THE CONSTITUTIONAL INCONGRUITY OF "MAY-ISSUE" CONCEALED CARRY PERMIT LAWS

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Abstract

In 2019, at least 39,000 Americans were killed by guns. Given this epidemic of gun violence, it is no surprise when legislatures enact gun control measures; in fact, they should be applauded for doing so. However, the right to keep and bear arms is a fundamental constitutional right protected by the Second Amendment. While the precise scope of this right is unclear, it appears to include at least some right to carry guns outside of the home.

States have three categories of licensing schemes for those who wish to carry guns in public. In unrestricted or "constitutional carry" jurisdictions, citizens of the state do not need any license to carry. In "shall-issue" jurisdictions, citizens are required to have a permit, but the permitting entity has no discretion; provided that the applicant meets certain requirements, the government must issue the permit. In "may-issue" jurisdictions, the permitting entity has discretion as to whether to issue the permit, even if the applicant meets all the conditions. Most "may-issue" jurisdictions require applicants to prove that they have a good reason for wanting to carry a gun, such as a compelling need for self-defense. Even when these jurisdictions do not have this requirement, they give the permitting authority discretion as to whether to issue the license.

I argue in this Article that may-issue laws are unconstitutional. I examine four other fundamental constitutional rights: free speech, free exercise of religion, freedom from unreasonable searches and seizures, and access to abortion. While the government may constitutionally limit each of these rights, it may not do so based on the subjective decisions of government officials, and certainly not based on the otherwise-lawful exercise of that right. Therefore, I argue that if the right to carry a gun outside the home is protected by the Second Amendment, then laws that require citizens to prove a good reason for needing to exercise that right are unconstitutional.

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* J.D., William & Mary Law School, 2019; B.A., SUNY Geneseo, 2016. I am grateful to Sammy Block and Matt Strauser for comments and feedback on an earlier draft of this Article, and to my brother, Sam Chauvin, for tolerating a sink full of dirty dishes while I finished writing it. All opinions, and all errors, are my own.

INTRODUCTION

In 2019, 39,525 Americans were killed by guns.[1] Of that number, 24,090 committed suicide and 15,435 were killed by others.[2] A further 30,140 people were injured by firearms.[3] Children under eighteen accounted for 3,811 of the total deaths and injuries.[4] There were 417 mass shooting incidents.[5] Given that a person is shot and killed every thirteen minutes in the United States,[6] it is little wonder that in the wake of some of the most horrifying mass shootings, politicians attempt to galvanize support for common-sense gun control measures, such as universal

1. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE (Sept. 25, 2005), https://www.gunviolencearchive.org/past-tolls [https://perma.cc/U82S-9846].

2. *Id.* (Figures are updated regularly and reflect the reported figures as of Jan. 14, 2021).

3. *Id.* (Figures are updated regularly and reflect the reported figures as of Jan. 14, 2021).

4. *Id.* (Figures are updated regularly and reflect the reported figures as of Jan. 14, 2021).

5. *Id.* Under federal law, a "mass killing" is "3 or more killings in a single incident." 6 U.S.C. § 455(d)(2)(A) (2018).

6. I calculated this based on the 2019 shooting statistics. 2019 appears to be a relatively average year, at least since Gun Violence Archive began keeping track of shootings. *See Past Summary Ledgers*, *supra* note 1.

background checks.[7] What is wonderous is that they face so much resistance when they try and implement such reforms.[8]

Yet, "the right . . . to keep and bear arms" for self-defense purposes is a fundamental right protected by the Second Amendment.[9] Of course, like virtually all rights, "the right secured by the Second Amendment is not unlimited."[10] That is why, even though the Second Amendment right "shall not be infringed,"[11] there is no "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[12] After all, the states have a compelling interest in protecting public health and safety, and most objective gun control laws and regulations are reasonably related to that interest.[13] But because the Constitution protects the right to own and carry guns, states are not free to regulate guns in whatever way they choose. The precise bounds of how the states may regulate gun ownership are somewhat unclear; since the Supreme Court identified a self-defense right guaranteed by the Second Amendment in *District of Columbia v. Heller*[14] and incorporated it against the states in *McDonald v. City of Chicago*,[15] it has only considered one other Second Amendment case.[16]

While the Supreme Court has considered relatively few gun rights cases, the lower courts have begun to flesh out the Second Amendment doctrine. In the decade after *Heller* was decided, lower courts resolved

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7. *See, e.g.*, Mark Osborne & Elizabeth Thomas, *Democratic Candidates Call For Gun Control in Wake of El Paso, Dayton Shootings*, ABC NEWS (Aug. 4, 2019), https://abcnews.go.com/Politics/el-paso-native-beto-orourke-fellow-democratic-candidates/story?id=64762694 [https://perma.cc/WD9A-H2GB].

8. *E.g.*, Gregory S. Schneider, *Virginia AG Herring: 'Second Amendment Sanctuary' Proclamations Have No Force*, WASH. POST (Dec. 20, 2019, 2:51 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-ag-herring-second-amendment-sanctuary-proclamations-have-no-force/2019/12/20/5f7adcb2-234b-11ea-a153-dce4b94e4249_story.html [https://perma.cc/NWH8-GBR3].

9. U.S. CONST. amend. II; McDonald v. City of Chicago, 561 U.S. 742, 791 (2010); *see also* Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 659–60 (2019).

10. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

11. U.S. CONST. amend. II.

12. *Heller*, 554 U.S. at 626; *see also* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1538 (2015) ("[V]irtually no constitutional rights are absolute under contemporary doctrine.").

13. *E.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012). As I discuss below in Part III, I believe that the *Kachalsky* court's specific holding that New York's may-issue law was constitutional was in error.

14. 554 U.S. 570 (2008).

15. *McDonald*, 561 U.S. at 791.

16. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020). For an analysis of more than 1,000 lower court decisions concerning the Second Amendment in the decade following *Heller*, see generally Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433 (2018).

more than one thousand Second Amendment cases.[17] This has led to a maturing body of caselaw that increasingly falls in line with court analyses for other fundamental rights: many Second Amendment cases no longer present issues of first impression and are analyzed under a tiers-of-scrutiny approach.[18] Given this growing similarity between the Second Amendment and other constitutional rights, one would expect that government limits on gun ownership and possession would mirror restrictions on other constitutional rights. While the government can put at least some limits on most rights, it is required to do so in a neutral way; it cannot limit the right on a subjective basis, and certainly not based on the otherwise-legal use a person is making of the right.[19]

Many gun control laws and regulations work in precisely this manner: they establish neutral criteria for owning or possessing guns and are applied on a neutral basis. Take, for instance, New York's ban on high-capacity magazines.[20] It prohibits the knowing possession of "a large capacity ammunition feeding device . . . that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition."[21] The New York law, like any limitation on a constitutional right, can be objectively applied and reflects the legislature's judgment that the prohibition of large-capacity magazines serves the state's compelling interest in controlling crime.[22] However, not all gun control laws can be neutrally applied. Currently, nine states have what are known as "may-issue" concealed carry permit laws.[23] These laws give the permitting authority discretion as to whether to issue the permit, and typically require the applicant to show "[g]ood cause" as to why they need to carry a concealed weapon.[24]

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17. *See* Ruben & Blocher, *supra* note 16, at 1455.

18. *Id.* at 1488–96; *see also* Zick, *supra* note 9, at 660–75 (comparing the early development of First Amendment doctrine to the development of Second Amendment doctrine during its first decade).

19. *See, e.g.*, Noah C. Chauvin, *Policing the Heckler's Veto: Toward a Heightened Duty of Speech Protection on College Campuses*, 52 CREIGHTON L. REV. 29, 38–43 (2018).

20. N.Y. PENAL LAW § 265.36 (McKinney 2019).

21. *Id.*

22. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 263–64 (2d Cir. 2015).

23. The states are California, *see* CAL. PENAL CODE § 26150(a) (West 2020), Connecticut, *see* CONN. GEN. STAT. § 29-28(b) (2020), Delaware, *see* DEL. CODE ANN. tit. 11, § 1441(a) (West 2020), Hawaii, *see* HAW. REV. STAT. § 134-9 (2019), Maryland, *see* MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis 2020), Massachusetts, *see* MASS. GEN. LAWS ch. 140, § 131 (2019), New Jersey, *see* N.J. STAT. ANN. § 2C:58-4 (West 2020), New York, *see* N.Y. PENAL LAW § 400.00 (McKinney 2019), and Rhode Island, *see* 11 R.I. GEN. LAWS § 11-47-11 (2020).

24. *See, e.g.*, CAL. PENAL CODE § 26150(a) (West 2020); *see also* Jack M. Amaro, Note, *"Good Reason" Laws Under the Gun: May-Issue States and the Right to Bear Arms*, 94 CHI.-KENT L. REV. 27, 29 n.19 (2019). It is not just in the realm of concealed carry permitting that the government employs subjective standards when making decisions that implicate people's Second Amendment rights. For instance, the Third Circuit recently held that "a criminal law offender may

This is not how constitutional rights work—people do not have to show good cause for why the government should not restrict their rights. For instance, a person's First Amendment right to wear a jacket that reads "Fuck the Draft" is not premised on whether he can prove that the only way to convey his message is to use those words.[25] Rather, it is grounded in our understanding that the government is not allowed to restrict speech based on its content, outside of certain narrow categories of expression.[26] Similar principles apply to all constitutional rights. While the government may place reasonable restrictions on a constitutional right, it cannot force a person to justify his or her otherwise-lawful use of that right. The thesis of this Article is that may-issue laws are unconstitutional because they allow the government to subjectively decide whether to limit a person's Second Amendment rights.

This Article proceeds in five parts. Part I considers the scope of the Second Amendment right, may-issue laws, and court decisions relating to those laws.[27] Part II discuses four fundamental rights—freedom of speech, free exercise of religion, freedom from unreasonable searches and seizures, and access to abortion—and the bases for which the government can limit them.[28] Part III argues that in the context of how the Court treats other fundamental rights, may-issue laws are unconstitutional.[29] Part IV explains why it matters how we, as a nation, limit gun ownership.[30] Finally, Part V briefly responds to three counterarguments: that the Second Amendment does not protect carrying a weapon in public, that its language allows the government to limit gun ownership in a non-neutral fashion, and that gun ownership is different from other fundamental rights because guns are inherently dangerous.[31] A brief conclusion follows.[32]

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rebut the presumption that he lacks Second Amendment rights" if he shows that he "has shown 'that he is no more dangerous than a typical law-abiding citizen.'" Binderup v. Attorney Gen. of the U.S., 836 F.3d 336, 339, 366 (3d Cir. 2016) (en banc) (quoting United States v. Barton, 633 F.3d 168, 174 (3d Cir. 2011). Professor Adam Winkler has described this standard as a "rather abstract question [that] is impossible to answer, as it relies on predictions about the future dangerousness of the challenger and comparisons to a baseline of dangerousness of the average person that cannot ever be known." Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 256 (2018).

25. *See* Cohen v. California, 403 U.S. 15, 23–26 (1971).
26. *Id.* at 24.
27. *See infra* Part I.
28. *See infra* Part II.
29. *See infra* Part III.
30. *See infra* Part IV.
31. *See infra* Part V.
32. *See infra* Conclusion.

I. THE SECOND AMENDMENT RIGHT AND MAY-ISSUE LAWS

Courts are still in the process of fleshing out the full scope of the Second Amendment right. When the Supreme Court considered *District of Columbia v. Heller*[33] in 2008, it was the first time in almost seven decades it had taken a Second Amendment case. In *Heller*, the Court ruled that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," at least inside the home.[34] Two years later, the Court held in *McDonald v. City of Chicago* that the Due Process Clause of the Fourteenth Amendment had incorporated that right against the states.[35] Since that time, the Court has heard arguments in only one Second Amendment case.[36] Still, based on the Supreme Court precedent, as well as opinions from the lower courts, it is possible to draw some conclusions about the scope of the Second Amendment right. This Part discusses some of those conclusions. It then gives an overview of may-issue concealed carry permit laws, before discussing cases in which those laws have been challenged in court.

A. *The Scope of the Second Amendment Right*

For more than a century, the Second Amendment was understood as an individual right that protected the right to keep and bear arms for the purpose of serving in a militia. This conception of the Amendment came from two Supreme Court cases, *Presser v. Illinois*[37] and *United States v. Miller*.[38] In *Presser*, the Court considered a challenge to an Illinois statute that made it a misdemeanor, punishable by a fine of ten dollars or up to six months in jail, to form a private militia.[39] The petitioner challenged

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

34. *Id.* at 592, 628–29.

35. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

36. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019) (granting certiorari). *But see* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526–27 (2020) (vacating and remanding the case as moot). The Supreme Court's reluctance to take on Second Amendment cases has led some to bemoan what they view as the Second Amendment's treatment "as a 'second-class' right.'" Mance v. Sessions, 896 F.3d 390, 398 & n.1 (2018) (Ho, J., dissenting from denial of rehearing en banc); *see also* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari); Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari); Friedman v. City of Highland Park, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari); Jackson v. City & Cty. of San Francisco, 135 S. Ct. 2799, 2799–2800 (2015) (Thomas, J., dissenting from denial of certiorari); Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 67–68 (2018); Zick, *supra* note 9, at 675–80. The Court did issue a per curiam opinion in *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016), in which it held that the Second Amendment right to bear arms for the purpose of self-defense extended to stun guns.

37. 116 U.S. 252 (1886).

38. 307 U.S. 174 (1939).

39. *Presser*, 116 U.S. at 254.

his conviction under this law, arguing in part that it infringed on his Second Amendment rights.[40] The Court held that the statute was constitutional because it "only forb[ade] bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law," and did not "prohibit the people from keeping and bearing arms."[41]

Miller involved slightly different facts but reached a similar outcome. In *Miller*, the district court dismissed a federal indictment against the appellant for transporting a sawed-off shotgun across state lines, reasoning that the statute that outlawed such conduct violated the Second Amendment.[42] On taking up the case, the Supreme Court observed that there was no "evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' . . . ha[d] some reasonable relationship to the preservation or efficiency of a well regulated militia."[43] The Court ruled that because sawed-off shotguns were not weapons commonly used by militiamen, the indictment (and the federal statute it was based on) did not run afoul of the Second Amendment.[44]

After *Miller*, the Court did not consider a Second Amendment case for nearly seven decades. It broke that streak in 2008, when it took up *District of Columbia v. Heller*.[45] In *Heller*, a special police officer challenged a District of Columbia prohibition on the possession of handguns.[46] Specifically, the District made it a crime to have an unregistered gun, but did not allow handguns to be registered.[47] Additionally, no person was allowed to carry a handgun without a license, and lawfully owned firearms had to be disassembled or otherwise rendered unusable when stored in the home.[48] Heller challenged these restrictions on Second Amendment grounds, claiming—despite the holdings in *Presser* and *Miller* that the Second Amendment related to the

40. *Id.* at 264.

41. *Id.* at 264–65. The Court also held that "a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state." *Id.* at 265 (citing United States v. Cruikshank, 92 U.S. 542, 553 (1875)). *Contra* McDonald v. Chicago, 561 U.S. 742, 791 (2010) (holding the opposite conclusion).

42. *Miller*, 307 U.S. at 175–77.

43. *Id.* at 178.

44. *Id.* at 178–83.

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

46. *Id.* at 574–76.

47. *Id.* at 574–75.

48. *Id.* at 575.

need for a well-regulated militia—that they violated his right to defend himself within his home.[49]

In a 5-4 decision, the Court ruled that the restrictions did violate Heller's Second Amendment rights.[50] The Court first observed that its rulings in *Presser* and *Miller* did not foreclose the self-defense reading of the Second Amendment because *Presser* did not refute an individual rights view of the Amendment and *Miller* merely limited the "*types of weapons*" to which the right applies—those in common use for lawful purposes.[51] Neither case, according to the Court, explicitly held that the Second Amendment right did *not* include a right to keep and bear arms for self-defense purposes.[52] After observing that cases such as *Miller* were not "a thorough examination of the Second Amendment," the Court undertook a detailed textual and historical examination of the Amendment.[53]

The full text of the Second Amendment reads: "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."[54] The *Heller* Court first addressed whether the prefatory clause limited the right the Amendment protects.[55] The Court concluded that, while that clause announced a purpose, it did "not limit or expand the scope of the operative clause."[56] In other words, while the Second Amendment's announced purpose was to protect the ability to form a militia, the right actually guaranteed by the Amendment is "an individual right to keep and bear arms" for whatever lawful purpose; the Court gives the additional examples of self-defense and hunting.[57] The Court confirmed this analysis by examining analogous state constitutional provisions, alternative Second Amendment proposals, and interpretations of the Amendment by eighteenth and nineteenth century scholars, courts, and legislators.[58]

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49. *See id.* at 575–76; *see also* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 10–12 (2012) (describing the consensus among constitutional historians that the right to keep and bear arms was understood at the time of the founding as a right to engage in military activity).

50. *Heller*, 554 U.S. at 635.

51. *Id.* at 620–21, 624.

52. *Id.*

53. *Id.* at 623; *see also id.* at 635 ("[T]his case represents this Court's first in-depth examination of the Second Amendment . . . .").

54. U.S. CONST. amend. II.

55. *Heller*, 554 U.S. at 595–600.

56. *Id.* at 577–78.

57. *Id.* at 595, 599.

58. *See id.* at 600–19.

After examining its prior cases, the text, and the history of the Second Amendment, the Court turned to the District of Columbia laws at issue.[59] It found that "the inherent right of self-defense has been central to the Second Amendment right."[60] Because the D.C. handgun ban extended to all handguns that were used for what it called the "lawful purpose" of self-defense within the home, the Court ruled that the ban was unconstitutional.[61] The Court declined to identify what standard of scrutiny laws that restricted this self-defense right were subject to, because it found the complete ban on possessing any handguns in any situation would fail under any standard.[62] Accordingly, the Court held, D.C.'s complete ban on possessing a workable handgun in the home was invalid.[63] The Court acknowledged that "longstanding 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, [and] laws imposing conditions and qualifications on the commercial sale of arms" were presumptively valid.[64] However, the Court also recognized that "[t]he . . . enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[65]

Two years after *Heller*, the Court ruled in *McDonald v. City of Chicago* that the Second Amendment was a fundamental right, incorporated against the states by virtue of the Due Process Clause of the Fourteenth Amendment.[66] Then in 2016, the Court issued a *per curiam* opinion in *Caetano v. Massachusetts*,[67] in which it held that the Second Amendment right to bear arms for the purposes of self-defense extended to possession of stun guns.[68] However, the precise scope of the Second Amendment right remains unclear.

Many commentators "read *Heller* . . . as a guarantee of *some* right to carry a weapon anywhere a confrontation may occur," including outside of the home.[69] The federal circuit courts of appeal largely agree, though

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59. *Id.* at 628.

60. *Heller*, 554 U.S. at 628.

61. *Id.* at 628–29.

62. *Id.* In the years since *Heller*, lower courts have coalesced around intermediate scrutiny as the standard by which to evaluate Second Amendment claims. *See* Ruben & Blocher, *supra* note 16, at 1499-1500; Winkler, *supra* note 24, at 255 & nn.9–12.

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

64. *Id.* at 626–27.

65. *Id.* at 634 (alteration in original).

66. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

67. 136 S. Ct. 1027 (2016) (per curiam).

68. *Id.* at 1028.

69. Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1493 (2014); *see also id.* at 1518 (alteration in original) ("*Heller* requires that courts protect the open carry of firearms but allow for restrictions on concealed

they have not universally found the right to extend outside the home.[70] In its October 2019 term, the Supreme Court considered a case, *New York State Pistol & Rifle Ass'n v. City of New York*,[71] in which they were asked to clarify whether the Second Amendment right extends outside the home. Commentators expected that if the Court had reached the merits of that case, they would have found that at least some restrictions on carrying guns outside the home violate the Second Amendment.[72] However, the Court ultimately dismissed that case as moot on the Second Amendment issue and remanded for further proceedings.[73] As this paper was going to press, the Supreme Court agreed to take up the case of *New York Pistol & Rifle Ass'n v. Corlett*[74] during its October 2021 term; it is now widely expected that this will be the case in which the Court identifies some right to carry weapons outside the home for self-defense purposes.[75]

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carry."); James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 916–17 (2012).

70. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 256–73 (2017). Professor Brannon Denning has argued that Judge Richard Posner's opinion in *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), finding that the Second Amendment self-defense right must extend outside the home if it is to be meaningful, was an instance of judicial uncivil obedience—taking the principles of *Heller* to their logical limit as a means of implicitly criticizing them. *See* Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1, 29–31 (2018); *cf.* JUSTIN DRIVER, THE SCHOOLHOUSE GATE 121–22 (2018) (discussing how Judge Posner did the same thing with student free speech rights).

71. 140 S. Ct. 1525 (2020).

72. *See* Adam Liptak, *Second Amendment Case May Fizzle Out at the Supreme Court*, N.Y. TIMES (Dec. 2, 2019), https://www.nytimes.com/2019/12/02/us/politics/second-amendment-supreme-court.html [https://perma.cc/F22V-UTQ8]. The expectation that if the Court had reached the merits it would have explicitly extended the Second Amendment right to self-defense outside the home mired the Court in some political controversy. The Court did not need to reach the merits of the case; New York City repealed the law at issue, so the case was moot. *See id.* Concern that the Court could decide a moot case for political reasons led several United States Senate Democrats to file an amicus brief in the case, in which they tacitly threatened the Court with court-packing measures. *See* Brief of Senator Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 18, N.Y. State Rifle & Pistol Ass'n v. City of New York, No. 18-280 (U.S. Apr. 27, 2020). This led incensed Senate Republicans to send a letter to the Clerk of the Supreme Court, blasting what they referred to as the brief's threats of "political retribution" and vowing that as long as they were members of the Senate, the Court would have no more than nine members. Letter from Mitch McConnell et al., U.S. Senators, to Scott S. Harris, Clerk, U.S. Supreme Court (Aug. 29, 2019), https://www.documentcloud.org/documents/ 6366251-McConnell-to-Supremes-re-ny-gun-case.html [https://perma.cc/2MUM-EHER].

73. *N.Y. State Pistol & Rifle Ass'n*, 140 S. Ct. at 1526–27.

74. _ S. Ct. _, No. 20-843, 2021 WL 1602643, at *1 (U.S. Apr. 26, 2021).

75. *See, e.g.*, Amanda Hollis-Brusky, *The Supreme Court Just Agreed to Hear a Second Amendment Case. That's Bad News for Gun Regulation Advocates*, WASH. POST (Apr. 27, 2021, 7:45 AM), https://www.washingtonpost.com/politics/2021/04/27/supreme-court-just-agreed-hear-second-amendment-case-thats-bad-news-gun-reformers/ [https://perma.cc/LS7X-CWBF]; Ed Kilgore, *Supreme Court Accepts Case that Could Overturn State Gun Laws*, N.Y. MAG.

B. *May-Issue Laws*

Although the Supreme Court has never explicitly said that the Second Amendment includes a right to bear arms outside of the home for self-defense purposes, all fifty states and the District of Columbia have at least some mechanism for allowing citizens to concealed carry guns in public.[76] There are three basic schemes for regulating concealed carry. In unrestricted carry jurisdictions, sometimes known as "constitutional carry" jurisdictions,[77] no permit is required to concealed carry a gun in public.[78] In shall-issue jurisdictions, a person needs a license to concealed carry, but the issuing authority has no discretion to deny the permit if the applicant meets a set of clearly defined, objective criteria.[79] In contrast, in may-issue jurisdictions, people need a permit to concealed carry *and* the issuing authority has discretion to deny issuing the permit on a subjective basis, even if the applicant meets all of the objective criteria.[80]

This Article is concerned with this last category, the may-issue laws. Nine states—California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island—currently have may-issue concealed carry permitting schemes.[81] California's law is illustrative of what these statutes typically look like. It provides:

> When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:
>
> (1) The applicant is of good moral character.
>
> (2) Good cause exists for issuance of the license.
>
> (3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time

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(Apr. 26, 2021), https://nymag.com/intelligencer/2021/04/supreme-court-takes-case-that-could-overturn-state-gun-laws.html.

76. *See* Winkler, *supra* note 24, at 258–59.

77. *See id.* at 258.

78. *See* Amaro, *supra* note 24, at 29 n.20.

79. *See id.* at 29 n.18.

80. *See id.* at 29 n.19. May-issue permitting schemes are sometimes alternatively referred to as "discretionary permitting." *E.g.*, Winkler, *supra* note 24, at 257.

81. *See* CAL. PENAL CODE § 26150(a) (West 2019); CONN. GEN. STAT. § 29-28(b) (2019); DEL. CODE ANN. tit. 11, § 1441(a) (2019); HAW. REV. STAT. § 134-9 (2019); MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis 2019); MASS. GEN. LAWS ch. 140, § 131 (2019); N.J. STAT. ANN. § 2C:58-4 (West 2019); N.Y. PENAL LAW § 400.00 (McKinney 2019); 11 R.I. GEN. LAWS § 11-47-11 (2019).

> in that place of employment or business.
>
> (4) The applicant has completed a course of training as described in Section 26165.[82]

It is the second requirement, that the applicant show "good cause" for needing to carry a concealed weapon, that makes this a may-issue statute.[83] Other jurisdictions phrase this requirement slightly differently. For instance, Delaware requires that the applicant demonstrate "that the carrying of a concealed deadly weapon . . . is necessary for the protection of the applicant or the applicant's property, or both."[84] Still other states do not explicitly give any standard; Connecticut, for example, simply requires the permitting authority to determine that the applicant "is a suitable person to receive [a concealed carry] permit."[85] Regardless of their precise wording, each of the nine statutes has one key element in common: they all grant the permitting authority discretion to decide whether to issue the permit on a subjective basis.

C. *May-Issue Laws in Court*

By my count, six United States courts of appeal have considered whether may-issue laws are constitutional.[86] Those courts are the First, Second, Third, Fourth, Ninth, and D.C. Circuit Courts of Appeals.[87] While the D.C. Circuit has found may-issue laws unconstitutional,[88] every other circuit court to consider the issue has found that the laws pass constitutional muster.[89] Additionally, every state that currently has a

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82. CAL. PENAL CODE § 26150(a) (West 2019).

83. The requirement that the applicant prove that she "is of good moral character" arguably also gives the permitting authority some discretion, though sheriff's decisions with respect to this criterion are challenged less frequently than their determinations with respect to good cause. *E.g.*, Salute v. Pitchess, 132 Cal. Rptr. 345, 347 (Cal. Ct. App. 1976).

84. DEL. CODE ANN. tit. 11, § 1441(a); *see also* Application of Buresch, 672 A.2d 64, 65-66 (Del. 1996).

85. CONN. GEN. STAT. § 29-28(b) (2020); *see also* Ambrogio v. Bd. of Firearms Permit Exam'rs, 607 A.2d 460, 464 (Conn. Super. Ct. 1992).

86. Others have identified slightly different counts. *E.g.*, Winkler, *supra* note 24, at 255 & n.10.

87. *See, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 666 (D.C. Cir. 2017); Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016) (en banc); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 880-81 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012); *see also* Hightower v. City of Boston, 693 F.3d 61, 78-83 (1st Cir. 2012).

88. *Wrenn*, 864 F.3d at 666.

89. *Peruta*, 824 F.3d at 939; *Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 880–81; *Kachalsky*, 701 F.3d at 97; *Hightower*, 693 F.3d at 78–83. Some courts have found may-issue laws unconstitutional before later being reversed. *See* Peruta v. County of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc); Woollard v. Gallagher, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom.*, Woollard v. Gallagher, 712

may-issue law falls within the jurisdiction of one of the circuit courts that has found such laws constitutional.[90] This Section discusses the reasons courts have given for both upholding and striking down may-issue laws.

The Second Circuit's opinion in *Kachalsky v. County of Westchester*[91] has become the seminal decision among courts upholding may-issue laws. In that case, the court considered a challenge to a New York statute governing the issuance of concealed carry permits.[92] The may-issue statute in question required applicants to prove that "proper cause" justified them receiving a concealed carry permit.[93] In order to receive an unrestricted concealed carry license, applicants were required to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[94] The appellants challenged this restriction on Second Amendment grounds, arguing "that the Second Amendment guarantee[d] them a right to possess and carry weapons in public to defend themselves from dangerous confrontation and that New York [could] not constitutionally force them to demonstrate proper cause to exercise that right."[95]

The Second Circuit disagreed. It observed that *Heller* and *McDonald* did not squarely answer the question of whether New York's may-issue law was constitutional, and concluded "that the [Second] Amendment must have some application in the . . . context of the public possession of firearms."[96] Nonetheless, the court held that the proper cause requirement in New York's permitting statute was constitutional.[97] In reaching this determination, the court first looked to the "highly ambiguous" history and tradition of firearm regulation in the United States, and concluded that it did not clearly indicate one way or the other whether New York's

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F.3d 865 (4th Cir. 2013); *cf.* Young v. Hawaii, 896 F.3d 1044, 1050, 1071 (9th Cir. 2018), *rehearing en banc granted*, 915 F.3d 681 (9th Cir. 2019) (holding that while under *Peruta*, states may constitutionally limit the right to concealed carry in public, it is unconstitutional for them to ban open carry).

90. *See supra* note 81 and accompanying text; *see also Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/8AAQ-XNS4].

91. *Kachalsky*, 701 F.3d at 81.

92. *Id.* at 86.

93. *Id.* (quoting N.Y. PENAL LAW § 400.00(2)(f)). New York allows messengers employed by banks or express companies, state and city judges, and prison employees to receive concealed carry permits on a shall-issue basis. *Id.* (citing N.Y. PENAL LAW § 400.00).

94. *Id.* (quoting Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 256 (App. Div. 1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981)).

95. *Kachalsky*, 701 F.3d at 88.

96. *Id.* at 89.

97. *Id.* at 97.

may-issue law was constitutional.[98] The court next rejected comparisons between New York's may-issue law and prior restraints on speech, holding that unlike the classically unconstitutional prior restraints, New York's law did not give officials "unbridled discretion" to decide whether to issue a permit.[99] Finally, the court concluded that the may-issue law should be subject to intermediate scrutiny—the law had to be "substantially related to the achievement of a [compelling state] interest"[100]—because it fell outside of the Second Amendment's "core" protection for keeping guns in the home for the purposes of self-defense.[101] The court concluded that the proper cause requirement was substantially related to New York's compelling interest in "public safety and crime prevention," so it was constitutional.[102]

Subsequent decisions from circuit courts upholding may-issue laws followed *Kachalsky*'s logic.[103] These decisions applied intermediate scrutiny and found that the challenged may-issue laws were substantially related to achieving compelling state interests.[104] The one court that drastically differed from *Kachalsky* was the Ninth Circuit, in its *en banc* opinion in *Peruta v. County of San Diego*.[105] In that case, the court found that "[t]he historical materials bearing on the adoption of the Second and Fourteenth Amendments" were "remarkably consistent"; according to the court, they showed "unambiguously" that concealed carry was not intended to be protected by the Constitution.[106] Accordingly, the court held "that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public."[107] For that reason, the challenged may-issue statute was constitutional.[108]

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98. *Id.* at 91. The court observed that unlike the regulation at issue in *Heller*, New York's may-issue law was not clearly more extreme than most of its historical analogs—during the nineteenth century, some states upheld total bans on the public carry of firearms.

99. *Id.* at 92.

100. *Id.* at 96.

101. *Kachalsky*, 701 F.3d at 94.

102. *Id.* at 97.

103. *See* Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 879–80 (4th Cir. 2013).

104. *See Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 878–81.

105. *See* 824 F.3d 919 (9th Cir. 2016) (en banc).

106. *Id.* at 939. This is a far cry from the Second Circuit's determination that the history of concealed carry regulation was "highly ambiguous." *Kachalsky*, 701 F.3d at 91.

107. *Peruta*, 824 F.3d at 939. The court noted in dicta that even if the Second Amendment did include some protection of the right to concealed carry in public, the may-issue law in question would withstand intermediate scrutiny. *Id.* at 942. The Ninth Circuit is not the only United States court of appeals to hold that there is no Second Amendment protection for concealed carry; the Tenth Circuit reached the same outcome in its decision in Peterson v. Martinez, 707 F.3d 1197, 1211–12 (10th Cir. 2013).

108. *Peruta*, 824 F.3d at 939.

The D.C. Circuit is the only circuit court that has successfully struck down a may-issue law.[109] It did so in *Wrenn v. District of Columbia*,[110] a 2017 case involving a challenge to the District of Columbia's may-issue law. The challenged ordinance required an applicant for a concealed carry permit to show that she had a "good reason" for needing the permit.[111] The court found that the law implicated the "core" of the Second Amendment by limiting a person's ability to carry firearms for the purpose of self-defense.[112] The court observed that the District's may-issue statute operated as a total ban on ordinary citizens obtaining concealed carry licenses because it required applicants to prove that they had a greater need for self-defense than the average person.[113] Therefore, the court said the District's may-issue law was unconstitutional because, under *Heller*, "'complete prohibition[s]' of Second Amendment rights are always invalid."[114]

In *Woollard v. Sheridan*,[115] an opinion that was subsequently overturned on appeal, Judge Benson Everett Legg of the District of Maryland stuck down Maryland's may-issue statute for slightly different reasons.[116] The plaintiffs in that case alleged that Maryland's law, which required applicants for concealed carry permits to prove that they had "a good and substantial reason" to carry a handgun,[117] violated the Second Amendment because "it vests unbridled discretion in the officials responsible for issuing permits."[118] Judge Legg applied intermediate scrutiny and determined that while Maryland had compelling interests in preventing crime and advancing public safety, the statute was an "overly broad means by which . . . to advance this undoubtedly legitimate end," because it did not purport to keep guns out of the hands of the people most likely to misuse them, or out of places where they were most likely to be misused.[119] Moreover, Judge Legg said:

> If the Government wishes to burden a right guaranteed by the Constitution, it may do so provided that it can show a

109. The *Peruta* panel initially struck down California's law, before being overturned by the *en banc* panel. *See* Peruta v. County of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc).

110. 864 F.3d 650 (D.C. Cir. 2017).

111. *Id.* at 655.

112. *Id.* at 661.

113. *Id.* at 666.

114. *Id.* at 665 (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008)). The original *Peruta* panel reached a similar conclusion. *Peruta*, 742 F.3d at 1170.

115. 863 F. Supp. 2d 462 (D. Md. 2012)

116. *See* Woollard v. Gallagher, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom.* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

117. *Id.* at 474.

118. *Id.* at 471, 474.

119. *Id.* at 473–74.

> satisfactory justification and a sufficiently adapted method. The showing, however, is always the Government's to make. A citizen may not be required to offer a "good and substantial reason" why he should be permitted to exercise his rights. The right's existence is all the reason he needs.[120]

For these reasons, Judge Legg ruled that Maryland's may-issue statute was unconstitutional.[121]

Despite the ample development of lower court precedent relating to may-issue laws—including now a circuit split over whether they are constitutional—the Supreme Court has consistently declined to weigh in on whether they violate the Second Amendment.[122] The Court's decision to deny certiorari in cases such as *Peruta* is part of the reason that Justice Clarence Thomas (among others) claims that "the Second Amendment [is treated] as a disfavored right."[123] The key to many of these arguments that the Second Amendment has received second-class treatment is the claim that the Second Amendment right is treated differently from other fundamental rights.[124] Professor Timothy Zick has argued persuasively that as a general matter, this is not the case.[125] But as I discuss in the two following Parts, may-issue laws *do* regulate the Second Amendment right in a manner that would be unconstitutional if it were used on other fundamental rights, because they allow government officials to grant or deny permission to exercise the right on a subjective basis.[126]

II. LIMITATIONS ON OTHER FUNDAMENTAL RIGHTS

As discussed in the Introduction, the government is permitted to place reasonable restrictions on even fundamental constitutional rights.[127]

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120. *Id.* at 475.

121. *Id.*

122. *E.g.*, Peruta v. County of San Diego, 137 S. Ct. 1995 (2017) (Thomas, J., dissenting from denial of certiorari); *see also* Joseph A. Gonnella, Comment, *Concealed Carry: Can* Heller*'s Handgun Leave the Home?*, 51 CAL. W. L. REV. 111, 139 & n.202 (2014). This is somewhat surprising, because one of the primary factors the Supreme Court considers when deciding whether to grant a petition for a writ of certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." SUP. CT. R. 10. Of course, the Supreme Court often allows circuit splits to stand, even when fundamental constitutional rights are implicated. *See* Noah C. Chauvin, *Unifying Establishment Clause Purpose, Standing, and Standards*, 50 U. MEM. L. REV. 319, 344–45 (2021).

123. *Peruta*, 137 S. Ct. at 1999; *see also* Samaha & Germano, *supra* note 36, at 67–68; Zick, *supra* note 9, at 621–22.

124. *See* Zick, *supra* note 9, at 633.

125. *See id.* at 676 ("[T]he Second Amendment has not been subjected to any untoward or exceptional treatment in this regard either, particularly relative to how other fundamental constitutional rights have been treated by the Court.").

126. *See infra* Parts II–V.

127. *See supra* notes 10–12 and accompanying text.

While restrictions are allowed, they must be reasonable and neutral; a right cannot be restricted based on an otherwise-legal purpose for exercising it.[128] Indeed, "[t]he idea of a bureaucrat denying permission to exercise a right at his sole discretion is anathema to the very concept of fundamental rights."[129] This Part discusses this neutrality principle in the context of four fundamental constitutional rights: free speech,[130] free exercise of religion,[131] freedom from unreasonable searches and seizures,[132] and access to abortion.[133]

A. *Free Speech*

The First Amendment free speech right[134] is a useful place to begin my examination of the neutrality principle at work in constitutional rights for two reasons. First, Justice Scalia explicitly compared the Second Amendment right to the free speech right in his opinion for the Court in *Heller*, and lower courts have commonly used First Amendment reasoning by analogy in Second Amendment cases.[135] Second, the touchstone of speech regulation is content neutrality; the prohibition on government officials deciding whether to restrict a right based on the use a person is making of it—a subjective determination—is clearer here than it is with any other right.[136]

No free speech case illustrates this neutrality principle better than *National Socialist Party of America v. Village of Skokie*.[137] That case involved the American Nazi Party, who wanted to conduct a march—wearing their Nazi uniforms—in the Village of Skokie, a primarily Jewish town that was home to more than 5,000 Holocaust survivors.[138] The Nazis claimed that they merely wanted "to protest the Skokie Park District's requirement that [they] procure $350,000 of insurance prior to the[ir] use of the Skokie public parks for public assemblies"; members of the Skokie community on the other hand, felt that the march was

128. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("The very enumeration of [a] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."). In Part II.E, I argue that similar principles apply to unenumerated rights such as abortion as well. *See infra* Part II.E.

129. Bishop, *supra* note 69 at 915.

130. *See infra* Part II.A.

131. *See infra* Part II.B.

132. *See infra* Part II.C.

133. *See infra* Part II.A.

134. The First Amendment says that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

135. *Heller*, 554 U.S. at 582, 595; Kopel & Greenlee, *supra* note 70, 212–13 & n.106.

136. Chauvin, *supra* note 19, at 38–43; *see also* Noah C. Chauvin, *The Need to Increase Free Speech Protections for Student Affairs Professionals*, 32 REGENT U. L. REV. 229, 248 (2020).

137. 432 U.S. 43 (1977); *see* PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE 2 (1999) (describing *Skokie* as a "'classic' free speech case").

138. Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 22 (Ill. 1978).

intentionally designed to intimidate Jews.[139] Initially, the Circuit Court of Cook County entered an injunction against the Nazis, prohibiting them from marching in their uniforms in Skokie.[140] The Illinois Appellate Court denied the Nazis' application for a stay pending appeal, and the Illinois Supreme Court likewise denied a motion for a stay or an expedited appeal.[141]

The Supreme Court of the United States ruled that this was unconstitutional.[142] The Court held that the denial of a stay acted as a final determination on the merits because it would deprive the Nazis of their First Amendment rights during the time the case was under appellate review.[143] The Court made clear that a state could not deny citizens their rights in this way unless it put in place strict procedural safeguards.[144] In other words, even though the Nazis' speech was odious, it was fully protected by the First Amendment. Illinois could not deny the Nazis their free speech rights even though they wished to exercise those rights for a despicable purpose.[145]

Of course, governments are allowed to put some restrictions on free speech.[146] It is perfectly constitutional for governments to outlaw

139. *Id.*

140. Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. at 43 (1977).

141. *Id.* at 43–44.

142. *Id.* at 44.

143. *Id.*

144. *Id.* (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

145. Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d at 25–26 (holding, "albeit reluctantly," that the Nazis had a First Amendment right to march in their uniforms, even though those uniforms included swastikas); *id.* at 26 (ruling that even potentially hostile reactions from people who viewed the march—known in modern free speech parlance as the "heckler's veto"—were not enough to warrant restrictions on the Nazis' speech); *see also* Chauvin, *supra* note 19, at 33, 43–47 (describing the "heckler's veto," which is used in modern free speech parlance to refer to someone opposed to a speaker's message disrupting the speaker).

146. *See, e.g.*, Frederick Schauer, *Every Possible Use of Language?*, *in* THE FREE SPEECH CENTURY 33, 41 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

incitements to violence,[147] fighting words,[148] child pornography,[149] and other things.[150] For instance, laws outlawing incitement must pass the so-called *Brandenburg* test; they may only punish speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," not speech that advocates for violence in the abstract.[151] Likewise, restrictions on fighting words may only apply to "personally abusive epithets" that are "inherently likely to provoke violent reaction."[152]

Proscriptions of child pornography present a special case; child porn is so abhorrent that governments are given wide latitude to proscribe its

147. Only a narrow category of restrictions is permissible here. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (affirming that the government may punish speech as incitement only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also* NAACP v. Clairborne Hardware Co., 458 U.S. 886, 909–10 (1982) ("'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.") (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)); Chauvin, *supra* note 19, at 47–49; (discussing Supreme Court precedent for regulating speech that incited others to violence); Sean Radomski, Note, *We Helped Start the Fire: A College Sporting Event Incitement Standard*, 14 VA. SPORTS & ENT. L.J. 278, 294 (2015) (arguing for a more relaxed incitement standard at college sporting events).

148. R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) ("[Fighting words] can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*.") (emphasis in original) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); Cohen v. California, 403 U.S. 15, 20 (1971) ("[T]he States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.") (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

149. *See, e.g.*, United States v. Williams, 553 U.S. 285, 297–99 (2008) (holding that proposals to engage in illegal activity, such as activity related to child pornography, are not protected by the First Amendment); New York v. Ferber, 458 U.S. 757, 764–65 (1982) (describing the test for when laws outlawing child pornography are constitutional).

150. Governments may also proscribe credible threats of violence, harassment, obscenity, libel, and slander. *See* Chauvin, *supra* note 19, at 43. (citing Doe v. Univ. of Mich., 721 F. Supp. 852, 862–63 (E.D. Mich. 1989)). Additionally, governments are allowed to limit the speech of their employees. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); Connick v. Myers, 461 U.S. 138, 146–47 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."); Chauvin, *supra* note 136, at 241–42 (discussing restrictions on speech of public college employees). However, restrictions on the speech of government employees "must be directed at speech that has some potential to affect the [government employer's] operations." *Garcetti*, 547 U.S. at 418.

151. *Brandenburg*, 395 U.S. at 447.

152. *Cohen*, 403 U.S. at 20.

use and production.[153] However, there are limits. While governments may proscribe pornographic material that depicts actual children, material made using virtual images or young-appearing adult actors often cannot be outlawed.[154] Even child pornography, then, cannot be limited based on the repugnant content of the expression, but only on the harm that it causes when actual children are used to produce it. In sum, each time the government restricts the speech of its citizens, it must do so on a neutral basis that is divorced from the content of the speech to ensure that otherwise-legal speech is not captured by an overbroad statute.

B. *Free Exercise of Religion*

The First Amendment's free exercise clause gives constitutional protection to religious freedom.[155] The government can restrict religious practice, but it must do so on a neutral basis; it cannot prohibit an otherwise-legal practice because it is religious, nor can it discriminate among religions.[156] This principle has held true even though the test for what restrictions on religion are constitutional has changed several times over the past century and a half.

For decades, the free exercise clause was understood to protect religious beliefs, but not religious conduct. This understanding came from the Supreme Court's decision in *Reynolds v. United States*,[157] which involved a Mormon man who was convicted of bigamy.[158] The man challenged his conviction on a number of grounds, one of which was that his religious beliefs required him to practice polygamy, so the statute outlawing bigamy violated his First Amendment free exercise rights.[159] The Court disagreed, ruling that the free exercise clause "deprived [Congress] of all legislative power over mere opinion, but . . . left [it] free to reach actions which were in violation of social duties or subversive of good order."[160] Because "polygamy ha[d] always been odious among the northern and western nations of Europe," the Court concluded that the statute outlawing it was constitutional.[161] To hold otherwise, the Court

153. *See Ferber*, 458 U.S. at 763–64.

154. Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002) (citing *Ferber*, 458 U.S. at 763).

155. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

156. Although the government cannot discriminate on the basis of religious conduct, it is allowed to accommodate religious practice by exempting it from otherwise-generally applicable laws. *See* Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 WM. & MARY L. REV. 1893, 1923–26 (2019).

157. 98 U.S. 145 (1878).

158. *Id.* at 150–51.

159. *Id.* at 161–62.

160. *Id.* at 164.

161. *Id.* at 164–67.

said, would be "to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[162] This could not be tolerated.

The Warren Court greatly expanded the religious freedom protections granted by the free exercise clause. They did this, for instance, in *Sherbert v. Verner*,[163] a 1963 case involving a woman who was refused unemployment benefits because she declined to accept, on religious grounds, a job that would have required her to work on Saturdays.[164] The Supreme Court held that denying the woman unemployment benefits violated her free exercise rights, even though her refusal to work was arguably "conduct" within the meaning of *Reynolds*.[165] In reaching this decision, the Court held that governments that burdened a person's free exercise of religion must demonstrate that the regulations were narrowly tailored to achieve "a 'compelling state interest.'"[166] The Court reaffirmed that this so-called "strict scrutiny" standard[167] applied to free exercise claims in its opinion in *Wisconsin v. Yoder*.[168]

In 1990, the Court issued its opinion in *Employment Division v. Smith*,[169] in which it turned away from the strict scrutiny approach to the free exercise clause for a standard that "emphasized deference to the political branches."[170] In that case, the petitioners were fired from their jobs at a drug rehabilitation facility after "they ingested peyote [a Schedule I drug] for sacramental purposes at a ceremony of the Native American Church, of which both [were] members."[171] Oregon denied them unemployment benefits because they had been fired for cause.[172] The petitioners challenged this denial, arguing that it violated their free exercise rights.[173] The Supreme Court held that the petitioners' free

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162. *Id.* at 167.

163. 374 U.S. 398 (1963), *abrogated by* Holt v. Hobbs, 574 U.S. 352 (2015).

164. *Id.* at 399–400.

165. *See id.* at 403, 408–09.

166. *Id.* at 403.

167. "Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws . . . . To pass strict scrutiny, the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest." *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/P5T8-BGFM] (last visited Sept. 21, 2020).

168. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

169. 494 U.S. 872 (1990). 494 U.S. 872 (1990). *See generally* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA), 107 Stat. 1488, *as recognized in Hobbs*, 574 U.S. 352.

170. Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU L. REV. 167, 200.

171. *Smith*, 494 U.S. at 874.

172. *Id.*

173. *See id.* at 875.

exercise rights had not been violated.[174] To reach this decision, the Court changed the standard it used to decide free exercise cases. The Court said that generally applicable, religiously neutral laws did not violate the free exercise clause if they only incidentally burden a person's religious practice.[175]

Even under the weaker conception of the Free Exercise Clause the Court moved to in *Smith*, governments do not have *carte blanche* to burden religious exercise.[176] For instance, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[177] the Court reaffirmed the neutral and generally applicable *Smith* standard, but clarified that when a law is *not* neutral or generally applicable, strict scrutiny still applies.[178] On this basis, the Court invalidated a local ordinance that was designed to burden Santeria worshippers.[179] Similarly, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[180] the Court held that a "policy [that] expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . triggers the most exacting scrutiny."[181] The Court noted that, given its prior free exercise decisions, its application of strict scrutiny in a case in which a religious group was discriminated against based on its religion should be "unremarkable."[182]

Under whatever standard it has applied in its free exercise cases, the Supreme Court has always recognized that the government cannot infringe on people's religious freedoms based on the otherwise-legal nature of their religious practice. This is certainly true when cases are evaluated using a strict scrutiny standard. The laws at issue in *Lukumi* and *Trinity Lutheran* were subject to strict scrutiny—and were ultimately unconstitutional—because they discriminated based on religion; they were unlawful precisely because they were not neutral.[183] For laws to be subject to the lenient *Smith* standard, they must be neutral.[184] Even in

174. *Id.* at 890.

175. *Id.* at 879–80. The political reaction to the *Smith* decision was swift—and outraged. Federal lawmakers quickly passed the bipartisan Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. (2018), which purported to restore the strict scrutiny standard to free exercise cases. The Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA did not apply to state and local laws. However, it did acknowledge in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 n.1 (2006), that RFRA applies to federal statutes).

176. *E.g.*, Laycock, *supra* note 170, at 202–03.

177. 508 U.S. 520, 531–32 (1993).

178. *Id.* at 531–32.

179. *See id.* at 545–46.

180. 137 S. Ct. 2012, 2021 (2017).

181. *Id.*

182. *Id.*

183. *See Lukumi*, 508 U.S. at 545–46; *Trinity Lutheran*, 137 S. Ct. at 2021.

184. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–80 (1990).

cases such as *Smith* and *Reynolds*, in which courts uphold laws that restrict religious exercise based on what religious practices that exercise entails, they do so largely when those practices are otherwise illegal.[185] Thus, in *Smith*, it was constitutional for Oregon to deny employment benefits to people fired for consuming peyote as part of a religious sacrament because consuming peyote was illegal,[186] and in *Reynolds*, the statute outlawing bigamy was constitutional because it was not enacted to target religions that called for their members to be polygamous.[187]

C. *Freedom from Unreasonable Search and Seizure*

The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures."[188] In order to conduct a search or a seizure, the government must generally have either a warrant or probable cause.[189] However, the touchstone of the Fourth Amendment analysis is reasonableness; "there is no bright-line rule requiring law enforcement to obtain a warrant before seizing a person."[190] Regardless of whether the police seize people or evidence with or without a warrant, they must have objective, neutral reasons for doing so.[191] Two examples illustrate this point: the standards that control when the police are allowed to stop cars, and the criteria by which reports from confidential informants are evaluated.[192]

The Supreme Court articulated the standard that controls when law enforcement can stop vehicles in *Delaware v. Prouse*.[193] In that case, a police officer pulled over a car and caught the driver with marijuana in plain view.[194] The officer had no reason to make the stop; he had not witnessed the driver commit a traffic infraction, had not seen an

185. *Id.* at 874; Reynolds v. United States, 98 U.S. 145, 164–67 (1878).

186. *Smith*, 494 U.S. at 890; *see also id.* at 906 (O'Connor, J., concurring in the judgment) ("[A] religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs.").

187. *Reynolds*, 98 U.S. at 164–67.

188. U.S. CONST. amend. IV.

189. Hillary L. Kody, Note, *Standing to Challenge Familial Searches of Commercial DNA Databases*, 61 WM. & MARY L. REV. 287, 295 (2019).

190. Kyle M. Wood, Note, *Taking Shelter Under the Fourth Amendment: The Constitutionality of Policing Methods at State-Sponsored Natural Disaster Shelters*, 60 WM. & MARY L. REV. 1071, 1078 (2019).

191. *See id.*; *see also, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979); Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

192. There are a litany of other examples which are beyond the scope of this Article. For instance, when the police conduct pat-downs during investigatory stops—commonly known as *Terry* searches—they must be able to point to objective facts that created a reasonable, articulable suspicion that the person they pat-down is engaging (or about to engage in) criminal activity and is presently armed. *See Terry*, 392 U.S. at 20–22.

193. *Prouse*, 440 U.S. at 663, 648 (1979).

194. *Id.* at 650.

equipment violation, nor had he observed any suspicious activity.[195] Rather, he claimed he merely wanted to check the driver's license and registration.[196] The Court ruled that this was unconstitutional, explaining that "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard.'"[197] The officer's failure to identify objective facts supporting the stop meant that the stop violated the Fourth Amendment.[198]

Officers must similarly rely on objective facts when evaluating tips from confidential informants. The Supreme Court articulated this principle in *Alabama v. White*,[199] a case in which the police stopped the defendant after receiving an anonymous tip that she was carrying cocaine.[200] The tipster described the defendant, where she lived, and claimed that at a certain time she would be leaving her apartment in her brown Plymouth station wagon, that she would be carrying drugs in her briefcase, and that she would take them to a particular motel.[201] The police officers saw the defendant leave her home at the described time and get into the described car; they pulled her over while she was driving down the street the described motel was on.[202] She consented to a search of her vehicle, and the officers found marijuana in the briefcase.[203] The Court held that the anonymous tip had sufficient indicia of reliability to give the officers reasonable suspicion to stop the defendant.[204] The Court noted that because the police were able to independently verify many of

195. *Id.*

196. *Id.* at 650–51.

197. *Id.* at 654 (quoting *Terry*, 392 U.S. at 21). The objective standard can be probable cause or some lesser standard, such as reasonable suspicion. *See id.*

198. *Prouse*, 440 U.S. at 663. If an officer does have an objective basis for performing a vehicle stop, courts do not examine what his or her subjective basis was. *See* Whren v. United States, 517 U.S. 806, 810 (1996). Notably, the Court applies different logic when dealing with vehicle checkpoints. For instance, in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 447, 455 (1990), the Court held that a sobriety checkpoint at which all drivers were stopped and checked for signs of intoxication did not violate the Fourth Amendment because the invasion of privacy was small and the state had a strong interest in preventing drunken driving. However, even when operating these checkpoints, police are bound by objective limitations. They must operate consistently, for instance by stopping every car and following stated guidelines. *See id.* at 453.

199. 496 U.S. 325 (1990).

200. *Id.* at 327 (1990).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 330–32.

the facts the tipster conveyed, it was reasonable for them to believe that the tipster had inside knowledge of illegal activity.[205]

The Court is serious about its requirement that there be objective indicia of reliability when police make a stop or conduct a search on the basis of an anonymous tip. Thus, in *Florida v. J.L.*,[206] an anonymous tip that a black teenager wearing a plaid shirt was at a particular bus stop carrying a gun was not enough to give the officers reasonable suspicion to search him.[207] While the description of the boy was verifiably accurate, there were no objective indicators that he was *illegally* carrying the gun, so there could be no reasonable suspicion.[208] Accordingly, the stop was unconstitutional.[209]

Both vehicle-stops and evaluating information from confidential informants, then, illustrate the general principle that when the government acts in ways that implicate our constitutional rights, they must do so on an objective, neutral basis. If a police officer wishes to make a stop or to conduct a search—actions that implicate the core of the Fourth Amendment right—she must first have an objective reason for doing so. Failing that, her actions are unconstitutional.

D. *Abortion*

There is some debate over whether abortion is a fundamental right.[210] Proponents of the view that abortion is a fundamental right point to the Supreme Court's decision in *Roe v. Wade*,[211] while opponents of the fundamental rights view draw support from the Court's opinions in cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*[212] and *Gonzales v. Carhart*.[213] My purpose here is not to debate whether

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205. *White*, 496 U.S. at 332. The dissent observed that the facts conveyed by the tipster could just as easily convey inside knowledge about a neighbor's habits on her way to work. *Id.* at 333 (Stevens, J., dissenting).

206. 529 U.S. 266 (2000).

207. *Id.* at 272.

208. *Id.*

209. *Id.* at 274. The Court has said that one objective indicator of reliability is that an anonymous tip has been made via a 911 system. *Navarette v. California*, 572 U.S. 393, 400, 404 (2014). Given the increasing prevalence of doxing, this may no longer be a safe conclusion. *See* Julia M. MacAllister, Note, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 FORDHAM L. REV. 2451, 2455–62 (2017).

210. *See, e.g.*, Michael Dorf, *Symposium: Abortion Is Still a Fundamental Right*, SCOTUSBLOG (Jan. 4, 2016, 11:28 AM), https://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/ [https://perma.cc/Y6D9-ERZA].

211. 410 U.S. 113 (1973).

212. 505 U.S. 833 (1992).

213. 550 U.S. 124, 158, 166 (2007) (ostensibly equating *Casey*'s undue burden standard to the rational basis standard most associated with non-fundamental rights). *Roe*, 410 U.S. at 152–53, 155 (holding that privacy is a fundamental constitutional right that "is broad enough to cover the abortion decision"); *Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring in part and dissenting

abortion is a fundamental right—I leave that to the experts. Rather, I assume that it is,[214] and instead merely focus on the ways in which states may permissibly restrict that right.

The Court first recognized the abortion right in its opinion in *Roe*.[215] In that case, the appellants challenged a Texas statute that made it a crime to obtain an abortion, unless doing so was necessary to save the life of the mother.[216] The appellants claimed that the Texas statute violated their Fourteenth Amendment due process rights and their rights to "marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras."[217] The Court agreed, finding that the Constitution—through either the Ninth or Fourteenth Amendment—guaranteed a "fundamental" right of privacy, a right that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[218] However, the Court acknowledged that the right was not unlimited; a woman was not "entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[219] Rather, the Court said, the woman's privacy right had to be balanced against the government's interest in, for example, protecting the health of the mother.[220] Accordingly, the Court ruled that states could not regulate abortions during the first trimester, but could regulate them during the second trimester, and that they could ban them entirely at the point of fetal viability in the third trimester.[221] *Roe*, then, gave states objective markers for when they could regulate access to the abortion right.

The Court moved away from the *Roe* trimester framework in its opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[222] In that case, the appellants challenged several provisions of the Pennsylvania Abortion Control Act of 1982.[223] The Court's decision was fractured, but the controlling plurality opinion—coauthored by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter—rejected *Roe*'s "rigid" trimester framework, which the Justices "d[id] not consider

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in part) (claiming that the controlling opinion rejected the fundamental rights framework the Court adopted in *Roe*); *Gonzales*, 550 U.S. at 158, 166 (ostensibly equating *Casey*'s undue burden standard to the rational basis standard most associated with non-fundamental rights).

214. This assumption is well supported. *See* Dorf, *supra* note 210.

215. *Roe*, 410 U.S. at 113.

216. *Id.* at 117–18.

217. *Id.* at 129.

218. *Id.* at 152–53.

219. *Id.* at 153.

220. *Id*. at 162–63.

221. *Roe*, 410 U.S. at 163–65.

222. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 872–73 (1992).

223. *Id.* at 844.

to be part of the essential holding of *Roe*."[224] The plurality noted that "[the Court's] jurisprudence relating to all liberties . . . has recognized [that], not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."[225] The plurality held that laws that merely had the "incidental effect" of burdening the abortion right were not unconstitutional.[226] However, any law that imposed an "undue burden" on a woman's right to obtain an abortion was unconstitutional.[227] Therefore, states could regulate abortion, but only on a neutral basis, and not in a way that directly prevented or overly burdened a woman's right to obtain one.[228]

In the decades following *Casey*, the undue burden test has endured.[229] Thus, the right to access abortion, too, may only be limited when the government applies neutral, objective criteria, no matter the standard the Court uses to evaluate whether regulations interfere with access to the right.[230] What those criteria are—and how they should be interpreted—is of course hotly contested.[231] But the point is that even when it comes to a right as controversial as abortion, the government may not regulate the right in a subjective manner.

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This Part has considered four fundamental constitutional rights, three enumerated and one unenumerated: the rights to free speech, free exercise of religion, freedom from unreasonable searches and seizures, and access to an abortion. Although each of these rights is protected by the Constitution, the government is still allowed to place reasonable restrictions on a person's ability to exercise them. However, for every one of these rights, the restrictions must be neutral; they cannot be made on the basis of the otherwise-legal use the person intends to make of the right.

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224. *Id.* at 872–73.

225. *Id.* at 873. The Court drew on examples from another fundamental right, voting, in making this point.

226. *Id.* at 874.

227. *Casey*, 505 U.S. at 874. *Id.*

228. *See id.*

229. *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

230. There are also strong arguments that governments should not be able to limit access to abortion based on the reason a woman has for obtaining one. *See* David S. Cohen, *The Promise and Peril of a Common Law Right to Abortion*, 114 NW. U. L. REV. ONLINE 140, 143–44 (2019) (reviewing ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY (2019)).

231. *Abortion*, 20 GEO. J. GENDER & L. 265, 311 (2019) ("One thing remains certain: the legal framework surrounding abortion will continue to be a highly contentious topic in the legislative and judicial branches at both the federal and state level.").

III. MAY-ISSUE LAWS VIOLATE THE CONSTITUTION

Given the limitations on how the government may restrict constitutional rights, discussed in Part II, may-issue concealed carry permit laws appear to be unconstitutional because they allow the permitting authority to decide whether to restrict the Second Amendment right on a subjective, often non-neutral basis. In this Part, I briefly explain why may-issue laws do infringe on a protected constitutional interest. I then explain why they are unconstitutional, both when they merely give permitting officials subjective discretion over when to issue a permit, and when they require the applicant to prove why she has a special need for a concealed carry license.

In *Heller*, the Supreme Court said that self-defense was "the core lawful purpose" of the Second Amendment.[232] Although *Heller* specifically dealt with the right to keep guns in the home for the purposes of self-defense, that does not mean there is no Second Amendment right to carry guns for self-defense purposes outside of the home.[233] Indeed, as Judge Richard Posner noted in his majority opinion in *Moore v. Madigan*,[234] "the interest in self-protection is as great outside as inside the home."[235] Given the Supreme Court's holding in *Heller*, that the Second Amendment protects the right to keep and bear arms for self-defense purposes,[236] that right must apply outside of the home as well as inside of it.

True, as discussed in Part V.A, the Supreme Court did say in *Heller* that certain longstanding gun control regulations, such as bans on concealed carry in public, are presumptively lawful.[237] But there is a protected Second Amendment interest in carrying weapons outside the home, and regulations on concealed carry implicate that interest. Therefore, if a state implements a permitting scheme that allows some form of concealed carry in public, it must, consistent with how other constitutional rights are regulated, use a scheme that is objective and neutral.[238]

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232. District of Columbia v. Heller, 554 U.S. 570, 630 (2008).

233. *Id.* at 635; *see also* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); Meltzer, *supra* note 69, at 1518.

234. 702 F.3d 933, 942 (7th Cir. 2012).

235. *Id.* at 941.

236. *Heller*, 554 U.S. at 630.

237. *Id.* at 626. *See infra* Part V.A.

238. *See supra* Part II. Similar principles apply to other rights. For instance, in the context of free speech, governments sometimes create so-called "limited public forums, which are spaces that are not traditional public fora that the government has nonetheless opened to expressive activity." Matthew Strauser & Noah C. Chauvin, *Student-~~Athlete~~ Employee Speech*, 20 VA. SPORTS & ENT. L.J. (forthcoming 2020) (manuscript at 11), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542468. The government is not obligated

May-issue permitting schemes violate these principles. At a minimum, the laws give state officials discretion to determine, on a subjective basis, whether to issue a concealed carry permit.[239] Connecticut's may-issue statute, for instance, simply requires the permitting authority to determine whether the applicant "is a suitable person to receive [a concealed carry] permit."[240] Such discretion is anathema to the regulation of other fundamental constitutional rights. For instance, when a statute gives government officials the power to make subjective decisions about a person's speech, it is unconstitutional.[241] Similarly, a law that allows the government to make subjective decisions that burden a person's religious exercise violates the First Amendment because it is not generally applicable.[242] Police officers violate the Fourth Amendment when they pull over a car on a subjective basis absent probable cause or reasonable suspicion,[243] and if states only subjectively allowed women to access abortions, they surely would be imposing an undue burden.[244] May-issue laws are unconstitutional because they allow government officials to subjectively regulate a person's Second Amendment right. This is not how constitutional rights are supposed to work.

Admittedly, some may-issue laws have been limited by later court decisions that restrain permitting officials' discretion.[245] However, restrictions read into a may-issue statute by common law do not rescue the statute from the Second Amendment unless they remove *all* subjective decision-making. For instance, New York's may-issue law requires the permitting authority to determine that the applicant has a "proper cause" for needing to concealed carry.[246] Court decisions define proper cause as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[247] The problem with this definition is that while it does constrain permitting officials in some respects—it does give them a standard to apply[248]—it does not take away the ultimate subjectivity of the permitting decision. Permitting officials are still left to decide what the background self-defense needs of the community are and when an

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to create such fora, and it may close them at any time, but while it is operating them, it may only regulate them in a content-neutral manner. *Id.*

239. E.g., CONN. GEN. STAT. § 29-28(b).

240. *Id.*

241. *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977).

242. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531–32 (1993).

243. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

244. *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

245. *See, e.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 92 (2d Cir. 2012).

246. N.Y. PENAL LAW § 400.00 (McKinney 2019).

247. *In re* Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 256 (App. Div. 1980).

248. *See Kachalsky*, 701 F.3d at 92.

applicant's need is different enough from the general need to warrant carrying a gun. Even though caselaw has provided permitting officials with a standard the statute did not contain, they are still allowed a degree of subjective decision-making that would be unconstitutional if any other fundamental right were implicated.

May-issue laws that require the applicant to *prove* that she has a good reason for needing to carry a gun in public, such as Delaware's law, are even more constitutionally suspect.[249] As the Supreme Court said in *Heller*, "[t]he very enumeration of the [Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[250] This principle surely applies with as much force to the right to bear arms outside of the home. If there is some protected interest in carrying guns in public, the government cannot have the power to decide on a case-by-case basis whether an individual truly *needs* to exercise her rights.

No other fundamental constitutional right would tolerate a regulation that limited a person's ability to use that right based on what her use would be. In the context of free speech, this would be a classic content-based restriction.[251] The government may not restrict which words you can use based on whether it thinks you need particular phrases to adequately convey your message.[252] Likewise, the free exercise clause would be meaningless if the government was allowed to restrict a person's religious practice based on what religion she was practicing.[253] Fourth Amendment protections inure to all people, regardless of whether they are engaged in criminal activity.[254] Before her fetus is viable, a woman need not justify her desire to obtain an abortion; her right to privacy enables her to make this decision free from the prying of the state.[255] May-issue laws that require a person to prove that she truly needs to exercise her Second Amendment right therefore vary drastically from how other fundamental rights may be regulated. They are unconstitutional because "[t]he right's existence is all the reason [a person] needs" to be able to exercise it.[256]

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249. DEL. CODE ANN. tit. 11, § 1441(a) (West 2020).

250. District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

251. *See supra* Part II.A.

252. *See* Cohen v. California, 403 U.S. 15, 23–25 (1971).

253. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

254. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979).

255. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

256. *See* Woollard v. Sheridan, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom.*, Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

IV. WHY IT MATTERS HOW WE LIMIT GUN OWNERSHIP

So, may-issue concealed carry permitting laws violate the Constitution—so what? None of that changes the immense dangers caused by guns.[257] Why should we care that may-issue laws violate the Constitution, when they serve to decrease access to something designed to *kill*? I believe there are two primary reasons, which I discuss in this Part. First, governments should not be allowed to subjectively limit the lawful exercise of a constitutional right—any constitutional right.[258] If the government could limit the Second Amendment right on a subjective basis, how could we prevent them from restricting rights to speech, freedom of religion, freedom from unreasonable searches and seizures, and abortion, among many others, on an equally subjective basis? Second, and perhaps even more importantly, may-issue laws mislead the general public about how constitutional rights work. This has dramatic consequences for both the gun control debate and our public understanding of *all* constitutional rights.

A. *Governments Should Not Subjectively Limit the Lawful Exercise of Constitutional Rights*

If may-issue statutes are constitutional, then the government may regulate people's Second Amendment rights on a subjective basis. Moreover, if the laws that require citizens to prove a "proper cause" for needing to carry a gun are constitutional, then the Second Amendment allows the government to require citizens to prove that they truly need to exercise a constitutional right. The problem with this is that the principles justifying such limitations on the Second Amendment right are not easily confined to the Second Amendment context; they could just as readily be imported to limit other fundamental constitutional rights.

As described above in Part I.C, courts that have upheld may-issue laws have largely done so after finding that the laws are substantially related to the "compelling[] governmental interest[] in public safety and crime prevention."[259] Those are indeed compelling state interests. And while guns pose particularly serious risks of harming public safety or being used to commit a crime,[260] other constitutional rights can also raise serious concerns in these areas. Many people, for instance, argue that certain types of speech are a form of violence that can cause health problems.[261] Officials have attempted to justify laws that discriminate

257. *See supra* notes 1–8.

258. *See infra* Part IV.A.

259. *See supra* Part I.C; Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).

260. *See supra* notes 1–8.

261. *See* Chauvin, *supra* note 19, at 63–65. *See also supra* notes 122, 131, 133, and 134. *See also infra* note 296.

based on religion by claiming that certain religious practices are bad for public health.[262] The Fourth Amendment protects people not committing crimes and people committing crimes equally; Fourth Amendment protections are not reduced, for instance, just because a person is illegally carrying a gun.[263] And finally, abortion opponents have argued for decades that restrictions on abortion are designed to safeguard human life.[264]

There is a way to frame virtually every constitutional right as a matter of life and death, of crime and safety. If one right can be subjectively regulated because it impacts public health or safety, then there is no reason that *every* right could not be regulated for the same reasons. We should care deeply that governments have been allowed to regulate Second Amendment rights in a subjective manner because the same justifications that support may-issue laws support subjective limitations on our rights to freedom of speech, freedom of religion, freedom from unreasonable searches and seizures, and freedom to obtain an abortion.

Moreover, we should be suspicious of government efforts to subjectively limit our rights because governments consistently abuse their power to subjugate minority populations. An example from the gun control realm will illustrate this point. Several scholars have documented how gun control laws have been unevenly applied against racial minorities.[265] These scholars have identified "restrictive firearms laws . . . that were equal in the letter of the law, but unequally enforced."[266] This is the danger of laws that give government officials the subjective power to curb our constitutional rights: it is very difficult to prevent political majorities from suppressing the rights of minorities—be they racial, ethnic, religious, political, a function of gender identity or sexual orientation, or virtually any other marker—when the decisions of those in power cannot be easily evaluated for compliance with objective criteria.[267] We should not allow a constitutional right—any constitutional right—to be regulated in a subjective, non-neutral manner.

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262. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

263. *See* Florida v. J.L., 529 U.S. 266, 272 (2000).

264. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 150 (1973).

265. *See generally* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995). *But see generally* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95 (2016) (arguing that some early gun control laws were in fact intended to curb white-on-black violence).

266. Cramer, *supra* note 265, at 20.

267. *See, e.g.*, Chauvin, *supra* note 122, at 376–83.

B. *May-Issue Laws Mislead the Public About How Rights Work*

As the popular (at least among the #LawTwitter community) Twitter account @BadLegalTakes demonstrates on a daily basis, there is no shortage of misunderstanding by the general public about how the law works.[268] Public misunderstanding of any field is a bad thing, but misunderstanding of law can have particularly dire consequences because public discourse can impact the final shape that our constitutional rights take.[269] This section discusses why misunderstandings about our rights—any of our rights—are dangerous. Namely, the way we understand each of our rights informs our understandings of all of our other rights.

As Professors Zick and Winkler have documented, constitutional rhetoric has played an outsized role in how the Second Amendment has been interpreted, enforced, and supplemented.[270] One need not spend much time studying the gun rights community to see the rhetorical power that the Second Amendment holds; the phrase "shall not be infringed" is emblazoned on countless items of clothing, posters, and social media posts. As Professor Zick has noted, gun rights advocates' framing of the Second Amendment right as a guarantor of civil rights and civil liberty "appear to do little if anything to forge 'civic attachment' in the public at large" and instead seem to prime people for "perpetual culture wars."[271] While this would be concerning in its own right, it is particularly troubling because how the Second Amendment right is framed "will continue to affect" how courts interpret the Second Amendment and "fill an array of doctrinal gaps."[272]

May-issue laws may perform a similar function on the opposite side of the gun control debate. Gun control advocates often justify their positions by observing that a certain type of gun or gun accessory can be banned because it is unnecessary to perform some legal function of gun

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268. Bad Legal Takes (@BadLegalTakes), TWITTER, https://twitter.com/BadLegalTakes?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [https://perma.cc/7Q8H-YF29] (last visited Nov. 22, 2020). Two points on this. First, as much as I enjoy @BadLegalTakes, I wonder if the legal community is not doing the general public a serious disservice by punching down at Twitter trolls who do not understand how the law works. Second, when I was in high school, I was told that I must never cite to Wikipedia; now I am citing to a Twitter account. What a world.

269. *See* Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights, and Civil Liberties* 7–9 (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450947 [https://perma.cc/C9WM-29MB]).

270. *See* Winkler, *supra* note 24, at 259–61; Zick, *supra* note 269, at 46–53.

271. Zick, *supra* note 269, at 49; *cf.* Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 577–82 (2006). I should note that I am guilty in this paper of framing (at least some) gun rights as a civil liberty on par with First Amendment rights. Professor Zick indicates that this may be problematic. Zick, *supra* note 269, at 52.

272. Zick, *supra* note 269, at 51.

ownership. For instance, former Montana Governor Steve Bullock—a graduate of Columbia Law School—recently tweeted that "[n]o hunter needs a 30-round magazine, a bump stock, or an assault weapon."[273] This is doubtless true; hunters got by for millennia without any of these technologies. But it also strikes me as somewhat beside the point. The Second Amendment protects the right to keep and bear arms.[274] That most likely includes protection for bearing arms for the purpose of going hunting.[275] The reason to ban 30-round magazines, bump stocks, and assault rifles is that they are incredibly dangerous; they make it very easy for a single assailant to kill a great many people.[276] As I discuss below, the fact that they are unnecessary to perform an otherwise-legal purpose should not matter to the constitutional analysis.[277]

My favorite example of this phenomenon is the "30-50 feral hogs" meme.[278] In the wake of mass killings in El Paso and Dayton during the summer of 2019, many people expressed renewed support for common-sense gun control measures.[279] One man, responding to a tweet calling for restrictions on assault weapons, asked "[h]ow do I kill 30-50 feral hogs that run into my yard within 3-5 mins while my small kids play?"[280] The tweet went viral, and "30-50 hogs" quickly became a meme.[281] Part of it, I suspect, was people looking for anything amusing to distract them from the horrors of El Paso and Dayton. However, another part of it was people reacting to the seemingly ridiculous notion that a person would need an assault weapon to fend off feral hogs.[282] The teasing reactions were a result of people believing that no one would ever need an assault rifle to protect themselves or their families from wild hogs.

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273. Steve Bullock (@GovernorBullock), TWITTER (Oct. 21, 2019, 9:44 AM), https://twitter.com/governorbullock/status/1186277061150666753?lang=en [https://perma.cc/RJ5Y-72KV].

274. *See* U.S. CONST. amend. II.

275. *See* District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

276. Brian Roth, *Reconsidering a Federal Assault Weapons Ban in the Wake of the Aurora and Portland Shootings: Is it Constitutional in the Post-Heller Era?*, 37 NOVA L. REV. 405, 434 (2013).

277. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012); *cf.* Cohen, *supra* note 230, at 142–43 (making a similar argument in the context of abortion rights); *infra* notes 283–286.

278. *See* Dylan Matthews, *30 to 50 Feral Hogs, Explained*, VOX (Aug. 6, 2019, 1:10 PM), https://www.vox.com/future-perfect/2019/8/6/20756162/30-to-50-feral-hogs-meme-assault-weapons-guns-kids.

279. *Id.*

280. *Id.*

281. *See id*; *see also* Andy Golder, *Here They Are, The Best And Funniest Feral Hog Tweets*, BUZZFEED (Aug. 6, 2019, 1:27 PM), https://www.buzzfeed.com/andyneuenschwander/here-they-are-the-best-and-funniest-feral-hog-twe [https://perma.cc/B6NM-C54Z].

282. *See* Matthews, *supra* note 278 (noting that, according to wildlife scientists, there is good reason for this skepticism).

I believe that may-issue laws and the cases that uphold them contribute to a gun control culture in which people believe that firearms can be banned if people cannot adequately justify a need for them. May-issue laws teach that whether a person can exercise her constitutional right to keep and bear arms is at the subjective discretion of a government official.[283] Further, they indicate that if a person cannot justify her need for a gun, she may not have one.[284] As I described above in Part III, may-issue laws are unconstitutional.[285] Bans on certain weapons are perfectly lawful, but not because a person does not need them to hunt or defend her home from feral hogs. Rather, they are lawful because they are objective and are reasonably related to the government's compelling interest in protecting public health and safety.[286] Many people fail to understand this distinction, and part of the reason is that there are laws on the books that allow government officials to make subjective decisions about whether a person really needs a gun.

My fear is that this understanding of the Second Amendment will inform the public understanding of other fundamental constitutional rights. As Professor Justin Driver has written in a related context, "[t]he most prominent cost" of policies designed to eliminate any risk of violence "is the heavy toll placed on . . . notions of what it means to be an American citizen."[287] If people believe that the Second Amendment right can be limited if a person fails to adequately justify her need for it, they would have no reason to believe that other fundamental rights do not operate in the same manner. Calls to ban speech, for instance, are often premised on the idea that a person does not need to use particular words to convey her message.[288] If we are not careful, people could begin to believe that all constitutional rights can be limited unless a person can justify a need for them. Given public discourse's ability to shape the legal form of our rights, this is deeply concerning.[289]

V. COUNTERARGUMENTS

Few topics are more likely to raise political hackles than debates over gun control.[290] Gun control is a fraught issue because the stakes are so high; a gun control regulation can save lives at the same time it infringes on one of our fundamental liberties. When two such principles are in tension, there are bound to be compelling arguments on both sides. In this

283. *See supra* Part I.B.
284. *Id.*
285. *See supra* Part III.
286. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).
287. DRIVER, *supra* note 70, at 240.
288. *See* Cohen v. California, 403 U.S. 15, 20 (1971).
289. Zick, *supra* note 269, at 7–9.
290. Braman & Kahan, *supra* note 271, at 577–82.

Part, I briefly detail and respond to three counterarguments to my thesis that I initially found persuasive: that the Second Amendment does not protect carrying a weapon in public, that the Second Amendment's language limits the purposes for which a person can keep a gun, and that the right to keep and bear arms should be treated differently from other rights, given how dangerous guns are.

A. *The Second Amendment Does Not Protect Concealed Carrying a Firearm in Public*

Supporters of may-issue laws might argue that while under *Heller* the Second Amendment protects the right to keep and bear arms *in the home* for the purposes of self-defense, it does not include the right to carry firearms *outside* of the home. This position is not unsupported. Even as it recognized a Second Amendment right to possess handguns in the home for self-defense purposes, the *Heller* Court noted in dicta that certain limitations on the right to keep and bear arms, such as "prohibitions on carrying concealed weapons," are presumably lawful.[291] Several United States circuit courts of appeal have explicitly held that there is no Second Amendment right to concealed carry outside the home, reasoning that *Heller* found or indicated that total bans on concealed carry are presumably constitutional.[292]

As I discussed above in Parts I.A and III, I believe that this argument is incorrect.[293] In *Heller*, the Supreme Court identified self-defense as "the core lawful purpose" of the Second Amendment.[294] While *Heller* itself focused on the appellee's right to keep a gun in his home for the purposes of self-defense, it does not follow that there is no self-defense right outside of the home.[295] As the Seventh Circuit noted in *Moore v. Madigan*, a person's right to defend herself using a gun is surely just as important in public as it is in her home.[296] If there is a Second Amendment right to carry weapons outside of the home, then laws that regulate concealed carry implicate that right.

Even though the *Heller* Court indicated that prohibitions on concealed carry were presumably constitutional, that does not give governments freedom to regulate concealed carry in any manner they choose. As I

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291. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

292. *See, e.g.*, Peruta v. County of San Diego, 824 F.3d 919, 936, 939 (9th Cir. 2016) (en banc); Peterson v. Martinez, 707 F.3d 1197, 1211–12 (10th Cir. 2013); *see also* Kopel & Greenlee, *supra* note 70, at 268–69.

293. *See supra* Parts I.A & III.

294. *Heller*, 554 U.S. at 630.

295. *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012). *But see* Meltzer, *supra* note 69, at 1518 (arguing that *Heller* implies a right to open carry, but not concealed carry, outside the home).

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

discussed in Part III, laws that regulate concealed carry must be objective and neutral. Total bans on concealed carry meet this threshold; they do not leave decisions about issuing a concealed carry permit up to a government official's discretion, and they do not premise those decisions on the use the applicant intends to make of the permit.[297] May-issue laws on the other hand, *always* leave the permitting decision up to the discretion of a government official, and the decision is often based on the use the applicant intends to make of her right.[298] They therefore violate the neutrality principle that applies to all fundamental constitutional rights and impermissibly infringe on a person's protected interest in concealed carrying a gun in public.

B. *The Second Amendment's Limiting Language*

By its text, the Second Amendment premises the right to keep and bear arms on the necessity of "[a] well regulated Militia . . . to the security of a free State."[299] On its face then, the Amendment appears to protect the right to keep and bear arms only in the context of forming a well-regulated militia. And as I described above in Part I, that was the understanding of the Amendment for more than a century.[300] Supporters of may-issue laws, then, might well argue that the Second Amendment only protects the right to keep and bear arms when a person does so for the purpose of participating in a militia (this is a closely related argument to the one discussed in the previous Section).

This counterargument is unpersuasive because the cat is already out of the bag. While the argument is appealing on its face, it does not reflect the reality of our current constitutional landscape. The Supreme Court held in *Heller*—and reaffirmed in *McDonald*—that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense.[301] *Heller* and *McDonald* were both 5–4 decisions, but by the time the Court issued its opinion in *Caetano v. Massachusetts*, the principle that the Second Amendment applied to instruments of self-defense was so well established that when confronted with the question of whether stun guns were protected by the Second Amendment right, the

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297. *Cf.* Wrenn v. District of Columbia, 864 F.3d 650, 665–66 (D.C. Cir. 2017) (stating that the good-reason law is necessarily a total ban, even though it allows for some residents with "special" defense needs to bear arms, because it infringes on the right to carry in the face of "ordinary" self-defense needs); Amaro, *supra* note 24, at 46–47 (arguing that good reason laws impose a total carry ban on *most* people because of state discretion). Of course, if there is a Second Amendment right to carry weapons outside of the home for self-defense purposes, then jurisdictions that enact total bans on concealed carry must allow some form of open carry.

298. Amaro, *supra* note 24, at 47.

299. U.S. CONST. amend. II.

300. *See supra* notes 37–44 and accompanying text.

301. District of Columbia v. Heller, 554 U.S. 570, 628 (2008); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

Court issued a *per curiam* opinion finding that they were.[302] The Court did not even need to hear oral arguments because "Heller rejected the proposition 'that only those weapons useful in warfare are protected.'"[303] Given this line of cases, it is clear that a majority of the Court has accepted the holding in *Heller* that the Second Amendment—despite its plain text—includes a right to keep and bear arms for self-defense purposes.[304] Absent a reversal of course by the Court (a prospect that seems unlikely), the Second Amendment right is not limited to owning firearms for the sole purpose of participating in a well-regulated militia.

C. *Guns Are Dangerous*

I began this Article with a paragraph detailing how dangerous guns are.[305] As we see time and time again in the United States, guns in the hands of the wrong people pose an enormous threat to public safety.[306] This is why the government has a compelling interest in regulating guns; doing so serves the government's interests in advancing public safety and preventing crime.[307] Given the obvious dangers of guns, what prevents the government from regulating them as it does things such as dangerous speech? After all, speech is protected by the First Amendment, but that does not prevent the government from being able to ban certain types of speech, such as fighting words.[308] May-issue laws actually give greater access to guns than to certain types of dangerous speech, because they do not operate as complete bans. Or, to take the argument even further, maybe guns are just different. Perhaps they are so dangerous that the government can regulate the Second Amendment right in manners in which it would not be able to if other constitutional rights were implicated. I will address each of these counterarguments in turn.

First, of course the government can regulate dangerous things, even when those things are protected by the Constitution. Thus, the government is perfectly within its rights to ban fighting words—those words that, just by being spoken, are likely to cause a fight.[309] My argument is not that the government cannot regulate guns, it is only that when governments do so, they must do it on a neutral and objective basis. The same is true of restrictions on fighting words because governments

302. Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016).

303. *Id.* at 1028 (quoting *Heller*, 554 U.S. at 624–25).

304. *Cf.* Liptak, *supra* note 72 (reaching this same conclusion in the context of the oral argument in *New York Pistol and Rifle Ass'n v. City of N.Y.*).

305. *See supra* notes 1–8 and accompanying text.

306. *See supra* notes 1–8 and accompanying text; *see also* Zachary Hofeld, *Studying Abroad: Foreign Legislative Responses to Mass Shootings and Their Viability in the United States*, 28 MINN. J. INT'L L. 485, 511 (2019).

307. *E.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).

308. R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992).

309. *Id.* at 385.

may only restrict words that are, as a matter of general public understanding, inherently likely to cause a fight or indicate a willingness to fight.[310] Moreover, bans on fighting words do not operate as bans on all speech, but only on very particular words used in defined contexts. Thus, the appropriate Second Amendment analogue to bans on dangerous speech such as fighting words would be bans on dangerous *conduct* with guns, such as murder, or bans on carrying guns where doing so creates an unacceptable risk of violence in particularly sensitive places, such as K-12 schools or churches.[311] While governments may restrict the manner in which people *use* their guns when those uses are dangerous to other people, the fact that guns can be used to hurt other people does not give the authority to totally ban them, just as the government could not ban all speech because some of it is "dangerous."

Second, it is quite true that guns are dangerous—certainly more dangerous than any speech.[312] But as the Supreme Court has said, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[313] It is this enshrinement of the Second Amendment right that prevents governments from regulating concealed carry in a different manner than they do other constitutional rights. With the new understanding that the Second Amendment protects a personal right to carry guns for the purposes of self-defense, there must be some constitutional protection for carrying guns outside of the home.[314] Given that the right to carry firearms in places where there might be a confrontation is protected by the Constitution, there is no basis to allow the government to regulate it differently than it does with other constitutional rights. Allowing the government to regulate the Second Amendment right on a subjective basis would open the door to subjective evaluations of our freedoms of speech and religion, our freedom from unreasonable searches and seizures, and our freedom to access abortion services if we wish to do so. This is a result that cannot be borne.

CONCLUSION

The argument I have advanced in this Article is relatively narrow: may-issue concealed carry permitting laws are unconstitutional because they allow government officials to subjectively decide whether to restrict an applicant's Second Amendment rights. This is not how constitutional

310. *See* Cohen v. California, 403 U.S. 15, 20 (1971).

311. *See* GIFFORDS L. CTR, GUNS IN SCHOOLS, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/#state [https://perma.cc/WB8L-ANAY] (last visited Oct. 8, 2020)].

312. *See* Chauvin, *supra* note 19, at 63–65.

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

314. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); *supra* notes 69–72 and accompanying text.

rights work. As I discussed in Part II, the government may impose reasonable restrictions on constitutional rights such as the freedom of speech, freedom of religion, freedom from unreasonable searches and seizures, and access to abortion.[315] However, the government may not restrict those rights on the basis of the otherwise-lawful use that a person makes of those rights.

None of this is to suggest that government officials are obligated to issue a concealed carry permit to anyone who asks for one. As discussed in Part I.B, many states have shall-issue permitting schemes that still require the applicant to meet certain objective conditions before the government issues her a concealed carry permit.[316] Indeed, even a total ban on concealed carry is likely lawful.[317] Under my conception of the Second Amendment, *most* gun control measures, including universal background checks, assault weapon bans, requiring owners to report lost or stolen guns, and even so-called "red flag" laws are constitutional.[318] Such laws pass constitutional muster because they do not give government officials the opportunity to limit an applicant's Second Amendment right based on the otherwise-lawful use she intends to make of that right.

Guns are dangerous. Regulating who owns them and how they are carried is common sense. But "the right to keep and bear [a]rms" is also protected by the Constitution.[319] The government must not be allowed to restrict a constitutional right—any constitutional right—based on the otherwise-lawful use that a person plans to make of it.

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315. *See supra* Part II.

316. *See supra* Part I.B.

317. *See* District of Columbia v. Heller, 554 U.S. at 626 ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.").

318. These four measures are part of a gun control legislative package proposed by Virginia Governor Ralph Northam. *See* Schneider, *supra* note 8. A list of all eight proposed measures is available at Press Release, Office of the Governor, *Governor Northam Unveils Gun Violence Prevention Legislation Ahead of July 9 Special Session* (July 3, 2019), https://www.governor.virginia.gov/newsroom/all-releases/2019/july/headline-841482-en.html [https://perma.cc/YZK2-3U6Z].

319. U.S. CONST. amend. II.