

NOTE

HIDDEN OR ON THE HIP: THE RIGHT(S) TO CARRY AFTER *HELLER*

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INTRODUCTION	907
I. STATE CONCEALED- AND OPEN-CARRY LAWS	910
A. Introduction and Overview	910
B. Twin Extremes: No Regulation and No Permits	911
C. Binding the State: “Shall-Issue” Concealed Carry	912
D. The Problem of Discretion: “May-Issue” Concealed Carry	913
II. ASSERTING THE RIGHT TO CARRY AFTER <i>HELLER</i> : <i>KACHALSKY</i> AND <i>PERUTA</i>	914
A. <i>Kachalsky v. Cacace</i> and the “Proper Cause” Requirement	914
B. <i>Peruta v. County of San Diego</i> and the Alternative Outlet Doctrine	917
III. HIDDEN OR ON THE HIP: THE STATES’ DILEMMA	921
A. Next Steps	921
B. Rational Politics and the Search for Real Data	922
C. Untangling the Knot: Open or Concealed	923
D. Concealed Carry: The Least Dangerous, Least Costly, and Most-Studied Outlet for the Right to Carry Arms	926
CONCLUSION	928

INTRODUCTION

On August 16, 2009, law enforcement reported approximately a dozen men openly carrying firearms at a rally in Phoenix, Arizona, held in close proximity to where President Barack Obama was giving an address.¹ Responding to expressions of concern, Fox Business

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¹ *Man Carries Assault Rifle to Obama Protest—and It’s Legal*, CNN (Aug. 17, 2009), http://articles.cnn.com/2009-08-17/politics/obama.protest.rifle_1_protesters-weapons-assault-rifle?_s=PM:POLITICS; see xymox137, *Assault Gun Toting Protester at Obama Rally in*

News commentator Jim Rawles objected, arguing that these Phoenix protesters were “merely exercising a constitutional right.”² When pressed by the program’s host about carrying openly without displaying a permit, Rawles replied, “we do have a permit—it’s called the Second Amendment.”³ Many observers called the display provocative,⁴ but police made no arrests.⁵ Roughly seventeen months later, Jared Loughner killed six and wounded thirteen, including U.S. Representative Gabrielle Giffords, when he opened fire on a peaceful gathering in Tucson, Arizona, with a legally purchased, lawfully concealed handgun.⁶

There is perhaps no more jarring example of the gulf between our past and our present as Americans, and no clearer picture of the cultural divide around the Second Amendment, than the open wearing of firearms on the streets of a modern American city. As Professor Eugene Volokh points out, there is an “air of unreality” surrounding the topic of open carry.⁷ Scenes of Starbucks patrons packing hol-

Phoenix, Arizona, YouTube (Aug. 17, 2009), <http://www.youtube.com/watch?v=uh8XEOQ EYI> (showing video of a man with an assault rifle slung over his shoulder at an anti-Obama demonstration).

² *Right to Protest . . . With a Gun?*, FOX BUSINESS (May 6, 2011), <http://video.foxbusiness.com/v/3894193/right-to-protest-with-a-gun>.

³ *Id.*

⁴ See, e.g., *Man with Assault Rifle Attends Obama Protest*, MSNBC.COM, (Aug. 18, 2009, 12:15 PM), http://www.msnbc.msn.com/id/32457652/ns/politics-white_house/t/man-assault-rifle-attends-obama-protest/ (“When you bring a loaded gun, particularly a loaded assault rifle, to any political event, but particularly to one where the president is appearing, you’re just making the situation dangerous for everyone.” (quoting Paul Helmke, president of the Brady Campaign to Prevent Gun Violence)). Later news reports revealed that the most prominent gun-carrier at the event was encouraged to attend by a radio show and by his pastor, a fundamentalist who had prayed for Obama to die. Justin Elliott, *Pastor of Gun-Toter at Obama Event Prayed for Obama to Die*, TPM MUCKRAKER (Aug. 27, 2009, 3:14 PM), http://tpmmuckraker.talkingpointsmemo.com/2009/08/pastor_of_gun-toter_at_obama_event_day_before_even.php; Lila Shapiro, *Man Who Brought Assault Rifle to Obama Rally Was Part of Radio Stunt*, HUFFINGTON POST (May 25, 2011, 2:50 PM), http://www.huffingtonpost.com/2009/08/18/right-wing-radio-host-sta_n_262559.html.

⁵ *Man Carries Assault Rifle to Obama Protest—and It’s Legal*, *supra* note 1; see also ARIZ. REV. STAT. ANN. § 13-3102(B)(3)(a)–(b) (2010) (excluding from criminal penalties any firearm carried openly).

⁶ See Marc Lacey, *‘I Planned Ahead’ Is on Envelope*, F.B.I. SAYS, N.Y. TIMES, Jan. 10, 2011, at A1 (noting that Loughner fired more than thirty times before attempting to reload). Congress previously banned the new manufacture of magazines holding more than ten cartridges with 18 U.S.C. § 921(a)(30) (1994) (repealed 2004).

⁷ Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1521 (2009) (“[W]hen a gun is visible, it occupies people’s attention in a way that statistical realities do not.”); see also Andreina Cordani, *Girls with Guns*, MARIE CLAIRE UK, July 2010, at 94, 100 (showcasing stylized, open-carry holsters marketed specifically for women).

stered handguns,⁸ open-carry rallies in Palo Alto,⁹ and openly armed men outside a presidential speaking engagement implicate the public interest in safety, civility, and order, but these scenes also stir passionate support from advocates for the right of self-defense.¹⁰ Only slightly less provocative is the controversy over whether widespread access to concealed-handgun permits is in the public interest,¹¹ a controversy given renewed urgency by the Tucson shooting.¹²

Although the Supreme Court's landmark decision in *District of Columbia v. Heller* singled out bans on the concealed carry of handguns as presumptively constitutional, laws that prevent citizens from carrying firearms for self-defense unless they can show "good cause" are vulnerable under *Heller*.¹³ As discussed in detail in Part II, at least two cases would put the question squarely before the Supreme Court. At issue is whether the Second Amendment guarantees the right to carry firearms outside the home for self-defense, whether states can require citizens to show cause before exercising this right, and whether states can ban one outlet for the right to carry if they allow the other.

Part I of this Note outlines a taxonomy of state laws governing firearm carry. Part II considers two cases challenging handgun-carry laws in California and New York under the still largely unexplored *Heller* doctrine. Part III highlights several alternatives for state carry regulation and proposes a solution to the dilemma that many states would face following a Supreme Court decision finding that the Second Amendment protects the right to carry for self-defense.

⁸ Ashby Jones, *Like a Scone With Your Glock? Starbucks Stands by Its Gun Policy*, WSJ LAW BLOG (Mar. 4, 2010, 10:24 AM), <http://blogs.wsj.com/law/2010/03/04/like-a-scone-with-your-glock-starbucks-stands-by-its-gun-policy/> (commenting on Starbucks' allowance of open carry in its stores).

⁹ Will Oremus, *Gun-Rights Activists to Descend on Downtown Palo Alto*, SAN JOSE MERCURY NEWS, Mar. 5, 2010, at 6B; *see also Calif. Lawmakers Reject Open-Carry Gun Ban*, SEATTLE TIMES, Sept. 1, 2010, available at http://seattletimes.nwsourc.com/html/nationworld/2012773177_apusxgrcaliforniagunban.html (noting that one legislator sought an open-carry ban in response to a series of demonstrations).

¹⁰ See Volokh, *supra* note 7, at 1521–22 (discussing the "open carry movement").

¹¹ See MARCUS NIETO, CAL. RESEARCH BUREAU, CAL. STATE LIBRARY, CONCEALED HANDGUN LAWS AND PUBLIC SAFETY 17–20 (2007), available at <http://www.library.ca.gov/crb/97/07/97007.pdf> (analyzing public sentiment over concealed-handgun laws).

¹² See, e.g., Jo Becker & Michael Luo, *Woven Through Everyday Life, A Fierce Devotion to Firearms*, N.Y. TIMES, Jan. 11, 2011, at A1 (describing Arizona's permissive gun laws, which allow concealed carry without a permit, and the expected impact of the Tucson shooting on Arizona's firearm culture).

¹³ 554 U.S. 570, 624–27 (2008).

I

STATE CONCEALED- AND OPEN-CARRY LAWS

A. Introduction and Overview

To carry a firearm is to possess it on one's person outside the home.¹⁴ A "concealed" firearm is one that is kept out of sight;¹⁵ typically in a holster inside the waistband or under the arm, or in a pocket or purse.¹⁶ Because rifles, shotguns, and many sporting handguns are too bulky to conceal under ordinary clothes, the concealed firearms at issue in this Note are handguns built for self-defense.¹⁷ To openly carry a firearm is to carry it in plain view, either on a belt holster outside the waistband, if a handgun, or slung over the shoulder, if a rifle or shotgun. Early American law permitted citizens to openly carry weapons, but largely criminalized concealed carry.¹⁸ In a stunning cultural sea-change that began in the early 1990s, demand for concealed-carry permits exploded in popularity across the nation,¹⁹ and today more than forty states issue permits to anyone who meets relatively modest eligibility criteria.²⁰

¹⁴ See, e.g., CAL. PENAL CODE § 12031(a)(1) (West 2010) ("A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person . . . in any public place . . ."). For the sake of brevity, this Note does not address the complex, fact-specific, and occasionally contradictory law on whether a firearm, either loaded or unloaded, is "carried" if transported in a vehicle's passenger compartment, in a trunk, or in a closed container.

¹⁵ See, e.g., NEV. REV. STAT. § 202.3653 (2006) ("'Concealed firearm' means a loaded or unloaded pistol, revolver or other firearm which is carried upon a person in such a manner as not to be discernible by ordinary observation.").

¹⁶ See generally CONCEALED CARRY HOLSTERS, <http://concealedcarryholsters.org/> (last visited Mar. 16, 2012) (providing information on concealed-carry holsters for consumers).

¹⁷ Despite widespread confusion on the issue, many handguns are designed for sporting rather than self-defense use. Compare *Kachalsky v. Cacace*, No. 10–CV–5413 (CS), 2011 WL 3962550, at *23 (S.D.N.Y. Sept. 2, 2011) ("[H]unting does not involve handguns and therefore falls outside the ambit of the challenged [New York] statute."), with N.Y. State Dep't of Envtl. Conservation, *Rifle, Shotgun, and Bow Areas: Legal Implements for Regular Deer Season, Early and Regular Bear Seasons*, DEC.NY.GOV, <http://www.dec.ny.gov/outdoor/35010.html> (last visited Mar. 16, 2012) (designating portions of New York state for handgun hunting).

¹⁸ See, e.g., *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (holding that Louisiana citizens had the right to carry arms openly, but carefully distinguishing this from concealed carry, which the *Chandler* court found had overtones of "secret advantages and unmanly assassinations"). But see CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 47–48 (1999) (reporting that Ratification-era Kentucky law allowed concealed weapons while traveling).

¹⁹ See Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 747–57 (2005) (describing the wave of concealed-carry permit laws that passed state legislatures in the 1990s).

²⁰ See *Conceal and Carry (CCW) Laws by State*, CARRY CONCEALED, <http://apps.carryconcealed.net/legal/index.php> (last visited Mar. 16, 2012) [hereinafter CARRY CONCEALED] (providing an overview of concealed-carry laws organized by state).

Note that state and municipal firearm regulations take a variety of forms,²¹ and the scope of this Note does not permit a detailed look at the entire regulatory and penal regime.²² What follows instead is a high-level overview of the statutory and regulatory landscape among the states, focused primarily on concealed-carry permit issuance and open-carry regulation.

B. Twin Extremes: No Regulation and No Permits

Alaska, Arizona, Wyoming, and Vermont allow any legal resident to carry a concealed handgun without a permit; these are sometimes called “[c]onstitutional [c]arry” jurisdictions.²³ Residents of these states remain subject to federal firearm laws governing sales of firearms to felons,²⁴ and the federal National Firearms Act still regulates sales of restricted weapons such as machine guns.²⁵ Following the Tucson shooting, some commentators called on Arizona to tighten its concealed-carry laws,²⁶ while others singled out the National Instant Criminal Background Check System (NICS), the federal program that approved the sale of the handgun used in that deadly attack.²⁷ Perhaps unsurprisingly, all four constitutional carry states permit open carry of firearms in a wide range of circumstances that make this outlet for the right to carry relevant for self-defense purposes.²⁸

²¹ See generally NIETO, *supra* note 11, at 2–6 (providing an overview of differing types of permitting systems).

²² Many states do not preempt firearm regulation by counties and municipalities, and local laws are nearly always more restrictive than those at the state level. For example, the law at issue in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010), was Chicago’s municipal code, CHI. MUN. CODE § 8-20-040(a) (2009) (repealed), and not the Illinois state law prohibiting concealed carry that is discussed below. In some states, absence of state preemption leads to a de facto ban on carrying firearms in urban areas. See Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago, 393 Fed. App’x 390 (7th Cir. 2010); *City of Cleveland v. State*, 942 N.E.2d 370, 376–77 (Ohio 2010) (upholding state statute that superseded the previous “patchwork of local firearm ordinances”).

²³ John Haughey, *Wyoming Is Fourth State to Adopt ‘Constitutional Carry,’* OUTDOOR LIFE (Mar. 21, 2011), <http://www.outdoorlife.com/blogs/gun-shots/2011/03/wyoming-fourth-state-adopt-constitutional-carry-%C2%A0>.

²⁴ 18 U.S.C. § 922(d) (2006).

²⁵ 26 U.S.C. § 5861 (2006).

²⁶ See *Gun Control’s Prospects After Tucson*, WASH. POST TOPIC A (Jan. 14, 2011, 8:46 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/14/AR2011011406201.html> (“This shooting also highlighted, again, our weak gun laws. Those laws made it legal for the gunman . . . to carry that loaded gun without a permit. Not until the gunman fired at Gabrielle Giffords did he break any law.” (quoting Paul Helmke, president of the Brady Campaign to Prevent Gun Violence)).

²⁷ See Nathan Thornburgh, *After Tucson: Why Are the Mentally Ill Still Bearing Arms?*, TIME (Jan. 10, 2011), <http://www.time.com/time/nation/article/0,8599,2041448,00.html> (noting that prohibitions against the mentally ill buying firearms are meaningless if NICS has no record of their illness).

²⁸ See *Constitutional Carry*, OPENCARRY.ORG, <http://opencarry.org/constcarry.html> (follow links on map to Alaska, Arizona, Vermont, and Wyoming) (last visited Mar. 16, 2012) (describing each of the four states as one of the “‘Gold Star’ open carry states”).

At the opposite end of the ideological spectrum from these constitutional carry states lie two jurisdictions that do not issue concealed-carry permits to private citizens: Illinois and the District of Columbia (treated as a state for the purposes of this Note).²⁹ These states ban all forms of self-defense carry by private citizens—including open carry of loaded firearms.³⁰ Any extension of the Second Amendment right to keep and bear arms outside the home for the purpose of self-defense could render these laws unconstitutional.³¹

C. Binding the State: “Shall-Issue” Concealed Carry

The early 1990s saw a groundswell of popular interest in so-called “shall-issue” concealed-carry laws.³² Under these laws, the licensing agent, usually a county sheriff or judge, “shall issue” a concealed-carry permit unless he or she finds that the applicant has been convicted of a felony or a domestic violence offense, or has a history of serious mental illness.³³ With no discretion left to the state agency, these statutes grant any adult citizen without a criminal record or a serious mental illness the right to carry a concealed handgun for the purpose of self-defense.

The wave of adoption of these statutes was extraordinarily rapid; today forty-one states have shall-issue laws on the books.³⁴ Legislators in these states were spurred in large part by grassroots concealed-carry advocates who engaged in sometimes provocative demonstrations of what these groups painted as the alternative: open carry of arms in the streets.³⁵ The push for shall issue has slowed, but is by no means in

²⁹ 720 ILL. COMP. STAT. 5/24-1(a)(4) (2010) (“A person commits the offense of unlawful use of weapons when he knowingly . . . [c]arries or possesses in any vehicle or concealed on or about his person . . . any pistol, revolver, stun gun or taser or other firearm”); D.C. CODE § 22-4504(a) (2001) (“No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license”); 2008 D.C. Legis. Serv. 17-388 (West) (repealing the District’s pistol-licensing statute formerly at § 22-4506).

³⁰ 720 ILL. COMP. STAT. 5/24-1(a)(4) (criminalizing possession of a loaded handgun outside the home); D.C. CODE §§ 22-4504(a), 4504.02(c) (criminalizing transportation of any firearm unless unloaded and in a locked container).

³¹ See, e.g., Memorandum of Points and Authorities in Opposition to Defendants’ Motion for Summary Judgment and Reply to Defendants’ Opposition to Motion for Summary Judgment at 14–17, *Palmer v. District of Columbia*, No. 1:09-cv-01482 (D.D.C. Sept. 23, 2009) (plaintiffs challenged the constitutionality of the D.C. statute).

³² See Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 685–86 (1995) (examining “a new breed of concealed handgun permit laws” that increasingly passed state legislatures in the 1990s).

³³ See, e.g., IDAHO CODE ANN. § 18-3302(1) (2004) (“The citizen’s constitutional right to bear arms shall not be denied to him, unless he: . . . [listing felony convictions, mental illness, and the like].”).

³⁴ See generally CARRY CONCEALED, *supra* note 20 (surveying state laws).

³⁵ See Phil Helsel, *Armed and Shopping in Vermilion*, MORNING J. (Dec. 21, 2003), <http://morningjournal.com/articles/2003/12/21/top%20stories/10695259.txt> (“About 70 peo-

recession.³⁶ Instead, advocates in many shall-issue states have now shifted their focus to legalizing carry in prohibited places, such as college campuses, restaurants, and bars.³⁷

Most, but not all, shall-issue states also allow open carry of firearms; Part III of this Note discusses several notable outliers, such as Texas and Florida.

D. The Problem of Discretion: “May-Issue” Concealed Carry

A half-dozen states grant concealed-carry permits under what are sometimes called “may-issue” statutes, which authorize the issuing agency to grant permits to those applicants who demonstrate good cause, good character, or both.³⁸ Officials in these jurisdictions have unbounded discretion to grant or deny applications.³⁹ In most may-issue jurisdictions, this discretion is evenhanded in theory but fatal in fact: virtually no permits are issued.⁴⁰ In others, licensing agents issue

ple, who want a concealed-carry bill passed by the Ohio Legislature signed into law, showed up yesterday with pistols at their sides for a ‘Vermilion open carry shopping day’ . . .”).

³⁶ See, e.g., Peggy Senzarino, *New Iowa Gun Carry Permit Law Aimed at Reducing Inconsistency*, GLOBE GAZETTE (Nov. 13, 2010, 6:30 PM), http://www.globegazette.com/news/iowa/article_bab59a56-ef82-11df-aa0e-001cc4c03286.html (describing Iowa’s new shall-issue concealed-carry statute, which took effect in 2011).

³⁷ See, e.g., Malcolm Gay, *Taking Loaded Gun Into Bar? In 4 States, It’s Already Legal*, N.Y. TIMES, Oct. 4, 2010, at A1 (describing recent efforts to liberalize carry in shall-issue states); Anna M. Tinsley, *Gun-Rights Advocates Already Lobbying Texas Legislators*, FORT WORTH STAR-TELEGRAM, Nov. 27, 2010, at B (describing how gun-rights advocates in Texas are calling for concealed and open carry throughout the state, including on college campuses).

³⁸ See CAL. PENAL CODE § 12050(a)(1)(A) (West 2010) (“may issue”); DEL. CODE ANN. tit. 11, § 1441(a) (2007) (“may be licensed”); MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (LexisNexis 2011) (requiring a “good and substantial reason to wear, carry, or transport a handgun”); MASS. GEN. LAWS ch. 140, § 131(d) (2007) (“[M]ay issue if it appears that the applicant is a suitable person to be issued such license . . .”); N.Y. PENAL LAW §§ 400.00(1)(g), (11) (McKinney 2008) (employing a good-cause standard and authorizing the licensing officer, judge or justice of a court of record to revoke a pistol license “at any time”); R.I. GEN. LAWS § 11-47-11(a) (2002) (requiring a “good reason to fear an injury to his or her person or property . . . and that he or she is a suitable person to be so licensed”).

³⁹ See, e.g., *O’Brien v. Keegan*, 663 N.E.2d 316, 317 (N.Y. 1996) (finding that N.Y. PENAL LAW § 400.00(10) invests a licensing officer with authority to sua sponte revoke or cancel a license, determine the existence of proper cause for issuance of a license, and modify and restrict a license’s scope).

⁴⁰ See Kristina Davis & Greg Moran, *Group Sues Over Concealed-Weapon Permit*, SAN DIEGO UNION-TRIB., Nov. 28, 2010, at A-1; Christopher Baker, *Concealed Carry Firearm Permit Initiative*, HAWAII CONCEALED CARRY (Nov. 29, 2010), <http://hawaiiicw.com/news/concealed-carry-firearm-permit-initiative/> (stating that Honolulu County has issued no concealed handgun permits for fifteen years); *Permits to Carry a Concealed Weapon Issued in California*, CONN. GUN RIGHTS, <http://ctgunrights.com/08.Photos/California%20County%20CCW%20Info%20map.jpg> (last visited Mar. 16, 2012) (showing that San Francisco County—with more than eight-hundred thousand residents—issued just one concealed-carry permit in 2010).

permits on a shall-issue basis under the agency's carry-friendly internal rules.⁴¹

The critical difference between shall-issue and may-issue regimes is that the desire to defend one's self or property—absent a specific, particularized threat of harm—does not satisfy the “good cause” standard for a may-issue statute.⁴² Part II of this Note discusses in detail the challenges to New York and California's may-issue statutes on this basis. The majority of may-issue states preserve citizens' rights to openly carry firearms for self-defense.⁴³

II

ASSERTING THE RIGHT TO CARRY AFTER *HELLER*: *KACHALSKY AND PERUTA*

A. *Kachalsky v. Cacace* and the “Proper Cause” Requirement

Noted attorney Alan Gura's clients in *Heller* and *McDonald* were not just sympathetic; their stories embodied and lent dignity to the fight for Second Amendment rights because they focused the debate on ordinary people in their homes. The District of Columbia entrusted security guard Dick Heller with a gun to protect Washington, D.C. court buildings, but not to keep one in his home to protect himself and his family.⁴⁴ Otis McDonald wanted a handgun to protect his family after drug dealers operating in his neighborhood threatened him.⁴⁵

By contrast, Alan Kachalsky hardly seems Mr. Gura's type. As a Westchester county attorney, Mr. Kachalsky cannot claim the same immediate need for self-defense as a plaintiff like Mr. McDonald, who lived in a crime-ridden Chicago neighborhood. Instead, Mr. Kachalsky applied for a New York concealed-handgun permit because, in his own words, “we live in a world [where] sporadic random violence might at any moment place one in a position where one needs to defend oneself or possibly others, e.g. random shootings in universi-

⁴¹ Compare ALA. CODE § 13A-11-75(a) (2005) (stating that the sheriff of a county may issue a pistol license), with Jefferson Cnty., Ala. Sheriff's Office, *Pistol Permits*, http://www.jeffcosheriff.net/page.php?p=pistol_permits (last visited Mar. 16, 2012) (listing discrete, specific findings by which the department may deny a permit; these factors are identical to those provided in shall-issue statutes).

⁴² E.g., R.I. GEN. LAWS § 11-47-11(a) (requiring applicant to demonstrate “good reason to fear an injury to his or her person or property”).

⁴³ See sources cited *supra* note 38.

⁴⁴ See John Richardson, *In Their Own Words—Alan Kachalsky and Christina Nikolov*, NO LAWYERS—ONLY GUNS AND MONEY (July 28, 2010, 2:50 PM), <http://onlygunsandmoney.blogspot.com/2010/07/in-their-own-words-alan-kachalsky-and.html> (describing Heller and McDonald's backgrounds).

⁴⁵ See *id.*

ties . . . post offices, airline check-in counters, malls, road rage, as well as the run-of-the-mill street muggings and robberies.”⁴⁶

Depending on the reader’s experiences with and beliefs about violent crime, Mr. Kachalsky’s reasons for wanting to carry a concealed handgun may seem pragmatic or paranoid. But it is the very absence of a specific, identifiable threat to his or his family’s personal safety that makes Mr. Kachalsky the perfect plaintiff to challenge New York’s concealed-carry law. Mr. Gura, it seems, still knows how to pick them.

New York Penal Code section 400.00, covering “[l]icenses to carry, possess, repair and dispose of firearms,” allows the licensing agent to issue a permit to an applicant who is otherwise eligible if the applicant can show “proper cause” for the license under section 400.00(2)(f),⁴⁷ which is satisfied by demonstrating “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”⁴⁸ Mr. Kachalsky’s application demonstrates the same nebulous concern about unlikely catastrophes that leads people to buy life insurance and burglar alarms, but the licensing agent denied his application because he could not identify any specific threats to Mr. Kachalsky’s safety.⁴⁹ Here, the equities of Mr. Kachalsky’s position begin to crystallize, and Mr. Gura’s argument against arbitrary state action comes into focus.

The idea of a bureaucrat denying permission to exercise a right at his sole discretion is anathema to the very concept of fundamental rights. In certain contexts, such excesses are presumptively unconstitutional under the doctrine of prior restraint.⁵⁰ Prior restraint places a heavy burden on the state to show that its means are narrowly tai-

⁴⁶ See *id.* (quoting from Alan Kachalsky’s concealed permit application).

⁴⁷ N.Y. PENAL LAW § 400.00 (McKinney 2008).

⁴⁸ *In re Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 257 (App. Div. 1980), *aff’d* 421 N.E.2d 503 (N.Y. 1981).

⁴⁹ See Richardson, *supra* note 44 (quoting Kachalsky expressing his disappointment after officials denied him a permit because he “did not demonstrate a need for self-protection beyond that of the general public”).

⁵⁰ See *Berger v. City of Seattle*, 569 F.3d 1029, 1042 n.9 (9th Cir. 2009) (en banc) (“Rules that grant licensing officials undue discretion are not constitutional.” (citation omitted)); *Chesapeake B & M, Inc. v. Harford Cnty.*, 58 F.3d 1005, 1009 (4th Cir. 1995) (en banc) (“Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor’s discretion.”); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 964–68 (3d ed. 2006) (discussing prior restraint in the First Amendment context). While carrying a firearm may or may not be expressive conduct (and therefore squarely within prior restraint), the individual right of self-defense has at least as long a pedigree under common law and in the early republic. See *generally* JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 135–64 (1994) (discussing the English origins of the colonial right to bear arms). Arbitrary denial of any fundamental right implicates the same interests in basic fairness, and the right of self-defense—because it implicates the individual’s interest in his or her life—unquestionably has a greater claim on due process than prior restraint of merely commercial conduct. Cf. CHERMERINSKY, *supra* at 545–59 (describing procedural

lored to achieve its ends, and in practice operates more like a per se rule than traditional equal protection analysis.⁵¹ The exercise of a constitutional right may be subjected to a prior restraint, such as the New York licensing statute at issue here, only pursuant to objective, well-defined standards that eliminate the exercise of personal discretion.⁵² New York's "proper cause" standard is anything but objective or well-defined and is particularly nonsensical following *Heller* and *McDonald*, which locate the core of the Second Amendment in the fundamental right of self-defense.⁵³ This proper cause standard calls for the licensing agent to analyze the reasonableness of the applicant's perceived need for self-defense as compared to the larger community's need for self-defense.⁵⁴ Both assessments must be made in the absence of any guiding standards and with virtually no limits on the agent's discretion.⁵⁵ Mr. Kachalsky put it best:

The bottom line is right now some bureaucrat has the right to recommend that I be denied a carry permit based upon this ridiculous standard of New York . . . which is that I have to demonstrate a need

and substantive due process and the meaning of a deprivation of an individual's due process rights).

⁵¹ See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (citation omitted)). Other aspects of New York's firearm licensing regime, such as Westchester County's firearm training requirement or the state licensing fee, could be analyzed under traditional equal protection doctrine. This analysis, however, would hardly assure a clear result; for whatever reason, the *Heller* majority did not provide a tier of scrutiny for infringement of the right, instead it instructed lower courts to ask if the law is factually similar to longstanding prohibitions. Despite exhortations to follow the majority's historical analysis, lower courts have been blown to many different ports. See, e.g., *United States v. Skoien*, 587 F.3d 803, 810–14 (7th Cir. 2009) (applying intermediate scrutiny but noting that this level of review may "fluctuate with the character and degree of the challenged law's burden on the right and sometimes also with the specific iteration of the right"); *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 188 (D.D.C. 2010) (applying intermediate scrutiny on remand); *Peruta v. Cnty. of San Diego*, 678 F. Supp. 2d 1046, 1054–55 (S.D. Cal. 2010) (reviewing the different approaches taken by lower courts in the wake of *Heller*); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231–35 (D. Utah 2009) (applying strict scrutiny); *United States v. Miller*, 604 F. Supp. 2d 1162, 1169–72 (W.D. Tenn. 2009) (applying intermediate scrutiny); *United States v. Marzarella*, 595 F. Supp. 2d 596, 604–06 (W.D. Pa. 2009) (using a standard of review similar to "time, place, or manner" analysis from First Amendment doctrine); *People v. Flores*, 86 Cal. Rptr. 3d 804, 806–09 (Ct. App. 2008) (proposing but not applying an "undue burden" standard).

⁵² See, e.g., *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 350 n.8 (4th Cir. 2005) ("[U]nconstitutional prior restraints are found in the context of . . . a licensing scheme that places 'unbridled discretion in the hands of a government official or agency.'" (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225–26 (1990))).

⁵³ See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (calling self-defense the "core lawful purpose" behind gun ownership); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

⁵⁴ See *Kachalsky v. Cacace*, No. 10–CV–5413 (CS), 2011 WL 3962550, at *2 (S.D.N.Y. Sept. 2, 2011).

⁵⁵ See *supra* note 40 and accompanying text.

for self-protection beyond that of the general public. What does that even mean?⁵⁶

Because the individual right to keep and bear arms announced by *Heller* is still in its infancy, the question at the root of *Kachalsky*—and, given Mr. Gura’s record, the larger aim of this litigation—is whether the right to carry a firearm for self-defense is also protected by the Second Amendment. If so, then the strong presumption against prior restraint of fundamental rights would invalidate not only New York’s licensing scheme but every may-issue concealed-carry statute that requires a showing of good cause or special need. An extension of *Heller* outside the home under this framework would cause shockwaves forcing a dozen states and numerous major urban centers to rework their concealed-carry permit laws.

With the Second Circuit set to take up *Kachalsky* on appeal from the district court’s grant of the county’s motion for summary judgment,⁵⁷ the Supreme Court could grant certiorari as early as next year to resolve this larger issue. There is a wrinkle, however, that complicates the march back to the Supreme Court for Mr. Gura and the Second Amendment: the question of an “alternative outlet” for the right to carry a concealed weapon, which this Note explores below.

B. *Peruta v. County of San Diego* and the Alternative Outlet Doctrine

At the age of sixty and following a career in law enforcement, Edward Peruta is not ready for a quiet retirement. Instead, he is hard at work as a journalist and entrepreneur, running a private news-gathering service that sells original breaking video and stories to mainstream news outlets around the country.⁵⁸ While on assignment in his home state of California, Mr. Peruta carries expensive recording equipment and other valuables, and he frequently arrives at the scene of newsworthy events before the police.⁵⁹ Seeking to protect himself and his property, in 2009 Mr. Peruta requested a license to carry a concealed weapon from the San Diego County Sheriff’s License Division.⁶⁰

⁵⁶ Mark Berman, *NY Judge: No Constitutional Right to Carry Concealed Gun*, OPPOSING VIEWS.COM (Sept. 8, 2011), <http://www.opposingviews.com/i/society/guns/ny-judge-no-constitutional-right-carry-concealed-gun>.

⁵⁷ John Richardson, *Kachalsky v. Cacace Appealed to 2nd Circuit Court of Appeals*, NO LAWYERS—ONLY GUNS AND MONEY (Sept. 12, 2011, 11:32 PM), <http://onlygunsandmoney.blogspot.com/2011/09/kachalsky-v-cacace-appealed-to-2nd.html>.

⁵⁸ See *Peruta v. Cnty. of San Diego*, 678 F. Supp. 2d 1046, 1048 (S.D. Cal. 2010).

⁵⁹ See *id.*; Declaration of Edward Peruta in Support of Plaintiffs’ Motion for Partial Summary Judgment at ¶¶ 5–9, *Peruta v. Cnty. of San Diego*, 678 F. Supp. 2d 1046 (S.D. Cal. 2010) (No. 09-CV-2371-IEG (BGS)).

⁶⁰ *Id.* ¶¶ 8–9.

Although Mr. Peruta has no criminal record and no history of mental illness, and although he is a certified firearm safety instructor and a former law enforcement officer, the San Diego County Sheriff's Department denied his application, finding that his stated intent to protect himself, his family, and his valuables did not constitute "good cause" to carry a concealed handgun.⁶¹

According to briefs and local news reporting, one explanation for the county's refusal of Mr. Peruta's application may have been less than honorable.⁶² Regardless of the sheriff department's motives or beliefs in Mr. Peruta's case, as discussed above in *Kachalsky*, the absence of a concrete and objective standard for denial of a fundamental right is an unconstitutional prior restraint—if the Second Amendment protects the right to carry a firearm for self-defense.⁶³

The key issue presented by *Peruta* for the purposes of a fundamental rights analysis, however, is whether the Second Amendment protects the right to carry a firearm in some unspecified manner, and whether a state that bans or burdens one outlet for the right—either hidden or on the hip—must offer the alternative. Mr. Peruta's argument that California's concealed-carry law is unconstitutional is based on the assumption that its open-carry law works as a de facto ban and that he therefore has no alternative means to exercise his right of self-defense.⁶⁴ This "alternative outlet" doctrine makes intuitive sense for the Second Amendment context and draws a rational line through concealed- and open-carry case law, including older cases cited in *Heiler*,⁶⁵ but it is surprisingly novel. The defense of an alternative means

⁶¹ See *id.* ¶ 10; see also CAL. PENAL CODE § 12050(a)(1)(A) (West 2010).

⁶² See Declaration of Mark Cleary in Support of Plaintiffs' Motion for Partial Summary Judgment at ¶¶ 4–19, *Peruta v. Cnty. of San Diego*, 678 F. Supp. 2d 1046 (S.D. Cal. 2010) (No. 09-CV-2371-IEG (BGS)) (describing preferential treatment afforded by the San Diego County Sheriff's Licensing Division to certain individuals in the concealed handgun licensing process); Charles Nichols, *More Evidence of Police Favoritism in Peruta v. San Diego Gun Case*, L.A. EXAMINER (Oct. 20, 2010, 2:36 PM) (alleging that applicants who belonged to the San Diego County Honorary Deputy Sheriff's Association and who financially "sponsored" a sheriff were granted licenses while nondonors who showed equal or greater good cause were denied) available at <http://web.archive.org/web/20101025231652/http://www.examiner.com/la-in-los-angeles/more-evidence-of-police-favoritism-peruta-v-san-diego-gun-case>. Bribery and favoritism are unfortunately common in municipalities where permits are otherwise never issued. See, e.g., Philip Messing & Murray Weiss, *NYPD Big Under Fire in Aerosmith 'Got a Gun' Scandal*, N.Y. POST (Nov. 24, 2002), available at http://www.nypost.com/p/news/nypd_big_under_fire_in_aerosmith_CnOc0GJC1FB18llmgCQIUJ (detailing an investigation of a top NYPD official for helping Steven Tyler and Joe Perry obtain handgun licenses in return for VIP treatment at an Aerosmith concert).

⁶³ See *supra* note 51.

⁶⁴ CAL. PENAL CODE § 12050(a)(1)(A) ("may issue"); *id.* § 12031(a)(1) ("A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory."); *Peruta v. Cnty. of San Diego*, 678 F. Supp. 2d 1046, 1052–53 (S.D. Cal. 2010).

⁶⁵ See *infra* notes 74–77 and accompanying text.

of exercise does not seem to have an analog among other enumerated constitutional rights. The state cannot raise as a defense to censorship of one book that it allowed the injured party to publish a different one. But apparently a state can deny one outlet for the right to carry without causing the plaintiff constitutional harm so long as it allows the alternative form.

In resolving cross motions for summary judgment, the *Peruta* court adopted this alternative-outlet theory—that the state could not ban both outlets of the right to carry without infringing Mr. Peruta’s Second Amendment right to carry, should such a right exist—but nevertheless found that California law did not work a ban.⁶⁶ While California Penal Code section 12031 prohibits the open carry of loaded firearms in incorporated areas, the statute contains an exception for “a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.”⁶⁷ Reasoning that section 12031 offered an escape from the Hobson’s choice of going unarmed or not going, the court announced that a California resident unable to obtain a concealed-carry permit had a life raft: he could openly carry an unloaded firearm in one hand and ammunition in the other “ready for instant loading.”⁶⁸

Not only is the court’s suggestion impractical in a wide variety of self-defense situations, it also misapplies precedent introduced in *Heller*. After noting (in a sentence often cited and rarely examined) that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues,”⁶⁹ the *Heller* majority cited with approval several state high-court decisions including *State v. Reid*.⁷⁰ In *Reid*, the Supreme Court of Alabama held that “[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or *which requires arms to be so borne as to render them wholly useless for the purpose of defence*, would be clearly unconstitutional.”⁷¹

⁶⁶ See *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1114–15 (S.D. Cal. 2010) (relying on *Heller* for the maxim that “concealed weapons restrictions . . . must be viewed in the context of the government’s overall scheme”); see also *id.* at 1121 (holding that the government’s policy does not infringe on plaintiff’s Second Amendment rights).

⁶⁷ CAL. PENAL CODE § 12031(j)(1).

⁶⁸ *Peruta*, 758 F. Supp. 2d at 1114. But see Patrick McGreevy & Nicholas Riccardi, *Brown Bans Open Carrying of Handguns*, L.A. TIMES (Oct. 10, 2011), <http://articles.latimes.com/2011/oct/10/local/la-me-brown-guns-20111011> (reporting passage of a bill outlawing open carry of unloaded handguns, thus closing the only alternative outlet for the right to carry in California).

⁶⁹ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

⁷⁰ See *id.* at 629 (citing *State v. Reid*, 1 Ala. 612 (1840)).

⁷¹ *Reid*, 1 Ala. at 616–17 (emphasis added).

This sentence is quoted in *Heller* as an accurate expression of the right to bear arms.⁷² The Court's assertion in *Heller* and *McDonald* that states must allow citizens to keep firearms loaded and ready for self-defense further echoes this command.⁷³

Whether the district court was right about section 12031 in Mr. Peruta's case—regarding whether an unloaded handgun is rendered “wholly useless for the purpose of defence”—is less fundamental than the court's adoption and explication of *Heller*'s implicit doctrine of an alternative outlet for the right to carry.⁷⁴ In denying the defendant's motion to dismiss, the *Peruta* court located this doctrine in two more cases cited in *Heller*:

Both *Chandler* and *Nunn*, the two cases relied upon by the Supreme Court, concerned prohibitions on carrying of concealed weapons where the affected individuals *had alternate ways to exercise their Second Amendment rights*—by *openly* carrying those weapons. . . . *The applicability of these cases is questionable where, as here, the State expressly prohibits individuals such as Plaintiff from openly carrying a loaded firearm in public places.*⁷⁵

In *Nunn v. State*, the Georgia Supreme Court struck down a ban on openly carrying handguns in public for protection but upheld the concealed-carry ban because it did not “deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms.”⁷⁶ In *State v. Chandler*, the court held that the Second Amendment guarantees the right to carry arms for self-defense, but that the legislature had the authority to choose the right's outlet.⁷⁷

If concealed carry and open carry are in fact equal alternative outlets for the same indivisible right, then a state can ban or burden one so long as it allows the other.⁷⁸ State may-issue concealed-carry laws would be safe even if they required a showing of “good cause,” so long as the state allowed open carry of loaded handguns, as virtually all do. Rather than an upheaval, any extension of the Second Amend-

⁷² *Heller*, 554 U.S. at 629.

⁷³ *See id.*; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

⁷⁴ *See supra* note 66.

⁷⁵ *Peruta v. Cnty. of San Diego*, 678 F. Supp. 2d 1046, 1052–53 (S.D. Cal. 2010) (emphasis added).

⁷⁶ 1 Ga. 243, 251 (1846).

⁷⁷ 5 La. Ann. 489, 490–91 (1850).

⁷⁸ *See Volokh, supra* note 7, at 1516 (“*Heller* stated that bans on concealed carry of firearms are so traditionally recognized that they must be seen as constitutionally permissible. . . . The same cannot, however, be said about general bans on carrying firearms in public, which prohibit open as well as concealed carrying.”); Malcolm MacLachlan, *Would Open-Carry Ban Force Boost Concealed Weapons Permits?*, CAPITOL WEEKLY, Jul. 22, 2010, at A1, <http://www.capitolweekly.net/article.php?xid=z03k54zggitlvf> (noting concerns among California lawmakers that passing a total open-carry ban may, in conjunction with the restrictive may-issue concealed-carry statute, violate the Second Amendment).

ment outside the home under this doctrine would cause only a few local tremors.

With the Ninth Circuit already proceeding with *Peruta* on appeal from the district court's grant of the county's motion for summary judgment, the Supreme Court could grant certiorari at any time following the court's final order.⁷⁹

III

HIDDEN OR ON THE HIP: THE STATES' DILEMMA

A. Next Steps

The full scope of the Second Amendment is still uncertain, but the Court, at least the *Heller* majority, foresees more work ahead.⁸⁰ Despite efforts to portray *Heller* as the “high-water mark” of a vainglorious and already receding wave,⁸¹ and despite staunch opposition from legislatures and interest groups,⁸² the Roberts Court is likely to consider laws that burden the right to carry in the next few years—potentially joining *Kachalsky* and *Peruta* in one case to reach the “good cause” statutes of California and New York in the same decision.⁸³ The leap from *Heller* to a right to carry is modest: accounts of the broad and longstanding acceptance of open carry from common law

⁷⁹ The Court will not be limited to choosing between *Kachalsky* and *Peruta* if it wishes to take on this issue; several cases brought since *Heller* challenge discretionary may-issue statutes. See, e.g., *Woollard v. Sheridan*, No. L-10-2068, 2012 WL 695674, at *2 (D. Md. Mar. 2, 2012); Complaint, *Muller v. Maenza*, No. 2:10-CV-6110-WHW-CCC (D.N.J. Nov. 22, 2010); Complaint, *Birdt v. Beck*, No. 2:10-cv-08377-JAK-JEM (C.D. Cal. Nov. 4, 2010); Complaint, *Jacobs v. Reed*, No. 2:10-cv-00913-LKK-EFB (E.D. Cal. Apr. 16, 2010); Complaint, *Pizzo v. Newsom*, No. 4:09-cv-04493 (N.D. Cal. Sept. 23, 2009); *Richards v. Prieto*, No. 2:09-cv-01235-MCE-KJM (E.D. Cal. May 5, 2009).

⁸⁰ See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”); see also Johnson, *supra* note 19, at 730–36 (finding in the rise of shall-carry regimes signs of a larger social movement). But see Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Methods and Outcomes*, 56 UCLA L. REV. 1425, 1430 (2009) (noting that “*Heller* is likely to set the high-water mark for originalist interpretation” and predicting that lower courts will adopt rational basis with bite, and that the Court will respond with less zeal as its membership changes—though this post-*Heller* analysis was “predicated on the assumption that the Supreme Court will not take up another Second Amendment case in the near future”).

⁸¹ Tushnet, *supra* note 80, at 1430–34; see also Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1276 (2010) (predicting that lower courts “are likely to play very rough with *McDonald* and *Heller*”).

⁸² E.g., Suzanne Ito, *Heller Decision and the Second Amendment*, ACLU BLOG OF RIGHTS (Jul. 1, 2008, 3:44 PM), <http://www.aclu.org/2008/07/01/heller-decision-and-the-second-amendment> (rejecting *Heller* and insisting that the Second Amendment is a “collective right”).

⁸³ See Adam Liptak, *The Most Conservative Court in Decades: Under Roberts, Center of Gravity Has Edged to the Right, Analyses Show*, N.Y. TIMES, July 25, 2010, at A1 (“If the Roberts court continues on the course suggested by its first five years, it is likely to . . . elaborate further on the scope of the Second Amendment’s right to bear arms.”).

through ratification and incorporation dot both *Heller* and *McDonald* like white stones on a forest floor.⁸⁴ Under any application of originalist analysis, the Court need only follow these clues to a holding that states may not prohibit open carry unless they instead offer the alternative outlet of concealed carry.

B. Rational Politics and the Search for Real Data

At the center of this Note are a small number of states whose laws prohibit or restrain both outlets for the right to carry and that are therefore vulnerable under any extension of *Heller* outside the home. These states are California, Hawaii, Illinois, Maryland, New Jersey, New York, Rhode Island, and the District of Columbia.

Because a ban on one outlet for the right to carry is valid only if the state authorizes the alternative outlet, rationally, these states should permit the version that is the less costly, disruptive, and dangerous so that the state may continue to ban the less-favored. These states could then take affirmative steps to reduce the impact of their choice by establishing rigorous firearm licensing requirements, offering safety courses and law enforcement public outreach,⁸⁵ expanding the presumptively constitutional categories of “dangerous and unusual weapons” and “sensitive places,”⁸⁶ and ensuring that felons and the severely disturbed never receive a permit or a firearm.⁸⁷

Which outlet for the right to carry is superior? We might start by asking which is safer, cheaper, or more effective at deterring crime, but even these basic empirical questions have no ready answers. While a statute that prevents citizens from carrying concealed handguns decreases the incidence of lawful carry, there is no evidence that this leads to a corresponding drop in the incidence of handgun violence, accidental deaths, or overall carry. In fact, there are studies showing the opposite, that adopting shall-issue statutes causes a reduc-

⁸⁴ See, e.g., *Heller*, 554 U.S. at 570, 612–13, 628–29, 687–88; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3082, 3134 (2010). See generally Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 228 (2008) (“[P]rima facie, the logic and language of *Heller* extend to the possession and use of firearms outside of the home.”).

⁸⁵ See, e.g., Denise Lockwood, *What Should You Know About the Wisconsin Conceal Carry Law?*, WHITEFISHBAYPATCH (July 23, 2011), <http://whitefishbay.patch.com/articles/what-should-you-know-about-the-wisconsin-conceal-carry-law> (describing efforts by Wisconsin, the latest shall-issue state, to implement public safety measures before the law goes into effect in November 2011).

⁸⁶ *Heller*, 554 U.S. at 626–27.

⁸⁷ See, e.g., Andrea Stone, *Giffords Shooting Raises Questions About Guns and Mental Illness*, AOL NEWS (Jan. 11, 2011, 7:39 PM), <http://www.aolnews.com/2011/01/11/arizona-shooting-raises-questions-about-how-to-keep-guns-from-me/> (reporting on holes in the Arizona statute that allowed Jared Loughner to purchase a firearm).

tion in the violent-crime rate.⁸⁸ California effectively bans concealed carry and has a very low incidence of lawful carry,⁸⁹ yet the state's rate of homicides committed with a handgun, as a percentage of all homicides, is thirteenth in the nation at 69.4%.⁹⁰ Vermont, a sparsely populated rural state with no state regulation of handgun carry, has the third-lowest violent-crime rate in the nation.⁹¹ And yet Alaska, another sparsely populated rural state with no state regulation of handgun carry, has the sixth-highest violent-crime rate in the nation.⁹² The data does not suggest a robust predictive model for firearm regulation and public safety.

Perhaps the only certainty in this inquiry is Professor Tushnet's observation that the data does not reflect what reasonable voters and legislators might expect: "it is quite difficult to show with any moderately persuasive social-science evidence that . . . gun regulations . . . advance public policies favoring reduction in violence, reduction in gun violence, reduction in accidents associated with guns, or pretty much anything else the public thinks the regulations might accomplish."⁹³

C. Untangling the Knot: Open or Concealed

Without firm empirical and predictive guidelines, the states must rely on historical practice, majoritarian pressure, cultural beliefs about public safety, and hard-won experience. Because decisions based on these factors are path-dependent and organic, they have led to unusual results in several cases. For example, most states that grant concealed permits under a shall-issue statute also allow the open carry of firearms, frequently without a permit.⁹⁴ Five of these states, however,

⁸⁸ See *McDonald*, 130 S. Ct. at 3026 (noting an increase in the handgun murder rate since Chicago enacted its handgun ban); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 39 (1997) (using statistical evidence to argue that shall-issue, concealed-carry statutes reduce crime). But see Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1204 n.19 (2003) (arguing that shall-issue laws do not reduce handgun violence, but conceding that the debate frequently comes down to little more than "competing anecdotes").

⁸⁹ *BRFSS Survey Results 2001 for Nationwide: Firearms*, N.C. STATE CENTER FOR HEALTH STAT., <http://www.schs.state.nc.us/SCHS/brfss/2001/us/firearm3.html> (last visited Mar. 12, 2012).

⁹⁰ Simon Rogers, *Gun Crime Statistics by US State: Latest Data*, THE GUARDIAN DATABLOG (Sept. 27, 2011, 8:30 AM), <http://www.guardian.co.uk/news/datablog/2011/jan/10/gun-crime-us-state?commentpage=all#start-of-comments>.

⁹¹ U.S. CENSUS BUREAU: VIOLENT CRIMES PER 100,000 POPULATION (2006), available at <http://www.census.gov/statab/ranks/rank21.html>.

⁹² *Id.*

⁹³ Tushnet, *supra* note 80, at 1427.

⁹⁴ See, e.g., ARIZ. REV. STAT. ANN. § 13-3102(B)(3)(a)-(b) (2010) (excluding from criminal penalties any firearm carried openly); WASH. REV. CODE §§ 9.41.040, 9.41.045, 9.41.070 (2010).

enforce strict bans on the open carry of loaded handguns—including states like Texas and Oklahoma that have long traditions of open carry stemming from cultural connections to six-guns and the Wild West.⁹⁵ These states require residents to carry their handguns out of sight, a dramatic shift from the rule that prevailed at common law and in the early American republic.⁹⁶ The legislatures in these states may rightly be concerned about displays of weapons provoking violence or disturbing the peace. All of these states allowed open carry for at least some part of their history; these rules may reflect a reaction against that experience.⁹⁷ Alternatively, legislators in these states may believe that there is a crime-reduction benefit to a policy that denies criminals the ability to distinguish armed from unarmed citizens, and thus makes every attempted robbery, rape, or assault a potentially lethal gamble for the felon.⁹⁸ The shift in acceptance from open to concealed carry may even be rooted in demographic movement. As states in the South and Midwest transformed from rural and agrarian to urbanized and educated,⁹⁹ the balance between self-defense and the interests of civilized society may have changed.

Until recently, two states still embodied the classic common-law doctrine by favoring open carry over concealed: Delaware and Wisconsin. Today, only Delaware carries the banner—Wisconsin became the latest state to enact shall-issue concealed carry when Governor

⁹⁵ See, e.g., TEX. GOV'T CODE ANN. § 411.177(a) (West 2005 & Supp. 2011) (effective Sept. 1, 2009) (shall-issue, concealed-carry statute); TEX. PENAL CODE ANN. § 46.02(a-1)(1) (West 2011) (criminalizing open carry of a handgun); TEX. PENAL CODE ANN. §46.035(a) (West 2011) (criminalizing failure by a permit holder to conceal handgun); see also Donna Leinwand, *Four States Considering Open-Carry Gun Laws*, USA TODAY, Feb. 12, 2009, at A3 (describing the push for open carry in Texas, South Carolina, Oklahoma and Arkansas, which one Texas legislator opposed as “harkening too far back to the Wild West”; all four states continue to resist these efforts).

⁹⁶ See sources cited *supra* note 18.

⁹⁷ Washington State passed its limited open-carry ban following demonstrations by the Black Panther Party in Seattle, making it a criminal offense to carry a firearm openly and in a manner that “warrants alarm for the safety of other persons.” See WASH. REV. CODE § 9.41.270(1) (2010); see also CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822) (“[I]n this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.”).

⁹⁸ See Dan Baum, *Happiness Is a Worn Gun: My Concealed Weapon and Me*, HARPER’S, Aug. 2010, at 29, 34 (“In Ohio, a judge recently suggested that, in the face of law-enforcement budget cuts, people should ‘arm themselves.’”); Ian Urbina, *Taking Guns to Cafes to Show They Can*, N.Y. TIMES, Mar. 8, 2010, at A11 (noting that “the flock is safer when the wolves cannot tell the difference between the lions and the lambs,” a quote attributed to former National Rifle Association President, Charlton Heston).

⁹⁹ See, e.g., *Texas in Focus: A Statewide View of Opportunities*, WINDOW ON STATE GOV'T, <http://www.window.state.tx.us/specialrpt/tif/population.html> (last visited Mar. 16, 2012) (showing the changes in Texas’ population demographics through 2000).

Scott Walker signed into law 2011's Act 35.¹⁰⁰ The essence of the common-law approach—and its hostility to the popular concealed-carry movement—was summarized by former Wisconsin Governor Jim Doyle who, following the narrow defeat of a concealed-carry amendment to the state constitution, told supporters that if you want to carry a gun in Wisconsin, “wear it on your hip.”¹⁰¹

The seemingly draconian regime in these states—allowing a resident to openly carry his or her handgun on crowded city streets, but punishing the resident with years of prison if the same sidearm is carried in a purse—echoes the ancient presumption that concealed weapons were a greater threat to public safety than openly carried ones.¹⁰² Is there value to this approach?

The modern basis for allowing open carry is probably more real-politik than history: requiring citizens to choose between going openly armed or unarmed likely reduces carry activity. Citizens who wear deadly weapons openly in urban centers attract negative attention from the police, fellow citizens, and the media.¹⁰³ Requiring carriers to wear their guns on the hip sets up a powerful social barrier to actually carrying a firearm for self-defense and decreases the number of people willing to do so.¹⁰⁴ Those states that recoil at the thought of anonymous and secretive concealed carry might find this model a practical alternative to shall-issue concealed carry, and one that curbs the exercise of carry in urban areas without directly violating the Second Amendment. Despite its odd fit with residents and public officials who might prefer that gun owners simply move to the next state

¹⁰⁰ See generally *Concealed Carry Law*, WIS. DEP'T OF JUSTICE, <http://www.doj.state.wi.us/dles/cib/ConcealedCarry/ConcealedCarry.asp> (last updated Nov. 9, 2011) (describing the process for Wisconsin residents to apply for concealed-carry permits under 2011 Wisconsin Act 35).

¹⁰¹ Stacy Forster et al., *Rush to Carry Guns in Open Is Not Likely*, MILWAUKEE J. SENTINEL, Apr. 22, 2009, at A1; see also *What is Open Carry?*, DELAWARE OPEN CARRY, <http://deloc.org/whatis.php> (last visited Mar. 16, 2012) (quoting former Delaware Attorney General Charles M. Oberly, III: “Under current Delaware law, virtually anyone, excepting felons, may strap on a holster and carry a gun in plain view”).

¹⁰² See sources cited *supra* note 18; see also *District of Columbia v. Heller*, 554 U.S. 570, 612–13 (2008).

¹⁰³ See Bonnie Eslinger, *Open-Carry Advocates Fired Up By Comment*, SAN JOSE MERCURY NEWS, Jul. 17, 2010, at 7B (referring to a police detective that posted on Facebook that he “should’ve pulled the [assault rifle] out and prone them all out,” after encountering a Redwood City man in a supermarket with a gun on his hip); see also *Banks v. Gallagher*, 686 F. Supp. 2d 499, 503–07 (M.D. Pa. 2009) (questioning detention and arrest of open-carry demonstrators); Complaint at ¶¶ 17–26, *Wis. Carry, Inc. v. City of Madison*, 2011 U.S. Dist. LEXIS 77308 (W.D. Wis. 2011) (No. 3:10-cv-00548-BBC) (suing city of Madison to end harassment of open carriers).

¹⁰⁴ See Volokh, *supra* note 7, at 1521 (“[C]arrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.”).

over,¹⁰⁵ an open-carry regime in conjunction with rigorous police enforcement of permit requirements and behavior by permit holders might be an effective—if counterintuitive—policy for large cities and largely urban states forced to offer some outlet for the right to carry following an extension of the Second Amendment outside the home.

These theoretical advantages of open carry, however, must withstand two criticisms. The first source of criticism is open carry's unpopularity. With Wisconsin now a shall-issue state, Delaware is the last remaining member of the common-law club among U.S. states.¹⁰⁶ An open-carry-only regime is on the wrong side of history and highly vulnerable to majority pressure—as evident from recent history in Iowa and Wisconsin. The second source of criticism is whether exposing citizens to “*Terry stops*”¹⁰⁷ and related police searches for engaging in constitutionally protected conduct—the almost certain consequence of a shift to an open-carry regime—raises a constitutional concern.¹⁰⁸ Some courts have held that the right to carry arms is not a positive right guaranteeing freedom from being questioned, arrested, or detained, but merely a “negative right”—an affirmative defense to prosecution.¹⁰⁹ It is not clear, however, how broadly this doctrine extends or whether it would survive determined opposition.¹¹⁰

D. Concealed Carry: The Least Dangerous, Least Costly, and Most-Studied Outlet for the Right to Carry Arms

Despite the advantages of open carry from the perspectives of public safety, administrative concerns, and common-law pedigree, the concealed-carry outlet seems to be the superior alternative even for industrialized urban states. The proliferation of concealed-carry permits beginning in the early 1990s did not produce a commensurate

¹⁰⁵ See, e.g., Breyer: *Founding Fathers Would Have Allowed Restrictions on Guns*, FOXNEWS.COM (Dec. 12, 2010), <http://www.foxnews.com/politics/2010/12/12/breyer-founding-fathers-allowed-restrictions-guns/> (quoting Justice Breyer answering a rhetorical question from D.C. gun owners: “Do you like to shoot pistols at targets? Well, get on the subway and go to Maryland”).

¹⁰⁶ See *supra* note 100.

¹⁰⁷ See *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (allowing limited search of clothing and person if police have a reasonable basis for suspecting the detainee may be “armed and dangerous”).

¹⁰⁸ See *Herrington v. United States*, 6 A.3d 1237, 1244–45 (D.C. 2010) (striking down a District ban on possession of ammunition because it “presumes criminality from constitutionally-protected conduct”).

¹⁰⁹ See *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 146–47 (2d Cir. 2010) (Wesley, J., concurring) (construing federal statute authorizing travel with firearms as creating not a positive right, but only an affirmative defense to conviction under state law).

¹¹⁰ See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 937 n.22 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997) (“The distinction between affirmative and negative rights, though its legitimacy has been much disputed in academic circles, continues to find favor with the Supreme Court.” (citations omitted)).

explosion in violent crime, even in large cities and the nation's second-most-populous state, Texas. Instead, crime rates fell nationwide throughout the 1990s and early 2000s.¹¹¹ Although there is no data proving a positive correlation between issuance of concealed-carry permits and crime rates, the converse is also true: no one can prove a positive correlation between concealed-carry licensing and an increase in crime rate in any jurisdiction. We do not have empirical data that open carry is worse than concealed, but we do know that five conservative long-time open-carry states abandoned open carry for concealed carry early on and never looked back.¹¹² These states' firm and unwavering decisions to switch to concealed carry, especially given their long collective experience with open carry, speak volumes about the relative social utility of open versus concealed carry and the impact of open carry on at least the perception of public safety.

Additionally, the specter of constitutional challenge is very real in a common-law open-carry regime. Though some cases insulating police action under the negative rights doctrine are on the books, it is doubtful how long these holdings would survive a widespread pattern of searches conducted solely because citizens chose to engage in their only legally permissible outlet for exercise of a constitutional right.¹¹³ Carrying concealed weapons does not routinely subject citizens to *Terry* stops. Consequently, issuing concealed-carry permits alone would help avoid this collision of courts, legislatures, law enforcement, and the federal constitution.

Finally, though concealed carry raises the specter of "unmanly assassinations,"¹¹⁴ and of Jared Loughner and the next mass-murderer who hides a gun under his coat, it is unclear how a ban on concealing deadly weapons could ever be an effective deterrent to these madmen. An assassin intent on mayhem is already unmoved by the risk of life imprisonment or even execution: the threat of an additional misdemeanor or Class D felony charge would hardly alter his or her course. Nor would an open-carry regime solve the problem of systematic bad actors: law-abiding citizens might wear their arms openly, as at common law, but criminals seeking secret advantages would persist in the expedient of slipping a handgun into their pocket. This ancient subterfuge is no more preventable or punishable today than at common law.

¹¹¹ See *Crime in the United States*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (last visited Mar. 16, 2012) (showing decreasing national crime rate between 1991–2010).

¹¹² See *supra* notes 95–99 and accompanying text.

¹¹³ See *supra* notes 109–10.

¹¹⁴ See sources cited *supra* note 18.

CONCLUSION

The choice is coming. The doctrine of alternative outlets for the right to carry—implied in *Heller*, discussed in *Peruta*, and combined with a bar on “good cause” discretion for permit issuance under *Kachalsky*—points to the next major development in Second Amendment jurisprudence. Not now, but soon, California, Hawaii, Illinois, Maryland, New Jersey, New York, Rhode Island, and the District of Columbia must allow their citizens to carry loaded firearms for self-defense—whether hidden or on the hip.

This Note weighs the options these states face and comes down in favor of concealed carry over open carry. It is less disruptive to the public peace; its impact on the crime rate, while debatable, is not negative; it is popular and democratically stable; and it raises no significant risks of constitutional conflict. However, it is impossible to overstate how difficult this choice will be for cities and states whose electorates, leaders, and civic cultures are hostile to gun ownership, particularly when they have suffered through decades of gun crime.¹¹⁵ These cities and states face on the one hand, pistols worn on the hip straight from a television western and on the other, a world in which virtually anyone—possibly even a Jared Loughner—can legally conceal a handgun. Worse still, this debate is shockingly light on objective evidence; no one can claim to understand, much less predict, the effect of gun laws on crime or public safety, despite decades of determined study.¹¹⁶ Only in the echo chamber of the United States gun control debate could each side lay exclusive claim to the truth when the impact of a new form of regulation is totally unknown.¹¹⁷

Like the push for urban gun control in the 1970s, and for shall-issue concealed-carry laws in the 1990s, this new choice between open and concealed carry will be fought not by social scientists and statisti-

¹¹⁵ See, e.g., Mark Guarino, *Homicide Rate Jumps in Chicago, Daley Pushes For More Gun Control*, CHRISTIAN SCI. MONITOR, Apr. 27, 2010, <http://www.csmonitor.com/USA/2010/0427/Homicide-rate-jumps-in-Chicago-Daley-pushes-for-more-gun-control> (providing historical background for Chicago’s murder rate and placing it in context with other major American cities).

¹¹⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 702 (2008) (Breyer, J., dissenting) (“What would the District’s crime rate have looked like without the ban? Higher? Lower? The same? Experts differ; and we, as judges, cannot say.”).

¹¹⁷ Compare Press Release, Coal. to Stop Gun Violence, Governor Schwarzenegger Signs Historic Crime-Fighting Legislation into Law (Oct. 14, 2007), available at <http://www.csgv.org/media-web/press-releases/2007-press-releases/87-governor-schwarzenegger-signs-historic-crime-fighting-legislation-into-law> (celebrating new resources provided by legislation designed to help fight gun-related crime), with “Micro-Stamping”: *Incremental Gun Prohibition Advances in California*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION (Oct. 29, 2007, 12:00 AM), <http://www.nraila.org/news-issues/fact-sheets/2007/micro-stamping-incremental-gun-prohi.aspx?s=&st=&ps=> (decrying legislative efforts to limit the sale of pistols by imposing ever-expanding restrictions).

cians, but by voters, legislators, and judges, in the “world of affairs rather than ideas,”¹¹⁸ and at a steep cost to rational public discourse and the ideals of civic democracy.

¹¹⁸ Ayres & Donohue, *supra* note 88, at 1198.

