

THE SUPRISINGLY STRONG ORIGINALIST CASE FOR PUBLIC CARRY LAWS

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Before I jump in, I want to lay out a roadmap for my remarks, which will begin with a discussion of *District of Columbia v. Heller*.¹ Any discussion of the Second Amendment must now begin with *Heller*. I want to focus both on what the Court said the Second Amendment protects and what the Court said the Second Amendment does not protect—understanding both categories is crucially important. And then I’ll turn to how *Heller* is being applied in the lower courts. When it comes to applying *Heller*, the courts of appeals have coalesced around a two-step framework.² The first step is to determine whether the law at issue burdens conduct that is protected by the Second Amendment as historically understood.³ If it does, courts proceed to the second step and analyze the law under some form of scrutiny⁴—typically intermediate scrutiny.⁵

Admittedly, there have been some dissenters from this two-step approach, including, most notably, then-Judge Kavanaugh.⁶

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

2. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 & n.49 (2d Cir. 2015) (listing circuit court of appeals cases that apply this two-step framework); *Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (same); *see also* *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (“The [Supreme] Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal ‘test’ for resolving future claims.”).

3. *See, e.g.*, *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018); *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016).

4. *Jimenez*, 895 F.3d at 232; *Silvester*, 843 F.3d at 821.

5. *See, e.g.*, *Jimenez*, 895 F.3d at 234, 236 (citing cases that have applied intermediate scrutiny and applying intermediate scrutiny); *Silvester*, 843 F.3d at 822–23, 827 (same).

6. *See* *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269–96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

But for the most part, that is the accepted framework. When the courts of appeals analyze public carry restrictions of the sort we're discussing today, in particular the good-cause requirement, they typically apply this approach and have upheld such laws under intermediate scrutiny.⁷ While that's a fine approach, today I want to offer a different defense for why I think these laws are constitutional—one that is fully consistent with Judge Kavanaugh's interpretation of *Heller*, and which some of the folks in this room might find appealing. It's rooted in history, tradition, federalism, and respect for *Heller*.

So let's begin with *Heller*, because I think, as I mentioned, that's where we have to begin. The Court's opinion in *Heller* is four parts.⁸ The first part, a discussion of the background in that case and the procedural section,⁹ is not relevant to today's discussion. But parts two, three, and four are critically important, and I'll just walk through each of them.

Part two outlines the parameters of Second Amendment protections.¹⁰ In *Heller*, the Court is resolving whether the right protected is an individual right to keep and bear arms, or a collective right.¹¹ And the Court resolves that disagreement in favor of the individual rights approach.¹² But in doing so, it looks not only to the text of the Second Amendment, but also to history and tradition, and for that reason has been regarded by many as a kind of high-water mark of originalism.¹³

The Court's approach began by canvassing the antecedent English history, which Justice Scalia seemed to find highly relevant.¹⁴ He did so because the Second Amendment, by speaking of *the* right to keep and bear arms, assumes a preexisting right inherited from our predecessors in England.¹⁵ But the Court then also looked to the early American tradition to in-

7. See, e.g., Nat'l Rifle Ass'n of Am. v. ATF, 700 F.3d 185, 195 (5th Cir. 2012) (identifying a form of intermediate scrutiny as the most appropriate level of scrutiny post-*Heller*).

8. See District of Columbia v. Heller, 554 U.S. 570 (2008).

9. *Id.* at 574–76.

10. *Id.* at 576–626.

11. *Id.* at 579–95.

12. *Id.* at 595.

13. *Id.* at 576–626; see also Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325 (2009).

14. *Heller*, 554 U.S. at 592–95.

15. *Heller*, 554 U.S. at 592.

form the shape and the scope of the right.¹⁶ And the Court did not limit its consultation of historical materials to documents from the Founding Era, but also reviewed historical documentation all the way up through the late nineteenth century, illustrating that all of that time period is important to the constitutional analysis.¹⁷ After consulting all this historical material, the Court came to the conclusion that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁸ So the core of the right is self-defense in the home. To be clear, that is not necessarily the *only* right the Second Amendment protects, but it is the core of the right.

Then, the Court proceeded to the third part of its opinion, which is equally important: the overview of what the Second Amendment *doesn't* protect.¹⁹ Here, the Court said explicitly that, just like many other constitutional rights, the Second Amendment right is “not unlimited.”²⁰ So how do we know what those limitations are? The text of the Second Amendment does not tell us. It simply says that “the right of the people to keep and bear Arms shall not be infringed.”²¹ You will not find answers to the difficult questions by staring hard at that text all day. Instead, we must look again to history and tradition—the same touchstones that led the Court to conclude that the Second Amendment right is an individual right and guided the Court in determining the contours of that individual right.

The Court said explicitly: “[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation,”²² or to “keep and carry any weapon whatsoever in any manner . . . and for [any] purpose.”²³ Instead, as the Court explained, these “longstanding prohibitions” are seen as tradition-based “exceptions” to the Second Amendment, and are thus constitutional by virtue of their “his-

16. *Id.* at 600–19.

17. *Id.* at 614–19.

18. *Id.* at 635.

19. *Id.* at 626–28.

20. *Id.* at 626.

21. U.S. CONST. amend. II.

22. *Heller*, 554 U.S. at 595.

23. *Id.* at 626.

torical justifications.”²⁴ Some examples that the Court gave of these lawful, longstanding regulations are the prohibitions on the possession of firearms by felons and the mentally ill.²⁵ These examples are notable because such prohibitions, while longstanding in the Court’s eyes, had been around for only a hundred years or so at the time of *Heller*.²⁶ So the Court says that we don’t simply look to the time of the Founding to see if a law is longstanding; we also consult the full tradition of this country.

In the last part of its opinion, the Court turned to the application of the Second Amendment as interpreted to the law at issue in the case.²⁷ The law in *Heller* was a total prohibition on owning any handguns in the home.²⁸ The Court concluded that this amounted to a destruction of the right, and it notably chose not to apply any of the levels of scrutiny typically applied when assessing a challenge based on an enumerated constitutional right.²⁹ However, while not applying any of the levels of scrutiny, the Court said that the challenged law would nonetheless fail under any of them.³⁰ It also refused to apply rational

24. *Id.* at 626–27, 635.

25. *Id.* at 626 (“[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 . . .”).

26. *See, e.g.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (observing that “*Heller* deemed a ban on private possession of machine guns to be obviously valid”—even though “states didn’t begin to regulate private use of machine guns until 1927,” and Congress didn’t begin “regulating machine guns at the federal level” until 1934 (citations omitted)); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (noting that, because of these examples, “early twentieth century regulations” may qualify as longstanding under *Heller*); *United States v. Booker*, 644 F.3d 12, 23–24 (1st Cir. 2011) (explaining that *Heller* illustrates that even laws “firmly rooted in the twentieth century” can be longstanding); *United States v. Skoien*, 614 F.3d 638, 640–41 (7th Cir. 2010) (en banc) (observing that *Heller* also considered prohibitions on firearm possession by felons and the mentally ill to be sufficiently longstanding, despite being “of 20th Century vintage”); Carlton F.W. Lawson, *Four Exceptions in Search of a Theory*: District of Columbia v. Heller and Judicial Ipse Dixit, 60 HASTINGS L.J. 1371, 1374–78 (2009) (noting the absence of felon and mental illness prohibitions on firearm ownership before the twentieth century).

27. *Heller*, 554 U.S. at 628–35.

28. *Id.* at 628.

29. *Id.* at 628–29.

30. *Id.*

basis and refused to apply Justice Breyer's freestanding balancing test.³¹

Now, as I mentioned at the outset, when it comes to interpreting *Heller*, the lower courts have coalesced around this two-step approach that starts with consulting the history and asking whether the law is longstanding.³² If the answer is yes, the analysis ends there.³³ But if the answer is no, the courts proceed to apply some form of scrutiny.³⁴ Typically, courts of appeals have applied intermediate scrutiny,³⁵ but there are some notable dissenters on that front as well.³⁶ In *Heller II*,³⁷ which Dr. Halbrook argued, then-Judge Kavanaugh dissented from this approach. In his view, *Heller* mandates a history-and-tradition-based test only.³⁸ If a law is longstanding, it's constitutional. If it's not, it's not. That's the end of the analysis.

Now, most courts of appeals that have addressed good-cause restrictions have assessed the law by assuming that it burdens conduct protected by the Second Amendment.³⁹ Then, moving on to step two, the courts of appeals apply intermediate scrutiny because the law does not infringe on the core of the right, which is armed self-defense in the home.⁴⁰ Therefore, they uphold the law under intermediate scrutiny.⁴¹ That's a fine approach, but I want to instead make the argument that I believe Justice Kavanaugh and some of the folks here might find appealing, which is that these good-cause laws are longstanding and should be upheld at step one because they are consistent with our historical tradition. This is an argument that my firm and I have made on behalf of Everytown for Gun Safety, after Everytown uncovered a number of old, historical laws. We've

31. *Id.* at 628 n.27, 634–35.

32. *See, e.g.,* United States v. Jimenez, 895 F.3d 228, 232 (2d Cir. 2018); Silvester v. Harris, 843 F.3d 816, 820–21 (9th Cir. 2016).

33. *Jimenez*, 895 F.3d at 232; *Silvester*, 843 F.3d at 821.

34. *Jimenez*, 895 F.3d at 232; *Silvester*, 843 F.3d at 821.

35. *See, e.g., Jimenez*, 895 F.3d at 234, 236 (citing cases that applied intermediate scrutiny and applying intermediate scrutiny); *Silvester*, 843 F.3d at 822–23, 827 (same).

36. *See Heller II*, 670 F.3d 1244, 1269–96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
37. 670 F.3d 1244.

38. *Id.* at 1271 (Kavanaugh, J., dissenting).

39. *See, e.g.,* Gould v. Morgan, 907 F.3d 659, 672–73 (1st Cir. 2018).

40. *See, e.g., id.*

41. *See, e.g., id.* at 673–77.

brought them to courts' attention in the last few years.⁴² I've also made the argument in *Gould v. Morgan*,⁴³ which we discussed at the outset.

Now, in framing the historical question, the inquiry of whether these laws are longstanding, first, one must have a handle on how these laws operate on the ground. I'm speaking about good-cause laws, and Dr. Stephen Halbrook has characterized the question as whether a total prohibition on carrying firearms outside the home is constitutional.⁴⁴ That's actually not what these laws do in practice. If you look at the *Gould* case, which I argued, the plaintiff in that case had requested an unrestricted license to carry a firearm in public from the town in Brookline, and he was denied that license.⁴⁵ He was, however, given the ability to carry a firearm in his home, at work, while traveling to and from work (even late at night), while hiking—which was a purpose he articulated as being particularly important to him—while target shooting, and under a number of other circumstances.⁴⁶

Now, in circumstances beyond those, he was restricted from carrying a firearm. I think the question of whether the Second Amendment has any purchase outside the home is a fine one, but it's not ultimately going to answer the question whether a regime like that is constitutional. I think instead, one must ask whether the imposed restrictions find sufficient support in our history and tradition to be deemed longstanding and constitutional under *Heller*.

I think that these laws are longstanding for a few reasons. The first is you look to the English tradition that Dr. Halbrook mentioned,⁴⁷ which dates back all the way to 1328 in the Statute

42. See, e.g., Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellants and Reversal at 3–21, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (No. 15-7057) [hereinafter *Everytown Wrenn* Brief]; Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellees and Affirmance at 4–21, *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (Nos. 10-56971 & 11-16255) [hereinafter *Everytown Peruta* Brief].

43. 907 F.3d 659; Brief of Defendant-Appellee Mark Morgan, in his Official Capacity as Acting Chief of the Brookline Police Department at 20–42, *Gould*, 907 F.3d 659 (No. 17-2202) [hereinafter *Gould* Defendant-Appellee Brief].

44. Stephen P. Halbrook, *The Right to Bear Arms: For Me, But Not for Thee?*, 43 HARV. J.L. & PUB. POL'Y 331, 331 (2020).

45. *Gould*, 907 F.3d at 662–66.

46. *Id.* at 664–65.

47. Halbrook, *supra* note 44, at 336–37.

of Northampton.⁴⁸ That statute, which admits of no menacing-behavior requirement in its text,⁴⁹ was in effect for hundreds of years up to and past the English Declaration of Rights,⁵⁰ which recognized the right to keep and bear arms⁵¹ and is the predecessor to our Second Amendment as the Court said in *Heller*.⁵² The Statute of Northampton was a broad prohibition on carrying firearms in fairs, marketplaces, and any place where people congregated in public.⁵³ There's a decision from the King's Bench in the seventeenth century that interpreted that law to have no exception for people who just peacefully carried a firearm.⁵⁴ The very act of carrying a firearm was considered to be in terror of the people and was therefore prohibited by that statute.⁵⁵

That tradition then took root in early colonial America where a lot of the colonies and states passed mirror images of that statute.⁵⁶ A few decades later in the early nineteenth century, beginning with Massachusetts in 1836,⁵⁷ some states started to take a more permissive approach to public carry, allowing some form of public carry if someone had a good cause for doing so.⁵⁸ These are kind of the early predecessors to the regimes

48. 1328, 2 Edw. 3 c. 3.

49. *Id.*

50. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEVELAND ST. L. REV. 1, 7–41 (2012).

51. An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 W. & M. 2 c. 2, 143, para. 14 (“That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.”).

52. See *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

53. 2 Edw. 3 c. 3.

54. See *Chune v. Piott* (1615) 80 Eng. Rep. 1161, 1162; 2 Bulstrode 328, 329 (“Without all question, the sheriffe hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.”).

55. Charles, *supra* note 50, at 20. *But see* David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 219–20 (2018).

56. See, e.g., 1692 Mass. Acts 10, 11–12; 1699 N.H. Laws 1, 1–2; 1686 N.J. Laws 289, ch. 9; 1786 Va. Acts 33, ch. 21; A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 60–61 (Newbern, Francois-Xavier Martin 1792).

57. See 1836 Mass. Acts 748, 750, ch. 134, § 16.

58. See, e.g., 1841 Me. Laws 707, 709, ch. 169, § 16; 1846 Mich. Pub. Acts 690, 692, ch. 162, § 16; 1851 Minn. Laws 526, 528, ch. 112, § 18; 1853 Or. Laws 218, 220, ch.

that you see in a number of states today that cover a quarter of the American people.⁵⁹

Then, immediately before and after the Civil War, which is a highly relevant time period when discussing the scope of the right to keep and bear arms as applied to the states through the Fourteenth Amendment,⁶⁰ over a dozen states and over a dozen municipalities enacted laws⁶¹ that—on any understanding—were at least as restrictive as the good-cause laws that you see today. They either broadly prohibited public carry in populated, urban places, or they required a good cause for doing that.

However you want to read the English history, however you want to read the early good-cause laws, you cannot deny that these laws, which are older than the laws recognized by the Supreme Court in *Heller* as longstanding, broadly prohibited public carry, and therefore form a sufficient basis for upholding good-cause laws today.

Now, that's not to say that this was the only approach taken by states in this country. There was another approach, primarily taken in the South, that was a lot more permissive of public carry.⁶² In this sense, it mirrors the policy debate you see today—where one half of the country takes a certain view of firearm ownership and the other half takes a different view. That is what you would expect in a federalist system. The question now is whether you end that longstanding debate, that policy debate, and constitutionalize it, declaring one side right for all time on the interpretation of gun policy, which now must govern every state in America. I submit to you that that's not the right approach. It's not the approach that *Heller* requires. The better approach is to recognize that both traditions in this country are fully consistent with the Second Amendment and constitutional.

16, § 17; PA. CRIM. PROC. § 6 (Kay & Bro. 1862); 1838 Wis. Sess. Laws 378, 381, § 16; 1847 Va. Acts 127, 129, ch. 14, § 16.

59. Everytown *Wrenn* Brief, *supra* note 42, at 1; Everytown *Peruta* Brief, *supra* note 42, at 1–2; *see also* Gould Defendant-Appellee Brief, *supra* note 43, at 17–20.

60. *See* Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) (“Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified).”).

61. *See supra* note 59.

62. *See, e.g.*, ALA. CODE § 4-1-3274 (Britan & De'Wolf 1852); GA. CODE § 4-1-4413 (John H. Seals 1861).

[Rebuttal to Dr. Stephen Halbrook:] I have just a couple of quick points in response on the methodological question of how you assess a constitutional challenge to a gun law. It is true that *Heller* eschewed at least express application of some level of scrutiny. But Justice Scalia, in referring to Justice Breyer's dissent, said:

[Justice Breyer] proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "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."⁶³

I don't read that language to be rejecting the application of some level of scrutiny but, if anything, quite the opposite. And that's the way the lower courts have uniformly read that language, with the exception of some dissenters, like Justice Kavanaugh, who have taken a tradition-and-history-based approach only—an approach that I think actually squares very nicely with the defense that I just laid out.

Now, just briefly on the nineteenth-century and early twentieth-century laws. Dr. Halbrook looks to these early good-cause laws, beginning with Massachusetts in the 1830s and then carrying through to the end of the nineteenth century.⁶⁴ That's fine, and I could quibble with the way that he's characterized it, but I think the broader point, which he cannot deny, is that a number of states, both before and after the ratification of the Fourteenth Amendment, clearly prohibited the carrying of a firearm without good cause or beyond.⁶⁵ I'll give you a couple examples so you know I'm not just making this up.

West Virginia passed a law that made clear that "If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property," he may be required to face criminal penalties.⁶⁶ Courts

63. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (quoting *id.* at 689–90 (Breyer J., dissenting)).

64. Halbrook, *supra* note 44, at 344–45.

65. See, e.g., 1869 N.M. Laws ch. 32, § 1; PA. CRIM. PROC. § 6 (Kay & Bro. 1862); 10 TEX. CRIM. CODE § 6512–6513 (George W. Paschal 1874); W. VA. CODE § 153-8 (John Frew 1870).

66. W. VA. CODE § 153-8 (John Frew 1870).

construed the self-defense exception quite narrowly to require specific evidence of a concrete, serious threat.⁶⁷

In the early twentieth century, over a hundred years ago, Massachusetts passed a law prohibiting public carry, unless you could demonstrate a good reason.⁶⁸ That is effectively unchanged from its law today.

Then, I would also say look at some of the state court cases. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement—once in 1871,⁶⁹ three years after the Fourteenth Amendment was ratified, and then again in 1874.⁷⁰ The court explained that the law thus made “all necessary exceptions,” and noted that it would be “little short of ridiculous”—their words, not mine—for a citizen to claim the right to carry a pistol in places “where ladies and gentlemen are congregated together.”⁷¹ Further, the court observed, the good-cause requirement was “not peculiar to our own state,” for nearly “every one of the states of this Union [had] a similar law upon their statute books” and many have laws that are “more rigorous than the act under consideration.”⁷² The only point, the modest point I'm making now, is that these nearly a dozen states that have continued this tradition today are not violating our Constitution by doing so.

67. See *State v. Workman*, 14 S.E. 9, 12 (W. Va. 1891).

68. See 1906 Mass. Acts 150, ch. 172, § 1.

69. See *State v. Duke*, 42 Tex. 455, 459 (1874).

70. See *English v. State*, 35 Tex. 473, 477 (1871).

71. *English*, 35 Tex. at 477–79.

72. *Id.* at 479.