TARGET DISCRIMINATION: Protecting the Second Amendment Rights of Women and Minorities

Daniel Peabody*

I. INTRODUCTION

In one of the darkest moments of United States jurisprudence, Chief Justice Roger Taney listed a "parade of horribles" that would result if freed African-Americans were considered "citizens." This list included the idea that "persons of the negro race, who were recognized as citizens in any one State of the Union," would have the right "to keep and carry arms wherever they went."[1] The *Dred Scott* Court considered African-Americans carrying firearms as too much to bear. While the *Dred Scott* Court sought to limit minorities' rights to bear arms when defining "citizen," the Supreme Court must soon consider protecting the rights of minorities to bear arms when defining the word "bear" in the Second Amendment.

The Supreme Court's decisions in *District of Columbia v. Heller*[2] and *McDonald v. City of Chicago*[3] opened the floodgates of Second Amendment litigation. Although the issues are legion (gun prohibitions, gun restriction, printing of 3D guns, magazine capacity laws, etc.), Second Amendment advocates have zeroed in on state laws that limit the individual's ability to carry a firearm. Five United States Courts of Appeals have heard such challenges.[4] Unfortunately, these circuit court opinions have not clarified the

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* J.D. Candidate, 2017, Sandra Day O'Connor College of Law at Arizona State University; B.A. Political Science and B.S. Economics, 2012, Arizona State University. I owe many thanks to Professor Amy Langenfeld for her assistance and support; Jeffrey Kerr for his valuable input; my parents, John and Jane Peabody for their support and input; and my wife Lydia Peabody for her love, support, and for tolerating my endless conversations about this Comment.

1. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 416–17 (1856) (discussing the effects of allowing non-white people to be included in the term "citizen" within the meaning of the Constitution of the United States), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

2. District of Columbia v. Heller, 554 U.S. 570, 574 (2008).

3. McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010).

4. Peruta v. County of San Diego (*Peruta I)*, 742 F.3d 1144, 1147 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016); Drake v. Filko, 724 F.3d 426, 427–28 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 83–84 (2d Cir. 2012); Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012).

issues. The Second, Third, and Fourth Circuits reached different conclusions on whether the Second Amendment includes the right to carry a firearm,[5] but ultimately upheld statutes that limit the right to carry a firearm.[6] On the other hand, the Seventh Circuit struck down Illinois' prohibition on carrying firearms,[7] and the Ninth Circuit originally struck down a similar California law[8] before upholding it by the Ninth Circuit en banc.[9] The result is a collaged understanding of the Second Amendment. One circuit held that carrying a firearm is part of the Second Amendment,[10] two held carrying is not part of the Second Amendment,[11] and two refused to answer.[12] What is more, one circuit held that states cannot ban one form of carrying while allowing discretionary statutes to prohibit the other form of carrying,[13] while four circuit courts held that states may.[14] Ultimately, the Supreme Court must resolve the unanswered questions about the most controversial and politically charged amendment.

This Comment argues that the Supreme Court should find that the Second Amendment guarantees an individual the right to carry a concealed firearm outside of the home for the purpose of self-defense. Part II provides a brief overview of the English right to bear arms and the development of the first statute to restrict carrying firearms, the Statute of Northampton. Part II continues by detailing the evolution of the American right to bear arms including the current firearm carrying statutes. Part II concludes with an analysis of the relevant sections of the landmark Second Amendment cases, *District of Columbia v. Heller*[15] and *McDonald v. City of Chicago*.[16] Part III discusses the current circuit split relating to concealed carry statutes. Part IV argues that the Second Amendment should be interpreted to include the right to carry firearms outside of the home for the purpose of self-defense. Part IV also considers the effects that restrictive concealed carry statutes are likely to

5. *See infra* Part I (discussing the decisions of the Second, Third, and Fourth Circuits).
6. *Id.*
7. *Moore*, 702 F.3d at 942.
8. *Peruta I*, 742 F.3d at 1178–79.
9. Peruta v. County of San Diego (*Peruta II*), 824 F.3d 919, 942 (9th Cir. 2016) (en banc).
10. *Moore*, 702 F.3d at 935–36.
11. *Peruta II*, 824 F.3d at 942; Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013).
12. Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 83 (2d Cir. 2012).
13. *Moore*, 702 F.3d at 942.
14. *Peruta II*, 824 F.3d at 942; *Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 879; *Kachalsky*, 701 F.3d at 96.
15. District of Columbia v. Heller, 554 U.S. 570, 574 (2008).
16. McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010).

have on women and minorities. Ultimately, I conclude that the Second Amendment allows the individual the right to carry a firearm outside of the home, and, because of the disproportionate negative effect that restrictive concealed carry statutes have on women and minorities, the Supreme Court must incorporate concealed carry in the Second Amendment.

II. HISTORY OF THE SECOND AMENDMENT AND CONCEALED CARRY

Justice Scalia's opinion in *Heller*[17] made clear that any opinion regarding the Second Amendment must include an analysis of the relevant history.[18] That is because the Second Amendment codifies a pre-existing right;[19] and as a result, "historical meaning enjoys a privileged interpretive role in the Second Amendment context."[20] Thus, this part will analyze the development of the right to bear arms and its historical limitations. This part begins with a discussion of the English right to bear arms and a statute limiting that right, the Statute of Northampton. This part then discusses the right to carry firearms in the United States and the effect of the Statute of Northampton on the scope of the Second Amendment. This part concludes with a brief analysis of the *Heller* and *McDonald* decisions.

A. The English Right to Bear Arms

Understanding the Second Amendment requires an understanding of both the English tradition to bear arms inherited by the America colonists, and the English Bill of Rights—the basis of the American Bill of Rights.[21]

The English right to bear arms was an obligation before it was a right.[22] Because the English did not have a standing army until the late seventeenth

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17. The Court's eventual interpretation of the Second Amendment is much more uncertain with the recent passing of Justice Scalia. Not only was Justice Scalia a great advocate for the Constitution and the Second Amendment, but he also authored the opinion of the Court in *District of Columbia v. Heller*, a 5-4 decision.

18. *See Heller*, 554 U.S. at 570.

19. *Heller*, 554 U.S. at 592; *see also* United States v. Cruikshank, 92 U.S. 542, 553 (1875) ("This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."); Brian Enright, *The Constitutional "Terra Incognita" of Discretionary Concealed Laws*, 2015 U. ILL. L. REV. 909, 933 (2015).

20. United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

21. Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 287 (1983).

22. *Id.* at 290.

century, nor a regular police force until the nineteenth century, an armed citizenry was required to keep law and order.[23] In fact, citizens who refused to assist were subject to a fine or imprisonment.[24] Perhaps because of these expectations, Englishmen were not convinced that to keep and bear arms needed to be recognized as a right until the Royal Army began to confiscate firearms in 1641.[25] After the confiscation of arms began, the English were soon "armed to the teeth,"[26] and the right to bear arms was codified in the English Declaration of Rights in 1689.[27] The English right provided "the Subjects which are Protestants may have Arms for their Defence [sic] suitable to their Conditions, and as Allowed by law."[28] This provision was never understood to limit the bearing of arms to the home.[29] Nor was the provision understood to limit bearing arms for a common defense of the state.[30] However, the clause, "as Allowed by law" was an invitation for regulation. One such law was the Statute of Northampton.[31] This law was enacted before, and enforced after, the English Declaration of Rights.[32]

The Statute of Northampton is an example of an early restriction on the right to bear arms.[33] In effect, this statute created the first "gun-free zones." The pertinent part of the fourteenth-century statute reads that no person shall "go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or the ministers, nor in no part elsewhere."[34] If the English Declaration of Rights is an influence for the Second Amendment, the Statute of Northampton can be seen as an influence for the modern day limits on carrying firearms in sensitive places such as schools, courthouses,

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23. *Id.* at 291.
24. *Id.*
25. *Id.* at 294–95.
26. *Id.* at 296 (citing 2 EDWARD HYDE, THE LIFE OF EDWARD EARL OF CLARENDON 117 (Oxford 1827)).
27. 1 W. & M., c. 2, § 7 in 3 Eng. Stat. at Large 441.
28. *Id.*
29. *Id.*
30. Ryan Notarangelo, *Carrying the Second Amendment Outside of the Home: A Critique of the Third Circuit's Decision in* Drake v. Filko, 64 CATH. U. L. REV. 235, 240 (2014).
31. Statute of Northampton 1328, 2 Edw. 3 c. 3 (Eng.), http://press-pubs.uchicago.edu/founders/documents/amendIIs1.html (last visited Nov. 15, 2016).
32. *Id.*
33. Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1712–13 (2012); Enright, *supra* note 19; Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1503 (2014).
34. Statute of Northampton, *supra* note 31.

government buildings, etc.[35] On its face, the statute did not eliminate the carrying of firearms altogether, nor was it understood to do so.[36]

The statute sought only to eliminate the carrying of arms when it was done in an unusual manner which would cause terror in the people.[37] The unusual manner could refer to carrying an unusual, and therefore particularly terrifying, weapon, or carrying a normal weapon in a particularly terrifying fashion.[38] Blackstone espoused this understanding in summarizing the statute as, "[t]he offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land."[39] The statute was not intended to eliminate carrying arms altogether but rather only prohibited "circumstances where carrying of arms was unusual and therefore terrifying."[40]

The English believed their English Declaration of Rights provided the individual citizen with the right to bear arms. Because it was understood that the individual had the right to bear arms, the Statute of Northampton was required to limit this right. Nonetheless, the statute did nothing more than limit the carrying of weapons when it was "accompanied by such circumstances as are apt to terrify the people."[41] The right of citizens to "[wear] common weapons . . . for their ornament or defence" was not disturbed.[42] Because the royal charters that created the colonies assured emigrants that they would enjoy all liberties and rights as if they were born and living in England, the right to carry firearms in a normal fashion for "ornament or defence" was exported to America.[43]

B. Bearing Arms Throughout U.S. History

Americans had the right to bear arms even before the Bill of Rights was ratified.[44] English emigrants were guaranteed all the liberties and rights they

35. *See* Meltzer, *supra* note 33, at 1507.
36. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49.
37. *Id.*
38. *Id.*
39. *Id.*
40. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009).
41. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136, ch. 63, § 9 (photo. reprint 1978) (1716).
42. *Id.*
43. Malcolm, *supra* note 21, at 289.
44. BLACKSTONE, *supra* note 36, at 139.

enjoyed in England,[45] and among those rights was bearing arms outside of the home for "ornament or defence."[46] Additionally, it was understood that bearing arms was essential to protect fundamental rights, such as personal security, property, and liberty, outside of the home.[47] By the time the Bill of Rights was ratified, it did little more than codify what was already understood to be a right of the people—carrying of a firearm outside of the home.[48] In 1799, a Philadelphia jury even acquitted a man of assault with a deadly weapon because it was believed that "every man has a right to carry arms who apprehends himself to be in danger."[49]

The early American understanding of the right to bear arms outside of the home, similar to the English understanding, caused the need for colonial and early American state statutes that mirrored the Statute of Northampton.[50] Consistent with Blackstone's interpretation that the Statute of Northampton was primarily concerned with prohibiting carrying a weapon in a terrifying manner, some states made clear that the prohibition applied specifically to "going armed offensively" or causing "terror" in the public.[51]

Challenges to state versions of the Statute of Northampton were common. In 1843, North Carolina's version of the statute—an almost verbatim incorporation of the Statute of Northampton[52]—was challenged in *State v. Hurley*.[53] The North Carolina Supreme Court began by saying:

> The offence of riding or going armed with unusual dangerous weapons, to the terror of the people, is an offence at common law, and is indictable in this State. A man may carry a gun for lawful purpose of business or amusement; but he cannot go about with that or any other dangerous weapon, to terrify and alarm, and in such a manner as naturally will terrify and alarm, a peaceful people.[54]

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45. Malcolm, *supra* note 21, at 289.
46. HAWKINS, *supra* note 41.
47. BLACKSTONE, *supra* note 36, at 139.
48. Notarangelo, *supra* note 30, at 243.
49. *Id.*
50. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 36 (2012); Meltzer, *supra* note 33, at 1506.
51. Meltzer, *supra* note 33, at 1507.
52. North Carolina's statute forbade going armed at night or day "in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere . . . ." Charles, *supra* note 50, at 32.
53. State v. Huntly, 25 N.C. (3 Ired.) 418, 421–22 (1843).
54. *Id.* at 418.

Carrying a firearm was prohibited only to the extent it terrified and alarmed the people.[55] States accepted the carrying of common weapons in a common fashion;[56] it was socially acceptable and legal if done for lawful reasons such as self-defense and even "amusement."[57]

There are two methods of carrying a firearm: concealed carry and open carry. Open carry is generally defined as carrying a firearm on one's person in a way that is open to the public.[58] Any time the firearm is open to the public it is considered open carry. Concealed carry is carrying a firearm on one's person in a fashion that covers the firearm from public observation.[59] For example, carrying the firearm inside of a waistband covered by a shirt is concealed carry. The only factor is whether the firearm is visible to the public.[60]

Concern for concealed firearms did not grow until the nineteenth century when the viability and popularity of handguns grew drastically. In 1813, Kentucky and Louisiana were the first states to prohibit carrying concealed firearms.[61] In the sixty years that followed, Indiana, Tennessee, Virginia, Alabama, Ohio, Texas, Florida, and Oklahoma passed similar statutes.[62]

Between 1822 and 1850, individuals challenged the concealed carry prohibitions of eight states.[63] The only state court to protect the right to concealed carry was Kentucky's highest court, which struck down its state's concealed carry prohibition, reasoning that "under a constitutional provision that 'the right of the citizens to bear arms in defense of themselves and the state shall not be questioned,' a statute prohibiting the carrying of a concealed weapon is void."[64] On the other hand, six state high courts affirmed the state's right to prohibit concealed carry by distinguishing between open and concealed carry and determining open carry was better suited for self-

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55. *Id. But see* Charles, *supra* note 50, at 38 (Charles contends this case still supports the notion that carrying for a lawful purpose does not violate the statute, but "if it was to merely carry arms among the public concourse it would be a violation of the Statute.").

56. Volokh, *supra* note 40, at 102 (internal quotations omitted).

57. *Huntly*, 25 N.C. at 421–22.

58. *See* CAL. PENAL CODE § 26350(a)(1) (West 2012) ("A person is guilty of openly carrying . . . when that person carries upon his or her person an *exposed* . . . handgun . . . .") (emphasis added).

59. *See id.* § 25400(a)(2) ("A person is guilty of carrying a concealed firearm when the person . . . [c]arries concealed upon the person any pistol, revolver, or other firearm . . . .").

60. *See id.* § 25400(b) ("A firearm carried openly in a belt holster is not concealed . . . .").

61. Nicholas Moeller, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401, 1407 (2014).

62. *Id.*

63. Meltzer, *supra* note 33, at 1513.

64. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 90 (1822).

defense.[65] An outlier, Arkansas' highest court allowed for the prohibitions of all forms of carrying.[66]

Common among the decisions affirming bans on concealed carry was the idea that the practice was cowardly, disgraceful, and perpetrated only by the dishonorable intent on committing a crime.[67] Ultimately, the high courts of Indiana,[68] Alabama,[69] Tennessee,[70] Georgia,[71] and Louisiana[72] would affirm prohibitions on concealed carrying. The Alabama Supreme Court held that "to suppress the evil practice of carrying weapons secretly" did not violate Alabama's constitutional provision of the right to bear arms because a weapon is only effective for the purpose of defense when carried openly; thus concealed carry did not fit a constitutional scheme allowing arms for self-defense.[73] Similarly, the Supreme Court of Tennessee held that arms used in defense "must necessarily be borne openly."[74] The Louisiana Supreme Court was the only court to elaborate on why carrying a concealed firearm was so dishonorable:

> [t]his law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man's right to carry arms (to use its words) "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence [sic] of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.[75]

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65. Meltzer, *supra* note 33, at 1513.
66. State v. Buzzard, 4 Ark. 18, 27 (Ark. 1842).
67. Meltzer, *supra* note 33, at 1511–12.
68. State v. Mitchell, 3 Blackf. 229, 229 (Ind. 1833).
69. State v. Reid, 1 Ala. 612, 616 (1840).
70. Aymette v. State, 21 Tenn. 154, 161 (1840).
71. Nunn v. State, 1 Ga. 243, 251 (1846) ("[S]uppress[ing] the practice of carrying certain weapons *secretly* . . . does not deprive the citizen of his *natural* right of self-defence [sic], or of his constitutional right to keep and bear arms . . . a prohibition against bearing arms openly, is in conflict with the constitution and void.") (emphasis in original).
72. State v. Chandler, 5 La. Ann. 489, 489–90 (1850).
73. *Reid*, 1 Ala. at 616, 619–21 ("[I]t is only when carried openly, that [weapons] can be efficiently used for defence . . . . If the emergency is pressing, there can be no necessity for concealing the weapon.").
74. *Aymette*, 21 Tenn. at 161.
75. *Chandler*, 5 La. Ann. at 489–90.

Similar to the Statute of Northampton prohibiting the carrying of firearms when it terrified the people,[76] these states' statutes were upheld because concealed carry of firearms was more terrifying to people than open carrying.[77] Legislators at the time reasoned that "gentlemen carried their guns in the open; only criminals needed to hide their weapons."[78] Concealed carrying was considered "a tool of the sneaky and the dishonorable."[79] The Richmond Grand Jury provided:

> We consider the practice of carrying arms secreted, in cases where no personal attack can reasonably be apprehended, to be infinitely more reprehensible than even the act of stabbing, if committed during a sudden affray, in the heat of passion, where the party was not previously armed for the purpose.[80]

Concealed carry was more concerning than if someone carried openly on the hip.[81]

Legislation during the 1920s and 1930s marked a shift in the public's perception of carrying concealed firearms.[82] Because the honorable open carrier was replaced by the Prohibition gangster, states began to recognize a legitimate need for civilians to carry a concealed firearm.[83] During this era, many states adopted the "Uniform Firearms Act" which allowed for individuals to receive permits to carry concealed firearms.[84] Statutes based on the Uniform Firearms Act were broadly discretionary.[85] Although these statutes often specified minimum standards to obtain a carrying permit, ultimately the decision of whether to issue a permit was based on a subjective determination of the applicant's character and necessity.[86]

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76. *See id.*
77. *See id.*
78. Moeller, *supra* note 61, at 1407.
79. Meltzer, *supra* note 33, at 1516.
80. Cornell, *supra* note 33, at 1718.
81. *See id.*
82. *See* MARCUS NIETO, CONCEALED HANDGUN LAWS AND PUBLIC SAFETY 2 (1997), http://www.library.ca.gov/crb/97/07/97007.pdf (last visited Nov. 15, 2016); John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 403 (1934); Moeller, *supra* note 61, at 1408.
83. Clayton Cramer & David Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 681 (1995).
84. Charles Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767 (1926).
85. *See* Cramer & Kopel, *supra* note 83.
86. *See* Imlay, *supra* note 84, at 768 (providing for "the issuance of licenses for the carrying of concealed weapons upon a satisfactory showing being made by the applicant as to his character and the necessity for his application"). These statutes are considered to be the first "may-issue" statutes. *See* Cramer & Kopel, *supra* note 83, at 701, 706, 710.

Some of these statutes were passed to prevent minorities from exercising the right to bear arms.[87] Because of the discretion given to licensing officials, it was easy to disqualify any minority by claiming their level of necessity was not adequate, or their character was inadequate.[88] Moreover, determinations of necessity and character were usually ignored outright when the applicant was white.[89] A Florida Supreme Court Justice stated that Florida's carrying scheme "was passed for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population and in practice has never been so applied."[90]

America's evolution on concealed carry continued with the emergence of two new forms of carrying laws, "shall-issue" statutes and "unrestricted concealed carry." Unlike discretionary statutes, which are called "may-issue" statutes, shall-issue statutes are nondiscretionary and require only that an applicant meet the statutory requirements before being issued a permit.[91] The first shall-issue statutes were enacted in the 1980s and spread rapidly in the 1990s.[92]

C. Current Firearm Carrying Statutes: May-Issue, Shall-Issue, and Unrestricted Concealed Carry

Currently, eight states are considered may-issue,[93] thirty-one states are shall-issue,[94] eleven states allow for unrestricted concealed carry,[95] and the District of Columbia prohibits concealed carrying.[96]

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87. *See* Watson v. Stone, 4 So.2d 700, 703 (Fla. 1941) (Buford, J., concurring).
88. *Id.*
89. *Id.*
90. *Id.*
91. *See* CAL. PENAL CODE § 26150(a)(1) (West 2012).
92. *See* Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws*, 26 CONTEMP. ECON. POL'Y 198, 198–99 (2008).
93. *State Gun Laws*, NRA-ILA, https://www.nraila.org/gun-laws/state-gun-laws/ (last visited Oct. 29, 2016).
94. *Id.*
95. Christine Rousselle, *Missouri Becomes 11th Constitutional Carry State*, TOWNHALL (Sept. 14, 2016, 11:31 PM) http://townhall.com/tipsheet/christinerousselle/2016/09/14/missouri-becomes-11th-constitutional-carry-state-n2218270.
96. The District of Columbia is excluded from this section because it prohibits the open and concealed carrying of firearms. Although the District of Columbia law allows for the carrying of a firearm with a permit, the District does not issue permits. D.C. CODE § 22-4504 (2016) ("No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law.").

A may-issue state allows licensing agents to exercise discretion when deciding whether to provide an individual with a permit to carry a firearm, even if the individual meets the articulated requirements.[97] Accordingly, an individual who meets the requirements articulated in the state's carrying statute may still be denied a permit to carry a firearm.[98] The licensing agent in most may-issue states is a member of law enforcement.[99]

Generally, may-issue statutes have two elements: (1) an "exceptional need" to carry a firearm[100] and (2) "suitability" to carry a firearm.[101] Most may-issue statutes require that both of these elements are met.[102]

The first element of may-issue statutes is that the applicant show some type of "exceptional need" to obtain a carrying permit. Unlike the character requirement, every may-issue statute has a version of the exceptional need requirement. Although the exact language of this element may vary,[103] these statutes require the applicant to show a need for the concealed carry permit that exceeds the need of the general population.

The exact requirements of "exceptional need" varies. Some states require a general showing that the individual's "special need for self-protection" is "distinguishable from that of the general community or of persons engaged in the same profession."[104] Others require the applicant to show that the carrying permit is a "reasonable precaution against apprehended danger."[105]

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97. *See* CAL. PENAL CODE § 26150(a)(1) (West 2012).

98. *See id.*

99. *See id.* ("When a person applies for a license to carry a pistol . . . *the sheriff of a county* may issue a license to that person upon proof of all of the following.") (emphasis added); CONN. GEN. STAT. § 29-28(b) (2015) ("Upon the application . . . such *chief of police* . . . may issue" a permit to carry a pistol) (emphasis added).

100. *See* HAW. REV. STAT. § 134-9(a) (2016) (requiring "an exceptional case").

101. *See* CONN. GEN. STAT. § 29-28(b) (allowing the "chief of police" to make a determination of whether "such person is a suitable person to receive such permit").

102. *See* N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2016) (requiring the person be "of good moral character"); *Id.* § 400.00(2)(f) (requiring "proper cause" for a concealed carry permit).

103. New York requires a showing that "proper cause exists." *Id.* § 400.00(2)(f). Maryland requires a showing of a "good and substantial reason." MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2016). New Jersey requires a "justifiable need to carry a handgun." N.J. STAT. ANN. § 2C:58-4(c) (West 2016). Delaware requires the applicant show the concealed carry permit is "necessary for the protection of the applicant." DEL. CODE ANN. tit. 11, § 1441(a)(2) (2016). Similarly, California requires the applicant show "good cause exists for the issuance of the permit." CAL. PENAL CODE § 26150(a)(2). Hawaii requires the applicant to state an "exceptional case" such as "reason to fear injury to . . . person or property." HAW. REV. STAT. § 134-9(a). Massachussetts and Rhode Island require the person show "good reason to fear" injury to person or property. MASS. GEN. LAWS ANN. ch. 140, § 131(d) (West 2016); 11 R.I. GEN. LAWS § 11-47-11(a) (2016).

104. Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257 (App. Div. 1980).

105. MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii).

The reasonable precaution language refers to whether the applicant has any "alternative available to him for protection other than a handgun permit."[106] An applicant's reasonable fear resulting from threats, living in a dangerous society, or both, are not enough to satisfy this element.[107] This element is satisfied if there is an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate special danger to the applicant's life that cannot be avoided by means other than the issuance of a permit to carry a handgun."[108]

The story of Mr. Otis McDonald, the named plaintiff in *McDonald v. City of Chicago*, puts these requirements in perspective. Although Mr. McDonald lived in a city the Supreme Court acknowledged was as dangerous as Iraq and Afghanistan,[109] and he was specifically threatened by local drug dealers on a regular basis, he would likely not be able to show an "exceptional need" in a may-issue state.[110] Moreover, by definition an "exceptional need" is a need which at a minimum exceeds the mean need of the population. Therefore, this requirement excludes at least half of the people from exercising their right to bear arms for the purpose of self-defense.[111]

The second element of may-issue statutes is the "suitability" requirement.[112] Most may-issue statutes require a showing of "good moral

106. Woollard v. Gallagher, 712 F.3d 865, 869 (4th Cir. 2013) (citation omitted) (internal quotation marks omitted).

107. *See id.* at 870 (stating that evidence of a "vague threat" or "general fear of living in a dangerous society" are not enough) (citation omitted) (internal quotation marks omitted).

108. N.J. ADMIN. CODE § 13:54-2.4(d)(1) (2016); *see, e.g.*, HAW. REV. STAT. § 134-9(a) (requiring "fear [of] injury to . . . person or property"); MASS. GEN. LAWS ANN. ch. 140, § 131(d) (requiring "good reason to fear injury"); 11 R.I. GEN. LAWS § 11-47-11(a) (requiring "good reason to fear an injury").

109. McDonald v. City of Chicago, 561 U.S. 742, 790 (2010).

110. Otis McDonald was the victim only of threats from the drug dealers in his neighborhood, the specificity of which are not known. *See also* Sara Blumberg, *Threat to Safety Often Not Enough to Obtain Maryland Concealed and Carry Permit*, WMAR BALTIMORE (July 23, 2014, 6:43 PM), http://www.abc2news.com/homepage-showcase/conceal-and-carry-permits-difficult-to-obtain-in-maryland (Woman was denied a concealed carry permit despite being threatened and in such great fear for her life that she had a stroke).

111. The Ninth Circuit briefly addressed this issue in *Peruta v. County of San Diego*. The court noted that requirements of exceptional need by definition prevents most from getting a concealed carry permit. *See Peruta I*, 742 F.3d 1144, 1169 (9th Cir. 2014) ("Given this requirement, the 'typical' responsible, law-abiding citizen . . . cannot bear arms."), *rev'd en banc*, 842 F.3d 919 (9th Cir. 2016).

112. Of the nine may-issue states, only Maryland does not require a showing of "good character" or "suitability." *See* MD. CODE ANN., PUB. SAFETY § 5-306 (West 2016) (not containing any requirement of "character" or "suitability").

character."[113] In addition to "good moral character," some applicants must prove a good reputation for peace and order in the community.[114] Similarly, other may-issue statutes require the licensing official to determine that the applicant is "suitable" to carry a concealed firearm.[115] In all of these states the licensing official has complete discretion, usually only requiring a reasonable basis, for their determination.[116]

Unlike may-issue states, licensing officials in shall-issue states do not have discretion to determine which applicants should receive a concealed carry permit.[117] Under a shall-issue statute, any applicant who meets the statute's articulated requirements must be issued a permit to carry a concealed handgun.[118] Generally, these requirements concern an applicant's age, residency, criminal background, and mental health history.[119] Some shall-issue states also require applicants to demonstrate a knowledge of firearm safety, pass an approved firearm course, or pass a self-defense course.[120]

Recently, unrestricted concealed carry states have been on the rise. Individuals in unrestricted concealed carry states do not need a permit to carry a concealed firearm.[121] Currently, Alaska,[122] Arizona,[123] Kansas,[124] Maine,[125] Vermont,[126] and Wyoming[127] are unrestricted concealed carry states.

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113. CAL. PENAL CODE §§ 26150 (a)(1)–(a)(2) (West 2012); N.J. STAT. ANN. § 2C:58-4 (b) (West 2016); N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2016).

114. DEL. CODE ANN. tit. 11, § 1441 (2016).

115. CONN. GEN. STAT. § 29-28(b) (2015); HAW. REV. STAT. § 134-9 (2016); MASS. GEN. LAWS ANN. ch.140, § 131(d)(x) (West 2016); 11 R.I. GEN. LAWS § 11-47-11 (2016).

116. *See* Kuck v. Danaher, 822 F. Supp. 2d 109, 129 (D. Conn. 2011) (holding the chief of police's discretion in determining suitability is broad but not "unbridled," requiring only a reasonable basis).

117. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3112(A) (2015) ("The department of public safety *shall issue* a permit to carry a concealed weapon to a person who is qualified under this section") (emphasis added).

118. *See, e.g., id.*

119. *See, e.g.*, ALASKA STAT. § 18.65.705 (2015).

120. *See, e.g., id.* § 18.65.715.

121. *See* Wm F. Cody, *Virginia Considers Unrestricted Concealed Carry for Citizens*, LAW ENFORCEMENT TODAY (Jan. 16, 2012) http://www.lawenforcementtoday.com/virginia-considers-unrestricted-concealed-carry-for-citizens/.

122. ALASKA STAT. § 11.61.220(a).

123. ARIZ. REV. STAT. ANN. § 13-3112 (A).

124. KAN. STAT. ANN. § 21-6302(a)(4) (2015).

125. ME. REV. STAT. ANN. tit. 25, § 2001-A(2)(A-1) (2015).

126. *See* VT. CONST. Ch. I, art. 16; VT. STAT. ANN. tit. 13, § 4004(a) (2015); State v. Rosenthal, 55 A. 610, 610 (Vt. 1903).

127. WYO. STAT. ANN. § 6-8-104 (a)(iv) (2015).

D. Heller and McDonald

In 2008 the Supreme Court reviewed the District of Columbia's general prohibition on handguns.[128] The question presented was whether the Second Amendment protected an individual right or a collective right to bear arms.[129] The Court held that the term "bear arms" meant to carry arms for purposes unrelated to militia service,[130] and that the central tenet of the Second Amendment is the right to self-defense.[131] Although the Court was careful not to resolve issues not before it, the opinion provides useful analysis for predicting how the Court will decide the inevitable "carrying" question.

First, the Court alluded to the validity of certain restrictions, including limitations on carrying.[132] Supporting certain restrictions, the Court stated that there is no doubt about the validity of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[133] However, by using "sensitive places" to qualify acceptable carrying restrictions, the Court implied that regulating the carrying of firearms in non-sensitive places is presumptively invalid.[134]

Second, the Court foreclosed the use of any public policy argument based on gun statistics.[135] Second Amendment challenges are fraught with conflicting statistics of gun control saving lives or increasing violence.[136] Here, the Court made clear that "the enshrinement of a constitutional right necessarily takes certain policy choices off the table."[137]

Finally, *Heller* clarified much of the Second Amendment. The Court defined "bearing arms" as 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 the case of a conflict with another person."[138] Also, *Heller* held that the purpose of the Second Amendment was to guarantee the individual the right to keep and bear arms for self-defense.[139] Accordingly, as opposed to the pre-*Heller* understanding that the Second

128. District of Columbia v. Heller, 554 U.S. 570, 574 (2008).
129. *See id.* at 592–95.
130. *Id.* at 595–97.
131. *Id.* at 599; McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).
132. *See Heller*, 554 U.S. at 626.
133. *Id.*
134. *See Peruta I*, 742 F.3d 1144, 1153 (9th Cir. 2014).
135. *See Heller*, 554 U.S. at 636.
136. *See* Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).
137. *Heller*, 554 U.S. at 636.
138. *Id.* at 584 (quoting Muscarello v. United States, 524 U.S. 125, 143, 118 S.Ct. 1911, 1921 (1998) (Ginsburg, J., dissenting)).
139. *Id.* at 599; *McDonald*, 561 U.S. at 767.

Amendment only guaranteed the right of "pre-standing military" militiamen to attend drill,[140] the Second Amendment now guarantees the individual the right to wear or carry, upon their person or in their clothing, a firearm for the purposes of self-defense.[141]

In *McDonald v. City of Chicago*, the Supreme Court reaffirmed much of *Heller* when it granted certiorari to determine whether the Second Amendment was incorporated in the Fourteenth Amendment.[142]

In *McDonald*, the four petitioners, who sought to keep handguns in their homes for personal protection, challenged a city ordinance criminalizing possession of handguns.[143] Petitioner Otis McDonald, an African-American man in his late seventies, devoted much of his life to improving his high crime neighborhood, and even worked with police on certain efforts to help prevent crime.[144] Mr. McDonald's attempts to reduce crime in his neighborhood made him the target of many local drug dealers,[145] and he was often subjected to violent threats.[146] Mr. McDonald lived in fear of the neighborhood criminals.[147] And although Mr. McDonald owned a handgun for self-defense, he kept it outside of the city to follow the law.[148] The Court sided with Mr. McDonald and held that the Second Amendment applied to the states through the Fourteenth Amendment,[149] and it "protect[s] a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."[150] Similar to *Heller*, the Court avoided answering any question not before it, and therefore did not answer whether Mr. McDonald could carry his firearm outside of his front door. Despite *McDonald*'s narrow holding, it contains analysis that is relevant to resolving the carrying question.

First, the Court reasoned that to protect the value of the Second Amendment's promise of self-defense, it must protect the individual's preferences for methods of self-defense. The Court reiterated that "the Second Amendment protects the right to keep and bear arms for the purpose

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140. *See Heller*, 554 U.S. at 577.
141. *Id.* at 584.
142. McDonald v. City of Chicago, 561 U.S. 742, 752–53 (2010).
143. Petitioners were Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson. *Id.* at 750.
144. *Id.* at 751.
145. *Id.*
146. *Id.*
147. *See id.*
148. *Id.*
149. *Id.* at 791.
150. *Id.* at 780.

of self-defense,"[151] and "individual self-defense is the central component of the Second Amendment right."[152] Further, the Court stated that the Second Amendment especially applies to handguns because "they are the most preferred firearm in the nation to keep and use for protection."[153] Thus, because of the self-defense component of the Second Amendment, the Second Amendment must apply to the preferred methods of self-protection.

Second, the Court continued to disregard public safety implications when resolving Second Amendment questions.[154] The Court pointed out that "all of the constitutional provisions that impose restriction on law enforcement and on the prosecution of crimes" have a controversial safety implication.[155] For example, there are safety implications to well accepted rights such as the "exclusionary rule," which "generates substantial social costs" and sometimes includes "setting the guilty free and the dangerous at large"[156] and the requirement of *Miranda* warnings, which will "in some unknown number of cases . . . return a killer, a rapist or other criminal to the streets . . . to repeat his crime."[157]

Third, the Court rejected assigning a level of scrutiny by explicitly rejecting "interest-balancing" to determine the scope of the Second Amendment.[158]

Finally, the Court acknowledged the importance of the Second Amendment to minorities throughout U.S. history and today.[159] In dissent, Justice Breyer contended the Second Amendment does not further any broad constitutional object such as "protect[ing] minorities or persons neglected by those holding political power."[160] Regarding the effect on minorities, the Court pointed out that "[Illinois] legislators noted that the number of Chicago homicide victims during the current year equaled the number of American soldiers killed during the same period in Afghanistan and Iraq and that 80% of the Chicago victims were black."[161] The Court concluded this right was especially important to women, minorities, and members of other groups that

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151. *Id.* at 750.
152. *Id.* at 767 (citing District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).
153. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008)).
154. McDonald v. City of Chicago, 561 U.S. 742, 783 (2010).
155. *Id.*
156. *Id.* (citing Hudson v. Michigan, 547 U.S. 586, 591 (2006)).
157. *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 517 (1966) (White, J., dissenting)).
158. *Id.* at 785 ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.").
159. *See id.* at 771.
160. *Id.* at 789.
161. *Id.* at 789–90.

"may be especially vulnerable to violent crime."[162] Moreover, "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials."[163]

III. THE CIRCUIT COURT SHOOT-OUT

Recently, the Second,[164] Third,[165] Fourth,[166] Seventh,[167] and Ninth[168] Circuit Courts of Appeals heard challenges to may-issue statutes. The threshold issue in each of these decisions was whether the Second Amendment guarantees the right to carry a firearm outside of the home.[169] The Second, Third, and Fourth Circuits upheld the challenged statutes.[170] On the threshold issue, the Second and Fourth Circuits declined to make a determination, and the Third Circuit answered in the negative.[171] On the other hand, the Seventh and Ninth Circuit answered the threshold issue in the affirmative and struck down the challenged statutes.[172]

A. Upholding May-Issue Statutes: The Second, Third, Fourth, and Ninth Circuits

The Second, Third, Fourth, and Ninth Circuit Courts of Appeals upheld the challenged may-issue statutes as constitutional. Originally, the Ninth Circuit determined the California may-issue statute was unconstitutional because the statute was part of a scheme as a whole that had the effect of eliminating the right to bear arms for many citizens. On an en banc rehearing of the case, the Ninth Circuit overturned that earlier determination because the statute itself—not viewed in the context of the entirety of California's firearm regulation scheme—was constitutional.[173]

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162. *Id.* at 790.
163. *Id.*
164. Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012).
165. Drake v. Filko, 724 F.3d 426 (3d Cir. 2013).
166. Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).
167. Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).
168. *Peruta I*, 742 F.3d 1144 (9th Cir. 2014).
169. *See id.* at 1150; *Drake*, 724 F.3d at 430; *Woollard*, 712 F.3d at 875; *Moore*, 702 F.3d at 935; *Kachalsky*, 701 F.3d at 83.
170. *Drake*, 724 F.3d at 429–30; *Woollard*, 712 F.3d at 882; *Kachalsky*, 701 F.3d at 84.
171. *Drake*, 724 F.3d at 429–30; *Woollard*, 712 F.3d at 875; *Kachalsky*, 701 F.3d at 89–91.
172. *Peruta I*, 742 F.3d at 1152; *Moore*, 702 F.3d at 935–36.
173. *Peruta II*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc).

1. The Second Circuit: *Kachalsky v. County of Westchester*

In *Kachalsky v. County of Westchester*, the Second Circuit upheld New York's may-issue statute.[174] In *Kachalsky*, individuals challenged New York's may-issue statute after the state denied their concealed handgun permit applications because they failed to establish "proper cause."[175] One of the applicants, Eric Detmer, was a member of the United States Coast Guard and was required to regularly take a "non-firing judgmental pistol course, a firing tactical pistol course, and use-of-force training."[176] Moreover, Mr. Detmer passed all other requirements including the mental health requirements.[177] Mr. Detmer was nonetheless denied a carrying permit because his concerns for self-defense were "speculative"; thus, he was not able to demonstrate "proper cause."[178]

The court upheld the New York "proper cause" requirement of the statute finding that it passed muster under the standard of intermediate scrutiny.[179] The court applied a two-prong approach, deciding whether the conduct in question was included in the Second Amendment, and if so, determining if it met the appropriate means-end scrutiny.[180] The court avoided defining "bearing arms" altogether and assumed arguendo that concealed carry was a right under the Second Amendment.[181] With the first prong settled, the court determined if the restriction met the appropriate means-end scrutiny.

The court applied intermediate scrutiny.[182] The court reasoned that because *Heller* stated the "core" protection of the Second Amendment was the use of arms "in defense of hearth and home," strict scrutiny did not apply to the Second Amendment outside of the home.[183] Ultimately the court concluded "compelling[] governmental interests in public safety and crime prevention" and the history of states regulating the concealed carry of firearms show that the statute passed intermediate scrutiny.[184]

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174. *Kachalsky*, 701 F.3d at 84.

175. *Id.* at 83–84.

176. First Amended Complaint at 7, Kachalsky v. Cacace, 817 F. Supp. 2d 235 (S.D.N.Y. 2007) (No. 10-cv-05413), ECF 15.

177. *Id.*

178. *Id.* at 8.

179. Kachalsky v. County of Westchester, 701 F.3d 81, 84, 96 (2d Cir. 2012).

180. *Id.* at 96–97.

181. *Id.*

182. *Id.* at 96.

183. *Id.* at 93 (citation omitted).

184. *Id.* at 96–97 ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

Despite language of both *Heller* and *McDonald* that certain constitutional rights, such as the Second Amendment, are beyond public policy considerations, the *Kachalsky* court still relied on policy.[185] The court stated it should be left to the legislature to assess "the risks and benefits of handgun possession and shap[e] a licensing scheme to maximize the competing public-policy objectives."[186]

2. The Fourth Circuit: *Wollard v. Gallagher*

The Fourth Circuit heard a similar challenge to Maryland's may-issue statute.[187] *Woollard v. Gallagher* focused on Maryland's "good-and-substantial cause" requirement after Mr. Woollard was denied renewal of his concealed carry permit.[188] Mr. Woollard, a rural farmer, was originally granted a carrying permit in 2003, renewed in 2006, but denied in 2009.[189] Mr. Woollard originally obtained his permit after his son-in-law broke into his house, high on drugs, attempted to steal the family car, and assaulted Mr. Woollard with a shotgun.[190] The son-in-law was released from prison shortly before Mr. Woollard renewed his permit in 2006. Apparently, the "good and substantial cause" evaporated by 2009.[191]

The *Woollard* court applied the same two-prong test as *Kachalsky*, first deciding whether the conduct in question was included in the Second Amendment, and then determining if it met the appropriate means-end scrutiny.[192] Similar to *Kachalsky*, the court assumed arguendo that concealed carry was a right under the Second Amendment.[193] The court resolved the second prong by relying on public policy implications.[194]

Ultimately, the Fourth Circuit concluded that Maryland's good and substantial cause requirement passed intermediate scrutiny.[195] The court "easily appreciate[d] Maryland's . . . measures aimed at protecting public safety and preventing crime," and concluded "that such objectives are

185. *Id.* at 99.
186. *Id. But see* District of Columbia v. Heller, 554 U.S. 570, 636 (2008).
187. Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).
188. *Id.* at 869–71.
189. *Id.* at 871.
190. *Id.*
191. *Id.*
192. *Id.* at 875.
193. *Id.* at 876.
194. *Id.* at 879–81.
195. *Id.* at 882.

substantial governmental interests."[196] Moreover, the court reasoned the good-and-substantial-reason requirement advances objectives of protecting public safety and prevents violence because it reduces the number of handguns carried, decreases handguns available for theft, decreases the likelihood of deadly confrontations, and averts confusion for officers.[197]

3. The Third Circuit: *Drake v. Filko*

Soon after the decision in *Woollard*, the Third Circuit heard a challenge to New Jersey's may-issue statute.[198] John Drake owned a business servicing and restocking ATMs.[199] Mr. Drake feared that because of the nature of his job he was an exceptional target for a violent crime and accordingly sought a carrying permit for self-defense.[200] Similar to Mr. Drake, as a part-time deputy sheriff with the Essex County, New Jersey Sherriff's Department, Finley Fenton feared he or his family were exceptional targets of criminals he had apprehended.[201] Neither of these reasons qualified as a "justifiable need" to carry a firearm in New Jersey.[202] Accordingly, these men, along with two others, challenged the constitutionality of New Jersey's "justifiable need" in the Third Circuit case *Drake v. Filko*.[203]

The Third Circuit applied the same two-prong approach as the Second and Fourth Circuits.[204] However, unlike the Second and Fourth Circuits, the *Drake* court held concealed carrying was not a right within the scope of the Second Amendment.[205] The court reasoned that "history and tradition do not speak with one voice here"[206] and referred to the state versions of the Statute of Northampton as support.[207] Accordingly, the court concluded that the

196. *Id.* at 877.

197. It should be noted that the court implies that officers will be able to distinguish the innocent people from the criminals because the criminals will be the ones possessing guns—it seems to be accepted that even under this scheme, the criminals find a way to get guns. *Id.* at879–80.

198. Drake v. Filko, 724 F.3d 426, 428 (3d Cir. 2013).

199. Complaint for Deprivation of Civil Rights Under Color of Law at 10, Piszczatoski v. Filko, 840 F. Supp. 2d 813 (D.N.J. 2012) (No. 10-cv-06110), 2010 WL 10378297.

200. *Id.*

201. *Id.* at 12–13.

202. *See Drake*, 724 F.3d at 429.

203. *Id.*

204. *Id.*

205. *Id.* at 429–30.

206. *Id.* at 431.

207. *Id.* at 433; *see supra* Section II.

requirement of demonstrating "justifiable need" to publicly carry a handgun qualified as a "presumptively lawful," "longstanding" regulation.[208]

4. The Ninth Circuit: *Peruta v. County of San Diego* (I & II)

In *Peruta I* the Ninth Circuit determined the constitutionality of California's requirement that an applicant proves "good cause" to receive a concealed carry permit.[209] Originally, the Ninth Circuit struck down California's may-issue statute as unconstitutional;[210] however, on rehearing en banc the Ninth Circuit overturned the earlier decision and held California's may-issue statute was constitutional.[211]

The *Peruta I* court first acknowledged that the Second Amendment secured the right to "bear" arms.[212] *Peruta I* reiterated that to "bear" meant to carry for the purpose of confrontation.[213] The court illustrated this point:

> One needn't point to statistics to recognize that the prospect of conflict—at least, the sort of conflict for which one would wish to be "armed and ready"—is just as menacing (and likely more so) beyond the front porch as it is in the living room. . . . To be sure, the idea of carrying a gun "in the clothing or in a pocket, for the purpose . . . of being armed and ready," does not exactly conjure up images of father stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee, or mother concealing a handgun in her coat before stepping outside to retrieve the mail. Instead, it brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site.[214]

Further, the court acknowledged that when *Heller* identified the right to restrict carrying in certain areas, it implied the right to carry publicly.[215] That is because if there were no right to carry publicly, the validity of such restrictions would go without being said.[216]

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208. *Id.* at 440.
209. *Peruta I*, 742 F.3d 1144, 1147–48 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).
210. *Id.* at 1179.
211. *Peruta II*, 824 F.3d 919, 942 (9th Cir. 2016).
212. *Peruta I*, 742 F.3d at 1151.
213. *Id.* at 1152.
214. *Id.*
215. *Id.* at 1153.
216. *Id.*

Moreover, the *Peruta I* court pointed out that even the nineteenth century state cases upholding the state equivalents of the Statute of Northampton supported a right to carry firearms in public.[217] Indeed, "[a]lthough some courts approved limitations on the manner of carry outside the home, none approved a total destruction of the right to carry in public."[218] Accordingly, because the California statute effectively eliminated the right to bear arms by restricting the right to concealed carry and prohibiting open carry, the statute violated the Second Amendment.[219]

The Ninth Circuit reheard *Peruta v. County of San Diego* sitting en banc and ultimately held that the Second Amendment does not protect the right to carry a concealed firearm.[220] The court reasoned that the history of the Second Amendent did not support a right to concealed carry[221] and that the issue presented should be resolved without regard to Californians' overall constitutional right to bear arms.[222]

The court analyzed the nineteenth century cases that upheld the validity of state concealed carry laws in great detail.[223] After discussing *Mitchell*, *Reid*, *Aymette*, *Buzzard*, *Nunn*, *Chandler*, and *Bliss*, the court stated "an *overwhelming majority* of the states to address the question . . . understood the right to bear arms . . . as not including a right to carry concealed weapons in public."[224] Moreover, the court also relied on the following language from the Supreme Court's opinion in *Robertson v. Baldwin*: "the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons."[225]

Ultimately, the court reasoned that the overall state of the right to bear arms in California was not at issue—at issue was only whether the state could restrict concealed carry.[226] The court concluded:

> The Second Amendment may or may not protect to some degree a right of a member of the general public to carry a firearm in public. If there is such a right, it is only to carry a firearm openly. But

217. *Id.* at 1155–60.
218. *Id.* at 1160.
219. *Id.* at 1179.
220. *Peruta II*, 824 F.3d 919, 942 (9th Cir. 2016).
221. *Id.*
222. *Id.*
223. *Id.* at 933–36.
224. *Id.*
225. *Id.* at 939.
226. *Id.* at 942.

> Plaintiffs do not challenge California's restrictions on open carry; they challenge only restrictions on concealed carry.[227]

The crux of the dissent was that "[t]he Second Amendment is not a 'second-class' constitutional guarantee."[228] The dissent pointed out that the cases referred to in the majority's historical analysis "presumed a right to openly carry a firearm in public or relied on a pre-*Heller* interpretation of the Second Amendment."[229] However, California's minimal licensing of concealed carry permits "is tantamount to a total ban on the right of an ordinary citizen to carry a firearm in public for self-defense . . . . While states may choose between different manners of bearing arms for self-defense, the right must be accommodated."[230] Moreover, the dissent notes that despite the dicta of *Robertson v. Baldwin*, the *Heller* Court made clear that individuals must have some means of exercising the Second Amendment—the right cannot be completely eradicated.[231]

B. Striking Down May-Issue Statutes: The Seventh Circuit

The Seventh Circuit's decision in *Moore v. Madigan* was the first to invalidate a restrictive concealed carry law.[232] The challenge in *Moore* focused on the constitutionality of Illinois' laws prohibiting the carrying of firearms.[233] The *Moore* court held that the Illinois statute prohibiting the carrying of firearms outside of the home violated the Second Amendment.[234]

Writing for the court, Judge Posner first addressed whether the Second Amendment included the right to carry firearms outside of the home.[235] Judge Posner acknowledged that the "constitutional right of armed self-defense is broader than the right to have a gun in one's home,"[236] and that to refer to "bearing" arms as strictly applying to within one's home "would at all times have been awkward usage."[237] Accordingly, the Second Amendment "implies a right to carry a loaded gun outside the home."[238]

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227. *Id.*
228. *Id.* at 945 (Callahan, J., dissenting).
229. *Id.* at 946.
230. *Id.*
231. *Id.* at 947–48.
232. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).
233. *Id.* at 934–35.
234. *Id.* at 942.
235. *Id.* at 935–36.
236. *Id.* at 935.
237. *Id.* at 936.
238. *Id.*

Judge Posner also acknowledged that, unlike the "keeping" aspect of the Second Amendment, history may not "speak with one voice" when it comes to carrying firearms.[239] Acknowledging that statutes such as the Statute of Northampton restricted the right to carry, the court concluded that these statutes were largely irrelevant because of the then-prevailing understanding that these statutes only prevented bearing dangerous or unusual arms that would terrify the people.[240]

Moreover, the court emphasized the self-defense aspect of the Second Amendment.[241] Judge Posner illustrated this point as follows:

> A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under his mattress.[242]

Finally, the court addressed the public policy implications and concluded that they provide little effect on the analysis.[243] After acknowledging that a gun is more dangerous when carried in public than when left in the home, Judge Posner offered the counter argument: "the other side of this coin is that knowing that many law-abiding citizens are walking the streets armed may make criminals timid."[244] Accordingly, the net effect on crime is not known by either side, and cannot be proven.[245] Moreover, *Heller* and *McDonald* made clear that the scope of the Second Amendment does not depend on casualty counts.[246]

IV. THE RIGHT TO BEAR (CONCEALED) ARMS SHALL NOT BE INFRINGED

Concealed carry for self-defense must be included in the Second Amendment. First, *Heller* and *McDonald* made clear that the Second

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239. *Id.*
240. *Id.*
241. *Id.* at 937 ("To confine the right to be armed to the home is to divorce the Second Amendment from the right to self-defense described in *Heller* and *McDonald* . . . 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.").
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 939.

Amendment includes the right to carry a firearm outside of the home for self-defense. Second, although "history does not speak with one voice" regarding concealed carry, historical hostility towards concealed carry no longer resonates. Finally, if the Second Amendment does not protect the right to concealed carry, then two populations who are the most in need of the right's promise of self-defense, women and minorities, will be at risk of losing the right to bear arms altogether.

A. Heller and McDonald and the Right to Carry Outside of the Home

In *Heller* and *McDonald*, the Supreme Court all but explicitly held that the Second Amendment includes the right to carry arms outside of the home for the purpose of self-defense. The Court held that the Second Amendment guarantees the individual the right to keep and bear arms for the purpose of self-defense.[247] The Court defined "bearing arms" as 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 the case of a conflict with another person."[248] Accordingly, the Second Amendment guarantees the individual the right to keep and wear or carry, on their person or in a pocket, arms for the purpose of self-defense.

This interpretation of the Second Amendment is beyond debate. In *Moore v. Madigan*, Judge Posner acknowledged that to refer to bearing arms as strictly the right to keep a gun in one's own home "would at all times have been awkward usage."[249] Moreover, the Court has repeatedly emphasized the importance of self-defense when defining the boundaries of the Second Amendment. Few would argue that the need for self-defense is greater inside the home than outside of the home.[250] To this point, because *Heller* acknowledges the validity of restricting carrying in certain areas, there is an implied right to carry in public. If that were not the case, then the Court would not have needed to state such restrictions were valid.

Accordingly, the Supreme Court has already stated, albeit in dicta, that the Second Amendment includes the right to carry firearms outside of the home for self-defense.

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247. District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

248. *Id.* at 584 (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

249. Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).

250. *See id.* at 937.

B. History's Hostility Has Dissipated

Only one circuit court concluded that the Second Amendment did not include the right to carry firearms outside of the home. In support of its conclusion, the court stated that when it came to carrying firearms "[h]istory and tradition do not speak with one voice."[251] Indeed, public perception of concealed carry has not been consistent. However, despite the different voice, the message has remained constant: carrying a firearm is acceptable, terrifying people with a firearm is not. Today, the voice screams for concealed carry over open carry.

Historical hostility towards concealed carrying does not resonate today. The perceptions that founded the now outdated premises on which much of history's voice is based have changed. The sentiments of the time are captured by the Richmond, Virginia Grand Jury in 1820:

> The Grand Jury would not recommend any legislative interference with what they conceive to be one of the most essential privileges of freemen, the right of carrying arms: But we feel it our duty publicly to express our abhorrence of a practice which it becomes all good citizens to frown upon with contempt, and to endeavor to suppress. We consider the practice of carrying arms secreted . . . to be infinitely more reprehensible than even the act of stabbing, if committed during a sudden affray . . . .
>
> We conceive that it manifests a hostile, and, if the expression may be allowed, a piratical disposition against the human race—that it is derogatory from that open, manly, and chivalrous character, which it should be the pride of our countrymen to maintain unimpaired . . . .[252]

History's voice exclaims that carrying arms was "one of the most essential privileges of freemen," but carrying a firearm "secreted" was an expression of "piratical disposition" to be contrasted with the "manly, and chivalrous" act of carrying a firearm openly. Carrying a firearm concealed was unacceptable. Furthermore, statutes and precedent that allowed for the open carry of firearms and banned the concealed carry of firearms had no impact on self-defense because open carry was customary. That is not the case today.

Now, unlike in the 1820s, there is a very real stigma attached to carrying a firearm openly. It is no longer viewed as a chivalrous or honorable

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251. Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013) (quoting Kalchalsky v. County of Westchester, 701 F.3d 81, 91 (2d Cir. 2012)).

252. Cornell, *supra* note 33, at 1717.

practice.[253] For one reason or another, legitimate or not, most Americans generally feel a discomfort around openly carried firearms.[254] Despite discomfort around openly carried firearms, most Americans actually feel safer when citizens carry concealed firearms.[255] Moreover, even for those who dislike firearms altogether, concealed carrying is the preferred option because the statistical reality that someone may be carrying a concealed firearm does not arouse fear in the way that one openly carried firearm often does.

History's voice has changed. The historically "dastardly" practice of concealed carry is now comforting. The historically "chivalrous" practice of open carry is now terrifying. To consider this change as support for preventing concealed carry or carrying altogether is to misunderstand the voice. History's voice has always advocated for firearm carrying. It was just louder for whichever method was least apt to terrify the people—today that method is concealed carry.

Despite this, there is a movement among some Second Amendment advocates to make open carry more accepted by law enforcement and the general population.[256] Second Amendment expert, and law professor, Eugene Volokh compares these attempts to normalize open carry to individuals wearing an "I had an abortion" T-shirt.[257] Like the T-Shirt, the purpose of the

253. This is not to say that it is a dishonorable practice, only that it is not generally viewed as honorable.

254. *See* Greg Ellifritz, *The Perils of Open Carry*, ACTIVE RESPONSE TRAINING, http://www.activeresponsetraining.net/the-perils-of-open-carry (last viewed Nov. 15, 2016); Matt Valentine, *Gun Activists Have a New Craze—And It's* More *Dangerous than You Think*, SALON (Dec. 18, 2013, 9:06 AM), http://www.salon.com/2013/12/18/gun_activists_have_a_new_craze_and_its_more_dangerous_than_you_think/; Sam Verhovek, *Ideas & Trends; Why Not Unconcealed Guns*, N.Y. TIMES (Sept. 3, 1995), http://www.nytimes.com/1995/09/03/weekinreview/ideas-trends-why-not-unconcealed-guns.html (discussing the general discomfort that many feel around open carried firearms).

255. Frank Newport, *Majority Say More Concealed Weapons Would Make U.S. Safer*, GALLUP (Oct. 20, 2015) http://www.gallup.com/poll/186263/majority-say-concealed-weapons-safer.aspx?g_source=concealed%20carry&g_medium=search&g_campaign=tiles (survey shows that 56% of people feel that more concealed carry weapons would make the country safer).

256. This "open carry movement" usually attempts to achieve their goal of normalizing open carrying of firearms by staging events where dozens of open carry supporters will get together, in a very public area, and open carry firearms. These events often include the display of openly carried rifles, such as AR-15s and AK-47s, along with standard side-arms—a revolver or pistol.

257. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 U.C.L.A. L. REV. 1443, 1521 (2009).

open carry groups that "patrol" neighborhoods with AR-15s is little more than shock value to make a political statement.[258]

Today most Americans feel safer when citizens are allowed to carry a concealed firearm.[259] Concealed carrying no longer shows criminal intent. Indeed, concealed carrying is likely the more considerate option considering the unease created when the public is forced to observe a deadly weapon in their daily activities.[260]

While open carry is legal in most states, in some even without a permit, concealed carry is preferred. Also, practically, it is much more difficult for a reprobate or ruffian to snatch a concealed gun than an open carried gun. Moreover, wrongdoers are faced with the deterrent risk knowing that almost any potential victim could have a concealed firearm.

C. Concealed Carry Is Essential for Women and Minorities

Concealed carry must be included in the Second Amendment because if states are allowed to restrict concealed carry it will likely have the practical effect of eradicating the right to bear arms for some populations. Specifically, limiting concealed carry will have a negative effect on women and minorities more so than any other groups.

America has witnessed an explosion in gun ownership. Annual background checks increased from roughly 11.2 million in 2007 to 23.1 million in 2015.[261] Over this same time period, the number of concealed carry permits increased from 4.6 million to 12.8 million.[262] This boom is

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258. *See id.* Although, one must wonder if these same groups as American's fighting for constitutional rights would be as excited if a group of American Muslims, dressed in traditional Islamic garb, or Military fatigues, were to join their ranks and decide to walk through *their* neighborhoods while openly displaying AR-15s or AK-47s.

259. Newport, *supra* note 255.

260. However, no other right included in the Bill of Rights is limited in any way by what others are comfortable with. One can imagine the impact on the First Amendment if it was limited in application to only such speech, protest, and exercise of religion as others were comfortable with. Nonetheless, so long as carrying a firearm is included in the Second Amendment, most reasonable gun carriers are likely to be satisfied with the incorporation, at a minimum, at the federal level, of concealed carry.

261. FBI, NICS FIREARM BACKGROUND CHECKS: MONTH/YEAR, https://www.fbi.gov/about-us/cjis/nics/reports/nics_firearm_checks_-_month_year.pdf (last visited Oct. 27, 2016).

262. These numbers are not exact and most likely reflect lower than actual numbers. That is because many states do not have a statewide database tracking concealed carry permits. Moreover, several states do not require a concealed carry permit. As such, there is no way to determine the actual amount of concealed carriers in those states. Kellan Howell, *Murder Rates Drop as Concealed Carry Permits Soar: Report*, WASH. TIMES (July 14, 2015),

largely attributable to an increase in women purchasing firearms and applying for concealed carry permits. Using Texas as an example,[263] in 2000 the State issued 8,994 concealed carry permits to women.[264] In 2014, that number reached 65,691.[265] Women are obtaining concealed carry permits at twice the rate of men.[266] Indeed, twenty-five percent of permit holders are now women.[267]

These numbers are telling. Women are not only purchasing but carrying firearms in record numbers, and mainly for self-defense.[268] For women, the concealed firearm is the equalizer[269] considering that most criminals are younger males.[270]A firearm drastically increases a woman's ability to defend herself from any attacker and gives them greater freedom because they can ensure their own safety without relying on someone else.[271]

Restricting concealed carry effectively negates the benefits of carrying a firearm for women. Anywhere from fifty percent to ninety percent of women

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http://www.washingtontimes.com/news/2015/jul/14/murder-rates-drop-as-concealed-carry-permits-soar-/?page=all.

263. Texas is used as the example because Texas is one of the few states that tracks concealed carry permits issued by year, in a statewide database, and breaks the applications down by gender and race.

264. CONCEALED HANDGUN LICENSING BUREAU, TEX. DEP'T OF PUB. SAFETY, DEMOGRAPHIC INFORMATION BY RACE/SEX: PERIOD 01/01/2000-12/31/2000, https://www.txdps.state.tx.us/rsd/chl/reports/2000Calendar/ByRace/CY00R-SLicAppsIssued.pdf (last visited Sep. 2, 2016) [hereinafter TEXAS REPORT 2007].

265. CONCEALED HANDGUN LICENSING BUREAU, TEX. DEP'T OF PUB. SAFETY, DEMOGRAPHIC INFORMATION BY RACE/SEX: PERIOD 01/01/2014-12/31/2014, https://www.dps.texas.gov/RSD/CHL/Reports/2014Calendar/byRace_Sex/1LicenseApplicationsIssued.pdf (last visited Oct. 27, 2016) [hereinafter TEXAS REPORT 2014].

266. *See* Justin Mayo et al., *Concealed-Carry Permits Skyrocket, Especially for Women*, SEATTLE TIMES (May 31, 2014) http://www.seattletimes.com/seattle-news/concealed-carry-permits-skyrocket-especially-for-women/.

267. *See id.*

268. *See* Art Swift, *Personal Safety Top Reason Americans Own Guns Today*, GALLUP (Oct. 28, 2013) http://www.gallup.com/poll/165605/personal-safety-top-reason-americans-own-guns-today.aspx.

269. As the famous quote goes, "God made man, but Sam Colt made them equal." *See* Mayo et al., *supra* note 266.

270. *See* FBI, CRIME IN THE U.S.: MURDER OFFENDERS (2012), https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-3 (last visited Oct. 27, 2016).

271. Erica Ritz, *Women and Guns: Why Female Gun Ownership Is Rising and Why Many Are Taking Notice*, BLAZE (Apr. 9, 2013), http://www.theblaze.com/stories/2013/04/09/more-and-more-women-are-buying-guns-heres-why/. This ultimately concludes in a greater sense of equality, empowerment, and a more positive self-image. *Id.*

who carry a firearm do so concealed.[272] Indeed, as rare as it is to see a man open carrying a firearm, it is even more rare to see a women open carry a firearm. Moreover, the practical advantages of concealed carry apply with greater effect for women. As stated, one reason to carry concealed is that it decreases the likelihood that a miscreant will snatch your gun from your holster.[273] Because the idea of the criminal overpowering the victim is a greater concern for women than men, this practical reason to concealed carry as opposed to open carry applies with greater strength. Moreover, women may stand to benefit more than men from concealed carry because it offers the tactical advantage of the element of surprise.

If the Second Amendment enshrines the right to carry a firearm publicly, for self-defense, the Court would practically eradicate this right for women by incorporating only open carry and not concealed carry. If the true purpose of the Second Amendment is self-defense, there is no logic in stifling this right for women—who are targeted much more often than men.

Just as more women are buying and carrying firearms, minorities are also causing the boost in the gun market and concealed carry numbers. In 2007, Texas issued concealed carry permits to 6,677 African-Americans.[274] This number was up to 17,594 in 2014.[275] Although the percentage of African-Americans who received permits was constant at seven percent, the percentage of minorities who received concealed carry permits increased from fourteen percent to sixteen percent.[276]

Again, if self-defense is the central tenet of the Second Amendment, any change in Second Amendment law must consider the practical effect on those most in need of self-defense. Nowhere is self-defense needed more than in America's inner cities. Chicago is often more dangerous than even

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272. *See Women and Holsters Infographic*, WELL ARMED WOMAN, http://thewellarmedwoman.com/women-and-guns/concealed-carry/women-favorite-holsters-infographic (last visited Oct. 27, 2016) (showing that only ten percent of women reported to carrying a firearm openly, and over half carry inside the waistband or in their purse); Ed Ziralski, *Women Buying Guns More than Ever*, SAN DIEGO UNION-TRIBUNE (Jan. 21, 2015, 6:15 PM), http://www.sandiegouniontribune.com/news/2015/jan/21/shot-show-women-shooters/2/#article-copy (stating that nearly half of women have a concealed carry permit in their state of residence).

273. Although this fear is slightly unrealistic for many reasons, not the least of which is that it would take severe levels of desperation, bravery, or stupidity for a criminal to attempt to snatch a firearm from someone, usually the very sight of a firearm is a deterrent. Moreover, many holsters sold today are "retention holsters" meaning you have to press a button on the holster to allow the firearm to leave the holster. These buttons are designed to be difficult to press unless you are properly drawing the firearm.

274. TEXAS REPORT 2007, *supra* note 264.

275. TEXAS REPORT 2014, *supra* note 265.

276. *See id.*

Afghanistan.[277] Chicago reported 2,986 shooting victims in 2015, and through eleven months of 2016 that number is already approaching 4,000 shooting victims.[278] The victims of these shootings are overwhelmingly young African-American males.[279] Moreover, even those who are not directly victimized, such as Mr. Otis McDonald, are terrorized and are forced to live unarmed, in a warzone.

Chicago is not alone. Inner cities throughout the country are plagued with violence, often claiming the lives of young minorities at a far from proportional rate.[280] If the core component of the Second Amendment is the right to self-defense, these individuals need the Second Amendment more than anyone else, and practical considerations make concealed carry their only option.

Allowing for only the open carry of firearms would practically eliminate the right to bear arms for minorities in high crime areas. A young African-American male in a high crime neighborhood is the individual most in need of a firearm for self-defense. However, if a younger Otis McDonald—a young African-American male—were forced to open carry a firearm because the Second Amendment was interpreted to exclude concealed carry, he would be walking probable cause.[281] Young minorities, and indeed minorities of all ages, would be forced to decide between proceeding through a virtual warzone, unarmed and risking death, or walking through a virtual warzone openly armed alerting potential assailants and police to the presence of a firearm.[282] Furthermore, this option puts law enforcement in the difficult situation of trying to keep neighborhoods safe all the while trying not to

277. McDonald v. City of Chicago, 561 U.S. 742, 789–90 (2010).

278. *Chicago Shooting Victims*, CHI. TRIB., http://crime.chicagotribune.com/chicago/shootings (last updated Nov. 17, 2016); *see also* Andrew Blake, *100+ Shot, 19 Killed So Far This Year in Chicago*, WASH. TIMES (Jan. 12, 2016), http://www.washingtontimes.com/news/2016/jan/12/100-shot-19-killed-so-far-year-chicago/.

279. *See Homicide Watch Chicago*, CHI. SUN-TIMES, http://homicides.suntimes.com/victims/ (last visited Oct. 27, 2016) (a detailed list of every Chicago shooting victim since 2013).

280. James Pilcher, *FBI Chief Concerned About Surge in Inner-City Violence*, USA TODAY (Oct. 14, 2015, 8:30 PM), http://www.usatoday.com/story/news/nation-now/2015/10/14/fbi-chief-concerned-surge-inner-city-violence/73961214/.

281. *See generally* Illinois v. Wardlow, 528 U.S. 119, 121–22 (2000).

282. It is appropriate here to note that this is not intended to imply anything negative about law enforcement. It is my sincerest belief that a high majority of police are doing their best, even sacrificing their lives to make violent streets a safer place. Moreover, officers in such a situation would have no idea whether that individual is simply exercising his right, or attempting to intimidate a rival gang member—which is a decent likelihood in a high crime area. Also, in the most dangerous city in America, the presence of a firearm is likely in itself reason to stop an individual if for no other reason than the high percentage of shootings.

needlessly bother law abiding individuals who are exercising their Second Amendment rights.

The Second Amendment must apply to all citizens equally. Today, most are ignorant—many willfully—of the reality facing many African-Americans who want to practice their Second Amendment right to bear arms, and although the Second Amendment's promise of self-defense is at its zenith with many African-Americans the reality is that their Second Amendment rights are handicapped. It is nearly impossible to carry a concealed firearm in the major inner cities. African-American males open carrying will be treated as walking probable cause. Even African-American males with valid concealed carry permits face a different reality.[283]

Today few would tolerate even the thought of laws that would indirectly impede on the rights of women or minoritites to speak freely under the First Amendment. Nonetheless, many willfully ignore their inability to practice the Second Amendment. What's worse, many will advocate for laws that will make for laws that may eradicate the Second Amendment for low-income African Americans.

Authorizing open carry to the exclusion of concealed carry would eliminate the ability of minorities in high crime neighborhoods—both the population and the location most in need of self-defense—to exercise their Second Amendment right for self-defense.

V. CONCLUSION

The Supreme Court will inevitably resolve the current circuit split regarding the scope of the individual's right to carry firearms under the Second Amendment. As *Heller* and *McDonald* made clear, understanding the Second Amendment requires an analysis of the relevant history. As such the importance of early statutes regulating the carrying of firearms is likely to be discussed. However, America's current perspective on the carrying of firearms has eradicated the premise on which historical regulations of the concealed carrying of firearms are based.

The Court has all but held the Second Amendment includes the right to carry a firearm for the purpose of self-defense. Further, the Court has

283. The shooting of Philando Castile is an example of this. Mr Castile, a black male, had a concealed carry permit and carried a handgun. During a traffic stop, an officer shot and killed Mr. Castile while he was reaching for his wallet after he notified the officer that he had a concealed carry permit and was legally carrying a concealed firearm. *How Philando Castile Told Officer About Gun Critical in Investigation*, CHI. TRIBUNE (July 14, 2016, 8:21 PM), http://www.chicagotribune.com/news/nationworld/ct-philando-castile-concealed-carry-20160714-story.html.

repeatedly held self-defense is the most important aspect of the Second Amendment. Moreover, the Court's eventual ruling must allow for all citizens to exercise the right to carry arms for the purpose of self-defense. In order to preserve this right for two populations who are the most in need of the right to self-defense, women and minorities, the Court must hold that concealed carry is a protected right as part of the Second Amendment. Anything less risks eradicating this right because legislation and official discretion can be, and has been, used to prevent minorities from receiving concealed carry permits. Furthermore, outlawing concealed carry in favor of unrestricted open carry will eradicate the right for women and minorities because practical considerations make open carry difficult, if not impossible, for these two populations.