CONSTITUTIONAL LAW — SECOND AMENDMENT — SEVENTH CIRCUIT STRIKES DOWN ILLINOIS'S BAN ON PUBLIC CARRY OF READY-TO-USE FIREARMS. — *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013).

In *District of Columbia v. Heller*,[1] the Supreme Court decided that "the Second Amendment confer[s] an individual right to keep and bear arms,"[2] in particular for the purpose of self-defense inside one's own home.[3] Two years later in *McDonald v. City of Chicago*,[4] the Court held that its interpretation of the Second Amendment in *Heller* was "fully applicable to the States" under the Fourteenth Amendment.[5] However, the scope of this right outside the home was left undefined.[6] Even after these holdings, Illinois maintained its restrictive gun control statutes, which criminalized carrying a readily accessible firearm outside one's home, place of business, or another's home where the gun carrier was an invitee.[7] Recently, in *Moore v. Madigan*,[8] the Seventh Circuit held the Illinois laws unconstitutional in light of *Heller* and *McDonald*, extending the individual right to keep and bear a firearm for self-defense beyond the home and into the public sphere.[9] While Supreme Court precedent requires courts to conduct historical inquiries in Second Amendment cases, the *Moore* opinion failed to consider either the Amendment in its full constitutional context or what the Framers' conception of judicial review counsels for judges engaged in originalist interpretation. A more comprehensive originalist approach reveals that shielding the home from governmental regulation was a foundational value in the Bill of Rights and that the Founders placed a premium on judicial restraint, calling into question the *Moore* decision.

The modern version of the Illinois gun control law, the Unlawful Use of Weapons[10] (UUW) statute, was enacted in 1961.[11] In 2000, the

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1 128 S. Ct. 2783 (2008).

2 *Id.* at 2799.

3 *See id.* at 2822 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.").

4 130 S. Ct. 3020 (2010).

5 *Id.* at 3026.

6 *See Heller*, 128 S. Ct. at 2817 (saying that the need for self-defense is "most acute" within the home but declining to elaborate further).

7 720 ILL. COMP. STAT. 5/24-1(a)(4), -1(a)(10), -1.6(a) (2010). An individual was still able to carry a firearm outside the excepted areas provided that it "(i) [was] broken down in a non-functioning state; or (ii) [was] not immediately accessible; or (iii) [was] unloaded and enclosed in a case, firearm carrying box, shipping box, or other container." *Id.* § 24-1(a)(4), (10).

8 702 F.3d 933 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013).

9 *Id.* at 942.

10 720 ILL. COMP. STAT. 5/24-1.

11 *See* People v. McKnight, 237 N.E.2d 488, 490 (Ill. 1968) (explaining the significance of the 1961 amendments to the Illinois firearm-carry law).

state legislature added an additional offense — Aggravated Unlawful Use of a Weapon[12] (AUUW). Together, these laws represented one of the most stringent gun control regimes in the United States: Illinois was the only state to have a flat ban on carrying ready-to-use guns in public without an exception allowing private citizens to obtain concealed-carry permits for self-defense.[13]

In 2011, Michael Moore and others filed a complaint in the United States District Court for the Central District of Illinois, alleging that the UUW and AUUW statutes violated the Second Amendment right to carry firearms in public and seeking to enjoin their enforcement.[14] Judge Myerscough rejected the plaintiffs' claims, holding that the Second Amendment's individual right does not extend beyond the home and that even if it did, Illinois's statutes would survive intermediate scrutiny.[15] First, she found that "[n]either *Heller* nor *McDonald* recognizes a Second Amendment right to bear arms outside of the home,"[16] an interpretation popular across many other courts.[17] Since the "UUW and AUUW statutes do not limit possession of weapons for the purpose of self-defense in the home," the court held that the laws did not infringe on the plaintiffs' Second Amendment rights.[18]

Second, Judge Myerscough found that even if the Second Amendment granted some right to bear arms in public, the statutes would still survive constitutional scrutiny.[19] Employing intermediate scrutiny,[20] she asked "(1) whether the contested law[s] serve[d] an important governmental objective; and (2) whether the statute[s were] substantially related to that governmental objective."[21] The court found that public safety was a sufficient state concern to satisfy the first prong[22] and that the second element was satisfied as well, deferring to the legisla-

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12 720 ILL. COMP. STAT. 5/24-1.6; *see also* Ill. Gen. Assemb., S. Sess. Transcript for Apr. 7, 2000, at 92, http://www.ilga.gov/senate/transcripts/strans91/ST040700.pdf (statement of Sen. Petka) (describing the AUUW as a means to differentiate between otherwise law-abiding citizens and dangerous criminals, particularly members of organized street gangs).

13 *Moore*, 702 F.3d at 940; *see also* James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 912 (2012).

14 *See* Moore v. Madigan, 842 F. Supp. 2d 1092, 1096–97 (C.D. Ill. 2012).

15 *See id.* at 1110.

16 *Id.* at 1101.

17 *See id.* at 1102–03 (collecting cases).

18 *Id.* at 1105.

19 *See id.* at 1106.

20 *Heller* indicated that Second Amendment challenges must be subject to something more than rational basis review. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2817 n.27 (2008). But the district court in *Moore* believed that near–strict scrutiny was too stringent, as the UUW and AUUW statutes did not impede "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Moore*, 842 F. Supp. 2d at 1105 (quoting Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011)); *id.* at 1106–08.

21 *Moore*, 842 F. Supp. 2d at 1108.

22 *See id.*

ture's judgment that the Illinois laws were a reasonable way to protect the public from gun violence.[23]

The Seventh Circuit reversed and remanded.[24] Writing for a divided panel, Judge Posner[25] first noted his unwillingness to revisit the binding historical analyses in *Heller* and *McDonald*, which he interpreted as describing a longstanding right to bear arms for self-defense.[26] Looking to those cases' implications, Judge Posner reasoned that the Supreme Court's language about a right to "carry weapons in case of confrontation"[27] pointed to the right's existence in public since "[c]onfrontations are not limited to the home."[28] In addition, he held that both the actual language of the Second Amendment[29] and the context in which the Framers drafted it[30] support the conclusion that the right to bear arms includes the right to carry a gun outside the home. And the continued recognition of this right would not be an anachronism — an individual today is often at least as unsafe on the street as she is in her home, so to allow her to have a firearm in one circumstance and not the other would be "an arbitrary difference."[31]

After concluding that the right to carry a firearm in public was embedded in the Second Amendment, the court asked whether the Illinois statutes withstood constitutional scrutiny. Rejecting the holding of the district court, the Seventh Circuit found that the state had not made the requisite "'strong showing' that [the] gun ban was vital to public safety."[32] The breadth of the restrictions imposed by the UUW and AUUW statutes required a particularly concrete or persuasive showing that the public stood to benefit from the laws, and the state failed to provide such evidence.[33] Judge Posner then cited sources as-

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[23] *See id.* at 1109.

[24] The court directed the lower courts to enter declarations of unconstitutionality and permanent injunctions but stayed its order for 180 days to allow the state legislature to draft gun legislation consistent with its opinion. *Moore*, 702 F.3d at 942.

[25] Judge Posner was joined by Judge Flaum.

[26] *See Moore*, 702 F.3d at 935 ("The appellees ask us to repudiate the Court's historical analysis. That we can't do.").

[27] *Id.* at 936 (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008)) (internal quotation mark omitted).

[28] *Id.*

[29] *See id.* ("To speak of 'bearing' arms within one's home would at all times have been an awkward usage.").

[30] *See id.* (discussing the need of eighteenth-century frontiersmen to protect themselves).

[31] *Id.* at 937. In fact, the Seventh Circuit's interpretation that the Second Amendment provides a right to bear arms in case of confrontation may actually suggest a *greater* right outside the home than within it, as someone "is *more* vulnerable to being attacked while walking to or from her home than when inside." *Id.* (emphasis added).

[32] *Id.* at 940 (quoting United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc)).

[33] *See id.* Compared to the burden in *United States v. Skoien*, 614 F.3d 638, in which the court upheld a federal law barring convicted domestic abusers from possessing firearms, *id.* at 645, the government needed to make a "stronger showing" here that the UUW and AUUW stat-

serting that higher rates of public carry may not increase the incidence of gun violence[34] and ultimately concluded that the empirical evidence "fail[ed] to establish a pragmatic defense of the Illinois law."[35] He also implied that Illinois's status as an outlier among the states discredited its gun control system[36] and that the "meager exceptions" to its ban on public carry failed to vindicate the Second Amendment right for law-abiding citizens to bear arms for the purpose of self-defense.[37]

Judge Posner then addressed two recent sister-circuit cases upholding firearm restrictions. First, he discussed *Kachalsky v. County of Westchester*,[38] a Second Circuit decision upholding a New York law requiring applicants for public carry permits to show "proper cause."[39] Judge Posner did more than draw factual distinctions from *Kachalsky*; he directly challenged the Second Circuit's view that the Second Amendment should have greater force inside the home than in public.[40] Next, he dismissed the Fourth Circuit's suggestion from *United States v. Masciandaro*[41] that lower courts should exercise judicial restraint when considering purported Second Amendment rights that the Supreme Court has not yet addressed.[42] Eschewing this more cautious approach, Judge Posner insisted that *Heller* and *McDonald* compelled a holding that the UUW and AUUW statutes were unconstitutional.[43]

Judge Williams dissented. She agreed with the majority's belief that Supreme Court precedent required a focus on history, but she insisted that "*Heller* did not assess whether there was a pre-existing right to carry guns in public for self-defense."[44] After reviewing the historical sources, Judge Williams concluded that the drafters of the Second Amendment might not have conceptualized the right to bear arms for self-defense as equally salient outside the home as within it.[45] In light of this historical ambiguity, she cautioned against "treat[ing] *Heller* as containing broader holdings than the Court set out to establish" and urged the conclusion that recent precedent concerned only firearms

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utes were essential to public safety because they curtailed "rights of the entire law-abiding adult population of Illinois," *Moore*, 702 F.3d at 940.

34 *See Moore*, 702 F.3d at 937–38.

35 *Id.* at 939.

36 *See id.* at 940 ("If the Illinois approach were demonstrably superior, one would expect at least one or two other states to have emulated it.").

37 *Id.*

38 701 F.3d 81 (2d Cir. 2012).

39 *Id.* at 84, 101.

40 *See Moore*, 702 F.3d at 941.

41 638 F.3d 458 (4th Cir. 2011).

42 *See Moore*, 702 F.3d at 942.

43 *See id.*

44 *Id.* at 943 (Williams, J., dissenting).

45 *See id.* at 943–46.

kept at home for self-defense.[46] Judge Williams also cited "assurances" from the Supreme Court that legislatures may forbid certain dangerous individuals from carrying firearms and may prohibit anyone at all from bringing guns into certain places to further her claim that the majority read the Second Amendment too absolutely.[47] And there was yet another limiting factor: the implication in *Heller* that concealed carry — "the most common way in which people exercise their right to bear arms"[48] — could still be subject to constitutionally permissible prohibition.[49] Thus, Judge Williams found improper the majority's declaration that the UUW and AUUW statutes were unconstitutional.

The dissent then compared Illinois's "obvious interest" in protecting its citizens to the "unsettled" scope of the Second Amendment.[50] Despite the majority's skepticism about the empirical evidence, Judge Williams encouraged deference to the legislature about how to craft policy based on that information.[51] Reiterating her belief that the Illinois laws adequately safeguarded the core Second Amendment right to keep and bear arms for at-home self-defense, she urged the court not to interfere with the state's reasonable enforcement regime.[52]

Despite their obvious differences over the outcome in *Moore*, both the majority and the dissent agreed: any analysis of the Second Amendment must consider its original understanding.[53] This mandate comes from the Supreme Court[54] and has set the contours of the recent debate over the right to bear arms.[55] But despite widespread understanding — across the ideological spectrum — that history is at the core of Second Amendment interpretation, courts like the one in

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[46] *Id.* at 946 (alteration in original) (quoting United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)) (internal quotation mark omitted).

[47] *Id.* at 947 (quoting McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010)) (internal quotation mark omitted). The existence of a "patchwork of places" where gun carry could be constitutionally restricted, Judge Williams added, "suggests that the constitutional right to carry ready-to-use firearms in public for self-defense may well not exist." *Id.* at 948.

[48] *Id.* at 948 (quoting David B. Kopel, *The Right to Bear Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 126).

[49] *See id.* (citing District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008)).

[50] *Id.* at 949.

[51] *See id.* at 950–52.

[52] *See id.* at 953.

[53] *See id.* at 935–37 (majority opinion) (beginning the opinion with historical analysis, which was "central to the Court's holding in *Heller*," *id.* at 937); *id.* at 943 (Williams, J., dissenting) (agreeing with the majority that examining perspectives in 1791, the year of the Second Amendment's ratification, was essential in assessing the modern right to bear arms).

[54] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010); *Heller*, 128 S. Ct. at 2816.

[55] *See, e.g.*, Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 7–41 (2012) (employing a historical analysis to conclude that the right to bear arms for self-defense does not extend outside the home); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 623–65 (2012) (leveraging historical sources to reach the opposite conclusion).

Moore have taken a surprisingly narrow approach, focusing on definitions of the words in the Amendment or on statutes and statements that dealt explicitly with the right to bear arms. A more comprehensive and structural originalism would have to wrestle with two Founding-era principles that undermine *Moore*'s great expansion of the Second Amendment right articulated in *Heller*. First, the Framers drafted the Bill of Rights with a special concern for protecting the home from governmental intrusion, a principle that supports the security of *Heller*'s core holding while counseling against the decision in *Moore*. And second, those drafters conceived of a judiciary that gave substantial deference to considered legislative judgments.

Constructing a constitution that provided special protection for the home was of paramount importance to the Framers. James Otis, a prominent lawyer from colonial Massachusetts, declared in 1761 that "one of the most essential branches of English liberty, is the freedom of one's house,"[56] and the Supreme Court has noted that "[t]he zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear" that the colonists attached certain enhanced rights to individuals within their own homes.[57] Drawing on a conception of liberty that predated the Founding, the drafters of the Bill of Rights saw the walls of the home as impenetrable to otherwise legitimate regulation.[58] Considering the evidence that early constitutional rights were "inextricably enmeshed with the home privacy castle doctrine," the *Moore* court's indifference to the home/public distinction undermines its claims of adherence to original understanding.[59]

The Framers' intent to safeguard the home pervades the Bill of Rights. Some examples are obvious: both the Third and Fourth Amendments mention the home explicitly, and (perhaps unsurprisingly) courts have used cases litigating those provisions to articulate a special concern for the sanctity of the home.[60] Admittedly, the Second

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[56] JOHN ADAMS, *Petition of Lechmere (Arguments on Writs of Assistance)*, *in* 2 LEGAL PAPERS OF JOHN ADAMS 134, 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[57] Payton v. New York, 445 U.S. 573, 596 (1980). The maxim that "a man's house is his castle" is derived from early-seventeenth-century English common law. *See* Semayne's Case, (1604) 77 Eng. Rep. 194 (K.B.) 195; 5 Co. Rep. 91 a, 93 b.

[58] *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1305 (2009) ("For centuries, Anglo-American society has used the home as a conceptual pivot to decide what should or should not come under governmental sway.").

[59] David I. Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments — and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. REV. 1073, 1074 (2005).

[60] *See* Engblom v. Carey, 677 F.2d 957, 966–67 (2d Cir. 1982) (Kaufman, J., concurring in part and dissenting in part) ("[T]he Third Amendment . . . embodies a fundamental value the Founders of our Republic sought to insure after casting off the yoke of colonial rule: the sanctity of the

Amendment contains no textual indication that it was written with the protection of the home in mind. The exclusion of such a term might suggest that the Framers did not intend for the Second Amendment to guarantee different rights in the home and in public. But neither the First nor Fifth Amendments mention the home, and yet the Supreme Court has interpreted them to have different potencies when applied inside versus outside one's residence.[61] Moreover, it has become common practice among the courts and within legal scholarship to consider certain provisions of the Bill of Rights in the context of their neighbors.[62] The *Moore* court's insistence that the right to bear arms for self-defense is the same both inside and outside the home would make the Second Amendment unique among the provisions of the first half of the Bill of Rights. This interpretation is not necessarily wrong, but the home-protection value underpinning the Bill of Rights more generally, a value that courts have recognized when considering other amendments, makes the Second Amendment exceptionalism inherent in *Moore* a more dubious proposition.

In *Kachalsky*, the Second Circuit used the preceding structural originalist approach to determine that the Constitution contemplates greater regulation of the public sphere than the home,[63] a finding that the court then used to uphold New York's stringent public-carry firearm-licensing regime against a Second Amendment challenge.[64] But instead of engaging with the substance of the Bill of Rights–based support for the holding,[65] Judge Posner focused only on *Kachalsky*'s

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home from oppressive governmental intrusion." (footnote omitted)); *see also Payton*, 445 U.S. at 601.

[61] *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) ("States retain broad power to regulate obscenity [under the First Amendment]; that power simply does not extend to mere possession by the individual in the privacy of his own home."); *see also* Kelo v. City of New London, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting) (claiming that the Fifth Amendment created special protections for "traditional rights in real property," such as the home); Boyd v. United States, 116 U.S. 616, 630 (1886) (describing the Fifth Amendment as protecting "the sanctity of a man's home").

[62] *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2799, 2821 (2008); Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) (taking "First Amendment doctrine and extrapolat[ing] a few general principles to the Second Amendment context"); *see also* Caplan & Wimmershoff-Caplan, *supra* note 59, at 1074–75 (linking the home-bound self-defense right with "fundamental rights that are embedded in the core of the Fourth Amendment," *id.* at 1075); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 73–74 (1996) (using the First Amendment to derive insights into possible Second Amendment regulation); John L. Schwab & Thomas G. Sprankling, Houston*, We Have a Problem: Does the Second Amendment Create a Property Right to a Specific Firearm?*, 112 COLUM. L. REV. SIDEBAR 158, 168 (2012) (encouraging consideration of the Second Amendment in light of the Third and Fifth Amendments).

[63] *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 94 (2d Cir. 2012) ("Treating the home as special and subject to limited state regulation is not unique to firearm regulation; it permeates individual rights jurisprudence.").

[64] *Id.* at 101.

[65] *See id.* at 94 & n.18.

less-than-convincing use of *Lawrence v. Texas*[66] as another example of constitutional home protection, rejecting that comparison and, with it, the home/public distinction in full.[67] But *Lawrence* is the Second Circuit's least compelling piece of *originalist* evidence: the case was decided on Fourteenth Amendment grounds, and that amendment was not ratified until seventy-seven years *after* the Bill of Rights. While the *Moore* court may have justifiably dismissed the *Kachalsky* court's reliance on *Lawrence*, its failure to engage with the Second Amendment's contemporaries undermines its holding.

The Bill of Rights's concern for home protection legitimates the core holding of *Heller* while calling into question what the *Moore* court *said*: that using the home as a regulatory line is "arbitrary."[68] But another Founding-era touchstone — a presumption of judicial deference to legislative judgments — undermines what the *Moore* court *did*: exert judicial supremacy when confronted with ambiguous evidence. The Founders' conception of judicial review was one in which "[c]ourts generally did not intervene unless the unconstitutionality of a law was clear beyond doubt."[69] If any branch was seen as the first among equals, it was the legislature, not the judiciary.[70] The activism of the *Moore* court, invalidating a law with conflicting empirical and policy justifications, is much more modern than it is originalist in its unequivocal assertion of judicial power.[71]

The argument for judicial restraint as the original understanding is not without its critics. Some scholars have marshaled evidence indi-

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[66] 539 U.S. 558 (2003). *Lawrence* held that Texas's law criminalizing homosexual sexual conduct was an unconstitutional interference with individual liberty under the Due Process Clause of the Fourteenth Amendment. *See id.* at 578–79.

[67] *Moore*, 702 F.3d at 941. One of the most persistent critiques of modern originalist jurisprudence is that it selectively ignores contradictory evidence. *See, e.g.*, Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012)), *available at* http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism.

[68] *Moore*, 702 F.3d at 937.

[69] Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 99 (2001); *see also* Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 798–99 (1999) ("[F]or many Americans in the 1790s judicial review of some sort did exist. But it remained an extraordinary and solemn political action, . . . something to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution.").

[70] *See* Kramer, *supra* note 69, at 48 ("No one of the branches was meant to be superior to any other, unless it were the legislature . . . ."); *see also* Phillip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of London v. Wood, 94 COLUM. L. REV. 2091, 2093 (1994) (discussing a foundational opinion of English common law that demonstrated an extremely limited conception of the judiciary's ability to void legislative acts).

[71] *See* Jed Handelsman Shugerman, Marbury *and Judicial Deference: The Shadow of* Whittington v. Polk *and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 61–62 (2002) (arguing that robust judicial review is a modern phenomenon and that the early cases establishing it prescribe "a much more deferential and cautious approach to overturning legislation," *id.* at 62).

cating that judicial review was embedded in the structure of the Constitution itself and was a significant concern of the Framers.[72] Of particular relevance for a case like *Moore*, during the Founding era, federal circuit courts struck down state laws that were not obviously unconstitutional.[73] And of course there is *Marbury v. Madison*,[74] decided less than twelve years after the ratification of the Bill of Rights, which cemented the authority of the Supreme Court "to say what the law is."[75] While there are questions about the contemporary importance of *Marbury* in establishing the robust judicial review we see today,[76] judges arguably cannot disregard how their role has evolved, and to adhere to Framing-era judicial restraint would, to many scholars, be more an example of anachronism than originalism.[77]

This approach makes sense in certain contexts: there are some constitutional amendments, for example, that courts and legal scholars have interpreted in light of modern realities.[78] It would be counterintuitive to superimpose the Founding's conception of the role of judges onto a distinctly modern body of law. But the Second Amendment is different: *Heller* and *McDonald* require that courts view the right to bear arms through an originalist lens,[79] so it is logically consistent to try to tap into the Framers' perspective more broadly, not just for the scope of rights, but also for the scope of review. As Judge Posner him-

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[72] *See, e.g.*, Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 927–29 (2003).

[73] *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 517 (2005) ("[E]arly federal circuit case law reflects a notably close scrutiny of state statutes . . . .").

[74] 5 U.S. (1 Cranch) 137 (1803).

[75] *Id.* at 177.

[76] *See* ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 18 (1989) (claiming that *Marbury* instructed judges "to disregard laws only when such laws violate constitutional restrictions on judicial power" (emphasis omitted)); *see also id.* at 161–75 (chronicling the development of *Marbury* from its minimalist beginnings to its current status as the foundation of judicial review); David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of* Marbury v. Madison, 57 ALA. L. REV. 1041, 1052–55 (2006) (same).

[77] *See* Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 633–34 (2012) ("[A]s acceptance of judicial supremacy has seeped more and more deeply into the nation's political culture, the perceived need to defer has receded.").

[78] *See* Baze v. Rees, 553 U.S. 35, 94 (2008) (Thomas, J., concurring in the judgment) (noting that the Court's Eighth Amendment jurisprudence "finds no support in the original understanding of the Cruel and Unusual Punishments Clause"); Schenck v. United States, 249 U.S. 47, 51–52 (1919) (expanding First Amendment free speech beyond the "previous restraints" that concerned the Framers, *id.* at 51); Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1915–28 (1995) (discussing the limits of an originalist understanding of the Fourteenth Amendment in justifying *Brown v. Board of Education*).

[79] *See* Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 33, *available at* http://www.newrepublic.com/article/books/defense-looseness (noting that the Court has embraced originalism for the Second Amendment, but not the Eighth).

self has said: "Originalism without the interpretive theory that the Framers and the ratifiers of the Constitution expected the courts to use in construing constitutional provisions is faux originalism."[80]

And the original judicial-restraint ideal is far from extinct in the Second Amendment context — other courts that have recently confronted the issue of firearm regulation in the public space have deferred to reasonable legislative judgments.[81] For example, the Fourth Circuit displayed significant caution when confronting legislation that went beyond *Heller*'s core holding, saying that the scope of the Second Amendment's public self-defense right was "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree."[82] By contrast, the *Moore* court's decision to aggressively question the policy judgments of the legislature in light of mixed evidence is a bold assertion of judicial supremacy. And the ultimate determination that the UUW and AUUW statutes were unconstitutional not only strays from the core of the *Heller* opinion[83] but also from its larger originalist imperative; to have exhibited greater restraint would have been truer to the Framers' intent in a comprehensive sense.[84]

A member of the Seventh Circuit who did not sit on the *Moore* panel said: "If we are to acknowledge the historical context and the values of the period when the Second [Amendment was] adopted, then we must accept and apply the full understanding of the citizenry at that time."[85] But the court in *Moore* instead took a narrower originalist approach, neglecting the framing of the Second Amendment and the Founders' belief in a limited judicial role. In the wake of recent gun tragedies from Aurora to Newtown, courts' use of restrictive orig-inalism might leave legislatures unable to address contemporary challenges. In *Moore*, the court interpreted recent precedent as saying "that it wasn't going to make the right to bear arms depend on casualty counts."[86] But with a more context-focused originalism, the courts can display both sensitivity and constitutional fidelity.

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[80] *Id.* at 33 (focusing on judicial interpretive conventions rather than separation of powers).

[81] *See, e.g.*, Hightower v. City of Boston, 693 F.3d 61, 87 (1st Cir. 2012); United States v. Marzzarella, 614 F.3d 85, 101 (3d Cir. 2010). The Supreme Court has also been hesitant to clarify the scope of the Second Amendment right to bear arms for self-defense in public. *See, e.g.*, Williams v. Maryland, 132 S. Ct. 93 (2011) (mem.), *denying cert. to* 10 A.3d 1167 (Md. 2011); United States v. Masciandaro, 132 S. Ct. 756 (2011) (mem.), *denying cert. to* 638 F.3d 458 (4th Cir. 2011).

[82] *Masciandaro*, 638 F.3d at 475.

[83] *See Hightower*, 693 F.3d at 72 (listing many cases embracing the notion that *Heller* stands for "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" (emphasis omitted) (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008))).

[84] *See* Kramer, *supra* note 77, at 623–27 (claiming that the concept of judicial restraint emerged at the Framing rather than in the past century).

[85] Ezell v. City of Chicago, 651 F.3d 684, 714 (7th Cir. 2011) (Rovner, J., concurring in the judgment).

[86] *Moore*, 702 F.3d at 939.