

board of police of his or her county, shall keep or carry fire-arms of any kind”³

Deprivations of freed slaves’ Second Amendment rights featured in debates over bills leading to enactment of the Freedmen’s Bureau Act and the Civil Rights Act of 1866. Rep. Thomas Eliot, sponsor of the former, explained that the bill would render void laws like that of Opelousas, Louisiana, providing that no freedman “shall be allowed to carry fire-arms” without permission of his employer and approval by the board of police.⁴ He noted that in Kentucky “[t]he civil law prohibits the colored man from bearing arms”⁵ Accordingly, the Freedmen’s Bureau bill guaranteed the right of freedmen and all other persons “to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms.”⁶ Senator Garrett Davis said that the Founding Fathers “were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.”⁷

Yet violations persisted. Alexandria, Virginia, for example, continued “to enforce the old law against them [freedmen] in respect to whipping and carrying fire-arms”⁸ To counter such infringements, in South Carolina General D. E. Sickles issued General Order No. 1 to enforce the general right to bear arms with certain exceptions:

The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another without his consent.⁹

This order was repeatedly printed in the *Loyal Georgian*, a black newspaper.¹⁰ One issue of the paper included the following question-and-answer:

Have colored persons a right to own and carry fire arms?

A Colored Citizen

Almost every day we are asked questions similar to the above. . . .

Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms, and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.¹¹

“In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection,” observed *McDonald*.¹² Senator Samuel Pomeroy counted among the “safeguards of liberty” “the right to bear arms for the defense of himself and family and his homestead.”¹³ Introducing the Fourteenth Amendment in the Senate, Jacob Howard referred to “the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms”¹⁴ He averred, “The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”¹⁵ The new amendment was needed, Rep. George W. Julian argued, because Southern courts declared the Civil Rights Act void and some states made it “a misdemeanor for colored men to carry weapons without a license.”¹⁶

A Mississippi court declared the Civil Rights Act unconstitutional in upholding the conviction, under the 1865 Mississippi law quoted above, of a freedman for carrying a musket without a license.¹⁷ However, another Mississippi court found Mississippi’s carry ban void, asking, “Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen?” General U.S. Grant noted these decisions in a report stating, “The statute prohibiting the colored people from bearing arms, without a special license, is unjust, oppressive, and unconstitutional.”¹⁸

The Freedmen’s Bureau Act was passed by the same two-thirds-plus members of Congress who voted for the Fourteenth Amendment.¹⁹ The Act declared that:

the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of

3 Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, quoted in *McDonald*, 561 U.S. at 771. See *Harper’s Weekly*, Jan. 13, 1866, at 3 (“the statute laws of Mississippi do not recognize the negro as having any right to carry arms”).

4 Cong. Globe, 39th Cong., 1st Sess. 517 (1866).

5 *Id.* at 657. See *Heller*, 554 U.S. at 614-15.

6 Cong. Globe, *supra* note 4, at 654.

7 *Id.* at 371.

8 Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 21 (1866).

9 Cong. Globe, *supra* note 4, 908-09. See *McDonald*, 561 U.S. at 773 & n.21 (citing this order and commenting that “Union Army commanders took steps to secure the right of all citizens to keep and bear arms”).

10 *Loyal Georgian*, Feb. 3, 1866, at 1.

11 *Id.* at 3. See also *Heller*, 554 U.S. at 615; *McDonald*, 561 U.S. at 848-49 (Thomas, J., concurring).

12 *McDonald*, 561 U.S. at 775.

13 *Id.* (citing Cong. Globe, *supra* note 4, at 1182).

14 Cong. Globe, *supra* note 4, at 2765.

15 *Id.* at 2766.

16 *Id.* at 3210.

17 *New York Times*, Oct. 26, 1866, at 2; see *McDonald*, 561 U.S. at 775 n.24.

18 Cong. Globe, 39th Cong., 2d Sess. 33 (1866).

19 *Freedmen*, *supra* note 1, at 41-43.

such State or district without respect to race or color or previous condition of slavery.²⁰

The term “bear arms” was used, and as *McDonald* recognized, “[i]t would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist.”²¹ As the Court concluded, “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”²²

B. Protection Under the Civil Rights Act of 1871

“[I]n debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South,” noted *McDonald*.²³ The Act is codified at 42 U.S.C. § 1983, and it provides that any person who, under color of state law, subjects a person “to the deprivation of any rights, privileges, or immunities secured by the Constitution” is civilly liable.²⁴

The Supreme Court averred in *Patsy v. Board of Regents* that, in passing the Act, “Congress assigned to the federal courts a paramount role in protecting constitutional rights.”²⁵ Rep. Henry Dawes explained at the time that the federal courts would protect “these rights, privileges, and immunities.”²⁶ As he further noted, under the Act, the citizen “has secured to him the right to keep and bear arms in his defense.”²⁷

The *Patsy* Court also endorsed the remarks of Rep. John Coburn,²⁸ who observed that “A State may by positive enactment cut off from some the right . . . to bear arms How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?”²⁹ “Opponents of the bill also recognized this purpose,” *Patsy* continued, citing remarks of Rep. Washington Whitthorne.³⁰ Whitthorne objected that “if a police officer . . . should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, & c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the

Constitution”³¹ Of course, no one suggested that arresting someone brandishing a firearm would be actionable under the new law; supporters of the bill were concerned that police would arrest a law-abiding African American peaceably carrying a pistol.

After passage of the Act, President Ulysses S. Grant reported that KKK groups continued “to deprive colored citizens of the right to bear arms and of the right to a free ballot”³² The Klan targeted the black person, Sen. Daniel Pratt noted, who would “tell his fellow blacks of their legal rights, as for instance their right to carry arms and defend their persons and homes.”³³ While at this point the disarming of blacks was taking place more by the Klan than by state action, a report recalled the state laws of 1865-66 under which “a free person of color was only a little lower than a slave. . . . [and hence] forbidden to carry or have arms.”³⁴

The Civil Rights Act of 1871 was understood to provide a remedy to persons who were deprived of the right to keep and bear firearms. To bear arms meant to carry them, and the right to do so was never suggested to be limited to one’s house.

C. Carry Bans in Reconstruction and the Jim Crow and Anti-Immigrant Eras

The Fourteenth Amendment prohibited the states from infringing on the right to bear arms. Since they could no longer deprive persons of the right based on race or color, some states instead passed bans on the carrying of handguns altogether or instituted discretionary licensing schemes. These approaches allowed for selective enforcement against disfavored classes and the extension of privileges to favored classes. The following analyzes some such laws and judicial reactions to them.

In *Andrews v. State* (1871), the Tennessee Supreme Court held that a prohibition on both open and concealed handgun carry, as applied to the type of revolver used by soldiers, violated the state guarantee of the right of the citizens to “to bear arms for their common defense.”³⁵ It rejected the argument that the legislature could “prohibit absolutely the wearing of all and every kind of arms, under all circumstances,” as “[t]he power to regulate, does not fairly mean the power to prohibit”³⁶ The legislature could not prohibit wearing arms in “circumstances essential to make out a case of self-defense.”³⁷

In *English v. State* (1871), the Texas Supreme Court upheld a ban on carrying a pistol (but not a long gun) on one’s person unless the carrier had reasonable grounds to fear an attack or was traveling. The restriction was valid because the Texas Constitution only recognized a right to bear arms “under such regulations as

20 An Act to continue in force and to amend “An Act to establish a Bureau for the Relief of Freedmen and Refugees,” Ch. 200, §14, 14 Stat. 173, 176-77 (1866).

21 *McDonald*, 561 U.S. at 779.

22 *Id.* at 777.

23 *McDonald*, 561 U.S. at 776 (citing *Freedmen*, *supra* note 1, at 120-31).

24 17 Stat. 13 (1871).

25 *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982).

26 *Id.* (quoting Cong. Globe, 42d Cong., 1st Sess., 476 (1871)).

27 Cong. Globe, *supra* note 26, at 475-76. See *McDonald*, 561 U.S. at 835 (Thomas, J., concurring).

28 *Patsy*, 457 U.S. at 504.

29 Cong. Globe, *supra* note 26, at 459.

30 *Patsy*, 457 U.S. at 504 n.6.

31 Cong. Globe, *supra* note 26, at 337.

32 Ex. Doc. No. 268, 42d Cong., 2d Sess. 2 (1872).

33 Cong. Globe, 42d Cong., 2d Sess., 3589 (1872).

34 1 Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States 261-62 (1872).

35 *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 177, 186-87, 8 Am. Rep. 8 (1871).

36 *Id.* at 180-81.

37 *Id.* at 191.

the legislature may prescribe.”³⁸ Those tempted to cite this case as precedent today may not like its recognition of “the right to ‘keep’ such ‘arms’ as are used for purposes of war,” which included not just the musket and pistol, but also “the field piece, siege gun, and mortar.”³⁹

In *Wilson v. State* (1878), the Arkansas Supreme Court overturned a conviction for carrying a revolver, reasoning that “to prohibit the citizen from wearing or carrying a war arm . . . is an unwarranted restriction upon his constitutional right to keep and bear arms.”⁴⁰ Militia-type arms received the highest protection.

A Florida law passed in 1893 made it a crime for a person “to carry around with him, or to have in his manual possession” a Winchester or other repeating rifle without a license, which “may” be granted after posting a \$100 bond.⁴¹ That would be equivalent to \$2,859 today.⁴² The average monthly wage for farm labor in Florida in 1890 was \$19.35.⁴³ The law effectively excluded the poor and African Americans. In 1901, the law was amended to add pistols to the list. As noted in *Watson v. Stone* (1941), the law “was passed when there was a great influx of negro laborers in this State,” and it was “for the purpose of disarming the negro laborers The statute was never intended to be applied to the white population”⁴⁴ Moreover, “it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.”⁴⁵

In Virginia, advocates of “a prohibitive tax” on the sale of revolvers and requiring registration thereof appealed to racist rhetoric in support:

It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of “toting” guns has always been one of the most fruitful sources of crime Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.⁴⁶

In 1926, Virginia enacted a registration requirement and an annual tax of \$1 (the poll tax for voting was \$1.50) for each pistol or revolver, and possession of an unregistered handgun

was punishable with a fine of \$25-50 and sentencing to the State convict road force for 30-60 days.⁴⁷ Not surprisingly, “three-fourths of the convict road force are negroes.”⁴⁸ The law functioned to prevent African Americans from having arms and to conscript those who exercised their right to bear arms for forced road work.

Meanwhile, New York’s restrictive licensing for “premises” and “carry” permits originated with the Sullivan Act of 1911 in an era of mistrust against Italians and other recent immigrants.⁴⁹ The first person sentenced under the Sullivan Act was a worker named Marino Rossi, who carried a revolver because he was in fear for his life from the Black Hand criminal gang. Sentencing him to one year in Sing Sing, the judge decried the propensity of “your countrymen to carry guns,” adding, “It is unfortunate that this is the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country.”⁵⁰ The *New York Times* commented: “The Judge’s warning to the Italian community was timely and exemplary.”⁵¹ Upholding the law because it regulated the right by requiring a permit rather than prohibiting the right, the Appellate Division added, “If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power.”⁵² In New York today, the police have discretion to decide whether a person “needs” to carry a handgun, which effectively prohibits the bearing of arms and limits licenses to a privileged few.⁵³

* * *

The postbellum black codes required freedmen to obtain a license to bear arms, issuance of which was subject to the discretion of an official. The Freedmen’s Bureau Act explicitly protected the right to bear arms, and the Fourteenth Amendment was adopted in part to guarantee this right in the face of state attempts to infringe it. The Civil Rights Act of 1871 aimed to provide a remedy for deprivation of the right. Some states enacted general carry bans during Reconstruction and the Jim Crow and anti-immigrant eras to prevent disfavored classes from exercising the right to bear arms.

V. FROM THE STATE COURTS TO THE SUPREME COURT

A. State Cases Recognizing the Right to Bear Arms

This section analyzes selected cases on the right to bear arms decided by state courts in the twentieth and twenty-first centuries. These precedents generally recognize the right to bear arms outside the home for lawful purposes.

38 *English v. State*, 35 Tex. 473 (1871). The law did not prevent travelers “from placing arms in their vehicles for self-defense” *Maxwell v. State*, 38 Tex. 170, 171 (1873).

39 *English*, 35 Tex. at 476-77.

40 *Wilson v. State*, 33 Ark. 557, 559-60, 34 Am. Rep. 52 (1878).

41 1893 Fla. Laws 71-72.

42 Inflation Calculator, <https://www.in2013dollars.com/us/inflation/1893>.

43 George K. Holmes, *Wages of Farm Labor*, USDA at 29 (1912), available at <https://babel.hathitrust.org/cgi/pt?id=njp.32101050723756&view=lup&seq=745>.

44 *Watson v. Stone*, 148 Fla. 516, 524, 4 So. 2d 700 (1941) (Buford, J., concurring).

45 *Id.*

46 Editorial, *Carrying Concealed Weapons*, in 15 VIRGINIA LAW REGISTER 391-92 (R.T.W. Duke, Jr. ed., 1909).

47 1926 Va. Acts 285, 286.

48 R. Withers, *Road Building by Prisoners*, in *Proceedings of the National Conference of Charities and Correction* 209 (1908).

49 DON B. KATES, *RESTRICTING HANDGUNS* 17 (1979); L. KENNETT & J. ANDERSON, *THE GUN IN AMERICA* 177-78 (1975).

50 *New York Times*, Sept. 28, 1911.

51 *Id.*, Sept. 29, 1911.

52 *People v. Warden of City Prison*, 154 A.D. 413, 421 (1913).

53 *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (upholding law), *cert. denied*, 133 S. Ct. 1806 (2013).

Outright bans on carrying and possession of firearms and other weapons in public places or outside one's home have been held to violate the right to bear arms in Idaho, Tennessee, New Mexico, Colorado, Kansas, Oregon, and Delaware.⁵⁴ The laws at issue in those cases prohibited both open and concealed carry.

In Vermont, a ban on carrying a concealed pistol without a license, where "neither the intent nor purpose of carrying them enters into the essential elements of the offense," was found to violate the right to bear arms.⁵⁵ In Ohio, a ban on carrying a concealed weapon, to which "reasonable cause" was an affirmative defense, in the context where open carry would also lead to an arrest, was held to violate the right to bear arms.⁵⁶ In West Virginia, a ban on carrying a weapon "for any purpose without a license or other statutory authorization" was found void.⁵⁷ In Wisconsin, a ban on carrying concealed firearms, as applied in the defendant's business premises, was held violative of the right to bear arms.⁵⁸

Two precedents are worthy of special note. One from North Carolina upheld the right to open carry without a license. In *State v. Kerner*, the North Carolina Supreme Court upheld the right to openly carry a pistol without a license.⁵⁹ While protected arms did not include war planes or cannons, for the citizen "the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to 'bear,' and his right to do this is that which is guaranteed by the Constitution."⁶⁰ The right includes "all 'arms' as were in common use, and borne by the people as such when this provision was adopted."⁶¹ In view of places "where great corporations . . . terrorize their employees by armed force," law-abiding citizens must be able to "assemble with their pistols carried openly" to protect themselves "from unlawful violence without going before an official and obtaining license . . ."⁶²

The other noteworthy precedent rejected official discretion over an applicant's "need" in the issuance of a license to carry a

concealed handgun. In *Schubert v. DeBard*, the Court of Appeals of Indiana held that the right to bear arms precluded the state police from exercising discretion in deciding whether an applicant had "a proper reason" for a license to carry a handgun.⁶³ Such discretion "would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual is involved."⁶⁴

Currently, open carry requires no permit in thirty states, requires a permit in fifteen states, and is prohibited in five states.⁶⁵ Forty-one states (arguably forty-three) and the District of Columbia issue concealed carry permits to all law-abiding persons who meet training or other requirements—these are known as "shall issue" states. Vermont does not issue permits, but both concealed and open carry are lawful. Nine states allow both concealed and open carry without a permit—these are known as "constitutional carry" states. In eight states (arguably six), officials decide if a person "needs" to carry a firearm—these are "may issue" states.⁶⁶

It is in those "may issue" states where the question of whether the Second Amendment literally guarantees the right to "bear arms" is in litigation, mostly in the federal courts.

B. Heller: To "Bear" Means to "Carry"

In *District of Columbia v. Heller*, the U.S. Supreme Court held that the right to keep and bear arms extends to individuals and invalidated the District's handgun ban.⁶⁷ Its analysis clearly recognized the right to carry firearms subject to limited exceptions.

Textual interpretation has a historical basis; the Constitution "was written to be understood by the voters," and its terminology was thus used in its ordinary meaning.⁶⁸ Historical sources considered the right to "keep arms" to be "an individual right unconnected with militia service."⁶⁹ Furthermore, "At the time of the founding, as now, to 'bear' meant to 'carry.'"⁷⁰ More specifically, to bear arms meant to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."⁷¹ Reflecting such usage, in the years just before and after the adoption of the Bill of Rights,

54 *In re Brickey*, 70 P. 609 (1902) (carry ban violated Second Amendment and state guarantee); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (1928) (invalidating ban on carrying pistol on the person); *City of Las Vegas v. Moberg*, 82 N.M. 626, 627 (Ct. App. 1971) (ban on carrying weapons on the person void because "an ordinance may not deny the people the constitutionally guaranteed right to bear arms"); *City of Lakewood v. Pillow*, 501 P.2d 744 (1972) (ban on possession of firearm except in one's domicile and on carrying firearm held "unconstitutionally overbroad"); *Junction City v. Mevis*, 601 P.2d 1145 (1979) (ban on possession of firearm outside home or business held "unconstitutionally overbroad"); *State v. Blocker*, 291 Or. 255, 259 (1981) ("possession of a billy in a public place is constitutionally protected"); *Bridgeville Rifle & Pistol Club v. Small*, 176 A.3d 632 (Del. 2017) (ban on possession in state parks).

55 *State v. Rosenthal*, 55 A. 610, 610-11 (1903).

56 *Klein v. Leis*, 146 Ohio App.3d 526, 531, 535 (2002).

57 *State ex rel. City of Princeton v. Buckner*, 180 W. Va. 457, 462-63 (1988).

58 *State v. Hamdan*, 665 N.W.2d 785 (2003).

59 *State v. Kerner*, 181 N.C. 574, 577-78 (1921).

60 *Id.* at 576.

61 *Id.* at 577.

62 *Id.* at 577-78.

63 *Schubert v. DeBard*, 398 N.E. 2d 1339, 1341 (Ind. App. 1980).

64 *Id.*

65 *Open Carry*, OpenCarry.org, <https://opencarry.org/maps/map-open-carry-of-a-properly-holstered-loaded-handgun/>.

66 *Concealed Carry Permit Information by State*, USA Carry, https://www.usacarry.com/concealed_carry_permit_information.html. This source lists Connecticut and Delaware as "may issue," but these states arguably are "shall issue."

67 *Heller*, 554 U.S. 570.

68 *Id.* at 576.

69 *Id.* at 582.

70 *Id.* at 584.

71 *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

several states adopted guarantees of the right of citizens to bear arms for defense of self and state.⁷²

Although “bear arms” may be used in a military context, there is no “right to be a soldier or to wage war,” which would be an absurdity.⁷³ In historical usage, “bearing arms” meant “simply the carrying of arms,” such as “for the purpose of self-defense” or “to make war against the King.”⁷⁴

Heller thus found that the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation,” which the historical background confirmed.⁷⁵ The attempts of monarchs to disarm subjects led both to the English Declaration of Rights of 1689 and to the Second Amendment a century later.⁷⁶ Although both protected an individual right to have arms, the right was not unlimited.⁷⁷ Since “all persons [have] the right to bear arms,” “it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily.”⁷⁸

Turning to the prefatory clause, the *Heller* Court found that a “well regulated militia” was seen by the founding generation as necessary to the security of a free polity.⁷⁹ “The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense.”⁸⁰ While “the sorts of weapons protected were those ‘in common use at the time,’” there was a “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”⁸¹ But no such tradition existed of banning the carrying of common arms, and indeed some “statutes required individual arms bearing for public-safety reasons,” such as mandated carriage of firearms to church in times of danger.⁸²

It is noteworthy that neither the majority nor dissenting opinions in *Heller* so much as mention the Statute of Northampton of 1328, which punished going armed to the terror of the subjects and which is currently being promoted by advocates as somehow overriding the Second Amendment.⁸³ Going armed peaceably could be a right or a duty, and in neither case was it unlawful. As *Heller* stated: “The prefatory clause does not suggest that

preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”⁸⁴ Bearing arms for lawful purposes such as these is exactly what the Amendment protects.

Heller also addressed the public understanding of the Second Amendment from just after its ratification through the end of the nineteenth century. That included post-ratification commentary, antebellum judicial opinions, Reconstruction legislation, and post-Civil War commentary.⁸⁵ For instance, the Court discussed precedents upholding the right to carry arms openly⁸⁶ and protection in the Freedmen’s Bureau Act of 1866 for “the constitutional right to bear arms.”⁸⁷

Prior decisions of the Court had recognized the individual right to bear arms. *United States v. Cruikshank* (1876) averred that “[t]he right . . . of bearing arms for a lawful purpose . . . is not a right granted by the Constitution,” because the right pre-existed the Constitution.⁸⁸ *Presser v. Illinois* (1886) held that the right was not violated by a law forbidding (in *Heller*’s words) “private paramilitary organizations.”⁸⁹ These cases did not consider whether rights under the First and Second Amendment were incorporated against the states by the Fourteenth Amendment.⁹⁰

Heller further recalled the wording in *Robertson v. Baldwin* (1897) that the Bill of Rights codified rights “inherited from our English ancestors.”⁹¹ As *Robertson* added, these rights that were incorporated into “the fundamental law” had exceptions; “the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . .”⁹² In short, there is a right to carry arms, but regulation of the mode of carry is allowed.

Based on this analysis, *Heller* declared that the District of Columbia’s ban on the possession of handguns violated the Second Amendment. Recalling antebellum state court decisions

72 *Id.* at 584-85.

73 *Id.* at 586.

74 *Id.* at 588.

75 *Id.* at 592.

76 *Id.* at 593-94.

77 *Id.* at 595.

78 *Id.* at 588 n.10 (quoting C. HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822)).

79 *Id.* at 598.

80 *Id.* at 624-25 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

81 *Id.* at 627.

82 *Id.* at 601.

83 See Stephen P. Halbrook, *To Bear Arms for Self-Defense: A “Right of the People” or a Privilege of the Few? Part One*, 21 FEDERALIST SOC’Y REV. 46, 48-49 (2020), available at <https://fedsoc.org/commentary/publications/to-bear-arms-for-self-defense-a-right-of-the-people-or-a-privilege-of-the-few>.

84 *Heller*, 554 U.S. at 598-99.

85 *Id.* at 589.

86 *E.g.*, *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

87 See *Heller*, 554 U.S. at 614-15 (citing *Freedmen*, *supra* note 1).

88 *Id.* at 592, 619-20 (quoting *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876)). On *Cruikshank*, see *Freedmen*, *supra* note 1, chapter 7.

89 *Id.* at 621-22 (citing *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886)) (stating that the law forbade “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law”). *Presser* led a parade of four hundred men with rifles through the streets of Chicago without having a license from the governor. *Id.* See S. Halbrook, *The Right of Workers to Assemble and to Bear Arms*: *Presser v. Illinois*, 76 U. DET. MERCY L. REV. 943 (1999).

90 *Id.* at 620 n.23 (citing *Miller v. Texas*, 153 U.S. 535, 538 (1894)). In *Miller*, the defendant challenged a ban on carrying weapons and allowing arrest without a warrant as violative of the Second and Fourth Amendments. The Court rejected the argument that these rights were protected by the Fourteenth Amendment because that had not been claimed in the trial court and was waived. *Id.* See C. Leonardatos, D. Kopel, & S. Halbrook, *Miller versus Texas: Police Violence, Race Relations, Capital Punishment, & Gun-toting*, 9 J.L. & POL’Y, 737 (2001).

91 *Id.* at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

92 *Robertson*, 165 U.S. at 281.

that declared bans on openly carrying handguns unconstitutional, the Court noted that “Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”⁹³

However, the decision did not “cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” which are among the “presumptively lawful regulatory measures . . .”⁹⁴ This implies that the right to carry arms in non-sensitive places is protected.

C. *Heller*: Rejection of Interest-Balancing

Heller took a categorical approach to adjudicating disputes involving the right to bear arms and, without any consideration of a committee report that sought to justify the handgun ban or of empirical studies, held:

The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose [self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” . . . would fail constitutional muster.⁹⁵

That the need for defense is “most acute” in the home implies that it is also acute elsewhere, such as on lonely streets or deserted parking lots at night, although perhaps to a lesser degree.

Heller rejected rational basis analysis⁹⁶ as well as Justice Stephen Breyer’s proposed “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’”⁹⁷ Relying on intermediate-scrutiny cases, Justice Breyer would have applied a standard under which “the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”⁹⁸

Justice Breyer relied on the committee report which proposed the handgun ban and which was filled with data on

the misuse of handguns to justify banning them.⁹⁹ He also cited empirical studies about the role of handguns in crime, injuries, and death.¹⁰⁰ Contrary empirical studies questioning the effectiveness of the handgun ban and focusing on lawful uses of handguns, in his view, would not suffice to overcome the legislative judgment.¹⁰¹

Heller rejected the dissent’s use of interest-balancing reliance based on the committee report and empirical studies as follows:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.¹⁰²

Since *Heller* was decided, lower courts have disagreed on what standards of review to apply in Second Amendment cases. Justice Clarence Thomas, in a dissent from denial of certiorari, noted the application of two different tests in a D.C. Circuit case that came to be known as *Heller II*: the majority applied a test based on levels of scrutiny, and then-Judge Brett Kavanaugh, in dissent, argued for a test based on text, history, and tradition.¹⁰³ A number of more recent cases have been decided against Second Amendment rights based on intermediate scrutiny analyses akin to Justice Breyer’s interest-balancing test, despite the *Heller* majority’s rejection of that approach.

D. *McDonald*: A Fundamental Right, Not a Second-Class Right

Next came the Supreme Court’s decision in *McDonald v. Chicago*, which repeated the Court’s “central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”¹⁰⁴ The right to bear arms for self-defense also exists outside the home, although perhaps somewhat less notably.

McDonald held that “the right to keep and bear arms is fundamental to *our* scheme of ordered liberty” and is “deeply rooted in this Nation’s history and tradition,” and thus that the Second Amendment is applicable to the states through the Fourteenth Amendment.¹⁰⁵ Tracing the right through periods of American history from the Founding through current times, the Court called the right “fundamental” at least ten times.¹⁰⁶

McDonald rejected the view “that the Second Amendment should be singled out for special—and specially

93 *Heller*, 554 U.S. at 629 (citing *Nunn*, 1 Ga. at 251); *Andrews*, 50 Tenn. at 187; *State v. Reid*, 1 Ala. 612, 616-617 (1840)).

94 *Id.* at 626-27 & n.26.

95 *Id.* at 628-29 (citation omitted). While *Heller* invalidated the handgun ban under the categorical test, it implied that strict scrutiny could be applied based on the right being fundamental: “By the time of the founding, the right to have arms had become fundamental for English subjects. . . . Blackstone . . . cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.” *Id.* at 593-94.

96 *Id.* at 629 n.27.

97 *Id.* at 634.

98 *Id.* at 690 (Breyer, J., dissenting) (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195-196 (1997)).

99 *Id.* at 693.

100 *Id.* at 696-99.

101 *Id.* at 699-703.

102 *Id.* at 634.

103 *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of cert.) (comparing *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*) (majority opinion) with *id.* at 1271 (Kavanaugh, J., dissenting)).

104 *McDonald*, 561 U.S. at 780.

105 *Id.* at 767.

106 *Id.* at 767-91.

unfavorable—treatment,” and that it should be treated as “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees”¹⁰⁷ It invalidated Chicago’s handgun ban without according Chicago’s legislative findings any deference or even discussion.¹⁰⁸

In dissent, Justice Breyer objected that the decision would require courts to answer empirical questions such as: “Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles?”¹⁰⁹ The Court responded that it “is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise.”¹¹⁰ After all, *Heller* had rejected an interest-balancing test and held that “[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”¹¹¹

E. Caetano: *A Stun Gun in a Parking Lot*

A unanimous per curiam decision by the Supreme Court, *Caetano v. Massachusetts*, reversed and remanded a decision of the Massachusetts Supreme Judicial Court that had upheld a ban on stun guns.¹¹² The Massachusetts court erred in holding stun guns not to be protected on the basis that they were not in common use when the Second Amendment was adopted, contrary to *Heller*’s holding that the Amendment extends to “arms . . . that were not in existence at the time of the founding.”¹¹³ It erred in concluding that stun guns were “unusual” because they are a modern invention, for the same reason.¹¹⁴ And it erred in asserting “that only those weapons useful in warfare are protected,” a test that *Heller* explicitly rejected.¹¹⁵

Justice Samuel Alito, joined by Justice Thomas, concurred. Jaime Caetano got the stun gun for protection against her abusive former boyfriend. The concurring Justices specifically noted that “By arming herself, Caetano was able to protect against a physical threat that restraining orders had proved useless to prevent.”¹¹⁶

It is noteworthy that Ms. Caetano carried the stun gun outside of her home, and indeed she was said to be “homeless.”¹¹⁷ She displayed it to defend herself “one night after leaving work” when her ex-boyfriend threatened her. Police later arrested her for

possession of the stun gun in the parking lot of a supermarket.¹¹⁸ If the Court thought that no right exists to bear arms for self-defense outside the home, it might just as well have denied certiorari and let her conviction stand. While the Court has not *held* that the right to bear arms is protected outside the home, its holding in *Caetano* *assumes* that to be the case.

* * *

Heller concluded that “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field,” adding that it could “expound upon the historical justifications for the exceptions” to the right should they come before the Court.¹¹⁹ Many knocks at the Court’s door since then have gone unanswered.

VI. THE LIMBO GAME: HOW LOW CAN THE STANDARD GO?

A. *The Post-Heller Circuit Split*

The circuits are split on whether “may issue” laws violate the right of “the people” to “bear arms.” No significant litigation took place in the federal courts on that issue before *Heller* confirmed that the Second Amendment protects individual rights and *McDonald* held the Amendment to apply to the states, but since 2010, the circuits have split such that the First, Second, Third, and Fourth Circuits approve of “may issue” regimes and the D.C. and Seventh Circuits disapprove, while a Ninth Circuit panel disapproved but the case is pending rehearing en banc. This section discusses four of the leading opinions in the circuit split.

Judge Richard Posner’s opinion in *Moore v. Madigan* invalidated Illinois’ ban on carrying firearms outside the home, which did not even provide for discretionary licensing.¹²⁰ Reviewing text, history, and precedent, the court concluded: “To speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.”¹²¹ The right to self-defense is fundamental, and “a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.”¹²² The existence of the constitutional right overrides policy arguments about whether “the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban”¹²³

By contrast, *Drake v. Filko* upheld New Jersey’s discretionary carry license law.¹²⁴ The majority held that the requirement to demonstrate a “justifiable need” to publicly carry a handgun for self-defense is a “presumptively lawful,” “longstanding” regulation, and it thus “does not burden conduct within the scope of the

107 *Id.* at 780.

108 *Id.* at 750-51 (quoting Journal of Proceedings of the City Council).

109 *Id.* at 923 (Breyer, J., dissenting).

110 *Id.* at 790-91.

111 *Id.* at 791 (citation omitted).

112 *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (per curiam).

113 *Id.* at 1027.

114 *Id.* at 1028.

115 *Id.*

116 *Id.* at 1029 (Alito, J., concurring).

117 *Id.* at 1028-29.

118 *Id.*

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

120 702 F.3d 933 (7th Cir. 2012).

121 *Id.* at 936.

122 *Id.* at 937.

123 *Id.* at 939.

124 724 F.3d 426 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014).

Second Amendment's guarantee."¹²⁵ Even if it did, it would be upheld under intermediate scrutiny.¹²⁶ New Jersey had enacted the "justifiable need" requirement for concealed carry permits in 1924. The court said it was not surprising that no legislative history existed with data to justify the requirement because it could not be anticipated that the Second Amendment would be held in *Heller* and *McDonald* to be an individual right applicable to the states.¹²⁷

In dissent, Judge Thomas Hardiman wrote that to restrict "bearing" arms to the home would conflate it with "keeping" arms.¹²⁸ The ban was not "longstanding" in that, while the 1924 law required concealed carry permit applicants to show need, open carry was not banned until 1966.¹²⁹ No evidence justified a ban on carrying by the typical citizen, so the law could be upheld only under rational basis review, which *Heller* said should not be applied to the right to bear arms.¹³⁰

The en banc majority in *Peruta v. County of San Diego* held that the Second Amendment does not protect a right to carry concealed firearms, but refrained from opining on whether it protected open carry, although that too was banned in the law being challenged.¹³¹ Carry permits were limited to persons with "good cause," excluding concern for one's safety.¹³² To show that the right to bear arms had "long been subject to substantial regulation," the court recalled restrictions on the right imposed by English kings, such as a statute that "limited gun ownership to the wealthy,"¹³³ and antebellum state cases upholding concealed carry restrictions.¹³⁴

A dissent joined by four judges would have held that, as the law at issue banned both concealed and open carry, the right to bear arms was violated: "States may choose between different manners of bearing arms for self-defense so long as the right to bear arms for self-defense is accommodated."¹³⁵ As to the county's unfettered discretion, the dissent pointed out that "[s]uch discretionary schemes might lead to licenses for a privileged class including high-ranking government officials (like judges), business owners, and former military and police officers, and to the denial of licenses to the vast majority of citizens."¹³⁶ Another dissenting opinion would have held that the law did not survive either strict or intermediate scrutiny. The county provided

no evidence that "preventing law-abiding citizens, trained in the use of firearms, from carrying concealed firearms helps increase public safety and reduces gun violence."¹³⁷

Justice Thomas, joined by Justice Neil Gorsuch, dissented from the denial of certiorari in *Peruta*.¹³⁸ Based on *Heller's* interpretation of the right to "bear arms," Justice Thomas wrote that the Court "has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion."¹³⁹ He found it "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen."¹⁴⁰ Given the historical evidence and precedents, the denial of certiorari "reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."¹⁴¹ Justice Thomas concluded:

For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.¹⁴²

Finally, *Wrenn v. District of Columbia* invalidated the District of Columbia's law restricting issuance of concealed handgun licenses to those the police deem as having "good reason to fear injury."¹⁴³ The analysis was based on the textual reference to "bear arms," the common law and historical tradition, and *Heller*. The court rejected the continuing relevance of the Statute of Northampton and instead emphasized the understanding of the framers and ratifiers of the Bill of Rights:

we can sidestep the historical debate on how the first Northampton law might have hindered Londoners in the Middle Ages. Common-law rights developed over time, and American commentaries spell out what early cases imply: the mature right captured by the Amendment was not hemmed in by longstanding bans on carrying in densely populated areas. Its protections today don't give out inside the Beltway.¹⁴⁴

Since the law was a total ban on exercise of a right by the people at large, it was inappropriate to apply any level of scrutiny, strict or intermediate: "Bans on the ability of most citizens to exercise

125 *Id.* at 429.

126 *Id.* at 430.

127 *Id.* at 437-38.

128 *Id.* at 444 (Hardiman, J., dissenting).

129 *Id.* at 448-49.

130 *Id.* at 453, 455.

131 *Peruta v. County of San Diego*, 824 F.3d 919, 924, 927 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017).

132 *Id.* at 926.

133 *Id.* at 929-30.

134 *Id.* at 933-37.

135 *Id.* at 946 (Callahan, J., dissenting).

136 *Id.* at 955.

137 *Id.* at 957 (Silverman, J., dissenting).

138 *Peruta v. County of San Diego*, 137 S. Ct. 1995 (2017) (Thomas, J., dissenting from denial of cert.).

139 *Id.* at 1998.

140 *Id.*

141 *Id.* at 1999.

142 *Id.* at 1999-2000.

143 *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), *reh'g en banc denied* (Sept. 28, 2017).

144 *Id.* at 661. For more on the Statute of Northampton, see Halbrook, *To Bear Arms for Self-Defense*, *supra* note 83.

an enumerated right would have to flunk any judicial test that was appropriately written and applied, so we strike down the District’s law here apart from any particular balancing test.”¹⁴⁵ In sum, “[a]t the Second Amendment’s core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions” like licensing, but not bans on carrying without a special need.¹⁴⁶

Discretionary licensing regimes have also been upheld by the First, Second, and Fourth Circuits.¹⁴⁷ At the time of this writing, petitions for a writ of certiorari regarding the laws of New Jersey, Massachusetts, and Maryland are pending before the Court.¹⁴⁸

B. *New York City’s Ban on Transport Outside the Home*

The Supreme Court granted a petition for a writ of certiorari in *New York State Rifle & Pistol Association v. City of New York* to review New York City’s rule providing that a person with a license to keep a handgun at his or her dwelling may not take it out of the premises other than to a licensed shooting range within the City.¹⁴⁹ One of the petition’s questions presented is: “Whether the City’s ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment”¹⁵⁰

The Second Circuit had upheld New York City’s rule because it deferred to a declaration by a retired police official that allowing licensees to transport handguns to second homes or to competitions or ranges outside the City is “a potential threat to public safety.”¹⁵¹ The court speculated that City residents could simply keep another handgun at a second home, or rent or borrow a handgun at ranges or matches.¹⁵² Concluding that its review required “difficult balancing” of the constitutional right with the governmental interests, the court applied intermediate scrutiny and upheld the rule.¹⁵³

After the Supreme Court granted certiorari, the City amended its rule to allow transport directly to specified places and then argued to the Court that the case is moot. Yet even under the amended rule, to transport a handgun to a second home, one would be required to obtain yet another premises permit from the

issuing authority at that location.¹⁵⁴ Transport to hotels or other temporary abodes would not be possible. As the Court has stated elsewhere, “Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.”¹⁵⁵ At oral argument on December 2, 2019, petitioners and the amicus United States argued against mootness because injunctive relief and damages were still live issues, while the City contended that its representations sufficed to shield the petitioners from any adverse consequences. Oral argument included much discussion about whether the new rule on direct transport would allow a person to stop for coffee, use the bathroom, or make a quick visit with one’s mother who lives near a range.¹⁵⁶

On the merits, the real question is whether a Second Amendment right exists to take a firearm out of one’s home. The New York City law should be an easy case because an unloaded, inaccessible, and locked away firearm is being restricted. But recognition of the right should not stop there, but should lead to a full right to bear arms, i.e., carrying a firearm on the person outside the home for self-defense.

VII. CONCLUSION

Over two centuries passed between 1791 when the Bill of Rights was ratified and the Supreme Court’s 2008 *Heller* decision which resurrected the Second Amendment from oblivion. Despite the textual reference to “the right of the people to . . . bear arms” and *Heller*’s reading in ordinary language that “bear” means “carry,” some lower courts brush that away and hold that banning this constitutional right is justified by judicial balancing tests that they devised.

Rewriting history and tradition play a major role in this game. Its most grotesque manifestation is the misreading of the 1328 Statute of Northampton that supposedly overrides the explicit right to bear arms guaranteed by the Second Amendment. The right of Englishmen to have arms for self-defense was recognized by the Declaration of Rights of 1689 and explicated by Blackstone.

At the Founding and in the early Republic, the right to bear arms was constitutionalized, and going armed was lawful unless done in a manner to terrorize others, or in some states, if arms were openly carried. African Americans were prohibited from exercise of the right because they were slaves or, if free, were not considered citizens. The discretionary licensing policies foisted upon the freedmen by the black codes represent the clearest historical precedent for today’s “may issue” laws. The Fourteenth Amendment sought to obliterate such laws, but they crept back in during the Jim Crow and anti-immigrant eras. Today they live on in a handful of states—albeit some of the most populated states in the nation.

Whether “the people” have a right to bear arms, or whether the right is reserved for a government-approved elite, should be

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

146 *Id.*

147 *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Kachalsky*, 701 F.3d 81, *cert. denied*, 133 S. Ct. 1806 (2013); *Woollard v. Sheridan*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 571 U.S. 952 (2013).

148 *Rogers v. Grewal*, 2018 WL 2298359 (D. N.J. 2018), *summarily affirmed* (3d Cir., Sept. 21, 2018), *cert. petition filed*, No. 18-824 (Dec. 20, 2018); *Gould*, 907 F.3d 659, *cert. petition filed*, No. 18-1272 (Apr. 1, 2019); *Malpasso v. Pallozzi*, 767 F. App’x 525 (4th Cir. 2019) (*mem.*), *cert. petition filed*, No. 19-423 (Sept. 26, 2019).

149 *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2d Cir. 2018) (“*NYSRPA*”), *cert. granted*, 139 S. Ct. 939 (2019).

150 *Petition for a Writ of Certiorari, New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280 (2019).

151 *NYSRPA*, 883 F.3d at 63.

152 *Id.* at 57-58, 61.

153 *Id.* at 64.

154 See Brief of Respondents, *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280, at 5-6, 14-15 (2019).

155 *Knox v. Service Employees Internat’l Union*, 567 U.S. 298, 307 (2012).

156 Transcript of Argument, Dec. 2, 2019, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-280_m64o.pdf.

resolved by the Supreme Court. The Court took a step in that direction by granting certiorari regarding the home-bound rule in New York City. Petitioners from “may issue” states wait in line at the Court’s door, knocking. It seems to be only a matter of time before the door is opened.

