KEYS, WALLET, AND PISTOL: THE SEVENTH CIRCUIT ESTABLISHES A CONSTITUTIONAL RIGHT TO CARRY FIREARMS OUTSIDE OF THE HOME

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INTRODUCTION

The recent shooting in Newtown, Connecticut, brought the need for comprehensive firearms regulation to the forefront of American politics. This shooting has received more attention than previous mass shootings because of the ages of the victims. Currently, Congress is fighting voraciously, with no compromise in sight. While this battle wages in the national political arena, individual state legislatures are also wrestling with the implementation of new firearms laws. But, before the Newtown murders, the judiciary began placing restraints on a legislature’s ability to regulate private use of firearms.

Most recently, in Moore v. Madigan, the Seventh Circuit held that citizens have a right to carry firearms in public. That decision overturned Illinois’s ban on private citizens carrying firearms in public.¹ Until Moore, no court had held that there is a constitutional

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¹ Moore v. Madigan, 702 F. 3d 933 (2012).
right to carry firearms outside in public. *Moore* is the lineal result of the Supreme Court’s holding in *District of Columbia v. Heller*, which held that the Second Amendment provides a private right to self-defense, which includes the keeping of operable firearms in the home. In *Heller*, the Supreme Court couched the right to bear arms in what it called a core right of self-defense, thereby setting the stage for the Seventh Circuit’s decision in *Moore*.

This Comment will explain, that although untimely, the Seventh Circuit’s decision in *Moore* is consistent with the Supreme Court’s recent Second Amendment holdings. The Seventh Circuit decision gave short shrift to the Illinois firearms law, and faulted that legislation because of its broad scope. However, the Seventh Circuit decision is supported by the emerging Second Amendment test that courts had adopted after the Supreme Court held in *D.C. v. Heller* that the Second Amendment confers an individual right to self-defense.

Part I of this Comment will first provide a brief background of the Supreme Court’s recent Second Amendment cases and the Seventh Circuit’s *Moore* decision. *Moore* did not provide an in depth analysis, leaving to the lower courts the task of determining the scope of the right to self-defense. Therefore, in Part II, the Comment will explain that lower federal courts have begun to use a First Amendment corollary to analyze Second Amendment cases. That corollary was not applied in the *Moore* decision, but it will be applied here *post hoc*. Part III of this Comment will show that based on this framework *Moore* was decided correctly, and will conclude by explaining how future courts should continue to apply this standard to Second Amendment cases.

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3 *Id.* at 628.
4 *Moore*, 702 F. 3d at 933.
I. THE SUPREME COURT FINDS A PRIVATE RIGHT TO SELF DEFENSE

The Supreme Court decided District of Columbia v. Heller in 2008, holding that the Second Amendment embodies an individual right to bear arms in the home.\(^6\) Further, the Court singled out the handgun as the “quintessential self-defense weapon.”\(^7\) Calling this right fundamental, the Court found that the Second Amendment merely codified what the founders knew as a natural right. The federal government cannot infringe this right.\(^8\) Moreover, the Court held that this right to self-defense is greatest in the home.\(^9\) Heller was authored by Justice Scalia and shows originalist analysis and interpretation of historical evidence. This decision has faced criticism for its refusal to declare a standard that subsequent courts could apply in Second Amendment cases.\(^10\)

In 2010, the Court expanded its Heller ruling to include state regulations as well. In McDonald v City of Chicago the Supreme Court held that the Fourteenth Amendment makes the Second Amendment applicable to the states.\(^11\) However, aside from acknowledging that legislative action would require more than a rational basis review,\(^12\) neither of these Supreme Court cases applied a clear framework for further judicial interpretation.

Dick Anthony Heller was a District of Columbia special policeman who sought to keep a loaded firearm in his home for self-defense.\(^13\) However, the District of Columbia banned unlicensed

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\(^6\) Heller, 554 U.S. at 570.
\(^7\) Id. at 629.
\(^8\) Id.
\(^9\) Id.
\(^12\) Id.
\(^13\) Heller, 554 U.S. at 574.
handguns and made it unlawful to register a handgun.\textsuperscript{14} Furthermore, the District required that firearms kept in the home be made nonfunctional by use of a trigger lock, or other means. The Court of Appeals for the District of Columbia found that the city’s total ban was unconstitutional. On appeal, the Supreme Court upheld that ruling; and further, the Court held that the law requiring that lawful firearms be made inoperable was unconstitutional.\textsuperscript{15}

The crux of the Supreme Court’s analysis was divorcing the Second Amendment’s operative clause, “the right of the people to bear Arms, shall not be infringed” from the prefatory clause, “[a] well regulated Militia being necessary to the security of a free State.”\textsuperscript{16} The majority opinion stated that the prefatory clause did not limit the operative clause grammatically, and therefore, the two clauses should be understood independently.\textsuperscript{17} By framing its reasoning in this manner, the Court could narrow its analysis to the meaning of the operative clause. In this analysis, the Court distinguished militias, which Congress can “call forth,” from Armies and Navies, which Congress can raise and provide.\textsuperscript{18} According to the Court, Article I assumes that militias are already in existence, essentially that citizens would already own the weapons that they would use when the militia was called forth.\textsuperscript{19}

The majority held that “apart from the clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”\textsuperscript{20} The court found support for this reasoning in the historical evidence presented in amicus briefs and scholarly works.\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 570.
\item Id. at 635.
\item Id. at 576.
\item Id.
\item Id. at 596; see also U.S. CONST. art. I, § 8.
\item Heller, 554 U.S. at 596.
\item Id. at 578.
\end{enumerate}
\end{footnotesize}
analyzing the operative clause, the majority’s opinion returned to the prefatory clause in order to “ensure that [their] reading of the operative clause is consistent with the announced purpose.”

The Court then determined that the Second Amendment protects an individual’s right to armed self-defense in the home. The Court found that the major flaw with the District of Columbia’s law was that it banned “the quintessential self-defense weapon [the handgun] in the place Americans hold most dear—the home.” Accordingly, the Court held that that ban was unconstitutional the District of Columbia’s ban on handgun ownership and the requirement that weapons in the home be made inoperable.

In his dissent, Justice Stevens argued that the prefatory clause should be understood as a preamble that limits the scope of the Amendment and explains its purpose. In support of this reading, Justice Stevens looked to various state declarations that were adopted contemporaneous to the Declaration of Independence. He pointed to these provisions in an attempt to show that the founding generation felt that state militias were important to defense, and to indicate that they were the main reason for adaptation of the Second Amendment. Justice Stevens concluded that the preamble sets forth the object of the Amendment and provides its meaning; “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”

According to Justice Stevens, the majority’s opinion conducted its analysis in an unusual manner, and therefore denigrates the importance of the prefatory clause. In a separate dissent, Justice

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22 *Heller*, 554 U.S. at 578.
23 *Id.* at 592.
24 *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2012).
25 *Heller*, 554 U.S. at 642.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 643 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).
30 *Id.* at 644.
31 *Heller*, 554 U.S. at 128.
Breyer whole-heartedly accepted Justice Stevens’ interpretation and proposed an interest balancing approach.  

A. The Right to Self-Defense Cannot be Impinged by State Regulation

In a 2010 decision, *McDonald v. City of Chicago*, the Supreme Court made *Heller* applicable to the states, holding that the Due Process clause of the Fourteenth Amendment makes the Court’s Second Amendment holding applicable to the states. In *McDonald*, the plaintiffs challenged a city ordinance that banned private ownership of handguns within city limits. This case was the Supreme Court’s first Second Amendment case post *Heller*, and in the majority opinion, the court reiterated its previous holding and stated that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day… self-defense is the “central component” of the Second Amendment right.”

Once again, the Court reviewed historical evidence, and recommitting itself to *Heller*, held that the core of the Second Amendment is a right to bear arms in self-defense and that this right is applicable to the States. Likewise, the Court looked to the legislative history surrounding the Fourteenth Amendment and concluded that post-civil war legislation indicated that a main reason for the Fourteenth Amendment was to guarantee that the newly freed slaves would have the right to defend themselves. Because the Court had determined that the right to bear arms is a fundamental right, “then unless *stare decisis* counsels otherwise, that guarantee is fully binding on the states and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and

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32 Id.
33 *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (2010).
34 Id. at 3036.
35 Id.
36 Id. at 3040.
Moreover, the Court rejected an interest balancing approach for Second Amendment cases.\textsuperscript{38} While stating that the right to bear arms is a fundamental right and thus applicable to the states, the Court also acknowledged that this right has limits. Quoting \textit{Heller}, the Court stated, “that the right to keep and bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”\textsuperscript{39} Furthermore, the Court acknowledged that circumstances exist where even the core of the right could be infringed or limited: “our holding [in \textit{Heller}] did not cast doubt on such longstanding regulatory measures as prohibitions…forbidding the carrying of firearms in sensitive places such as schools and government buildings.”\textsuperscript{40} However, the Court did not make any rulings on whether the right to self-defense extended outside of the home. The Court declined to articulate the precise meets and bounds of the Second Amendment, and therefore left much of the decision for lower courts to decide.

\textbf{B. The Seventh Circuit Extends Heller}

In \textit{Moore v. Madigan}, the Seventh Circuit held that a right to self-defense is as compelling outside of the home as inside. In so holding, the Seventh Circuit held that an Illinois law that banned private citizens from carrying firearms in public was unconstitutional.\textsuperscript{41} Under Illinois law, citizens were restricted from carrying firearms outside of the home unless they were police officers or licensed security guards.\textsuperscript{42} There was no way for a private citizen to obtain a permit to carry a firearm for protection, no matter how compelling her need for it might have been. The appellants in that case argued that the states’ ban violated the holdings of \textit{D.C. v. Heller} as made applicable to the

\begin{footnotesize}
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\item \textsuperscript{37} \textit{Id.} at 3046.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}; see also \textit{D.C. v. Heller}, 554 U.S. 570, 624 (2008).
\item \textsuperscript{40} \textit{Heller}, 554 U.S. at 625-26.
\item \textsuperscript{41} \textit{Moore}, 702 F. 3d 933 (2012).
\item \textsuperscript{42} \textit{Id.}; see also \textit{ILL. Crim. Code. tit. 720 § 5/24-1} (2012).
\end{itemize}
\end{footnotesize}
states by *McDonald v. City of Chicago*. The question before the court was whether the Second Amendment confers a right to self-defense outside of a person’s home. The court began its analysis with the Supreme Court’s pronouncement that the Second Amendment protects an individual’s right to self-defense, and concluded that a right to self-defense is equally compelling outside of the home. The court specifically faulted the scope of the ban, which prohibited most classes of citizens from carrying firearms under most circumstances. Finding that, “a ban as broad as Illinois [could not] be upheld merely on the ground that it was not irrational.” Therefore, the court gave Illinois 180 days to implement legislation in compliance with its ruling. Although the Illinois Attorney General petitioned for an en banc rehearing, that petition was denied. The state had until July 9, 2013 to adopt complying legislation; and on that day the legislature managed to implement a bill over the Governor’s attempt to veto.

In *Moore v. Madigan* the Seventh Circuit expanded *Heller*, holding that a right to self-defense is also applicable on the streets. Until the Seventh Circuit’s decision rendered Illinois’ ban void, Illinois was the only state to have a complete ban on carrying firearms in public.

The Seventh Circuit’s opinion declared that the Second Amendment’s right to bear arms does not end when a person leaves their home, but instead follows them into the streets and throughout their daily lives. Ironically, this ruling came only two years after Justice Stevens dissented in *McDonald* and proclaimed that, “[t]hankfully, the Second Amendment right identified in *Heller* and its newly minted Fourteenth Amendment analogue are limited, at least for

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43 *Moore*, 702 F.3d at 935.
44 *Id*.
45 *Id* at 933.
46 *Id*.
47 *Moore*, 702 F.3d at 941.
48 *Id* at 937.
49 *Id* at 940.
now, to the home.”\textsuperscript{50} In expanding \textit{Heller}, Judge Posner, the author of the \textit{Moore} opinion, held that citizens have a constitutional right to carry firearms for protection, stating that:

Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.\textsuperscript{51}

Although it can be argued that \textit{Moore} was merely the logical extension of the right to self-defense, the holding was far from a foregone conclusion. Even Judge Posner, who authored the \textit{Moore} decision, had earlier expressed doubts regarding the soundness of the \textit{Moore} decision. In an article written for the \textit{New Republic} shortly after the \textit{Heller} decision was handed down, Judge Posner lambasted the Supreme Court’s decision, arguing that it was improvident, and the situation was better suited for individual legislators to make:

The differences in attitudes toward private ownership of pistols across regions of the country and, outside the South, between urban and rural areas, are profound (mirroring the national diversity of views about gay marriage, and gay rights in general, as well as about abortion rights). A uniform rule is neither necessary nor appropriate. Yet that is what the \textit{Heller} decision will produce if its rule is held applicable to the states

\textsuperscript{50} McDonald v. City of Chicago, Ill., 130 S.Ct. 3020, 3120 (2010) (emphasis added).
\textsuperscript{51} Moore, 702 F.3d. at 937.
as well as to the District of Columbia and other federal enclaves.\footnote{52}

Judge Posner further stated that, “Heller gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation. A majority of Americans support gun rights. But if the District of Columbia (or Chicago or New York) wants to ban guns, why should the views of a national majority control?”\footnote{53} Although he initially criticized the Supreme Court’s decision, when presented with the opportunity to limit what he had called 

Heller’s judicial interference with legislative intent, Judge Posner chose instead to expand that holding. Although the Seventh Circuit was bound by \textit{stare decisis} to uphold the right to self-defense in the home, there was no such precedent stating that the right to self-defense extends outside of the home.

With its most recent holdings, the Supreme Court has established a fundamental right to self-protection in the home and has stated that that this right applies to the states through the Due Process clause of the Fourteenth Amendment.\footnote{54} However, these decisions left significant room for interpretation by stating that the textual elements of the Second Amendment “guarantee the individual right to possess and carry weapons in case of confrontation,”\footnote{55} while also acknowledging that legislatures could place limits on possession and the carrying of firearms.\footnote{56}

As this Comment will show, the court in \textit{Moore} arrived at the correct holding, but did not go far enough in its analysis. In \textit{Moore}, the Seventh Circuit explained that individuals are more likely to face confrontation outside of the home than inside of it,\footnote{57} and thus the court

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\item \footnote{52} Richard Posner, \textit{supra} note 10.
\item \footnote{53} \textit{Id.}
\item \footnote{54} \textit{See} D.C. v. Heller, 554 U.S. 570 (2008); \textit{McDonald}, 130 S.Ct. 3020 (2010).
\item \footnote{55} Heller, 554 U.S. at 591.
\item \footnote{56} \textit{Id.}
\item \footnote{57} Moore v. Madigan, 702 F. 3d 933, 940 (2012).
\end{itemize}
was compelled to expand the Supreme Court’s previous rulings. While the court did not mandate whether carry could be concealed or open or which time, place or manner requirements would be acceptable, it left no doubt that there must be a legal means for citizens to carry firearms in public. Ultimately, the court found that a blanket ban against any form of carry, concealed or otherwise, is unconstitutional, thus establishing for the first time a right to carry firearms in public.

The crux of the courts decision was Illinois’s complete ban. The court was fully cognizant of the dangerous implications that may result if citizens are given freedom to carry firearms in all circumstances. And, in rejecting the state’s empirical evidence, the court presumed that Illinois will implement stricter requirements than the ones that the state had cited to show the dangers of allowing public carry: “there is no reason to expect Illinois to impose minimal permit restrictions on carriage of guns outside the home, for obviously this is not a state that has a strong pro-gun culture.” Likewise, the court listed permissible instances where the invalidation of the law would have little effect on carry. Specifically, the court mentioned the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics and in sensitive places. The court also stated that the state may implement application requirements and that private institutions are free to ban guns from their premises.

Neither the Supreme Court nor the Seventh Circuit articulated a coherent approach for Second Amendment jurisprudence. In the case of the Supreme Court, this was done purposefully—leaving the

58 Id. at 942.
59 Id.
60 Id. at 940.
61 Id. at 939.
62 Id. at 938, 39.
63 Id. at 939.
64 Id. at 940.
65 Id.
66 Id. at 941.
judicial scrutiny to be determined by the lower courts. Likewise, Moore did not clearly state a method for Second Amendment interpretation; instead, it hinted at a per se unconstitutionality by stating, “our analysis is not based on degrees of scrutiny, but on Illinois’s failure to justify the most restrictive gun law of any of the 50 states.”67 In Moore, the court should have utilized the emerging Second Amendment framework to reach its ultimate holding. Prior to Moore federal courts had begun to implement a Second Amendment test based off of the Heller and McDonald opinions.68 When this test is applied to the Moore decision the result is the same: Illinois ban is unconstitutional.

II. PRIOR TO MOORE COURTS HAD ADOPTED A TWO PRONGED TEST TO RESOLVE SECOND AMENDMENT CHALLENGES

Neither McDonald nor Heller established a specific judicial test or standard of review.69 However, the Supreme Court did provide some general guidance, stating that more than rational basis review would be necessary: “If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”70 Moreover, the Court specifically rejected the interest balancing approach that Justice Breyer suggested in his separate dissent, stating:

“[w]e 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—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

67 Id.
69 D.C. v. Heller, 554 U.S. 570, 635 (2008); see Ezell, 651 F.3d at 705.
70 Heller, 554 U.S. at 628.
constitutional guarantee subjected to future judges’ assessments of its usefulness is no constitutional guarantee at all.”71

Finally, the Court analogized its Second Amendment holding in *Heller* to other First Amendment rulings: “[I]ke 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.”72 The Court used this analogy to respond to Justice Breyer’s dissent, stating that:

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than…our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justification for the exceptions we have mentioned if and when those exceptions come before us.73

Evidently, subsequent courts saw this repeated reference to the First Amendment as a signpost guiding them through new and unchartered territory. Therefore, despite the sparse guidance from the Supreme Court, lower courts have begun to flesh out the levels of scrutiny that apply in Second Amendment cases by using applicable First Amendment analysis.

71 *Id.* at 634.
72 *Id.* at 635.
73 *Id.*
A. The First Amendment as an Analogy to the Second Amendment

Similar to Heller, in Ezell v. City of Chicago, the Seventh Circuit analogized the Second Amendment’s freedoms to those of the First Amendment.\textsuperscript{74} Noting that Heller did not specify “any doctrinal test for resolving future claims,”\textsuperscript{75} the Seventh Circuit used the Supreme Court’s prior First Amendment holdings in order to determine the proper doctrinal test applicable to the Second Amendment.\textsuperscript{76} Ezell was brought after the Supreme Court’s decision in McDonald, and it involved a challenge to the City of Chicago’s initial legislative response to McDonald. Amongst other things, the city’s new ordinance banned private gun ranges within its borders, while simultaneously making range training a mandatory condition for handgun ownership.\textsuperscript{77} The lower court held that the plaintiffs did not have standing because they were not irreparably harmed and because they could not succeed on the merits. However, the Court of Appeals reversed, finding that the plaintiffs had standing to bring this cause of action before the court.\textsuperscript{78}

On appeal, the Seventh Circuit had to first determine whether the plaintiffs stated a sufficient cause of action before proceeding on the merits. Turning to the merits, the court first addressed the issue of what standard or doctrinal test to use in its Second Amendment analysis. Paraphrasing McDonald, the court reasoned that:

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when state-or local government action is challenged the focus of the original-meaning inquiry is carried forward in time; the Second Amendment’s scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified...this wider historical lens is required if we are to follow the Court’s lead in
\end{quote}

\textsuperscript{74} Ezell v. City of Chicago, 651 F.3d 684, 702 (2011).
\textsuperscript{75} Id. at 701.
\textsuperscript{76} Id. at 702, 704.
\textsuperscript{77} Id. at 705.
\textsuperscript{78} Id. at 693.
resolving questions about the scope of the Second Amendment by consulting its original public meaning as both a starting point and an important constraint on the analysis.”

For the court, original meaning acted both as a starting point and as a constraint on its analysis.

Looking to *Heller* for guidance, the court found that that the case lacked “any doctrinal test for resolving future claims.” And analogizing the Second Amendment to the First Amendment, the court determined that because the Supreme Court had already laid a framework for a “scope” inquiry in some First Amendment challenges to state action, this framework could also serve to analyze “scope” in Second Amendment cases. Therefore, in *Ezell*, the court applied this First Amendment framework to analyze the facts of a Second Amendment case.

Applying this analysis, the Seventh Circuit first looked at Supreme Court precedent. The Supreme Court had previously determined that certain “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems,” exist. Among these unprotected classes of speech are fraud, defamation, incitement and speech integral to criminal conduct. Moreover, when the Court has “identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.” Rather, the Court used history and legal tradition to determine whether a type of speech falls within the First Amendment’s

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79 *Id.* at 702.
80 *Id.*
81 *Id.* at 701.
82 *Id.* at 702.
83 *Id.* at 701.
85 *Id.*
86 *Id.* at 1586.
Historically, speech that was obscene or defamatory has never fallen within the scope of the First Amendment’s protections.  

Applying that same historical analysis to the Second Amendment, the Ezell court found that both Heller and McDonald suggest that some gun laws will survive Second Amendment challenges because they fall outside of the scope of the right as publically understood when the Bill of Rights was ratified.  But, the onus is on the government to show that the challenged law:

…regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment- 1791 [ratification of the Bill of Rights] or 1868 [ratification of the Fourteenth Amendment]- then the analysis can stop there and the regulated activity is categorically unprotected." If however, the government cannot meet this burden, the court must then “evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve.” Courts must determine how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.

In Ezell, the court determined that the city could not produce historical evidence clearly indicating that the regulation was beyond the scope of the Second Amendment’s protection. The court cited two Seventh Circuit cases that applied intermediate scrutiny after first determining that the state action infringed upon the Second
Amendment right.\textsuperscript{93} The court added that this general framework had been followed by the Third, Fourth and Tenth Circuits.\textsuperscript{94}

In applying this framework to the facts before it, the court held that firing ranges did fall within the “scope” of the Second Amendment.\textsuperscript{95} Drawing on \textit{Heller} and \textit{McDonald}, “[t]he Court emphasized in both cases that the central component of the Second Amendment is the right to keep and bear arms for defense of self, family, and home.”\textsuperscript{96} In \textit{Ezell}, the court held that the core right to possess firearms for protection implicates a further right to training with those weapons.\textsuperscript{97} After completing this two-prong analysis, the court then turned to the proper standard of scrutiny.

The court synthesized the standards of scrutiny for First Amendment cases into a framework for analyzing Second Amendment cases:

[W]e can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government’s means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.\textsuperscript{98}

\textsuperscript{93} See U.S. v. Skoien, 614 F.3d 638 (2010); see also U.S. v Williams, 616 F.3d 685 (2010).
\textsuperscript{94} \textit{Ezell}, 651 F.3d at 703.
\textsuperscript{95} Id. at 709.
\textsuperscript{96} Id. at 704 (paraphrasing \textit{Heller} and \textit{McDonald}) (internal quotations omitted).
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 708.
Further, the court stated that reviewing the city’s ban on all firing ranges would require “not quite strict scrutiny.” Rather, in order to overcome its burden, the city would have to show that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified. The fact that the plaintiffs were all law-abiding citizens whose Second Amendment rights were entitled to full solicitude under *Heller* was integral to the court’s reasoning. Ultimately, the court held that the right to self-defense also implies a right to remain proficient in the use of firearms, and to have access to training facilities. Moreover, a right to have a firing range so that a citizen may remain proficient implicates a right to travel with your firearm to get to the firing range. It also implicates a right to have and to use a firearm outside of the home. Therefore, utilizing this test in *Moore* would require heightened scrutiny. Extrapolating this holding to carrying firearms in public, the Illinois concealed carry ban affected every class of citizen. This was not a modest burden on the right to self-defense; it was a severe burden on the core right because it prohibited law-abiding citizens from protecting themselves outside of the home.

*Ezell* is not the only federal case that has articulated a two-prong approach to Second Amendment cases. While confirming the defendant’s conviction for possessing a firearm with an obliterated serial number, the Third Circuit Court of Appeals found that *Heller* suggests:

...a two-pronged approach to Second Amendment challenges. First we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendments guarantee...If it does, we evaluate the law under some form

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99 *Id.*  
100 *Id.*  
101 *Id.*  
102 *Id.*  
103 *Id.* at 709.
of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails it is invalid. 104

Therefore, taking these precedents into account, one would assume the Seventh Circuit would have used a similar test in deciding Moore. Similar to Ezell, the Moore court was faced with a blanket prohibition and a challenge on Second Amendment grounds. 105 Like gun ranges in Ezell, the prohibition in Moore effected citizens irrespective of their standing in the community. 106 Felons and law-abiding citizens were treated alike in Illinois’s ban on carrying firearms. However, while the Moore court acknowledged Ezell, it did not utilize the framework adopted by the Ezell court. 107 And, while holding that more than rational basis review would be required, the court did not attempt to explain what level of scrutiny should be applied. 108 Below, the facts in Moore will be reanalyzed using the more thorough two pronged analysis used by other federal courts.

B. Scrutinizing the Moore Decision

The court in Moore arrived at the correct ruling; however, the opinion did not provide a clear method for emulation. In Moore, the court seemed to rely predominately upon basic logic rather than thorough analysis. The Supreme Court has interpreted the Second Amendment to “guarantee the individual right to possess and carry weapons in case of confrontation.” 109 However, the Court has never explicitly found a right to carry weapons in public. Yet, the Seventh Circuit inferred a right to carry weapons in public, stating that “[t]he Supreme Court has decided that the amendment confers a right to bear

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104 U.S. v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010); see also U.S. v. Chester, 628 F. 3d 85, 89 (2010).
106 Id.
107 Id. at 939.
108 Id.
arms for self-defense, which is as important outside the home as inside . . . [t]he Supreme Court’s interpretation of the Second Amendment therefore compels us to reverse.”\textsuperscript{110} Because the Supreme Court has indicated that the Second Amendment confers an individual right to self-defense, the court stated that therefore “we can’t . . . ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one’s home.”\textsuperscript{111}

As stated, the Seventh Circuit’s Moore decision did not articulate any level of judicial scrutiny, opting instead to base its decision on “Illinois’s failure to justify the most restrictive gun law of any of the 50 states.”\textsuperscript{112} However, the court did state that Illinois would have to provide more than a rational basis and show that its “sweeping ban” was justified by an increase in public safety.\textsuperscript{113} Although the majority in Moore did hint at many of the factors that were articulated in Ezell and other cases, it did not do so systematically. In its opinion, the court tersely passed over the empirical data and the history of the amendment without specifically adopting it to the framework that had been established. The remainder of this article will apply the judicial test established in Ezell to the facts presented in Moore.

\textbf{C. Carry Falls within the Scope of the Second Amendment}

According to Ezell, the first step in Moore should have been to determine whether the Second Amendment protects the carrying of firearms by individuals.\textsuperscript{114} As previously mentioned, scope is determined by looking to the amendment at the time that it was

\textsuperscript{110} Moore, 702 F. 3d at 942.
\textsuperscript{111} Id. at 935.
\textsuperscript{112} Id. at 941.
\textsuperscript{113} Id.
\textsuperscript{114} Ezell v. City of Chicago, 651 F.3d 684, 693, 701 (7th Cir. 2011). The court acknowledged that the first step in some Second Amendment cases would be a “scope” question.
enacted.\textsuperscript{115} Here it is important to note some confusion created by \textit{McDonald}. In \textit{Ezell}, the court stated that “when a state- or local-government action is challenged the focus of the original meaning inquiry is carried forward in time; the Second Amendment’s scope as a limitation on the states depends on how the right was understood when the Fourteenth Amendment was ratified.”\textsuperscript{116} However, in \textit{Moore}, the court states that 1791, the year that the Second Amendment was ratified, is the relevant year.\textsuperscript{117} The reason for this apparent disagreement is likely due to the Supreme Court’s expansive opinion in \textit{McDonald}.

After declaring that it would be incongruous to apply different standards depending on whether the claim was asserted in a state or federal court,\textsuperscript{118} the Supreme Court then spends a large portion of its opinion in \textit{McDonald} discussing the post-civil war implications of the Fourteenth Amendment. The relevant year of inquiry is 1791; however, in this circumstance it actually matters very little. This fact is made clear by \textit{McDonald}, first when the Court stated that “incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment”\textsuperscript{119} and second when the Court introduces evidence that both the framers of the Constitution\textsuperscript{120} and the drafters of the Fourteenth Amendment\textsuperscript{121} believed that self-defense was an important reason for their respective actions. This history implies that the relevant historical inquiry should focus on the drafting of the Second Amendment, but the Court spends a significant portion of its opinion discussing the post-civil war reasons for drafting the Fourteenth

\textsuperscript{115} \textit{Moore}, 702 F. 3d at 935.
\textsuperscript{116} \textit{Ezell}, 651 F.3d at 702.
\textsuperscript{117} \textit{Moore}, 702 F. 3d at 935.
\textsuperscript{118} \textit{McDonald v. City of Chicago, Ill.}, 130 S.Ct. 3020, 3035 (2010).
\textsuperscript{119} \textit{Id.} at 3035.
\textsuperscript{121} \textit{Id.} at 3038.
Amendment.\textsuperscript{122} Regardless of the year of inquiry, the underlying right remains the same and is applied on the federal and state level with the same level of scrutiny.\textsuperscript{123}

An article written for the Washington Post’s blog is useful to elucidate the changing interpretation of the Second Amendment over time. The author, Ezra Klein, shows two photographs that were pointed out to him by Professor Akhil Reed Amar of Yale Law.\textsuperscript{124} Professor Amar is a constitutional scholar whose work had been cited in \textit{McDonald}.\textsuperscript{125} According to Professor Amar, these paintings illustrate the changing landscape of the Second Amendment’s interpretation.\textsuperscript{126} And although he does not agree with the Supreme Court’s interpretation of the Founder’s understanding of the right to bear arms, he does ultimately conclude that “[h]aving guns in homes for self protection is a very deep part of American culture.”\textsuperscript{127} The first painting is by John Trumball, entitled “Death of General Warren at Bunker Hill,” and it shows the founders battling the British at Bunker Hill. Professor Amar claims that this painting depicts the original vision of the Second Amendment:

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 3038, 3048.
\item \textsuperscript{123} \textit{McDonald}, 130 S.Ct. at 3098.
\item \textsuperscript{125} \textit{McDonald}, 130 S.Ct. at 3020, 3029, 3074, 3041, 3039.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\end{itemize}
The second illustration shows the Freedman’s Bureau where newly freed slaves faced off against a mob of angry Klansmen with a reconstruction officer standing in between them:

These illustrations help to clarify that although the actors may have changed, each generation felt that the bearing of arms was a necessary tool for an individual’s self-defense.

The Supreme Court reviewed the historical record in *Heller* and stated that the right to self-defense is the core of the Second
Amendment. 128 Because this core right is fundamental, the right does not shift. If a right is fundamental, then the only relevant period of inquiry is when that right was written into law. Thus, the Court’s use of historical evidence from a later time did nothing more than elucidate the nature of that right. 129

Establishing the appropriate historical period focuses the inquiry, but it does not end it. In Moore, the court then should have identified the “scope” of the right as understood by the Framers when the Second Amendment was enacted. In deciding Heller, the Supreme Court was faced with a regulation that forbade operable firearms in the home. Therefore, its holding was appropriately limited to self-defense in the home. However, in it analysis, the Court did make note of two historical pieces of evidence that point to the proposition that the carrying of firearms was understood to be included within the original meaning of the Second Amendment. The court pointed to a Louisiana case from 1850, State v. Chandler, holding that citizens had a right to carry firearms openly: “[t]his is the right guaranteed by the constitution of the United States, and which is calculated to incite men to a manly and noble defense of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.” 130 Likewise, the Court cited to a Georgia statute that implored men that qualified for military service to carry firearms to places of worship. 131 These cases show that when the Second Amendment was ratified, at least some people believed that it conferred a right to carry firearms outside of the home. And as stated by the Moore court, “one doesn’t have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. . . One would need from time to time to leave one’s home to obtain supplies from the nearest trading post, and en route one would be as much

129 Id. at 616 (holding that the right to keep and bear arms was considered fundamental to the drafter of the Bill of Rights).
130 Id. at 613 (citing State v. Chandler, 5 La. Ann. 489 (1850)).
131 Id. at 601.
(probably more) at risk if unarmed as one would be in one’s home unarmed.”

If the respondents in Moore raised an alternative historical analysis it was not repeated in the opinion. However, some evidence mentioned in McDonald indicates that there was a belief that the right to carry firearms outside of the home was envisioned by the Second Amendment.

D. The Appropriate level of Judicial Scrutiny

Determining the appropriate level of scrutiny to apply in Second Amendment cases has caused the most differentiation between the circuits when applying this test. Similar to the Supreme Court’s previous holdings, the Moore court purposively eschewed judicial scrutiny in arriving at its decision, stating that, “our analysis is not based on degrees of scrutiny, but on Illinois’s failure to justify the most restrictive gun law of any of the 50 states.” However, in its opinion, the court did address a previous Second Amendment decision that had been made by the Second Circuit. That decision held New York’s requirement that individuals show “proper cause” when applying for concealed carry licenses constitutional. In upholding the law, the Seventh Circuit opined that Second Amendment cases require a sliding scale of scrutiny based on the nature of the offending legislations burden on the Second Amendment right. Although New York’s law was one of the strictest in the nation, one would imagine second only to Illinois’s, that ban was upheld using intermediate scrutiny.

Rather than delineating a specific degree of scrutiny, in U.S. v. Chester the Fourth Circuit argued that a sliding scale is the most appropriate way to determine the applicable level of scrutiny. In Chester, the Court rejected the defendant’s argument for strict scrutiny,

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133 Id. at 941.
134 Kachalsky v. County of Westchester, 701 F.3d 81, 84 (2012).
135 U.S. v. Chester, 628 F.3d 673, 682 (2010).
stating “the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”

The court referred to First Amendment cases as illustrative examples, noting “a content based speech restriction on non-commercial speech is permissible only if it satisfies strict scrutiny. But, courts review content-neutral time, place, and manner regulations using an intermediate level of scrutiny.” The court then held that intermediate scrutiny was most appropriate; however, the court found that Chester’s claim was not within the scope of the Amendment because he had a previous conviction for domestic violence.

According to the Fourth Circuit, in keeping with the First Amendment corollary, the decision to apply intermediate or strict scrutiny is determined by the nature of the challenged regulation. Although, the Seventh Circuit differentiated Chester, if it had applied the sliding scale analysis it would have determined that Illinois’s ban required strict scrutiny.

Thus, in Moore, the court should have determined whether the restriction was most similar to a content based restriction—requiring strict scrutiny—or if it was closer to a time place and manner limitation, which would require intermediate scrutiny. Reasonable minds may differ, but facially a regulation that forestalls all law-abiding citizens from carrying firearms seems to favor a content-based strict scrutiny analysis. Moreover, in Kachalsky v. County of Westchester, the Second Circuit Court of Appeals indicated that this type of ban would require strict scrutiny. There, the court stated, “heightened scrutiny is triggered only by those restrictions that (like the complete prohibition in handguns struck down in Heller) operate as a substantial burden on the ability of law abiding citizens to posses and use a firearm for self defense (or for other lawful purposes).”

In Kachalsky, the Second Circuit also applied intermediate scrutiny to New York State’s handgun licensing scheme that required a

\[136 \text{Id.} \]
\[137 \text{Id.} \]
\[138 \text{Id. at 683.} \]
\[139 \text{Kachalsky, 701 F.3d at 93.} \]
showing of “proper cause” before a license would be issued.\textsuperscript{140} New York issued four types of carry permits; the first two were “shall issue” permits limited to the home or a merchant’s place of business.\textsuperscript{141} The third type of permit was also a “shall issue” permit that was limited to certain professions.\textsuperscript{142} The final type of permit – the one challenged in this case – was also a “shall issue” permit but it required a showing of “proper cause.”\textsuperscript{143} Proper cause was not defined in the statute but it had been judicially defined as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”\textsuperscript{144} For those seeking the permit for hunting or target practice the license was issued on a limited basis.\textsuperscript{145} However, for those seeking a general carry permit the application process was rigorous.\textsuperscript{146} The plaintiffs’ applications had all been denied, despite the fact that one of the plaintiffs claimed that her status as a transgender female put her at great risk of violence.\textsuperscript{147}

\textit{Kachalsky} helps to clarify three important issues. First, it supports the Seventh Circuit’s opinion by stating that carrying firearms outside of the home must have some bearing in the Second Amendment.\textsuperscript{148} Second, the court acknowledged, but did not fully adopt, the First Amendment analogy.\textsuperscript{149} The court noted that this analogy has existed before it was articulated in \textit{Heller},\textsuperscript{150} but stated that it would be imprudent to apply the analogy equally.\textsuperscript{151} The court was specifically referring to the plaintiff’s contention that New York law required prior

\begin{itemize}
  \item \textsuperscript{140} Id. at 84.
  \item \textsuperscript{141} Id. at 86.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} Id.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Id. at 87.
  \item \textsuperscript{147} Id. at 88.
  \item \textsuperscript{148} Id. at 89 (analyzing the scope of the right).
  \item \textsuperscript{149} Id. at 92.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id.
\end{itemize}
restraint–censorship–analysis. 152 Third, this case presented an apt analysis of the level of judicial scrutiny to be applied to Second Amendment challenges.

Essentially, in Kachalsky, the court established that when a law imposes a substantial burden on core Second Amendment rights, “heightened scrutiny is triggered.”153 The court explained that heightened scrutiny may be akin to strict scrutiny when it is applied to laws that burden core rights,154 but that it is less than strict scrutiny, or intermediate scrutiny, when the regulation does not touch upon the core right.155 After citing historical evidence to support this holding, the court found that carrying firearms outside of the home did not touch the core of the Second Amendment, and used intermediate scrutiny to uphold the New York regulation.156

Kachalsky misconstrues the Supreme Court’s holding in Heller. Kachalsky held that because New York’s licensing scheme regulates carrying weapons outside of the home, Heller is not completely relevant because it only applied to a ban inside of the home.157 While it is true that Heller held that the need for self-defense is most acute in the home,158 it is a stretch to presume that Heller means that the core right of self-defense is limited to the home. In Heller the Court referred to the Districts handgun ban and stated, “[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”159 And although Kachalsky is correct that the Court’s ultimate holding was limited to the challenged activity -- self-defense in the home -- the opinion is replete with language implicating a broader scope. In fact, the Court stated that the

152 Id.
153 Id. at 93.
154 Id. at 93.
155 Id. at 93-96.
156 Id.
157 Id. at 94.
159 Id. at 630 (emphasis added).
meaning of the operative clause is to “guarantee the individual right to possess and carry weapons in case of confrontation.”\textsuperscript{160}

In \textit{Moore}, Judge Posner distinguished \textit{Kachalsky} and stated that:

Our principal reservation about the Second Circuit’s analysis (apart from, disagreement, unnecessary to bore the reader with, some historical analysis in the opinion—we regard the historical issues as settled by \textit{Heller}) is its suggestion that the Second Amendment should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction. For example the opinion states that “in \textit{Lawrence v. Texas}, the [Supreme] Court emphasized that the state’s efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home.” Well of course—the interest in having sex inside one’s home is much greater than the interest in having sex on the sidewalk in front of ones home. But the interest in self-protection is as great outside as inside the home.\textsuperscript{161}

Here, it is important to further distinguish \textit{Kachalsky} and the regulation that the case addressed. New York’s law did not ban handgun registration, but rather placed the burden upon citizens to prove the need for carrying firearms. Even with the rigorous application process, that law was less restrictive than the Illinois law.\textsuperscript{162} Although the petitioners in that case were unable to obtain unrestricted permits, there was no evidence that all citizens had been denied such permits. While the opinion does not indicate so, there could be individuals who were able to show the appropriate level of proper cause. Perhaps—like Judge Posner’s \textit{Moore} hypothetical \textsuperscript{163}—

\textsuperscript{160} \textit{Id.} at 592; see also \textit{id.} at 584 (quoting Justice Ginsburg’s interpretation of the Second Amendments meaning of “bear”).

\textsuperscript{161} \textit{Moore v. Madigan}, 702 F.3d 933, 941 (2012).

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.} at 937.
there is a female stalking victim that was able to obtain an unrestricted permit.\textsuperscript{164} As Judge Posner points out, although New York’s law is one of the most restrictive in the nation, it was still less restrictive than Illinois’s law.\textsuperscript{165} In New York, citizens retain the right to carry firearms, despite the difficulties that the registration process entails. In Illinois, no citizen was allowed to legally carry a firearm in public no matter how compelling their need. Arguably, the state has a compelling interest to protect the public; however, the means used were not narrowly tailored to meet its ends. Illinois’s regulation placed a severe burden on the core right of self-defense by prohibiting the public from carrying firearms indiscriminately by all citizens. Although the state did have a compelling interest to protect, the law was not narrowly tailored to achieve that end because the restriction burdened all citizens, not just those who presented a specific risk. Therefore it would have failed heightened scrutiny had that analysis been applied.

\textit{E. The Supreme Court Cases Settled the Question of Historical Meaning}

\textit{Heller} left much to be determined by lower courts. However, historical evidence was not one of those things. Although \textit{Heller} has been criticized for an overreliance on historical interpretation, most notably by Judge Posner,\textsuperscript{166} the Court needed to determine the historical record in order to give lower courts discretion to create a judicial test, rather than constantly reevaluating the historical understanding of the Amendment. Although judges are not historians,\textsuperscript{167} in \textit{Heller} it was necessary to interpret historical evidence in order to determine that the Second Amendment stands for an individual right to self-defense.

\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 931.
\textsuperscript{166} Richard Posner, \textit{supra} note 10.
\textsuperscript{167} Moore, 702 F. 3d at 943 (Judge Williams, dissenting).
In both *Heller* and *McDonald* the court conducted extensive historical analysis, and gave no indication that it wished for lower courts to replicate or interpret that analysis. In *Moore*, the parties and the amici presented the court with a wealth of historical evidence, which according to the court, sought to repudiate the historical record utilized in the two Supreme Court cases.\(^{168}\) In response to this evidence, the court states that “[s]imilar evidence…had of course been presented in [] *Heller*”\(^{169}\) and that “[t]he Supreme Court rejected [those arguments]. The appellees ask us to repudiate the Court’s historical analysis. That we cannot do.”\(^{170}\)

Accordingly, by refusing to review the historical evidence anew, the *Moore* court gave appropriate judicial deference to the Supreme Courts opinion. Likewise, subsequent courts should only look to the historical evidence when absolutely necessary, and only when the Supreme Court has not previously defined the challenged legislation. While the dissent in *Moore* urged that courts must look at history for every new Second Amendment challenge: “*Heller*’s approach suggests that judges are to examine the historical evidence and then make a determination as to whether the asserted right…is within the scope of the Second Amendment.”\(^{171}\) Although that statement may be true, *Heller* had already indicated that public carry is consistent with the right to self-defense.

In *Ezell v. City of Chicago*, the Seventh Circuit had already conducted an analysis as to when it is necessary for courts to review history in Second Amendment cases.\(^{172}\) In *Ezell*, a city ordinance disallowed private handgun ranges (even though the Chicago Police Department and federal agencies did have ranges within the borders of the city).\(^{173}\) The court urged that historical analysis hinges upon the scope of the regulated activity: “*McDonald* confirms that if the claim

\(^{168}\) *Id.* at 935.

\(^{169}\) *Id.*

\(^{170}\) *Id.*

\(^{171}\) *Id.*


\(^{173}\) *Id.* at 693-701.
concerns a state or local law, the “scope” question asks how the right was publicly understood when the *Fourteenth Amendment* was proposed and ratified. Accordingly, if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment…then the analysis stops there; the regulated activity is categorically unprotected.”

The court also stated that when the historical evidence is inconclusive, then the courts must look to the strength of the government’s justification. As previously stated, *Ezell* misconstrued the relevant historical period; nevertheless, the inquiry is still pertinent.

In *Moore*, the dissent admits that the historical record is inconclusive, while still claiming that history supports a ban on carrying firearms. In her dissent, Judge Williams urges that all courts should interpret the historical record when faced with new Second Amendment challenges. She urges the court to rehash the historical arguments made in *Heller*, while at the same time conceding that there was not a historical consensus on the issue of bearing arms in public. Judge Williams explains: “So while there are a variety of other sources and authorities, the ones I have discussed suggest that there was not a clear historical consensus that persons could carry guns in public for self-defense.” The dissent further concedes: “I do not mean to suggest that the historical evidence definitively demonstrates that there was not a right to carry arms for public self-defense at the time of the founding. The plaintiffs point to other authorities that they maintain reveal the opposite. At best, the history might be ambiguous as to whether there is a right to carry loaded firearms for potential self-defense outside the home.”

174 Id. at 703 (quoting *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3047 (2010) and *D.C. v. Heller*, 554 U.S. 570, 628-35 (2008)).
175 Id.
177 Id. at 946.
178 Id. at 947.
Without definitive historical evidence indicating that the right to self-defense ends in the home, the majority was bound to a reasonable inference based on the Supreme Court’s holding that there exists a constitutional right to self-defense. The Supreme Court has settled the historical questions regarding the core right of self-defense, and by refusing to uphold Illinois’s blanket ban on carrying firearms based solely on conflicting historical interpretations, the majority correctly decided this case.

F. Determining Future Second Amendment Cases

The Second Amendment protects an individual’s right to self-defense. This right extends to the states, and does not end when an individual steps out of her home. When deciding Second Amendment cases that call into question government regulations, courts should first determine whether the challenged activity falls within the scope of the Second Amendment and, if the activity does not fall within that scope, the court’s inquiry ends, and the legislation is valid. However, if the regulated activity does fall within the scope of the Second Amendment, courts must look to the restriction and determine the level of the burden placed upon the Second Amendment. The courts should apply heightened scrutiny; closer to strict scrutiny in cases where a severe burden is present and intermediate scrutiny when the burden is less severe. But this too will allow courts wide discretion to determine how severe the burden is. Although the Seventh Circuit did not adhere to this standard when deciding Moore v. Madigan, the court did arrive at the right result. Applying this standard to the facts of Moore, we see that Illinois’s ban was a severe burden on the right to self-defense. This regulation was not narrowly tailored nor the least restrictive means to reach the compelling governmental interest of preventing crime.\textsuperscript{179}

Recently, a Tenth Circuit court decision held that the Second Amendment did not protect concealed carry. In Peterson v. Martinez, the court upheld a Colorado law forbidding non-residents from

\textsuperscript{179} Id. at 941.
receiving concealed carry permits. However, non-residents could openly carry firearms. The court acknowledged that a two-step analysis is necessary, and found that the historical scope of the Amendment is to be determined first. The court then found support in Heller for it’s ruling that the Colorado regulation was constitutional. In Heller, the Court stated “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.” This holding does not conflict with Moore. In Colorado, non-residents could exercise their right to self-defense by openly carrying firearms, and the right protected by the Second Amendment is a right to self-defense, not to a particular form of carry. Nothing prohibits states from placing reasonable limitations on where the right is exercised, but they may not completely outlaw the exercise of the right. When conducting this inquiry courts should avoid a reanalysis of historical evidence, as Heller has settled this issue.

CONCLUSION

The meaning of the Second Amendment has changed over time and for many it is still changing. Recently, the Supreme Court has found that the Second Amendment was drafted in order to protect an individual’s right to bear arms in self-defense. While acknowledging that this right has limits, the Court left it to lower courts to determine the boundaries of those limitations. The Seventh Circuit greatly expanded that Supreme Court holding by finding an Illinois law that banned all forms of concealed carry unconstitutional. However, the Seventh Circuit eschewed any in depth analysis of the constitutional implications, instead relying solely on the over-breadth of the

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181 Id. at 1209.
182 Id. at 1211.
183 Id.
offending law. But, the decision finds support when a coherent analysis is derived from the emerging Second Amendment jurisprudence confirming the Seventh Circuit’s holding.

Given the present national debate over gun regulation, it is certain that Second Amendment challenges will continue to be litigated. Perhaps soon, the Supreme Court will grant certiorari in a case to further define or place limits upon the scope of the Second Amendment.