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## Out of the Home and in Plain Sight: Our Evolving Second Amendment and Open Carry in Wisconsin

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# OUT OF THE HOME AND IN PLAIN SIGHT: OUR EVOLVING SECOND AMENDMENT AND OPEN CARRY IN WISCONSIN

I. INTRODUCTION .....	1305
II. WISCONSIN’S LONG TRADITION OF OPENLY CARRIED FIREARMS .....	1308
III. <i>HELLER</i> AND THE SECOND AMENDMENT RIGHT OUTSIDE THE HOME..	1312
A. Shifting Course in <i>Heller</i> and <i>McDonald</i> .....	1312
B. An Evolving and Uncertain Right Post- <i>Heller</i> .....	1314
C. Open Carry Guidance: <i>Norman</i> and <i>Young</i> .....	1318
IV. PUBLIC SAFETY, FREE SPEECH, AND OPEN CARRY IN WISCONSIN .....	1322
A. Charlottesville and the Public Safety Rationale Against Open Carry .....	1322
B. Friction Between Open Carry and the First Amendment.....	1325
C. Wisconsin: A Prime Candidate for Sensible Open Carry Restrictions .....	1327
V. CONCLUSION .....	1329

## I. INTRODUCTION

On August 12, 2017, the nation was gripped by events in Charlottesville, Virginia, where those protesting the planned removal of a confederate monument—including many torch-wielding, unabashed white nationalists—met in a violent clash with self-described “anti-fascist” counter-protestors.<sup>1</sup> One counter-protestor was killed after a white nationalist drove his car into a crowd, and dozens more were injured by the car or in separate skirmishes.<sup>2</sup> Somewhat lost in the ensuing debate over President Trump’s refusal to unequivocally denounce the white nationalists who sparked the melee<sup>3</sup> was the

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1. Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html> [https://perma.cc/V9UT-Q2SD].

2. *Id.*

3. Graham Lanktree, *Donald Trump’s Charlottesville Response Will Continue to Haunt Him, Says Watergate Veteran*, NEWSWEEK (Aug. 21, 2017, 7:40 AM), <http://www.newsweek.com/why-donald-trumps-charlottesville-response-will-continue-haunt-him-652670> [https://perma.cc/FZU7-4BX9].

fact that some protestors took advantage of Virginia's generally permissive laws on openly carried firearms<sup>4</sup> to proudly display loaded guns at the event. Photographs in the *New York Times* showed militia members toting AR-15-style assault rifles and wearing tactical vests with abundant additional ammunition.<sup>5</sup> None of the casualties that day resulted from the guns on hand, but the presence of such firepower amid the chaos begs the question of how close the incident came to more extreme bloodshed.

While the white nationalists behind the Charlottesville "Unite the Right" rally represent an extreme fringe of American beliefs, many observers saw the incident as a reflection of more common—but still simmering—political differences haunting the nation today. Few states encapsulate these divided and fractious politics of modern America better than Wisconsin. The seat of its government lies in Madison, a university town and liberal bastion known for volatile protests since the Vietnam War.<sup>6</sup> The other reliably Democratic portion of the state, Milwaukee, is both one of the only racially diverse regions in Wisconsin and one of the most segregated cities in the country.<sup>7</sup> The vast sea of red in between and around these Democratic strongholds—populated largely by whites—carried Republican President Donald Trump to a narrow victory in the state in the 2016 election.<sup>8</sup>

And few issues divide Wisconsin, and the nation, more starkly than gun control, or perhaps gun rights, depending on your preferred nomenclature. While later to the game than many states, Wisconsin has fallen in line with the sweeping nationwide trend of giving residents more freedom to carry firearms

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4. *Virginia*, OPENCARRY.ORG, <https://opencarry.org/state-info-t-z/virginia/> [https://perma.cc/R55A-UU7L] (last visited Jan. 4, 2019) (labeling Virginia a "Gold Star" open carry state for total state preemption of local gun laws and noting that "open carry is increasingly common and law enforcement is well educated as to its legality").

5. John Feinblatt, *Ban the Open Carry of Firearms*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/open-carry-charlottesville.html> [https://perma.cc/H3AH-ZAKG].

6. *Two Days in October: Police and Protesters*, AM. EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-demonstrations-university-wisconsin/> [https://perma.cc/UW2U-34YU] (last visited Jan. 4, 2019) ("The protests at Madison were the first student demonstrations to turn violent—presaging the coming months of national turmoil over the Vietnam War.").

7. JOHN R. LOGAN & BRIAN J. STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 6 (Mar. 24, 2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf> [https://perma.cc/D7W7-U49Q] (ranking Milwaukee as the second-most segregated city in the U.S., in terms of black–white segregation).

8. *2016 Wisconsin Presidential Election Results*, POLITICO, <https://www.politico.com/2016-election/results/map/president/wisconsin/> [https://perma.cc/8DBN-LDL9] (last updated Dec. 13, 2016).

in public, most notably with the passage of legislation in 2011 creating a licensing scheme for concealed carry that gives the authorities little leeway to deny permits to anyone outside of felons and the mentally ill.<sup>9</sup> Meanwhile, the state has taken steps to solidify the legality of its longstanding tradition of allowing citizens to carry handguns openly in holsters or rifles and shotguns upon the shoulder, commonly known as “open carry.” The combination of these two developments gives Wisconsinites dual options to go armed throughout much of the state, even as the debate over mass shootings and gun control has reached a fevered pitch across the U.S.

Wisconsin’s shift to doubly permissive laws governing the public carry of firearms has occurred in roughly the same time frame as a sea change in Second Amendment law, beginning with the Supreme Court’s recognition in 2008—for the first time—of an individual right to keep and bear arms in *District of Columbia v. Heller*.<sup>10</sup> Whether this right travels beyond the home and into the streets has sowed confusion among jurists and scholars, particularly with respect to the constitutionality of laws restricting the public carry of firearms. Do both modes of exercising the right to bear arms—openly or concealed—enjoy similar constitutional protection? Or can allowing one mode of carrying guns for self-defense satisfy the Second Amendment as public safety and other considerations justify prohibiting the other?

The relative merits and constitutionality of carrying guns openly versus concealed might seem to be a footnote in the broader debate over gun control, or an esoteric dispute echoing quietly in the halls of appellate courts. But the real-world implications of the issue were on display in Charlottesville. The presence of openly carried firearms at a volatile protest, an increasingly common sight in America today, raises serious concerns about not just public safety, but the First Amendment as well. Can protestors armed with bullhorns and placards assemble and speak freely in the face of an opposition armed with AR-15s? Will gun-toting protesters compel their ideological foes to take up arms as well, increasing the potential for bloodshed? These questions are especially relevant in Wisconsin, where the country’s deep ideological rifts are deeper still and political protest is something of a state tradition.

This Comment advocates stricter open carry laws in Wisconsin: first, by examining the evolving Second Amendment landscape and finding room for open carry restrictions in case law riddled with uncertainty and conflicting decisions; and, second, by identifying a public safety and free speech rationale with special significance in Wisconsin. Part II details Wisconsin’s historic affinity for open carry and the rapid and continuing expansion of gun carry

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9. See WIS. STAT. § 175.60(3) (2017–2018).

10. 554 U.S. 570, 584 (2008).

rights in the state to this day. Part III explores the morass of legal authority that has arisen post-*Heller* interpreting the Second Amendment right—if one indeed exists—to carry firearms outside the home. Part III concludes that the so-called alternative outlet doctrine,<sup>11</sup> under which the state can choose to prohibit either open carry or concealed carry as long as gun owners are not blocked from exercising their right to bear arms through the other,<sup>12</sup> is a practical lens to view the Second Amendment through and could permit stricter regulation of open carry in Wisconsin. Finally, Part IV justifies potential restrictions by pointing to the polarized U.S. political climate and the prevalence of openly carried firearms at increasingly antagonistic protests across the country, noting that Wisconsin is a potential tinderbox for those ingredients to burst into a deadly conflagration. This Comment concludes with potential policy prescriptions for the Wisconsin legislature.

## II. WISCONSIN'S LONG TRADITION OF OPENLY CARRIED FIREARMS

Under the common law in the U.S., openly carried firearms were generally favored over concealed firearms, which were often subject to strict regulation at the state and local level.<sup>13</sup> Beginning in the late 1980s, however, state laws allowing the concealed carry of handguns with a state-issued permit swept across the U.S., with the trend accelerating as dire warnings of higher crime rates in states allowing expanded carry privileges proved unfounded.<sup>14</sup> Today, thirty-eight states require a permit to carry concealed weapons in public, with only eight of those states—California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and New York—adhering to the stricter “may issue” policy in which the permit applicant must specifically justify his need for the permit, leaving thirty states with more permissive “shall issue” regimes that put the onus on the government to justify denial of the permit.<sup>15</sup> Another twelve states don’t require a permit at all, allowing anyone who can legally possess a gun to carry it concealed in public.<sup>16</sup>

But as the barriers to carrying handguns out-of-sight fell, states largely kept intact the common law right to openly carry firearms, with varying levels of

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11. James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 917 (2012) (coining the term “alternative outlet” in the Second Amendment context).

12. *Id.* at 918–19.

13. *Id.* at 924.

14. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 752–54 (2005).

15. *Concealed Carry*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> [https://perma.cc/DC7E-CGJ8] (last visited Nov. 11, 2017).

16. *Id.*

restriction from state-to-state.<sup>17</sup> Only five states—California, Florida, Illinois, New York, and South Carolina—ban outright the open carry of handguns,<sup>18</sup> while the rest of the nation presents a patchwork of different regulations.

Thirteen states require permits to openly carry handguns,<sup>19</sup> while other states generally ban the open carry of long guns (i.e. rifles and shotguns) with exemptions for permit-holders.<sup>20</sup> Texas does not restrict the open carry of long guns in any way, but only recently passed legislation allowing the open carry of handguns with a permit.<sup>21</sup> Some state regulations are more nuanced: North Dakota only allows the open carry of handguns without a permit if the gun is unloaded, and only during the daytime;<sup>22</sup> Alabama requires the consent of the property owner for permitless open carry on private property;<sup>23</sup> Missouri allows for local jurisdictions to restrict open carry by those who do not have a concealed carry permit.<sup>24</sup>

Other state legislatures have passed laws restricting open carry in specific high-density population centers. Pennsylvania generally allows open carry throughout the state, but requires a concealed carry permit to do so in Philadelphia.<sup>25</sup> Virginia prohibits open carry of certain semi-automatic, high-capacity firearms without a permit in numerous cities and counties, but, notably, Charlottesville and surrounding Albemarle County are not among them.<sup>26</sup>

For many years, Wisconsin was one of two states—along with Delaware—to resist the trend toward legalized concealed carry and continue to sanction open carry but not concealed, adhering to the common law philosophy that a

17. Joshua Gillin, *There Are 45 States that Allow Open Carry for Firearms, Former NRA President Says*, POLITIFACT (Nov. 18, 2015, 5:26 PM), <http://www.politifact.com/florida/statements/2015/nov/18/marion-hammer/there-are-45-states-allow-open-carry-handguns-form/> [https://perma.cc/Z6YQ-EBKD].

18. *Open Carry*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> [https://perma.cc/HLL5-WA29] (last visited Jan. 10, 2019).

19. *Id.*; see, e.g., TEX. PENAL CODE ANN. § 46.15(b)(6) (2017); IOWA CODE § 724.4(4)(i) (2019); MINN. STAT. § 624.714 (2018).

20. See MASS. GEN. LAWS ch. 140, §§ 129C, 131(a) (2015); MINN. STAT. § 624.7181(1)(b)(3); N.J. REV. STAT. § 2C: 39-5(c) (2013).

21. Anna M. Tinsley, *Now's the Time to Ban Open Carry of Long Guns, Assault Rifles, Texas Lawmaker Says*, FORT WORTH STAR-TELEGRAM (Nov. 8, 2017, 1:42 PM), <https://www.star-telegram.com/news/politics-government/state-politics/article183447951.html> [https://perma.cc/T7RC-L59F].

22. N.D. CENT. CODE § 62.1-03-01(1) (2017).

23. ALA. CODE § 13A-11-52 (2016).

24. MO. ANN. STAT. § 21.750(3) (West 2014).

25. 18 PA. CONS. STAT. § 6108 (2018).

26. VA. CODE ANN. § 18.2-287.4 (2016).

hidden gun is more of a hazard than one in plain sight.<sup>27</sup> Former Wisconsin Governor Jim Doyle, a Democrat who vetoed two concealed carry bills during his term from 2003–2011, summed up the state’s loyalty to the common law succinctly: “If you want to carry a gun in Wisconsin, wear it on your hip.”<sup>28</sup>

Wisconsin’s sanction of open carry was later determined to be supported by the state constitution; specifically, through a provision added in 1998 that closely tracks the Second Amendment of the U.S. Constitution.<sup>29</sup> In 2009, after concealed carry legislation was narrowly defeated in the Wisconsin legislature, the Wisconsin Department of Justice relied on that constitutional amendment in an advisory memorandum to local prosecutors, stating that the department “believes that the mere open carrying of a firearm by a person, absent additional facts and circumstances, should not result in a disorderly conduct charge from a prosecutor.”<sup>30</sup>

In 2011, with the state government under complete Republican control, Wisconsin lawmakers shifted course and passed legislation—Act 35—that created for the first time a concealed carry permitting regime in the state.<sup>31</sup> Far from abandoning open carry, however, the legislation solidified its legal standing beyond the implied right that the Attorney General drew out from the state constitution in his 2009 memorandum by amending the state disorderly conduct statute to specifically protect the open carry of firearms.<sup>32</sup> The amended statute provides that, unless the police can discern “a criminal or malicious intent,” a person is not committing disorderly conduct simply by openly carrying a firearm.<sup>33</sup> This provision codified the conclusions of the Wisconsin Department of Justice and continued Wisconsin’s longstanding recognition of its citizens’ right to openly carry firearms.

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27. Bishop, *supra* note 11, at 924–25.

28. *Governor Doyle Visits Dells Area*, WIS. DELLS EVENTS (Mar. 11, 2006), [http://www.wisnews.com/wisconsin/dells/events/news/local/article\\_fe0a3448-01b4-51fb-a92d-8ce2eced96b6.html](http://www.wisnews.com/wisconsin/dells/events/news/local/article_fe0a3448-01b4-51fb-a92d-8ce2eced96b6.html) [<https://perma.cc/C556-BTGE>].

29. WIS. CONST. art. I, § 25. (“The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.”).

30. Memorandum from J.B. Van Hollen, Wis. Att’y Gen., to Wisconsin District Attorneys, Deputy District Attorneys and Assistant District Attorneys, *The Interplay Between Article I, § 25 of the Wisconsin Constitution, the Open Carry of Firearms and Wisconsin’s Disorderly Conduct Statute*, Wis. Stat. § 947.01 (Apr. 20, 2009), <https://www.doj.state.wi.us/sites/default/files/2009-news/final-open-carry-memo-2009.pdf> [<https://perma.cc/R5DF-8PFE>].

31. Wis. Legislative Council, *Information Memorandum 2011-10, Carrying and Possessing Firearms in Wisconsin*, [http://legis.wisconsin.gov/lc/publications/im/IM2011\\_10.pdf](http://legis.wisconsin.gov/lc/publications/im/IM2011_10.pdf) [<https://perma.cc/FR4F-ZM59>].

32. WIS. STAT. § 947.01(2) (2017–2018).

33. *Id.*

In interpreting the new disorderly conduct statute, the courts have toed the line between protecting open carry and giving the police leeway to investigate possible criminal activity. In *Gonzalez v. Village of West Milwaukee*,<sup>34</sup> the plaintiff—a vocal member of Wisconsin’s “open carry” movement—brought a civil rights suit against the police for false arrest after he was arrested on two separate occasions for openly carrying a holstered handgun into retail stores.<sup>35</sup> In denying his claim, the court noted that his offenses occurred before the 2011 disorderly conduct amendment, when the “legal landscape [on open carry] was uncharted.”<sup>36</sup> Coincidentally, Gonzalez was convicted of homicide around the same time the amendment was passed, which negated some of his claims<sup>37</sup> and may have influenced the court’s ultimate decision. In another case, the Seventh Circuit overturned a lower court’s denial of immunity to a police officer that detained and ticketed a man who was observed brandishing a realistic-looking pellet gun in his vehicle, finding that the Wisconsin courts had not yet interpreted the new disorderly conduct statute to the point that it was “clearly established.”<sup>38</sup>

With constitutional backing, a targeted revision to the state’s disorderly conduct statute, and a long history of adherence to the common law preference for the open carry of firearms, Wisconsin has been a particularly amenable locale for gun owners to proudly wear or carry their weapons, in comparison with many other states.<sup>39</sup> This inclination has persisted—indeed strengthened—even as the state has expanded its citizens’ options to exercise their constitutional right to bear arms for self-defense through the legalization of concealed carry.<sup>40</sup> But is it constitutionally necessary to allow Wisconsin gun owners such broad sanction to carry deadly weapons, both openly and concealed, at the same time? Answering this question requires a closer look at the broader shifts in Second Amendment law that have occurred in the last decade.

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34. 671 F.3d 649 (7th Cir. 2012).

35. *Id.* at 651.

36. *Id.* at 659.

37. *Id.* at 652.

38. *Gibbs v. Lomas*, 755 F.3d 529, 532–34, 541 (7th Cir. 2014).

39. *See* Bishop, *supra* note 11, at 924–25.

40. WIS. STAT. § 941.23 (2017–2018).

III. *HELLER* AND THE SECOND AMENDMENT RIGHT OUTSIDE THE HOMEA. *Shifting Course in Heller and McDonald*

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>41</sup> Even accounting for the evolution of the English language and legislative draftsmanship in the centuries since its enactment, the Second Amendment rolls off the tongue clumsily and lacks in clarity, as many judges and commentators have noted.<sup>42</sup> The text consists of a “prefatory clause” that introduces the right in the context of a “well regulated militia,” before broadening to bestow that right on “the people” generally in its “operative clause,” with the jumble of phrases leaving the exact contours of the right to bear arms open to interpretation.

Despite its place among the original ten amendments to the U.S. Constitution, the U.S. Supreme Court found little need to expound upon the right to bear arms for much of U.S. history.<sup>43</sup> In fact, the leading case on the matter prior to the previous decade, *United States v. Miller*,<sup>44</sup> construed the Second Amendment rather narrowly, focusing on the prefatory clause to interpret the right to bear arms as a collective right cabined by the provision’s reference to a “well regulated militia.”<sup>45</sup> In the second half of the twentieth century following *Miller*, lower courts relied on this collective rights interpretation to uphold a variety of state law gun regulations with little fanfare.<sup>46</sup>

But at the same time gun rights were becoming a pillar of conservative orthodoxy in the U.S., with the National Rifle Association emerging as a uniquely powerful and effective interest group beginning in the late 1970s.<sup>47</sup> In 2008, coincidentally or not, the Supreme Court pivoted sharply away from its

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41. U.S. CONST. amend. II.

42. See, e.g., Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1187 (2015).

43. Meg Penrose, *A Return to the States’ Rights Model: Amending the Constitution’s Most Controversial and Misunderstood Provision*, 46 CONN. L. REV. 1463, 1476 (2014) (noting that only five U.S. Supreme Court cases have directly dealt with the Second Amendment).

44. 307 U.S. 174 (1939).

45. Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329, 347 (2017).

46. Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 998 (1996).

47. PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 277–78* (2018) (detailing the 1977 “Cincinnati Revolt” at the NRA’s national convention, where the group hardened its stance against gun control laws, and the subsequent expansion and increased sophistication of its lobbying efforts in the decades leading up to *Heller*).

holding in *Miller*, interpreting the Second Amendment for the first time to contain an individual right to bear arms in *Heller*.<sup>48</sup> In striking down a Washington, D.C. ordinance prohibiting possession of handguns within the home, the high court relied on historical evidence to determine that self-defense was inherent in the Second Amendment's protections,<sup>49</sup> and that the prefatory clause's reference to a well-regulated militia was not meant to qualify the amendment's remaining "operative clause" protecting the right of the people to keep and bear arms.<sup>50</sup> Moreover, the Court held that *Miller* only limited the right in relation to dangerous and unusual weapons like the short-barreled shotgun at issue in that case.<sup>51</sup> This extended relatively broad protection to weapons "in common use at the time,"<sup>52</sup> which could cover a wide array of small arms while stopping somewhere short of military armaments.<sup>53</sup> This ill-defined zone of Second Amendment protection does not appear to be static,<sup>54</sup> leading one scholar to deem the standard "troubling" for its reliance on the "popularity of a weapon."<sup>55</sup>

Justice Scalia's opinion in *Heller*, while outlining a previously unknown individual Second Amendment right, appeared to discourage a full-out assault on state and local gun restrictions by noting that the right "is not unlimited."<sup>56</sup> Sticking to his originalist analysis, Scalia suggested that concealed carry regulations could still withstand constitutional scrutiny based on various nineteenth century decisions upholding such restrictions (notably, the Justice made no explicit mention of open carry regulations in this context).<sup>57</sup> The Court went on to detail a list of "presumptively lawful" gun regulations, but cautioned that they were only examples and not intended to be a comprehensive list,<sup>58</sup>

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or

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48. Imoukhuede, *supra* note 45, at 348–49.

49. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

50. *Id.* at 578, 599.

51. *Id.* at 625.

52. *Id.* at 624 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

53. Imoukhuede, *supra* note 45, at 351–52.

54. *Id.* at 352.

55. *Id.* at 353.

56. *Heller*, 554 U.S. at 626.

57. *Id.*

58. *Id.* at 627 n.26.

laws imposing conditions and qualifications on the commercial sale of arms.<sup>59</sup>

In sum, the groundbreaking case “clearly gestures at a right to carry firearms outside the home, but also acknowledges significant limitations on it.”<sup>60</sup>

In 2011, the Court extended its reasoning in *Heller* to apply to state regulations through the Fourteenth Amendment in *McDonald v. City of Chicago*.<sup>61</sup> While firmly establishing an individual right to possess firearms for self-defense, the tandem of cases left open some critical questions. Most importantly, particularly for states grappling with how to balance the regulation of concealed carry versus open carry, the Court did not specifically opine on the right to carry a firearm outside the home and punted that nettlesome question to the lower courts.<sup>62</sup>

### B. *An Evolving and Uncertain Right Post-Heller*

The courts that have taken up the question of the right to bear arms outside the home in the ensuing decade have reached disparate decisions, with some embracing *Heller*'s historical analysis and others opting for differing tiers of scrutiny.<sup>63</sup> Few have tackled head-on the related question of what that right guarantees with respect to how the guns are carried—openly or concealed. The legal wrangling has taken place amid a fierce public debate on gun control, with devoted interest groups often taking sides in litigation challenging or defending carry regulations.<sup>64</sup>

On one end of the spectrum, gun rights advocates view *Heller* as an invitation to carry however they please, arguing that guns in the hands of virtuous Americans deter crime and increase public safety.<sup>65</sup> In the Badger state, one group of firearm aficionados, Wisconsin Carry Inc., sums up this view succinctly in its mission statement: “We believe that ‘Open-Carry’ and ‘Conceal Carry’ are choices to be made by law-abiding citizens based on what

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59. *Id.* at 626–27.

60. Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1495 (2014).

61. 561 U.S. 742, 791 (2010).

62. Meltzer, *supra* note 60, at 1488.

63. *Id.*

64. *See, e.g.*, Peterson v. Martinez, 707 F.3d 1197, 1201 (10th Cir. 2013) (listing NRA Civil Rights Defense Fund and Brady Center to Prevent Gun Violence as amici curiae).

65. *Concealed Carry—Right-to-Carry*, NRA-ILA, <https://www.nra-ila.org/get-the-facts/right-to-carry-and-concealed-carry/> [https://perma.cc/6M9B-MU9S] (last visited Jan. 5, 2018).

suits their needs best.”<sup>66</sup> On the other side of the divide, gun control advocates support heavy restrictions—or even outright prohibition—of both concealed and open carry, arguing that lax permitting regimes give potential criminals carte blanche to walk the streets with guns in tow.<sup>67</sup>

However, amidst these cross-currents of public opinion, a middle ground has begun to take shape, with some judges and scholars embracing the alternative outlet doctrine and concluding that legislators can avoid running afoul of *Heller*’s individualized Second Amendment as long as one of the two options for carrying—open or concealed—is permitted, regardless of how severe the restrictions placed on the other option.<sup>68</sup> But a consensus on the right to carry outside the home and its exact contours remains elusive.

Notably, for the purposes of Wisconsin legislators in particular, the Seventh Circuit in 2012 held that the right to bear arms elucidated in *Heller* extends outside the home.<sup>69</sup> In holding unconstitutional an Illinois law banning outright any carrying of guns in public, Judge Richard Posner opined: “To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”<sup>70</sup> Noting that the Illinois statute was the only total ban in the country,<sup>71</sup> the Seventh Circuit added that the state would need more than a “rational basis” to support the ban in terms of public safety.<sup>72</sup> And, in reaching this conclusion, the court pointed out that the empirical evidence on the safety implications of permitting or restricting firearms in public is often contradictory and, on the whole, inconclusive.<sup>73</sup>

Most recently, the D.C. Circuit, the appeals court that first wrangled with *Heller*, outlined perhaps the most expansive right to carry outside the home in striking down a Washington, D.C., law that required applicants for a concealed carry permit to show a “good reason” why they needed to carry a gun for self-defense.<sup>74</sup> The court found that the District’s stringent may-issue regime was effectively a “total ban” on carrying concealed weapons because only a tiny fraction of residents could meet the requirements.<sup>75</sup> The court located the right of the typical citizen to carry firearms within the Second Amendment’s core,

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66. WIS. CARRY INC., <http://www.wisconsincarry.org/> [<https://perma.cc/7EKL-625E>] (last visited Jan. 4, 2019).

67. *Concealed Carry*, *supra* note 15.

68. *See* Bishop, *supra* note 11, at 920 n.78.

69. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

70. *Id.* at 937.

71. *Id.* at 940.

72. *Id.* at 942.

73. *Id.* at 939.

74. *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

75. *Id.* at 666.

eschewing tiers of scrutiny and finding the law invalid, taking its cue from the Supreme Court's treatment of the total ban on home possession of handguns in *Heller*.<sup>76</sup> And, according to the D.C. Circuit, the "traditional limits" on carrying guns cited in *Heller* did not extend to restrictions on carrying in urban areas or the requirement of a particularized need for self-defense,<sup>77</sup> casting doubt upon two of the most common types of concealed carry limitations.

While firmly backing a right to carry outside the home, the Seventh Circuit and D.C. Circuit did not squarely address how that right applies to the twin modes of exercising it, open or concealed. The Ninth Circuit did tackle this question—but vacillated in its pioneering support of the alternative outlet doctrine in a pair of decisions that underscore the broader difficulty among the circuit courts in interpreting *Heller*. In 2014, the Ninth Circuit trumpeted the alternative outlet doctrine in *Peruta v. County of San Diego*<sup>78</sup> as it struck down another strict "good cause" (i.e. may-issue) concealed carry permitting system.<sup>79</sup> The court said strong concealed carry restrictions were unconstitutional in the context of California's recent adoption—during the pendency of the case—of a total ban on the open carry of handguns.<sup>80</sup> Without overtly broaching the subject, *Heller* implicitly subscribed to the idea that prohibiting both open and concealed carry would run afoul of the Second Amendment through the handful of cases it cited on nineteenth century concealed carry laws, according to the Ninth Circuit.<sup>81</sup> "California's favoring concealed carry over open carry does not offend the Constitution, so long as it allows one of the two," Judge O'Scannlain wrote for the court.<sup>82</sup>

Bishop viewed the alternative outlet doctrine sketched out in *Peruta*<sup>83</sup> as a "novel" way to rationalize cases dealing with the regulation of public carry, pointing out that other constitutional rights are not divisible in the same manner.<sup>84</sup> It also heralded a difficult choice for any state with heavy restrictions

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76. *Id.* at 666–67.

77. *Id.* at 667.

78. 742 F.3d 1144 (9th Cir. 2014).

79. *Id.* at 1179.

80. *Id.* at 1172 (citing CAL. PENAL CODE § 26350 (West 2012)).

81. *Id.* at 1156–60 (discussing, among other cases, *State v. Reid*, 1 Ala. 612, 615 (1840); *Nunn v. State*, 1 Ga. 243, 251 (1846)).

82. *Peruta*, 742 F.3d at 1172.

83. Bishop, writing in 2012, relied on the original district court opinion in *Peruta*, which was handed down when California still allowed the open carry of unloaded handguns. The lower court held that open carry sufficed as an alternative outlet for the Second Amendment because a Californian could carry the ammunition separately and quickly load the weapon upon the need for self-defense. *Peruta v. County of San Diego*, 678 F. Supp. 2d 1046, 1052–53 (S.D. Cal. 2010).

84. Bishop, *supra* note 11, at 918–19 ("The state cannot raise as a defense to censorship of one book that it allowed the injured party to publish a different one.").

on both forms of carry—as one must be permitted under the doctrine to satisfy the Second Amendment—with Bishop falling squarely on the side of concealed carry.<sup>85</sup> “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.”<sup>86</sup>

However, the Ninth Circuit’s championing of the alternative outlet doctrine was short-lived. On en banc review in 2016, the appeals court backtracked, refusing to opine on the Second Amendment’s reach outside the home without explicit guidance from the Supreme Court<sup>87</sup> and holding that, if such a right exists, the historical evidence would limit it to open carry alone.<sup>88</sup> This foreclosed any resort to the alternative outlet doctrine because one of the two alternatives—concealed carry—was held to fall outside the Second Amendment’s shelter.<sup>89</sup>

In dissent, Judge Callahan doubled down on the alternative outlet doctrine, saying that *Heller* gives states the right to choose which method is best for its citizens and that the “Supreme Court has *never* dictated how states must accommodate the right to bear arms.”<sup>90</sup> He called the majority’s constitutional defense of open carry “unwise,”<sup>91</sup> citing a law professor’s common-sense observation that those openly displaying guns could scare their fellow citizens, incur social stigma, or invite unwanted attention from law enforcement.<sup>92</sup>

On the East Coast, the Second Circuit gave tepid support for a right to carry outside the home in upholding New York’s restrictive may-issue concealed carry permitting system under intermediate scrutiny.<sup>93</sup> Unlike the *Peruta II* court, the Second Circuit simply assumed based on *Heller* that the Second Amendment extended outside the home to some degree.<sup>94</sup> But while the court noted the nineteenth century cases with early articulations of the alternative outlet doctrine that Justice Scalia relied on in *Heller*,<sup>95</sup> it found the historical

85. *Id.* at 928.

86. *Id.*

87. *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (*Peruta II*).

88. *Id.* at 942.

89. *Id.* at 939 (“[T]he Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.”).

90. *Id.* at 954 (Callahan, J., dissenting).

91. *Id.* at 955 (Callahan, J., dissenting).

92. *Id.* (citing 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)).

93. *Kachalsky v. County of Westchester*, 701 F.3d 81, 96–97 (2d Cir. 2012) (finding that, under intermediate scrutiny, New York’s “proper cause” requirement for obtaining a concealed carry license is “substantially related” to the governmental interests of crime prevention and public safety).

94. *Id.* at 89.

95. *See, e.g., State v. Reid*, 1 Ala. 612, 615 (1840); *Nunn v. State*, 1 Ga. 243, 251 (1846).

evidence too divided to support the plaintiff's claim challenging the state's dual restrictions on carrying firearms.<sup>96</sup> Importantly, according to the Second Circuit, New York did issue concealed carry permits to those who could show "proper cause" and, therefore, while strict, it was not a "total ban" like the law against home handgun possession at issue in *Heller*.<sup>97</sup>

In contrast, the Tenth Circuit suggested in dicta that the alternative outlet doctrine was in line with *Heller*, all but chastising the plaintiff for limiting his challenge to Colorado's concealed carry law alone, rather than addressing it in tandem with Denver's prohibition of open carry.<sup>98</sup>

By all accounts, federal appeals courts are hopelessly divided on what, exactly, the new individual right to bear arms elucidated in *Heller* means for citizens wishing to walk the streets with guns in tow. Some have forcefully stated that the Second Amendment must reach beyond the gun-owner's abode, while others parsed their words carefully in qualifying such a right or remained silent until further direction from the Supreme Court, which hasn't come despite several opportunities.<sup>99</sup> However, these cases have centered largely on challenges to concealed carry laws. Two more recent cases—one in Florida's highest court and another before the Ninth Circuit—have dealt squarely with the right to bear arms in the context of open carry, but may only serve to muddy the waters further.

### C. Open Carry Guidance: Norman and Young

The alternative outlet doctrine is based on the view that the Second Amendment protects some right to carry arms in public, but that states can heavily restrict—or even outright ban—open carry as long as citizens can exercise their right to bear arms through concealed carry, or vice versa.<sup>100</sup> Others view the right in the absolute, guaranteeing both concealed and open carry, subject to certain reasonable restrictions.<sup>101</sup> Still another perspective, based on nineteenth century Supreme Court cases and in line with the old common law doctrine, is that the Second Amendment only guarantees the right

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96. *Kachalsky*, 701 F.3d at 90–91 (noting that four states—Texas, Wyoming, Tennessee, and Arkansas—all had nineteenth century laws banning both concealed and open carry that survived constitutional challenges).

97. *Id.* at 91.

98. *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013) ("We see no reason that a plaintiff could not challenge both the statute and the ordinance in the same suit, but Peterson has made a conscious decision not to challenge the Denver ordinance.").

99. *See, e.g., Peruta v. California*, 137 S. Ct. 1995, 1996 (2017) (denying petition for certiorari); *Kachalsky v. Cacace*, 569 U.S. 918 (2013) (denying petition for certiorari).

100. *See, e.g., supra* notes 78–80.

101. *See, e.g., Peruta*, 137 S. Ct. at 1995 (denying petition for certiorari).

to openly carry guns<sup>102</sup>—a view given some credence in *Peruta II*.<sup>103</sup>

In *Norman*, Florida fully embraced the alternative outlet doctrine. Florida’s high court ruled that the state’s near-total ban on openly carrying firearms was constitutional, finding that the state’s permissive concealed carry regime allowed Florida residents to exercise their right to bear arms for self-defense even without the ability to carry openly.<sup>104</sup> The court subjected the Florida statute<sup>105</sup> to intermediate scrutiny based largely on the presence of a concealed carry alternative, noting that—unlike the home handgun bans in *Heller* and *McDonald*—Florida had not enacted a total bar on possession or public carry.<sup>106</sup> Intermediate scrutiny, according to the court, “appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety.”<sup>107</sup> In finding that the statute “reasonably fits” the state’s interest in securing public safety and deterring gun crime, the court summarized the state’s rationale:

[T]he State argued that by restricting how firearms are carried in public so that they may only be carried in a concealed manner under a shall-issue licensing scheme, deranged persons and criminals would be less likely to gain control of firearms in public because concealed firearms—as opposed to openly carried firearms—could not be viewed by ordinary sight.<sup>108</sup>

It doesn’t take much imagination to conceive of counterarguments of a similarly conclusory nature that would favor open carry over concealed in terms of public safety. For example, openly carried weapons at least allow the public and law enforcement to know who, in fact, is armed at any given time, which was the general theory behind the old common law rule.<sup>109</sup> Moreover, criminals could potentially be deterred by the mere sight of armed civilians in public spaces, as open carry enthusiasts contend.<sup>110</sup> However, the court held that its acceptance of the state’s rationale with little questioning was appropriate under

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102. See generally Meltzer, *supra* note 60.

103. *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (*Peruta II*).

104. *Norman v. State*, 215 So. 3d 18, 41 (Fla. 2017).

105. FLA. STAT. § 790.053 (2018).

106. *Norman*, 215 So. 3d at 37–38 (“Florida’s Open Carry Law is not so close to the ‘core’ of this [Second Amendment] right as to prevent people from defending themselves. Indeed, under Florida’s permissive ‘shall-issue’ licensing scheme, most individuals are not prevented from carrying a firearm in public for self-defense.”).

107. *Id.* at 38 (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015)).

108. *Id.* at 40.

109. Meltzer, *supra* note 60, at 1511–15.

110. Brett Pucillo, *Open Carry Deters Crime: Opposing View*, USA TODAY (July 17, 2016, 7:13 PM), <https://www.usatoday.com/story/opinion/2016/07/17/open-carry-republican-national-convention-ohio-carry-editorials-debates/87228740/> [<https://perma.cc/A57Q-GMG8>].

intermediate scrutiny, saying “federal courts have upheld gun regulations by the government if they reasonably comport with important governmental interests, even if the government did not justify the restriction with data or statistical studies.”<sup>111</sup>

*Norman* posits that *Heller* and its progeny can tolerate open carry prohibitions if gun owners can enjoy their right to bear arms via concealed carry, as was the case in Florida. But since all courts might not employ intermediate scrutiny in weighing firearms restrictions (though many have post-*Heller*), and future judges considering open carry laws may not be as credulous of the government’s rationale as the Florida Supreme Court, the policy justification for restricting open carry accepted in *Norman* leaves something to be desired.

At the federal level, the Ninth Circuit recently came to a starkly different conclusion when considering Hawaii’s strict open-carry permitting law. In *Young v. Hawaii*,<sup>112</sup> a three-judge panel struck down a Hawaii statute that limited the open carry of firearms to residents “engaged in the protection of life and property,”<sup>113</sup> finding that open carry is protected under the individual right to bear arms for self-defense outlined in *Heller*.<sup>114</sup> In doing so, the court rejected an argument by state and local authorities that the Second Amendment right to self-defense by firearm was limited to the home and did not embrace open carry.<sup>115</sup> Because open carry is within the core of the Second Amendment,<sup>116</sup> the strict Hawaii law—under which Hilo County had not issued a single permit<sup>117</sup>—would fail under any level of scrutiny, the Ninth Circuit said, dispensing with any need to weigh the governmental interests underpinning the statute.<sup>118</sup>

However, the panel reached this conclusion within the boundaries of the Ninth Circuit’s decision in *Peruta II*, which held that concealed carry did not enjoy Second Amendment protection.<sup>119</sup> Therefore, the analysis undertaken in *Norman* under the alternative outlet doctrine<sup>120</sup> could not be applied in the Ninth

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111. *Norman*, 215 So. 3d at 40.

112. 896 F.3d 1044 (9th Cir. 2018).

113. HAW. REV. STAT. § 134-9 (2018).

114. *Young*, 896 F.3d at 1071.

115. *Id.* at 1068.

116. *Id.* at 1070 (“[W]e reject a cramped reading of the Second Amendment that renders to ‘keep’ and to ‘bear’ unequal guarantees . . . the right to carry a firearm openly for self-defense falls within the core of the Second Amendment.”).

117. *Id.* at 1072.

118. *See id.* at 1071.

119. *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (*Peruta II*).

120. *Norman v. State*, 215 So. 3d 18, 41 (Fla. 2017).

Circuit, as one of the two options to bear arms for self-defense—concealed carry—had already been ruled outside the ambit of the Second Amendment.<sup>121</sup> But the logic remains essentially the same. As the *Young* court noted, “[o]nce identified as an individual right focused on self-defense, the right to bear arms must guarantee *some* right to self-defense in public.”<sup>122</sup> In Hawaii’s case, open carry was the only option left in the Ninth Circuit to guarantee that right and the state statute placed too heavy a burden upon it.

The contrast between the outcomes in *Young* and *Norman*—a state court upholding a blanket ban on open carry under the alternative outlet doctrine versus a federal court striking down an impossibly strict open carry permit process—presents a confusing picture at first glance for lawmakers weighing further restrictions on open carry. But the Ninth Circuit has a reputation for being an outlier among its sister courts,<sup>123</sup> some of which—including the Seventh Circuit in *Moore*—have found much broader protections for public carry in the Second Amendment. An increasingly conservative U.S. Supreme Court is unlikely to adopt the Ninth Circuit’s idiosyncratic and disfavored view of concealed carry, meaning that, with both concealed and open carry on the table, the alternative outlet doctrine should remain a viable way to interpret the Second Amendment with regard to public carry.

Unfortunately, the conflicting social sciences research on the health and crime implications of gun laws does not offer clear guidance to policymakers either. For example, a key statistic in the social cost–benefit analysis on public carry is how often, exactly, guns are used for self-defense—the right central to Second Amendment jurisprudence post-*Heller*. But two reputable studies, conducted during roughly the same timeframe, put the number of defensive gun uses per year in the U.S. at 100,000 and 2.5 million, respectively.<sup>124</sup> The yawning gap between those two numbers could span very different policy choices based on the utility of guns for defensive purposes weighed against their obvious dangers.

The fact that few studies differentiate between open carry and concealed carry likely complicates the issue further for courts and lawmakers.<sup>125</sup> Open carry is exercised in most states either without the need for a permit or by those with a concealed carry permit (as opposed to an open carry-specific permit).

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121. *Young*, 896 F.3d at 1068.

122. *Id.*

123. See Diarmuid F. O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record in the Supreme Court Since October Term 2000*, 14 LEWIS & CLARK L. REV. 1557, 1557 (the author, a Ninth Circuit judge, calling his court’s recent history before the U.S. Supreme Court “strikingly poor”).

124. NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 102 (Charles F. Wellford et al. eds., 2005), <https://doi.org/10.17226/10881> [<https://perma.cc/QD55-3Y9B>].

125. See Bishop, *supra* note 11, at 927.

This—along with the obvious social and law enforcement consequences of carrying openly that make it significantly less-popular than concealed carry—make record-keeping and analysis difficult.

But a potential public safety defense of open carry restrictions can be found by looking at a string of troubling news bulletins and political currents. The combination of an increasingly polarized political climate, a dedicated group of open carry proponents who display weapons in support of various causes, and the rise of hostile counterdemonstrations have led to extremely volatile confrontations on the public square that are just one itchy trigger-finger away from disaster. The Charlottesville protest stands as a stark reminder of the dangers. And beyond public safety, these political and social trends raise another argument for restricting open carry: that it runs headlong into the First Amendment rights to free speech and public assembly with chilling consequences for these cherished liberties.

#### IV. PUBLIC SAFETY, FREE SPEECH, AND OPEN CARRY IN WISCONSIN

##### A. *Charlottesville and the Public Safety Rationale Against Open Carry*

Just how close the events in Charlottesville came to a firefight—whether through an exchange of fire with the police or by shots fired against combative counter-protestors—cannot be known with certainty. Media reports documented one shot fired during the fracas, by a man who “strolled past a line of about a dozen state police troopers” before firing a round into the ground but in the direction of counter-protestors.<sup>126</sup> Some bystanders said the police took no action after the protestor discharged his pistol,<sup>127</sup> while other witnesses surmised that law enforcement generally took a passive stance toward the clashing protestors due to the presence of openly displayed firearms throughout the protest grounds.<sup>128</sup>

The precarious mix of political demonstration and open carry apparent in Charlottesville is hardly an isolated incident. Demonstrators—whether touting gun rights or championing other causes—have showed up visibly armed in the public square with increasing frequency in recent years. In January 2019, protestors brandishing guns swarmed the seat of Pittsburgh’s local government to challenge firearm restrictions proposed after thirteen were killed in a mass

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126. Frances Robles, *As White Nationalist in Charlottesville Fired, Police ‘Never Moved’*, N.Y. TIMES (Aug. 25, 2017), [https://www.nytimes.com/2017/08/25/us/charlottesville-protest-police.html?\\_r=0](https://www.nytimes.com/2017/08/25/us/charlottesville-protest-police.html?_r=0) [https://perma.cc/7E46-5N82].

127. *Id.*

128. A.C. Thompson, *Police Stood By as Mayhem Mounted in Charlottesville*, PROPUBLICA (Aug. 12, 2017, 11:00 PM), <https://www.propublica.org/article/police-stood-by-as-mayhem-mounted-in-charlottesville> [https://perma.cc/7ENQ-Q2U8].

shooting at a local synagogue.<sup>129</sup> Others have marched with guns in response to a random knife attack on Ohio State University's campus,<sup>130</sup> while Starbucks became such a magnet for open carry activists that the company issued a statement gently asking its customers to disarm before stopping in for a latte.<sup>131</sup> Some gun rights groups contend that the self-proclaimed anti-fascist, or "Antifa," counter-protestors have begun arming themselves at demonstrations as well.<sup>132</sup>

A 2014 grazing rights feud in Nevada famously ended with federal agents backing down after a tense faceoff with rancher Cliven Bundy, who had hundreds of armed anti-federal-government militia members flock to his cause during the confrontation.<sup>133</sup> Bundy's son, Ammon Bundy, harnessed the same discontent with federal stewardship of western lands in 2016 when he and many of the same allies that supported his father in Nevada staged a month-long armed takeover of a federal wildlife refuge in Oregon.<sup>134</sup> While the two Bundy incidents were more direct confrontations with law enforcement, as opposed to dueling protests, their broader political aims were stated clearly enough to illustrate the peril of openly bearing arms to make a political point.

Whether in the heated exchange of political views by opposition groups in crowded public spaces, or where guns are brandished to support a political end in the face of government intervention, it does not take exhaustive psychological or sociological research to conclude that the presence of guns elevates tensions and the potential for bloodshed. Yet the judges and commentators who have cautioned against unrestrained open carry have largely

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129. John Shumway, *Gun Rights Advocates Protest at 'Open Carry Rally' at City-County Building*, CBS PITTSBURGH (Jan. 7, 2019, 7:44 PM), <https://pittsburgh.cbslocal.com/2019/01/07/open-carry-rally-city-county-building-portico/> [<https://perma.cc/L9CR-M4F2>].

130. Joe Clark, *Group Holds Open-Carry Gun Walk in Response to Attack at OSU*, NBC4I.COM (Dec. 5, 2016, 11:44 AM), <http://nbc4i.com/2016/12/05/group-holds-open-carry-gun-walk-in-response-to-attack-at-osu/> [<https://perma.cc/NYD2-AUY8>].

131. Howard Schultz, *Our Respectful Request*, STARBUCKS STORIES (Sept. 17, 2013), <https://news.starbucks.com/views/open-letter-from-Howard> [<https://perma.cc/M844-RRFP>] ("For those who champion 'open carry,' please respect that Starbucks stores are places where everyone should feel relaxed and comfortable. The presence of a weapon in our stores is unsettling and upsetting for many of our customers.")

132. Tom Knighton, *Antifa Open Carrying in Seattle Protest?*, BEARING ARMS (Dec. 4, 2018, 12:00 PM), <https://bearingarms.com/tom-k/2018/12/04/antifa-open-carrying-seattle-protest/> [<https://perma.cc/RR9K-QJUL>].

133. Ralph Ellis & Michael Martinez, *Feds End Roundup, Release Cattle After Tense Nevada Showdown*, CNN, <https://www.cnn.com/2014/04/12/us/nevada-rancher-rangers-cattle-showdown/index.html> [<https://perma.cc/J8NN-2PLK>] (last updated Apr. 14, 2014, 10:54 AM).

134. Jason Wilson, *Oregon Militia Threatens Showdown with US Agents at Wildlife Refuge*, GUARDIAN (Jan. 3, 2016, 8:18 AM), <https://www.theguardian.com/us-news/2016/jan/03/oregon-militia-threatens-showdown-with-us-agents-at-wildlife-refuge> [<https://perma.cc/HCR6-97QW>].

focused on individuals openly carrying firearms—how they might frighten bystanders,<sup>135</sup> or how social stigma might deter those wishing to bear arms from carrying openly.<sup>136</sup> The Florida Supreme Court in *Norman* relied on a surprisingly thin argument against open carry from the state involving the potential for a criminal to wrest control of a gun from an openly carrying civilian.<sup>137</sup> But the aggregated danger of numerous open carriers gathering for political purposes may finally present a convincing, readily observable public safety basis for states to rethink their generally permissive stances on open carry before an honest-to-goodness firefight erupts in a public park somewhere. Considering the increased frequency and variety of open carry events, all in a nation riven by deep social and ideological divides that promise future confrontations, a reexamination of how and when citizens can bear arms openly in public is long overdue.

In addition to the general danger posed by openly carried firearms on the public square, there is a more specific, practical point questioning the safety and wisdom of open carry. Unlike concealed carry—which in practice only permits carrying handguns that are capable of being hidden from view—open carry allows for the public bearing of long guns, including high-powered assault rifles. One need look no further than how the high-powered, semi-automatic AR-15 and similar weapons, adapted from fully automatic military cousins, have been used with gruesome efficiency in a parade of mass shootings, including the October 2017 slaughter at a country music festival in Las Vegas that left fifty-eight dead<sup>138</sup> and the February 2018 school shooting in Parkland, Florida that killed seventeen.<sup>139</sup> The capability of assault rifles, which can only be carried openly, to kill even more quickly and efficiently than handguns, particularly in crowded public spaces, further buttresses the public safety rationale against open carry.

The Charlottesville protest ended in tragedy—a tragedy that may have been exacerbated by police inaction due to the presence of armed protestors. The fact that only one shot was reported fired at the incident should not be cause for calm; the minimal amount of violence connected to guns on the scene may have resulted from mere luck and might not be predictive of the restraint that will be

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135. See *supra* note 92 and accompanying text.

136. See *supra* note 92 and accompanying text.

137. *Norman v. State*, 215 So. 3d 18, 40 (Fla. 2017).

138. Bart Jansen & William Cummings, *Why Mass Shooters Are Increasingly Using AR-15s*, USA TODAY (Nov. 6, 2017, 9:51 PM), <https://www.usatoday.com/story/news/2017/11/06/ar-15-style-rifles-common-among-mass-shootings/838283001/> [<https://perma.cc/3JTH-AEHL>].

139. Jennifer Earl & Kaitlyn Schallhorn, *Florida School Shooting Among 10 Deadliest in Modern US History*, FOX NEWS (Feb. 14, 2018), <https://www.foxnews.com/us/florida-school-shooting-among-10-deadliest-in-modern-us-history> [<https://perma.cc/2C22-WAYX>].

practiced by openly carrying civilians or the police under different circumstances in the future. The accelerating current of the open carry movement, running alongside other gun rights causes and branching off at times to advance separate political ends, has exposed public safety concerns not previously weighed by courts and policymakers. That alone should be enough to spur public debate and possibly legislative action on open carry, but largely hypothetical scenarios of violence will not pass the smell test for many skeptics. An appeal to liberty, stemming from the clash of First Amendment and Second Amendment rights in the context of political activity accompanied by guns, adds further weight to the case for limiting open carry.

### *B. Friction Between Open Carry and the First Amendment*

In the aftermath of the Charlottesville protest, several observers noted the troubling potential for armed protestors to chill speech at confrontational demonstrations and political gatherings. A federal judge rejected the city's bid to relocate the protest on the grounds that the move would be an unconstitutional restriction based on the content of the protestors' speech, adding that "merely moving Kessler's demonstration to another park will not avoid a clash of ideologies or prevent confrontation between the two groups."<sup>140</sup> But the judge failed to factor into his analysis the potential that dozens, or perhaps hundreds, of protestors would square off in the Charlottesville park with guns in tow, even though the city police had warned of such a possibility.<sup>141</sup> Commentators argued that the judge's First Amendment analysis, while solid, had failed to catch up with the realities of modern day political division and protest:

Conrad's decision seems to have been issued in a vacuum, one in which Second Amendment open-carry rights either swallowed First Amendment doctrine altogether or were simply wished away, for after-the-fact analysis. The judge failed to answer the central question: When demonstrators plan to carry guns and cause fights, does the government have a compelling interest in regulating their expressive conduct more carefully than it'd be able to otherwise?<sup>142</sup>

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140. *Kessler v. City of Charlottesville*, No. 3:17CV00056, 2017 WL 3474071, at \*4 (W.D. Va. Aug. 11, 2017). Jason Kessler, the plaintiff in the case, was the organizer of the so-called Unite the Right rally in Charlottesville.

141. Dahlia Lithwick & Mark Joseph Stern, *The Guns Won*, SLATE (Aug. 14, 2017, 7:34 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/the\\_first\\_and\\_second\\_amendments\\_clashed\\_in\\_charlottesville\\_the\\_guns\\_won.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/the_first_and_second_amendments_clashed_in_charlottesville_the_guns_won.html) [<https://perma.cc/SUM8-DBRQ>].

142. *Id.*

Many armed demonstrators—particularly those with specific Second Amendment goals—consider carrying their weapons in public as a form of symbolic speech, the gun itself an “educational tool” on constitutional rights.<sup>143</sup> At least one federal circuit court has lent some support to this guns-as-speech idea,<sup>144</sup> blurring the protections of the First and Second Amendments in the context of armed demonstrators. In analyzing this argument, Horwitz notes that guns in this context could chill speech directly through intimidation or by granting gun-toting counterdemonstrators an effective “heckler’s veto” by prompting the authorities to break up contentious demonstrations,<sup>145</sup> exactly what some criticized the courts and law enforcement for failing to do in Charlottesville.

Horwitz posits that courts could walk the line between safeguarding symbolic speech by open carry advocates and protecting the corresponding free speech rights of their unarmed counterparts by adding to the “true threat” doctrine,<sup>146</sup> a gap in the First Amendment that leaves threatening speech unprotected.<sup>147</sup> Adopting the perspective of unarmed demonstrators faced with armed opposition, “the true threat doctrine should be clarified to hold that the First Amendment does not protect speech a reasonable audience would find intimidating.”<sup>148</sup> While Horwitz concludes that “guns and ‘free speech’ are largely incompatible,”<sup>149</sup> he proposes a First Amendment solution to what is primarily a Second Amendment problem, especially considering the tenuous argument for guns as symbolic speech. He contends that this approach would avoid “excessively limiting the rights of gun carriers.”<sup>150</sup>

The inevitably post hoc First Amendment remedy proposed by Horwitz would be difficult for civil authorities and law enforcement to implement, foisting a complicated free speech analysis on parties ill-suited to differentiate between guns borne as symbolic speech and those meant to intimidate political foes or squelch the voices of unarmed demonstrators. A more direct route

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143. Daniel Horwitz, *Open-Carry: Open-Conversation or Open-Threat?*, 15 FIRST AMEND. L. REV. 96, 107–08 (2016).

144. *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) (“[A] gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally.”).

145. Horwitz, *supra* note 143, at 119 (“This runs counter to the spirit of the First Amendment, which protects the ‘freedom of speech’ and the ‘right of the people to peaceably assemble,’ presumably without fear of being shot.”).

146. *See Virginia v. Black*, 538 U.S. 343, 359 (2003).

147. Horwitz, *supra* note 143, at 120.

148. *Id.*

149. *Id.*

150. *Id.*

would be to enact targeted open carry restrictions that comport with the Second Amendment under the alternative outlet doctrine, but still cast a wide enough net to prevent firearms from being paraded around at divisive political events in the first place. Each state can decide for itself whether open carry presents a risk within its borders. Wisconsin, with a demographic and political make-up that mirrors the deepest divisions in broader American culture, and a history of fiery protests, would be wise to be proactive in limiting the chances of open carry activity leading to bloodshed.

*C. Wisconsin: A Prime Candidate for Sensible Open Carry Restrictions*

In October 1967, University of Wisconsin-Madison students staged a sit-in to protest job-recruitment on campus by Dow Chemical, which made the napalm used in munitions that took a terrible human toll during the Vietnam War.<sup>151</sup> After the protestors refused to relent, dozens of police swarmed the school's Commerce Building and dispersed the crowd with billy clubs, drawing more students into the melee and ultimately injuring forty-seven students and eighteen police officers.<sup>152</sup> The incident is widely noted as the first Vietnam War protest to erupt into violence, presaging a difficult period in American history.<sup>153</sup> The political and cultural unrest of the Vietnam War would cut especially deep in Madison, with the low-point marked by the 1970 bombing of a university building that left a researcher dead.<sup>154</sup>

The deep political divisions in Wisconsin and the identity of Madison as a crucible for fiery protest did not end with the Vietnam War. In 2011, tens of thousands of pro-union protestors swarmed the state capitol to oppose Governor Scott Walker's proposal to severely curtail the collective bargaining rights of Wisconsin public employee unions. The protests, beginning in February and flaring up on and off until June, when 2011 Wisconsin Act 10 was upheld by the Wisconsin Supreme Court, attracted a smaller crowd of anti-union counterdemonstrators as well, many affiliated with conservative Tea Party

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151. *Two Days in October: Napalm and the Dow Chemical Company*, AM. EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-dow-chemical-and-use-napalm/> [https://perma.cc/68LX-BAM5] (last visited Jan. 4, 2018).

152. *Two Days in October: Police and Protesters*, *supra* note 6.

153. *Id.*

154. Jerry Markon, *After 40 Years, Search for University of Wisconsin Bombing Suspect Heats Up Again*, WASH. POST (Sept. 21, 2010, 11:43 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/21/AR2010092106588.html> [https://perma.cc/GK9U-KB6W].

groups.<sup>155</sup> The demonstrations were widely reported to be peaceful despite heated disagreement over the fate of the state's unions.<sup>156</sup>

While the 2011 protests exhibited relative civility and calm in a contentious atmosphere, political discord in Wisconsin and the nation has increased in the years since, as has the momentum and reach of the open carry movement.<sup>157</sup> The 2016 election solidified Wisconsin's reputation as a crucial and unpredictable swing state, with President Donald Trump carrying the day by less than 30,000 votes over Democrat Hillary Clinton and the electoral map showing an almost night-and-day divide between the state's two urban, Democratic strongholds—Milwaukee and Madison—and the rural or small-town Republican voters nearly everywhere else.<sup>158</sup> The pendulum swung back in 2018 at the state level, with Democrat Tony Evers capturing Wisconsin's governorship and leaving the executive at loggerheads with a Republican-controlled legislature that passed eleventh-hour legislation to curb the incoming governor's power, sparking the latest round of peaceful protests in Madison.<sup>159</sup>

Wisconsin remains a fertile ground for political protest, with open carry proponents continuing to support their cause in the state as well.<sup>160</sup> The persistence of open carry advocates in Milwaukee prompted the Police Chief Edward Flynn to complain to the press recently, "I wish more of our legislators could see past the ideology. . . . They have no concern about the impact in urban environments that are already plagued by too many guns and too much violence."<sup>161</sup> Flynn's complaint about violence in "urban areas" raises another issue with open carry with special significance in a highly segregated city like Milwaukee: the potential for open carry to be policed more heavily in cities and, whether by design or not, for law enforcement to crack down more forcefully against black people openly carrying in cities.

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155. James Kelleher, *Competing Wisconsin Protests Peaceful, Draw Thousands*, REUTERS (Feb. 18, 2011, 6:27 PM), <https://www.reuters.com/article/us-wisconsin-protests/competing-wisconsin-protests-peaceful-draw-thousands-idUSTRE71H3UZ20110219> [<https://perma.cc/8EZ7-QMEF>].

156. *Id.*

157. *See supra* notes 111–22 and accompanying text.

158. *2016 Wisconsin Presidential Election Results*, *supra* note 8.

159. Mitch Smith & Monica Davey, *Lawmakers Clash and Protestors Chant Amid Fight Over Wisconsin Governor's Power*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/us/wisconsin-republicans-power.html> [<https://perma.cc/XCQ2-WBPY>].

160. Hannah Flood, *Gun Rights Rally Planned for Saturday*, NBC15.COM (Apr. 12, 2018, 4:23 PM), <https://www.nbc15.com/content/news/Gun-rights-rally-planned-for-Saturday-479566393.html> [<https://perma.cc/7H7T-CZT4>].

161. Julia Harte, *Police in Cleveland, Dallas, and Milwaukee Push Back Against 'Open Carry' Gun Laws*, BUS. INSIDER (July 19, 2016, 8:50 AM), <http://www.businessinsider.com/police-push-back-against-open-carry-gun-laws-2016-7> [<https://perma.cc/BTN6-EKFT>].

The potential is obvious for open carry to result in improper “Terry stops”<sup>162</sup>—where police briefly detain and search a person on reasonable suspicion that they are armed and dangerous—in violation of the Fourth Amendment.<sup>163</sup> This exact scenario raised the specter of racial injustice in 2016 when Milwaukee police disarmed a Black Panther group at a food drive event.<sup>164</sup> To be sure, Wisconsin police have intervened against white citizens seen open carrying as well.<sup>165</sup> But the disparate responses from law enforcement in Milwaukee and the predominantly white suburb of Wauwatosa after the 2009 Attorney General memo sanctioning open carry was telling. Milwaukee Police Chief Flynn said: “My message to my troops is if you see anybody carrying a gun on the streets of Milwaukee, we’ll put them on the ground, take the gun away and then decide whether you have a right to carry it.”<sup>166</sup> Police Lt. Dominic Leone, of suburban Wauwatosa, was decidedly more subdued: “We all anticipate in the metro area that some people who are very passionate about this topic may exercise this right, and there may be reason for us to stop and talk to them.”<sup>167</sup>

The chance of even the appearance of prejudicial policing, given the widespread distrust of law enforcement in black communities and unrest over police shootings in recent years, marks yet another argument against unfettered open carry in Wisconsin, particularly when concealed carry tends not to attract police attention.

## V. CONCLUSION

Could a Charlottesville-type protest-run-amok happen in Madison—only worse, with the guns on hand used as more than just props? If it seems improbable, consider that the residents of Charlottesville, another quiet, liberal college town in a politically divided state, likely never imagined that their park space would host the type of chaos seen in August 2017. Even if the potential for a worst-case scenario still seems remote amongst famously amiable Midwesterners, perhaps a particularly divisive political issue—say, the possible impeachment of President Trump—could fan the flames of political discord enough to make armed confrontation on the public square more likely.

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162. See *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

163. Bishop, *supra* note 11, at 926.

164. Terry Sater, *Video Shows Confrontation Between Black Panthers Group and Police*, WISN (Dec. 30, 2016, 10:15 AM), <http://www.wisn.com/article/black-panthers-group-stages-demonstration-leads-to-police-confrontation/8546244> [<https://perma.cc/NEZ3-TMQW>].

165. See, e.g., *supra* note 129 and accompanying text.

166. Linda Spice et al., *Rush to Carry Guns in Open is Not Likely*, J. SENTINEL (Apr. 21, 2009), <http://archive.jsonline.com/news/statepolitics/43347632.html> [<https://perma.cc/WB6E-ZNXS>].

167. *Id.*

Moreover, the additional consequence of hindering the First Amendment rights of fellow political activists should tip the scales of caution toward rethinking Wisconsin's permissive open carry stance. With a shall-issue concealed carry regime, law-abiding Wisconsin residents have ample opportunity to exercise the individual right to bear arms for self-defense outlined in *Heller*, which leaves room for restrictions on open carry under the alternative outlet doctrine. While the presence of concealed weapons at heated political demonstrations also poses public safety concerns, it would not further heighten tensions toward violence or intimidate opposing voices into silence. Nor could protestors carry the most deadly assault weapons in a concealed manner.

But what form should such open carry restrictions take? One potential approach would be to recognize the separate gun cultures between rural areas, where residents often value hunting and gun rights register strong support, and urban centers where gun violence is prevalent and gun control laws are popular—a view termed “firearm localism” by Joseph Blocher.<sup>168</sup> Blocher proposes allowing local jurisdictions to fashion firearm restrictions based on their needs and local support.<sup>169</sup> There are several states Wisconsin could follow in shifting toward firearm localism. Pennsylvania and Virginia have state laws limiting open carry in certain populous locales, but only absent a concealed carry permit. Perhaps a similar law in Wisconsin, only barring permit-holders from carrying openly as well, would strike the appropriate Second Amendment balance. Missouri has left the decision to regulate open carry without a permit to local jurisdictions through an exception to a statute that preempts local gun regulations that are stricter than state law.<sup>170</sup> Wisconsin could likewise amend its own preemption statute.<sup>171</sup>

A legislative nod to firearm localism could allow militia groups or open carry advocates to organize and parade outside city limits, while leaving political demonstrators that tend to gather in urban centers to voice their opinions without the menacing presence of openly displayed firearms in the hands of fellow civilians. This approach would, of course, increase the potential for complaints that urban-dwelling minorities are subject to a different Second Amendment standard than white citizens in the country. It also would not prevent the sort of rural stand-offs with law enforcement organized by

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168. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 82 (2013).

169. *Id.* at 142.

170. MO. ANN. STAT. § 21.750(3) (West 2014).

171. WIS. STAT. § 66.0409(2) (2017–2018).

Ammon and Cliven Bundy,<sup>172</sup> but it could be a compromise proposal to assuage the fears of gun rights advocates.

Another route would be to adopt the sort of blanket bans on open carry found in Florida and California.<sup>173</sup> This approach would, no doubt, rankle those gun rights absolutists who view their personal firearms as an essential safeguard against tyranny. And it could be a very tough sell in Wisconsin, where hunting is a cherished pastime and any restriction on open carry in the countryside—no matter how qualified to accommodate hunters—could raise fears of sportsmen unwittingly falling on the wrong side of the law. But the time has come for Wisconsin policymakers to at least reconsider the state's headlong rush toward a society where holsters are as ubiquitous as smart phones. Sensible open carry restrictions are a good place to start.

LANCE DURONI\*

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172. *See supra* notes 135–36 and accompanying text.

173. *See* FLA. STAT. § 790.053 (2018); CAL. PENAL CODE § 26350 (West 2012).

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