopular, and constitutional challenges soon followed.<sup>109</sup>

Between 1822 and 1850, eight western and southern states faced challenges to statutes, or in one case a common law court ruling, which limited the right to carry. Of these cases, just one produced a holding that protected the right to concealed carry—and that holding was soon overturned by state constitutional amendment.<sup>110</sup> And just one state supreme court gave its legislature nearly no limits in its regulation of the carry of arms.<sup>111</sup> Six state high courts affirmed the state’s right to ban concealed carry, but held that bans on open carry would run afoul of the right to keep and bear arms.<sup>112</sup> Thus, six out of eight of the courts reaching this question found constitutional significance in the distinction between open and concealed carry, determining that the need for self-defense required open carry while the interest in public safety allowed states to ban concealed carry.

Kentucky was the first state to ban the carry of concealed weapons, and the first state to hear a challenge to the law in its highest court. This was no surprise, given that Kentucky was, according to historian Clayton Cramer, “at or near the center of a back country culture of violence” in early nineteenth-century America.<sup>113</sup> The Kentucky Court of Appeals, in *Bliss v. Commonwealth*,<sup>114</sup> found that the state’s concealed weapons ban violated the Second Amendment analogue in the Kentucky Constitution.<sup>115</sup> The legislature voiced its displeasure with the court’s decision, and Kentucky subsequently amended its constitution to allow bans on concealed weapons.<sup>116</sup>

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108. CORNELL, *supra* note 69, at 141.

109. Kopel, *supra* note 106, at 1416.

110. See *infra* notes 114–116 and accompanying text.

111. See *infra* note 117 and accompanying text.

112. See *infra* notes 118–134 and accompanying text.

113. See CRAMER, *supra* note 104, at 17.

114. 12 Ky. (2 Litt.) 90 (1822).

115. The Kentucky Constitution read: “the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned.” *Id.*

116. CORNELL, *supra* note 69, at 145–46.

The Kentucky Court of Appeals would prove an outlier, not a trailblazer, in its treatment of concealed weapons bans. So too would the Arkansas Supreme Court in its approval of a ban on the carry of all weapons. In *State v. Buzzard*, the court provided the era's most permissive view of limitations on the carry of weapons:

I have come to the conclusion that the Legislature possesses competent powers to prescribe, by law, that any and all arms, kept or borne by individuals, shall be so kept and borne as not to injure or endanger the private rights of others, distur[b] the peace or domestic tranquility, or in any manner endanger the free institutions of this State or the United States; and that no enactment on this subject, which neither directly nor indirectly so operates as to impair or render inefficient the means provided by the Constitution for the defense of the State, can be adjudged invalid on the ground that it is repugnant to the Constitution.<sup>117</sup>

It is difficult to find a firmer statement of a state's ability to regulate the right to carry for private purposes. *Buzzard* envisioned a right to keep and bear arms that was violated only when a challenged regulation impaired the defense of the state. This interpretation would also stand apart from those offered by other state courts of the era.

Most states that heard challenges to laws regulating the carry of weapons instead distinguished between open and concealed carry. They found open carry protected by the Second Amendment or the state analogue, while determining that concealed carry could be banned. In each case, courts emphasized that concealed carry did not vindicate the interests of legitimate self-defense that underscored the right to keep and bear arms. The earliest of these cases, the Indiana Supreme Court's 1833 decision in *State v. Mitchell*,<sup>118</sup> provides no reasoning at all, simply stating in a one sentence opinion: "IT was held in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional."<sup>119</sup> Subsequent courts would offer more substantial

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<sup>117</sup>. 4 Ark. 18, 27 (1842).

<sup>118</sup>. 3 Blackf. 229 (Ind. 1833).

<sup>119</sup>. *Id.*

justifications. For example, in the 1840 case of *State v. Reid*,<sup>120</sup> Alabama's highest court ruled that a concealed weapons ban was constitutional, while a ban on open carry would not be. According to the court, "it is only when carried openly, that [weapons] can be efficiently used for defence."<sup>121</sup> Carrying concealed weapons did not fit within the state's constitutional allowance that a person could keep and bear arms "for the purposes of defending himself and the State"<sup>122</sup> because, for purposes of self-protection in moments of immediate danger, the court found that "there can be no necessity for concealing the weapon."<sup>123</sup> And, tellingly, the court rejected an argument that open carry and concealed carry were functionally identical, and that it mattered not which one was allowed and which was barred.<sup>124</sup>

That same year, the Tennessee Supreme Court upheld the state's concealed weapons ban.<sup>125</sup> Finding that "the right to bear arms in defence of themselves is coupled with the right to bear them in defence of the State," and that arms used in defense of the state "must necessarily be borne openly," the court held that only the open carry of weapons could be protected by Tennessee's Second Amendment analogue.<sup>126</sup> Concealed carry was simply not contemplated by the state constitution.<sup>127</sup> Six years later, the Georgia Supreme Court similarly found that a ban on the open carry of guns and knives was too great an imposition on the Second Amendment, but that the state's concealed weapons

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120. 1 Ala. 612 (1840).

121. *Id.* at 619.

122. *Id.*

123. *Id.* at 621.

124. *Id.* at 618.

125. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

126. *Id.* at 161.

127. The court went on to say that a full ban on open carry would infringe upon the right to bear arms, but seemingly only in situations where the right to common defense was implicated. *Id.* at 159-60. Indeed, the court suggested that it viewed the term "bear arms" to imply military use, and that any protected use of arms must relate to public, not private defense. *Id.* at 161. Although this reasoning would seem to provide a state with significant latitude in regulating the carry of arms, the *Heller* majority interpreted this case as "permitt[ing] [citizens] to carry arms openly, unconnected with any service in a formal militia." District of Columbia v. *Heller*, 554 U.S. 570, 613 (2008). This reading of *Aymette* appears sloppy at best and disingenuous at worst. Still, because Justice Scalia claimed the case stands for the right to carry independent of military service, an interpretation of *Aymette* as providing a robust right to regulate the carry of arms except when the common defense is implicated no longer seems tenable.

law was permissible.<sup>128</sup> The court noted that the proscription of concealed carry “does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms,” while “a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*.”<sup>129</sup> In *Heller*, Justice Scalia noted with approval the interpretation adopted by the Georgia Supreme Court in *Nunn*,<sup>130</sup> which makes the Georgia court’s distinction between open and concealed carry all the more consequential.

Shortly thereafter, in *State v. Chandler*, the Louisiana Supreme Court seized on the same divide between open and concealed carry, and ruled that the state could ban concealed carry.<sup>131</sup> *Chandler*, while similar to *Reid* and *Nunn*, provided a more complete statement of the importance of the concealed/open divide in the culture of Jacksonian America. Explaining the constitutionality of the state’s concealed weapons ban, the court wrote:

The act of the 25th of March, 1813, makes it a misdemeanor to be “found with a concealed weapon, such as a dirk, dagger, knife, pistol, or any other deadly weapon concealed in his bosom, coat, or any other place about him, that does not appear in full open view.” This law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man’s right to carry arms (to use its words) “in full open view,” which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.<sup>132</sup>

Just a few years earlier, the North Carolina Supreme Court had upheld the conviction of a man for arming himself with dangerous and unusual

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<sup>128.</sup> *Nunn v. State*, 1 Ga. 243 (1846). Interestingly, the Georgia Supreme Court incorporated the Second Amendment in this opinion, declaring that it applied to the states just as it did to the federal government, in contravention of United States Supreme Court precedent. *Id.* at 250.

<sup>129.</sup> *Id.* at 251.

<sup>130.</sup> *Heller*, 554 U.S. at 612.

<sup>131.</sup> *State v. Chandler*, 5 La. Ann. 489 (1850).

<sup>132.</sup> *Id.* at 489-90.

weapons,<sup>133</sup> stating: “[I]t is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime.”<sup>134</sup> These cases illustrate that early nineteenth-century legislatures and courts were not merely indulging policy preferences by proscribing concealed, but not open, carry. Their understanding of the right to keep and bear arms did not include concealed carry, which simply could not, in their minds, be utilized for legitimate self-defense. It was a tool of the sneaky and the dishonorable, and its protection could not possibly be intended by their state constitutions.

### *E. The Fourteenth Amendment and the Right to Carry*

When the Supreme Court determined that the Second Amendment was incorporated against the states in *McDonald*, it incorporated the right as understood in 1866, not as understood in 1791.<sup>135</sup> This raises the possibility that the Second Amendment could mean something different when applied to state laws than it means when applied to federal laws. This distinction made no difference in *Heller* and *McDonald* because the Court found that the 1791 and the 1866 understandings of the Second Amendment both guaranteed an individual right.<sup>136</sup> But that uniformity might not remain in a case involving the right to carry. Indeed, the Court described the post-Civil War Second Amendment right in *McDonald* as one that was no longer associated with the militia but instead intended to ensure the right to self-defense of the freedmen.<sup>137</sup> It is not difficult to imagine a more robust right to carry as part of this later understanding.

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<sup>133</sup> The wording of this charge closely tracked the wording in Blackstone's *Commentaries*, discussed in Subsection II.B.1, and was essentially the North Carolina common law incorporation of the Statute of Northampton, discussed in Section II.C.

<sup>134</sup> *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422-23 (1843).

<sup>135</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038-42 (2010); see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 223 (1998) (“[W]hen we ‘apply’ the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the amendment of 1866, not the Bill of 1789.”).

<sup>136</sup> *McDonald*, 130 S. Ct. at 3042; *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>137</sup> *McDonald*, 130 S. Ct. at 3038-42.

The question of whether the Second Amendment meant something different in 1866 than in 1791, and whether that difference should lead to different rights against the state and federal governments, is a complex question that is outside to scope of this Note. Instead of attempting to address it in detail, I will make two small observations. First, the Supreme Court and academic scholars have advanced strong evidence from the ratification debates of the Fourteenth Amendment that at least some congressmen intended the Amendment to provide freedmen with the right to armed self-defense against the widespread violence to which they were subjected.<sup>138</sup> A court could read this evidence independently of the Founding-era sources in order to determine the constitutionality of state restrictions on the right to carry. Second, courts and scholars that have evaluated state laws challenged under the Second Amendment have, generally speaking, continued to consult Founding-era history, either at the expense of or in addition to Reconstruction understandings of the Second Amendment.<sup>139</sup> Because of the remaining prevalence of the Founding- and antebellum-era sources in these authorities, I will not devote space in this Note to addressing whether courts should use the Reconstruction understanding of the Second Amendment when evaluating state laws. Nor will I address the differences that this approach might yield.<sup>140</sup> It remains, however, an important unresolved issue in Second Amendment scholarship, and one that I hope commentators will address in the future.

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138. See, e.g., *McDonald*, 130 S. Ct. at 3040-42; AMAR, *supra* note 135, at 259-66; CORNELL, *supra* note 69, at 172-73.

139. See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1210-11 (10th Cir. 2013) (citing antebellum case law); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 95-96 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (citing various colonial and early American gun regulations, as well as antebellum case law); Charles, *supra* note 71, at 31-41 (consulting eighteenth and nineteenth century sources); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 623-41 (2012) (devoting considerable attention to antebellum source material). *But see* *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("[T]he Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified.").

140. It should be noted that because *Heller* places so much emphasis on the early nineteenth-century case law, it diminishes the likelihood that there would be a substantial difference between the meaning of the right to keep and bear arms at the time of the passage of the Second Amendment and the Fourteenth Amendment. Instead of a difference of roughly seventy-five years, the gap is only a few decades.



### III. IMPLICATIONS FOR AN ORIGINALIST RIGHT TO CARRY

The history discussed in Part II, and the Court's reading of that history in *Heller* and *McDonald*, does not offer a clear answer on the contours of the right to carry. This is unsurprising—after all, the Second Amendment-related historical material in those opinions and this Note have been vociferously debated in legal scholarship for decades. Still, *Heller* and *McDonald*, by revealing the Supreme Court's view of which sources matter and how they should be read, provide a blueprint for how the Court would address a case involving the right to carry. This Part argues that fidelity to *Heller* requires that courts protect the open carry of firearms but allow for restrictions on concealed carry. This theory has not been advanced in the Second Amendment scholarship, but it most accurately captures the understanding of the right to keep and bear arms in the only sources used in *Heller* that contain any significant discussion of the right to carry. This interpretation may prove unpopular with most camps in the Second Amendment discussion, but that does not alter its descriptive force.

After laying out the argument for the constitutional significance of open carry, this Part addresses two alternative interpretations of the original understanding of the Second Amendment. First, I examine the argument against any right to carry outside the home at all. While a colorable argument can be made for this position, it would both require a retreat from *Heller* and diminish the importance of the nineteenth-century sources relied upon substantially by the Court. Next, I discuss what one scholar has described as the “alternative outlet” theory, which posits that some right to carry must be allowed, but that the government is free to choose whether that carry is open or concealed. While this argument is convenient for modern-day sensibilities regarding the right to carry, it does not conform to the nineteenth-century understanding of the Second Amendment and its analogues embraced by the *Heller* Court. As a result, courts would be wrong to embrace it.

#### A. *The Right to Carry Openly (and Not Concealed)*

The argument for a Second Amendment that guarantees the right to carry, but to carry only openly, is straightforward and grounded in fidelity to *Heller*. As we have seen, in that case, the Supreme Court consulted a range of sources—material on the English right, Founding-era legal authorities, Founding-era statutes, and nineteenth-century state court cases. Evaluating the same sources reveals that the material regarding the English right and the Founding era provides little to no help in discerning the historical right to carry. The Founding era certainly provides some examples of laws regulating

firearms for public safety as well as discussions of the importance of self-defense, but the eighteenth-century authorities simply do not speak to the question of the right to carry. The Court's nineteenth-century sources, however, concentrate heavily on the right to carry, and speak with what is close to a single voice on what the Second Amendment protected: the right to carry weapons openly for personal self-defense. *Heller* determined that these cases were a "critical tool" for understanding the historical public meaning of the Second Amendment, and using them as such leads to the conclusion that only open carry should be constitutionally protected.

Regardless of what we think about their reasoning today, antebellum courts did not randomly choose open carry over concealed carry. As discussed above,<sup>141</sup> their understanding of the right to carry for self-defense explicitly encompassed a view that the two were different, and that only open carry was protected. Antebellum state courts explicitly valorized the type of self-defense guaranteed by open carry and rejected what they saw as the deficiencies of concealed carry. The Alabama Supreme Court in *State v. Reid* reasoned that "it is difficult to conceive" of why someone interested in self-protection would have an interest to carry concealed instead of openly.<sup>142</sup> It held, quite unequivocally, that "it is only when carried openly, that [weapons] can be efficiently used for defence."<sup>143</sup> In *State v. Chandler*, the Louisiana Supreme Court agreed, holding that the right to carry openly "is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."<sup>144</sup> Concealed carry bans simply did not implicate the right to keep and bear arms, because they were entirely outside of its protection. The Georgia Supreme Court found that a concealed weapons ban did not "deprive the citizen of his *natural* right of self-defense, or of his constitutional right to bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . ."<sup>145</sup> These cases do not speak with the equivocal language of *either* and *or* when describing open and concealed carry. Instead, they clearly embody a Jacksonian understanding of the right to

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<sup>141</sup>. See *supra* Section II.D.

<sup>142</sup>. *State v. Reid*, 1 Ala. 612, 621 (1840).

<sup>143</sup>. *Id.* at 619.

<sup>144</sup>. *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

<sup>145</sup>. *Nunn v. State*, 1 Ga. 243, 251 (1846) (emphasis in original).

self-defense as requiring the visible carry of weapons that would prevent unexpected, unmanly violence.

When contemporary commentators and courts claim that it does not matter what kind of carry is protected, they set aside this antebellum understanding of self-defense in favor of a modern conception that does not align with the case law on which *Heller* rested much of its holding. Their desire to do so is understandable. Concealed carry and open carry no longer hold the same significance that they did in the nineteenth century. Today, open carry, as Eugene Volokh points out, intimidates those around the carrier and makes the carrier appear unreasonable to many—factors that may discourage some from carrying openly.<sup>146</sup> This may well be true. And yet, so too, the need for gun ownership for self-defense has changed enormously since the antebellum era. Unlike two hundred years ago, every American lives within the jurisdiction of a local law enforcement agency, there are no skirmishes with the European powers or Indians on the frontier, and dangerous wild animals pose no threat to most people.<sup>147</sup> But just as those largely outdated threats mattered greatly to the Court's opinion in *Heller*, so too the arguably outdated understanding of the proper mode for self-defense ought to carry weight in the Court's consideration of the right to carry.

One further factor also counsels in favor of unequal treatment for concealed and open carry: the long pedigree of concealed weapons bans. The *Heller* Court recognized this pedigree, specifically citing concealed weapons bans when explaining that the right to bear arms could be limited in certain ways.<sup>148</sup> More generally, it also noted that its holding should not “cast doubt on longstanding prohibitions.”<sup>149</sup> These statements by the majority further demonstrate that the equivalence drawn by contemporary scholars between open and concealed carry does not comport with the Court's approach to the history in *Heller*.

Two circuit courts have recently issued opinions that conform at least in some way to this conception of the right to keep and bear arms. Most directly, in *Peterson v. Martinez*,<sup>150</sup> the Tenth Circuit upheld a Colorado law that limited

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<sup>146</sup> Volokh, *supra* note 26, at 1521-23.

<sup>147</sup> Justice Kennedy, at oral argument, indicated that he believed that the Second Amendment was at least in part about self-defense from outlaws, Indians, and bears. See Transcript of Oral Argument at 8, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf).

<sup>148</sup> *Heller*, 554 U.S. at 626.

<sup>149</sup> *Id.*

<sup>150</sup> 707 F.3d 1197 (10th Cir. 2013).

concealed carry licenses to state residents. In its decision, the court canvassed much of the same antebellum case law analyzed in *Heller* and in Section II.D above, as well as Second Amendment scholarship, and found a “long history of concealed carry restrictions in this country.”<sup>151</sup> Because of *Heller*’s warning about respecting longstanding prohibitions,<sup>152</sup> and because concealed weapons bans have just such a pedigree, the court found that the Second Amendment did not invalidate the concealed weapons ban.<sup>153</sup> The plaintiff waived his challenge to Denver’s ban on the open carry of firearms, and so the court did not reach the question of whether Colorado’s concealed and Denver’s open carry bans acted together to effectively deprive non-residents of any right to carry weapons.<sup>154</sup> If it had, it might have had occasion to find that banning the open carry of weapons runs afoul of the Second Amendment, even as concealed carry bans remain constitutional.

The Second Circuit, in upholding New York State’s very strict concealed carry licensing regime, was less definitive than the Tenth Circuit in its reading of *Heller*. Still, its opinion leaves open the possibility of an open-carry-only view of the Second Amendment. In *Kachalsky v. County of Westchester*,<sup>155</sup> the court agreed with the Fourth Circuit that the application of *Heller* beyond the home was a “vast *terra incognita*.”<sup>156</sup> It nonetheless stated that a faithful reading of *Heller* “suggests . . . that the Amendment must have *some* application in the very different context of the public possession of firearms.”<sup>157</sup> This acknowledgement set the Second Circuit apart from the Fourth Circuit and the Maryland Court of Appeals, as discussed below.<sup>158</sup> Still, the court found the history of regulation of the right to carry too indeterminate to support the plaintiffs’ argument that the state could not bar both concealed and open carry of firearms.<sup>159</sup> It also found that New York’s lack of a total ban on the carry of

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<sup>151</sup>. *Id.* at 1211.

<sup>152</sup>. *Heller*, 554 U.S. at 626.

<sup>153</sup>. *Peterson*, 707 F.3d at 1211.

<sup>154</sup>. *Id.* at 1212.

<sup>155</sup>. 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

<sup>156</sup>. *Id.* at 89 (quoting *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)).

<sup>157</sup>. *Id.*

<sup>158</sup>. See *infra* notes 168-172 and accompanying text.

<sup>159</sup>. *Kachalsky*, 701 F.3d at 90-91. In *Moore v. Madigan*, Judge Posner quibbled with this historical analysis because he thought the history had been “settled” in *Heller*. 702 F.3d 933, 941 (7th Cir. 2012).

firearms fell within the mainstream of gun regulations.<sup>160</sup> Then, using an intermediate level of scrutiny, the court upheld the law.<sup>161</sup> It is difficult to tease out a clear distinction in the Second Circuit's opinion between concealed and open carry. But the court's reliance on numerous historical concealed weapons bans from New York and elsewhere shows that the court recognized the disparate treatment the two methods have received over the years.<sup>162</sup> Perhaps if it had been forced to explore more fully how the Second Amendment applies outside the home, it would have used that history to find the protection extended to the open carry of firearms.

Unsurprisingly, the possibility of a right to open, but not concealed, carry has garnered little support from either side of the gun debate.<sup>163</sup> There is little doubt that brandishing a weapon in most situations causes great alarm to the surrounding population.<sup>164</sup> For gun control advocates, open carry could not be worse: it combines the danger of guns with the public terror of observing them regularly. Meanwhile, because carrying openly is outside of mainstream practice and inspires discomfort and sometimes panic or terror, many gun rights advocates have also tried to sidestep a constitutional rule that would protect only a right to open carry. Nonetheless, if the *Heller* Court is to be taken at its word that the Second Amendment ought to be interpreted by its original understanding, and that the nineteenth-century cases are crucial to explaining that understanding, then any inconvenience posed by a constitutionalized open carry should not prevent the Court from staying loyal to its methodology.

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160. *Kachalsky*, 701 F.3d at 91.

161. *Id.* at 101.

162. *Id.* at 84-85, 89-91, 95-96.

163. It is worth noting that there is a small but visible set of gun enthusiasts who vociferously advocate for the right to carry weapons openly. See Volokh, *supra* note 26, at 1521. Legal commentators, however, tend not to embrace the movement.

164. See, e.g., *Embody v. Ward*, 695 F.3d 577, 579 (6th Cir.), *cert. denied*, 133 S. Ct. 770 (2012) (noting that multiple people called the authorities upon seeing a man carrying a large semi-automatic handgun openly in a Tennessee state park); Noelle Crombie, *Rifle Toting Activist in Portland Area Is Well Known to Medford Police*, OREGONIAN, Jan. 10, 2013, [http://www.oregonlive.com/portland/index.ssf/2013/01/rifle\\_toting\\_activist\\_in\\_portl.html](http://www.oregonlive.com/portland/index.ssf/2013/01/rifle_toting_activist_in_portl.html) (reporting on an incident in which two men walked through Portland, Oregon, toting assault rifles, leading to dozens of frightened calls to the police). But see Manny Fernandez, *Oklahomans Prepare for New Law that Will Make Guns a Common Sight*, N.Y. TIMES, Oct. 30, 2012, <http://www.nytimes.com/2012/10/31/us/oklahoma-prepares-for-open-carry-gun-law.html> (noting that a new Oklahoma law will allow concealed weapon permit holders to also carry openly).

### *B. Alternative Interpretations of the Right to Carry*

Although the historical evidence best supports a right to carry only openly outside the home, two other prominent interpretations have emerged in judicial opinions and legal scholarship since *Heller*. Those opposed to extending *Heller* beyond the home have attempted to argue that the history supports no right to carry at all—that *Heller* should essentially be confined to its facts and protect the right to carry weapons only in the home. Meanwhile, scholars more receptive to gun rights have argued that the history supports the right to carry, but that the method of carry is not implicated by the Second Amendment. States, then, can choose how to best protect the right. This position, which has been described as the “alternative outlet” theory because it requires *either* open or concealed carry as an “outlet” for the right to carry, has been accepted by at least one lower court, and perhaps another.<sup>165</sup> Neither of these positions, however, can be easily justified by *Heller* and its sources.

#### *1. No Right to Carry*

One way for the Supreme Court to avoid constitutionalizing open carry would be to rule that there is no right to carry weapons outside the home at all. This would confine *Heller* and *McDonald* to their holdings: that there is an individual right to possess a handgun in the home. This theory arguably finds some support in laws at the time of the Founding, as well as a broad reading of the common law’s embrace of the Statute of Northampton. This limited reading of *Heller* runs into one key problem: the logic of *Heller* itself seems to extend beyond the home, based both on the way the right to self-defense is described and the case law that the Court used to recognize an individual right.<sup>166</sup>

The strongest argument for the absence of any right to carry is simple but intuitive: there are no examples from the Founding era of anyone espousing the concept of a general right to carry, while there are many examples of limiting gun use for public safety reasons. As noted in Section II.C, gun regulation at the time of the Founding was relatively common, and there are no

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<sup>165.</sup> See *infra* notes 178-191 and accompanying text.

<sup>166.</sup> A second argument against this interpretation could be made based on the Fourteenth Amendment, which has been read by some scholars, and arguably by *McDonald*, as incorporating a broader individual right than the Second Amendment originally contemplated. For a brief explanation of this possibility, see *supra* Section II.E.

records of any challenges to any of those gun laws using states' Second Amendment analogues. If the Second Amendment and its state analogues protected a robust right to carry, one would expect to see some evidence in defenses to gun charges in the Founding era, but there appears to be none. Perhaps its absence lends credence to Patrick Charles's recent scholarship on the important role of the Statute of Northampton in the common law of colonies and states in the early Republic.<sup>167</sup> This argument, historically grounded and well sourced, provides the strongest case for *Heller* and *McDonald* being confined to the home.

Some courts, without delving into the history discussed in this Note, have seemed to embrace this limited conception of the right to keep and bear arms. For example, in *United States v. Masciandaro*,<sup>168</sup> which dealt with the right to carry a handgun in a national park, the Fourth Circuit found that the Second Amendment was not implicated. Judge Niemeyer, writing only for himself, claimed that "a plausible reading" of *Heller* would require the Second Amendment to apply outside the home in some capacity.<sup>169</sup> But Judge Wilkinson, writing for the court, refused to venture outside the home at all.<sup>170</sup> Maryland's highest court made a similar ruling in *Williams v. State*,<sup>171</sup> upholding a conviction for carrying a handgun in public without a permit. The court reasoned that "[i]f the Supreme Court . . . meant its [*Heller*] holding to extend beyond home possession, it will need to say so more plainly."<sup>172</sup>

This limited conception of the Second Amendment right is difficult to square with the logic of the Court's decision in *Heller*, which appears to foreclose a regime that allows no right to carry. *Heller* guarantees "the individual right to possess and carry weapons in case of confrontation."<sup>173</sup> While not entirely definitive, this statement seems to require a right to carry outside the home of some kind. A substantial number, perhaps the majority, of potential confrontations are likely to occur away from the home. If the right to

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167. See Charles, *supra* note 71, at 31-36 (arguing that the common law prohibitions on the carrying of arms openly in a way that tended to frighten the general population coexisted without controversy with the right to keep and bear arms at the time of the Founding).

168. 638 F.3d 458, 467 (4th Cir. 2011).

169. *Id.* at 467 (opinion of Niemeyer, J.).

170. *Id.* at 475 (majority opinion).

171. 10 A.3d 1167 (Md.), *cert. denied*, 132 S. Ct. 93 (2011).

172. *Id.* at 1177.

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

carry arms were confined to an individual's property, the right to carry in case of confrontation would be stripped of much of its use.

This reading of *Heller*—as requiring some right to carry—is certainly the most dominant in the academic analysis.<sup>174</sup> Some lower courts have also roundly rejected a total ban on the right to carry. Most notably, Judge Posner, writing for a divided panel in *Moore v. Madigan*,<sup>175</sup> held that the Second Amendment must include the right to carry arms outside the home, striking down Illinois's blanket ban on all carry of guns.<sup>176</sup> Judge Posner declined to revisit the history discussed in *Heller*, noting only that “[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”<sup>177</sup> The Seventh Circuit's decision seems to flow naturally from *Heller*'s reasoning, and fits into the scholarly consensus. While there is a defensible historical case to be made for limiting the Second Amendment right to the home, *Heller* appears to foreclose that interpretation, and to require some right to carry.

## 2. The Alternative Outlet Theory

Alan Gura, a prominent gun rights litigator and the victorious attorney in *Heller*, has been a principal exponent of the argument that some form of carry must be permitted, but it does not matter which one.<sup>178</sup> James Bishop, taking his cue from the reasoning of a California district court,<sup>179</sup> has named this the “alternative outlet doctrine.”<sup>180</sup> This conception of the right to carry relies on

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174. See, e.g., Blocher, *supra* note 26, at 16 (arguing that *Heller* “recognizes a right to have and carry guns in case the need for such an action should arise”); O’Shea, *supra* note 139 (observing the centrality of self-defense to the Court’s *Heller* opinion); O’Shea, *supra* note 26, at 377 (“*Heller* provides potent arguments that the Second Amendment protects a meaningful right to carry arms regularly for defense.” (emphasis added)); Volokh, *supra* note 26, at 1515 (stating that because “self-defense has to take place wherever the person happens to be,” the Second Amendment must protect the right to carry firearms).

175. 702 F.3d 933 (7th Cir. 2012).

176. As noted in Section I.B, Illinois had been the only state to prevent any civilian from carrying a firearm in any circumstances. The District of Columbia has a similarly strict law. See note 47 and accompanying text.

177. *Moore*, 702 F.3d at 942.

178. See O’Shea, *supra* note 139, at 608. Michael O’Shea has also embraced this theory in his own scholarship. *Id.*; see also Bishop, *supra* note 48, at 913.

179. *Peruta v. Cnty. of San Diego*, 678 F. Supp. 2d 1046, 1052–53 (S.D. Cal. 2010).

180. Bishop, *supra* note 48, at 917–18.



one of two options: sidestepping the history of regulation of open and concealed carry, or reading the case law in such a way as to minimize its emphasis on the difference between the two. Different scholars have adopted each of these approaches, but neither can be reconciled with *Heller*.

The first method is to recognize that the history points toward a right to open carry only, but to reject such a finding as impractical. The most prominent advocate of this compromise is Eugene Volokh. He acknowledges that the case law points toward a history of upholding concealed carry bans while protecting open carry.<sup>181</sup> But because cultural norms have changed, he believes that “social pressure” will prevent most Americans from carrying openly, and those who carry concealed do not now pose the danger that nineteenth-century courts thought they did.<sup>182</sup> Volokh worries that because of the stigma against open carry, a Second Amendment right that protected only open carry would deter many law-abiding citizens from carrying weapons at all.<sup>183</sup> Meanwhile, James Bishop, after canvassing the largely opaque empirical data, argues that concealed carry offers the least dangerous and least costly outlet for the right to carry.<sup>184</sup>

Michael O’Shea has advanced a more ambitious and historically grounded approach to undergird the alternative outlet theory. He reads the antebellum case law as focused not on the divide between open and concealed carry, but instead on presumptive versus non-presumptive carry. That distinction rests on whether most individuals are allowed to carry defensive weapons most of the time (presumptive carry), or whether they need to provide special justification in order to carry (non-presumptive carry).<sup>185</sup> Those state courts that recognized a right to carry openly were, according to O’Shea, in fact recognizing a right to carry weapons presumptively, and the method was of secondary importance.<sup>186</sup> He argues that what mattered to the majority of state high courts in the antebellum period was that the right to carry not be abridged or outlawed entirely. Concealed weapons bans were permissible, but only because open carry was allowed. For O’Shea, then, the key question in the right to carry debate is whether states must recognize presumptive carry—the method of the carry itself is of secondary importance. This theory supports

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<sup>181</sup>. Volokh, *supra* note 26, at 1516–17.

<sup>182</sup>. *Id.* at 1521–24.

<sup>183</sup>. *Id.* at 1523.

<sup>184</sup>. Bishop, *supra* note 48, at 926–27.

<sup>185</sup>. O’Shea, *supra* note 139, at 595.

<sup>186</sup>. *Id.* at 623–32.

what O'Shea sees as Gura's "functional" approach: what matters is the right to carry presumptively, and the method itself should not be constitutionalized.<sup>187</sup>

One federal appeals court, adding yet another divergent interpretation of the right to carry in the lower courts, explicitly adopted this approach. In *Peruta v. County of San Diego*,<sup>188</sup> the Ninth Circuit accepted the plaintiff's alternative outlet argument. It examined in detail much of the same historical evidence explored in this Note.<sup>189</sup> The majority then stated that the nineteenth century case law stands not for the legality of open carry, but instead for the need for legal carry outside the home of some kind.<sup>190</sup> Adopting O'Shea's presumptive carry model, the court stated: "California, through its legislative scheme, has taken a different course than most nineteenth-century state legislatures, expressing a preference for concealed rather than open carry . . . . California's favoring concealed carry over open carry does not offend the Constitution, so long as it allows one of the two."<sup>191</sup> The Ninth Circuit reversed a grant of summary judgment in favor of San Diego County and remanded the case, all but assuring that California's regulatory scheme—a general prohibition on open carry combined with difficult to obtain "may issue" concealed carry permits—will be overturned. The opinion stands as the only explicit invocation of the alternative outlet theory by a circuit court.<sup>192</sup> Were this interpretation to take hold, it might well render the question of open versus concealed carry largely moot.

In spite of Volokh's practical focus and O'Shea's creative presumptive carry argument, the centrality of open carry to the originalist inquiry of the right to self-defense is not so easy to dispatch. As discussed in Section III.A, the nineteenth-century courts did not exalt open carry simply because it was convenient. Nor because it was just one way of carrying presumptively, otherwise no different from concealed carry. Instead, the distinction between

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<sup>187</sup>. *Id.* at 608.

<sup>188</sup>. *Peruta v. Cnty of San Diego*, No. 10-56971 (9th Cir. Feb. 13, 2014). The opinion in this case was published as this Note was going to press. As a result, my discussion of this case is necessarily hastier than I wish it were.

<sup>189</sup>. *See id.* at 23-62.

<sup>190</sup>. *See id.* at 57-62.

<sup>191</sup>. *Id.* at 61-62.

<sup>192</sup>. Judge Posner's opinion in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), discussed in Subsection III.B.1, may also suggest an alternative outlet approach, though it is hard to say for sure. It is clear that Judge Posner rejected a blanket ban on any right to carry, *Moore*, 702 F.3d at 940, but the opinion did not reach the question of what type of carry is constitutionally protected.

open and concealed carry was crucial to their understanding of what proper self-defense entailed. For them, the right to keep and bear arms did not protect the carry of concealed weapons. Self-defense inherently required the open carry of weapons, because someone who concealed a weapon must surely have some sort of aggressive or sneaky intent.

At the conclusion of his majority opinion in *Heller*, Justice Scalia admonishes those who disagree with him with the following statement:

Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.<sup>193</sup>

These closing lines offer a combative testament that the Court will not bow to modern sensibilities at the expense of its interpretation of the original meaning of the Second Amendment. For the purposes of the original meaning of the Second Amendment, the nineteenth-century understanding of the right to carry matters, *Heller* tells us. Modern attempts to disregard the era's emphasis on the importance of carrying openly in order to make gun rights more palatable simply do not comport with how the Court approached the Second Amendment in *Heller*. Just as the Court refused to mollify those who wished to use one modern understanding of the value of the right to bear arms to limit its contemporary application, so too the Court should, in fidelity to *Heller*, reject those who wish to erase the connection between self-defense and open carry in the nineteenth century case law.

## CONCLUSION

This Note has argued that *Heller* and *McDonald*, and especially *Heller*, compel the conclusion that the Second Amendment protects the right to carry openly outside the home. The Court's methodology in *Heller* and its reliance on the nineteenth-century case law suggest that there must be some right to carry, and that open carry, not concealed carry, is protected by the Second Amendment. It is surely no accident, however, that no court has fully embraced this approach. Such a holding would be drastic, out of sync with contemporary

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193. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

norms, and could generate enormous public outcry. As a result, there is a reasonably good chance that the Supreme Court will, in future cases, find a way around such a result in favor of a more popular policy.

One way that the Court could affirm a personal right to self-defense without constitutionalizing open carry would be to evaluate the right to self-defense through a wider frame. Any originalist inquiry, by necessity, picks a given level of specificity at which to examine historical sources. In the future, the Supreme Court could remain at the quite narrow level it utilized in *Heller* when it found that historic laws regulating guns did not provide sufficient basis to allow Washington, D.C., to prevent residents from keeping guns in their homes.<sup>194</sup> According to the Court, the public safety laws cited by Justice Breyer in dissent were about specific issues like the storage of powder, and therefore inapposite to the safety of a loaded weapon.<sup>195</sup> A similarly narrow reading of the antebellum case law should lead the Court to find that only open carry is constitutionally protected. But by widening its scope, and instead finding that the nineteenth-century case law stands *only* for the existence of an individual right and nothing more, the Court could then fashion that right as it saw fit – as requiring an alternative outlet, for example.<sup>196</sup>

A second way the Supreme Court might escape enshrining a right to open carry would be to simply insert ahistorical reasoning into a case otherwise reliant on history. The Court would have a particularly good model for such a maneuver: *Heller* itself. As has been noted by disgruntled gun rights supporters, *Heller*'s statement that its holding should not affect laws disarming felons and the mentally ill or laws preventing guns in sensitive places lacks significant historical support.<sup>197</sup> And the Court cited a 1998 opinion of Justice Ginsburg's which itself cited the 1990 edition of *Black's Law Dictionary* to determine the meaning of "bear arms."<sup>198</sup> More fundamentally, Washington, D.C.'s handgun ban posed something of a problem for the majority in *Heller*,

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194. See *Heller*, 554 U.S. at 631-34.

195. *Id.*

196. Some have alleged that the availability of this type of manipulation is an inherent weakness of originalism, for it allows for the reader of the history to choose how to construe it to achieve a particular goal. See J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 46-59 (2012).

197. *Heller*, 554 U.S. at 626-27; see Lund, *supra* note 17, at 1356-58.

198. *Heller*, 554 U.S. at 584 (citing *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (quoting *BLACK'S LAW DICTIONARY* 214 (6th ed. 1990))); Siegel, *supra* note 17, at 196.

seeing as the framers of the Second Amendment undoubtedly had long guns in mind in 1791. To avoid this problem, the *Heller* Court determined that because handguns were the overwhelming choice of *modern-day* Americans for use in self-defense, they should receive protection under the Second Amendment.<sup>199</sup>

This was a puzzling move for an originalist opinion. After all, *Heller* is premised in no small part on a rejection of using modern norms at the expense of historical understanding. And yet, the Court had no trouble making these thoroughly modern accommodations, lending support to those scholars who argue that *Heller* is in fact a product of popular constitutionalism, and not originalism at all.<sup>200</sup> It is not difficult to imagine a similarly ahistorical accommodation for the modern preference for concealed carry, perhaps premised on Volokh's claim that the unpopularity of open carry would prevent it from truly vindicating the right to self-defense or on O'Shea's presumptive carry argument.

Still, even while recognizing the potential for an unprincipled retreat from *Heller*'s reasoning, this Note takes the Supreme Court at its word. For the right to carry, the most consequential choice the Court made in *Heller* was to place such a strong emphasis on nineteenth-century case law. These cases do indeed seem to require an individual right, as *Heller* stated. But they also protect only open carry, and for reasons tied to cultural factors not present at the Founding itself. *Heller*, then, has used post-Founding history to create a Second Amendment that reflects the sensibility of the Jacksonian frontier, not that of the eighteenth-century Enlightenment. This strange result is what *Heller* gave us. Following its methodology leads to an embrace of open carry and a rejection of both a strong public safety-oriented limitation on the right to carry and the alternative outlet theory. This is a result that is unlikely to please most anyone, and perhaps the Court will avoid it. But we should not mistake such a choice for anything but an unprincipled path of convenience. Given *Heller*'s reliance on modernity-accommodating carve-outs, however, perhaps we should prepare ourselves for just such an unsatisfying and unprincipled resolution for the right to carry weapons outside the home.

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

200. See Leider, *supra* note 46; Siegel, *supra* note 17.

