

# The Bear Necessities: Good Cause Statutes and “Step Zero” of Second Amendment Analyses

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## I. INTRODUCTION

On April 3, 2009, a man in Binghamton, New York walked into an immigration services center during a class with two pistols.<sup>1</sup> At 10:30 a.m., he began firing.<sup>2</sup> By the time he was finished, he had killed thirteen people and critically injured four before turning the gun on himself.<sup>3</sup> The Binghamton shooter was licensed by the State of New York to carry concealed firearms.<sup>4</sup> He bought two guns, loaded them, and drove to the center; and until he pulled the trigger, he had not committed a crime.<sup>5</sup>

There have been more than 150 mass shootings in America since 1966, resulting in more than 1,000 deaths.<sup>6</sup> Of the 305 firearms used in these shootings, at least 175 of them were obtained legally.<sup>7</sup> Since 2013, there have been 386 school shootings, an average of about one per week.<sup>8</sup> A small number of these mass shootings have been perpetrated by people with concealed carry licenses.<sup>9</sup>

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<sup>1</sup> Robert D. McFadden, *13 Shot Dead During a Class on Citizenship*, N.Y. TIMES (Apr. 3, 2009), <https://nyti.ms/2CdBqar> [on file with the *Ohio State Law Journal*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Manny Fernandez & Nate Schweber, *Binghamton Killer Kept His Fury Private*, N.Y. TIMES (Apr. 11, 2009), <https://nyti.ms/2FWIHdG> [on file with *Ohio State Law Journal*].

<sup>5</sup> McFadden, *supra* note 1.

<sup>6</sup> Bonnie Berkowitz et al., *The Terrible Numbers that Grow With Each Mass Shooting*, WASH. POST (Feb. 14, 2018), [https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm\\_term=.a90188269a48](https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm_term=.a90188269a48) [<https://perma.cc/W556-L7ZJ>] (last updated Nov. 9, 2018) (defining “mass shooting” as shootings in which four or more people were killed by one or two shooters); *see also* Lenyon Whitaker, *MAP: Timeline of Mass Shootings in the US Since 2000*, METRO (Dec. 3, 2015), <https://www.metro.us/news/map-timeline-of-mass-shootings-in-the-us-since-2000/tmWml1---14WH11UWCww> [<https://perma.cc/9CN6-VBLT>] (last updated Nov. 8, 2018) (highlighting certain mass shootings since the turn of the century).

<sup>7</sup> Berkowitz et al., *supra* note 6.

<sup>8</sup> *Gunfire on School Grounds in the United States*, EVERYTOWN (May 25, 2018), <https://everytownresearch.org/gunfire-in-school/> [<https://perma.cc/W47J-XCEH>] (last updated Jan. 7, 2019) (defining school shooting as any time a firearm discharges a live round inside a school building or on a school campus or grounds, as documented by the press and, when necessary, confirmed through further inquiries with law enforcement or school officials).

<sup>9</sup> *See Mass Shootings Committed by Concealed Carry Killers*, VIOLENCE POL’Y CTR., <http://concealedcarrykillers.org/mass-shootings-committed-by-concealed-carry-killers/> [<https://perma.cc/6W9Y-H4TY>] (last updated Oct. 29, 2018) (listing shootings with more than three casualties committed by concealed carry permit holders since May 2007). *But see*

For years, politicians, scholars, and members of the press have sought to introduce new and innovative ways to regulate firearms.<sup>10</sup> Several states have tried to curb gun violence through “good cause statutes.”<sup>11</sup> These statutes require people seeking concealed carry permits to provide a good cause for carrying a weapon in public.<sup>12</sup> Good cause statutes vary in how restrictively they define “good cause” and in how they interact with the broader regulation of firearms of the state.<sup>13</sup>

These efforts to reduce gun violence necessarily make gun ownership among law-abiding citizens more difficult, which in turn implicates considerations of personal liberty guaranteed by the Second Amendment.<sup>14</sup> In

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*Concealed Carry Permit Holders Crime Statistics*, GUNS TO CARRY, <https://www.gunstocarry.com/concealed-carry-statistics/concealed-carry-permit-holders-crime-statistics/> [<https://perma.cc/7WBB-JCQS>] (suggesting less than one tenth of one percent of crimes are committed by concealed carry permit holders); Brief for Arizona et al. as Amici Curiae Supporting Plaintiffs-Appellants at 15, *Gould v. O’Leary*, 907 F.3d 659 (1st Cir. 2018) (No. 17-2202) (outlining firearm crime statistics in Minnesota, Ohio, Louisiana, Florida, and Texas).

<sup>10</sup> See generally Jeremy Diamond & Dan Merica, *Trump Repeatedly Upends GOP Lawmakers in Gun Session*, CNN (Feb. 28, 2018), <http://cnn.it/2oD4dfk> [<https://perma.cc/XRQ8-5Q7Q>] (detailing President Trump’s remarks on gun control legislation); Tara Golshan & Ella Nilsen, *Where the Gun Control Debate Stands in Congress*, VOX (Feb. 27, 2018), <https://www.vox.com/2018/2/27/17053968/gun-control-debate-congress-parkland> [<https://perma.cc/CNS4-N54R>] (outlining Congressional responses to the school shooting in Parkland, Florida); Daniella Diaz, *5 Things Congress Could Do on Guns*, CNN (Feb. 26, 2018), <http://cnn.it/2ESVXTH> [<https://perma.cc/L9UD-VH7F>] (evaluating the likelihood of gun control legislation passing); Opinion, Nicholas Kristof, *How to Reduce Shootings*, N.Y. TIMES (Nov. 6, 2017), <https://nyti.ms/2hL5i2c> [on file with *Ohio State Law Journal*] (last updated Nov. 8, 2018) (outlining possible solutions suggested by scholars); Rebecca Kaplan & Rebecca Shabad, *Five Ways the U.S. Could Reduce Gun Violence*, CBS NEWS (Dec. 4, 2015), <https://www.cbsnews.com/news/five-ways-the-us-could-reduce-gun-violence/> [<https://perma.cc/9TS3-BKMX>] (same); see also ‘No Way to Prevent This,’ Says Only Nation Where This Regularly Happens, THE ONION (Nov. 8, 2018), <https://www.theonion.com/no-way-to-prevent-this-says-only-nation-where-this-r-1830308976> [<https://perma.cc/2DQ8-M64B>]. *The Onion* has published the same article after every mass shooting since 2015, using satire to “capture the frustration and futility felt by so many people.” Eli Rosenberg, *This Onion Story Goes Viral After Every Mass Shooting*, CHI. TRIB. (Oct. 4, 2017), <http://www.chicagotribune.com/news/nationworld/ct-onion-story-goes-viral-after-every-mass-shooting-20171004-story.html> [<https://perma.cc/FF2C-T2J7>].

<sup>11</sup> See Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218, 218–19 (2014) (explaining the good cause requirement and listing California, New York, New Jersey, and Maryland as examples). The precise terminology for these types of statutes varies greatly, with different jurisdictions using different terms like “urgency or need,” “exceptional cases,” “good and substantial reason,” “good reason,” “justifiable need,” “proper cause,” and “proper reason.” See, e.g., *infra* Part III. This Note couches all of these phrases under the umbrella term “good cause statutes.”

<sup>12</sup> Blocher, *supra* note 11, at 218.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

2008, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment provides a right of the people to own a handgun for self-defense in the home.<sup>15</sup> In *Heller*, the Court determined that self-defense is a “core lawful purpose”<sup>16</sup> of gun ownership, and concluded that personal gun ownership is a core right under the Second Amendment.<sup>17</sup> *Heller* stands for the proposition that the Constitution provides a floor for the individual right to bear arms, and that floor cannot be lowered by one judge’s discretion.<sup>18</sup> But the *Heller* majority also conceded that there are limits to the protections afforded by the Second Amendment.<sup>19</sup> The Court included a non-exhaustive list of constitutionally valid, historical restrictions on gun ownership, critically including historic prohibitions on carrying concealed firearms.<sup>20</sup>

There are still interpretation problems with the scope of the *Heller* decision.<sup>21</sup> Does the core lawful purpose of self-defense extend to public use?<sup>22</sup> How should courts determine whether a Second Amendment right is a core right? And how should the Court interpret the constitutionality of a restriction on guns that does *not* infringe on a core right?<sup>23</sup> Good cause statutes are a useful window into the exploration of the questions left unanswered by *Heller*. The Court in *Heller* did not address whether the scope of the Second Amendment’s core rights include the right to carry concealed weapons in public.<sup>24</sup> It did not address whether concealed carry permit regulations implicate the Second

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<sup>15</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The Court incorporated this right against the States two years later in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>16</sup> *Heller*, 554 U.S. at 630.

<sup>17</sup> *Id.* at 595.

<sup>18</sup> *Id.* at 634 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”).

<sup>19</sup> *Id.* at 626 (“Like most rights, the right secured by the Second Amendment is not unlimited.”).

<sup>20</sup> *Id.* The Court also noted historical restrictions on firearm bans for felons or mentally ill, prohibiting possession on school grounds or government buildings, and imposing restrictions and qualifications on the commercial sale of firearms. *Id.* at 626–27.

<sup>21</sup> For a master list of the circuits’ interpretations of *Heller* and an in-depth discussion of special Second Amendment topics, see David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193 (2017).

<sup>22</sup> See *id.* at 256–74; Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 374 n.3 (2016) (listing legal commentary addressing public right to carry firearms).

<sup>23</sup> See generally Kopel & Greenlee, *supra* note 21, at 274–313 (unpacking the different modes of analysis used in *Heller* and subsequent cases); Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012) (same).

<sup>24</sup> *Heller*, 554 U.S. at 634–35.

Amendment.<sup>25</sup> And it did not address what mode of analysis a court should use to answer these questions and determine whether good cause statutes can be constitutional.<sup>26</sup>

Courts and scholars alike have struggled to discern how to correctly apply *Heller* to Second Amendment issues, including good cause statutes. Good cause statutes have generated a new split in the circuit courts<sup>27</sup> and a wide swath of academic literature.<sup>28</sup> One recent addition to this dialogue in federal circuit courts comes from a decision coming out of the D.C. Circuit, *Wrenn v. District of Columbia*.<sup>29</sup> The court in *Wrenn* held that there is a core constitutional right to carry weapons in public, and D.C.’s good cause statute unconstitutionally infringed on that right.<sup>30</sup> The analysis in *Wrenn*, as well as its conclusion, is at odds with several other circuits,<sup>31</sup> making the question ripe for the Supreme Court to address.

In Part II, this Note unpacks the *Heller* decision and the modes of analysis it generated in the circuit courts, including the two-step analysis used now by nearly every circuit.<sup>32</sup> Part III introduces and explains the four different categories of good cause statutes and locates each of them within the current Second Amendment jurisprudence among various circuits, highlighting a split caused by a recent decision in the D.C. Circuit. In Part IV, this Note argues that the Supreme Court should adopt the two-step method used by most circuits, and add a preliminary “step zero” to that method. Part V analyzes each of the categories of good cause statutes under the proposed analytical regime. It explains that the most restrictive statutes within the most restrictive regulatory

<sup>25</sup> See James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 909 (2012).

<sup>26</sup> *Heller*, 554 U.S. at 634–35; see also Rostron, *supra* note 23, at 705.

<sup>27</sup> Compare *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) (striking down D.C.’s good cause statute as unconstitutional), with *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018) (upholding Massachusetts’s good cause statute), *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) (same in California), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017), *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (same in Maryland), *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013) (same in New Jersey), and *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (same in New York).

<sup>28</sup> See Bishop, *supra* note 25; Lindsay Colvin, Note, *History, Heller, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041 (2014); Nicholas Griepsma, Note, *Conceal Carry Through Common Use: Extending Heller’s Constitutional Construction*, 85 GEO. WASH. L. REV. 284 (2017); Kopel & Greenlee, *supra* note 21; Nicholas Moeller, Comment, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401 (2014); Rostron, *supra* note 23.

<sup>29</sup> 864 F.3d 650 (D.C. Cir. 2017).

<sup>30</sup> *Id.* at 666–67; see also *infra* Part III.

<sup>31</sup> See *supra* note 27.

<sup>32</sup> Borrowing from administrative law doctrine introduced in *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), this Note colloquially refers to the circuits’ Second Amendment test as the *Marzarella* two-step.

schemes will always run afoul of the Second Amendment, but that all other good cause statutes are constitutional unless they cannot pass intermediate scrutiny. Part VI concludes by placing the suggested framework back in the context of the Court's broader Second Amendment jurisprudence.

## II. THE *HELLER* DECISION AND THE DEVELOPMENT OF THE *MARZZARELLA* TWO-STEP

In 2003, Dick Anthony Heller tried to get a gun in the District of Columbia.<sup>33</sup> Mr. Heller was a special police officer who regularly carried his firearm with him while working, and he wanted to carry a personal firearm within his home.<sup>34</sup> The District's statutory scheme regulating firearms, however, prohibited personal ownership of guns.<sup>35</sup> So Mr. Heller sued the District of Columbia under the Second Amendment, claiming a constitutional right to bear arms within his home.<sup>36</sup> The Supreme Court held that there is an individual right to gun ownership under the Second Amendment, and that the District's firearm ban unconstitutionally restricted that right.<sup>37</sup>

*Heller* is a fascinating opinion. Apart from its critical implications for Second Amendment jurisprudence, the case also produced two titanic debates between the Justices that continue to be relitigated even ten years later.<sup>38</sup> The first is the competing analyses of the purpose of the Second Amendment between Justices Scalia and Stevens.<sup>39</sup> *Heller* is perhaps the peak of the twenty-six years of battle between the two Justices, and the tit-for-tat between the majority and the principal dissent ranges from diverse constructions of the history of gun ownership in the United States<sup>40</sup> to careful analyses of the Court's

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<sup>33</sup> Complaint at 3, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 03-cv-213).

<sup>34</sup> *Id.* at 2–3; *see also* *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008).

<sup>35</sup> *Heller*, 554 U.S. at 574–75 (“The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited.”).

<sup>36</sup> *Id.* at 575–76.

<sup>37</sup> *Id.* at 628–30.

<sup>38</sup> *See, e.g.*, Adam Liptak, ‘It’s a Long Story’: Justice John Paul Stevens, 98, *Is Publishing a Memoir*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/us/politics/john-paul-stevens-memoir.html> [on file with *Ohio State Law Journal*] (calling *Heller* “just about as bad [a decision] as any in my tenure”); Tony Mauro, *Stevens Recounts His Clashes with Scalia*, NAT. L.J. (Apr. 26, 2016), <https://www.law.com/nationallawjournal/almID/1202755971832/> [<https://perma.cc/W9M2-44WW>] (“Stevens has criticized Scalia’s position in *Heller* in more than two dozen speeches since retiring.”).

<sup>39</sup> *Compare* *District of Columbia v. Heller*, 554 U.S. 570, 573–636 (2008), *with id.* at 636–80 (Stevens, J., dissenting).

<sup>40</sup> *Compare id.* at 619–26, *with id.* at 672–79.

previous Second Amendment jurisprudence to the semantic and grammatical construction of the Amendment itself.<sup>41</sup>

Justices Scalia and Breyer account for the second debate, which centers around the future of Second Amendment questions to be governed by *Heller*.<sup>42</sup> Although not nearly as iconic as the first, it is, perhaps, more pragmatic.<sup>43</sup> This section provides an in-depth overview of that second debate—how to analyze Second Amendment questions after *Heller*. Where Justice Breyer’s dissent advocates for an interest-balancing test,<sup>44</sup> Justice Scalia’s majority describes a categorical analysis.<sup>45</sup> This section then describes the two-step test developed and adopted by nearly every lower court in the years following *Heller*.

### A. Justice Breyer’s Interest-Balancing Test

Justice Breyer adopted Justice Steven’s dissent in its entirety.<sup>46</sup> His separate dissenting opinion assumes *arguendo* that individual self-defense is one of the purposes of the Second Amendment as envisioned by the Framers.<sup>47</sup> In his opinion, Justice Breyer addresses how to approach Second Amendment questions under the assumption that it does contain an individual liberty to bear arms in self-defense.<sup>48</sup> First, the dissent considers applying traditional levels of scrutiny to Second Amendment questions, but ultimately discards them in favor of a shifting interest-balancing test.<sup>49</sup> It then applies this interest-balancing test to the facts in *Heller* and concludes that the handgun ban at issue passes the proposed constitutional test.<sup>50</sup>

Justice Breyer’s dissent begins by examining historical evidence to determine if the Second Amendment’s self-defense liberty interest can justify invalidating any gun regulation statute.<sup>51</sup> After concluding that the self-defense interest is not sufficient by itself to conclude an analysis of a Second Amendment question,<sup>52</sup> the opinion considers the application of traditional

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<sup>41</sup> Compare *id.* at 577–92 (majority opinion), with *id.* at 640–52 (Stevens, J., dissenting). The semantic debate makes more sense in light of the punishingly complex language of the Second Amendment: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

<sup>42</sup> *Heller*, 554 U.S. at 634–35; *id.* at 681–91, 721–22 (Breyer, J., dissenting).

<sup>43</sup> See Rostron, *supra* note 23, at 706–07.

<sup>44</sup> *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

<sup>45</sup> *Id.* at 626–29, 634–35 (majority opinion).

<sup>46</sup> *Id.* at 681 (Breyer, J., dissenting).

<sup>47</sup> *Id.* at 682–83 (Breyer, J., dissenting).

<sup>48</sup> *Id.* (Breyer, J., dissenting).

<sup>49</sup> *Id.* at 687–91 (Breyer, J., dissenting).

<sup>50</sup> *Heller*, 554 U.S. at 706–16 (Breyer, J., dissenting).

<sup>51</sup> *Id.* at 683–87 (Breyer, J., dissenting).

<sup>52</sup> *Id.* at 687 (Breyer, J., dissenting) (“[H]istorical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry.”).

means-end scrutiny.<sup>53</sup> The respondent in *Heller* advocated for the application of strict scrutiny to all Second Amendment questions,<sup>54</sup> but Justice Breyer rejected that position, pointing to the majority's admission that certain categories of gun regulation are constitutional,<sup>55</sup> and these categories would likely be unconstitutional under a pure strict scrutiny analysis.<sup>56</sup>

Instead, Justice Breyer explicitly proposed an interest-balancing test for Second Amendment questions to determine if the proposed regulation disproportionately burdens a liberty right within the Second Amendment in its attempt to promote a compelling government interest.<sup>57</sup> Indeed, he argued that such a balancing test is the logical conclusion of applying strict scrutiny to any Second Amendment question.<sup>58</sup> Under such a test, "the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."<sup>59</sup>

To answer this question, Justice Breyer argued for deference to the legislature.<sup>60</sup> In doing so, he drew an analogy to First Amendment cases,<sup>61</sup> reasoning that "deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions."<sup>62</sup> According to Justice Breyer, then, a Second Amendment question can thus be phrased: Does a legislature have substantial evidence to make a reasonable inference that a gun regulation fits the compelling interest of public safety?<sup>63</sup>

Applying his test to the District's statute, the thrust of Justice Breyer's answer is yes.<sup>64</sup> The District's handgun ban should be constitutional because the

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<sup>53</sup> *Id.* at 687–89 (Breyer, J., dissenting).

<sup>54</sup> *Id.* at 688 (Breyer, J., dissenting).

<sup>55</sup> *Id.* at 626–28 (majority opinion).

<sup>56</sup> *Heller*, 554 U.S. at 688–89 (Breyer, J., dissenting).

<sup>57</sup> *Id.* at 689–90 (Breyer, J., dissenting).

<sup>58</sup> *Id.* at 689 (Breyer, J., dissenting) ("[A]lmost every gun-control regulation will seek to advance . . . a 'primary concern . . . for the safety and indeed the lives of its citizens.' The Court has deemed that interest . . . to be compelling, and the Court has . . . found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties. Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other . . . ." (citations omitted)).

<sup>59</sup> *Id.* at 689–91, 705 (Breyer, J., dissenting).

<sup>60</sup> *Id.* at 690 (Breyer, J., dissenting).

<sup>61</sup> *Id.* (citing *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997)). "In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.' Our sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Turner Broad. Sys.*, 520 U.S. at 195 (citations omitted) (quoting *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 666 (1994)).

<sup>62</sup> *Heller*, 554 U.S. at 705 (Breyer, J., dissenting).

<sup>63</sup> *See id.* at 689–90 (Breyer, J., dissenting).

<sup>64</sup> *Id.* at 722 (Breyer, J., dissenting).



government's interest in saving lives does not disproportionately burden an individual right of self-defense.<sup>65</sup> The District's safety interest passed this proportionality test because the legislature had substantial evidence to reasonably determine the necessity of the District-wide ban.<sup>66</sup>

### B. *The Majority's Categorical Test*

The majority in *Heller* expressly rejected Justice Breyer's interest-balancing approach.<sup>67</sup> The majority opinion does not take nearly as much time addressing Justice Breyer's analytical dissent as it does on Justice Stevens's historical and semantic opinion.<sup>68</sup> Instead, it discards the interest-balancing test as "judge-empowering."<sup>69</sup> The Court held firm that the core protections of the Second Amendment must be beyond the reach of a judge's discretion.<sup>70</sup> Justice Scalia's opinion also draws on the Court's First Amendment jurisprudence:

Like the First, [the Second Amendment] is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates *above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home.<sup>71</sup>

Although not explicit, the majority's response to Justice Breyer's dissent suggests that when the core right of the Second Amendment is at issue, there is *no other interest* that can possibly justify infringement of that right.<sup>72</sup>

<sup>65</sup> *Id.* at 722–23 (Breyer, J., dissenting).

<sup>66</sup> *Id.* at 693–705 (Breyer, J., dissenting).

<sup>67</sup> *Id.* at 634–35 (majority opinion).

<sup>68</sup> Compare *Heller*, 554 U.S. at 631–36 (addressing Justice Breyer's dissent), with *id.* at 586–92, 603–05, 620–25 (addressing Justice Stevens' dissent).

<sup>69</sup> *Id.* at 634.

<sup>70</sup> *Id.* ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.")

<sup>71</sup> *Id.* at 635 (emphasis added).

<sup>72</sup> See *id.* at 630 ("[The law] makes it impossible for citizens to use [firearms] for the *core* lawful purpose of self-defense and is hence unconstitutional." (emphasis added)); *id.* at 634 ("We know of no other enumerated constitutional right whose *core* protection has been subject to a freestanding 'interest-balancing' approach." (emphasis added)); cf. *id.* at 720 (Breyer, J., dissenting) ("What is its basis for finding that to be the *core* of the Second Amendment right?") (emphasis added); see also Rostron, *supra* note 23,28 at 720 ("In Scalia's view, laws infringing the core right established by the Second Amendment cannot be tolerated even if every legislator and judge in the country wholeheartedly agrees that such laws would have significant positive social effects."); Kopel & Greenlee, *supra* note 21, at 198 (outlining the Court's holdings that self-defense is an "inherent" right, and that core rights are not subject to an interest-balancing test); cf. Colvin, *supra* note 28, at 1062 ("[*Heller*] explicitly prohibited the use of balancing tests like strict or intermediate scrutiny. Rather, *Heller* mandated the examination of 'text, history, and tradition' to both determine

But the Court tempered this bright-line rule with a non-exhaustive list of clear exceptions to the rights contained within the Second Amendment.<sup>73</sup> The Court admitted that a historical analysis of gun ownership in America reveals “that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>74</sup> Rather, the categorical protection offered by the majority in *Heller* is limited to the *core* rights that fall within the Second Amendment.<sup>75</sup> At this point, the Court has only established “lawful self-defense within the home” as a core right of the Second Amendment, but there is nothing in the Court’s Second Amendment jurisprudence to suggest that there are no other categorical rights.<sup>76</sup>

Outside the categorical protection of the core right announced in *Heller* lie two categories of regulations: (1) longstanding historical regulations that are presumptively lawful<sup>77</sup> and (2) other regulations that burden an individual’s ability to own and operate a firearm, but that do not infringe on a core right.<sup>78</sup> The Court indicated that the first category of regulations is entirely untouched by the *Heller* decision,<sup>79</sup> and that the examples listed in the Court’s opinion are not exhaustive.<sup>80</sup> But the Court in *Heller* ignored the second category of regulations altogether. Indeed, the *Heller* majority implicitly left the door open for lower courts to build on the full scope of the Second Amendment’s protections, refusing to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.”<sup>81</sup>

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the scope of Second Amendment rights and assess gun legislation.” (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)); Griepsma, *supra* note 28, at 300 (“Even under strict scrutiny, certain governmental interests can be so compelling as to justify the curtailment of a constitutional right. It is this broader notion that the [*Heller*] majority rejects . . .”).

<sup>73</sup> *Heller*, 554 U.S. at 626–27.

<sup>74</sup> *Id.* at 626.

<sup>75</sup> See *supra* note 72 and accompanying text.

<sup>76</sup> See Kopel & Greenlee, *supra* note 21, at 211–12 (noting that other Amendments have more than one core right, and arguing that “defense of others” and “militia uses” are also core rights of the Second Amendment).

<sup>77</sup> *Heller*, 554 U.S. at 626–27, 627 n.26.

<sup>78</sup> See *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). In dicta, the Court in *Heller* seems to limit the application of its categorical test to extreme regulations like outright bans. *Heller*, 554 U.S. at 629 (“Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”).

<sup>79</sup> *Heller*, 554 U.S. at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

<sup>80</sup> *Id.* at 627 n.26.

<sup>81</sup> *Id.* at 626.

### C. The Lower Courts – The Marzzarella Two-Step

Although the Majority in *Heller* rejected Justice Breyer’s interest-balancing test, the approach lower courts have taken to most Second Amendment questions resembles it closely.<sup>82</sup> Indeed, every single circuit has adopted some sort of means-end scrutiny that involves balancing the government’s interest in safety with the burden of regulations on individuals’ Second Amendment rights.<sup>83</sup> In most courts, however, the actual means-end scrutiny analysis only comes into play when the regulation in question burdens a Second Amendment right outside of its core purpose.<sup>84</sup> When a regulation amounts to an outright ban, *Heller*’s categorical test strikes it down.<sup>85</sup>

The seminal case in the lower courts comes from the Third Circuit—*United States v. Marzzarella*<sup>86</sup>—which introduced a two-step analysis for courts to determine Second Amendment questions. In *Marzzarella*, the defendant was convicted of possession of a handgun with an obliterated serial number.<sup>87</sup> The defendant challenged his conviction under the Second Amendment.<sup>88</sup> The Third Circuit considered how to approach the constitutionality of the statute under the Second Amendment.<sup>89</sup> The government argued that the court should apply rational basis,<sup>90</sup> while the defendant advocated for strict scrutiny.<sup>91</sup> The Third Circuit summarily rejected the government’s rational basis argument, noting that *Heller* specifically forbade its use.<sup>92</sup> But the defendant could not convince the court that strict scrutiny should always apply.<sup>93</sup> Instead, the Third Circuit adopted a more flexible two-part test to decide Second Amendment questions:

First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-

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<sup>82</sup> See generally Rostron, *supra* note 23 (arguing that Justice Breyer’s framework has won out in the lower courts).

<sup>83</sup> See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 95–99 (3d Cir. 2010) (employing a two-step analysis to balance the government’s public safety interest against the burdens on the individual’s Second Amendment rights). Every other circuit has followed the Third Circuit’s test in some fashion. See *infra* notes 95–97.

<sup>84</sup> See *infra* Part III.D.

<sup>85</sup> See, e.g., *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (invalidating a Massachusetts ban on stun guns).

<sup>86</sup> 614 F.3d 85 (3d Cir. 2010).

<sup>87</sup> *Id.* at 87 (citing 18 U.S.C. § 922(k)).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 95.

<sup>91</sup> *Id.* at 96.

<sup>92</sup> *Marzzarella*, 614 F.3d at 95–96 (citing *District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008)).

<sup>93</sup> *Id.*

end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.<sup>94</sup>

Although the application of the test has produced different rules among the circuits,<sup>95</sup> the two-step *Marzzarella* framework itself has been fully adopted by every circuit except the Eighth.<sup>96</sup> It has also been treated favorably in the Eighth Circuit.<sup>97</sup>

One of the critical questions addressed by the circuits in applying the *Marzzarella* two-step test is what level of means-end scrutiny should apply. Virtually every circuit agrees that the rational basis test is inappropriate in any case that involves individual rights under the Second Amendment.<sup>98</sup> Most circuits have also chosen to apply different forms of heightened scrutiny on a case-by-case basis.<sup>99</sup>

The two-step analysis is a useful springboard for addressing new gun regulations, but it has not been adopted nor has it been approved by the Supreme

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<sup>94</sup> *Id.* at 89 (citation omitted).

<sup>95</sup> Compare *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) (holding that prohibitions on felons and the mentally ill owning firearms are presumptively lawful because they satisfy heightened means-end scrutiny), with *Marzzarella*, 614 F.3d at 91–92 (holding that prohibitions on felons and the mentally ill owning firearms are presumptively lawful because they do not implicate Second Amendment rights at all).

<sup>96</sup> See *Gould v. Morgan*, 907 F.3d 659, 668–69 (1st Cir. 2018); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Kachalsky v. City of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *GeorgiaCarryOn.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 701–04 (7th Cir. 2011), *aff'd in part, rev'd in part*, 846 F.3d 888 (7th Cir. 2017); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

<sup>97</sup> See *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) (describing the first step as a dispositive question in Second Amendment cases).

<sup>98</sup> *Marzzarella*, 614 F.3d at 96; accord *Gould*, 907 F.3d at 673; *Chovan*, 735 F.3d at 1137; *Nat'l Rifle Ass'n*, 700 F.3d at 195–96; *Ezell*, 651 F.3d at 706; *Heller v. District of Columbia*, 670 F.3d at 1256; *Reese*, 627 F.3d at 801. But see *Kopel & Greenlee, supra* note 21, at 251–52 (explaining the Second Circuit's application of rational basis review to a statute that implicated the Second Amendment, but did not substantially burden the Second Amendment right in *United States v. Descastro*, 682 F.3d 160 (2d Cir. 2012)).

<sup>99</sup> *Kopel & Greenlee, supra* note 21, at 275–78 (providing an overview of the flexible approaches used by the Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits); accord *Tyler*, 837 F.3d at 690–93 (analyzing the extent of the burden on the Second Amendment and determining that intermediate scrutiny should apply); see also *Marzzarella*, 614 F.3d at 96 (“Whether or not strict scrutiny may apply to particular Second Amendment challenges, it is not the case that it must be applied to all Second Amendment challenges.”).

Court.<sup>100</sup> For now, though, the *Marzzarella* two-step framework governs the Second Amendment in nearly all federal courts. The next Part provides an overview of good cause statutes as they have been implemented in various states and Washington, D.C. and examines how different categories of good cause statutes have been interpreted differently across the circuits.

### III. AN OVERVIEW OF GOOD CAUSE STATUTES

At their heart, good cause statutes restrict who may successfully apply to receive a permit to carry a firearm in public.<sup>101</sup> When it comes to concealed carry permits, every jurisdiction in the United States falls into one of three broad categories: (1) unrestricted, (2) shall issue, or (3) may issue.<sup>102</sup> In “may issue” jurisdictions, officials have the authority and discretion to grant or deny gun permits to applicants based on statutory requirements.<sup>103</sup> A good cause statute is an example of such a requirement. It requires applicants to explain why they are applying (to provide good cause) to carry a firearm before they can receive a permit.<sup>104</sup> Currently, eight states have some form of a good cause requirement that applicants must meet to qualify for a permit, whether open or concealed.<sup>105</sup>

Each of these eight statutes can be neatly fit into one of four categories based on how restrictive the language of the statutory definition of good cause is, and how restrictive the state’s overall statutory scheme is for the regulation of carrying open firearms.<sup>106</sup> These four categories house every good cause statute in this way:

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<sup>100</sup> See Rostron, *supra* note 23, at 716–17 (speculating that the Court’s failure to adopt any specific Second Amendment test is due, in part, to Chief Justice Roberts’ skepticism toward applying means-end scrutiny to the Second Amendment at all).

<sup>101</sup> See Blocher, *supra* note 11, at 218–19.

<sup>102</sup> See generally Bishop, *supra* note 28, at 911–14 (describing shall-issue and may-issue jurisdictions); Nancy Thorne, *What Is the Difference Between “May Issue”, “Shall Issue”, “No Issue” and “Unrestricted” Concealed Carry Laws?*, NAT’L CARRY ACAD. (Aug. 29, 2016), <https://www.nationalcarryacademy.com/our-blog/mayissueshallissuenoissue/> [<https://perma.cc/G35R-9W8X>] (providing a primer for the different types of concealed carry permit laws); GIFFORDS LAW CTR., *Concealed Carry*, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> [<https://perma.cc/B556-4WD5>] (outlining different concealed carry laws in every U.S. jurisdiction).

<sup>103</sup> GIFFORDS LAW CTR., *supra* note 102.

<sup>104</sup> See Blocher, *supra* note 11, at 219 (arguing that an end to good cause statutes would make a jurisdiction effectively “shall issue”).

<sup>105</sup> CAL. PENAL CODE § 26150(a)(2) (2018) (California); DEL. CODE ANN. tit. 11, § 1441(a)(2) (2015) (Delaware); HAW. REV. STAT. ANN. § 134-9(a)-(c) (West 2008) (Hawaii); PUB. SAFETY § 5-306(a)(6)(ii) (2015) (Maryland); MASS. GEN. LAWS ch. 140, § 131(d) (LexisNexis 2016) (Massachusetts); MD. CODE ANN., N.J. STAT. ANN. § 2C:58-4(c) (West 2019) (New Jersey); N.Y. PENAL LAW § 400.00(1)(n) (McKinney 2019) (New York); R.I. GEN. LAWS § 11-47-11(a) (2002) (Rhode Island); see also GIFFORDS LAW CTR., *supra* note 102.

<sup>106</sup> For these two variables, this Note refers to the definition of good cause as “definition” and the broader statutory scheme as “open carry.”

Table 1: *Four Categories of “Good Cause Statutes”*

	<b>Permissive Open Carry</b>		<b>Restrictive Open Carry</b>	
<b>Permissive Definition</b>	1	Massachusetts	2	New York, Rhode Island
<b>Restrictive Definition</b>	3	Delaware	4	California, Hawaii, Maryland, New Jersey, D.C. <sup>107</sup>

The first category is the least restrictive on paper. It includes jurisdictions with an easy-to-meet definition of good cause, and non-restrictive open carry laws. The second category includes jurisdictions with easy-to-meet good cause requirements, but restrictive open carry laws, or outright bans. In other words, the second category focuses regulation on open carry, rather than concealed carry. The third category holds applicants to a higher standard to meet good cause but balances the greater restrictions with less restrictive open carry laws. That is, the third category restricts concealed carry rather than open carry. The fourth category is the most restrictive. It includes jurisdictions with tight good cause requirements and restrictive open carry laws. Together, these regulations often amount to a near-total ban of firearms.

The Supreme Court has not spoken on the constitutionality of good cause statutes generally, and it has not considered any of these categories specifically. But several circuits have weighed in on the issue. The rest of this Part provides an overview of each category of good cause statutes, including each circuit-level decision. It discusses good cause statutes in the context of states’ open carry and concealed carry laws, measuring how restrictive each good cause requirement is when viewed in the light of the overall statutory scheme.

#### *A. The First Category: Permissive Definition and Permissive Open Carry*

Overall, Massachusetts has the most permissive language in its statute requiring good cause for concealed carry permit applicants. Massachusetts generally requires a permit to open carry a firearm in public.<sup>108</sup> Once a person receives a permit, however, they may open carry their firearm freely.<sup>109</sup> Massachusetts also has different classifications of firearm permits: firearm

<sup>107</sup> *But see* Wrenn v. District of Columbia, 864 F.3d 650, 667–68 (D.C. Cir. 2017) (invalidating D.C.’s good cause statute and creating a split in the circuits).

<sup>108</sup> MASS. GEN. LAWS ch. 269 § 10 (2015).

<sup>109</sup> *Id.* (“No person having in effect a license to carry firearms for any purpose . . . shall be deemed to be in violation of this section.”).

identification cards, class B licenses to carry, and class A licenses to carry.<sup>110</sup> Firearm identification cards and class B licenses entitle a person to purchase, possess, and openly carry certain firearms and ammunition.<sup>111</sup> Class A permits entitle a person to carry concealed firearms and ammunition.<sup>112</sup>

Firearm identification cards are relatively easy to come by. The language of the Massachusetts statute is permissive,<sup>113</sup> and the only requirements are that the applicant must be over eighteen years old (or have a parent's permission), and not be a "prohibited person."<sup>114</sup> Although more restrictive than a state that allows open carry without a permit,<sup>115</sup> the language of the statutory scheme in Massachusetts is much less onerous than jurisdictions like California or Hawaii.<sup>116</sup>

Massachusetts' statutory provision for Class A licenses houses the state's good cause statute.<sup>117</sup> But the good cause requirement in the statute also uses rather permissive language.<sup>118</sup> In order to receive a class A permit, an applicant must show "good reason to fear injury" to property or person, or "*any other reason* including . . . sport or target practice."<sup>119</sup> Local police have the ultimate authority to decide whether an applicant has provided good cause in their application, and whether their license should be limited in any way.<sup>120</sup>

The First Circuit produced the latest case revolving around good cause statutes in *Gould v. Morgan*.<sup>121</sup> In *Gould*, the plaintiffs applied for licenses to carry firearms in Massachusetts, but had several limitations placed on the

<sup>110</sup> *Id.* ch. 140 §§ 129B, 131 (2018).

<sup>111</sup> See MASS.GOV, *Gun Ownership in Massachusetts*, <https://www.mass.gov/service-details/gun-ownership-in-massachusetts> [<https://perma.cc/KS6N-DZYT>]. Class B licenses to carry are no longer issued, but the last class B permits will not expire until 2021. An Act Relevant to the Reduction of Gun Violence, 2014 Mass. Legis. Serv. Ch. 284 § 101 (West) (effective Jan. 1, 2021).

<sup>112</sup> See MASS. GEN. LAWS ch. 140 § 131 (2018).

<sup>113</sup> *Id.* § 129B ("A firearm identification card *shall be* issued and possessed.") (emphasis added).

<sup>114</sup> MASS.GOV, *supra* note 111. "Prohibited persons" include, for example, violent criminals, the mentally ill, and children under the age of fourteen. MASS. GEN. LAWS ch. 140 § 129B (2018).

<sup>115</sup> For example, Alaska does not require a permit to open carry at all. See GIFFORDS LAW CTR., *Open Carrying in Alaska*, <http://lawcenter.giffords.org/open-carrying-in-alaska/> [<https://perma.cc/2FPL-HM2B>] (last updated Nov. 9, 2017).

<sup>116</sup> See *infra* Part III.D.

<sup>117</sup> MASS. GEN. LAWS ch. 140 § 131(d) (2018).

<sup>118</sup> *But see* *Ruggiero v. Police Comm'r of Bos.*, 464 N.E.2d 104, 106–08 (Mass. App. Ct. 1984) (holding that the legislature intended for police to have discretion to restrict licenses to carry to specific purposes based on the individual's reason for application).

<sup>119</sup> MASS. GEN. LAWS ch. 140 § 131(d) (2018) (emphasis added).

<sup>120</sup> *Id.*; see also *Ruggiero*, 464 N.E.2d at 107 (upholding limitation imposed by police department on license to carry).

<sup>121</sup> *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018).

licenses they were issued.<sup>122</sup> The plaintiffs sued the Brookline and Boston Police Departments under the Second Amendment, claiming that the limitations placed on their licenses to carry prevented them from exercising their right to defend themselves in public.<sup>123</sup> The court disagreed, holding that the Massachusetts good cause statute does not violate the Second Amendment.<sup>124</sup> Critically, the court expressly rejected the plaintiffs' proposition that public self-defense is a core right under the Second Amendment.<sup>125</sup> After limiting "the core Second Amendment right . . . to self-defense in the home,"<sup>126</sup> the First Circuit applied intermediate scrutiny to Massachusetts' good cause statute, concluding that the government's interest in preventing gun violence led the law to pass its constitutional test.<sup>127</sup>

### B. *The Second Category: Permissive Definition and Restrictive Open Carry*

The next category of good cause statutes includes jurisdictions with a permissive definition of what constitutes good cause, but a restrictive open carry policy. These jurisdictions include New York<sup>128</sup> and Rhode Island.<sup>129</sup> Both states prohibit open carry without a license,<sup>130</sup> but the statutory language defining good cause is generally permissive.<sup>131</sup> But New York and Rhode Island courts have interpreted "good cause" much more narrowly than the statutory language suggests.

New York state courts interpret the broad language of the New York good cause statute to allow licensing authorities broad discretion.<sup>132</sup> In *O'Connor v. Scarpino*, Michael O'Connor applied for a concealed carry permit for hunting, target shooting, and self-defense, but New York only issued him a license restricted to target shooting and hunting.<sup>133</sup> O'Connor argued that the plain

<sup>122</sup> *Id.* at 662. The restrictions included limitations to activities like hunting and sporting, and restrictions to locations like the workplace or at home. *Id.* at 664. Critically, the plaintiffs' licenses did not include the general right to self-defense outside the home. *See id.*

<sup>123</sup> *Id.* at 667 ("[Plaintiffs] contend that the right to carry firearms in public for self-defense lies at the core of the Second Amendment and, thus, admits of no regulation.").

<sup>124</sup> *Id.* at 672.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Gould*, 907 F.3d at 672.

<sup>128</sup> N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2018).

<sup>129</sup> 11 R.I. GEN. LAWS § 11-47-11(a) (2002).

<sup>130</sup> N.Y. PENAL LAW § 265.03(3) (McKinney 2018); 11 R.I. GEN. LAWS § 11-47-8(a) (2002).

<sup>131</sup> 11 R.I. GEN. LAWS § 11-47-11 (2002) (defining good cause as "good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver"); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (defining "proper cause" to include target practice, hunting, or self-defense).

<sup>132</sup> *O'Connor v. Scarpino*, 638 N.E.2d 950, 951 (N.Y. 1994).

<sup>133</sup> *Id.*



language of the statute prevented the licensing authorities from imposing conditions on licenses.<sup>134</sup> The New York Court of Appeals disagreed, holding that determining proper cause “inherently includes the power to restrict the use to the purposes that justified the issuance.”<sup>135</sup>

The Second Circuit upheld this category of good cause statutes in *Kachalsky v. County of Westchester*.<sup>136</sup> In *Kachalsky*, the plaintiffs applied for concealed carry permits, which required showing “proper cause.”<sup>137</sup> The plaintiff-applicants listed “self-defense” as proper cause,<sup>138</sup> but the licensing authority denied the applications because the plaintiffs failed to show a “special need for self-protection.”<sup>139</sup> After the denials, the plaintiffs challenged New York’s good cause statute under the Second Amendment.<sup>140</sup>

The Second Circuit affirmed New York’s denial of the plaintiff’s applications.<sup>141</sup> The court explained that the proper cause requirement was defined by state courts “to include carrying a handgun for target practice, hunting, or self-defense,” but that this broad definition also gave licensing officers discretion to restrict the concealed carry permit to limited purposes.<sup>142</sup> The Second Circuit applied the *Marzzarella* two-step analysis to this interpretation of the New York statute and upheld this interpretation of “good cause” after applying intermediate scrutiny.<sup>143</sup> The court determined that the government had an important interest in public safety and crime prevention, and that a good cause restriction on concealed carry permits was substantially related to achieving that goal.<sup>144</sup>

### C. *The Third Category: Restrictive Definition and Permissive Open Carry*

The third category of good cause statutes occurs when it is difficult to prove good cause for the purposes of carrying a concealed weapon, but it is not difficult to carry firearms openly. This category encompasses good cause statutes that severely restrict or prohibit carrying a concealed firearm in public for self-defense, but that permit openly carrying firearms in public for the same purpose. This particular category can only be found in Delaware.<sup>145</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 701 F.3d 81, 101.

<sup>137</sup> *Id.* at 83; see N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2018).

<sup>138</sup> *Kachalsky*, 701 F.3d at 83.

<sup>139</sup> *Id.* at 83–84.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 101.

<sup>142</sup> *Id.* at 86.

<sup>143</sup> *Id.* at 96–97.

<sup>144</sup> *Kachalsky*, 701 F.3d at 97–101.

<sup>145</sup> See DEL. CODE ANN. tit. 11 § 1441(a)(2) (2015).

Delaware's definition of good cause in its concealed carry statute is exceedingly restrictive. Delaware will only issue a concealed carry license if it is "necessary for the protection of the applicant or the applicant's property, or both."<sup>146</sup> But Delaware also has very permissive open carry laws, permitting general members of the public to openly carry firearms.<sup>147</sup> The Third Circuit has not addressed this category by examining Delaware's particular good cause statute, but it has already upheld a more restrictive good cause statute in New Jersey.<sup>148</sup>

#### D. *The Fourth Category: Restrictive Definition and Restrictive Open Carry*

The final category of good cause statutes combines a restrictive definition of good cause with a restrictive statutory scheme regulating the open carry of firearms. A good cause statute fits in this fourth category when a state severely restricts its citizens from carrying (either open or concealed) any weapon in public for the purpose of general self-defense. When a state prohibits any person from carrying any firearm unless they prove good cause, and when that state's definition of "good cause" is narrow and strict, the result becomes a de facto ban. Several jurisdictions have passed good cause statutes that fit in this category, including California,<sup>149</sup> Maryland,<sup>150</sup> New Jersey,<sup>151</sup> and Washington, D.C.<sup>152</sup> In each of these jurisdictions, the statutory scheme was challenged on Second Amendment grounds.<sup>153</sup> These challenges have led to a split in the circuits in whether the most restrictive good cause statutes violate the Second Amendment.<sup>154</sup> While the Third, Fourth, and Ninth Circuits have upheld them for different reasons, the D.C. Circuit, in a 2015 decision, struck down the District's good cause statute because of its overly restrictive nature.<sup>155</sup> The rest of this Part explains the differences between the various circuits in their analyses of the good cause statutes located in this most restrictive category.

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<sup>146</sup> *Id.*

<sup>147</sup> See GIFFORDS LAW CTR., *Open Carrying in Delaware*, <http://lawcenter.giffords.org/open-carrying-in-delaware/> [<https://perma.cc/3UF6-T2S5>] (last updated Nov. 7, 2017).

<sup>148</sup> *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (discussed *infra* Part III.D.1).

<sup>149</sup> CAL. PENAL CODE §§ 25400, 25655 (2012).

<sup>150</sup> MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (LexisNexis 2015).

<sup>151</sup> N.J. STAT. ANN. § 2C:58-4(c) (West 2018).

<sup>152</sup> D.C. CODE § 22-4504(a) (2015), *invalidated by* *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

<sup>153</sup> *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Drake v. Filko*, 734 F.3d 426 (3d Cir. 2013).

<sup>154</sup> *Compare Peruta*, 824 F.3d 919, *with Wrenn*, 864 F.3d 650 (Ninth Circuit upholding California's law while the D.C. Circuit struck the District's down).

<sup>155</sup> See *Wrenn*, 864 F.3d at 667.

### 1. Upholding Restrictive Good Cause Statutes

Three circuits have considered highly restrictive good cause statutes and concluded that they do not violate the Second Amendment.<sup>156</sup> But each of the courts used different analytical moves to come to that conclusion. Where one examined the good cause statute separately from the broader regulatory scheme,<sup>157</sup> another held that prohibitions on carrying concealed firearms are presumptively lawful as longstanding regulations.<sup>158</sup> The three decisions are considered here in further detail.

#### a. *The Ninth Circuit: Peruta v. County of San Diego*

In California, a member of the general public may not carry a concealed firearm in public unless she has a permit to do so.<sup>159</sup> To receive a permit, an applicant must show that “[g]ood cause exists for issuance of a license.”<sup>160</sup> California leaves the determination of whether good cause exists to the county or the sheriff reviewing the application.<sup>161</sup> After the application is processed, the licensing authority must provide the applicant with its determination of whether she has met the requirements and explain its reasoning if the application is denied.<sup>162</sup>

Significantly, open carry is also broadly illegal in California.<sup>163</sup> The result of this statutory scheme as a whole is a de facto ban against carrying firearms unless the carrier has a permit. Since it is exceedingly difficult to show good

<sup>156</sup> *Peruta*, 824 F.3d at 942; *Woollard*, 712 F.3d at 882; *Drake*, 724 F.3d at 440.

<sup>157</sup> See *Peruta*, 824 F.3d at 919–20.

<sup>158</sup> See *Drake*, 724 F.3d at 426.

<sup>159</sup> CAL. PENAL CODE §§ 25400, 25655 (2012) (outlawing carrying a concealed firearm and providing an exemption for those with a concealed carry permit). There are also numerous other exemptions for peace officers, carrying for sports and entertainment, and licensed hunters and fishers. *Id.* §§ 25450–25650. However, the only provision allowing the general public to carry a concealed weapon without a permit is an affirmative defense that also requires good cause. *Id.* § 25600 (establishing defense for a violation of § 25400 for a person who can prove a reasonable belief of grave danger).

<sup>160</sup> *Id.* § 26150(a)(2) (2016).

<sup>161</sup> *Id.* There is wide variance among California counties regarding what constitutes “good cause.” Compare CTY. OF TEHAMA SHERIFF, *Concealed Weapons*, <https://tehamaso.org/administration/licenses-permits/concealed-weapons/> [https://perma.cc/SL9Y-FVSL] (“[A]ll qualified residents of Tehama County are eligible to apply for a permit to carry concealed weapons.”) with S.F. POLICE DEP’T, *CCW Licensing Policy* (Jan. 12, 2012), [https://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/25869-CCW LicensingPolicy%5B1%5D.pdf](https://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/25869-CCW%20LicensingPolicy%5B1%5D.pdf) [https://perma.cc/DD45-5AQ3] (requiring applicants to provide convincing evidence of five factors related to significant risk of danger). See Kevin Behne, *Packing Heat: Judicial Review of Concealed Carry Laws Under the Second Amendment*, 89 S. CAL. L. REV. 1343, 1398–99 (2016) (explaining different restrictions used by different counties in California).

<sup>162</sup> CAL. PENAL CODE § 26202 (2012).

<sup>163</sup> See *id.* § 26350.

cause in some counties,<sup>164</sup> the California good cause requirement to obtain a permit places a high burden on an individual's ability to bear arms in public.

An en banc panel of the Ninth Circuit upheld California's good cause statute in *Peruta v. County of San Diego*, determining that there is no individual right to carry a concealed firearm in public under the Second Amendment.<sup>165</sup> In *Peruta*, the defendant counties denied the plaintiffs concealed carry permits because they did not meet the good cause requirement.<sup>166</sup> The plaintiffs sought concealed carry permits for general self-defense, but the two counties that denied the plaintiffs permits did not recognize general self-defense as a good cause.<sup>167</sup>

The plaintiffs argued that California's overall statutory scheme prohibiting both open and concealed carry, taken together, amounts to a total ban on publicly carrying firearms for self-defense, which violates the Second Amendment.<sup>168</sup> But the relief that the plaintiffs requested was limited to the issuance of concealed carry permits.<sup>169</sup> Because of this, the court did not address whether there is a Second Amendment right to carry firearms in public.<sup>170</sup> Instead, the court held that based on "the overwhelming consensus of historical sources, . . . the protection of the Second Amendment . . . simply does not extend to the carrying of concealed firearms in public by members of the general public."<sup>171</sup>

The majority in *Peruta* never explicitly refers to the two-step framework that the Ninth Circuit adopted from *Marzzarella*,<sup>172</sup> but the *Peruta* opinion still fits squarely within the *Marzzarella* two-step analysis. The first step of the inquiry under *Marzzarella* is to determine whether the regulation burdens any rights under the Second Amendment at all.<sup>173</sup> The court applied step one of the test by asking whether the right to publicly carry concealed weapons falls within the scope of the Second Amendment.<sup>174</sup> The Ninth Circuit relied on a historical analysis of public concealed carry laws to make this determination<sup>175</sup> and held that concealed carry restrictions are fully outside the Second Amendment, so there was no need to consider step two.<sup>176</sup>

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<sup>164</sup> See discussion *supra* note 161.

<sup>165</sup> 824 F.3d 919, 924 (9th Cir. 2016) (en banc), *cert. denied sub nom.* *Peruta v. California*, 137 S. Ct. 1995 (2017).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 926–27 (one county requiring specific threats and another excluding self-protection without credible threats).

<sup>168</sup> *Id.* at 927.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Peruta*, 824 F.3d at 927.

<sup>172</sup> The Ninth Circuit adopted the *Marzzarella* two-step in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

<sup>173</sup> *Id.*; *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

<sup>174</sup> *Peruta*, 824 F.3d at 929.

<sup>175</sup> *Id.* at 933–39.

<sup>176</sup> *Id.* at 942.

The majority in *Peruta* carefully limited its holding to California's restrictions on carrying concealed firearms.<sup>177</sup> Indeed, the principal difference in the majority and dissent is which portion of California's statute should have been examined. While the majority focused on the narrow good cause requirement itself,<sup>178</sup> the dissent examines the California's statutory scheme as a whole. Judge Callahan contended that the bans of both open and concealed carrying without a permit, combined with the extreme difficulty of obtaining a permit, violates the Second Amendment.<sup>179</sup> The dissent does not contest the majority's contention that the good cause requirement itself does not violate the Second Amendment. Instead, Judge Callahan examined California's good cause requirement in the context of the statutory scheme taken together.<sup>180</sup>

b. *The Third Circuit: Drake v. Filko*

To carry a gun in public in New Jersey, a person must apply for and receive a permit which requires a "justifiable need to carry" a weapon.<sup>181</sup> The state defines "justifiable need" as "the urgent necessity for self-protection, as evidenced by specific threats or previous attacks, which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."<sup>182</sup> If the issuing body refuses to grant the applicant a permit, the only recourse for the applicant is to "request a hearing in the Superior Court . . . by filing a written request for such a hearing within 30 days of the denial."<sup>183</sup>

In *Drake v. Filko*, four New Jersey residents challenged this statutory scheme, claiming the good cause statute, along with the restrictive open carry laws, violated their Second Amendment right to carry firearms outside of the home for self-defense.<sup>184</sup> The court began its analysis with the first step of the *Marzzarella* test, and concluded that the good cause statute did not burden conduct within the scope of the Second Amendment at all.<sup>185</sup> The court held that New Jersey's good cause statute is a "longstanding" regulation on firearms, which makes it "presumptively lawful" under *Heller*.<sup>186</sup>

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 945–51 (Callahan, J., dissenting).

<sup>180</sup> *Peruta*, 824 F.3d at 950 (Callahan, J., dissenting) ("In the context of California's choice to prohibit open carry, the counties' policies regarding the licensing of concealed carry are tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense, and are therefore unconstitutional." (emphasis added)).

<sup>181</sup> N.J. STAT. ANN. § 2C:58-4(c) (West 2018).

<sup>182</sup> N.J. ADMIN. CODE 13:54-2.4(d)(1) (2007).

<sup>183</sup> N.J. STAT. ANN. § 2C:58-4(e) (West 2018).

<sup>184</sup> *Drake v. Filko*, 724 F.3d 426, 427–28 (3d Cir. 2013).

<sup>185</sup> *Id.* at 429.

<sup>186</sup> *Id.* at 430.

The court made it clear that normally the analysis would stop there.<sup>187</sup> But as an alternative argument, the court applied the second step of the *Marzzarella* test to determine if the statute passed heightened scrutiny.<sup>188</sup> The court applied intermediate scrutiny to the statute, deciding that strict scrutiny was inappropriate since the good cause statute did not impact the core of the Second Amendment.<sup>189</sup> After balancing the government's interest against the impact on the individual's liberty interest in carrying a firearm in public, the court held that the good cause statute satisfies intermediate scrutiny.<sup>190</sup>

### c. *The Fourth Circuit: Woollard v. Gallagher*

Maryland's good cause statute resembles its counterparts in California and New Jersey. It prohibits all firearms, both open and concealed, from being carried in public without a permit.<sup>191</sup> To receive a permit, an applicant must demonstrate "good and substantial reason."<sup>192</sup> To demonstrate that good and substantial reason, that applicant must show "that the permit is necessary as a reasonable precaution against apprehended danger."<sup>193</sup>

Just like New Jersey's statute in the Third Circuit, Maryland's statutory scheme was challenged under the Second Amendment in the Fourth Circuit.<sup>194</sup> The plaintiffs in *Woollard* brought the same claim brought in *Drake*, arguing that the Second Amendment provides a right to self-defense in public and that Maryland's good cause statute unjustifiably infringed on that right.<sup>195</sup> In applying the two-step analysis, the Fourth Circuit declined to decide the first step at all. Instead, the court simply assumed that good cause statutes implicate the Second Amendment in some way.<sup>196</sup> After skipping to the second step of the test, the court upheld Maryland's good cause statute, applying intermediate scrutiny.<sup>197</sup> In doing so, the Fourth Circuit adopted the reasoning of the Second Circuit in *Kachalsky*.<sup>198</sup>

## 2. *Invalidating Restrictive Good Cause Statutes: The D.C. Circuit*

In 2017, the D.C. Circuit broke away from the Second, Third, Fourth, and Ninth Circuits by striking down the District's good cause statute.<sup>199</sup> Until

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

<sup>188</sup> *Id.*

<sup>189</sup> *Drake*, 724 F.3d at 436.

<sup>190</sup> *Id.* at 436–40.

<sup>191</sup> MD. CODE ANN., CRIM. LAW §§ 4-203(a), (b)(2) (West 2018).

<sup>192</sup> MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2015).

<sup>193</sup> *Id.*

<sup>194</sup> *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013).

<sup>195</sup> *Id.* at 872.

<sup>196</sup> *Id.* at 875–76.

<sup>197</sup> *Id.* at 875–82.

<sup>198</sup> *Id.* at 880–81; *see also supra* Part III.B.

<sup>199</sup> *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

*Wrenn*, open carry in the District was prohibited.<sup>200</sup> Additionally, concealed carry was only legal with a permit, which required an applicant to show “good reason to fear injury to his or her person.”<sup>201</sup> When Matthew Grace and Brian Wrenn tried to obtain a concealed carry permit under this regime, the District denied their applications because they failed to show good cause.<sup>202</sup> The two of them brought suit and their cases were merged in the D.C. Circuit.<sup>203</sup>

In *Wrenn*, the plaintiffs made a slightly different argument than the challenges to good cause statutes in other circuits: they invoked the categorical test used in *Heller*.<sup>204</sup> So the court began by explicating the Supreme Court’s holding that core Second Amendment rights cannot be abrogated.<sup>205</sup> The court explained that a core right of the Second Amendment is self-defense by law-abiding citizens.<sup>206</sup> It held that a natural reading of the Second Amendment suggests that this core extended beyond the home.<sup>207</sup> The court held that there is a core right to carry firearms in public.<sup>208</sup>

Critically, the court in *Wrenn* did not use the two-step analysis begotten by *Marzzarella*, even though it is the prevailing standard in the D.C. Circuit.<sup>209</sup> At issue in *Wrenn* was the District’s overall gun permitting statutory scheme, which prohibited public carry (either open or concealed) without a permit.<sup>210</sup> Before even getting to the two-step analysis from *Marzzarella*, the court added a “step zero,”<sup>211</sup> and held that the District’s statutory scheme was an impermissible ban on all guns outside the home, subject to categorical protection under *Heller*.<sup>212</sup> The court in *Wrenn* refused to use any tier of scrutiny because the District’s law stripped individual Second Amendment rights from too many people to be justified under *any* circumstances.<sup>213</sup>

The split between the Ninth and D.C. Circuits can be explained almost entirely by the breadth of the question each court examined. Both cases involved similar statutory schemes, requiring a permit to carry a weapon publicly at all

<sup>200</sup> D.C. CODE § 22-4504(a) (2015).

<sup>201</sup> *Id.* § 22-4506.

<sup>202</sup> *Wrenn*, 864 F.3d at 656.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (arguing the law should be held invalid “without applying tiers of scrutiny because this regulation is analogous to the ‘total ban’ that the Supreme Court struck down in *Heller*”).

<sup>205</sup> *Id.* at 657.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 657–58.

<sup>208</sup> *Wrenn*, 864 F.3d at 661.

<sup>209</sup> The D.C. Circuit adopted the two-step test in *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

<sup>210</sup> *Wrenn*, 864 F.3d at 655–56; *see also supra* Part III.D.

<sup>211</sup> The phrase “step zero” was never used by the court in *Wrenn*. Rather, it is a phrase that this Note uses to help locate the D.C. Circuit’s analysis within the traditional two-step framework.

<sup>212</sup> *Wrenn*, 864 F.3d at 665–67.

<sup>213</sup> *Id.* at 666.

and requiring a showing of good cause to get a permit.<sup>214</sup> In *Wrenn*, the D.C. Circuit struck down the good cause statute because the statutory scheme taken as a whole was a de facto ban on carrying firearms in public at all.<sup>215</sup> The question in *Wrenn* required an examination of the full scope of the District's permitting scheme, including the good cause statute as well as the broader open carry ban. But in *Peruta*, the question the Ninth Circuit answered was whether there is an individual right to carry concealed weapons *generally*.<sup>216</sup> The court in *Peruta* avoided striking down California's good cause statute by narrowly tailoring the issue it considered on appeal.<sup>217</sup> Indeed, it is easy to imagine the outcome of the case changing if the Ninth Circuit were forced to consider the totality of California's gun permit statutory scheme.<sup>218</sup> The key difference between *Peruta* and *Wrenn* is that where the court in *Peruta* avoided considering the overall statutory scheme,<sup>219</sup> the court in *Wrenn* embraced it.<sup>220</sup>

There is an even more apparent contradiction between *Wrenn* and *Drake*,<sup>221</sup> which upheld New Jersey's extremely restrictive statutory scheme for gun permits as "longstanding restrictions" allowed by *Heller*.<sup>222</sup> In *Wrenn*, the D.C. Circuit addressed this contradiction in piecemeal fashion, first acknowledging that there are "longstanding" restrictions that are presumptively lawful,<sup>223</sup> then explaining why two longstanding practices restricting public-carry in densely populated areas do not apply.<sup>224</sup> On appeal, the District identified two "longstanding" statutes from Anglo-American history to support its good cause statute—English Northampton laws and surety laws.<sup>225</sup> The Northampton laws prevented members of the general population from carrying firearms in

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<sup>214</sup> Compare *supra* Part III.D.1.a (describing California's gun permit statutes), with *supra* Part III.D.2 (describing the District's statutory scheme that was struck down).

<sup>215</sup> *Wrenn*, 864 F.3d at 666.

<sup>216</sup> *Peruta v. Cty. of San Diego*, 824 F.3d 919, 932 (9th Cir. 2016) (en banc), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017).

<sup>217</sup> *Id.* at 927.

<sup>218</sup> *Cf. id.* at 939 ("There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public."). In fact, the Ninth Circuit's first go around in *Peruta* invalidated California's statutory scheme for this very reason. *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017).

<sup>219</sup> The Ninth Circuit finally addressed the public carry question in *Young v. Hawaii*, holding that there the Second Amendment does in fact extend to the public sphere. *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018), *reh'g en banc granted*, No. 12-17808, 2019 U.S. App. LEXIS 3979 (9th Cir. Feb. 8, 2019).

<sup>220</sup> See *Wrenn*, 864 F.3d at 667. Indeed, the court sharply disagreed with the Ninth Circuit's decision to examine the good cause statute independently of the greater statutory scheme. *Id.* at 663 n.5 ("We do not agree with the Ninth Circuit that a ban on concealed carry can be assessed in isolation from the rest of a jurisdiction's gun regulations.").

<sup>221</sup> *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); see also *supra* Part III.D.1.b.

<sup>222</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

<sup>223</sup> *Wrenn*, 864 F.3d at 657.

<sup>224</sup> *Id.* at 659–61.

<sup>225</sup> *Id.*



public.<sup>226</sup> According to surety laws, if a person “reasonably feared” harm from someone publicly carrying a firearm, the weapon-holder had to post bond to cover any damage he did with the firearm unless he could show “reason to fear injury.”<sup>227</sup>

The court discounted the Northampton laws and distinguished the surety laws from the District’s law at issue.<sup>228</sup> The court held that the Northampton laws were outdated vestiges of British law abandoned by the colonies and replaced by early American commentaries, which showed that the individual right captured by the Second Amendment was more developed than the traditional English right to bear arms at the time of the Northampton laws.<sup>229</sup> The court also distinguished traditional surety laws from the statute at issue in *Wrenn*.<sup>230</sup> Surety laws, the court explained, began with the presumption that individuals have a right to publicly bear arms, and that inherent right could be limited by someone else’s “reasonable fear.”<sup>231</sup> At that point, the individual must prove good cause to restore the inherent right.<sup>232</sup> But the District’s good cause law began with the presumption that individuals may not bear arms in public and that they must *prove* good cause to restore their rights.<sup>233</sup>

The D.C. Circuit also offered a broader critique of the other circuit decisions: the court suggested that the other circuits improperly “relied on an inference from the tolerance of American law for certain other carrying regulations.”<sup>234</sup> The Second and Fourth Circuits justified good cause statutes by analogizing them to the longstanding restrictions contemplated in *Heller*.<sup>235</sup> The D.C. Circuit disagreed, drawing an analogy from the Supreme Court’s First Amendment jurisprudence and holding that legislatures “must leave ample channels for keeping and for carrying arms.”<sup>236</sup> According to the court in *Wrenn*, the District’s good cause statute did not leave sufficient channels for individuals to exercise their Second Amendment rights.<sup>237</sup>

The D.C. Circuit is the first circuit to strike down a good cause statute under the Second Amendment, but *Wrenn* is not totally incompatible with the other circuit decisions. The next Part proposes a way for the Supreme Court to

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 661.

<sup>228</sup> *Id.* at 660–61.

<sup>229</sup> *Wrenn*, 864 F.3d at 660–61.

<sup>230</sup> *Id.* at 661.

<sup>231</sup> *Id.* at 661.

<sup>232</sup> *Id.*

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* at 661–64.

<sup>235</sup> *See* *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012).

<sup>236</sup> *Wrenn*, 614 F.3d at 662–63; *see also* 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, 1471–73 (2009) (discussion of channels of access as it relates to First Amendment jurisprudence).

<sup>237</sup> *Wrenn*, 614 F.3d at 662–63.

reconcile *Wrenn* with the rest of the circuits, solidify the analytical framework for the Second Amendment, and properly balance the competing interests inherent in firearm regulation all in one fell swoop.

#### IV. THE SUPREME COURT SHOULD USE THE PRELIMINARY “STEP ZERO” TEST, AND FORMALLY ADOPT THE *MARZZARELLA* TWO-STEP

The split between the D.C. Circuit and the First, Second, Third, Fourth, and Ninth Circuits may come to an end in the next couple of terms. Although *Wrenn* sputtered out after the D.C. Circuit denied the District’s request for an en banc rehearing,<sup>238</sup> the Supreme Court recently granted certiorari to a Second Amendment case involving New York City’s gun licensing system from the Second Circuit.<sup>239</sup> The Supreme Court now has an opportunity to address the Circuit split and clarify the scope of the Second Amendment, giving further guidance to lower courts on how to answer Second Amendment questions. This Part argues that the Court should give this guidance by reaffirming the “step zero” categorical analysis used by the D.C. Circuit in *Wrenn*, and then by formally adopting the *Marzzarella* two-step framework.

##### A. *The Court Should Adopt the Categorical “Step Zero” Used in Wrenn*

The Supreme Court should formally approve the preliminary categorical analysis used by the D.C. Circuit in *Wrenn*. *Heller* itself stands for the proposition that core rights under the Second Amendment must be categorically protected.<sup>240</sup> But what is a core right? The Court has given little guidance to circuits on this question. In *Heller*, the Court did not attempt to delineate the entire scope of the individual rights within the Second Amendment.<sup>241</sup> The Court did not seek “to clarify the entire field, any more than *Reynolds v. United States*, [its] first in-depth Free Exercise Clause case, left that area in a state of utter certainty.”<sup>242</sup> Instead, its holding was limited to striking down one of the most restrictive gun laws in the history of the United States.<sup>243</sup>

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<sup>238</sup> Ann E. Marimow & Peter Jamison, *D.C. Will Not Appeal Concealed Carry Gun Ruling to Supreme Court*, WASH. POST (Oct. 5, 2017), [https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d_story.html) [<https://perma.cc/M7TW-GRDH>].

<sup>239</sup> *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), cert. granted, 2019 U.S. LEXIS 734 (U.S. Jan. 22, 2019) (No. 18-280).

<sup>240</sup> See *supra* Part II.B.

<sup>241</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).

<sup>242</sup> *Id.* (internal citations omitted).

<sup>243</sup> *Id.* at 629 (“Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”).

The Court's next opportunity to inform the circuits on how to approach the core of the Second Amendment came in *McDonald v. City of Chicago*.<sup>244</sup> *McDonald* included in-depth discussions about how the Court has determined what rights are protected from state interference through the doctrine of substantive due process and incorporation.<sup>245</sup> The Court explained that circuits should incorporate rights if they are "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,"<sup>246</sup> if they are "are so rooted in the traditions and conscience of our people as to be ranked as fundamental,"<sup>247</sup> or if they "are the very essence of a scheme of ordered liberty and essential to a fair and enlightened system of justice."<sup>248</sup>

Although *McDonald* addresses incorporation, the incorporation tests articulated by the Court are useful analytical tools for circuits to use in determining whether something is a "core" right. Categorical protection should not be given lightly; such steadfast protection should only be given to core constitutional rights. The categorical right in *Heller* is lawful self-defense in the home.<sup>249</sup> To determine how much further the scope of categorical protection should extend, there is a certain intuitive logic to using the Court's incorporation tests to determine which rights are protected by the Second Amendment "above all other interests."<sup>250</sup> Both should require a higher standard to match the greater protections they afford.

The Ninth Circuit engaged in a similar historical analysis for an alleged right to carry concealed weapons in *Peruta v. County of San Diego*.<sup>251</sup> The court in *Peruta* recognized that *Heller* and *McDonald* mandate an inquiry into whether an alleged right is deeply rooted in the traditions and conscience of the American people.<sup>252</sup> Even though the analysis looked like an application of the first step of *Marzzarella*,<sup>253</sup> the court's discussion was focused instead on the history of

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<sup>244</sup> 561 U.S. 742 (2010).

<sup>245</sup> *Id.* at 759–66; *id.* at 861–70 (Stevens, J., dissenting). For a background on substantive due process, see Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1999); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 *N.C. L. REV.* 64 (2006); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408 (2010).

<sup>246</sup> *McDonald*, 561 U.S. at 760 (majority opinion).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* (internal quotes omitted).

<sup>249</sup> See *supra* Part IV.A.

<sup>250</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>251</sup> 824 F.3d 919, 929–39 (9th Cir. 2016) (outlining the right to bear arms in England, the history relevant to the Fourteenth Amendment, and concluding there is no right to carry concealed weapons). *But see, id.* at 947–49 (Callahan, J., dissenting) (outlining history supporting the proposition that there is a historical right to carry concealed weapons).

<sup>252</sup> See *id.* at 929 ("[T]he Supreme Court in *Heller* and *McDonald* treated its historical analysis as determinative.").

<sup>253</sup> See *id.* at 942 (agreeing with the concurrence's application of the two-step test).

concealed carry regulations in the United States.<sup>254</sup> After an in-depth historical analysis, the majority concluded that there is no core right to concealed carry weapons that is deeply rooted in history.<sup>255</sup>

The D.C. Circuit applied the same kind of historical analysis in *Wrenn v. District of Columbia*.<sup>256</sup> In previous cases, the D.C. Circuit interpreted *Heller* to mean that a restriction imposing substantially on a core right of the Second Amendment requires strict scrutiny, rather than categorical protection.<sup>257</sup> In *Wrenn*, however, the court held that carrying a firearm for lawful self-protection is a core right of the Second Amendment that extends beyond the home.<sup>258</sup> It went on to strike down the District's statutory scheme as an impermissible ban on publicly carrying firearms for lawful self-defense, holding that it did not apply any level of scrutiny.<sup>259</sup> The key point here is that the court in *Wrenn* made this analytical move *before* it even began the two-step test. Instead, it began with an initial "step zero" categorical test, concluding that a law that flunks this test will always be unconstitutional.<sup>260</sup>

*Wrenn's* step zero adjustment to the traditional two-step framework should be adopted by the Supreme Court. It is more consistent with *Heller* because it addresses the categorical approach in *Heller* directly. The court in *Wrenn* stated that the "categorical approach is appropriate here even though our previous cases have always applied tiers of scrutiny to gun laws" because the two-step analysis has always lead to "only intermediate or strict scrutiny to every burdensome gun law we ever review."<sup>261</sup> Under the step zero approach, before a court can get to the *Marzzarella* two-step, it must first ask whether a case warrants categorical protection of a core Second Amendment right.<sup>262</sup> If it does (i.e., if it infringes on a core right of the Second Amendment), the court must strike down the offending law. If not, the court must proceed to the first step of the *Marzzarella* test.<sup>263</sup>

<sup>254</sup> *Id.* at 929–39 (examining the history of concealed carry restrictions in England, colonial America, and post-Civil War America).

<sup>255</sup> *Id.* at 929.

<sup>256</sup> 864 F.3d 650, 656–61 (D.C. Cir. 2017).

<sup>257</sup> *Heller v. District of Columbia*, 670 F.3d 1244, 1256–57 (D.C. Cir. 2011).

<sup>258</sup> *Wrenn*, 864 F.3d at 657.

<sup>259</sup> *Id.* at 666 ("Bans on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test that was appropriately written and applied, so we strike down the District's law here apart from any particular balancing test.").

<sup>260</sup> *Id.*

<sup>261</sup> *Wrenn*, 864 F.3d at 666.

<sup>262</sup> *Id.*

<sup>263</sup> It is also possible to imagine adding "categorical scrutiny" to step two of the *Marzzarella* framework instead. The phrase "categorical scrutiny" is misleading, however, and it is a borderline oxymoron. Indeed, any application of the categorical test under *Heller* involves no judicial scrutiny at all. See *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008); *Wrenn*, 864 F.3d at 655 ("[T]he Second Amendment erects some absolute barriers that no gun law may breach."). But if one were to incorporate the idea of categorical scrutiny into *Marzzarella* step two, a court would use step one to determine if the case implicates

### B. *The Court Should Adopt the Marzzarella Two-Step*

After the Supreme Court solidifies a preliminary categorical analysis of Second Amendment questions with a step zero baseline, the Court should fully adopt the two-step framework first used in *Marzzarella*.<sup>264</sup> The Court in *Heller* explicitly left much of the Second Amendment to the lower courts, and nearly all of the circuits have agreed that the two-step test is the appropriate analytical framework.<sup>265</sup> These courts adopted the *Marzzarella* two-step in part because it comes from a First Amendment analysis, and the Supreme Court in *Heller* and *McDonald* frequently used the Court's First Amendment jurisprudence as a guide for its Second Amendment cases.<sup>266</sup> Second Amendment cases are rife with comparisons between the First and Second Amendments. And the two-step analysis—for both the First and Second Amendment—strikes an appropriate balance between the constitutional protection of an individual liberty and the government's interest in promoting safety and the general welfare.

In *Heller*, the Supreme Court suggested that lower courts should be responsible for further analysis of the Second Amendment.<sup>267</sup> The court declined to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,”<sup>268</sup> and instead punted such analyses to the lower courts.<sup>269</sup> Over the next decade, nearly every single circuit formally adopted the same two-step analytical framework to answer Second Amendment questions.<sup>270</sup> This kind of overwhelming uniformity of approval and adoption among the circuits should persuade the Supreme Court that the test itself is analytically sound.

The circuits have all agreed on the two-step test in part because of its roots in First Amendment jurisprudence.<sup>271</sup> The *Marzzarella* two-step test comes from a First Amendment case, *United States v. Stevens*,<sup>272</sup> where the court used a similar two-step analysis. The first step is to determine if a statute implicates

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Second Amendment at all. If it does, the court must use step two to decide what level of heightened scrutiny would apply: intermediate, strict, or categorical scrutiny. Ultimately, using the “step zero” approach is the better option. It stays truer to *Heller* because it puts a greater emphasis on the inalienability of the right. *Accord Heller*, 554 U.S. at 628 & n.27 (emphasizing the categorical nature of the right to bear arms for individual self-defense in the home).

<sup>264</sup> *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

<sup>265</sup> *See supra* notes 92–94 and accompanying text.

<sup>266</sup> *See, e.g., Heller*, 554 U.S. at 582; *McDonald v. City of Chicago*, 561 U.S. 742, 759 (2010).

<sup>267</sup> *Heller*, 554 U.S. at 626.

<sup>268</sup> *Id.*

<sup>269</sup> *See supra* notes 74–79 and accompanying text.

<sup>270</sup> *See supra* notes 95–97 and accompanying text.

<sup>271</sup> Kopel & Greenlee, *supra* note 21, at 212.

<sup>272</sup> 533 F.3d 218 (3d Cir. 2008), *aff'd* 559 U.S. 460 (2010); *see also* Kopel & Greenlee, *supra* note 21, at 212.

the First Amendment at all.<sup>273</sup> If it does, the court takes the second step: it applies the appropriate level of scrutiny to determine the statute's constitutionality.<sup>274</sup> In *Marzzarella*, the Third Circuit took the *Stevens* test step by step, simply replacing the First Amendment with the Second.<sup>275</sup> Taken together, the connection between the First and Second Amendment, approved by the Supreme Court and developed by the circuits, leads to the clear conclusion that the Court should adopt the *Marzzarella* two-step.

The Third Circuit's comparison to a First Amendment case was not an accident.<sup>276</sup> Second Amendment cases—including *Heller* and *McDonald*—are rife with comparisons to the Court's First Amendment decisions.<sup>277</sup> In the three opinions of *Heller*, the Justices invoked the First Amendment sixteen times, either as an analogy to the Second Amendment, as a citation to support an analogous proposition, or as a response to another part of the decision making a similar analogy.<sup>278</sup> Justice Scalia used the First Amendment to support the notion that the Second Amendment is an individual right,<sup>279</sup> and that the Second Amendment applies to modern weapons;<sup>280</sup> he even notes that other historical scholars have made the *same comparison*.<sup>281</sup> The *Heller* and *McDonald* decisions show that there can be little doubt of the strong theoretical connection between the First and Second Amendments.

Legal scholars also widely approve of favorably comparing the First Amendment to the Second. Professor David B. Kopel lauds the common history and purpose of the two amendments, arguing that both were ratified to protect

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<sup>273</sup> *Stevens*, 533 F.3d at 223 (“First, we show how [the statute] regulates protected speech. Second, because [the statute] regulates protected speech, we must subject the statute to strict scrutiny.”).

<sup>274</sup> *Id.*

<sup>275</sup> *United States v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010).

<sup>276</sup> *Marzzarella*, 614 F.3d at 89 & n.4 (citing a First Amendment case and explicitly invoking First Amendment jurisprudence to develop its analysis).

<sup>277</sup> *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 759 (2010) (holding that a nineteenth century case that does not apply to the First Amendment also does not apply to the Second); *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“Just as the First Amendment protects modern forms of communications, . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”); *Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017) (using First Amendment’s “ample alternative channels” doctrine as an analogy).

<sup>278</sup> *Heller*, 554 U.S. at 579, 582, 590 n.13, 591 & n.14, 595, 606, 620 n.23, 626, 635; *Id.* at 645–46, 651 n.13, 689 (Stevens, J., dissenting); *id.* at 704 (Breyer, J., dissenting).

<sup>279</sup> *Id.* at 579 (majority opinion) (stating that the phrase “the right of the people” is used in the First Amendment to indicate an individual right).

<sup>280</sup> *Id.* at 582 (drawing a comparison between the Second and First Amendment’s application to modern technology).

<sup>281</sup> *Id.* at 606 (“St. George Tucker’s version of Blackstone’s Commentaries . . . grouped the right [to keep a gun] with some of the individual rights included in the First Amendment . . .”).

individual rights from government interference.<sup>282</sup> He goes on to identify certain topics in First Amendment jurisprudence that can naturally be read into the Second Amendment.<sup>283</sup> From the rights surviving changes to technology<sup>284</sup> to concepts like chilling and vagueness,<sup>285</sup> Professor Kopel demonstrates why the First and Second Amendment share so much common ground. And he is not alone in his analysis.<sup>286</sup>

Finally, the Court should adopt the two-step test because comparing the First and Second Amendment makes intuitive sense. The Constitution recognizes the need to balance the right to bear arms with the government's interest in promoting the general welfare in society. The Court has recognized in First Amendment cases that a government can prohibit entire categories of speech to promote society's interest in protecting "social interest in order and morality."<sup>287</sup> And the majority in *Heller* recognized that there are limitations to the Second Amendment too.<sup>288</sup> The two-step test is an excellent way for courts to determine these limitations because it balances the protection of individual liberties with the promotion of a safer society. Of course, the two-step test should be modified to include a preliminary step zero.<sup>289</sup> But because of *Marzzarella's* logical outgrowth from the First Amendment, the Supreme Court should formally adopt it as the analytical framework for Second Amendment questions.

#### V. APPLYING THE NEW TEST TO EACH CATEGORY OF GOOD CAUSE STATUTES

Using the new Second Amendment framework proposed here, the question of the constitutionality of good cause statutes begins with step zero: whether a good cause statute infringes on a core right of the Second Amendment. If it does, it is invalid according to the categorical test under *Heller* and step zero of the analysis; if it does not, proceed to the *Marzzarella* two-step test. This Part

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<sup>282</sup> David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 418 (2014).

<sup>283</sup> *Id.* at 447–77.

<sup>284</sup> *Id.* at 454–56.

<sup>285</sup> *Id.* at 464–65.

<sup>286</sup> See, e.g., Symposium, *Heller in the Lower Courts*, 40 CAMPBELL L. REV. 399, *passim* (2018) (frequently comparing the First Amendment to the Second); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV., 375, 377–80 (2009); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1280 (2009); Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller's "Schools" and "Government Buildings"*, 92 NEB. L. REV. 537, 574–75 (2014); Jordan E. Pratt, *Uncommon Firearms as Obscenity*, 81 TENN. L. REV. 633, 641–44 (2014); Volokh, *supra* note 236, at 1471.

<sup>287</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>288</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited.")

<sup>289</sup> See *supra* Part IV.A.

examines the categories of good cause statutes under the proposed framework, determining that only the most restrictive good cause statutes categorically infringe on the core right to self-defense, failing step zero. It then applies the next part of the two-step analysis to the remaining categories of good cause statutes, concluding that while good cause statutes can exist in harmony with the Second Amendment, they can also go too far.

### *A. Step Zero: When a Restrictive Definition Meets a Restrictive Open Carry Regime, the Statutory Scheme Violates the Second Amendment*

Although there is still a great deal of uncertainty regarding the scope of core rights,<sup>290</sup> courts have struck down regulations as categorical violations of the Second Amendment when they are explicit or de facto bans.<sup>291</sup> But good cause statutes are not always so restrictive. Instead, the different categories of good cause statutes implicate different possible Second Amendment rights: the right to carry in public generally, the right to open carry in public, and the right to concealed carry in public.<sup>292</sup> Applying step zero to each of these possible rights shows that only the most restrictive good cause statutes banning public carry of firearms altogether will categorically fail step zero under the modified Second Amendment analysis proposed here.

To determine if the most restrictive good cause statutes fail step zero, the relevant question is whether there is a core right within the Second Amendment to carry firearms in public.<sup>293</sup> This is a close question. In *Heller*, the Supreme Court noted in its historical analysis that the Second Amendment was “understood to be an individual right protecting against both *public* and private violence.”<sup>294</sup> Despite this suggestive language, there is a wide split on the issue among the circuits, ranging from a definitive right, to a limited right, to no right at all.<sup>295</sup>

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<sup>290</sup> For a discussion of what constitutes a “core right,” see *supra* Part IV.A.

<sup>291</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Heller*, 554 U.S. 570; *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

<sup>292</sup> See *supra* Part III.

<sup>293</sup> *Wrenn*, 864 F.3d at 667.

<sup>294</sup> *Heller*, 554 U.S. at 594 (emphasis added).

<sup>295</sup> See *Young v. Hawaii*, 896 F.3d 1044, 1071 (9th Cir. 2018) (holding carrying in public is a core right), *reh 'g en banc granted*, No. 12-17808, 2019 U.S. App. LEXIS 3979 (9th Cir. Feb. 8, 2019), *Wrenn*, 864 F.3d at 667 (same); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (affirming right to carry in public “as important outside the home as inside”); *cf.* *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (declining to answer question), *cert. denied sub nom.* *Peruta v. California*, 137 S. Ct. 1995 (2017); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (assuming there is some right). *But see* *Drake v. Filko*, 724 F.3d 426, 430 (4th Cir. 2013) (“It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home.”). For more discussion on the topic, see *Kopel & Greenlee, supra* note 21, at 256–74 (providing overview of the circuit decisions regarding a Second Amendment right to carry in public).



The Seventh Circuit held the right to publicly carry firearms is logical because “the interest in self-protection is as great outside as inside the home.”<sup>296</sup> The D.C. Circuit held in *Wrenn* that an individual right to carry for self-defense in public was based in history.<sup>297</sup> The court held that the nineteenth century cases cited in *Heller* applied to self-defense both within the home, and in public.<sup>298</sup>

The Ninth Circuit most recently solidified the right to public carry in *Young v. Hawaii*.<sup>299</sup> The plaintiff in *Young* applied for a license to carry his firearm openly in public, and challenged Hawaii’s restrictive firearm licensing statutory scheme after he was rejected.<sup>300</sup> The Ninth Circuit held that there is a core Second Amendment right to openly carry firearms in public.<sup>301</sup> The court first distinguished *Young* from *Peruta*, noting that *Peruta* was limited to concealed-carry restrictions, and that it “explicitly left unresolved the question of whether the Second Amendment encompasses a right to open carry.”<sup>302</sup> Next, the court in *Young* explored what a “core” Second Amendment right entails.<sup>303</sup> The court focused its inquiry on “whether the core of the right encompasses both . . . keeping and bearing arms for self-defense, or, more narrowly, only keeping arms for self-defense within the home.”<sup>304</sup> The court decided on the former and held that Hawaii’s statutory scheme violated the Second Amendment because the “typical, law-abiding citizen in the State of Hawaii is . . . entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense.”<sup>305</sup>

The battle over Hawaii’s statutory scheme in the Ninth Circuit is far from over. In some ways, *Young* bears a striking resemblance to *Peruta*. The Ninth Circuit panel in *Young* was split, just like *Peruta*. As fate would have it, Judge O’Scannlain wrote the majority opinion in *Young*, just as he did in *Peruta*.<sup>306</sup>

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<sup>296</sup> *Moore*, 702 F.3d at 941.

<sup>297</sup> *Wrenn*, 864 F.3d at 657–58.

<sup>298</sup> *Id.*

<sup>299</sup> 896 F.3d 1044 (9th Cir. 2018), *reh’g en banc granted*, No. 12-17808, 2019 U.S. App. LEXIS 3979 (9th Cir. Feb. 8, 2019).

<sup>300</sup> *Id.* at 1049.

<sup>301</sup> *Id.* at 1068–70.

<sup>302</sup> *Id.* at 1050.

<sup>303</sup> *Id.* at 1068.

<sup>304</sup> *Id.*

<sup>305</sup> *Young*, 896 F.3d at 1071.

<sup>306</sup> *Id.* at 1048; *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1147 (9th Cir. 2014), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017).

And the Ninth Circuit granted an en banc rehearing in *Young*,<sup>307</sup> just as it did in *Peruta*.<sup>308</sup>

Hawaii has a good shot at winning a reversal at an en banc rehearing. Judge Clifton—dissenting in *Young*—noted that seven out of the eleven judges in *Peruta* believed that the similarly restrictive statutory scheme in California “struck ‘a permissible balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets.’”<sup>309</sup> A Ninth Circuit panel sitting en banc in *Young* will most likely make good on the dicta in *Peruta* and hold that there is not a core right to publicly carry firearms. For now, though, the Ninth Circuit is the third appellate court to hold that there is a core constitutional right to carry firearms in public.<sup>310</sup>

In the middle of the road sit the First and Second Circuits, both of which have tacitly accepted the right to bear arms in public without affirmatively holding that the right exists.<sup>311</sup> The Fourth Circuit in *Drake* expressed some doubt that the Second Amendment extends beyond the home, but it did so cautiously in dicta.<sup>312</sup>

For everyone keeping score at home, that brings the current tally of circuit courts to three circuits carving a definitive core Second Amendment right to carry publicly, two circuits declining to define the scope of the right, and one expressing doubt to any right to carry publicly at all. The definitive rulings in the Seventh, Ninth, and D.C. Circuits, along with the waffling in the other circuits leads to the conclusion that there is some core right under the Second Amendment to carry in public.<sup>313</sup> Thus, whether a good cause statute fails step zero of this new framework depends on the breadth and severity of its restriction. If there are tight restrictions on who may open carry in a jurisdiction, there cannot also be an impossibly high standard an applicant must show to demonstrate good cause.<sup>314</sup> Therefore, a statute that combines a restrictive

<sup>307</sup> *Young*, 896 F.3d 1044, *reh’g en banc granted*, No. 12-17808, 2019 U.S. App. LEXIS 3979 (9th Cir. Feb. 8, 2019); *see also* Timothy Hurley, *Hawaii Appeals Decision to Allow Guns in Public*, HONOLULU STAR ADVERTISER (Sept. 14, 2018), <https://www.staradvertiser.com/2018/09/14/breaking-news/hawaii-appeals-decision-to-allow-guns-in-public/> [<https://perma.cc/G5DH-SCDP>].

<sup>308</sup> *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), *cert. denied sub nom.* *Peruta v. California*, 137 S. Ct. 1995 (2017).

<sup>309</sup> *Young*, 896 F.3d at 1075 (Clifton, J., dissenting) (quoting *Peruta v. Cty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (Graber, J., concurring)).

<sup>310</sup> *Id.* at 1071 (majority opinion); *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

<sup>311</sup> *Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012); *Kachalsky v. Cty. Of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *see also* Kopel & Greenlee, *supra* note 21, at 266–68.

<sup>312</sup> *Drake v. Filko*, 724 F.3d 426, 430–31 (4th Cir. 2013).

<sup>313</sup> *Young*, 896 F.3d at 1071; *Wrenn*, 864 F.3d at 667; *Moore*, 702 F.3d at 942; *see Drake*, 724 F.3d at 430–31; *Hightower*, 693 F.3d at 74; *Kachalsky*, 701 F.3d at 89.

<sup>314</sup> *See, e.g., Young*, 896 F.3d at 1071 & n.21.

definition of good cause with a restrictive open carry policy must be struck down at step zero as an impermissible de facto ban on firearms in public altogether.<sup>315</sup>

This is the trouble that Washington, D.C. ran into in *Wrenn*,<sup>316</sup> and it is the same trouble that other states in the most restrictive category of good cause statutes will run into if this approach is adopted by the Supreme Court. The good cause statutes in California, Hawaii, Maryland, and New Jersey all use restrictive language defining what constitutes “good cause.”<sup>317</sup> They also all have highly restrictive statutory schemes regarding carrying firearms openly.<sup>318</sup> These two factors together infringe on an individual’s Second Amendment right to carry a firearm. But the statutory solution is just as simple: If these states loosen the restrictions on either one of these factors, the result would be a statutory scheme that permissibly restricts firearm use without amounting to an outright ban on publicly carrying firearms.

Several other good cause statutes run into the same trouble when state courts interpret less restrictive language in good cause statutes to be more restrictive.<sup>319</sup> When this restrictive interpretation of the definition of good cause combines with a general ban on openly carrying firearms, the result becomes a de facto ban, which flunks step zero.

New York serves as perfect examples of this idea. The interpretation of New York’s good cause statute in *O’Connor v. Scarpino* gives power to local police departments to restrict gun permits to hunting or sport.<sup>320</sup> At the same time, the statutory scheme overall prevents carrying any weapon without a permit.<sup>321</sup> Since a permit for self-defense is difficult to come by, the New York statutes as interpreted in *O’Connor* cannot be sustained.

To side-step this trouble, courts in states like New York should prevent a de facto ban through the constitutional avoidance doctrine.<sup>322</sup> When faced with a similar statute, a court has two reasonable readings: one gives the local licensing authority the power to unconstitutionally limit the purpose of the licenses issued; the other gives the permissive language of the statute its full effect. When faced with this question, courts must choose the latter and truly include *any* permissible reason within the definition of good cause.<sup>323</sup>

<sup>315</sup> See, e.g., *id.*

<sup>316</sup> *Wrenn*, 864 F.3d at 666.

<sup>317</sup> See *supra* Part III.D.

<sup>318</sup> See *supra* Part III.

<sup>319</sup> See, e.g., New York, *supra* Part III.B.

<sup>320</sup> *O’Connor v. Scarpino*, 638 N.E.2d 950, 951 (N.Y. 1994).

<sup>321</sup> *Id.*

<sup>322</sup> See, e.g., *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.” (internal quotations and citations omitted)).

<sup>323</sup> Before *Peruta* was redecided en banc, Kevin Behne made a similar argument that lowering the threshold for what constitutes good cause to make it easier to obtain a concealed carry permit would satisfy the Second Amendment. Behne, *supra* note 161, at 1398–99.

Thus interpreted, the other categories of good cause statutes have little difficulty in passing step zero of the proposed framework. When open carry is broadly legal, requiring an applicant to show good cause before she can be issued a concealed carry permit does not amount to a total ban on carrying weapons in public for lawful self-defense. This is true no matter how difficult it is for an applicant to show good cause. Since carrying concealed firearms in public is not a core right of the Second Amendment,<sup>324</sup> there is no step zero problem with this category.

Similarly, an easy-to-meet good cause requirement does not amount to a de facto ban on firearms, regardless of whether open carry is legal or not. As long as some avenue to publicly carry exists, there is no unlimited right to open carry.<sup>325</sup> Instead, circuit courts that have held there is a public right to carry have borrowed the “alternative channels” doctrine from the Court’s First Amendment jurisprudence.<sup>326</sup> In short, the alternative channels doctrine gives legislatures the constitutional authority to choose which method of carrying in public may be prohibited: a state may ban either open carry or concealed carry, but not both.<sup>327</sup>

At least one commentator has suggested that the traditional historical analysis mandated by *Heller* leads to the conclusion that open carry, and *only* open carry, is a guaranteed right under the Second Amendment outside the

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<sup>324</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[C]ommentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . 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>325</sup> *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 955 (9th Cir. 2016) (en banc) (Callahan J., dissenting) (“States may have good reasons for allowing concealed carry but banning open carry.”), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017); *Norman v. State*, 215 So.3d 18, 36–38 (Fla. 2017) (stating that openly carrying is “related” to the core of the Second Amendment, but upholding ban under intermediate scrutiny); *see also Volokh, supra* note 236, at 1521 (“In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.”).

<sup>326</sup> *See Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017) (“The rights to keep and to bear, to possess and to carry, are equally important inasmuch as regulations on each must leave alternative channels for both.”); *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (“[W]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places.”); *Bishop, supra* note 28, at 917–21 (naming it the “alternative outlet doctrine” and describing its use in the Ninth Circuit before *Peruta* was reheard *en banc*); 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, 592 (2012) (“[R]egulation must leave open ample alternative channels by which the right can be effectively exercised.”); *see also Young v. Hawaii*, 846 F.3d 1044, 1071 n.21 (9th Cir. 2018) (holding that Hawaii’s statutory scheme impermissibly restricted public open-carry, but declining to “address whether . . . a concealed carry regime could provide a sufficient channel for typical, law-abiding citizens to exercise their right to bear arms for self-defense”), *reh’g en banc granted*, No. 12-17808, 2019 U.S. App. LEXIS 3979 (9th Cir. Feb. 8, 2019).

<sup>327</sup> *Bishop, supra* note 25, at 918–19.

home.<sup>328</sup> This conclusion is based on a rigorous examination of antebellum cases that routinely protected individuals' right to open carry and routinely upheld restrictions on concealed carry.<sup>329</sup> It is also predicated on the assumption that all Second Amendment cases must begin and end with an originalist interpretation, and that there is no room for further analysis.<sup>330</sup> But this second assumption unravels in the face of analytical development of Second Amendment cases in the circuit courts, as well as the fact that even *Heller* has notes of nonoriginalism.<sup>331</sup> The framework proposed in this Note—even the categorical step zero introduced in *Wrenn*—is not compatible with only an originalist viewing of the Second Amendment. It is more complete than that. The proposed framework here requires courts to undertake a thorough investigation of Second Amendment questions, beginning with originalism to locate the core of the amendment and ending with a familiar means-end scrutiny test to determine peripheral rights.

Lastly, as a practical matter, the alternative channels doctrine is much more politically appealing than an open carry system for advocates on both sides of the debate.<sup>332</sup> For gun control advocates, a rigid open carry system “combines the danger of guns with the public terror of observing them regularly.”<sup>333</sup> For gun rights advocates, such a system ignores the fact that openly carrying “is outside of mainstream practice and inspires discomfort and sometimes panic or terror.”<sup>334</sup> The alternative channels doctrine also allows for more flexibility among the states to choose their own path for regulation. Rather than forcing every state to allow open carry, the alternative channels doctrine opens the laboratories of democracy and gives states the leeway to take a one-or-the-other approach to regulation.

### B. *The Two-Step: Other Categories of Good Cause Statutes Do Not Violate the Second Amendment as Long as They Survive Intermediate Scrutiny*

Even after *Wrenn*, there is a place for statutes that require a showing of good cause to receive a concealed carry license. Good cause statutes are regulations

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<sup>328</sup> Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1486 (2014).

<sup>329</sup> *Id.* at 1499–500 (noting that while early Anglo-American cases and commentaries did not contemplate the manner of carry, antebellum cases often addressed the distinction between open and concealed carry).

<sup>330</sup> *Id.* at 1518, 1522.

<sup>331</sup> See *supra* Part II.C; see also Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH U. L. REV. 1187, 1195–97 (2015) (“*Heller*’s discussion of the centrality of self-defense and the defense of the home, and the extent to which a challenged regulation impinges on the interest in such defense, has no apparent footing in the original meaning of the Second Amendment’s operative clause.”).

<sup>332</sup> See Meltzer, *supra* note 328, at 1522.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

limiting the right to carry a concealed weapon.<sup>335</sup> States are well within their rights to enact regulations on carrying concealed weapons.<sup>336</sup> And *Wrenn* did not change this.<sup>337</sup> The court in *Wrenn* was careful to limit its holding to the conclusion that the core of the Second Amendment is still lawful self-defense and only went on to hold that the core right to lawful self-defense extends beyond the home.<sup>338</sup> Under *Wrenn*, the District is not barred from regulating concealed carry permits. The important reminder in *Wrenn* is that these good cause regulations should not amount to a total ban on publicly carrying weapons in lawful self-defense.<sup>339</sup>

Thus, *Wrenn* does not stand for the proposition that there is a per se constitutional right to carry concealed weapons, nor that every good cause statute is an unconstitutional ban. *Wrenn*'s holding is rather limited: the court held that the District's particular flavor of good cause statute was tantamount to total bans on guns in public, which made it invalid under the Second Amendment's core right to lawful self-defense in public.<sup>340</sup>

Even after *Wrenn*, good cause statutes flourish in many different forms across many different jurisdictions.<sup>341</sup> Indeed, the D.C. Circuit is the only circuit court to strike down a good cause statute. There is little doubt that at least some forms of good cause statutes do not completely prevent citizens from publicly carrying guns. These forms of good cause statutes then are not categorically barred by *Heller* and step zero. Once a good cause statute passes step zero, it must then be considered under the *Marzzarella* two-step test.

After determining that a law does not impermissibly infringe on a core right of the Second Amendment, step one of the test is to determine if the law raises the specter of the Second Amendment at all.<sup>342</sup> If a court determines that a Second Amendment right has been implicated in some form, the next question is step two: courts must ask what level of scrutiny should apply and then apply that level of scrutiny.<sup>343</sup>

The Third, Fourth, and Ninth Circuits all assumed *arguendo* that there is some form of individual right to bear arms outside the home under the Second Amendment.<sup>344</sup> All three have also ruled that intermediate scrutiny is the proper form of heightened scrutiny for examining good cause statutes.<sup>345</sup> Once

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<sup>335</sup> See *supra* Part III.

<sup>336</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

<sup>337</sup> *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> See *supra* Part III.

<sup>342</sup> *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

<sup>343</sup> *Id.*

<sup>344</sup> See *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cty. Of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). *But see* *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (applying intermediate scrutiny *arguendo* only after concluding that there is no Second Amendment implication for good cause statutes).

<sup>345</sup> *Kachalsky*, 701 F.3d at 96; *Woollard*, 712 F.3d at 876; *Drake*, 724 F.3d at 429–30.

applying intermediate scrutiny, each of the circuits upheld the good cause statutes as constitutionally valid.<sup>346</sup>

The difference between the remaining circuits comes in step one of the framework. In *Drake v. Filko*, the Fourth Circuit held that New Jersey's good cause statute was a presumptively lawful, longstanding regulation, and therefore did not implicate the Second Amendment at all.<sup>347</sup> The other two circuits, *Kachalsky v. County of Westchester* and *Woollard v. Gallagher*, simply assumed the first step was met and focused their analyses on the second step.<sup>348</sup>

As with step zero of the analysis, the application of the first step of the inquiry to good cause statutes should examine the breadth and the extent of the restrictions in the language of the statute. A good cause statute that restricts all forms of carry seems to implicate individual rights under the Second Amendment, even where showing good cause is relatively easy.<sup>349</sup> This category of good cause statutes tends to fail step one—that is, at the very least, these statutes implicate the Second Amendment—but depending on how strict the permitting scheme is, statutes within this category can still pass step two by surviving intermediate scrutiny.

Intermediate scrutiny is an interest balancing test that requires a “significant, substantial, or important” government interest that does not “burden more conduct than is necessary.”<sup>350</sup> Therefore, strict regulatory permitting schemes will fail intermediate scrutiny if there is not a substantial government interest, or if the statute is so strict as to burden individuals' right to self-defense more than necessary. Intuitively, this suggests that there is some point at which a state's permitting scheme fails step two because it is too strict to fit the government's interest in preventing gun violence from concealed carry holders, but that line remains to be drawn. Instead, the spirit of step two is easier to state through its general principle: the easier it is to acquire a permit, the less restrictive it is, and the more likely it is to pass intermediate scrutiny.

Conversely, a good cause statute that restricts only concealed carry permits, and allows an individual to open carry,<sup>351</sup> is merely a regulation on concealed carry weapons, which does not implicate the Second Amendment at all.<sup>352</sup> So

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<sup>346</sup> *Kachalsky*, 701 F.3d at 100–01; *Woollard*, 712 F.3d at 882; *Drake*, 724 F.3d at 433–34.

<sup>347</sup> *Drake*, 724 F.3d at 431–32.

<sup>348</sup> *Kachalsky*, 701 F.3d at 93 (“[G]iven our assumption that the Second Amendment applies to this context, the question becomes how closely to scrutinize New York's statute to determine its constitutional mettle.”); *Woollard*, 712 F.3d at 875 (“[W]e are not obliged to impart a definitive ruling at the first step of the . . . inquiry.”).

<sup>349</sup> See Category 2, *supra* Part III.

<sup>350</sup> *Drake*, 724 F.3d at 436. This is one of many similar articulations of the same intermediate scrutiny test across the circuits.

<sup>351</sup> See Category 3, *supra* Part III.

<sup>352</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[T]he 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.”); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (“the Second Amendment right to

in one way, the question of whether a good cause statute can survive Second Amendment scrutiny can boil down to how a state sells its firearm regulation package. The more it focuses on only regulating concealed weapons, the less it is likely to implicate the guarantees of the Second Amendment. But the more a statute heralds itself as an overall gun regulation package, the more the danger grows that it will unacceptably infringe on individuals' Second Amendment liberty.

For good cause statutes that do implicate the Second Amendment, the next question is what level of heightened scrutiny should apply.<sup>353</sup> Case law and common sense agree that intermediate scrutiny is the appropriate level of analysis for good cause statutes.<sup>354</sup> The proposition that good cause statutes regulating concealed weapons in public are subject to intermediate scrutiny still carries support from the majority of circuits that have considered the issue, and circuit courts have applied intermediate scrutiny to a multitude of regulations of other Second Amendment issues.<sup>355</sup>

Intermediate scrutiny also balances best the rights of individuals to keep and bear arms with important government goals of reducing and preventing gun violence. Good cause requirements for concealed carry weapons may prove to be important in cities where gun violence is more prevalent.<sup>356</sup> Intermediate scrutiny allows courts to take into account differences like population density that bright-line rules cannot address. A good cause statute may pass constitutional muster for a city ordinance in New Orleans, whereas the same statute from a state legislature in Wyoming may fail intermediate scrutiny.<sup>357</sup> The framework that this Note proposes also balances the principles of individual rights and federalism. The two-step test provides states with latitude to tailor their own policies to their own specific needs. It gives states greater self-determination. But at the same time, the framework is ultimately a check on

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keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.”), *cert. denied sub nom.* *Peruta v. California*, 137 S. Ct. 1995 (2017); *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013) (“[T]he Second Amendment does not confer a right to carry concealed weapons.”).

<sup>353</sup> *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

<sup>354</sup> See *supra* Part III for a discussion of the various circuit decisions on good cause statutes; see also *Kopel & Greenlee, supra* note 21, at 274–312.

<sup>355</sup> See *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (applying intermediate scrutiny to assault weapon and large-capacity magazine ban); *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) (applying intermediate scrutiny to firearm registration and prohibition on semi-automatic rifles).

<sup>356</sup> See generally Richard Florida, *The Geography of U.S. Gun Violence*, CITYLAB (Dec. 14, 2012), <https://www.citylab.com/equity/2012/12/geography-us-gun-violence/4171/> [<https://perma.cc/YDK9-M5EW>].

<sup>357</sup> Compare *id.* (62.1 homicides per 100,000 people in New Orleans), with DIVISION OF CRIMINAL INVESTIGATION, 2016 ANNUAL REPORT – CRIME IN WYOMING 15 (2016), <http://wyomingdci.wyo.gov/dci-criminal-justice-information-systems-section/uniform-crime-reporting> [<https://perma.cc/A682-7YD9>] (3.2 homicides per 100,000 people in Wyoming).



states who may abuse this authority in an overzealous attempt to curb gun violence.

Under the framework proposed by this Note, good cause statutes should be limited in two ways. First, the statutes cannot amount to a de facto ban on carrying firearms for self-defense in public. And second, such statutes must be narrowly tailored to fit a significant government interest, consistent with intermediate scrutiny. Since most good cause statutes are passed with concrete goals of reducing firearm casualties and promoting public health and safety, the main hurdle for these statutes is limiting the language to make them sufficiently narrow to fit the needs of the jurisdiction and prevent them from banning weapons in public completely.

## VI. CONCLUSION

The Supreme Court should adopt the categorical step zero introduced in *Wrenn* for Second Amendment questions.<sup>358</sup> The Court should also formally adopt the two-step framework used in *Marzzarella* as a baseline for analyzing Second Amendment questions.<sup>359</sup> When this modified two-step is firmly in place, lower courts will have a definitive mode of analysis, and they will be able to better balance the competing interests of public safety and health and the individual's right to self-defense.

For states, the best way to implement good cause statutes is to draft them in conjunction with the overall statutory scheme. States must find the right balance between how restrictive their definition of good cause is and how restrictive their overall statutory system regulating firearms is. To make sure that the balance legislatures strike does not overstep their constitutional limits, courts should apply the two-step framework, beginning with the categorical step zero.

Building a solid analytical framework for answering Second Amendment questions is only the first step to providing local, state, and federal legislatures with the tools they need to harmonize an individual's right to bear arms in self-defense with the government's pressing need to reduce gun violence across the nation. While good cause statutes are a good example of how the two-step test can work, the framework this Note proposes is even more versatile.

For example, the Court recently granted certiorari in *New York State Rifle & Pistol Association v. City of New York*.<sup>360</sup> The plaintiffs challenge a different aspect of New York's statutory licensing scheme. Instead of homing in on the good cause requirement under § 400.00(2)(f) specifically,<sup>361</sup> the plaintiffs focus on a New York City code that prohibits transportation of a firearm outside city

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<sup>358</sup> *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

<sup>359</sup> *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

<sup>360</sup> *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), cert. granted, 2019 U.S. LEXIS 734 (Jan. 22, 2019) (No. 18-280).

<sup>361</sup> N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2018).

limits.<sup>362</sup> The plaintiffs argue that by forbidding citizens to leave the City with their weapons, the City infringes on their core Second Amendment right to “acquire and maintain proficiency in [the use of firearms].”<sup>363</sup>

The Second Circuit applied the two-step test developed from *Marzarella*, and assumed without deciding that the City’s rule restricted some activity protected by the Second Amendment.<sup>364</sup> The court rejected strict scrutiny and chose to apply intermediate scrutiny “[b]ecause [it assumed], *arguendo*, that the Rule approaches the Second Amendment’s core area of protection . . . though it does not impose a substantial burden [on it].”<sup>365</sup> The court devoted significant attention to the scope of the core right to self-defense in the home, but only in the context of determining whether strict scrutiny or intermediate scrutiny applied.<sup>366</sup> The Second Circuit never considered whether the rights articulated by the plaintiffs should receive the categorical protection that comes directly from *Heller*.

The Supreme Court should review the Second Circuit’s decision under the framework proposed by this Note. Begin the analysis with the categorical analysis, determining whether New York City’s regulation hits on a core guarantee of the Second Amendment. Doing so emphasizes the lesson from *Heller* that certain rights cannot be limited “[u]nder any standards of scrutiny.”<sup>367</sup> This requires the Court to ask whether publicly transporting firearms hits the very core of the amendment’s protections. If it does, the statute cannot be validated. The Court should only proceed to reviewing the Second Circuit’s application of the two step test if it determines that the regulation does not fail at step zero.

The *Marzarella* two-step, supplemented by *Wrenn*’s categorical step zero, can also be applied to any other firearm regulation, from bump-stock bans to bullet control.<sup>368</sup> As legislatures grapple with how best to tackle the tragedy of gun violence without treading on civil liberties, an authoritative decision from the Supreme Court on the Second Amendment will go a long way to giving guidance on the correct way to approach the balancing act.

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<sup>362</sup> *N.Y. State Rifle & Pistol Ass’n*, 883 F.3d at 53–54 (citing 38 RCNY § 5-23(a)). The plaintiffs also challenge the transportation prohibition under the Dormant Commerce Clause and as a violation of the right to travel, both of which fall outside the scope of this Note. *Id.*

<sup>363</sup> Petition for Writ of Certiorari at 12, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 2019 U.S. LEXIS 734 (Sept. 4, 2018) (No. 18-280) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)).

<sup>364</sup> *N.Y. State Rifle & Pistol Ass’n*, 883 F.3d at 55.

<sup>365</sup> *Id.* at 61–62.

<sup>366</sup> *Id.* at 55–62.

<sup>367</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

<sup>368</sup> Daniel J. French, Note, *Biting the Bullet: Shifting the Paradigm from Law Enforcement to Epidemiology; A Public Health Approach to Firearm Violence in America*, 45 SYRACUSE L. REV. 1073, 1093–100 (1995).