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Woollard v. Gallagher: Normalizing the Fourth Circuit's Approach to Second Amendment Challenges

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WOOLLARD v. GALLAGHER: NORMALIZING THE FOURTH CIRCUIT'S APPROACH TO SECOND AMENDMENT CHALLENGES

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The Second Amendment to the United States Constitution preserves the individual right to keep and bear arms.[1] This right, however, is in conflict with the problem of handgun violence in the United States. In an attempt to alleviate this tension, the State of Maryland devised a handgun-permitting scheme that, while preventing most citizens from carrying handguns in public, allowed those citizens with a "good and substantial reason" to do so.[2] In *Woollard v. Gallagher*,[3] the United States Court of Appeals for the Fourth Circuit, facing a Second Amendment challenge to Maryland's permitting scheme, upheld the good-and-substantial-reason requirement.[4] Drawing from its Second Amendment jurisprudence,[5] the Fourth Circuit engaged in a straightforward application of precedent to an issue of first impression.[6] The court's decision is consistent with the opinions of other federal circuit courts of appeals.[7] While the scope of the Second Amendment right, as expressed by the Supreme Court of the United States, remains uncertain, handgun-permitting schemes that grant permits to those with a documented, articulable need for self-protection should withstand constitutional scrutiny.

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1. U.S. CONST. amend. II; *see also* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").
2. *See infra* Part I.
3. 712 F.3d 865 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).
4. *See infra* Part III.
5. *See infra* Part II.
6. *See infra* Part III.
7. *See infra* Part IV.C.

I. THE CASE

Maryland's regulatory framework renders it unlawful to carry a handgun, concealed or otherwise, outside of one's home without a permit.[8] To obtain a permit, an individual must submit an application to the Secretary of the State Police.[9] The Handgun Permit Unit, acting as the Secretary's designee, conducts an investigation of the applicant to ensure that he or she satisfies the conditions prescribed by Maryland law.[10] Chief among these conditions is the requirement that "the applicant 'has good and substantial reason to wear, carry, or transport a handgun.'"[11] Provided an individual meets the enumerated conditions, the Secretary is required to issue that individual a permit.[12] If the Secretary denies an application, the applicant may appeal the decision to the Handgun Permit Review Board.[13] The Review Board may sustain, reverse, or modify the Permit Unit's decision.[14]

On December 24, 2002, Raymond Woollard was at home with his wife, children, and grandchildren when an intruder broke in by shattering a window.[15] Woollard retrieved a shotgun and aimed it at the intruder, but the intruder was able to wrestle away the shotgun.[16] Using a second gun, Woollard's son was able to detain the intruder while the family waited two-and-a-half hours for the police to arrive.[17]

After the incident, Woollard applied for, and the Secretary granted, a permit to carry a handgun.[18] In 2006, shortly after the intruder was released from incarceration, the Permit Unit allowed Woollard to renew his permit.[19] In 2009, however, the Permit Unit denied Woollard's second renewal appli-

8. *See* MD. CODE ANN., CRIM. LAW § 4-203 (LexisNexis 2012); Woollard v. Sheridan, 863 F. Supp. 2d 462, 464 (D. Md. 2012), *rev'd sub nom.* Woollard v. Gallagher, 712 F.3d 865 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).

9. *Woollard*, 863 F. Supp. 2d at 465.

10. *Id.*

11. *Id.* (quoting MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (LexisNexis 2011)). Other notable factors include "'whether the applicant has any alternative available to him for protection other than a handgun permit,' and 'whether the permit is necessary as a reasonable precaution for the applicant against apprehended danger.'" *Id.* (quoting MD. CODE REGS. 29.03.02.04L, 29.03.02.04O (2010)).

12. *Id.*

13. *Id.* (citing MD. CODE ANN., PUB. SAFETY § 5-312 (LexisNexis 2011)).

14. *Id.* (citing MD. CODE ANN., PUB. SAFETY § 5-312 (LexisNexis 2011)).

15. *Id.*

16. *Id.*

17. *Id.* The intruder, Woollard's son-in-law Kris Abbott, received three years' probation for first-degree burglary and ultimately was incarcerated after violating that probation. *Id.*

18. *Id.*

19. *Id.* Specifically, "[p]ermits expire 'on the last day of the holder's birth month following two years after the date the permit is issued' and may be renewed for successive three-year terms." *Id.* at 465 n.4 (quoting MD. CODE ANN., PUB. SAFETY § 5-309 (LexisNexis 2011)).

cation because he was unable to provide evidence of a current threat to substantiate his purported apprehended fear.[20] Woollard's attempt to have the decision overturned through the administrative review process proved unsuccessful.[21] The Review Board concluded "that Woollard 'ha[d] not demonstrated a good and substantial reason to wear, carry or transport a handgun as a reasonable precaution against apprehended danger.'"[22]

Abandoning his appeal effort, Woollard, joined by the Second Amendment Foundation, filed suit against the Secretary and three members of the Review Board in the United States District Court for the District of Maryland on the grounds that Maryland's statutory scheme violated the Second Amendment to the United States Constitution.[23] Both sides moved for summary judgment based on the undisputed facts of the case.[24] The district court granted summary judgment in Woollard's favor, finding that intermediate scrutiny applied,[25] that the right to bear arms is not confined to the home, and that the good-and-substantial-reason requirement was not reasonably adapted to a substantial government interest.[26] The Secretary and Review Board members appealed the district court's decision to the Fourth Circuit Court of Appeals, presenting the issue of whether Maryland's good-and-substantial-reason requirement burdens conduct protected by the Second Amendment and, if so, whether the requirement withstands constitutional scrutiny.[27]

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20. *Id.* at 465.

21. *Id.* at 465–66.

22. *Id.* at 466 (alteration in original) (quoting Plaintiffs' Motion for Summary Judgment Exhibit D at 3, *Woollard*, 863 F. Supp. 2d 462 (No. 1:10-cv-2068), ECF No. 12-6).

23. *Id.* Notwithstanding any concern over the intruder, Woollard asserted a desire to wear and carry a handgun outside of his home for general self-defense. *Id.*

24. *Id.* at 464.

25. The traditional forms of tiered scrutiny, applied in constitutional challenges to supposedly burdensome government actions, are strict, intermediate, and rational basis scrutiny. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 949–51 (2004). Strict scrutiny is applied to highly suspect classifications, such as those "that materially infringe on fundamental constitutional liberties . . . (for due process purposes, those that are deeply rooted in our history and tradition and implicit in the concept of ordered liberty . . .)." *Id.* at 949 (footnotes omitted). To survive strict scrutiny, the government must prove that the classification is *necessary* to accomplish a *compelling* governmental objective. *Id.* Intermediate scrutiny, applied to moderately suspect classifications, determines whether the classification is *substantially related* to the accomplishment of an *important* government objective. *Id.* at 950 (citation omitted). Finally, rational basis scrutiny, the default level of scrutiny, is applied to non-suspect government actions that are presumed valid and "the challenger of the action [must] prove . . . that either the government has no legitimate purpose for its action or that the action is not rationally related to the accomplishment of any legitimate purpose." *Id.* at 951.

26. *Woollard*, 863 F. Supp. 2d at 464, 471.

27. Woollard v. Gallagher, 712 F.3d 865, 873 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013). On September 9, 2013, approximately six months after the Fourth Circuit rendered its opinion, the intruder, Kris Abbott, was "involved in a domestic dispute with his estranged wife, Dawn Abbott, 45, and his parents . . . . During the dispute, police said, he pushed Dawn Abbott to the ground,

II. LEGAL BACKGROUND

The Second Amendment to the United States Constitution provides: "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."[28] The Supreme Court of the United States has established that the Second Amendment protects an individual's right to keep and bear arms—unconnected to militia service—for self-defense inside the home; and that this proscription applies equally to the federal and state governments.[29] Accordingly, the Fourth Circuit developed a two-part inquiry for Second Amendment challenges to firearms statutes.[30] The U.S. Courts of Appeals for the Second, Third, Seventh, and Ninth Circuits have applied a similar framework when faced with Second Amendment challenges to state firearms permitting regimes.[31] The Supreme Court's announcement of a new right, coupled with its failure to provide clear standards of review, has resulted in the void that the lower courts have attempted to fill.[32]

A. The Second Amendment's Resurgence in the Supreme Court

The Supreme Court ruled on the constitutionality of the National Firearms Act[33] in *United States v. Miller*.[34] The defendants were charged with transporting in interstate commerce a short-barreled shotgun without the appropriate documentation in violation of the Act.[35] Reviewing the constitutionality of this Act, the Supreme Court performed a historical analysis to discern the Second Amendment's original meaning,[36] and concluded that the Amendment's protection extends to weapons in common use at the time of ratification.[37] The Court held that, without evidence showing that the

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damaged a vehicle with a metal pipe, and then used the pipe to assault both of his parents." Jessica Anderson, *Man Dead After Barricade Was at Center of Md. Handgun Suit*, BALT. SUN, Sept. 11, 2013, at 1A. Following the dispute, Kris Abbott barricaded himself inside the home and fatally shot himself. *Id.*

28. U.S. CONST. amend. II.

29. *See infra* Part II.A.

30. *See infra* Part II.B.

31. *See infra* Part II.C.

32. *See infra* Parts II.B–C.

33. Ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2012)).

34. 307 U.S. 174 (1939).

35. *Id.* at 175.

36. *Id.* at 178 ("With obvious purpose to assure the continuation and render possible the effectiveness of [the Militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.").

37. *See id.* at 179–82 ("The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough . . . that ordinarily when called for service

weapon at issue bore "some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*."[38] The Court further asserted that it was "not within judicial notice that th[e] weapon [was] part of the ordinary military equipment or that its use could [have] contribute[d] to the common defense."[39]

The Court did not revisit Second Amendment jurisprudence until almost seventy years later in *District of Columbia v. Heller*,[40] where the Court performed its "first in-depth examination of the Second Amendment."[41] In *Heller*, the respondents challenged the constitutionality of the District of Columbia's firearms regulations that generally prohibited the possession of handguns and required any "lawfully owned firearms, such as registered long guns, [to be] 'unloaded and disassembled or bound by a trigger lock or similar device.'"[42] Because the Second Amendment was the codification of a pre-existing right, the Court performed a textual and historical inquiry to determine the Second Amendment's original public meaning at the time it was ratified.[43] This inquiry led the Court to conclude "that the Second Amendment conferred an individual right to keep and bear arms" and self-defense was the central component of that right.[44] The Court conceded that it did "not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment" and recognized that the right was not unlimited.[45] Presaging its next Second Amendment case, the Court noted that it had not yet recognized the Fourteenth Amendment to incorporate Second Amendment protections.[46]

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these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.").

38. *Id.* at 178 (emphasis added).

39. *Id.*

40. 554 U.S. 570 (2008).

41. *Id.* at 635.

42. *Id.* at 575 (citations omitted).

43. *Id.* at 592–93.

44. *Id.* at 595, 599.

45. *Id.* at 626. The Court also noted "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Id.* at 595. Moreover, the Court added:

> [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.

Id. at 626–27. The Second Amendment's protection is limited to "the sorts of weapons . . . 'in common use at the time'" the states ratified the Amendment. *Id.* at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

46. *See id.* at 620 n.23 ("With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that [*United States v.*] *Cruikshank*[, 92 U.S. 542

Applying its conclusion to the District of Columbia's handgun ban, the Court held that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' would fail constitutional muster."[47] The Court further held unconstitutional the District of Columbia's requirement that lawful "firearms in the home be rendered and kept inoperable at all times" because "[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense."[48] The Court did not articulate the level of scrutiny with which to evaluate laws burdening Second Amendment conduct,[49] but it limited the rigor to one of the heightened standards of scrutiny.[50] The Court concluded that, regardless of the Second Amendment's scope, "it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[51]

Two years later, the Court revisited the *Heller* decision in *McDonald v. City of Chicago*.[52] Faced with a statutory scheme similar to that in *Heller*,[53] the issue presented was whether the Fourteenth Amendment incorporated the Second Amendment as the Court left open in *Heller*.[54] The Court found "that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[55] Accordingly, the Court held "that the

(1876),] also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.").

47. *Id.* at 628–29 (footnote and citation omitted). The Court also noted that "the need for defense of self, family, and property is most acute" in the home. *Id.* at 628.

48. *Id.* at 630.

49. The dissenting Justices were critical of the Court for establishing a "new" constitutional right without providing guidance to lower courts with respect to that right's scope or the applicable standard of review. *Id.* at 679 (Stevens, J., dissenting); *id.* at 718 (Breyer, J., dissenting).

50. *See id.* at 628 n.27 (majority opinion) ("Obviously, [rational-basis scrutiny] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. 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." (citation omitted)).

51. *Id.* at 635.

52. 130 S. Ct. 3020 (2010).

53. *Id.* at 3026.

54. *Id.* at 3028. The petitioners argued that "the Chicago and Oak Park laws violate[d] the right to keep and bear arms for two reasons." *Id.* The petitioners' "primary submission [was] that this right is among the 'privileges or immunities of citizens of the United States' and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter–House Cases* . . . should now be rejected. As a secondary argument, petitioners contend[ed] that the Fourteenth Amendment's Due Process Clause 'incorporates' the Second Amendment right." *Id.*

55. *Id.* at 3042.

Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[56] In so holding, the Court restated its holding in *Heller*, but did not expound upon it.[57] Underscoring limitations to the Second Amendment right recognized in *Heller*, the Court stated, "incorporation does not imperil every law regulating firearms."[58] The Court made clear, however, that the Second Amendment right, among other considerations, was "valued because the possession of firearms was thought to be essential for self-defense . . . [and] self-defense was 'the *central component* of the right itself.'"[59]

B. The Fourth Circuit Court of Appeals Developed Its Second Amendment Framework Through Constitutional Challenges to Federal Statutes

The Fourth Circuit developed its Second Amendment jurisprudence through constitutional challenges to provisions of 18 U.S.C. § 922(g)[60] and a challenge to 36 C.F.R. § 2.4(b).[61] The challenged provisions of Section 922(g) make it unlawful for certain classes of people to possess firearms or ammunition, and persons within these classifications have challenged the statute insofar as it prevents them from possessing a firearm for self-defense within the home.[62] The challenged regulation, 36 C.F.R. § 2.4(b), prohibits the carrying or possession of loaded handguns within national parks.[63] The court developed a two-part inquiry for Second Amendment challenges to these provisions.[64] Applying this framework, the court found that these laws withstand constitutional scrutiny, even assuming the laws burden conduct within the Second Amendment's scope.[65]

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56. *Id.* at 3050.

57. *Id.* ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.").

58. *Id.* at 3047 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' '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.' We repeat those assurances here.") (quoting District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008)) (citation omitted).

59. *Id.* at 3048 (quoting *Heller*, 554 U.S. at 599).

60. 18 U.S.C. § 922(g) (2012).

61. 36 C.F.R. § 2.4(b) (2013).

62. *See* 18 U.S.C. § 922(g)(1) (making it unlawful to possess a firearm or ammunition for persons convicted of crimes punishable by longer than one year of imprisonment); *id.* § 922(g)(3) (same for illegal drug users or addicts); *id.* § 922(g)(8) (same for persons subject to certain domestic violence protection orders); *id.* § 922(g)(9) (same for domestic violence misdemeanants).

63. 36 C.F.R. § 2.4(b).

64. *See infra* text accompanying notes 71–75.

65. *See infra* Part II.B.

1. The Fourth Circuit Has Upheld Numerous Federal Gun Dispossession Laws Against Second Amendment Challenge

In *United States v. Chester*,[66] the Fourth Circuit faced the issue of whether a federal statute prohibiting firearm possession by domestic violence misdemeanants impermissibly burdened the misdemeanant's Second Amendment right to keep and bear arms.[67] Initially, the court remanded the case to develop the record further with regard to the contours of the Second Amendment claim and for the district court to determine and apply the appropriate degree of means-end scrutiny.[68] Acting on a petition for panel rehearing, the court vacated this decision "to provide district courts in this Circuit guidance on the framework for deciding Second Amendment challenges."[69] The court then adopted a two-part inquiry for Second Amendment claims.[70] The first part addresses the Second Amendment's scope and asks "'whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.'"[71] The court asserted that this inquiry is historical in nature and seeks to determine whether the burdened conduct was within the scope of Second Amendment protection at the time the Amendment was ratified.[72]

If the conduct falls within the Second Amendment's historically understood scope, or the government cannot prove that the conduct is categorically excluded, "then we move to the second step of applying an appropriate form of means-end scrutiny."[73] The court, choosing among the forms of heightened scrutiny,[74] concluded that intermediate scrutiny was more appropriate because of the appellant's criminal history as a domestic violence misdemeanant.[75] The court noted that strict scrutiny is not appropriate

66. 628 F.3d 673 (4th Cir. 2010).

67. *Id.* at 677–78.

68. United States v. Chester, 367 F. App'x 392, 398–99 (4th Cir.) (per curiam), *vacated*, 628 F.3d 673 (4th Cir. 2010). For a more detailed discussion of the degrees of scrutiny, see Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449 (1988) ("Means-end scrutiny is an analytical process involving examination of the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes.").

69. *Chester*, 628 F.3d at 678.

70. *Id.* at 680.

71. *Id.* at 680 (quoting United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010)).

72. *Id.*

73. *Id.* (citing *Marzzarella*, 614 F.3d at 89).

74. *See id.* at 682 (stating that *Heller* indicated rational-basis review does not apply when reviewing a law that burdens conduct protected under the Second Amendment, and that, therefore, the court's task was to "select between strict scrutiny and intermediate scrutiny").

75. *Id.* at 682–83 ("[W]e believe his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense—by virtue of Chester's criminal history as a domestic violence misdemeanant."). The court looked to

"whenever a law impinges upon a right specifically enumerated in the Bill of Rights"; rather, "the level of scrutiny . . . depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[76]

In *United States v. Staten*,[77] the court picked up where the *Chester* court left off.[78] The court had to determine whether the government established that there was a reasonable fit between the statute and a substantial governmental interest.[79] The court first found that the government established that it had a substantial interest in reducing domestic gun violence.[80] Moving to the reasonable fit analysis, the court first explored the precise contours of the challenged statute and determined that "the question we must resolve under the reasonable fit inquiry is whether the government has carried its burden of establishing a reasonable fit between the substantial governmental objective of reducing domestic gun violence and the keeping of firearms out of the hands of" domestic violence misdemeanants.[81] The government relied extensively on scholarly social science articles and reports discussing domestic violence and its connection with firearms use to establish that there was a reasonable fit between the challenged statute and the substantial governmental interest.[82] Based on these facts and the narrow sweep of the statute, the court ruled that the government satisfied its burden.[83]

In *United States v. Carter*,[84] the Fourth Circuit was faced with another Second Amendment challenge to a federal statute that prohibited "firearm possession by a person 'who is an unlawful user of or addicted to any con-

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the levels of scrutiny used in the First Amendment context, which it found to be analogous. *Id.* at 682.

76. *Id.* Having outlined the analytical framework and identified the appropriate standard of review, the Fourth Circuit remanded the case to the district court for further proceedings. *Id.* at 683. The court observed that the government provided numerous *reasons* why there was a reasonable fit, but the government did not provide sufficient *evidence* to prove the fit was reasonable. *Id.*

77. 666 F.3d 154 (4th Cir. 2011).

78. *Id.* at 161.

79. *Id.*

80. *Id.* at 161–62.

81. *Id.* at 162.

82. *Id.* at 163–67 ("To summarize, the government has established that: (1) domestic violence is a serious problem in the United States; (2) the rate of recidivism among domestic violence misdemeanants is substantial; (3) the use of firearms in connection with domestic violence is all too common; (4) the use of firearms in connection with domestic violence increases the risk of injury or homicide during a domestic violence incident; and (5) the use of firearms in connection with domestic violence often leads to injury or homicide.").

83. *Id.* at 167–68.

84. 669 F.3d 411 (4th Cir. 2012).

trolled substance.'"[85] Here, the court relied on the two-part analysis it created in *Chester*.[86] Despite the government's contention that "dangerous and non-law-abiding citizens are categorically excluded from the historical scope" of the right to bear arms, the court, as it had done on three prior occasions, assumed that the statute burdened Carter's Second Amendment right to keep and bear arms for self-defense within the home.[87] The court determined that intermediate scrutiny was the appropriate degree of review because, as in *Chester*, Carter's right did not lie at the Second Amendment's core.[88] The court concluded that crime prevention was an important governmental goal, but found that the government did not carry its burden to satisfy the reasonable fit inquiry.[89] The court stated that the government "may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense,"[90] but it "may not rely upon mere 'anecdote and supposition.'"[91] The court then remanded the case back to the district court for further proceedings.[92]

2. The Fourth Circuit Has Encountered a Single Case Involving a Second Amendment Challenge Outside of the Home

In *United States v. Masciandaro*,[93] the Fourth Circuit was confronted with a Second Amendment challenge to a federal statute forbidding the possession of loaded handguns in motor vehicles within national parks.[94] The court recognized that "a considerable degree of uncertainty remains as to the scope of [the Second Amendment] beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation."[95] While the court did not expressly adopt the two-part

85. *Id.* at 413 (quoting 18 U.S.C. § 922(g)(3) (2012)).

86. *Id.* at 415–16 ("We first applied *Heller* in *United States v. Chester* where we adopted . . . a two-step approach for evaluating a statute under the Second Amendment." (citation omitted)).

87. *Id.* at 416 ("Under the first step, we have three times deferred reaching any conclusion about the scope of the Second Amendment's protection. . . . [A]gain we will *assume* that Carter's circumstances implicate the Second Amendment . . . .") (citing to United States v. Chester, 628 F.3d 673 (4th Cir. 2010); United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011); United States v. Staten, 666 F.3d 154 (4th Cir. 2011)).

88. *Id.* at 416–17 ("But Carter cannot claim to be a law-abiding citizen, and therefore his asserted Second Amendment right cannot be a core right, as we held in *Chester*, where we concluded that the defendant's status as a domestic violence misdemeanant rendered his claim 'not within the core right identified in *Heller*.'" (quoting *Chester*, 628 F.3d at 682–83)).

89. *Id.* at 417–19. The court noted that the government, relying instead on common sense, provided no studies, empirical data, or legislative findings to prove reasonable fit. *Id.* at 419.

90. *Id.* at 418 (citing *Staten*, 666 F.3d at 160–61, 167–68).

91. *Id.* (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 822 (2000)).

92. *Id.* at 421.

93. 638 F.3d 458 (4th Cir. 2011).

94. *Id.* at 465 (addressing a Second Amendment challenge to 36 C.F.R. § 2.4(b) (2013)).

95. *Id.* at 467.

Chester inquiry for laws burdening the purported Second Amendment right outside the home, it did perform a substantively similar analysis.[96]

Because the conduct was not within the Second Amendment's core, the court concluded that a showing of less than strict scrutiny was "necessary with respect to laws that burden the right to keep and bear arms outside of the home."[97] In reaching this determination, the court relied on a longstanding distinction between the scope of firearm rights outside the home as opposed to inside the home.[98] The court, invoking the principle of constitutional avoidance,[99] found that it need not decide whether the *Heller* right applied outside the home; and even assuming it did apply, the regulation still withstood intermediate scrutiny.[100] The court also stated that "intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question."[101]

C. Other Courts Have Adopted Similar Approaches to Second Amendment Challenges to State Firearm Regulations

Although *Woollard* presented the Fourth Circuit with an issue of first impression, other federal courts have faced this same issue. The Second Circuit upheld the proper cause requirement of New York's handgun permitting scheme against a Second Amendment challenge.[102] The Seventh Circuit, however, struck down an Illinois statute that effectively was a wholesale ban on handguns.[103] After the Fourth Circuit issued its *Woollard* decision, the Third Circuit upheld New Jersey's permitting regime, while the Ninth Circuit held unconstitutional San Diego County's interpretation of

96. *See id.* at 475 (stating that it is not necessary to determine the applicability of the *Heller* right outside the home because the statute withstands the applicable level of scrutiny).

97. *Id.* at 471. Therefore, the government was required to show that the statute was "reasonably adapted to a substantial government interest." *Id.*

98. *Id.* at 470.

99. Constitutional avoidance is the principle that, when reviewing statutes and regulations, a court should avoid making decisions on constitutional grounds whenever possible. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 254 (1994).

100. *Masciandaro*, 638 F.3d at 475 ("There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, [or] what sliding scales of scrutiny might apply to them . . . . The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree."). Finding constitutional avoidance inappropriate in this case, Judge Niemeyer concluded that "Masciandaro's claim to self-defense . . . does implicate the Second Amendment, albeit subject to lawful limitations." *Id.* at 468 (Niemeyer, J., dissenting in part).

101. *Id.* at 474 (majority opinion) (citing United States v. Baker, 45 F.3d 837, 847 (4th Cir. 1995)).

102. *See infra* Part II.C.1.

103. *See infra* Part II.C.2.

California's permitting scheme.[104] Each court engaged in an analysis similar to the Fourth Circuits two-part *Chester* inquiry.[105]

1. The Second Circuit Court of Appeals Upheld New York's Handgun-Permitting Scheme Against a Second Amendment Challenge

In *Kachalsky v. County of Westchester*,[106] the Second Circuit addressed whether a New York "handgun licensing scheme violate[d] the Second Amendment by requiring an applicant to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public."[107] As defined by New York case law, to establish proper cause, "an applicant must 'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'"[108] At the outset, the court acknowledged that the scope of the Second Amendment right was undefined but conceded that it "must have *some* application in the very different context of the public possession of firearms."[109] In an effort to determine whether the New York statute burdened conduct within the scope of the Second Amendment's protection, the court examined several nineteenth-century state courts' treatment of restrictions on public carrying of weapons.[110] This examination proved inconclusive, however. It demonstrated that, historically, there has been frequent disagreement among the states as to the scope of the Second Amendment with respect to public carrying of firearms.[111] The court also was hesitant to import First Amendment prior-restraint jurisprudence and adapt it to the Second Amendment context.[112]

Nonetheless, because the court assumed that the Second Amendment had some application in this context, the court turned to the question of what level of judicial scrutiny applied to the New York statute.[113] The court concluded that intermediate scrutiny was the appropriate standard be-

104. *See infra* Parts II.C.3–4.

105. *See infra* Parts II.C.1–4.

106. 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

107. *Id.* at 83. Specifically, "[t]hat section provides that a license 'shall be issued to . . . have and carry [a firearm] concealed . . . by any person when proper cause exists for the issuance thereof.'" *Id.* at 86 (alterations in original) (quoting N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2008)).

108. *Id.* at 86. Proper cause is not established by a generalized desire for self-protection or by "living or being employed in a 'high crime area[].'" *Id.* at 86–87 (alteration in original).

109. *Id.* at 89 ("What we know . . . is that Second Amendment guarantees are at their zenith within the home." (citing District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008))).

110. *Id.* at 90–91.

111. *Id.* at 90–92.

112. *Id.* at 91–92. The court also noted that no other court has done so. *Id.*

113. *Id.* at 93.

cause "state regulation of the use of firearms in public was 'enshrined with[in] the scope' of the Second Amendment when it was adopted."[114] Precedent dictated, and the parties agreed: "New York ha[d] substantial, indeed compelling, governmental interests in public safety and crime prevention."[115] Therefore, the court was left to determine whether the proper cause requirement survived intermediate scrutiny.[116] In making this determination, the court need only find that there was a reasonable fit between the challenged regulation and the governmental interest.[117] The court found that, by limiting the restriction only to those who could not establish a proper cause, the New York statute survived intermediate scrutiny.[118] The court also deferred to the legislature to weigh the competing data and studies as to the effect of regulating public handgun possession.[119] The court concluded that its "review of the history and tradition of firearm regulation does not 'clearly demonstrate[]' that limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment."[120]

2. The Seventh Circuit Court of Appeals Employed an Analysis Similar to the Fourth Circuit's Chester *Analysis and Invalidated a General Ban on Public Handgun Possession*

In *Moore v. Madigan*,[121] the Seventh Circuit was faced with a consolidated appeal of Second Amendment challenges to an Illinois statute that generally prohibited a person from carrying in public "a gun ready to use (loaded, immediately accessible—that is, easy to reach—and uncased)."[122] The court first employed a historical and textual inquiry into the Second Amendment's scope.[123] As a result, the court found implicit within the Supreme Court's *Heller* and *McDonald* decisions the proposition "that the constitutional right of armed self-defense is broader than the right to have a

114. *Id.* at 96 (alteration in original) (quoting *Heller*, 554 U.S. at 634). The court also relied on a perceived inside-the-home or outside-the-home dichotomy when selecting intermediate scrutiny over strict scrutiny. *Id.* at 96.

115. *Id.* at 97.

116. *Id.*

117. *Id.* (citing United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010)).

118. *Id.* at 98.

119. *Id.* at 99.

120. *Id.* at 101 (alteration in original) (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012)).

121. 702 F.3d 933 (7th Cir. 2012), *reh'g denied*, 708 F.3d 901 (7th Cir. 2013).

122. *Id.* at 934.

123. *Id.* at 935–37. Although *Heller* and *McDonald* found that the Second Amendment protection is most acute within the home, this does not mean that it is confined to the home or that it is not acute outside the home. *Id.* at 935.

gun in one's home."[124] The court further found that "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."[125]

The court then turned to the second part of its inquiry. Without establishing the appropriate level of heightened scrutiny, the court found that Illinois failed to satisfy even intermediate scrutiny.[126] A state cannot justify a statute that burdens a constitutional right on the basis that it is not irrational, particularly where empirical literature fails to conclusively establish an adequate justification for the law.[127] Yet the court implied that meeting intermediate scrutiny still may not have been sufficient for the statute to pass constitutional muster.[128] The court went on to distinguish the statute under review from one in which a state bans guns in a particular place because "a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need."[129]

The Seventh Circuit also addressed the Second Circuit's decision in *Kachalsky*.[130] While expressing reservations about the Second Circuit's analysis, the Seventh Circuit distinguished *Kachalsky* to the extent that, in the present case, "our analysis is not based on degrees of scrutiny, [as was the case in *Kachalsky*] but on Illinois's failure to justify the most restrictive gun law of any of the 50 states."[131] The court then remanded the consolidated cases for entry of permanent injunctions against the state.[132]

124. *Id.* at 935–36 ("A right to bear arms . . . implies a right to carry a loaded gun outside the home.").

125. *Id.* at 937.

126. *See id.* at 942 (stating "Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety").

127. *Id.* at 939.

128. *See id.* at 940 (asserting Illinois "would have to make a stronger showing in this case than the government did in [*United States v.*] *Skoien*, because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of the entire law-abiding adult population of Illinois" (citation omitted)).

129. *Id.*

130. *Id.* at 941.

131. *Id.* ("Our principal reservation about the Second Circuit's analysis . . . 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.").

132. *Id.* at 942.

3. The Third Circuit Court of Appeals Upheld New Jersey's Permitting Scheme Against a Second Amendment Challenge

In *Drake v. Filko*,[133] the United States Court of Appeals for the Third Circuit was faced with a Second Amendment challenge to New Jersey's handgun permitting scheme.[134] New Jersey's statutory scheme requires, among other things, that the applicant "'has a justifiable need to carry a handgun.'"[135] Applicants must submit evidence of justifiable need detailing "'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.'"[136] The court, relying on the two-part analysis it adopted in *United States v. Marzzarella*,[137] sought to determine the constitutionality of this permitting scheme by determining whether the statute burdens conduct "'falling within the scope of the Second Amendment's guarantee'" and, if so, by then evaluating the law under the appropriate level of scrutiny.[138]

Proceeding with its analysis, the court conceded that the individual right to bear arms for self-defense may apply outside the home, but stopped short of making such a declaration.[139] Nevertheless, the court found that the provisions of New Jersey's handgun permitting scheme fell outside the Second Amendment's scope by virtue of being a "longstanding," "presumptively lawful" regulation.[140] Such regulations are an exception to the Second Amendment's guarantee due to their enduring and consistent nature.[141] The court, nonetheless, proceeded to the second step of its analysis due to this area of the law's "critical importance."[142]

Assuming that the New Jersey statute burdened conduct that fell within the Second Amendment's scope, the court determined that the provisions would withstand constitutional scrutiny.[143] The court determined that intermediate scrutiny—the requirement that there is a reasonable fit between the challenged statute and an important government interest[144]—was appro-

133. 724 F.3d 426 (3d Cir. 2013), *petition for cert. filed*, 2014 WL 117970 (U.S. Jan. 9, 2014) (No. 13-827). The Third Circuit's opinion was filed July 31, 2013, four months after the Fourth Circuit's opinion in *Woollard* on March 21, 2013.

134. *Id.* at 428.

135. *Id.* (emphasis omitted) (quoting N.J. STAT. ANN. § 2C:58-4(c) (West 2005)).

136. *Id.* (quoting N.J. ADMIN. CODE § 13:54-2.4(d)(1) (2014)).

137. 614 F.3d 85 (3d Cir. 2010).

138. *Drake*, 724 F.3d at 429 (quoting *Marzzarella*, 614 F.3d at 89).

139. *Id.* at 431.

140. *Id.* at 431–32.

141. *Id.* at 432.

142. *Id.* at 434–35.

143. *Id.* at 435.

144. *Id.* at 436.

priate because strict scrutiny is only appropriate when the government imposes restrictions on the core of the right—"the right to possess usable handguns in the home for self-defense."[145] Applying intermediate scrutiny, the court first found that New Jersey's interest in protecting public safety was an important governmental interest.[146] Next, turning to the reasonable fit inquiry, the court noted that "courts 'accord substantial deference to the [legislature's] predictive judgments.'"[147] Although there was no history indicating the New Jersey legislature's basis for enacting the statute, the court relied on the statute's longevity and the reasonable inference that requiring particularized need for permit issuance serves the governmental interest of public safety.[148] Finally, the court found that the New Jersey statute did not burden more conduct than reasonably necessary to accomplish New Jersey's goal of protecting public safety.[149] The court concluded that New Jersey's permitting scheme was constitutional because the challenged provision did not burden conduct protected by the Second Amendment and, assuming it did, the provision survives intermediate scrutiny.[150]

4. The Ninth Circuit Court of Appeals Held Unconstitutional a California County's Interpretation of the State's Licensing Statute

In *Peruta v. County of San Diego*,[151] the Ninth Circuit addressed a Second Amendment challenge to San Diego County's policy interpretation of California's handgun permitting scheme.[152] California law requires, among other things, that a concealed carry permit applicant establish "good cause" and "delegates to each city and county the power to issue written policy setting forth the procedures for obtaining" a permit.[153] San Diego County's interpretation of the good-cause requirement obligates the applicant to distinguish himself from the populace; a general concern for self-protection is insufficient.[154] The court embarked on a two-step inquiry to

145. *Id.* (emphasis omitted).

146. *Id.* at 437.

147. *Id.* at 436–37 (alteration in original) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).

148. *Id.* at 437–38.

149. *Id.* at 439–40.

150. *Id.* at 440.

151. No. 10-56971, 2014 WL 555862 (9th Cir. Feb. 13, 2014). The Ninth Circuit's opinion was filed February 13, 2014, eleven months after the Fourth Circuit's opinion in *Woollard* on March 21, 2013.

152. *Id.* at *2.

153. *Id.* at *1 (citing CAL. PENAL CODE §§ 26150, 26155 (West 2012)).

154. *Id.*

determine whether the burdened conduct was within the Second Amendment's scope and, if so, whether the county's policy infringed that right.[155]

Addressing the first part of the inquiry, the court engaged in a textual and historical analysis to determine whether the Second Amendment protected the right of a "responsible, law-abiding citizen[] . . . to carry a gun outside the home for self-defense."[156] This analysis led the court to conclude that the burdened conduct was within the Second Amendment's scope.[157] According to the court, this examination is of critical importance for determining whether a permitting requirement passes constitutional muster.[158]

Turning to the second part of its inquiry, the court sought to determine whether the challenged requirement infringed the Second Amendment.[159] At the outset, the court questioned whether the good-cause requirement amounted to a total destruction of the right "to bear arms in public for the lawful purpose of self-defense" for a "typical responsible, law-abiding citizen."[160] Because the good-cause requirement was not satisfied by a general concern for personal safety, the typical responsible, law-abiding citizen was not permitted to publicly bear arms.[161] Accordingly, the court determined that San Diego County's "good cause" policy interpretation infringes the Second Amendment.[162] The Ninth Circuit did not have to venture into the ambit of tiered scrutiny because a regulation that destroys a constitutional right cannot pass muster under any degree of constitutional scrutiny.[163]

III. THE COURT'S REASONING

In *Woollard v. Gallagher*, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the United States District Court for the District of Maryland, concluding that the good-and-substantial-reason

155. *Id.* at *3, *19 (citing United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013)). In *Chovan*, the Ninth Circuit adopted the two-part *Chester* inquiry for Second Amendment challenges. 735 F.3d at 1136.

156. *Peruta*, 2014 WL 555862, at *3.

157. *Id.* at *18.

158. *Id.* at *19.

159. *Id.*

160. *Id.* at *20 ("[T]he question is not whether the California scheme (in light of San Diego County's policy) allows *some* people to bear arms outside the home in *some* places at *some* times.").

161. *Id.* at *21 ("[A] *typical* citizen fearing for his 'personal safety'—by definition—cannot '*distinguish* [*himself*] *from the mainstream*.'").

162. *Id.* at *30. The Second Amendment does not require that states allow concealed carry; however, it "does require that the states permit *some form* of carry for self-defense outside the home." *Id.* at *24.

163. *Id.* at *18.

requirement was reasonably adapted to Maryland's substantial interests in protecting public safety and preventing crime.[164]

In reaching its decision, the court acknowledged that the scope of the Second Amendment right articulated by the Supreme Court in *Heller*[165] was uncertain.[166] The Fourth Circuit, however, found that it was unnecessary to delineate the bounds of the Second Amendment's protection to dispose of this case.[167] Instead, the court assumed, without finding, that the *Heller* right extends outside the home and that the statute, as applied in *Woollard*, infringed that right.[168]

The court reiterated that intermediate scrutiny was the appropriate standard of review for laws "that burden [any] right to keep and bear arms outside the home."[169] Therefore, the challenged statute must be reasonably adapted to meet a substantial government interest to pass constitutional muster.[170] The court, citing codified legislative findings and crime statistics, found that Maryland's interests in public safety and preventing crime satisfied the "significant governmental interest" prong of intermediate scrutiny.[171] The court rejected Woollard's attempts to invoke strict scrutiny—

164. 712 F.3d 865, 882–83 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013).

165. 554 U.S. 570, 628 (2008). Moreover,

> [t]he *Heller* Court concluded that the District of Columbia's outright ban on the possession of an operable handgun in the home—proscribing "the most preferred firearm in the nation to keep and use for protection of one's home and family"—would fail to pass muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."

Woollard, 712 F.3d at 874 (alteration in original) (quoting *Heller*, 554 U.S. at 628–29).

166. *Woollard*, 712 F.3d at 874. The court recognized that "a considerable degree of uncertainty remains as to the scope of [the *Heller*] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation." *Id.* (alteration in original) (quoting United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011)).

167. *Id.* at 874–76 ("We hew to a judicious course today, refraining from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections.").

168. *Id.*

169. *Id.* (alteration in original) (quoting *Masciandaro*, 638 F.3d at 470–71).

170. *Id.*

171. *Id.* at 876–78. The Maryland legislature found that:

> (1) the number of violent crimes committed in the State has increased alarmingly in recent years; (2) a high percentage of violent crimes committed in the State involves the use of handguns; (3) the result is a substantial increase in the number of deaths and injuries largely traceable to the carrying of handguns in public places by criminals; (4) current law has not been effective in curbing the more frequent use of handguns in committing crime; and (5) additional regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of the public.

Id. at 876–77 (quoting MD. CODE ANN., CRIM. LAW § 4-202 (LexisNexis 2012)).

namely that the right to bear arms for self-defense outside the home was a fundamental right.[172]

The court then addressed the second prong of its intermediate scrutiny analysis, finding that there was a reasonable fit between the good-and-substantial-reason requirement and Maryland's governmental interests.[173] The court articulated several reasons why the requirement advanced Maryland's governmental interests of public safety and crime prevention by decreasing the number of handguns carried in public.[174] The court further found that the permitting regime did not overreach because it allowed the issuance of permits to those with a profound need for self-protection.[175] The court reinforced its analysis by citing the Second Circuit Court of Appeals's decision in *Kachalsky* as support.[176]

Finally, the court confronted the lower court's analysis.[177] The Fourth Circuit stated that the district court misapplied the intermediate scrutiny standard.[178] The appeals court found that the district court engaged in a more sweeping review, such that the lower court's analysis more closely resembled strict scrutiny.[179] The court, assuming a more obsequious position, deferred to the "considered judgment of the General Assembly that the good-and-substantial-reason requirement strikes an appropriate 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 of Maryland."[180] In accordance with its finding that Maryland's permitting regime survived intermediate scrutiny, the Fourth Circuit reversed the district court's judgment.[181]

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172. *Id.* at 877–78.

173. *Id.* at 880.

174. *Id.* at 879–80. Among other things, the statute "[d]ecreas[es] the availability of handguns to criminals via theft, [l]essen[s] 'the likelihood that basic confrontations between individuals would turn deadly,' [and] [a]vert[s] the confusion . . . that can result from the presence of a third person with a handgun during a confrontation between a police officer and a criminal suspect." *Id.* at 879 (citations omitted).

175. *Id.* at 880.

176. *Id.* at 881. In *Kachalsky*, the Second Circuit held that "New York's 'proper cause' requirement 'is oriented to the Second Amendment's protections,' and constitutes 'a more moderate approach' to protecting public safety and preventing crime than a wholesale ban on the public carrying of handguns." *Id.* (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 98–99 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013)).

177. *Id.*

178. *Id.* at 881–82.

179. *Id.* at 882.

180. *Id.* at 881 ("'It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.'") (quoting *Kachalsky*, 701 F.3d at 99).

181. *Id.* at 882–83.

IV. ANALYSIS

The Fourth Circuit Court of Appeals correctly held constitutional Maryland's good-and-substantial-reason requirement. The two-part *Chester* inquiry provides a flexible framework with which to evaluate laws burdening conduct implicating the Second Amendment.[182] Laws burdening conduct outside the home usually will be subject to intermediate scrutiny due to the right's subordinate position in the Second Amendment hierarchy.[183] Maryland's good-and-substantial-reason requirement withstands intermediate scrutiny because the provision is reasonably adapted to the government's interest in protecting public safety and preventing crime.[184] Handgun-permitting schemes, like Maryland's, that do not amount to a wholesale ban and grant permits to those with a documented, articulable need for self-protection should withstand constitutional scrutiny.[185]

A. The Two-Part Chester *Inquiry Fills the Void Left by the Supreme Court's* Heller *Decision*

In *Heller*, the Supreme Court identified a right at the Second Amendment's core, but it did not define the scope of the Second Amendment right outside of the home.[186] The Court left "for future cases the formidable task of defining the scope of permissible regulations,"[187] without providing "clear standards for resolving those challenges."[188] The Fourth Circuit has developed a two-part inquiry for examining laws that restrict the Second Amendment right inside the home.[189] Hesitant to venture unnecessarily into the "vast *terra incognita*" of the Second Amendment's applicability outside of the home, the Fourth Circuit has advanced its Second Amendment jurisprudence only when necessary and only by small degree.[190] Applying the

182. *See infra* Part IV.A.

183. *See infra* Part IV.B.

184. *See infra* Part IV.B.

185. *See infra* Part IV.C.

186. *See* District of Columbia v. Heller, 554 U.S. 570, 630, 635 (2008) ("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 . . . ."); *see also supra* note 166 and accompanying text.

187. *Id.* at 679 (Stevens, J., dissenting).

188. *Id.* at 718 (Breyer, J., dissenting).

189. United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

190. United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011). For a discussion of the Fourth Circuit's restrained approach, see, e.g., Note, *Fourth Circuit Upholds Good-and-Substantial-Reason Requirement for Concealed Carry Permits*, 127 HARV. L. REV. 1477, 1480 (2014) ("After *Heller* and *McDonald*, the Fourth Circuit signaled its recognition of the centrality of historical inquiries to resolving Second Amendment challenges . . . . Despite this recognition, the court avoided historical analysis altogether in *Masciandaro* and *Woollard*, instead simply assuming that the right at issue existed before analyzing it under intermediate scrutiny. The Fourth Circuit has defended this approach on constitutional avoidance grounds, declining to enter the

two-part *Chester* analysis to laws burdening conduct outside the home preserved the court's deliberative approach while providing guidance to lower courts.

In addition to the Fourth Circuit, many other circuit courts of appeals, relying on the limited framework provided by the Supreme Court in *Heller* and *McDonald*, have employed the two-part inquiry to evaluate firearm regulations.[191] This inquiry seeks to determine whether the Second Amendment protects the burdened conduct and, if so, whether the challenged regulation satisfies the appropriate level of judicial scrutiny.[192] This inquiry provides a flexible framework, which allows courts to evaluate a Second Amendment challenge based on the nature of the conduct and the degree to which the conduct is burdened.[193] The inquiry also allows the court to avoid the first step's determination of Second Amendment scope outside the home—and the attendant risks accompanying an overbroad ruling[194]—when the statute nevertheless can survive judicial scrutiny.[195] Additionally, the court can dispose of the challenge if the burdened conduct is excluded categorically from the Second Amendment's protection.[196]

The second prong of the two-part inquiry also is malleable. It allows the court to tailor the degree of scrutiny based upon the extent to which the challenged provision burdens protected conduct.[197] Although most courts

'vast *terra incognita*' of the Second Amendment's scope when the case 'could be resolved on narrower grounds.'").

191. *See* Woollard v. Gallagher, 712 F.3d 865, 874–75 (4th Cir. 2013) (collecting cases from the Third, Fifth, Sixth, Seventh, Tenth, and District of Columbia Circuits applying the two-part inquiry), *cert. denied*, 134 S. Ct. 422 (2013).

192. *Chester*, 628 F.3d at 680.

193. *Id.* at 682 ("The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right.").

194. *See Masciandaro*, 638 F.3d at 475 ("This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.").

195. *Id. But see* Peruta v. Cnty. of San Diego, No. 10-56971, 2014 WL 555862, at *19 (9th Cir. Feb. 13, 2014) ("Understanding the scope of the right is not just necessary, it is key to our analysis. For if self-defense outside the home is part of the core right to 'bear arms' and the California regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-ends scrutiny can justify San Diego County's policy.").

196. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 405 (2009) (referring to *Heller*'s "flat exclusion[] of felons, the mentally ill, and certain 'Arms' from constitutional coverage"); *see also Chester*, 628 F.3d at 679 (noting "[s]ome courts have treated *Heller*'s listing of 'presumptively lawful regulatory measures,' for all practical purposes, as a kind of 'safe harbor' for unlisted regulatory measures . . . which they deem to be analogous to those measures specifically listed in *Heller*.").

197. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 96 (3d Cir. 2010) (stating that strict scrutiny does not necessarily apply to all Second Amendment challenges); *Chester*, 628 F.3d at 683 (concluding that intermediate scrutiny was more appropriate when a challenged regulation does not burden conduct within *Heller*'s core right).

using this approach have applied intermediate scrutiny,[198] courts can apply a more or less stringent form of scrutiny depending on the magnitude of the burden the challenged regulation imparts on the right.[199]

Courts use a similar approach under First Amendment jurisprudence, where the degree of scrutiny the courts apply depends upon the nature of the regulated conduct and the extent to which the challenged provision burdens that conduct.[200] Although courts should not adopt First Amendment jurisprudence wholesale to shortcut the development of Second Amendment jurisprudence,[201] it can provide guideposts for the lower courts until the Supreme Court definitively establishes the Second Amendment's bounds.[202] In fact, the Supreme Court made several comparisons between the First and Second Amendments in its *Heller* decision.[203] The Fourth Circuit was correct to extend the two-part *Chester* inquiry to firearms regulations outside the home because it provides a flexible examination and, despite exploring *terra incognita*, its application has an inherent familiarity.

198. Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald*?*, 21 CORNELL J.L. & PUB. POL'Y 489, 514 (2012); *see also* United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (observing that many courts apply intermediate scrutiny to Second Amendment challenges to federal felon dispossession statutes); *cf.* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (finding rational basis review inappropriate for Second Amendment challenges).

199. Sobel, *supra* note 198, at 514.

200. *Chester*, 628 F.3d at 682.

201. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012) ("We are hesitant to import *substantive* First Amendment principles wholesale into Second Amendment jurisprudence. Indeed, no court has done so."), *cert. denied*, 133 S. Ct. 1806 (2013); Gregory P. Magarian, *Speaking the Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 63 (2012) (emphasizing the different underlying considerations for First and Second Amendment jurisprudence).

202. *See* Blocher, *supra* note 196, at 381 (stating that free speech doctrine "has been frequently linked to the Second Amendment"); Magarian, *supra* note 201, at 72 ("Our understanding of the First Amendment can, however, generate other valuable, even decisive, tools for determining the shape and legal force of the Second Amendment right to keep and bear arms.").

203. *See, e.g.*, 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."); *id.* at 592 ("We look to [the Second Amendment's historical background] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."); *id.* at 595 ("Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."); *id.* at 635 ("Like the First [Amendment], [the Second Amendment] is the very *product* of an interest balancing by the people . . . ."). Such analogies have been made for over 200 years. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 97 (2009).

B. Intermediate Scrutiny Is the Proper Standard, One That Maryland's Permitting Scheme Satisfies

In addition to declining to explicate the Second Amendment's scope, the Supreme Court also did not establish a level of scrutiny for evaluating Second Amendment challenges to firearms regulations.[204] The Court, however, did disclaim the use of rational basis review because "the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[205] Therefore, courts are left to decide between the heightened standards of scrutiny—intermediate and strict scrutiny.[206] Intermediate scrutiny is the appropriate standard of review due to public handgun possession's subordinate position,[207] the flexibility afforded under intermediate scrutiny,[208] and its deferential treatment of legislative judgments.[209]

The closer the burdened conduct lies to the core constitutional right, or the greater the law's burden, the closer the standard of review is to strict scrutiny.[210] Regulations burdening conduct nearer to the Second Amendment's periphery, or laws imposing a slight burden, may be justified more easily.[211] The *Heller* Court stated that the "core protection" of the Second Amendment applies to an individual right to bear arms for self-protection within the home.[212] Provisions burdening the right to bear arms outside of the home are further from the core *Heller* right and, accordingly, subject to a more deferential review than strict scrutiny.[213] Outside the home, the right to bear arms occupies a subordinate position because it is an area traditionally subject to government regulation.[214] Most courts have applied intermediate scrutiny when reviewing statutes in light of a Second Amendment challenge.[215]

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204. *See Heller*, 554 U.S. at 628–29 (stating that the statute "would fail constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights").

205. *Id.* at 628 n.27.

206. United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010).

207. *See infra* text accompanying note 214.

208. *See supra* text accompanying note 193.

209. *See infra* text accompanying note 219.

210. United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011).

211. *Id.* (quoting *Chester*, 628 F.3d at 682).

212. District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

213. *Masciandaro*, 638 F.3d at 470.

214. *See id.* ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012) ("[O]ur tradition . . . clearly indicates a substantial role for state regulation of the carrying of firearms in public . . . ."), *cert. denied*, 133 S. Ct. 1806 (2013).

215. Sobel, *supra* note 198199, at 513.

While it is true that "self-defense has to take place wherever [a] person happens to be,"[216] the *Heller* Court explicitly disclaimed the use of an "interest-balancing inquiry" when evaluating Second Amendment challenges to firearms regulations.[217] Intermediate scrutiny, however, does permit "clandestine" interest balancing to occur.[218] The particular formulation of intermediate scrutiny in this instance, while more rigorous than rational basis scrutiny, nonetheless exhibits a posture that is deferential to legislators.[219] Typically, the court will defer to the predictive judgments of the legislature when evaluating the degree of fit between the governmental objective and the challenged regulation.[220] After all, it is the legislature's duty to weigh evidence, assess risks and benefits, and make public-policy decisions.[221]

Maryland's interest in protecting public safety and preventing crime were important government interests.[222] Due to the prevalence of crime in urban environments,[223] among other things, protecting public safety and preventing crime are important, if not compelling, government interests.[224] Professor Calvin Massey observed that, in the context of strict scrutiny, "[t]he government's compelling purpose will typically be some variation on the theme of public safety . . . . Surely this is a compelling interest."[225] Similarly, Professor Adam Winkler asserted that "the requirement of a compelling government interest[] is likely to be found to be satisfied in

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216. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009).

217. *Heller*, 554 U.S. at 634–35.

218. Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1129 (2000).

219. *See* Richard C. Boldt, *Decisional Minimalism and the Judicial Evaluation of Gun Regulations*, 71 MD. L. REV. 1177, 1187 (2012) ("The judicial exercise of intermediate scrutiny under these circumstances, while not toothless rational basis review, should be characterized by a deferential stance toward the sensitive public policy judgments reached decades ago and maintained over the years by officials in the legislative and executive branches of state government.").

220. Drake v. Filko, 724 F.3d 426, 436–37 (3d Cir. 2013) (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)), *petition for cert. filed*, 2014 WL 117970 (U.S. Jan. 9, 2014) (No. 13-827).

221. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

222. *See supra* note 171 and accompanying text (noting the Maryland legislature's finding regarding gun-related crime).

223. *See* Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 7–20 (2009) (discussing a spike in urban crime rates in the late 1980s and early 1990s).

224. *See, e.g.*, *Kachalsky*, 701 F.3d at 97 (finding that "New York ha[d] substantial, indeed compelling, governmental interests in public safety and crime prevention").

225. Massey, *supra* note 218, at 1132. Professor Massey predicted that "[t]he degree of connection between this laudable objective and the means chosen to achieve it would likely prove to be the litigation battleground." *Id.*

nearly every case because the interest in public safety (or some variant of that goal, such as 'preventing violence' or 'reducing crime') is so obviously important."[226] Professor Eugene Volokh observed that the difference between important government interest—required under intermediate scrutiny—and compelling government interest—required under strict scrutiny—is not likely to be relevant because "virtually every gun control law is aimed at serving interests that would usually be seen as compelling—preventing violent crime, injury, and death."[227]

As expected, Maryland's purported interests were protecting public safety and preventing crime.[228] The district court acknowledged, "[b]eyond peradventure, public safety and the prevention of crime are substantial, indeed compelling, government interests."[229] Woollard even conceded "that 'a compelling government interest in public safety' generally exists."[230] Therefore, the Fourth Circuit "readily"[231] and correctly concluded that Maryland's interests in protecting public safety and preventing crime were important government interests.

There was a reasonable fit between the good-and-substantial-reason requirement and the State's interests in protecting public safety and preventing crime. To discharge its reasonable fit burden, "the government may not rely upon mere 'anecdote and supposition.'"[232] The government must produce evidence to establish that there is reasonable fit rather than offering plausible reasons why the fit is reasonable.[233] To that end, the government may rely on "a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require."[234] In *Woollard*, the state relied on codified legislative findings and declarations by three police commanders with more than one hundred years of combined law enforcement experience.[235] The evidence proffered by the state supports the court's finding that there was a reasona-

226. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 727 (2007).

227. Volokh, *supra* note 216, at 1470.

228. Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).

229. Woollard v. Sheridan, 863 F. Supp. 2d 462, 473 (D. Md. 2012), *rev'd sub nom.* Woollard v. Gallagher, 712 F.3d 865 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).

230. *Woollard*, 712 F.3d at 877.

231. *Id.* ("In these circumstances, we can easily appreciate Maryland's impetus to enact measures aimed at protecting public safety and preventing crime, and we readily conclude that such objectives are substantial governmental interests.").

232. United States v. Carter, 669 F.3d 411, 418 (4th Cir. 2012) (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 822 (2000)).

233. United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010).

234. *Carter*, 669 F.3d at 418 (citing United States v. Staten, 666 F.3d 154, 160–61, 167–68 (4th Cir. 2011)).

235. *Woollard*, 712 F.3d at 876–77 & n.6.

ble fit between the good-and-substantial-reason requirement and the government's interest in protecting public safety and preventing crime.[236]

The reasonable fit inquiry also accords deference to the considered, predictive judgments made by the legislature.[237] The court's "role is . . . 'to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'"[238] The magnitude of deference reflects the longevity and consistency of the provision.[239] The longevity of Maryland's permitting regime, dating back to 1972, militates in favor of a finding of reasonable fit.[240] In addition, there also is an extensive history of firearm regulation by states throughout the United States.[241]

A regulation "may be somewhat over-inclusive," but such an observation suggests only that the fit is not perfect.[242] In fact, "[m]ost legislation will assert broad safety concerns and broad gun control measures to match, covering both 'good' and 'bad' gun possessors . . . . Such legislation cannot be narrowly tailored to reach only the bad people who kill with their innocent guns."[243] Intermediate scrutiny requires only that the fit be reasonable, not perfect.[244] Maryland's permit scheme provides that an applicant shall receive a license if, among other things, he has a good and substantial reason.[245] Even if this requirement is somewhat over-broad,[246] this demonstrates only that the fit is reasonable, not perfect.

C. A Developing Split Among the Circuit Courts of Appeals

Until the Ninth Circuit's *Peruta* opinion, the federal circuit courts of appeals consistently applied a two-part approach to constitutional challenges to firearms regulations.[247] The Seventh Circuit's *Moore* analysis followed this approach and, despite striking down the statute at issue, does not undermine *Woollard*'s holding.[248] Although the Ninth Circuit correctly ar-

236. *See supra* notes 171, 174 and accompanying text.

237. Drake v. Filko, 724 F.3d 426, 436–37 (3d Cir. 2013), *petition for cert. filed*, 2014 WL 117970 (U.S. Jan. 9, 2014) (No. 13-827).

238. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994)), *cert. denied*, 133 S. Ct. 1806 (2013).

239. *See supra* text accompanying note 148.

240. Boldt, *supra* note 219, at 1186 (citing Md. S.B. 205, 1972 Sess.).

241. *Id.*

242. United States v. Staten, 666 F.3d 154, 167 (4th Cir. 2011).

243. Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 111 (1997).

244. *Staten*, 666 F.3d at 167.

245. Woollard v. Gallagher, 712 F.3d 865, 880 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).

246. Boldt, *supra* note 219, at 1183–84.

247. *See infra* Part IV.C.1.

248. *See infra* Part IV.C.2.

ticulated the inquiry, logical gaps in its analysis and its disregard of the constitutional avoidance principle led to an erroneous outcome.[249] Consequently, the Fourth Circuit's decision correctly upheld Maryland's permitting scheme.

1. The Second and Third Circuits' Analyses Echo the Approach Followed by the Fourth Circuit

The Fourth Circuit's *Woollard* decision is consistent with the Second Circuit's *Kachalsky* decision and the Third Circuit's *Drake* decision. Although the statutory language varied in each case,[250] the courts effectively were faced with determining the constitutionality of a permitting scheme requiring a documented, articulable need for armed self-defense outside the home.[251] The courts then applied a two-part analysis to determine whether the challenged provisions burdened conduct within the Second Amendment's scope and, if so, whether the challenged provision withstood the appropriate level of judicial scrutiny.[252] Without imparting a definitive ruling of the scope of the Second Amendment's guarantee,[253] the courts assumed that the provisions burdened conduct protected by the Second Amendment and continued with their analyses.[254] Recognizing that the burdened conduct fell outside the Second Amendment's core and that public possession of firearms traditionally has been subject regulation, the circuit courts concluded that intermediate scrutiny was the appropriate standard of judicial review.[255]

The courts easily dispatched the first prong of intermediate scrutiny, finding that each state had a substantial government interest in public safety

249. *See infra* Part IV.C.3.

250. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 86 (2d Cir. 2012) (describing New York's proper cause requirement), *cert. denied*, 133 S. Ct. 1806 (2013); *Woollard*, 712 F.3d at 869 (describing Maryland's good-and-substantial-reason requirement); Drake v. Filko, 724 F.3d 426, 428 (3d Cir. 2013) (describing New Jersey's justifiable need requirement), *petition for cert. filed*, 2014 WL 117970 (U.S. Jan. 9, 2014) (No. 13-827).

251. *See Kachalsky*, 701 F.3d at 86–87 (requiring more than a generalized desire to carry for self-defense); *Woollard*, 712 F.3d at 870 (requiring more than general fear or a vague threat); *Drake*, 724 F.3d at 428 & n.2 (requiring specific threats or previous attacks).

252. *See Kachalsky*, 701 F.3d at 89 ("What we do not know is the scope of [the *Heller*] right beyond the home and the standards for determining when and how the right can be regulated by a government."); *Woollard*, 712 F.3d at 875 (describing the two-part *Chester* inquiry); *Drake*, 724 F.3d at 429 (describing the two-part *Marzzarella* inquiry).

253. *See Kachalsky*, 701 F.3d at 89 (finding that the Second Amendment must have *some* application outside the home); *Woollard*, 712 F.3d at 876 (refraining from making any determination of applicability); *Drake*, 724 F.3d at 431–32, 434 (finding that the Second Amendment *may* have some applicability outside the home but, as the target of a presumptively lawful, longstanding regulation, the burdened conduct is outside the Second Amendment's scope).

254. *Kachalsky*, 701 F.3d at 93; *Woollard*, 712 F.3d at 876; *Drake*, 724 F.3d at 434–35.

255. *Kachalsky*, 701 F.3d at 96; *Woollard*, 712 F.3d at 876; *Drake*, 724 F.3d at 435–36.

and crime prevention.[256] Turning to the second prong—substantially related or reasonable fit—the *Woollard* court relied on legislative findings, testimonial evidence, and legislative deference to conclude that there was a reasonable fit between the challenged provision and Maryland's governmental interests.[257] The *Kachalsky* court placed a greater emphasis on legislative deference and cited legislative findings, studies and data, and the tradition of state regulation of public firearm possession for concluding that the challenged provision was substantially related to New York's governmental interests.[258] The *Drake* court likewise emphasized the concept of legislative deference, even going so far as to excuse the state from putting forth evidence to support the legislature's judgment.[259] Instead, the court relied on common sense, legislative history, and reasonable inferences.[260] When performing their "reasonable fit" analyses, the three circuit courts also emphasized that the challenged regulations did not amount to complete bans because applicants were entitled to a permit if they establish the requisite need.[261] The Second, Third, and Fourth Circuits engaged in substantively similar analyses, deferring to the legislatures' predictive judgments and upholding handgun permitting schemes that generally disallowed a permit to issue unless the applicant could establish a documented, articulable need.[262]

2. Despite Reaching Opposite Conclusions, the Fourth and Seventh Circuits' Decisions Are Not Incompatible

Although *Woollard* and *Moore* reached different conclusions, the cases are reconcilable. In *Moore*, the Seventh Circuit proceeded with its analysis in a manner roughly similar to the two-part analysis the Fourth Circuit employed in *Woollard*.[263] First, the court examined the scope of the Second Amendment, and then it scrutinized the handgun provision.[264] Unlike *Woollard*, the *Moore* court found that, implicit in the Supreme Court's jurisprudence, the Second Amendment right does extend outside the home.[265]

256. *Kachalsky*, 701 F.3d at 97; *Woollard*, 712 F.3d at 877; *Drake*, 724 F.3d at 437.

257. *Woollard*, 712 F.3d at 878–82.

258. *Kachalsky*, 701 F.3d at 97–101.

259. *Drake*, 724 F.3d at 436–39.

260. *Id.* at 437–40.

261. *Kachalsky*, 701 F.3d at 98–99; *Woollard*, 712 F.3d at 880–81; *Drake*, 724 F.3d at 439–40.

262. *See supra* Part II.C.

263. Moore v. Madigan, 702 F.3d 933, 934–42 (7th Cir. 2012), *reh'g denied*, 708 F.3d 901 (7th Cir. 2013).

264. *Id.*

265. *See id.* at 937, 942 ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.").

The Seventh Circuit then held that the provision failed to satisfy any level of scrutiny greater than rational review.[266]

As part of its scrutiny of the Illinois statute, the Seventh Circuit examined empirical literature to determine whether there was support for the provision.[267] Unlike the evidence in *Woollard*, the empirical data was uncertain as to whether the handgun statute advanced or detracted from Illinois's governmental interests.[268] Accordingly, the *Moore* court did not proclaim an applicable level of scrutiny because Illinois failed to advance evidence sufficient to satisfy any standard greater than minimal scrutiny.[269]

The principal distinguishing feature between *Moore* and *Woollard* is breadth of the challenged statute. The statute in *Moore* provided for a regulatory scheme that effectively amounted to a wholesale ban on the public carrying of firearms,[270] while Maryland's handgun permitting scheme grants permits to those who can demonstrate a good and substantial reason.[271] To be sure, the Seventh Circuit did not foreclose the possibility that Illinois could enact a permitting scheme similar to Maryland's.[272] Key to the Seventh Circuit's analysis was Illinois's failure to justify sufficiently the most restrictive statute in the United States.[273]

3. The Ninth Circuit Erred in Its Classification of the Conduct at Issue and in Its Interpretation of the Challenged Policy

Exercising judicial restraint and legislative deference, the Fourth Circuit avoided making the same errors as the Ninth Circuit. The Ninth Circuit used a two-part inquiry that was similar to that used by the Fourth Circuit in *Woollard*.[274] The Ninth Circuit went further, however, and found that a regulatory scheme that amounts to a wholesale ban on the public carrying of firearms necessarily infringes the Second Amendment.[275] The Ninth Circuit purported to engage in a historical inquiry and found that the Sec-

266. *Id.* at 940–42.

267. *Id.* at 937–39.

268. *Id.* at 937.

269. *See id.* at 941 (stating that the court's analysis was "not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states").

270. *See supra* text accompanying note 122.

271. *See supra* notes 8–14 and accompanying text.

272. *See Moore*, 702 F.3d at 940–41 (distinguishing the New York statute at issue in *Kachalsky* from Illinois's statute); *see also* Moore v. Madigan, 708 F.3d 901, 903–04 (7th Cir. 2013) (order denying rehearing) (Hamilton, J., dissenting) (noting that the panel decision leaves open the possibility to regulate who may publicly carry firearms).

273. *See Moore*, 702 F.3d at 941 (emphasizing Illinois's failure to justify the statute).

274. *See* Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir.) (describing the two-part *Chester* inquiry), *cert. denied*, 134 S. Ct. 422 (2013); Peruta v. Cnty. of San Diego, No. 10-56971, 2014 WL 555862, at *3 (9th Cir. Feb. 13, 2014) (describing the Ninth Circuit's methodology).

275. *Peruta*, 2014 WL 555862, at *18.

ond Amendment right applies beyond the home.[276] The court then pronounced that the right to bear arms for lawful self-defense in public was part of the Second Amendment's central protection.[277] Yet, the Fourth Circuit, practicing judicial restraint, did not reach the issue of the Second Amendment's scope concerning carrying firearms in public.[278] Instead, the Fourth Circuit recognized that public carrying of handguns was an area traditionally subject to regulation and, accordingly, analyzed the challenged statute using a measure of deference to legislative judgments.[279]

The Ninth Circuit further erred in its classification of San Diego County's policy interpretation. The regulations at issue in *Woollard* and *Peruta* were substantially similar, despite variation in the manner in which the governmental entity carries them out.[280] Where the Fourth Circuit found the challenged regulation to be a moderate approach to handgun permitting, the Ninth Circuit chided the regulation as a complete ban on public handgun possession and a destruction of the Second Amendment right.[281] The *Peruta* court claimed that the typical, law-abiding citizen was foreclosed from exercising his Second Amendment right to publicly carry a handgun for self-defense.[282] The court overlooked the opportunity for the average, law-abiding citizen to obtain a permit, provided he can establish a particularized need.[283] By construing the provision narrowly, the Ninth Circuit erroneously held San Diego County's policy interpretation unconstitutional.

V. CONCLUSION

In *District of Columbia v. Heller*, the Supreme Court identified the core right of the Second Amendment as the right to keep and bear arms in the home for self-defense.[284] In *Woollard v. Gallagher*, the Fourth Circuit, faced with a Second Amendment challenge to Maryland's permitting scheme, upheld the good-and-substantial-reason requirement.[285] Drawing from its Second Amendment jurisprudence,[286] the Fourth Circuit engaged in

276. *Id.*

277. *Id.* at *26.

278. *Woollard*, 712 F.3d at 876.

279. *Id.* at 876, 881.

280. *See Woollard*, 712 F.3d at 869 (describing Maryland's good-and-substantial-reason requirement); *Peruta*, 2014 WL 555862, at *1 (describing San Diego County's interpretation of California's good cause requirement).

281. *Woollard*, 712 F.3d at 881; *Peruta*, 2014 WL 555862, at *21.

282. *Peruta*, 2014 WL 555862, at *21.

283. *Id.*

284. 554 U.S. 570, 628 (2008).

285. *See supra* Part III.

286. *See supra* Part II.

a straightforward application of precedent to an issue of first impression.[287] The Fourth Circuit's decision is consistent with the opinions of other federal courts.[288] Although the scope of the Second Amendment right remains uncertain, handgun-permitting schemes that grant permits to those citizens with a good and substantial reason, proper cause, or justifiable need should withstand constitutional scrutiny.[289] Handgun regulations that amount to a wholesale ban, however, likely will be held unconstitutional.[290]

287. *See supra* Part III.
288. *See supra* Part IV.
289. *See supra* Parts II.B–C.
290. *See supra* Part IV.C.