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ON YOUR FIRST DAY, PRESIDENT TRUMP, PLEASE REPEAL THE IMMUNIZATION OF GUN SELLERS ACT[†]

*Frank J. Vandall**

The purpose of this edition of the *Emory Corporate Governance and Accountability Review* is to suggest what needs to be done during the first few days of President Trump's new administration. The first act should be the repeal of the Protection in Lawful Commerce in Arms Act (PLCA) (2005).¹ In essence this is a ban on suits against corporations that manufacture guns. Gun manufacturers are the experts and need to be brought into the gun safety debate. When at fault, they should be held liable.

Congress nailed the doors to the Courthouse closed in 2005. The Gun Manufacturers Immunity Law (PLCA) (2005) protects gun manufacturers from suit. One of the arguments against the passing of the "Protection of Lawful Commerce in Arms Act" (PLCA) was that the bill prevented the victims of gun violence from having their day in court.² Senator Jack Reed noted how a bill that protected firearms manufacturers from civil liability would prevent those who lost loved ones to gun violence from seeking justice.³ Senator Reed presented the case of Conrad Johnson, saying, "Conrad Johnson was the bus driver who was killed by the Washington area snipers. The snipers' Bushmaster

[†] Portions of this paper were presented to the Emory faculty. I appreciate the comments of Tom Arthur, Debbie Dinner and Sasha Volokh.

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¹ This bill provides tort immunity for gun manufacturers from civil suit. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (PLCA) (2005).

Other gun safety measures must also be adopted:

- a) Insurance for all guns, so innocent parties who are injured can recover from the shooter at fault.
- b) Registration of all guns—like cars. This is to enable bad persons to be found and prosecuted—like automobiles used in bank robberies.
- c) Storage of "rapid fire" guns in an armory. Military posts require this.
- d) Guns can only be transported in a locked box in the trunk. Avoids accidental shootings and "drive by" shootings.
- e) Warning sign—Caution gun inside. To warn neighbors with children and deter potential thieves.
- f) Encourage corporations to develop "smart guns." Hand guns only work if a unique ring or bracelet is in very close proximity.
- g) Close the "gun show" loophole.

² 151 CONG. REC. S8915 (daily ed. July 26, 2005) (statement of Sen. Reed).

³ *Id.*

assault rifle was one of more than 230 guns that disappeared from the Bull's Eye Shooter Supply gun store in Washington State. The gun store's careless oversight of firearms in its inventory raised serious questions of negligence that fully deserved to be explored by the civil courts."⁴ Bringing a torts suit was forbidden by the PLCA however. Senator Reed's point was that the PLCA wrongly immunized the gun store from judicial examination by means of a suit.

This Paper will manifest that laws immunizing gun manufacturers and sellers prevent victims of gun violence from asserting their rights. This is premised on the simple idea that the negligent gun merchant, felonious shooter, or both, owe a duty to the decedent. When a thief shoots a victim, or when an enraged spouse shoots his wife, the shooter has acted as prosecutor, judge and jury. The victim is dead without ever having access to the courts to plead her case. The handgun provides instant death or serious injury. Mr. Conrad Johnson and his family were unable to obtain justice because of the PLCA. The negligent gun store owner was immunized from tort liability by the PLCA. Today, because of the lobbying strength of the gun manufacturers and the NRA, there is no meaningful debate of gun safety.

Congress passed the PLCA in less than a year and was very much influenced by the National Rifle Association and the numerous arms manufacturers. I predict that not a word in the PLCA will be changed in 2017. The path forward in regard to gun safety must then rest with the civil justice bar. To reduce the carnage, hand guns and rapid fire weapons must be restricted to the home for self-defense purposes. Thus "carry everywhere laws" that encourage taking guns outside the home, such as Georgia's, must be challenged in court as being unconstitutional.

In terms of the numbers of deaths from gun violence, it is as if we are at war. War is safer than living in the United States. About 15,000 people die from gun violence each year. That amounts to 150,000 gun deaths every 10 years. In comparison about 60,000 American military personnel were killed in Vietnam, about 4,000 in Iraq over 10 years, and 132 American soldiers were killed in Afghanistan in 2013.⁵

⁴ *Id.*

⁵ *U.S. Military Casualties—Vietnam Conflict Casualty Summary*, DEF. CASUALTY ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/report_vietnam_sum.shtml (last accessed Dec. 23, 2014); *U.S. Military Casualties—Operation Iraqi Freedom (OIF) Military Deaths—All*, DEF. CASUALTY ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/report_oif_all.shtml (last accessed Dec. 23, 2014); *U.S. Military Casualties—Operation Enduring Freedom (OEF) Casualty Summary by Month and Service*, DEF.

A gun is the most dangerous thing you can bring into your home. A person in the home is four times more likely to be shot and killed than an intruder.⁶ Each year approximately 10,000 children are killed or injured by gun violence in the United States.⁷ Women are most at risk, to be sure. If a domestic abuser has access to a gun, a woman is 500% more likely to be killed than if no gun is present.⁸ To put the issue into today's context, the prosecutor involved in the Ferguson Missouri grand jury report said that Officer Wilson shot Michael Brown because he feared that Brown was armed.⁹

Thus, more guns on the street will lead to the police fearing more guns on suspects and in vehicles. One reason the firemen refused to put out the fires in Ferguson, Missouri was that they heard shots and feared that they would be shot.¹⁰

More guns carried outside the home will make the police more likely to shoot a suspect. Recently, an officer shot a 12-year-old child in Cleveland, Ohio because he was pointing a gun at people.¹¹ In fact, it turned out to be a toy gun.¹²

I. THE GEORGIA CARRY GUNS EVERYWHERE ACT

In April 2014, the Georgia legislature passed a bill that permits carrying handguns and rifles in restaurants, churches, and school parking lots.¹³ I argue

CASUALTY ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/report_oef_month.xhtml (last accessed Dec. 23, 2014).

⁶ Arthur L. Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. TRAUMA 263 (1998).

⁷ Clare Kim, *Nearly 10,000 American Children Are Injured or Killed by Guns Every Year*, MSNBC (Jan. 28, 2014, 1:11 PM), <http://www.msnbc.com/the-last-word/the-toll-gun-violence-children>.

⁸ J.C. Campbell et al., *Risk factors for femicide within physically abusive intimate relationships: results from a multi-site case control study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

⁹ See Transcript of Grand Jury Volume V at 227–28, *State of Mo. v. Darren Wilson* (Sept. 16, 2014); Russel Berman, *Darren Wilson: 'I Just Did My Job'*, ATLANTIC (Nov. 26, 2014, 12:14 PM), <http://www.theatlantic.com/politics/archive/2014/11/i-just-did-my-job/383227/>.

¹⁰ See *Ferguson Protests: Firefighters turned back by gunfire*, NJ.COM (Nov. 25, 2014, 3:59 PM), http://www.nj.com/news/index.ssf/2014/11/ferguson_protests_firefighters.html.

¹¹ Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES, Nov. 23, 2014, at A12.

¹² *Id.*

¹³ The “carry” everywhere act permits guns to be taken into restaurants. Open Carry Protection Act, 2014 Ga. Laws Act 604, § 16-11-127 (b) (2014) (identifying only 6 locations where carrying a weapon is “unauthorized”). Starbucks has asked gun owners to keep guns outside. Howard Schultz, *An Open Letter from Howard Schultz, CEO of Starbucks Coffee Company*, STARBUCKS (Sept. 17, 2013), <http://www.starbucks.com/blog/an-open-letter-from-howard-schultz-ceo-of-starbucks-coffee-company/1268>.

that the act rests on flawed policies and is unconstitutional. Briefly put, the so-called “Safe Carry Protection Act” allows individuals to carry firearms anywhere in Georgia, subject to only a few exceptions. Under the new law, firearms are only prohibited within 150 feet of a polling place, on the premises of a nuclear power facility, inside state mental health facilities, and inside of a school building.¹⁴ As long as the proprietor does not forbid it, firearms may be carried in restaurants, bars, and all similar places of public accommodation.¹⁵ The same goes for churches.¹⁶ You may find yourself dining in a fine restaurant and the next patron over carrying an AK 47.

Furthermore, individuals may carry firearms into any government building so long as “ingress into such building is not restricted or screened by security personnel.”¹⁷ With regard to schools, firearms may be carried so long as the weapon is “under the possessor’s control in a motor vehicle or in a locked compartment of a motor vehicle or in a locked container or in a locked firearms rack which is on a motor vehicle.” Teachers are also allowed to carry firearms in their vehicles on school property. Essentially, the act allows individuals to possess firearms on any school parking lot, so long as they are not actually a student at the school. Even if a licensed individual is caught carrying a firearm inside of a school, in violation of the new law, he or she is guilty of only a misdemeanor.¹⁸

While the law does include a licensing requirement to carry weapons in public, the provision is phony. The Act forbids application forms from requiring “*gun serial numbers or other identification capable of being used as a de facto registration of firearms.*” Also, while there is a provision preventing individuals who have been inpatients at a mental health facility, or adjudicated

Kroger has said that guns are welcome. Steve Inskeep, *Kroger Policy Attracts Pro and Anti-Gun Advocates*, NPR (Sept. 08, 2014), <http://www.npr.org/2014/09/08/346735594/kroger-policy-attracts-pro-and-anti-gun-advocates> (noting Kroger’s “policy of following local and state gun carrying laws”).

Forty-five states permit the carrying of handguns outside the home. “Thirty-one states without any license or permit . . . Fifteen states require some form of license or permit in order to openly carry a handgun.” *Open Carrying*, L. CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/open-carrying/> (last visited 11/13/2016).

¹⁴ Open Carry Protection Act, 2014 Ga. Laws Act 604, § 16-11-127 (2014).

¹⁵ *Id.* The disgust will resemble the past when smoking was permitted in restaurants. We had much to fear from side draft smoke (but did not know). Isn’t alcohol consumed in bars? Don’t people in bars get intoxicated?

¹⁶ *Id.* Isn’t church for peaceful worship and reflection?

¹⁷ *Id.* Why aren’t legislators permitted to carry guns inside?

¹⁸ *Id.* Students risk being shot in their parking lots.

not guilty by reason of insanity from getting a carry license, the Act contains a petitioning procedure by which they still may receive a license to carry.¹⁹

In reality, though, these licensing requirements are a mere façade, as “[a] person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license.”²⁰ In other words, anyone could carry a firearm into one of the myriad places allowed by law, and a police officer would have no legal way of knowing whether that individual was permitted to do so. Furthermore, if an unlicensed individual were to shoot someone in “[d]efense of self or others,” it would act as an absolute defense to any criminal liability under the licensing provisions.²¹

The law even limits law enforcement’s ability to respond to gun violence in an emergency. The Act states that, even “pursuant to a declared state of emergency,” no official may seize any legal firearm, prohibit possession of any firearm, require the registration of any firearm, or even prohibit the carrying of any firearm; clearly, the Act eliminates the value of firearms registration.²²

The Georgia “guns everywhere” law has not yet been judicially reviewed. Because of this, and because the new Congress will not consider the repeal of the PLCA, the constitutionality of the “guns everywhere” law calls for careful evaluation. This paper argues that the act is unconstitutional on four grounds: due process, equal protection, access to court and special legislation.

II. DUE PROCESS

When someone is shot and killed, the shooter is the judge, the jury and the executioner. The victim has not received “due process” in terms of a preliminary hearing or trial. For example, Tom rapidly approaches Sam in a dark alley and Sam feels threatened and shoots Tom in self-defense. But what if Tom was mentally challenged, drunk or insane? Or, Sam was never at risk? Tom is now dead and never received “due process” before his death; he never received an opportunity to defend his actions on the basis that he was mentally ill.²³

¹⁹ *Id.* Why must the recently insane be permitted to carry a gun outside? This is a clear example of “overkill” on the part of gun supporting legislators.

²⁰ § 16-11-137.

²¹ *Id.* If the gun were stolen and used in a crime, there would be no way to trace it back to the owner.

²² *Id.* “Why are gun owners apprehensive of registration?”

²³ Defining due process as “established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case”. *Due Process*, Black’s Law Dictionary (10th ed. 2014).

Due process can be divided into two classes, procedural and substantive.

A. *Procedural Due Process*

The Georgia legislature snuck the “carry law” through on the last day of the session.²⁴ It was entirely different than the bill that had been debated for the previous six months.²⁵ Therefore the passage of the bill violated procedural due process in that it was never read or debated by the legislature prior to passage.²⁶

Professor John E. Nowak and Ronald D. Rotunda had this to say about “procedural” due process:

When the Court reviews a law to determine its procedural fairness, it reviews the system of decision-making to determine whether or not a government entity has taken an individual’s life, liberty, or property without the fair procedure or “due process” required by the Fifth and Fourteenth Amendments.²⁷

. . .

It is important to realize that procedural review is limited in scope. Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person’s life, liberty or property.²⁸

²⁴ Larry Copeland & Doug Richards, *Ga. Governor Signs ‘Guns Everywhere’ into Law*, U.S.A. TODAY (Apr. 23, 2014, 4:17 PM), <http://www.usatoday.com/story/news/nation/2014/04/23/georgia-gun-law/8046315/>. “The law, once contained a bill from the House and the Senate. . . . A lack of transparency among legislators left . . . organizations puzzled about which measures were included and which were removed from the changed bill.” Michele Richinick, *Georgia ‘guns everywhere’ bill takes effect*, MSNBC (July 1, 2014, 7:12 AM), <http://www.msnbc.com/msnbc/georgia-guns-everywhere-bill-takes-effect>. “Ga. Gov. Nathan Deal signed the . . . measure . . . on the last day of the legislative session.” *Georgia ‘guns everywhere’ law takes effect*, ALJAZEERA AM. (July 1, 2014, 8:52 AM), <http://america.aljazeera.com/articles/2014/7/1/georgia-guns-everywhere.html>.

²⁵ At the debate “Gun Rights and Wrongs: Balancing the Interests” held at John Marshall Law School in Atlanta, on October 6, 2014, a representative from Moms Demand Action stated that the Act that passed had never been seen or read before passage.

²⁶ Professor Hanah Metchis Volokh decries the proclivity of legislatures to rush bills through the voting process without care, and argues that legislators have a duty to read proposed legislation for the good of the political system. See Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135 (2011). She argues for a “rule that requires the full text of a bill to be available to all Members for a reasonable amount of time prior to the final floor vote” and that “[s]uch a rule would prevent bills from being rushed through without providing at least an opportunity for legislators to read them,” adding that “[t]his rule should be nonwaivable, or waivable only in bona-fide emergency situations by a supermajority vote.” Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 162–63 (2011).

²⁷ RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE 346 (5th ed., 1995).

²⁸ *Id.* at 346–47 (5th ed., 1995) (alteration in original).

The huge risk of the Georgia “carry” law is that it will increase the number of shootings. People who have guns tend to use them.²⁹ Spouses will shoot spouses and children will shoot other children and their parents because of the spread of guns outside the home.³⁰ Strangers to the family will also be shot.³¹

B. *Substantive Due Process*

[“Substantive due process” is different from “procedural due process.”] The concept the Court employs to control the substance of legislation under the due process clause is that certain types of lawmaking go beyond any proper sphere of governmental activity. In short, the Court views the act as incompatible with our democratic system of government and individual liberty. The judicial premise for this position is that any life, liberty, or property limited by such a law is taken without due process because the Constitution never granted the government the ability to pass such a law.³²

The Georgia carry law will likely be reviewed for substantive due process under the “strict scrutiny test.” [Simply put, strict scrutiny is a basis of review that mandates the means used to achieve a *compelling* government interest must be *narrowly tailored*.³³ In other words, the rule must be necessary in order to meet a supremely important government goal; there cannot be any possibility of a less restrictive alternative.]

The “strict scrutiny” approach is used for critical statutes dealing with core issues such as “fundamental rights” and race.³⁴ Here, the new law will likely lead to more deaths so the court will strike it down after very close examination under the “strict scrutiny” test. The Court will have to define the interest driving

²⁹ See Matthew Miller, David Hemenway, & Deborah Azrael, *State-level homicide victimization rates in the US in relation to survey measures of household firearm ownership, 2001–2003*, 64 SOC. SCI. & MED. 656, 659–60 (2007) (finding that the states with the highest rate of gun ownership experience firearm homicide rates that are 114% higher than states with the lowest rate of gun ownership).

³⁰ See *id.* at 656, 661, 663 (2007) (“Consistent . . . with studies that found a gun in the home was a risk factor for homicides in the home perpetrated by family members, intimates or acquaintances . . . we found that household firearm prevalence was associated with firearm homicide victimization of women.”) (“Our findings that household firearm ownership rates are related to firearm and overall homicide rates . . . for women, children and men of all ages, even after controlling for several potential confounders previously identified in the literature, suggests that household firearms are a direct and an indirect source of firearms used to kill Americans both in their homes and on their streets.”) (citation omitted).

³¹ See *id.*

³² Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance & Procedure* 346–47 (5th ed., 1995).

³³ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 670 3rd ed., (2006).

³⁴ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 695 (3rd ed., 2006).

the law, and decide if the means it uses to achieve that interest are narrowly tailored. Preventing the public funding of racial discrimination,³⁵ protecting the rights of “members of groups that have historically been subjected to discrimination,”³⁶ and “procuring the manpower necessary for military purposes”³⁷ are all examples of interests that have been deemed compelling. As evidenced by these examples, compelling interests are those that are *necessary* for some crucial end, such as preserving fundamental rights or the government’s ability to function.

Carrying a gun in public is not a fundamental right. In the present case, the only interest proponents of the new law could cite is the preservation of some grossly expanded Second Amendment right such as a right to carry a gun anywhere outside the home. However, even the broad decision in *McDonald v. City of Chicago* (2010), allowing the almost unqualified ownership of handguns, did not attempt to say there was an absolute right to carry firearms in public.³⁸ It is unrealistic to suggest that a court will call the interest in expanding Second Amendment rights far beyond their previous bounds “compelling.”

Even if the reviewing court uses the less demanding “rational basis” test, the carry act should fail because people will take their weapons outside their homes and into the streets, restaurants, churches, and school parking lots.³⁹ This will most likely lead to more shootings and bloodshed. With 15,000 shooting deaths per year, the war is at home, not in some foreign country. Quite simply, there is no rational basis for the “carry anywhere” act, because instead of protecting life it endangers life and will lead to additional bloodshed and deaths.

For instance, the 11th Circuit has held that excessive force cases, can qualify as a denial of substantive due process.⁴⁰ This decision was based on the idea that shooting a citizen “denie[s] his or her constitutional right to life through means other than a law enforcement official’s arrest, investigatory stop, or other seizure.”⁴¹ The victim is denied the proper procedures of law that ensure the

³⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

³⁷ *Gillette v. United States*, 401 U.S. 437, 462 (1971).

³⁸ 561 U.S. 742 (2010).

³⁹ Open Carry Protection Act, 2014 Ga. Laws Act 604, § 16-11-127(b) (2014).

⁴⁰ *Carr v. Tatangelo*, 338 F.3d 1259, 1270–71 (11th Cir. 2003). Police officer while hiding in the bushes shot suspect; *Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir. 1993). The officer opened Wilson’s bathroom door and she shot herself. Court held she had not been seized.

⁴¹ *Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir. 1993) (quoting *Pleasant v. Zamieski*, 895 F.2d 272, 276 n. 2 (6th Cir. 1990)).

right for him or her to be heard. The 1st, 6th, and 9th Circuits all agree with this argument.⁴²

A substantial increase in the risk of being shot should weigh as heavily on the minds of the legislators as it does on the people. After all, the Constitution clearly provides that no State may “deprive any person of *life, liberty, or property without due process of law.*”⁴³ Indeed, the Georgia Constitution contains a provision that is nearly identical.⁴⁴

It might be argued that such due process violations must come from an *official* abuse of power. Indeed, the cases cited above all involve *police* conduct.⁴⁵ However, while the 11th Circuit did make it clear that “[t]he substantive due process guarantee protects against government power arbitrarily and oppressively exercised,” it maintained that unjustified shootings fell under that category.⁴⁶ Additionally, the Supreme Court has noted, “[t]he phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Unconstitutionality, is to be tested by an appraisal of the totality of facts in a given case.”⁴⁷

Thus it can fairly be said that the State’s action in passing this law is sufficient to support a due process challenge. After all, the “Carry Everywhere Act” greatly increases the likelihood that innocent citizens (those not carrying guns) will be denied their rights almost everywhere they go. This law *encourages* the denial of due process for the average citizen. There is nearly a direct correlation between the number of guns and shootings in a given area (be it an area as small as the home or as large as an entire state).⁴⁸ By passing this Act, the Georgia legislature disregarded the fundamental due process rights of its people by encouraging the spread of violence into all areas of public life.

⁴² Pleasant v. Zamieski, 895 F.2d 272, 276 n. 2 (6th Cir. 1990); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796 (1st Cir. 1990); Sinaloa Lake Owner’s Ass’n v. City of Simi Valley, 882 F.2d 1398, 1408 n. 10 (9th Cir. 1989).

⁴³ U.S.CONST. amend. XIV, § 1.

⁴⁴ GA. CONST. art. I, § 1.

⁴⁵ See generally Carr v. Tatangelo, 338 F.3d 1259 (11th Cir. 2003); Wilson v. Northcutt, 987 F.2d 719 (11th Cir. 1993). Pleasant v. Zamieski, 895 F.2d 272 (6th Cir. 1990); Landol-Rivera v. Cruz Cosme, 906 F.2d 791 (1st Cir. 1990); Sinaloa Lake Owner’s Ass’n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989).

⁴⁶ Wilson v. Northcutt, 987 F.2d 719, 722 (11th Cir. 1993). But see *infra* notes 95–96.

⁴⁷ County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998).

⁴⁸ Law Center to Prevent Gun Violence, <http://smartgunlaws.org/> (last visited Jan 12, 2017).

In reviewing the Maryland right to carry law, the U.S. Court of Appeals for the Fourth Circuit, in *Woollard* applied the “intermediate scrutiny” test. “Under intermediate scrutiny, a law will be upheld if it is *substantially related to an important government purpose.*”⁴⁹ Thus, intermediate scrutiny is more demanding than rational basis review in two ways. First, the government interest at stake need be more than merely “legitimate,” it must be fairly characterized as “important.” Second, the means to achieve that end must be more than merely “rational” or “reasonable.” Instead, they have to be “substantially related to obtaining that goal.”⁵⁰

Woollard is on point. It involved a challenge to Maryland’s “good and substantial reason requirement” for issuing a permit to carry a handgun.⁵¹ This requirement mandates that, before a permit may be issued, an applicant must prove that he or she “has 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.”⁵² The provision was challenged on Second Amendment grounds, and the 4th Circuit granted certiorari to determine whether it would survive a Constitutional challenge.

The facts are that Raymond Woollard and the Second Amendment Foundation initiated this action in the District of Maryland asserting “that Maryland’s ‘good-and-substantial-reason’ requirement for obtaining a handgun permit contravenes the Second Amendment.”⁵³ Ultimately, the Court in *Woollard* noted that “intermediate scrutiny applies ‘to laws that burden [any] right to keep and bear arms *outside of the home* . . . [because] as we move outside the home, firearm rights have always been more limited, *because public safety interests often outweigh individual interests in self-defense.*”⁵⁴ The Court expressly denied the argument that strict scrutiny must always apply in Second Amendment cases, opting to side with its precedent of applying intermediate scrutiny for restrictions on firearms carried outside the home.⁵⁵

⁴⁹ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 540 (3rd ed., 2006).

⁵⁰ *Id.*

⁵¹ See generally *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), cert. denied, 134 S. Ct. 422 (2013).

⁵² Md. Code Ann., Pub. Safety § 5-306(a)(6)(ii) (LexisNexis 2013).

⁵³ *Woollard v. Gallagher*, 712 F.3d at 870.

⁵⁴ *Id.* at 876 (quoting *U.S. v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011)).

⁵⁵ *Woollard v. Gallagher*, 712 F.3d at 877–78. Because “the state cannot have an interest in suppressing a fundamental right.”

It may be successfully argued, then, that it would be rational, for Georgia to limit its concealed carry policy in a similar way. For instance, the “Guns Everywhere Act” does not really concern protection of the home at all. It deals exclusively with expanding areas where guns may be carried *outside* of the home.⁵⁶ Thus, it would merit intermediate scrutiny under the *Woollard* framework.

Furthermore, for the purpose of intermediate scrutiny, Maryland’s interest in “protecting public safety” associated with carrying guns outside sufficed as an important government interest.⁵⁷ The Court found that interest to be served by enforcement of the “good-and-substantial-reason requirement.”⁵⁸ The Supreme Court denied Certiorari in *Woollard*.⁵⁹

III. EQUAL PROTECTION

The Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution ensures that no state may “deny any person within its jurisdiction the equal protection of the laws.”⁶⁰ Georgia’s Constitution contains a similar provision, which states, “no person shall be denied the equal protection of the laws.”⁶¹

The concept behind equal protection is that the government should treat all persons equally.⁶² Generally, equal protection claims are raised over legislation that classifies or identifies certain groups for certain benefits, while denying others that same benefit. For example, equal protection concerns have historically been raised over legislation that discriminates on the basis of race⁶³ or gender.⁶⁴ More generally, equal protection means that the government may not deny any group a fundamental right, such as the right to marry or procreate, without a compelling reason.⁶⁵

⁵⁶ Open Carry Protection Act, 2014 Ga. Laws Act 604, § 16-11-127(b) (2014).

⁵⁷ See *Woollard v. Gallagher*, 712 F.3d at 876–77.

⁵⁸ See *Woollard v. Gallagher*, 712 F.3d at 879–80.

⁵⁹ *Woollard v. Gallagher*, 134 S.Ct. 422 (2013).

⁶⁰ U.S. CONST. amend. XIV, § 1.

⁶¹ GA. CONST. art. I, § 1.

⁶² *Id.*

⁶³ *Loving v. Virginia*, 388 U.S. 1, 1 (1967); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 488 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

⁶⁴ *United States v. Virginia*, 518 U.S. 515, 520–21 (1996); *Craig v. Boren*, 429 U.S. 190, 192 (1976).

⁶⁵ *Zablocki v. Redhail*, 434 U.S. 374, 376–77, 388 (1978); See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

For instance, in *Skinner v. Oklahoma*, the Supreme Court struck down a law that mandated the sterilization of “habitual criminals.”⁶⁶ In its decision, the Court stressed the fact that the right to procreate was *fundamental* to human existence.⁶⁷ As such, the Court held, a law may not deny any one group the equal protection of a right fundamental to human existence without a compelling reason.⁶⁸ Thirty-five years later, the Court added to this decision, in *Zablocki v. Redhail*. There, the Court held it impermissible to deny a certain class of citizens the right to marry without explicit court approval.⁶⁹ The Court once again named marriage as a fundamental right, and cautioned against the proscription of any such right.⁷⁰

In like manner, when a person on the street (perhaps an innocent bystander) is shot, she can argue that she was not treated equally because she was unarmed. The “carry everywhere” law singles out those citizens who are not armed with guns for unequal deprivation of arguably the *most* fundamental right: one’s right to live without fear of physical and emotional harm or death. In effect, it forces everyone, even those who are opposed to handguns, to carry one. It is a superficial argument that those who object to the act can buy a gun. The opponent may refuse to purchase a gun because she realizes that having a gun in the home triples the risk of being shot and may increase the risk of being shot in a domestic argument by 500%.⁷¹ She realizes that having a gun is a bad idea. Thus such a law endangers those who realize the risks of gun ownership and refuse to own one.⁷²

The Georgia Act drives the sales of more guns, which is the goal of NRA lobbying.⁷³ The NRA is, at its base, a trade association of gun manufacturers.⁷⁴

⁶⁶ *Skinner v. Oklahoma*, 316 U.S. at 536, 541 (The law had exempted white collar criminals from the requirement).

⁶⁷ *Id.* at 541.

⁶⁸ *See Id.* at 540–41.

⁶⁹ *Zablocki*, 434 U.S. at 375–77.

⁷⁰ *Id.* at 384; *See also* *Obergefell v. Hodges*, 576 U.S. 2584, 2607–08 (2015).

⁷¹ J.C. Campbell et al., *Risk factors for femicide within physically abusive intimate relationships: results from a multi-site case control study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003); *see also* Matthew Miller, Deborah Azrael, & David Hemenway, *Firearm Availability and Suicide, Homicide, and Unintentional Firearm Deaths Among Women*, 79 J. Urb. Health 26, 34 (2002) (finding that women are 4.9 times more likely to be killed by a firearm in states where gun ownership is prevalent).

⁷² A professor at the University of Texas recently resigned because he feared being shot by one of his 500 students. Texas passed a “Carry Law” similar to Georgia. CNN, Oct. 20, 2015.

⁷³ *See* Josh Sugarmann, *The NRA: Gun Industry Trade Association Masquerading as a Shooting Sports Foundation*, HUFFINGTON POST (June 25, 2014, 10:59 AM), http://www.huffingtonpost.com/josh-sugarmann/the-nra-gun-industry-trad_b_5212780.html (detailing the exorbitant amount of funding the NRA

It lobbies to make certain gun control laws remain lax, so that more guns will be sold.⁷⁵

IV. ACCESS TO COURTS

In addition to its guarantee of equal protection, Georgia's Constitution also guarantees that "[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the Courts of this state."⁷⁶ The concept behind the "access to courts" provision is that each person who suffers injury has a right to use the courts to obtain justice. In fact, the Supreme Court recognized that "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right [above] all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . ."⁷⁷ However, with legislation like the "Carry Everywhere Act" it is becoming close to impossible for citizens to go to court when they are faced with gun violence. Simply put, when the victim is dead she cannot take the issue to court.

More guns carried in public means more opportunities to take away the victim's Constitutional right to argue her case in court.⁷⁸ Proponents of the Bill argue that self-defense is a foundational right. They ignore the equal right of the victim not to be shot and killed.⁷⁹ The Declaration of Independence states that "life is an unalienable right."⁸⁰ People who own guns tend to use them to

receives from gun manufacturers). The support of the NRA is effectively bought and paid for by these gun manufacturers.

⁷⁴ See Josh Sugarmann, *The NRA: Gun Industry Trade Association Masquerading as a Shooting Sports Foundation*, HUFFINGTON POST (June 25, 2014, 10:59 AM), http://www.huffingtonpost.com/josh-sugarmann/the-nra-gun-industry-trad_5212780.html (noting the vast contributions firearms manufacturers make to the NRA in exchange for the organization's focus on promoting "trade shows" billed as "meetings").

⁷⁵ See *Sturm, Ruger & Company Raises Over \$1.2 Million to Benefit the NRA Institute for Legislative Action*, NRA-ILA (April 25, 2012), <https://www.nra-ila.org/articles/20120425/sturm-ruger-company-raises-over-12-million-to-benefit-the-nra-institute-for-legislative-action> (describing that the purpose of the NRA Institute for Legislative Action is to lobby against gun control, and detailing the \$1.2 million dollars the organization made directly off the sale of over one million firearms).

⁷⁶ GA. CONST. art. I, § 1.

⁷⁷ *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

⁷⁸ *Woollard v. Gallagher*, 712 F.3d 865, 879–80 (4th Cir. 2013) (enumerating several of the dangers inherent to carrying firearms in public).

⁷⁹ See The Declaration of Independence para. 2 (U.S. 1776) ("[A]ll men . . . are endowed by their Creator with certain unalienable Rights . . . Life, Liberty and the pursuit of Happiness.").

⁸⁰ *Id.*

shoot people.⁸¹ Free countries such as Australia, England and Japan reject “carry anywhere” laws and have extensive gun control.⁸² They have almost no gun deaths.⁸³ Visiting these countries carries almost no risk of being shot.

Fewer guns on the streets will provide time for the potential victims to gain access to the courts to challenge the shooter and argue defenses for the victim. The courts are the proper venue for serious disagreements, not the streets, restaurants, churches, and school parking lots.⁸⁴ The expansion of the possession of guns in public will greatly tend to displace the courts.

V. SPECIAL LEGISLATION

Courts often strike down legislation that only applies to a very small group.⁸⁵ This is called “special legislation.”⁸⁶ Here the “carry” act is special in that it only benefits a small group—those who want to carry guns in public. While it might be argued that all of society benefits from the “protection” provided by upstanding citizens carrying weapons in public, a recent study has shown that “for each percentage point increase in gun ownership, the firearm homicide rate

⁸¹ See Matthew Miller, David Hemenway & Deborah Azrael, *State-level homicide victimization rates in the US in relation to survey measures of household firearm ownership, 2001–2003*, 64 SOC. SCI. & MED. 656, 659–60 (2007) (finding that the states with the highest rate of gun ownership experience firearm homicide rates that are 114% higher than states with the lowest rate of gun ownership).

⁸² Australasian Police Ministers’ Council, Special Firearms Meeting: The National Agreement on Firearms § 3 (1996) (noting that “personal protection [is not] a genuine reason for owning, possessing or using a firearm”), available at <http://www.austlii.edu.au/au/other/apmc/>; Max Fisher, *A Land Without Guns: How Japan Has Virtually Eliminated Shooting Deaths*, *The Atlantic* (July 23, 2012, 1:45 PM), <http://www.theatlantic.com/international/archive/2012/07/a-land-without-guns-how-japan-has-virtually-eliminated-shooting-deaths/260189/> (describing Japan as “the developed world’s least firearm-filled nation and perhaps its strictest controller,” and highlighting that only 11 people were killed by gun violence in Japan during 2011); Firearms Act, c. 27, § 19 (Eng.) (prohibiting the carrying of firearms in any public place).

⁸³ Simon Rogers, *Gun Homicides and Gun Ownership by Country*, *Guardian* (July 22, 2012, 8:01 AM), <http://www.theguardian.com/news/datablog/2012/jul/22/gun-homicides-ownership-world-list> (demonstrating that Australia, England, and Japan each only have firearm homicide rates of .07, and .01 per 100,000 people, respectively, compared to the U.S. rate of 2.97 homicides per 100,000 people).

⁸⁴ Deana Pollard Sacks, *Snyder v. Phelps*, *The Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193, 199 (2010) (“[T]ort law ‘promotes the law’s civilizing function’ and protects individual freedom, autonomy, and self-actualization by vindicating ‘private personality and emotional security, . . . the right to be let alone.’”) (citation omitted).

⁸⁵ See *Woods v. Unity Health Ctr.*, 196 P.3d 529, 531 (Okla. Civ. App. 2008) (holding a statute that singled out medical negligence plaintiffs for different treatment constituted special legislation); *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 390 (Ill. 1997) (holding a statute limiting compensatory damages to constitute special legislation on the grounds that it only benefitted a certain number of tortfeasors); *Adams v. Harris County*, 530 S.W.2d 606, 608 (Tex. App. 1975).

⁸⁶ *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 391 (Ill. 1997) (defining special legislation as “arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis”).

increased by .9%,” thus debunking the idea that more guns equal safer citizens.⁸⁷ For the rest of society carrying guns in public is unwanted, will greatly increase the dangers of going about in public [church, restaurants, school parking lots] and leads to morbid results—dangerous “guns everywhere and increased violence.”⁸⁸ For these reasons the new Georgia “carry” law should be struck down as unconstitutional special legislation.

A. Precedent

1. Places of Worship, Restaurants and Bars

In *Georgia Carry Org, Inc.* the 11th Circuit Court of Appeals held that the previous carry Act’s⁸⁹ provision that gave churches the power to exclude persons carrying guns from the premises did not violate the Second Amendment.⁹⁰ The court rested its decision on a property owner’s right to control his property, and will therefore lead to the striking down of the bars and restaurants provisions of the new Act, as well.⁹¹ The point is that the 2014 Georgia Law is backwards. It places the duty to exclude guns on the property owner. Instead the gun owner should have to ask for permission before taking a gun inside a building. Bars and restaurants might have their “No Guns” signs stolen or destroyed. The persons who totes the gun should have the burden of obtaining consent in each location not the other way around.

The 11th Circuit Reasoned:

Plaintiffs allege “the Carry law infringes on the rights of Plaintiffs to keep and bear arms, in violation of the Second Amendment, by prohibiting them from possessing weapons in a place of worship.”

...

Plaintiffs must argue that the individual right protected by the Second Amendment, in light of *Heller* and *McDonald*, trumps a private property

⁸⁷ Michael Seigel, Craig S. Ross, & Charles King III, *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981–2010*, 103 AM. J. PUB. HEALTH 2098, 2098 (2013).

⁸⁸ See *supra* notes 13, 26–28, 75.

⁸⁹ Specifically, O.C.G.A § 16-11-127(b).

⁹⁰ *Georgia Carry Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012) (“A place of worship’s right, rooted in the common law, to forbid possession of firearms on its property is entirely consistent with the Second Amendment.”).

⁹¹ *Georgia Carry Org, Inc. v. Georgia*, 687 F.3d 1244, 1262 n. 37 (11th Cir. 2012) (noting that private property owners may forbid the possession of a weapon).

owner's right to exclusively control who is allowed on his or her own premises. Thus, property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment. A clear grasp of this background illustrates that the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes. Quite simply, there is no constitutional infirmity when a private property owner exercises his, or her, or its—in the case of a place of worship—right to control who may enter, and whether that invited guest can be armed.

...

An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private owner to exercise exclusive dominion and control over his land. The Founding Fathers placed the right to private property upon the highest of pedestals, standing side by side with the right to personal security that underscores the Second Amendment. As Blackstone observed,

[T]hese fundamental rights may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

1 William Blackstone, Commentaries *129.

...

(“The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”) James Madison, Property (1762), reprinted in 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed., 1906).

...

Plaintiffs, in essence, ask us to turn *Heller* on its head by interpreting the Second Amendment to destroy one cornerstone of liberty—the right to enjoy one's private property—in order to expand another—the right to bear arms.

...

When the Second Amendment is understood in its proper historical context, it becomes readily apparent that the Amendment codified a pre-existing right that was circumscribed by the common law rights of an owner under property law, tort law, and criminal law. *Heller's* expounding of the pre-existing right enshrined in the Second Amendment does nothing to change this.

...

We conclude that the Second Amendment does not give an individual a right to carry a firearm on a place of worship's premises against the owner's wishes because such right did not pre-exist the Amendment's adoption.⁹²

2. Maryland—*Woollard*

The Georgia Carry Law rests on a false assumption. That assumption is that *D.C. v. Heller* applies outside the home. *Woollard v. Gallagher*, in the Court of Appeals for the Fourth Circuit, restricts *Heller* largely to the home. In Maryland in order to obtain a permit to carry, the person must have “a good and substantial reason” to carry the gun beyond the home. The Court in *Woollard* reasoned as follows:

The district court permanently enjoined enforcement of section 5-306(a)(5)(ii) of the Maryland Code, to the extent that it conditions eligibility for a permit to carry, wear, or transport a handgun in public on having “good and substantial reason” to do so. Necessary to the entry of the court's injunction was its trailblazing pronouncement that the Second Amendment right to keep and bear arms for the purpose of self-defense extends outside the home, as well as its determination that such right is impermissibly burdened by Maryland's good-and-substantial-reason requirement. Because we disagree with the court's conclusion that the good-and-substantial-reason requirement cannot pass constitutional muster, we reverse the judgment.

...

Under its permitting scheme, Maryland obliges “[a] person [to] have a permit issued ... before the person carries, wears, or transports a handgun.” Md. Code Ann., Pub. Safety § 5-303.

...

⁹² *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260–66 (11th Cir. 2012).

Pursuant to the good-and-substantial-reason requirement, permit eligibility also necessitates the Secretary’s finding, following an investigation, that the applicant has 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.⁹³

In *Woollard*, the petition claimed that the Second Amendment was absolute and applied beyond the home. The 4th circuit rejected this:

We now know . . . the Second Amendment guarantees the right of individuals to keep and bear arms for the purpose of self-defense. See 554 U.S. 570, 592 (2008). *Heller*, however, was principally concerned with the “core protection” of the Second Amendment: “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”

...

Two years after issuing its *Heller* decision, in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court . . . recognized, however, that “the Second Amendment right is fully applicable to the States,” and reiterated *Heller’s* holding “that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.” Accordingly, “a considerable degree of uncertainty remains as to the scope of [the *Heller*] right beyond the home.” . . . (What we know from [*Heller* and *McDonald*] is that Second Amendment guarantees are at their zenith within the home).

...

The State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public. That is, limiting the public carrying of handguns protects citizens and inhibits crime by:

- Decreasing the availability of handguns to criminals via theft . . .
- Lessening “the likelihood that basic confrontations between individuals would turn deadly.” (“The presence of a handgun in an altercation, however petty, greatly increases the likelihood that it will escalate into lethal violence.”) (“Incidents such as bar fights

⁹³ *Woollard v. Gallagher*, 712 F.3d 865, 868–70 (4th Cir. 2013) (quoting Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii) (LexisNexis 2014), Md. Code Ann., Pub. Safety § 5-303 (LexisNexis 2014)).

and road rage that now often end with people upset, but not lethally wounded, take on deadly implications when handguns are involved.”)

...

- Curtailing the presence of handguns during routine police-citizen encounters. (“If the number of legal handguns on the streets increased significantly, [police] officers would have no choice but to take extra precautions before engaging citizens, effectively treating encounters between police and the community that now are routine, friendly, and trusting, as high-risk stops, which demand a much more rigid protocol and a strategic approach.”);
- Reducing the number of “handgun sightings” that must be investigated [by the police].⁹⁴

For these reasons the 4th Circuit upheld the “good-and-substantial-reason” standard contained in the Maryland “carry” law.

3. New York—*Kachalsky*

New York adopted a carry law that required “proper cause” to be shown before a permit can be issued.⁹⁵ The Second Circuit Court of Appeals rejected an absolute interpretation of *Heller*. In *Kachalsky*, the Second Circuit upheld the “proper cause” requirement for a gun permit and agreed that before a permit issues the petitioner must show “a special need for self-protection—as a prerequisite for a license to carry a concealed handgun in public.”⁹⁶ This is a more rational approach than Georgia’s unique and extreme view that any gun can be carried almost anywhere. *Woollard* and *Kachalsky* nicely balance the Second Amendment right with the risk to the public of more guns being carried outside the home.

⁹⁴ *Woollard v. Gallagher*, 712 F.3d 865, 874, 879–80 (4th Cir. 2013) (quoting *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010)) (alteration in original).

⁹⁵ N.Y. PENAL LAW § 400.00(2)(f) (Consol. 2014).

⁹⁶ *Kachalsky v. County of Westchester*, 701 F.3d 81, 83–84 (2nd Cir. 2012). It is worth noting here that in Australia, personal protection is not even considered “a genuine reason for owning, possessing or using a firearm. Australasian Police Ministers’ Council, Special Firearms Meeting § 3 (1996), available at <http://www.austlii.edu.au/au/other/apmc/>.

VI. STATE ACTION

The “State Action” concept is sometimes a problem in constitutional challenge cases.⁹⁷ It is not here because of the many substantial actions by the state. First, drafting and passing the act. Second, forcing persons who choose to go about in public to endure an increased risk of death, injury and terror from guns. Third, actively implementing and funding the system for granting phony permits. Fourth, forcing the state, cities, and counties to spend hundreds of millions of dollars on personnel, training and new guns to deal with the influx of more guns. Fifth, the Act coerces persons who don’t want guns, to buy them.

Professor Chemerinsky argues that the time has come to abandon the “state action doctrine” and consider the Constitutional challenge on its merits:

The ability of the federal government, both through the judiciary and the legislature, to protect rights from private interference is determined, in large part, by the definition of state action. The state action doctrines remain the dividing line between the public sector, which is controlled by the Constitution, and the private sector, which is not. Courts continually face countless cases posing the question whether the Constitution’s protections should be applied to limit the conduct of nongovernmental actions.

I suggest that it is time to begin rethinking state action. It is time to again ask why infringements of the most basic values—speech, privacy and equality—should be tolerated just because the violator is a private entity rather than the government.

Thus, the state action doctrine is based on the anachronistic premise of a common law that is coextensive with individual liberties. Second, the literature on state action has completely ignored the jurisprudential question of why rights are protected. I contend that by any theory of rights—natural law, positivism, or consensus—the state action requirement makes no sense. The conclusion which emerges is that limiting the Constitution’s protections of individual rights to state action is anachronistic, harmful to the most important personal liberties, completely unnecessary, and even detrimental to the very goals that it originally intended to accomplish.

If the state action requirement were abolished, the courts in each instance would determine whether the infringer’s freedom adequately justified permitting the alleged violation. Eliminating the concept of state action merely means that the courts would

⁹⁷ See, Erwin Chemerinsky, *Rethinking State Action*, 80 NORTHWESTERN U.L. REV. 503 (1985).

have to reach the merits and decide if a sufficient justification exists; courts could not dismiss cases based solely on the lack of governmental involvement.

[M]y central thesis is that rights are protected by courts in order to safeguard values regarded as fundamental. Because these values are so important, any infringement should be suspect. Protection of these values from private infringements need not necessarily be by constitutional review; protection can be provided by state statute, state common law, or federal statute. What is essential is that protection is indeed provided. The state action requirement is undesirable because it requires courts to refrain from applying constitutional values to private disputes even though there is no other form of effective redress.⁹⁸

CONCLUSION

Because the “carry” laws will needlessly add to the carnage, and are unconstitutional, they should be struck down. The state legislatures should be required by the courts to begin anew and asked to keep in mind the Maryland and New York gun permit provisions that require “proper cause” be shown by the owner in order to take a gun outside the home. Of course, it is a fair question why corporations that manufacture hand guns and rapid fire weapons do not produce safer guns, and end their support for “carry everywhere” legislation on their own—without the intervention of civil suits?

⁹⁸ *Id.* At 504–07.