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The Justifiable Need Requirement is Not Justifiable

By: Victoria Tengelic

I. Introduction

The Second Amendment right to “keep and bear arms” has been the subject of heated debate in this country. Through two crucial cases heard between 2008 and 2010, *District of Columbia v Heller*, 554 U.S. 570 (2008) and *McDonald v City of Chicago*, 561 U.S. 742 (2010), the Supreme Court changed the landscape of Second Amendment law but left many questions unanswered. Although the Supreme Court asserted that citizens have the right to protect themselves in their home with the use of a handgun, the Court did not opine as to the extent of the protection outside the home or the proper standard of review.¹

Whether the Second Amendment provides the right to carry a gun for personal safety in public, and under what circumstances the right applies, has become an issue of importance for gun owners in states where the permitting scheme is discretionary. Under the licensing requirements in New Jersey, Maryland, New York, California, and Hawaii, applicants must show that a specific threat or need for protection exists before a permit to carry a firearm in public will be issued (the statutes use terms such as “justifiable need,” “good cause,” “good-and-substantial reason” etc.).² While the definition of these terms differs depending on the state that is applying

¹*District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the right to bear arms is an individual right); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that Second Amendment applies to the states); see also, *Kachalsky v. County of Westchester*, 701 F.3d 81, 88 – 89 (2nd Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013).

²*Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (challenge to New Jersey’s requirement to show “justifiable need” in order to obtain a permit to carry a firearm in public); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013) (challenge to Maryland’s requirement to show “good-and-substantial reason in order to obtain a permit to carry a firearm in public); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013) (challenge to New York’s requirement to show “proper cause” in order to obtain a permit to carry a fire arm in public); *Peruta v County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated*, 2015

it, “they are essentially the same-the applicant must show a special need for self-defense distinguishable from that of the population at large, often through a specific and particularized threat of harm.”³

In those circuits where states have licensing regimens that include these subjective requirements, a circuit split had emerged as to whether the discretionary requirement of “good cause” violates the constitutional right to “bear arms” under the Second Amendment.⁴ In February 2014, the Ninth Circuit became the fourth Circuit Court of Appeals to weigh in on the issue of whether a state may require “justifiable need,” “good cause,” or “proper cause,” etc. before issuing a permit to carry a handgun in public.⁵ In a three - judge panel opinion the Ninth Circuit held in, *Peruta v. County of San Diego*,⁶ that California’s “good cause” requirement, as applied in San Diego County was unconstitutional.⁷ On March 26, 2015, the Ninth Circuit vacated the February 2014 opinion in *Peruta v. County of San Diego* and voted to re-hear the matter en banc.⁸ The new hearing will be held in San Francisco in the third week of June, 2015.⁹

U.S. App. LEXIS 4941 (9th Cir. March 26, 2015) (challenge to San Diego County, California’s application of California’s “good cause” requirement in order to obtain a permit to carry a firearm in public); HAW. REV. STAT. §134-9 (2015) (Hawaii’s statute requiring “an applicant [to] show[s] reason to fear injury to the applicant’s person or property”);

³ *Drake v. Filko*, 724 F.3d 426, 442 (3rd Cir. 2013) (Hardiman, J., dissenting), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

⁴ *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (challenge to New Jersey’s requirement to show “justifiable need” in order to obtain a permit to carry a firearm in public- court upheld the requirement); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013) (challenge to Maryland’s requirement to show “good-and-substantial reason in order to obtain a permit to carry a firearm in public – court upheld the requirement); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013) (challenge to New York’s requirement to show “proper cause” in order to obtain a permit to carry a firearm in public – court upheld the requirement); *Peruta v County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015) (challenge to San Diego County, California’s application of California’s requirement to show “good cause” in order to obtain a permit to carry a firearm in public – court struck down the requirement);

⁵ *Peruta v County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015).

⁶ *Id.*

⁷ *Id.* at 1175.

⁸ *Peruta v County of San Diego*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015).

⁹ Bob Egelko, *Concealed Carry Law Gets New Court Date; Panel to Review Ruling by Appeals Court in '14*, S.F. CHRON., Mar. 27, 2015, at D1.

In addition to the differing opinions concerning the constitutionality of the “good cause” discretionary requirement, the circuit courts have also applied different levels of scrutiny.¹⁰

This Note will focus specifically on the constitutionality of the requirement to show “justifiable need” before being granted a right to carry permit and the level of scrutiny that should apply to the question. This Note concludes that the proper standard of review is a heightened form of intermediate scrutiny in which the court considers all evidence on the effect of the legislation. Under this standard, both the rights of the individual and the interests of the government are addressed. Applying heightened intermediate scrutiny to the justifiable need requirement, this Note then determines that the requirement is unconstitutional, as it is not a reasonable fit to the substantial interest of the government.

Part II provides background information including a description of different state licensing schemes and a brief history of the right to carry. Part III presents an overview of the circuits that have addressed the specific issue of whether it is permissible for a state to require an individual to show justifiable need before being issued a permit to carry a handgun in public. This will be followed, in Part IV, by a discussion of the constitutional standards of review and how they have been applied to the Second Amendment. Part V analyzes the justifiable need requirement under intermediate scrutiny, concluding that the Supreme Court should find the requirement impermissible as unreasonably burdensome on individual’s Second Amendment rights.

II. Background

This Part discusses the varying state requirements for handgun permits as well as the historical background underlying the current decisions on the right to carry a firearm for protection. The permitting scheme in most states includes a specific set of standards that, if met,

¹⁰ *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 775 F.3d 308, 324, (6th Cir. 2014). *vacated*, 2015 U.S. App. LEXIS 6638 (6th Cir. April 21, 2015).

requires an individual be allowed a permit to carry.¹¹ In a minority of states, law enforcement (or other licensing authority) has discretion, based on the “need” of the applicant, to approve or deny a permit application.¹² While historical analysis of case law from the time of the country’s founding indicates there is a preference towards open carry of firearms, until recently, discretionary permitting schemes were not directly reviewed.¹³

A. State Permitting Schemes

Forty-four states currently allow individuals to openly carry a handgun; fourteen of those states require a permit.¹⁴ However, most states require a permit to carry a concealed firearm.¹⁵ Permit requirements can be divided into two classes: shall issue and may issue. Under a “shall issue,” regime, unless there is a specific excluding factor such as felony convictions, the permit to carry must be issued.¹⁶ “In the forty shall-issue States, permitting officials must grant an application for handgun carry permits so long as the applicant satisfies certain objective criteria, such as a background check and completion of a safety course. In these jurisdictions, a general desire for self-defense is sufficient to obtain a handgun.”¹⁷ The “may issue” licensing scheme is a discretionary class, allowing government officials discretion to decide, sometimes with little judicial review, who may carry a gun.¹⁸ Only nine states follow a “may-issue” regime.¹⁹

¹¹ *Drake*, 724 F.3d at 441-442 (Hardiman, J., dissenting) (citation omitted).

¹² Nicholas Moeller, Note, *The Second Amendment Beyond The Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401, 1405 (2014).

¹³ *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2nd Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013); *see also*, Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2014) (arguing that open carry is the only form of firearm carry that is constitutionally protected).

¹⁴ Open Carry Map, OpenCarry.org, http://www.opencarry.org/?page_id=103 (last visited April 26, 2015).

¹⁵ Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1498 (2014).

¹⁶ Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 722 (2007).

¹⁷ *Drake*, 724 F.3d at 441- 442 (Hardiman, J., dissenting) (citation omitted).

¹⁸ Moeller, *supra* note 12, at 1405.

¹⁹ Meltzer, *supra* note 15, at 1498.

Another distinction made in the right to carry context are the differences between open carry and concealed carry. The advantages of open carry are that people are put on notice that there is an armed person in their midst. However, people are more likely to be afraid or disconcerted by the visible presence of a weapon; this causes many people to prefer to carry concealed weapons.²⁰ While carrying a concealed weapon dissipates the fear some feel by seeing an openly carried firearm, critics argue that if the weapon can't be seen, people are not aware of the possible danger and there is more temptation for the carrier to act nefariously.²¹ On the other hand, the Seventh Circuit argued that “knowing that many law-abiding citizens are walking the streets armed may make criminals timid.”²² There are not conclusive answers to the question of whether allowing citizens to carry weapons, either open or concealed, increases or decreases crime rates.²³ However, based on the data available, there appears to be little correlation between gun ownership and murder rates²⁴ nor does data establish that allowing the right to carry in public will increase crime rates in any impactful manner.²⁵

B. Historical Analysis

Both those supporting the right to carry firearms and those contending that governments are entitled to regulate under the Second Amendment have used history as far back as medieval times to defend their position. As with many topics that provoke intense feelings, history can often be wielded to support multiple arguments. The following section provides an overview of the case law and other historical references that have been used by the courts that have addressed the “justifiable need” issue.

²⁰ Eugene Volokh, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. v. Heller: 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).

²¹ *Id.* at 1523.

²² *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012).

²³ Volokh, *supra* note 20, at 1465-66; *see also*, *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012).

²⁴ Volokh, *supra* note 20, at 1466.

²⁵ *Moore*, 702 F.3d at 937.

The Supreme Court in *Heller* conducted a historical review of post-ratification cases because an inquiry into “the public understanding of a legal text in the period after its enactment or ratification is a critical tool of constitutional interpretation”²⁶ The Ninth Circuit also relied heavily on history to support its contention that the Second Amendment was meant to protect an individual’s right to carry a weapon for personal defense.²⁷ The Ninth Circuit determined that proper analysis included a review focusing significantly on state courts at the time of the enactment who viewed the right to bear arms, as the Supreme Court does, as an individual right to self-defense rather than a militia-based right.²⁸ This proposed review differs from the position taken by other circuit courts that addressed the justifiable need issue; in those cases only a very brief mention of the history was made or it was not addressed at all.²⁹

The following is a brief history of the treatment of the right to bear arms by the state courts starting after ratification of the Second Amendment and ending in the late nineteenth century. In 1822, Kentucky’s highest state court, in *Bliss v. Commonwealth*,³⁰ interpreted the right to bear arms very broadly finding that “[a]n act needn’t amount to a complete destruction of the right to be forbidden by the explicit language of the constitution since any statute that diminish[ed] or impair[ed the right] as it existed when the constitution was formed would also be void.”³¹ The court therefore struck down the law at issue which banned concealed carry.³² Although in 1840

²⁶ *Peruta*, 742 F.3d at 1173. (citing *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)).

²⁷ *Id.* at 1151, 1167; . see also, *Drake v. Filko*, 724 F.3d 426, 449 (3rd Cir. 2013) (Hardiman, J., dissenting); see also, Volokh, *supra* note 19, at 1464-65.

²⁸ *Peruta*, 742 F.3d at 1174 -75.

²⁹ *Id.* at 1174. see also, *Drake v. Filko*, 724 F.3d 426, 431 (3rd Cir. 2013) *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012)), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013); *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. Md. 2013) *cert. denied*, 134 S. Ct. 422 (2013).

³⁰ *Bliss v. Commonwealth*, 12 Ky. 90 (1822).

³¹ *Peruta*, 742 F.3d at 1156. (internal quotations omitted) (citing *Bliss v. Commonwealth*, 12 Ky. 90, 92 (1822)).

³² *Id.* (citing *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92. (1822)).

the Supreme Court of Alabama in *State v. Reid*³³ allowed a complete ban on concealed carry of firearms, it reminded lawmakers that legislation that “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.”³⁴ Demonstrating a different perspective, in 1842 in *State v. Buzzard*,³⁵ the Supreme Court of Arkansas upheld “restrictions on carrying weapons for self-defense as permissible police-power regulations.”³⁶ Taken together, the separate majority opinions regard the right secured by the Second Amendment as, not an individual right, but as a right to bear arms for sole purpose of militia service.³⁷ The dissent in this case found the majority’s proposition to “deem the right to be valueless and not worth preserving.”³⁸ In 1846, the Georgia Supreme Court in *Nunn v. State*³⁹ struck down a law that prohibited both concealed and open carry holding that a restriction on carrying a weapon is valid only as long “as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms.”⁴⁰ Four years later, in *State v. Chandler*,⁴¹ the Louisiana Supreme Court used a similar rationale to uphold a law banning concealed weapons when open carry was not restricted.⁴² In 1871, the Tennessee Supreme Court in *Andrews v. State*⁴³ found that although the right to bear arms was an individual right the main purpose under the Tennessee Constitution

³³ *State v. Reid*, 1 Ala. 612 (1840).

³⁴ *Id.* at 1158 (quoting *State v. Reid*, 1 Ala. 612 (1840)); see also, *Drake v. Filko*, 724 F.3d 426, 449 (3rd Cir. 2013) (Hardiman, J., dissenting), cert. denied sub nom. *Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

³⁵ *State v. Buzzard*, 4 Ark. 18 (1842).

³⁶ *Peruta*, 742 F.3d at 1159, (citing *State v. Buzzard*, 4 Ark. 18 (1842)).

³⁷ *Id.* at 1159, (citing *State v. Buzzard*, 4 Ark. 18, 22, 32 (1842)).

³⁸ *State v. Buzzard*, 4 Ark. 18, 35 (Ark. 1842) (Lacy, J., dissenting).

³⁹ *Nunn v. State*, 1 Ga. 243 (1846).

⁴⁰ *Peruta*, 742 F.3d at 1158-59, (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846) (emphasis in original)).

⁴¹ *State v. Chandler*, 5 La. Ann. 489 (1850).

⁴² *Peruta*, 742 F.3d at 1159 (citing *State v. Chandler*, 5 La. Ann. 489 (1850)); see also, *Drake v. Filko*, 724 F.3d 426, 449 (3rd Cir. 2013) (Hardiman, J., dissenting), cert. denied sub nom. *Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

⁴³ *Andrews v. State*, 50 Tenn. 165 (1871); see also, see also, *Peruta v. County of San Diego*, 742 F.3d 1144, 1157 (9th Cir. 2014), vacated, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015).

was for the purpose of promoting an efficient militia and common defense.⁴⁴ For that reason, the court found that a ban with regard to the carrying of “pocket” pistols is constitutional as it was not generally a weapon used in the military at the time.⁴⁵ However, the court held that the legislature can regulate, but not ban, the carrying of firearms which could be “adapted to the usual equipment of the soldier” and therefore is needed in peacetime to enable him to be a more efficient marksman.⁴⁶ In 1878, the Arkansas Supreme Court, in *Wilson v. State*,⁴⁷ changed its position from the *Buzzard* ruling when they stated that “to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey traveling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.”⁴⁸ Not all states agreed with the view that at least some form of public carry of weapons was required; “at least four states once banned the carrying of pistols and similar weapons in public, both in a concealed or an open manner.”⁴⁹ As this history shows, most states in which the courts viewed the right as being an individual right protected at least some form of the right to carry.

Other scholars and gun rights advocates focus solely on the language of the Second Amendment, specifically the term “keep and bear arms.” “Noah Webster’s 1828 first edition of *An American Dictionary of the English Language* shows several subtle variations on the verb “bear” in the sense of “to carry” or “to wear”; the primary definition is universal “to carry; ... as,

⁴⁴ *Id.* at 182.

⁴⁵ *Id.* at 186.

⁴⁶ *Id.* at 186.

⁴⁷ *Wilson v. State*, 33 Ark. 557 (Ark. 1878).

⁴⁸ *Id.* at 560; *see also, Peruta v. County of San Diego*, 742 F.3d 1144, 1159 (9th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015).

⁴⁹ *Kachalsky, v. County of Westchester*, 701 F.3d 81, 90 (2nd Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013).

‘they bear [it] upon the shoulder.’⁵⁰ The Ninth Circuit also found support from historical definitions of the term to “bear arms” gleaned from legal commentaries from the time of the ratification of the Second Amendment which were also cited by *Heller*.⁵¹ These commentaries equated the right to arm oneself for protection with “the natural right of resistance and self-preservation.”⁵²

Many scholars point to English common law, notably the Statute of Northampton, as providing an answer as to the viewpoints of our founding fathers and the early colonists.⁵³ The statute “provided that unless on King's business no man could go nor ride armed by night nor by day, in Fairs, markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.”⁵⁴ This statute and commentary on it has been interpreted by the Seventh Circuit as being concerned with “armed gangs, thieves, and assassins rather than with indoors versus outdoors as such.”⁵⁵ However, “the statute and its implications for the Second Amendment are fiercely debated in the scholarship.”⁵⁶ Further, the Ninth Circuit acknowledged St. George Tucker’s commentary on the American Constitution, in which Tucker asserted that “[t]he right to armed self-defense. . . is the first law of nature, and any law prohibiting any person from bearing arms crossed the constitutional line.”⁵⁷ Although these historical references shed some light on how the Second Amendment was viewed at the time it was enacted, they are not instructive on

⁵⁰ Clayton E. Cramer & Joseph Edward Olson, *What did “Bear Arms” Mean in the Second Amendment?* 6 GEO. J.L. & PUB. POL’Y 511, 520 (2008).

⁵¹ *Peruta*, 742 F.3d at 1153-54.

⁵² *Id.* at 1154. (citing *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008)).

⁵³ Meltzer, *supra* note 18, at 1507.

⁵⁴ *Moore*, 702 F.3d at 936 (citing 2 Edw. III, c. 3 (1328).) (internal citations omitted).

⁵⁵ *Id.* (citing Edward Coke, *Institutes of the Laws of England* 162 (1797)). (“Chief Justice Coke interpreted the statute to allow a person to possess weapons inside the home but not to “assemble force, though he be extremely threatened, to go with him to church, or market, or any other place.”).

⁵⁶ Meltzer, *supra* note 15, at 1507.

⁵⁷ *Peruta*, 742 F.3d at 1154. (internal quotations omitted). (citing St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* 289 (1803)).

whether the right to carry a firearm for defense can be limited to specific and known threats of danger.

Even with the same facts, some courts as well as scholars, view the history as supporting either complete or partial prohibitions on the right to carry a concealed weapon. In his March 2014 article, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, Jonathan Meltzer asserted the view that these early decisions specifically support open carry only:

“The cases, while differing subtly in their discussion of the right to carry, point decisively toward a robust right to carry weapons openly for self-defense but no right at all to carry such weapons concealed. Indeed, these cases are notable for their understanding of the right to keep and bear arms as not encompassing concealed carry.”⁵⁸

While there does appear to be a preference towards open carry over concealed carry in these cases, the issue addressed by these courts was not whether there was a right specifically to concealed carry or open carry. Rather the issues were whether there was a right to carry at all and if there was such a right, to what extent does the legislature have the ability to restrict that right? What history does not address on point is the question of whether a state can require an applicant for a license to carry to “demonstrate[e] a special need for self-protection”⁵⁹

III. Circuit Split over Justifiable Need Requirement

Although other courts have addressed the right to carry weapons in public, only four have specifically addressed the question of “justifiable need.” The following is a summary of those cases and their holdings.

⁵⁸ Meltzer, *supra* note 15, at 1511.

⁵⁹ *Kachalsky*, 701 F.3d at 91.

A. Second Circuit - *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012)

The Second Circuit addressed New York’s statute regarding obtaining a permit to carry a concealed firearm in *Kachalsky v. County of Westchester*. New York’s statute allows for “shall issue” permitting for people in occupations such as bank messengers, certain judges and individuals who work in prisons or jails.⁶⁰ The statute also allows for possession in the home or “in a place of business by a merchant or storekeeper.”⁶¹ However, outside of the occupations expressly listed in the statute, all other individuals must show that they have “proper cause.”⁶² New York’s definition of “proper cause” is not included in the statute but the New York State courts have held that it includes target practice and hunting as proper causes for requesting a license to carry (licenses of this kind are restricted to only those purposes).⁶³ If the interest is for self-defense then the person must show that they have a “special need” beyond a general concern for protection of themselves or their property that is “distinguishable from that of the general community or of persons engaged in the same profession.”⁶⁴ The decision as to whether proper cause has been shown is made by licensing officers who are “vested with considerable discretion.”⁶⁵ “Every application triggers a local investigation by police into the applicant’s mental health history, criminal history, moral character, and in the case of a carry license, representations of proper cause.”⁶⁶ Although judicial review is available to those who are denied a license, deference is shown to the government and the decision will only be overturned if it is found to be arbitrary and capricious.⁶⁷

⁶⁰ *Kachalsky, v. County of Westchester*, 701 F.3d 81, 86 (2nd Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013).

⁶¹ *Id.* at 86.

⁶² *Id.* at 85.

⁶³ *Id.* at 86.

⁶⁴ *Id.* at 86, 92.

⁶⁵ *Id.* at 87.

⁶⁶ *Id.* at 86.

⁶⁷ *Id.*

New York began regulating firearms prior to the Constitution.⁶⁸ Early firearms law in New York regulated who could use firearms, when and where they could be used, and even how gun power can be stored.⁶⁹ In New York a license must be obtained in order to own a firearm, which includes revolvers, pistols and short barrel rifles and shotguns but does not include standard rifles or shotguns.⁷⁰ Licensees must be “over twenty-one years of age, of good moral character, without a history of crime or mental illness, and "concerning whom no good cause exists for the denial of the license.”⁷¹ Since 1913, New York has had a statewide licensing program for the carry of firearms in public; the carry license requirements have always mandated that applicants show “good moral character, and that proper cause exists for the issuance [of the license].”⁷² Under New York law open carry of handguns is not allowed.⁷³

Five applicants, whose applications were rejected on the basis of “[f]ailure to show any facts demonstrating a need for self-protection distinguishable from that of the general public,” brought this action asserting that the requirement to show proper cause violates their Second Amendment rights.⁷⁴ Of the five applicants, only one actually attempted to comply with the requirement.⁷⁵ The court found the need she listed, that her risk of violence was increased by the fact that she is a transgender female, was not specific enough and needed to be a direct threat instead of a general concern.⁷⁶ Included among the other four applicants who did not list a specific threat was a “federal law enforcement office with the U.S. Coast Guard.”⁷⁷

⁶⁸ *Kachalsky*, 701 F.3d at 84.

⁶⁹ *Id.*

⁷⁰ *Id.* at 85.

⁷¹ *Id.* at 86.

⁷² *Id.* at 85. *see also*, NY PENAL LAW Penal § 400.00(2)(f) (2014).

⁷³ *Id.* at 86.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 86.

⁷⁷ *Id.*

The court noted the decisions of the Supreme Court in *Heller* and *McDonald* are controlling but not decisive because “*Heller* was never meant to clarify the entire field of Second Amendment Jurisprudence.”⁷⁸ Although the court stressed that individuals enjoy the greatest protection of the right to keep and bear arms in their homes, it acknowledged that the right extends outside the home.⁷⁹ While not as extensive as in *Heller* or as the Ninth Circuit’s analysis, the court conducted a historical review and found that “[h]istory and tradition do not speak with one voice here.”⁸⁰ Discussing many of the cases introduced in the previous Part, the court determined that, while there were some courts from the nineteenth century which held that at least some form of carry in public was appropriate, there were also at least four states at that time that banned public carry altogether regardless of the manner.⁸¹ Even the states that did allow concealed carry of firearms often regulated them and prohibited carrying them at certain times, certain occasions or in certain places.⁸² Further, though *Heller* did not address the issue of public carry directly, the court did note “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.”⁸³ The court pointed out that there were states with concealed carry bans that had limited exceptions, very similar to New York’s proper cause requirement, which centered on specific occupations or activities that would put the person in harm’s way.⁸⁴ “[S]tates have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public.”⁸⁵

⁷⁸ *Kachalsky*, 701 F.3d at 86.

⁷⁹ *Id.* at 89.

⁸⁰ *Id.* at 90.

⁸¹ *Id.* at 90.

⁸² *Id.* at 94-95.

⁸³ *Id.* at 95, (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

⁸⁴ *Id.* at 96.

⁸⁵ *Kachalsky*, 701 F.3d at 96.

The court determined that the most appropriate standard of review in this case was intermediate scrutiny “because our tradition so clearly indicates a substantial role for state regulations of the carrying of firearms in public.”⁸⁶ Based on its reading of *Heller* and the prior historical analysis, the court advised that the right to carry in public is not a “core” right as addressed in *Heller* and therefore is not entitled to heightened scrutiny.⁸⁷ The court found that the right that was infringed upon in *Heller* was one that was based in the home which is “special and subject to limited state regulation.”⁸⁸ Moreover, “outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”⁸⁹ Choosing a different level of scrutiny for restrictions on the Second Amendment right within the home versus outside the home is consistent with the standard of review question in other constitutional contexts where there are varying degrees of rights and burdens.⁹⁰ “Heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).”⁹¹ The court concluded that rational basis was not appropriate because even though *Heller* did not actually set down a level of review, it ruled out rational basis review.⁹² The court found that “this is precisely the type of argument that should be addressed by examining the purpose and impact of the law in light of the Plaintiff’s Second Amendment right.”⁹³

⁸⁶ *Kachalsky*, 701 F.3d at 96.

⁸⁷ *Id.* at 93-94.

⁸⁸ *Id.* at 94.

⁸⁹ *Id.* at 94.

⁹⁰ *Id.* at 93 - 94.

⁹¹ *Id.* at 93.

⁹² *Id.* at 93.

⁹³ *Id.* at 92.

The court determined that, under intermediate scrutiny, New York’s proper cause requirement was constitutional.⁹⁴ There was no question that New York has a “compelling governmental interest[] in public safety and crime prevention.”⁹⁵ The question under intermediate review was “whether the proper cause requirement is substantially related to these interests.”⁹⁶ To answer this issue the court gave “substantial deference to the predictive judgments of the legislature” as to the impact of the proper cause regulation on the interest.⁹⁷ Although there are scientific studies on both sides of the issue, the court found that “it is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments.”⁹⁸ Further, the court dismissed the plaintiffs’ argument that the proper cause standard was arbitrary and not a perfect fit to the government’s interests.⁹⁹ According to the court, the right to self-defense is not limitless and it is within New York’s authority to regulate the right.¹⁰⁰ The court reiterated that the fit need only be substantially related and by “restricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose” the statute meets that threshold.¹⁰¹

B. Fourth Circuit – *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

In *Woollard v. Gallagher*, the Fourth Circuit reversed the Maryland District Court’s ruling and found that Maryland’s “good-and-substantial-reason” requirement is constitutional.¹⁰² Maryland requires all but certain classes of people to have a “permit issued . . . before the person

⁹⁴ *Kachalsky*, 701 F.3d at 101.

⁹⁵ *Id.* at 97.

⁹⁶ *Id.* at 97.

⁹⁷ *Id.* at 97.

⁹⁸ *Id.* at 99.

⁹⁹ *Id.* at 98.

¹⁰⁰ *Id.* at 99.

¹⁰¹ *Id.* at 98.

¹⁰² *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 422 (2013).

carries, wears, or transports a handgun.”¹⁰³ According to the statute, permits must be issued once a finding is made that “the applicant is an adult without a disqualifying criminal record, alcohol or drug addiction, or propensity for violence” and the applicant has shown that they have “good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.”¹⁰⁴ Authority to issue permits has been assigned to the Handgun Permit Unit of the Maryland State Police.¹⁰⁵ The Handgun Permit Unit has categorized “good and substantial reason” showings as follows:

(1) for business activities, either at the business owner's request or on behalf of an employee; (2) for regulated professions (security guard, private detective, armored car driver, and special police officer); (3) for "assumed risk" professions (e.g., judge, police officer, public defender, prosecutor, or correctional officer); and (4) for personal protection.¹⁰⁶

Although the first three categories are self-evident, the Handgun Permit Unit considers more than a general concern for personal protection or a “vague threat” when addressing the fourth category.¹⁰⁷ Even if there is a specific threat listed, the Unit then reviews the threat against the following four factors:

“(1) the "nearness" or likelihood of a threat or presumed threat; (2) whether the threat can be verified; (3) whether the threat is particular to the applicant, as opposed to the average citizen; (4) if the threat can be presumed to exist, what is the basis for the presumption; and (5) the length of time since the initial threat occurred.”¹⁰⁸

These factors are “nonexhaustive” and therefore the Permit Unit “takes the applicant's entire situation into account when considering whether a 'good and substantial reason' exists.”¹⁰⁹ The permit expires two years after it is issued and can be renewed for successive three year periods

¹⁰³ *Woollard*, 712 F.3d at 869; see also, MD. CODE ANN., PUB. SAFETY §5-303(2014).

¹⁰⁴ *Id.* at 869.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 869-870.

¹⁰⁷ *Id.* at 870.

¹⁰⁸ *Id.* at 870.

¹⁰⁹ *Id.* at 870.

but each time all the requirements must be met including the “good and substantial cause” requirement.¹¹⁰ If a permit is denied, applicants may appeal through administrative channels and if they are denied further they can seek judicial review.¹¹¹

This case was brought by Raymond Woollard who was denied a renewal of his permit to carry which was first issued in 2003 and subsequently renewed in 2006 but was denied in 2009 for a lack of “good and substantial cause.”¹¹² The initial permit was issued after Mr. Woollard’s son-in-law, who was high on drugs, broke into his rural Baltimore County home on Christmas Eve 2002.¹¹³ Mr. Woollard and his son were able to subdue the son-in-law by use of guns they had on the premises but it took the police two-and-a-half hours to arrive once called.¹¹⁴ The son-in-law “received a sentence of probation for the . . . incident but was subsequently incarcerated for probation violations.”¹¹⁵ He was released in 2006 and Woollard was able to renew his permit to carry shortly thereafter.¹¹⁶ However, in 2009 the permit was denied for failure to show good-and-substantial reason.¹¹⁷ In their decision, the Handgun Permit Review Board reasoned that the only evidence Mr. Woollard gave as a showing of a specific threat was the 2002 incident with his son-in-law even though he had not had contact with him since the incident.¹¹⁸ Because he had not provided any evidence of a current threat, the Permit Review Board denied his appeal.¹¹⁹

The district court awarded summary judgement to Mr. Woollard and the Second Amendment Foundation finding that “the individual right to possess and carry weapons for self-defense is not

¹¹⁰ *Woollard*, 712 F.3d at 870.

¹¹¹ *Id.* at 870.

¹¹² *Id.* at 871.

¹¹³ *Id.* at 871.

¹¹⁴ *Id.* at 871.

¹¹⁵ *Id.* at 871.

¹¹⁶ *Id.* at 871.

¹¹⁷ *Id.* at 871.

¹¹⁸ *Id.* at 871.

¹¹⁹ *Id.* at 871.

limited to the home.”¹²⁰ The district court held that the “good and substantial reason” requirement “is insufficiently tailored to the State's interest in public safety and crime prevention, and impermissibly infringes the right to keep and bear arms” and enjoined enforcement of the requirement.¹²¹ The Fourth Circuit entered a stay pending appeal and accelerated the appellate process to resolve the issue.¹²²

The court noted that under *Heller*, the right to bear arms is an individual right for the purpose of self-defense but stated that the “core” of that right lies within the home.¹²³ The court found the following test used by other circuits as being applicable:

“[T]he first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.”¹²⁴

However, the court determined that both steps are not required in order to answer the issue and followed the Second Circuit's lead by simply stating that “we merely assume that the *Heller* right exists outside the home and that such right . . . has been infringed.”¹²⁵ The court applied an intermediate scrutiny standard ultimately finding that the “good and substantial reason requirement . . . is reasonably adapted to a substantial governmental interest.”¹²⁶

The court began its analysis of the standard of review by determining that the government's interest in reducing the crime rate in Maryland, which at the time was very high when compared

¹²⁰ *Woollard*, 712 F.3d at 873.

¹²¹ *Id.* at 873 (internal quotations omitted).

¹²² *Id.* at 873.

¹²³ *Id.* at 873.

¹²⁴ *Id.* at 875.

¹²⁵ *Id.* at 876.

¹²⁶ *Id.* at 876.

to other states, was a substantial governmental interest.¹²⁷ Based on past precedent recognizing a distinction between the right to keep arms in the home versus rights outside the home, the court also rejected the Appellees argument that the right to carry a firearm for self-defense is a fundamental right.¹²⁸ Because it found that the government had a substantial interest, the court moved on to analyze whether the “good and substantial reason” requirement was a reasonable fit to that interest.¹²⁹

In determining whether Maryland’s requirement was a reasonable fit to the government’s substantial interest, the court first looked at Mr. Woollard’s situation and determined that he had options for transporting and carrying his handguns under the exception to Maryland’s statute.¹³⁰ However, he is barred from carrying his handgun in places where a permit is required unless he can meet all of Maryland’s requirements including the “good and substantial reason” requirement which he could do by showing an “apprehended danger.”¹³¹ The court found that the government’s interests overrides Mr. Woollard’s because the State showed that the “requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public.”¹³² The State set forth the following ways in which reducing the number of handguns being carried reduces crime:

Decreasing the availability of handguns to criminals via theft . . . Lessening “the likelihood that basic confrontations between individuals would turn deadly . . . Averting the confusion, along with the potentially tragic consequences thereof that can result from the presence of a third person with a handgun during a confrontation between a police officer and a criminal suspect . . . Curtailing the

¹²⁷ *Woollard*, 712 F.3d at 876-77 (In 2009 Maryland has the “eighth highest violent crime rate, third highest homicide rate and the second highest robbery rate of any state”).

¹²⁸ *Id.* at 877-78.

¹²⁹ *Id.* at 878-79.

¹³⁰ *Id.* at 879 (“For example, Woollard may move handguns to and from bona fide repair shops and places of legal purchase and sale. *Id.* § 4-203(b)(3). Woollard may also wear, carry, and transport handguns if he engages in target shoots and practices, sport shooting events, hunting and trapping, specified firearms and hunter safety classes, and gun exhibitions. *Id.* § 4-203(b)(4)-(5).”).

¹³¹ *Id.* at 879.

¹³² *Id.* at 879.

presence of handguns during routine police-citizen encounters. . .Reducing the number of handgun sightings that must be investigated . . .Facilitating the identification of those persons carrying handguns who pose a menace . . .¹³³

The court also stated that the “good and substantial reason” requirement does not prevent someone who does have a specific need for self-defense from protecting themselves within the law.¹³⁴ In discounting the Appellees arguments as to the flaws in the State’s reasoning the court showed deference to the legislature’s findings.¹³⁵ The court therefore upheld Maryland’s “good and substantial reason” requirement as constitutional.¹³⁶

C. Third Circuit - *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013).

The Third Circuit reviewed New Jersey’s “justifiable need” requirement in *Drake v. Filko* and found it to be a constitutional burden on the Second Amendment right to bear arms.¹³⁷ Under New Jersey’s Handgun Permit Law, anyone seeking to carry a handgun in public for self-defense must obtain a license by applying to either the chief of police in their town or the superintendent of the state police.¹³⁸ The law provides that: “[n]o application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in 2C:58–3c. [which includes numerous criminal history, age and mental health requirements], that he is thoroughly familiar with the safe handling and use of handguns, and that he has a *justifiable need to carry a handgun*.”¹³⁹ In New Jersey “justifiable need” is defined as: “[T]he urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant’s life

¹³³ *Woollard*, 712 F.3d at 879-80.

¹³⁴ *Id.* at 880.

¹³⁵ *Id.* at 881.

¹³⁶ *Id.* at 882.

¹³⁷ *Drake v. Filko*, 724 F.3d 426, 429 (3rd Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

¹³⁸ *Id.* at 428.

¹³⁹ *Id.* at 428.

that cannot be avoided by means other than by issuance of a permit to carry a handgun.”¹⁴⁰ This standard was further defined by the New Jersey Supreme Court: “Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice.”¹⁴¹

Four applicants, “a group which included a reserve sheriff’s deputy, a civilian FBI employee, an owner of a business that restocks ATM machines and carries large amounts of cash, and a victim of an interstate kidnapping,”¹⁴² were denied permits on the basis of a lack of justifiable need. They appealed the district court’s ruling that New Jersey’s law was constitutional; arguing that “(1) the Second Amendment secures a right to carry arms in public for self-defense; (2) the “justifiable need” standard of the Handgun Permit Law is an unconstitutional prior restraint; and (3) the standard fails any level of means-end scrutiny a court may apply.”¹⁴³

The Third Circuit Court of Appeals reviewed the decision under a two-part test under which the court first determines “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”¹⁴⁴ If the conduct is found not to fall within the scope further review is unnecessary.¹⁴⁵ However, if the conduct is protected by the Second Amendment then “means-end scrutiny” is applied.¹⁴⁶ The court concluded that the conduct did not fall within the scope of the Second Amendment because the New Jersey requirement that applicants show a “justifiable need” qualified as a “presumptively lawful” and “longstanding” regulation and therefore was excluded from the *Heller* ruling.¹⁴⁷ In *Heller*, the Supreme Court specifically listed certain “long-standing prohibitions”, such as restricting felons’

¹⁴⁰ *Drake*, 724 F.3d at 428.

¹⁴¹ *Id.* at 443 (Hardiman, J. dissenting) (citing *In re Preis*, 118 N.J. 564, 571 (1990)).

¹⁴² *Id.* at 443 (Hardiman, J. dissenting).

¹⁴³ *Id.* at 428.

¹⁴⁴ *Id.* at 429 (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir.2010)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 430.

rights to possess a firearm, as “presumptively lawful.”¹⁴⁸ The Supreme Court noted that the exceptions they listed were simply examples and not the only possibilities¹⁴⁹ but “did not provide guidance on how to identify other regulations that may qualify.”¹⁵⁰ The Third Circuit concluded that because New Jersey has included “justifiable need” in its laws in some form since 1924 this provision counted as a long-standing prohibition falling under *Heller* and did not require Second Amendment protection.¹⁵¹ Judge Hardiman disagreed with this finding but, as the court also reviewed the law under the second prong, this Comment will not detail the argument on that issue.¹⁵²

Despite finding that the Second Amendment did not apply to New Jersey’s law, the court proceeded to analyze the law under the second prong of the test, applying a means end test and finding that “it withstands the appropriate, intermediate level of scrutiny.”¹⁵³ The State provided no evidence showing that there was a “reasonable fit” between the “justifiable need” standard and their goal of assuring public safety.¹⁵⁴ The court found that because the standard was implemented before the Second Amendment was incorporated against the states, legislators “could not have known that they were potentially burdening protected Second Amendment conduct” and therefore the fit is not unreasonable just because evidence was not available.¹⁵⁵ With regard to the burden the requirement places on the individual, the court found that because “New Jersey engages in an individualized consideration of each person's circumstances and his or her objective, rather than subjective, need to carry a handgun in public” it meets this

¹⁴⁸*Drake*, 724 F.3d at 432 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 – 627, n. 26 (U.S. 2008))

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 432.

¹⁵² *Id.* at 447 (Hardiman, J. dissenting).

¹⁵³ *Id.* at 435.

¹⁵⁴ *Id.* at 438.

¹⁵⁵ *Id.*

requirement as intermediate scrutiny doesn't require narrow tailoring.¹⁵⁶ Based on this and the fact that other courts have found a reasonable fit for the same type of requirement, the court found that even under intermediate scrutiny the law would be considered constitutional.¹⁵⁷

D. Ninth Circuit - *Peruta v County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

Coming to a conflicting conclusion, in *Peruta v County of San Diego*, the Ninth Circuit found San Diego County's application of California's good cause requirement to be unconstitutional.¹⁵⁸ As discussed previously, the Ninth Circuit has since vacated this decision and will be rehearing the matter en banc.¹⁵⁹ A summary of the court's original opinion is nevertheless included as it is instructive as to how the court may analyze the matter upon further review and provides an alternate view of the constitutionality of the justifiable need standard. California's statute regulating licenses to carry a concealed weapon requires that "good cause exists for issuance of the license" but does not define "good cause."¹⁶⁰ California gives authority to grant licenses for concealed carry to cities and counties with the requirement that they create and post a written policy containing a summary of the statutes.¹⁶¹ Under San Diego County's application of the statute, applicants must "show a sufficiently pressing need for self-protection" and "demonstrate circumstances that distinguish [him] from the mainstream."¹⁶² Five applicants challenged this interpretation as an impermissible burden on their Second Amendment right to bear arms.¹⁶³

¹⁵⁶ *Drake*, 724 F.3d at 439-440.

¹⁵⁷ *Id.* at 440.

¹⁵⁸ *Peruta v County of San Diego*, 742 F.3d 1144, 1179 (9th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015).

¹⁵⁹ *Peruta v County of San Diego*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015).

¹⁶⁰ *Peruta v County of San Diego*, 742 F.3d 1144, 1148 (9th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015) ; *see also*, CAL PEN CODE § 26150.

¹⁶¹ *Id.* at 1148; *see also*, CAL PEN CODE §26150; CAL PEN CODE §26155 and CAL PEN CODE §26160

¹⁶² *Id.*

¹⁶³ *Id.* at 1149.

The court reviewed the matter under the two-step test provided by *Heller* for reviewing rights under the Second Amendment: 1) Is the right the applicants are seeking to enforce one that is within the scope of the Second Amendment protections? and 2) Does the challenged interpretation infringe upon the right?¹⁶⁴ In order to determine whether the right to carry a concealed weapon outside the home is a right protected by the Second Amendment, the court addressed both the textual meaning and “public understanding” of the phrase to “keep and bear arms” and the historical treatment of the scope.¹⁶⁵ The court then analyzed the degree to which the right was burdened by first determining what, or if any, form of scrutiny should be applied.¹⁶⁶

The court began its examination of the textual and historical background of the scope by focusing on the meaning of the term to “bear arms”.¹⁶⁷ It found that to “bear” in the context of the Second Amendment meant not simply to carry, but to carry for the purpose of “being armed and ready for offensive or defensive action in a case of conflict with another person.”¹⁶⁸ Based upon this view, the court found it nonsensical that the right would be restricted to one’s home since you would not carry a loaded firearm throughout your daily routine within the home for purposes of defending oneself from a confrontation.¹⁶⁹ In determining that the right extended beyond the home, the court also found certain nuances in the *Heller* and *McDonald* opinions strongly suggestive.¹⁷⁰ *Heller* “secures the right to protect[] [oneself] against both *public* and private violence, thus extending the right in some form to wherever a person could become exposed to public or private violence.”¹⁷¹ Both *Heller* and *McDonald* refer to the need for

¹⁶⁴ *Peruta*, 742 F.3d at 1150.

¹⁶⁵ *Id.* at 1150 – 67.

¹⁶⁶ *Id.* at 1167 – 75.

¹⁶⁷ *Id.* at 1151– 52.

¹⁶⁸ *Id.* at 1152. (quoting *District Court of Columbia v. Heller*, 554 at 584).

¹⁶⁹ *Id.* at 1152.

¹⁷⁰ *Id.* at 1153.

¹⁷¹ *Id.* at 1153 (quoting *United States v. Masciadnaro*, 638 F.3d 458, 467 (4th Cir. 2011) (Niemeyer, J., specially concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008)) (emphasis added)).

protection being most critical within the home which implies that there is also a need for protection outside the home.¹⁷² By including “laws forbidding the carrying of firearms in sensitive places such as school and government buildings” in the list of “presumptively lawful” restrictions, the court viewed *Heller* as acknowledging there is a right to carry a firearm outside the home otherwise it would not have singled them out.¹⁷³ Most importantly, the court noted that “both *Heller* and *McDonald* identify the core component of the right as self-defense, which necessarily take[s] place wherever [a] person happens to be.”¹⁷⁴

The court delved into a detailed historical analysis of previous treatment of the right to bear arms, reviewing precedent from the time of ratification to post-civil war time.¹⁷⁵ The court first established that there should be a ranking to how precedent is reviewed, given that *Heller* determined that the right to keep and bear arms “is, and has always been, an individual right . . . oriented to the end of self-defense.”¹⁷⁶ Therefore, it grouped historical precedent into three categories in order of significance:

(1) authorities that understands bearing arms for self-defense to be an individual right, (2) authorities that understand bearing arms for a purpose *other than* self-defense to be an individual right, and (3) authorities that understand bearing arms not to be an individual right at all.¹⁷⁷

The court reviewed case law from early nineteenth-century courts, finding that courts in the first category, which viewed the right to bear arms as individual right with the purpose of self-defense, found a ban on both open and concealed carry to be a “destruction of the right”

¹⁷² *Peruta*, 742 F.3d at 1153.

¹⁷³ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

¹⁷⁴ *Id.* (citing Eugene Volokh, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. v. Heller: Implementing The Right To Keep and Bear Arms For Self-Defense: An Analytical Framework And A Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009)).

¹⁷⁵ *Id.* at 1155 – 1167.

¹⁷⁶ *Id.* at 1155.

¹⁷⁷ *Id.* at 1156.

granted by the Second Amendment.¹⁷⁸ Therefore, the court concluded that “carrying a gun outside the home for self-defense comes within the meaning of “bear[ing] Arms.”¹⁷⁹

The court then addressed the extent to which San Diego County’s application of the “good cause” requirement burdened the right to bear arms for self-defense in public.¹⁸⁰ In order to determine which level of scrutiny to apply to the issue the court first answered the question of whether the licensing scheme burdened the right or destroyed it.¹⁸¹ In California there is not a permitting scheme for open carry of a firearm and therefore “it is illegal in virtually all circumstances” to carry a firearm openly regardless of whether it is loaded or not.¹⁸² Under California law, certain classes of people are able to carry a concealed firearm without a permit: active and retired police officers, military personnel, and retired federal officers.¹⁸³ Additionally, a firearm may be carried on private property, places of business or “where hunting is allowed.”¹⁸⁴ California also makes an exception for situations of “immediate, grave danger in the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.”¹⁸⁵ Yet, without a permit, the “typical responsible, law-abiding citizen [of San Diego County is not able] to bear arms in public for the lawful purpose of self-defense”.¹⁸⁶ The only citizens of San Diego County that are able to carry are those who are included in the exceptions above or those who can show that they face a “unique risk of harm” under circumstances which differentiate them from the rest of the

¹⁷⁸ *Peruta*, 742 F.3d at 1160.

¹⁷⁹ *Id.* at 1167.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1168.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1169.

¹⁸⁵ *Id.*; *see also*, CAL PEN CODE § 26045.

¹⁸⁶ *Id.* at 1169.

society.¹⁸⁷ The court found that the right has been “destroyed when exercise of the right is limited to a few people, in a few places, at a few times.”¹⁸⁸ Because the court determined that San Diego County’s application of “good cause” destroyed the Second Amendment rights of the parties, as in *Heller*, it found the policy per se invalid.¹⁸⁹ “A law effecting a “destruction of the right” rather than merely burdening it is, after all, an infringement under any light.”¹⁹⁰

E. Analysis of the courts’ findings

The courts that find the ‘justifiable need’ requirement constitutional have a few similarities in their analysis: none attempt to determine the scope of the Second Amendment and they employ intermediate scrutiny in a loose manner granting significant deference to the findings of legislature.¹⁹¹ There are courts that have “applied the [heightened scrutiny] standard so loosely to firearm cases that it takes on the attributes of rational basis review” because these courts have “presume[ed] constitutionality with almost unlimited deference to the legislative process, and accept[ed] justifications based upon speculation rather than evidence.”¹⁹² If the purpose of heightened scrutiny is truly as “Justice O’Connor noted [to] help[] to ensure that . . . the State’s asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions” then the courts must require more evidence from the legislature.¹⁹³ With regard to the deference required to show the legislature, deference is only to be given to the determination of whether a

¹⁸⁷ *Peruta*, 742 F.3d at 1169.

¹⁸⁸ *Id.* at 1170.

¹⁸⁹ *Id.* at 1175.

¹⁹⁰ *Id.* at 1168.

¹⁹¹ *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2nd Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013); *Woollard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013); *Drake v. Filko*, 724 F.3d 426, 438 (3rd Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *see also*, David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1454 (2014). *Peruta v. County of San Diego*, 742 F.3d 1144, 1176 (9th Cir. Cal. 2014). (“This is not an appropriate application of intermediate scrutiny in at least two respects. First, the analysis in the Second, Third, and Fourth Circuit decisions is near-identical to the freestanding “interest-balancing inquiry” that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*.”).

¹⁹² David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1454 (2014).

¹⁹³ *Id.* at 1440 (internal quotations omitted).

substantial interest has been affected and whether the statute will positively address the issue.¹⁹⁴ However, “when assessing the fit between the asserted interests and the means chosen to advance them” no such deference is required.¹⁹⁵ Unlike the Second, Third and Fourth Circuits, the Ninth Circuit conducted a full historical review and scope analysis but did not truly apply a form of scrutiny because it found the right to carry arms in public for self-defense to be a core right covered by the Second Amendment and therefore, followed *Heller*’s lead in approaching the right as having been destroyed thereby finding the application of the “good cause” requirement per se impermissible.¹⁹⁶ While the Ninth Circuit made mention of intermediate scrutiny, it criticized the applications made by the other courts but did not truly apply the scrutiny itself.¹⁹⁷ The courts should apply intermediate scrutiny as it was intended, conducting a full review of the government’s findings to ensure that the “justifiable need” requirement is a reasonable fit and reduces crime more than background checks, mental health reports, fingerprinting and other measures alone do.

IV. Standards of Review as Applied to Second Amendment

As shown in the previous Part, the standard of review a court chooses and how they apply it is crucial to the determination of our rights as citizens. Those courts that granted great deference to the government without requiring more evidence as to the reasonable fit between the requirement of “justifiable need” and State’s substantial interest have allowed the rights granted by the Second Amendment to the citizens of those states to be diminished. This Part will begin with a description of the different standards that are applied in the Second Amendment

¹⁹⁴ *Peruta v County of San Diego*, 742 F.3d 1144, 1177 (9th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 4941 (9th Cir. March 26, 2015). .

¹⁹⁵ *Id.* at 1177.

¹⁹⁶ *Id.* at 1175.

¹⁹⁷ *Id.* at 1175 – 76.

context and a recap of how they have been applied to the “justifiable need” issue so far and will conclude by recommending a heightened form of intermediate scrutiny be used in the future.

A. Description of Applicable Standard of Review Options

Under strict scrutiny the burden on the affected right must be “genuinely necessary to serve a compelling government interest.”¹⁹⁸ The statute must be “narrowly tailored” to address that interest.¹⁹⁹ The burden is unconstitutional if the concerns raised by the government can be resolved through the use of alternative solutions which are less restrictive and burdensome on the right than what has already been proposed.²⁰⁰ Justice Scalia argued against strict scrutiny in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), suggesting it “was not appropriate in most free exercise cases because many burdensome laws were nevertheless necessary for the public welfare” and that many laws would not be able to meet the “compelling interest” standard and the result would be “courting anarchy.”²⁰¹

“[U]nder intermediate scrutiny the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary.”²⁰² Intermediate scrutiny balances the safety of the public against the rights of the individual.²⁰³ Some courts apply a degree of intermediate scrutiny known as exacting scrutiny which “requires the challenged law to have a substantial relation to a sufficiently important governmental

¹⁹⁸Volokh, *supra* note 20, at 1464 – 65.

¹⁹⁹ Hardy, *supra* note 192, at 1437.

²⁰⁰ Volokh, *supra* note 20, at 1464 – 65.

²⁰¹ Winkler, *supra* note 16, at 704-05. (citing *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 888 (1990)).

²⁰² *Drake*, 724 F.3d at 436.

²⁰³ *Id.* at 437.

interest, which must reflect the seriousness of the . . . burden on the exercise of a constitutional right.”²⁰⁴

Another possible standard of review which has been used at the state level is reasonable regulation which is very similar to intermediate scrutiny. The focus of this standard is on “whether a restriction is a “reasonable regulation” or a prohibition.”²⁰⁵ While the states find most regulations constitutional there are some cases where they do strike down those laws that “substantially burden people’s ability to defend themselves.”²⁰⁶

In contrast to the reasonable regulation and intermediate scrutiny tests, rational basis review focuses on the rationality of the government’s stated goal.²⁰⁷ The focus of the rational basis test is that the regulation is rationally related to the goal thus “a rational legislator could conclude that banning all firearms furthers public safety.”²⁰⁸ According to one scholar, “[o]rdinary forms of gun control such as licensing laws, bans on concealed carry, and prohibitions on particular types of weapons are, . . . attempts to regulate the right rather than eliminate it and are routinely upheld. So long as a gun control measure is not a total ban on the right to bear arms, the courts will consider it a mere regulation of the right.”²⁰⁹

B. Intermediate Scrutiny is the Appropriate Standard for Right to Carry Analysis

Although many gun rights activists argue that strict scrutiny is required to protect their gun ownership, critics reply that by applying strict scrutiny “the legislative duty to protect the public safety will be profoundly frustrated.”²¹⁰ However, others contend that the distinction between intermediate and strict scrutiny is irrelevant because the main interests that gun control

²⁰⁴ Hardy, *supra* note 192, at 1438.

²⁰⁵ Volokh, *supra* note 20, at 1458.

²⁰⁶ *Id.* at 1458.

²⁰⁷ Winkler, *supra* note 16, at 716 – 717.

²⁰⁸ *Id.* at, 717.

²⁰⁹ *Id.* (internal quotations omitted).

²¹⁰ *Id.* at 701, 704 – 05.

laws serve, prevention of “violent crime, injury and death” are compelling interests that would overcome the strict scrutiny standard.²¹¹ “Under this general approach, severe restrictions on the “core” right have been thought to trigger a kind of strict scrutiny, while less severe burdens have been reviewed under some lesser form of heightened scrutiny.”²¹² Despite this, applying strict scrutiny to gun control regulations could result in presumably reasonable regulations being struck down due to the requirement that the law be narrowly tailored.²¹³ In *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*,²¹⁴ the Sixth Circuit determined that strict scrutiny is the proper analysis to apply to gun control legislation because:

“[First] [t]he Supreme Court has by now been clear and emphatic that the right to keep and bear arms is a fundamental right necessary to our system of ordered liberty . . . Although it is true that strict scrutiny is not always implicated when a fundamental right is at stake, the Supreme Court has suggested that there is a presumption in favor of strict scrutiny when a fundamental right is involved. . . [Second] the courts of appeals originally adapted the levels of scrutiny of Second Amendment jurisprudence by looking to the First Amendment doctrine but that First Amendment doctrine reflects a preference for strict scrutiny more often than for intermediate scrutiny. . . [Third] strict scrutiny is preferable because this is a doctrinal area in which the Court has not simply *refrained* from suggesting that lesser review is called for but one in which it has strongly indicated that intermediate scrutiny should *not* be employed. . . Fourth . . . because it has no basis in the Constitution. Both the Court and the academy have said as much. The *Heller* Court’s reasons for explicitly rejecting rational-basis scrutiny apply equally to intermediate scrutiny. The Court rejected rational-basis scrutiny for Second Amendment challenges because it “is a mode of analysis we have used when evaluating laws under constitutional commands that are *themselves* prohibitions on irrational laws”²¹⁵

Intermediate scrutiny appears to make sense if the right to protect oneself in public is seen as an important, but not fundamental, right that requires there to be more than a simple

²¹¹Volokh, *supra* note 20, at 1470.

²¹² *Peruta*, 742 F.3d at 1167 – 1168.

²¹³ Winkler, *supra* note 16, at 727.

²¹⁴ *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 775 F.3d 308 (6th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 6638 (6th Cir. April 21, 2015). (The Sixth Circuit vacated this opinion and has granted a rehearing en banc).

²¹⁵ *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 775 F.3d 308, 327 – 328 (6th Cir. 2014), *vacated*, 2015 U.S. App. LEXIS 6638 (6th Cir. April 21, 2015).

relation between the law and its purpose. Requiring a level of scrutiny higher than rational basis but lower than strict scrutiny will guard against arbitrary laws that are not supported by evidence only if the courts apply the deference properly.²¹⁶ However, the courts, when reviewing whether the need is important, accord substantial deference to the [legislature's] predictive judgments."²¹⁷ Conversely if intermediate scrutiny is applied regulations that are too burdensome may be found to still be a "reasonable fit" when there are less restrictive ways for the government to meet their goal.²¹⁸

As discussed previously, the Second, Third and Fourth Circuits applied intermediate scrutiny loosely, choosing not to insist upon specific evidence that showed the regulations in place will actually have a positive effect upon the substantial interest.²¹⁹ "In applying a strict version of intermediate review, courts should demand that empirical data be presented that supports a gun restriction."²²⁰ The Ninth Circuit on the other hand applied *Heller* almost directly finding that the application of "good cause" as San Diego County interprets it is per se impermissible.²²¹

While the *Heller* Court did not specifically set a standard of review for the Second Amendment, by addressing both the burden of and the necessity for regulation and weighing the interests, it at least appeared to lean towards intermediate scrutiny.²²²

"Earlier in the opinion, the [*Heller*] Court similarly justified striking down the handgun ban on the grounds that the ban is a "severe restriction." In the process, the Court favorably quoted an old case distinguishing permissible "regulati[on]" from impermissible destruction of the right and from impermissible laws that make guns wholly useless for the purpose of defence. The Court did not

²¹⁶ Hardy, *supra* note 192, at 1454 – 55.

²¹⁷ *Drake*, 724 F.3d at 436 – 437.

²¹⁸ Winkler, *supra* note 16, at 731.

²¹⁹ Hardy, *supra* note 192, at 1452 – 53.

²²⁰ *Id.* at 1455.

²²¹ *Peruta*, 742 F.3d at 1175.

²²² Volokh, *supra* note 20, at 1456.

discuss what analysis would be proper for less “severe” restrictions, likely because the facts did not require such a discussion. But its analysis suggested that the severity of the burden was important.”²²³

Both the history and text of the Second Amendment show that the right to carry a firearm for self-defense is an individual right protected by the Second Amendment. While it is a fundamental right, the government has an undeniably strong interest to regulate that right to protect the public. However, this interest does not entitle them to run roughshod over the rights of the individual. While it is tempting to apply strict scrutiny to the right to carry a firearm for protection in public, courts should be cautious to ensure that a reasonable law that actually would protect the public is not struck down because it is not “narrowly tailored.” . Applying a heightened form of intermediate scrutiny that requires courts to seriously consider all the evidence of the effect of the legislation, rather than grant substantial deference, will ensure that the protections needs of both the individual and the government will be given correct consideration.

V. The Justifiable Need Requirement is Unconstitutional

Whether the requirement to show a “justifiable need” is reviewed under strict scrutiny or intermediate scrutiny, the result is that the requirement burdens the right more than is reasonably necessary to meet the government’s goal, especially when applied to both open and concealed carry permits. “Only by engaging in a true fit analysis are we faithful both to the Supreme Court’s rejection of naked interest balancing and to its reminder that the Second Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”²²⁴

²²³ Volokh, *supra* note 20, at 1456. (internal quotation marks omitted).

²²⁴ *Drake v. Filko*, 724 F.3d 426, 457, (Hardiman, J. dissenting).

In the New Jersey case, the appellants included “reserve sheriff’s deputy who wishes to carry a gun for self-defense while off duty, . . . a civilian FBI employee who received specific information that a terrorist organization might target him or his family, . . . [and] an owner of an ATM restocking company who routinely carries large amounts of cash”²²⁵ If people with circumstances and credentials such as this cannot obtain a permit to carry a concealed gun who would be eligible? This demonstrates, at least in New Jersey, how high the bar really is under the justifiable need requirement and calls into question whether there truly is a right to carry concealed, or open, at all in New Jersey. “Even assuming that New Jersey is correct to conclude that fewer guns means less crime, a rationing system that burdens the exercise of a fundamental constitutional right by simply making that right more difficult to exercise cannot be considered reasonably adapted to a governmental interest because it burdens the right too broadly. The regulation must be more targeted than that to meet intermediate scrutiny.”²²⁶

According to the Crime Prevention Research Center’s July 14th report, the states with may-issue permitting schemes have significantly low numbers of the adult population with permits to carry.²²⁷ In New Jersey, for example, only .02% of the state’s population has a permit to carry.²²⁸ Although this could be because few people in those states wish to carry, looking at this statistic in conjunction with the facts of *Drake v Filko* it seems more likely that the process was too burdensome or there were many denials. “One study undertook to determine the relationships between firearm homicide, firearm suicide, total homicide, and total suicide, and age requirements for handgun purchase and possession, “one-gun-a[-]month” laws, “shall issue”

²²⁵ *Id.* at 455 (Hardiman, J. dissenting).

²²⁶ *Id.* at 455, (Hardiman, J. dissenting). (citations omitted)

²²⁷ Crime Prevention Research Center, *Report From the Crime Prevention Center: Concealed Carry Permit Holders Across the United States*, , July 9, 2014 pg. 12-13, available at <http://crimepreventionresearchcenter.org/wp-content/uploads/2014/07/Concealed-Carry-Permit-Holders-Across-the-United-States.pdf>

²²⁸ *Id.*

carry permits, and bans on cheap handguns. No relationships could be found between these laws and homicide or suicide, except that "shall issue" permits were associated with higher firearm homicide and suicide rates, but not at a statistically significant level."²²⁹ Additionally, "no relationship could be found between imposition of the waiting period, or of the background check, and firearms homicide and suicide, with one exception--that of suicide victims aged fifty-five or older. That finding was somewhat offset by a rise in nonfirearm suicides, leaving a modest (though not statistically significant) reduction."²³⁰

If measures such as background checks and waiting periods, which are much more related to the security of the person handling the gun than the requirement that they be able to show that they are facing a specific threat, do not show a statistically significant change in rates of violence then it is hard to find a reasonable fit for the "justifiable need" requirement to the substantial interest of the government in protecting the public from those carrying firearms lawfully.

VI. Conclusion

The Second Amendment allows individuals the right to carry a concealed firearm for the purpose of self-defense. Although some form of gun control is necessary and reasonable, the requirement of justifiable need, good cause or proper cause creates an unreasonable burden on the right and therefore is unconstitutional under any measure of scrutiny.

²²⁹ Hardy, *supra* note 192, at1458.

²³⁰ Hardy, *supra* note 192, at1459.