Delegating Discrimination: Why Discretionary Licensing Statutes Controlling Concealed Carry Weapons Permits Contravene the Rule of Law

Robert J. Endorf
Delegating Discrimination:  
Why Discretionary Licensing Statutes 
Controlling Concealed Carry Weapons Permits 
Contravene the Rule of Law

Robert J. Endorf Jr.

ABSTRACT

The most significant change in this nation's firearm regulation in almost fifty years is the majority of states adopting liberalized rules for the carrying of concealed firearms. The political debate surrounding these new "shall issue" licensing laws has almost unanimously confused two distinct issues. The debate has centered on whether states should issue many licenses, or virtually no licenses; however, because many licensing statutes date back to the turn of the twentieth century and were originally passed for highly suspect motives, such as outright racism or xenophobia, the issue of how best to issue licenses has been buried under the debate concerning what is the optimal issuance volume. Regardless of how strict or liberal the issuance rules might be, those rules ought to be fair, but such is often not the case. The present goal is to examine the various states' methods for issuing concealed carry firearms licenses in light of the rule of law ideal and then determine what features of the current licensing systems violate that ideal. Additionally, because the vast majority of state caselaw controlling the issuance of concealed carry firearm licenses is not discussed in any secondary sources, this essay also includes an analysis of each state's relevant caselaw in an appendix. Much of the information in the appendix is currently unavailable in any other secondary source.
TABLE OF CONTENTS

Introduction 6

I. Systems Regulating the Carrying of Concealed Firearms 10

II. The Discretion Within Each System 11
  1. Discretion Defined 12
  2. Non-Licensing Systems 14
  3. Licensing Systems 15
     a. “Shall Issue” and “May Issue” Language 16
     b. Suitability Criteria 18
     c. Proper Need Criteria 22
     d. License Issuer Disclosure Obligations 28
     e. Judicial Review 29

III. Discretionary CCW Licensing Systems Violate the Fundamental Tenets of the Rule of Law 32
  1. That Laws Exist 33
  2. That Laws Incorporate Fundamental Regulatory Forms 36
     a. That Laws Must Be Prospective 37
     b. That Laws Must Be Knowable 39
     c. That Laws Must Be Reasonably Stable 47
     d. That the Rules Controlling Discretionary CCW Licensing Systems Fail to Incorporate the Forms Basic to the Rule of Law 50
  3. That Laws Apply Equally to All 52
     a. That the Rules Apply Fairly to Those with the Least Political Power 52
b. That the Rules Apply Fairly to Those with the Greatest Political Power

c. That Rules Not Be Applied to Arbitrarily Deny the Benefits Otherwise Conferred by Law

d. That Discretionary CCW Licensing Laws Do Not Apply Equally to All

4. Separation of Powers Doctrine

IV. Rule of Law Based Legal Challenges to CCW Discretionary Licensing Systems

1. Void for Vagueness and Standardless Delegation Challenges

2. Equal Protection Challenges

V. Conclusions

Appendix

Part A: List Each State's CCW System

Part B: States Generally Permitting the Carrying of Concealed Firearms Without a License

   Alaska

   Vermont

Part C: States Generally Prohibiting the Carrying of Concealed Weapons

   Illinois

   Wisconsin

Part D: States Regulating the Carrying of Concealed Firearms through a Discretionary Licensing System

   Alabama

   California

   Delaware
Part E: States Regulating the Carrying of Concealed Firearms through a Nondiscretionary System

Alaska 127
Arizona 128
Arkansas 128
Colorado 130
Connecticut 132
Florida 134
Georgia 135
Indiana 137
Kansas 138
Kentucky 140
Louisiana 141
Maine 142
Michigan 143
<table>
<thead>
<tr>
<th>State</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>147</td>
</tr>
<tr>
<td>Mississippi</td>
<td>148</td>
</tr>
<tr>
<td>Missouri</td>
<td>149</td>
</tr>
<tr>
<td>Montana</td>
<td>149</td>
</tr>
<tr>
<td>Montana</td>
<td>149</td>
</tr>
<tr>
<td>Nebraska</td>
<td>150</td>
</tr>
<tr>
<td>Nevada</td>
<td>152</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>153</td>
</tr>
<tr>
<td>New Mexico</td>
<td>153</td>
</tr>
<tr>
<td>New Mexico</td>
<td>153</td>
</tr>
<tr>
<td>New Mexico</td>
<td>153</td>
</tr>
<tr>
<td>North Carolina</td>
<td>158</td>
</tr>
<tr>
<td>North Carolina</td>
<td>159</td>
</tr>
<tr>
<td>North Carolina</td>
<td>159</td>
</tr>
<tr>
<td>North Dakota</td>
<td>159</td>
</tr>
<tr>
<td>North Dakota</td>
<td>159</td>
</tr>
<tr>
<td>Ohio</td>
<td>164</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>164</td>
</tr>
<tr>
<td>Oregon</td>
<td>164</td>
</tr>
<tr>
<td>Oregon</td>
<td>164</td>
</tr>
<tr>
<td>Oregon</td>
<td>164</td>
</tr>
<tr>
<td>Oregon</td>
<td>164</td>
</tr>
<tr>
<td>Oregon</td>
<td>164</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>166</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>166</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>166</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>166</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>166</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>166</td>
</tr>
<tr>
<td>South Carolina</td>
<td>167</td>
</tr>
<tr>
<td>South Carolina</td>
<td>167</td>
</tr>
<tr>
<td>South Carolina</td>
<td>167</td>
</tr>
<tr>
<td>South Dakota</td>
<td>175</td>
</tr>
<tr>
<td>South Dakota</td>
<td>175</td>
</tr>
<tr>
<td>South Dakota</td>
<td>175</td>
</tr>
<tr>
<td>Tennessee</td>
<td>175</td>
</tr>
<tr>
<td>Tennessee</td>
<td>175</td>
</tr>
<tr>
<td>Tennessee</td>
<td>175</td>
</tr>
<tr>
<td>Texas</td>
<td>176</td>
</tr>
<tr>
<td>Texas</td>
<td>176</td>
</tr>
<tr>
<td>Texas</td>
<td>176</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Utah</td>
<td>177</td>
</tr>
<tr>
<td>Virginia</td>
<td>180</td>
</tr>
<tr>
<td>Virginia</td>
<td>180</td>
</tr>
<tr>
<td>Virginia</td>
<td>180</td>
</tr>
<tr>
<td>Virginia</td>
<td>180</td>
</tr>
<tr>
<td>Virginia</td>
<td>180</td>
</tr>
<tr>
<td>Virginia</td>
<td>180</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>Washington</td>
<td>182</td>
</tr>
<tr>
<td>West Virginia</td>
<td>183</td>
</tr>
<tr>
<td>West Virginia</td>
<td>183</td>
</tr>
<tr>
<td>West Virginia</td>
<td>183</td>
</tr>
<tr>
<td>West Virginia</td>
<td>183</td>
</tr>
<tr>
<td>West Virginia</td>
<td>183</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
<tr>
<td>Wyoming</td>
<td>184</td>
</tr>
</tbody>
</table>
INTRODUCTION

The gun control debate has garnered national attention as Congress considers more federal gun control laws and allows older laws to sunset. The expiration of the assault weapons ban,¹ possible prohibitions on fifty caliber rifles,² the possible overturning the District of Columbia’s handgun ban,³ and the passage of the Protection of Lawful Commerce in Arms Act⁴ have all received prominent billing in the media and in the wider gun control debate. However, during the past couple decades the most significant change in firearms regulation has occurred not at the federal level, but among the states, a majority of them having dramatically expanded the population eligible to carry a concealed firearm.

Whether and how states should permit their citizens to carry concealed firearms has become a major issue within the broader gun control debate;⁵ the past two decades have seen a dramatic change in states’ stances towards citizens carrying concealed firearms.⁶ Throughout most of the twentieth century, the majority of states either prohibited outright the carrying of concealed weapons by ordinary citizens or used highly discretionary methods for determining who could legally carry a concealed firearm.⁷ Recently, a majority of states has adopted new, “shall issue”, or nondiscretionary, legislation for determining who may carry concealed firearms.⁸ Nondiscretionary licensing statutes generally allow considerably more people to obtain carry licenses than previous systems.⁹ The movement of many states to nondiscretionary licensing systems
has created a debate over whether the new “shall issue”, nondiscretionary, laws are a good idea or a disaster.

Most states permitting the concealed carrying of firearms issue a license that allows the holder to carry a concealed firearm. Prior to the emergence of nondiscretionary “shall issue” legislation, the most common method states employed for issuing concealed carry firearm licenses was “may issue” licensing. The older “may issue”, or discretionary, systems grant the issuing authority for concealed carry weapons [CCW] licenses, usually a police chief or judge, great discretion. Commentators coined these laws “may issue” because the issuing authority, based upon its discretion, may issue a license. “May issue” discretionary laws require the applicant for a concealed carry license to include an explanation of why the applicant needs a license, such as that the applicant regularly carries large sums of money. These laws also require proof from the applicant that he is of good moral character or a suitable person for a CCW license. New York State’s CCW statute is a typical discretionary licensing system, requiring an applicant to demonstrate “good moral character”, for whom “proper cause exists for the issuance”, and “concerning whom no good cause exists for the denial of the license”. The statute does not define these subjective requirements, thus providing the issuing authority great discretion when determining to whom it will or may issue a license.

Nondiscretionary legislation removes the subjective requirements, such as “of good moral character,” from the eligibility criteria for a CCW license. The elements for receiving a concealed carry license in nondiscretionary licensing states are purely objective and, subsequently, remove discretion from the issuing authority. These laws are often called “shall issue” because the issuing authority shall issue the license to every
qualified applicant. Idaho uses a typical nondiscretionary licensing system, requiring that “[t]he sheriff of a county shall … issue a license to the person to carry a weapon concealed on his person … [and a license] shall not be denied to him, unless he…”; the statute then specifies what objective criteria disqualifies an applicant. Those disqualifications do not provide discretion to the issuing authority. The disqualifications commonly are that the applicant has not been adjudicated mentally incompetent, can possess a firearm under applicable laws, is of the proper age, and has undergone specified firearms training. If the applicant meets the requirements, the issuing authority shall then issue him a CCW license. The result is that states having “shall issue” legislation usually grant dramatically more licenses than “may issue” states.

As more states have adopted “shall issue”, nondiscretionary legislation, the debate surrounding them has intensified. The rhetoric and research concerning the passage of “shall issue” laws have focused the debate upon empirical and utilitarian grounds, such as whether the increased carrying of concealed firearms by the general population will increase or decrease violent crime. Those in favor of strict gun control laws have argued that “shall issue” laws will increase violence because minor confrontations will turn deadly more often when significantly more people carry firearms. Those in favor of “shall issue” laws argue that violent criminals will shy away from violent crime in fear of encountering armed victims. Additionally, like all issues within the gun control arena, the Second Amendment comes into play, as well as much raw emotion.

The debate over “shall issue” laws is currently too focused on whether such laws will increase or decrease crime. “Shall issue” laws only regulate the distribution of CCW licenses. Many states that adopted “shall issue” laws had prior legislation providing for
CCW permits under a discretionary issuance system, or providing for concealed carry under an affirmative defense to the crime of carrying a concealed weapon. Presumably these states had already decided that in some instances ordinary citizens should have the option of carrying a concealed firearm. A change in how states administer the legal allowance for the carrying of a concealed weapon does not, in itself, appear so contentious. However, politicians and commentators have hotly debated the new “shall issue” laws. One reason for this intensity is that the debate concerning “shall issue” legislation serves as a proxy for the more basic issue of whether a state should ever permit an ordinary citizen to carry a concealed firearm. The focus is upon this more basic issue because the “shall issue” systems usually greatly increase the issuance of CCW licenses.

Determining whether states ought to employ “shall issue” legislation requires two decisions: first, should states ever permit ordinary citizens to carry concealed firearms, and, second, whether “shall issue” laws provide the best method for determining which citizens the state should allow to carry a concealed firearm. The first question is where the empirical issues of whether or not permitting ordinary citizens to carry concealed firearms, and the Second Amendment or state constitutional issues, are germane. If a state decides that under some circumstances it should permit certain citizens to carry concealed firearms, then the issue of how that state should administer the process of deciding who those citizens are is important. The goal here is to examine the second question. This examination will demonstrate that discretionary CCW statutes, the “may issue” laws, flagrantly violate the basic tenets of the rule of law ideal. Therefore, states
that wish to regulate the carrying of concealed firearms should employ a nondiscretionary, or “shall issue”, licensing system.

I. SYSTEMS REGULATING THE CARRYING OF CONCEALED FIREARMS.

Historically states have employed four approaches to the regulation of concealed firearms. The oldest approach is to not regulate the carrying of firearms. Before the nineteenth century no state regulated the carrying of firearms. Only Vermont continues this approach, prohibiting from carrying only those “with the intent or avowed purpose of injuring a fellow man”. Alaska has recently returned to allowing citizens to carry firearms without a license, but Alaska also retains a licensing system for those desiring a CCW license anyway.

By the first third of the nineteenth century southern states started prohibiting the carrying of concealed firearms. There is disagreement concerning why southern states initially prohibited the carrying of concealed weapons. Some argue that the early laws were primarily fueled by racist intentions and aimed at disarming slaves and freed blacks, however, recent scholarship demonstrates that the antebellum, race-neutral prohibitions were most likely intended at curbing that period’s dueling epidemic. Two states currently retain a general prohibition on the carrying of concealed firearms.

During the early twentieth century many states adopted discretionary CCW licensing systems. Discretionary, or “may issue,” licensing systems permit the carrying of concealed firearms only by those who have obtained a CCW license. The system is discretionary because the issuer of CCW licenses has significant discretion in determining who is eligible for a license. The original goal of discretionary licensing systems was for license issuers, usually the local police chief or sheriff, to deny license
applications from minorities, immigrants, or anyone else whom the police disfavored. One judge was surprisingly frank about Florida’s old discretionary licensing system: “I know something of the history of this legislation … the act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent … The statute was never intended to be applied to the white population…”

Ten states still employ a discretionary licensing system.

Florida passed a nondiscretionary, or “shall issue,” licensing statute in 1987, starting a flood of states doing likewise. These statutes removed the license issuer’s discretion through requiring the issuance of a license to all applicants satisfying the statute’s generally objective eligibility criteria. The intent of nondiscretionary statutes is to allow uniform, statewide regulations and to eliminate the arbitrary licensing decisions common in discretionary systems. Thirty-seven states currently employ a nondiscretionary licensing system.

II. THE DISCRETION WITHIN EACH SYSTEM.

Every state authorizes its citizens to carry a concealed firearm under some circumstances. The fundamental difference between discretionary systems and all others is who decides which citizens the state will permit to carry concealed firearms. Deciding who, and under what conditions, ought to have the legal authority to carry a concealed firearm is a policy question going to the heart of the gun control debate. That decision must be based upon fundamental beliefs concerning the role of firearms in American society and the value, or danger, of firearms when carried for self-defense. Those issues are obviously highly contentious in modern American politics.
1. Discretion Defined

Some state legislatures enact CCW statutes adequately addressing the core policy issues concerning the role of firearms within society, while other legislatures punt those issues, leaving those issues’ resolution to some other body. Statutes adequately deciding which citizens ought to have a legal ability to carry a concealed firearm do so through providing objective standards clearly specifying who, if anyone, is eligible to carry a concealed firearm and under what circumstances. Statutes that do not clearly specify who, and under what circumstances, may carry a concealed firearm delegate, by necessity, another institution or official the discretion to answer the policy questions left unanswered in the CCW statute. Such statutes are discretionary. Statutes using clear and precise language do not delegate another institution the discretion to determine key policy issues, because in formulating that clear and precise language, the legislature has decided the policy questions concerning who should carry concealed firearms; those statutes are, therefore, nondiscretionary.

Discretionary statutes authorize the exercise of that discretion by non-legislative bodies through the use of vague statutory language that requires interpretation to enforce. Interpretation of the vague standards within discretionary statutes necessitates decisions based upon policy determinations that are fundamental to the whole CCW issue; specifically, who, and when, should citizens be legally permitted to carry concealed firearms. Resolving that issue requires settling contentious issues such as the value of firearms for self-defense, the danger firearms pose generally, whether widespread gun carrying will escalate ordinary confrontations, etc.\(^4\) Therefore, discretionary statutes
employ vague standards that require reference to core policy issues not expressed in the statute in order to adequately interpret and enforce it.

All statutes contain some degree of vagueness, and whether that vagueness demonstrates unresolved policy concerns is not always readily apparent; sometimes the distinction between a discretionary and nondiscretionary statute is not perfectly transparent. However, if one can reasonably interpret any statutory vagueness such that, when in comparison with any alternative reasonable interpretations, it significantly alters the population eligible to carry a concealed firearm, then that CCW statute has failed to resolve key policy issues. If a legislature had adequately addressed the policy choices needed to determine who and when citizens ought to be legally entitled to carry a concealed firearm, then the CCW statute would presumably enact those policy conclusions and not contain vague standards. If a statute’s interpretation does require making core policy determinations, then the possible reasonable interpretations will vary substantially in how they alternatively affect the eligibility of substantial portions of the otherwise eligible population.

The gun control and CCW debates are very contentious and the political factions agree on almost nothing. Determining who ought to have a legal ability to carry a concealed firearm requires making factual and normative conclusions based upon the gun control debate and, ultimately, taking a stance on that debate. The wide political divergence between participants in that debate means that possible positions one can stake out are many and diverse. One’s view of those divergent political stances substantially affects who ideally ought to have the legal ability to carry a concealed firearm. For instance, if one concludes that firearms have no value for self-defense, and
are inherently dangerous instruments, then one would conclude that almost no one should carry a concealed firearm; contrariwise, if a firearm offers great utility in defending oneself, and little danger, then most should be entitled to carry a firearm. Taking either view substantially alters how one would interpret vague statutory standards.

Various reasonable interpretations of a vague CCW statute that fails to address core policy issues would, between them, differ substantially in the population eligible to carry a concealed firearm. A discretionary CCW statute uses vague standards that do not resolve core policy issues and thus necessitates the interpreter to settle them; the statute is sufficiently vague to grant the determination of core policy issues to the interpreter if the vague standards support multiple reasonable interpretations variously affecting the eligibility of a significant portion of those otherwise legally permitted to carry a concealed weapon. Therefore, a CCW statute is discretionary if it (1) uses vague standards concerning who is entitled to carry a concealed firearm, and (2) those standards are sufficiently vague that they delegate discretion sufficient to empower the interpreter to make core policy decisions significantly affecting the range of people eligible for a CCW license. Nondiscretionary CCW regulatory systems have statutes clearly establishing core policy conclusions and thus do not delegate significant policy discretion to any institution or official enforcing or adjudicating the CCW statute; or, more simply, any CCW regulatory system that is not discretionary is nondiscretionary.

2. Non-Licensing Systems

Within the four approaches states have used in regulating the carrying of concealed firearms, the statutory language making a statute either discretionary or nondiscretionary is unmistakable. First, the four states that do not regulate the carrying
of concealed firearms through the issuance of CCW licenses all employ nondiscretionary systems. Alaska and Vermont generally allow any citizen who can legally possess a firearm to carry it concealed.\(^{53}\) Such a simple approach to CCW is clear in its language and provides no discretion.

Illinois and Wisconsin generally prohibit the carrying of concealed firearms.\(^{54}\) The language banning the carrying of concealed weapons is clear in both states’ statutes and the narrow exceptions to their prohibitions do not afford any non-legislative body any meaningful discretion.\(^{55}\) The prohibition states offer an exception for carrying concealed firearms upon one’s property or place of business, but any vagueness in what precisely is one’s property or place of business does not seriously affect any significant population.\(^{56}\) Additionally, the prohibition states offer affirmative defenses for those charged with illegally carrying a concealed firearm.\(^{57}\) Although the standards for each state’s affirmative defenses are rather vague, those defenses are also so narrow that they generally affect only those in the most extraordinary of circumstances.\(^{58}\) Therefore, the exceptions to prohibitions on the carrying of concealed firearms do not provide any non-legislative body meaningful discretion. The four states that regulate CCW without issuing CCW licenses are all nondiscretionary.

3. Licensing Systems

States that only allow licensed citizens to carry a concealed weapon vary between using either a discretionary or nondiscretionary system to issue CCW licenses. Thirty-seven states employ nondiscretionary licensing systems while ten states employ discretionary licensing systems.\(^{59}\) The means through which licensing systems grant non-legislative bodies, usually the issuers of CCW licenses, discretion follows a clear pattern.
Discretionary licensing systems always use statutes employing vague licensing standards that fail to address core policy concerns fundamental to determining who should have a legal ability to carry a concealed firearm. Either amplifying or diminishing any discretion afforded CCW license issuers is whether they have a duty to publish decisions made pursuant to their discretionary powers, and whether their discretion is subject to any meaningful judicial review. In distinguishing between discretionary and nondiscretionary licensing systems, statutory vagueness, publication requirements, and standards of review are all important considerations.

a. “Shall Issue” and “May Issue” Language

Important to determining whether a licensing system is discretionary is the operative language used in its CCW statute. First, whether a CCW statute requires the designated issuer of CCW licenses to grant licenses to all applicants who meet the statutory eligibility criteria, a mandatory issuance system, is an important consideration. The most common distinction drawn between licensing systems is based primarily upon this point: whether a statute states either that an issuer “shall issue” a license or “may issue” a license. Generally, “shall issue” means that the issuer must issue a permit to eligible applicants, while “may issue” means that the issuer has discretion to issue a permit. All but one nondiscretionary licensing law, and one discretionary law, employs “shall issue” language.

Statutory “may issue” verbiage has two possible interpretations. First, “may issue” can mean that the CCW license issuer has the discretion to deny any applicant, even one that otherwise satisfies the statute’s specified eligibility criteria. Four states use this non-mandatory interpretation of “may issue.” A second, narrower interpretation of
“may issue” is that the license issuer does have discretion to deny a license, but the issuer must base any denial upon the eligibility criteria specified within the statute. The narrow “may issue” is, therefore, simply a reference to the issuer’s discretion granted under other sections of the CCW statute, not an authorization for the issuer to deny applicants for reasons outside those listed in the statute. Connecticut, a nondiscretionary state, has interpreted its “may issue” verbiage as mandatory.64

Non-mandatory “may issue” language always results in a discretionary statute; if the issuer can deny an applicant for any reason, the ultimate in vague eligibility criteria, then the issuer clearly possesses discretion sufficient to empower him to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license.

Statutes employing “shall issue” or mandatory “may issue” language are functionally similar; any discretion granted to issuers comes from elsewhere in the statute. Either requires an issuer to base a denial upon the enumerated eligibility criteria within the CCW statute. Although a mandatory “may issue” might reference discretion granted through the statutory eligibility criteria, that discretion may not be sufficient to make the statute discretionary; it does not necessarily enable the issuer to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Therefore, both “shall issue” and non-mandatory “may issue” language operate identically: they are each obligatory, mandating license issuance to all applicants satisfying the statute’s specified eligibility criteria. For each, discretion must come from somewhere else than the operating verbiage of the statute.
Mandatory verbiage is necessary, but not sufficient, for a statute to be nondiscretionary. A statute may require an issuer to grant licenses to all applicants meeting that statute’s specified eligibility criteria, but if that criteria is sufficiently vague, then the statute is discretionary. Such is the case with Maryland’s CCW statute, which uses mandatory “shall issue” language, but also includes the undefined eligibility requirement that applicants demonstrate a “good and substantial reason” for a permit.\(^\text{65}\) Maryland’s mandatory issuance language does not make its statute nondiscretionary; it simply means that the issuer must issue a CCW permit to those who meet the eligibility criteria, as substantially defined and applied pursuant to the discretion of the issuer.\(^\text{66}\) Therefore, mandatory verbiage does not make a statute nondiscretionary; statutes using such language are nondiscretionary only if no other sections of the statute grant significant discretion to non-legislative bodies.

Because either a mandatory or non-mandatory interpretation of “may issue” can result in a discretionary statute, it is unclear which interpretation many “may issue” states hold.\(^\text{67}\) Statutes granting significant discretion through vague eligibility criteria do not require a clarification of “may issue” since a non-mandatory interpretation of “may issue” would likely not grant the issuer any additional discretion, thus making any “may issue” interpretation moot.

b. Suitability Criteria

Discretionary statutes delegate discretion to non-legislative bodies primarily through the use of vague eligibility criteria controlling the issuance of CCW licenses. The vague criteria are left undefined and open to numerous possible interpretations. Most discretionary statutes use criteria such as “a suitable person to be licensed” or “a
person that demonstrates a proper need for a license.” These undefined criteria require key policy conclusions in order to provide them meaning sufficient for one to apply the CCW statute. One’s stance upon the role firearms play in society and their self-defense utility will definitely affect that person’s interpretation of what precisely makes an applicant “suitable” or his need “proper.” Although every statute contains some vagueness, if a statute uses eligibility criteria sufficiently vague to empower its interpreter to use his interpretive discretion to make policy determinations significantly affecting the range of people eligible for a CCW license, then that statute is discretionary.

Discretionary CCW licensing statutes generally use two different forms of vague language to grant license issuers significant discretion. The first form of vague language is a proper person requirement. These requirements discern the attitudes, history, behavior, and trustworthiness an applicant. Typical of such proper person eligibility criteria is New York’s requirement that an applicant be “of good moral character”, or Massachusetts’s prerequisite that “the applicant is a suitable person to be issued such license.” Every state’s CCW legislation has requirements concerning which sorts of applicants are eligible, but these requirements vary widely, from wholly undefined criteria, such as “suitable person to be licensed,” to wholly objective criteria, such as disqualifications for specific criminal convictions.

Statutory language granting the most discretion uses vague and undefined criteria open to numerous divergent interpretations; the most discretionary proper person criteria are the undefined “suitable person” and “of good moral character” requirements. Twelve states use such proper person criteria. Another proper person type eligibility criterion granting issuers discretion is the dangerous person exclusion, or, as some have labeled
them, escape clauses. Typical of these escape clauses is Colorado’s: "if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others if the applicant receives a permit to carry a concealed handgun, the sheriff may deny the permit." Seventeen state CCW statutes contain escape clauses. The escape clauses differ from proper person criteria in that they place a burden upon the issuer to produce evidence establishing an applicant as dangerous to himself or the community, rather than granting the issuer the broad discretionary power to decide which persons are suitable or of good moral character.

Although both the proper person and the escape clause criteria provide a license issuer with discretion, that discretion is insufficient, by itself, to make a licensing system discretionary. Escape clauses require some evidence that an applicant will pose a danger if licensed, and any reasonable interpretation of proper person will require some evidence or indication that an applicant is unsuitable, regardless of how an issuer defines unsuitable. Even if an issuer interprets unsuitable to encompass a large range of potential behaviors or histories, an applicant must still have actually demonstrated those behaviors or histories for an issuer to find that applicant unsuitable. Most otherwise eligible license applicants do not have a history of violence, criminality, or instability, and there is no rational definition of “unsuitable” that would exclude a significant portion of the otherwise eligible population. Therefore, discretionary proper person criteria, and the less discretionary escape clauses, do not grant issuers sufficient discretion to empower them to create and apply policy determinations significantly affecting the range of people eligible for a CCW license. As such, discretionary suitability criteria cannot, by themselves, make a CCW licensing statute discretionary.
The only potential way that a suitable person criterion could make a statute discretionary is if the issuer decides that anyone who carries a firearm is dangerous, and, therefore, almost all, if not all, applicants are unsuitable. Some gun control advocates argue that the mere possession of a firearm, even by the law-abiding public, is in itself dangerous; although, serious doubts exist concerning the methodological integrity of the research supporting those theories.\textsuperscript{77} As one commenter noted, “the real issue … is whether one considers all gun carriers a threat to safety, or only those who are likely to commit an unlawful act.”\textsuperscript{78} However, although the theoretical possibility exists that an issuer may interpret a discretionary suitable person criterion so that everyone is virtually a priori unsuitable, no issuer has done so.\textsuperscript{79} If a license issuer does try to enforce such an interpretation, it would surely test the limits of an issuer’s discretionary powers, even when granted under the broadest suitable person criteria.

Also granting CCW license issuers discretion are requirements that an applicant not have committed an unspecified crime of violence or have suffered from unspecified mental or behavioral ailments.\textsuperscript{80} Because very few applicants otherwise eligible for CCW license have a history of violent behavior or mental illness, an issuer’s discretion in defining “crimes of violence” or “serious mental illness” is not sufficient to empower that issuer to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Therefore, statutes permitting issuers to define “crimes of violence” or “mental illness” are not, for that reason alone, discretionary. Finally, many licensing states use wholly objective proper person criteria that afford license issuers no meaningful discretion.\textsuperscript{81}
c. Proper Need Criteria

The second type of eligibility criteria granting license issuers discretion is proper need requirements. Vague proper need requirements do grant sufficient discretion to make a licensing system discretionary. Proper need requirements all require the applicant to demonstrate a reason for or need for a CCW license. New York’s statute is typical of proper need criteria in granting CCW licenses only “when proper cause exists for the issuance thereof.” Fourteen states use some form of a proper cause or need criterion.

Of those fourteen states, seven offer no meaningful definitions or restrictions on what proper needs justify the issuance of a CCW license. Statutes simply stating that an applicant must possess a proper need or justification to obtain a license have failed to address the core policy concerns necessary to create concrete regulations for the carrying of concealed firearms. An issuer’s stance on the politics of gun control necessarily affects his interpretation of “proper need”; an issuer cannot even interpret “proper need” until after addressing the policy issues of what role firearms play in society and how useful they are for self-defense. CCW statutes that fail to adequately define “proper need” have effectively delegated the core policy determinations that CCW statutes must make in order to have meaning sufficient for application and enforcement to the non-legislative bodies that must then provide that enforcement. Leaving “proper need” undefined in a statute grants the license issuer substantial discretion.

When a statute does not define “proper need,” those interpreting the statute possess enormous discretion to determine how that state will actually regulate the issuance of CCW licenses. The radically different interpretations used by Alabama and New Jersey illustrate the practical consequences of undefined proper need criteria.
Alabama’s CCW statute requires the issuance of a license only “if it appears that the applicant has good reason to fear injury to his person or property or has any other proper reason for carrying a pistol.” The statute does not define what precisely constitutes a “good reason to fear injury”, what is “any other proper reason for carrying a pistol”, nor what evidence, if any, is necessary for an applicant to demonstrate those inexplicit reasons. Alabama license issuers have chosen to use a liberal interpretation of the proper need requirement; Alabama has used such a wide definition of “proper reason” that many even classify Alabama as a quasi-“shall issue” state, despite the actual language in its statute.

New Jersey has taken the opposite approach. New Jersey’s CCW statute requires an applicant to show “a justifiable need to carry a handgun.” Like Alabama’s statute, New Jersey’s statute offers no definition or clarification for “justifiable need.” However, unlike Alabama, New Jersey’s permit issuers have interpreted “justifiable need” so narrowly that they have effectively nullified New Jersey’s CCW statute; as one commentator noted: “the New Jersey Supreme Court has interpreted the need requirement so that permits are effectively inaccessible to the general public. As revealed by the cases, concealed carry permits are not granted to civilians, even if they have genuine, reasonable and routine fears for their own safety.” New Jersey courts have made the policy determination that firearms are useless for self-defense and dangerous:

The grant of a permit to him to carry a concealed handgun on his person or in his automobile would, as all of the expert testimony indicates, afford hardly any measure of self-protection and would involve him in the known and serious dangers of misuse and accidental use … Surely such widespread handgun possession in the streets, somewhat reminiscent of frontier days, would not be at all in the public interest. Having determined that carrying a firearm provides no protection, and likely decreases one’s safety, it is understandable why New Jersey license issuers have interpreted
“justifiable need” so narrowly; no one has a need to risk injury for no appreciable benefit. The New Jersey courts continue to deny CCW permits to all applicants from the general population: “While there is no guarantee that any particular applicant will not be attacked, the minimal protection afforded by a handgun to one not subject to … special dangers … is still greatly outweighed by the dangers to society inherent in the proliferation of handguns.”

Undefined and vague proper need requirements grant CCW license issuers incredible discretion to determine the substance of a CCW statute, as evidenced by the extreme differences between the Alabama and New Jersey “proper need” interpretations. The discretion afforded license issuers through undefined proper need eligibility criteria is sufficient to empower issuers to create and apply policy determinations significantly affecting the range of people eligible for a CCW license; therefore, all seven states employing CCW statutes with undefined proper need requirements are discretionary.

Five states have proper need requirements that are undefined except for listing specific purposes as proper. These partially undefined proper need eligibility criteria differ from wholly undefined proper need requirements in that CCW license issuers do not have the discretion to determine in totality the needs that are proper. Whether a CCW statute’s inclusion of specified proper needs provides enough limitation on the discretion otherwise inherent in interpreting “proper need” to sufficiently circumscribe issuers’ discretion to make the licensing system nondiscretionary depends upon the specifics of each state’s CCW statute.

Statutorily specified proper needs limit a license issuer’s discretion in interpreting “proper need”; however, if an issuer may grant limited or restricted CCW licenses, then
any discretionary restrictions from specified proper needs become insignificant. Both the Massachusetts and New York CCW statutes require a showing of proper need, but license issuers must accept, by law, certain needs as proper; specifically, sporting purposes, such as target shooting and hunting. If an issuer can only issue a general CCW license, then any target shooter, which would essentially be everyone who owns a firearm, could satisfy the proper need requirement, thus effectively nullifying any discretion issuers have to create and apply policy determinations through interpreting “proper need.” However, if issuers can restrict the validity of a CCW license to only when the license holder is engaged in the activity satisfying the proper need requirement, then license issuers may retain significant discretion if the statutorily specified proper needs only include limited activities. Both Massachusetts and New York issuers may restrict CCW licenses; and both states’ only specifically specify sporting needs as proper. CCW licenses restricted to sporting uses are extremely limited and are of a different kind than the general CCW licenses under discussion here. Therefore, Massachusetts and New York both use a discretionary licensing system because their undefined proper need criteria grants license issuers discretion sufficient to empower them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license; that discretion is not significantly limited by specified proper needs because those issuers may grant restricted licenses.

New Hampshire’s CCW statute also has a proper need requirement and specifies specific needs as being proper; however, New Hampshire’s statute also prohibits the issuance of restricted CCW licenses. New Hampshire will accept “[h]unting, target shooting, or self-defense” as proper needs, and issuers cannot limit licenses to only those
purposes, but must issue a general CCW license to all eligible applicants. Since anyone can claim one of the preceding needs for a CCW license, New Hampshire’s proper need requirement does not provide license issuers with significant discretion.

Indiana and North Dakota specify self protection as a purpose satisfying their proper need requirements. Restricted licenses are not relevant for these states because self protection is not a limited activity precluding a general CCW license. However, the issue remains whether the self protection purpose is an objective standard, where the issuer must determine whether the applicant has a reasonable need to carry a firearm for self protection, or whether it is a subjective standard, where an applicant’s stated desire to carry a firearm for self protection is sufficient. If it is an objective standard, then the proper need requirement would operate like other undefined proper need criteria because the issuer must determine precisely what circumstances create a reasonable need to carry a firearm for self protection, a determination that requires making policy decisions core to the CCW issue. If, however, the standard is subjective, then an issuer has no significant discretion through the proper need requirement. Indiana applies a subjective standard to its proper need criterion and North Dakota’s proper need criterion does not grant significant discretion to its licensing authorities either.

Connecticut and Delaware also use proper need requirements, but Connecticut’s proper need criterion is not vague, simply requiring an applicant’s reason for a CCW license to be any lawful reason, and Delaware’s criterion is irrelevant because its issuers operate under a non-mandatory interpretation of “may issue”, which makes Delaware’s CCW statute discretionary regardless of what its explicit eligibility criteria are.
Proper need eligibility requirements are the main source of discretion sufficient to empower a license issuer to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license; they are the primary feature of discretionary licensing systems. Unless restricted either through clear language limiting interpretation, or through the inclusion of statutorily specified proper needs that are generally applicable, a proper need eligibility criterion will make a CCW statute discretionary.

The essence of a discretionary CCW statute is that it delegates to a non-legislative body the authority to determine the state’s policy towards CCW; through the use of vague eligibility criteria, discretionary CCW statutes sidestep tough policy decisions, leaving their resolution to those enforcing the statute. One court observed as much when it noted that “the chief plainly acts as a municipal policymaker when he decides on the criteria to be considered in granting or denying a request for a gun permit.”\textsuperscript{106} Statutes that use “may issue” verbiage, interpreted to mean that any statutory eligibility criteria are only guidelines for a license issuer to consider in its exercise of discretion, automatically make that state’s issuance system discretionary. The other language that makes a CCW statute discretionary is vague proper need criteria. Absent some binding clarification on which needs are proper, any license issuer given carte blanche discretion to determine what, substantively, are “proper needs,” operates under a discretionary licensing system. Therefore, the crucial statutory differences between discretionary and nondiscretionary CCW licensing systems are that discretionary statute usually use “may issue” verbiage, as opposed to nondiscretionary statutes’ almost universal use of mandatory language, and discretionary statutes almost always use vague proper need eligibility criteria.
d. License Issuer Disclosure Obligations

Discretionary statutes can either restrain or magnify license issuers’ discretion through requiring the publication of issuers’ exercises of discretion or making issuers’ discretion subject to meaningful review. Discretionary licensing systems rarely require issuers to publish rules specifying how they will exercise any discretion granted them through a CCW statute, and also rarely make the decisions of the issuer public record.

Discretionary statutes empower license issuers to make policy determinations through the interpretation of vague statutory eligibility criteria; how an issuer will interpret those criteria, and the resultant CCW policy for that issuer’s jurisdiction, is often unavailable to the public. Many bureaucratic agencies publish rules that explain to the public how an agency will exercise its powers; however, no discretionary licensing state requires its license issuers to publish formal, binding rules.\(^{107}\)

Even if issuers do not publish rules, their past determinations concerning applicants could inform the public of how issuers have exercised their discretion. However, most discretionary states do not make issuers’ rulings public records.\(^{108}\) New York and Rhode Island even amended their CCW statutes to conceal any record of issuers’ past actions after courts ordered those issuers to reveal license applications showing how they had exercised their discretion.\(^{109}\) Only Alabama and California explicitly grant the public access to information documenting what license issuers have previously considered to be “proper need.”\(^{110}\) The result of not requiring license issuers to publish how they have and will wield their policy making authority is that their power is amplified. License issuers in a discretionary system determine the core CCW policy conclusions; allowing those issuers to conceal what policy conclusions they have made
not only deprives citizens from knowing their eligibility status, but also deprives the public of any knowledge of what stance their jurisdiction has taken on the contentious issues of gun control and the carrying of firearms. Discretionary CCW license issuance without any public notice of policy determinations has no real public accountability.  

e. Judicial Review

All discretionary statutes further enhance the power of license issuers through denying license applicants any meaningful review of an issuer’s licensing decision. Courts in seven discretionary licensing states will only overrule an issuer’s decision if it is arbitrary or capricious. The arbitrary and capricious standard of review almost never poses any restraint on the exercise of discretionary powers:

The arbitrariness inquiry rarely functions as an active judicial test of the validity of governmental acts. Rather, when a judicial opinion begins its review of governmental action by choosing to apply the ‘arbitrary and capricious’ level of scrutiny, that fact usually telegraphs the likelihood that the official act or decision is shortly to be upheld. Additionally, three states using an arbitrary and capricious standard for judicial review also employ a non-mandatory interpretation of “may issue.” Issuers in a non-mandatory “may issue” state are not bound to the statutory eligibility criteria and, therefore, can deny applicants for any reason. If an issuer is empowered to deny applicants for almost any reason, regardless of whether an applicant satisfies the statutory standards, then it is difficult to imagine how any decision could be arbitrary because the issuer is essentially authorized to arbitrarily exercise his discretion. Unbounded discretion has no standards to obey and thus cannot exceed those nonexistent standards and become arbitrary. Unless courts determine that for government officials to act without boundaries is to act arbitrarily, those officials cannot act arbitrarily. A Rhode Island Supreme Court dissenting opinion accurately explains this problem:
According to the majority, the department [of the attorney general] has virtually unfettered discretion to deny an application for a gun permit pursuant to § 11-47-18(a). Indeed, according to the majority, ‘§ 11-47-18 vests the department with extremely broad discretion to grant or deny a license even when there has been ‘a proper showing of need.’’ Therefore, if the department possesses this type of unfettered discretion in determining who may receive a license under § 11-47-18, then any articulation of an alleged lack of a proper need that the department chooses to use must be upheld on review as sufficient. Presumably, therefore, the Court will have little or nothing to review on certiorari because if the department is not required to issue a permit even on a proper showing of need, how could any applicant obtain reversal of a license denial on review by certiorari? For this reason, review on certiorari of the department's denial of a gun license will prove to be a meaningless exercise because, by according the department the right to deny a license even after the applicant has made a proper showing of need, any articulated reason -- no matter how flimsy, insubstantial, or restrictive of the applicant's right to bear arms for any lawful purpose -- must be deemed sufficient to affirm the department's denial of a gun license.118

The three states using a non-mandatory “may issue” interpretation and an arbitrary and capricious standard for judicial review have rendered that judicial review meaningless. The one other non-mandatory “may issue” state, Delaware, does not even bother to offer any judicial review of CCW license issuer decisions.119

The other four states using an arbitrary and capricious standard of judicial review of licensing decisions also fail to provide any meaningful judicial review.120 Arbitrary and capricious decisions are those determined not “by fixed rules, procedures, or laws,”121 and those “guided by unpredictable or impulsive behavior.”122 To avoid arbitrary and capricious actions, a license issuer must act predictably, according to fixed rules. However, because issuers are under no obligation to publish formal rules specifying their exercise of discretion, and because their individual licensure decisions are not a part of the public record, there can be no fixed rules or predictability in discretionary licensing systems.123 Upon review there exists no record of the issuer’s licensing policies or past licensing decisions, and, therefore, no means to determine whether the issuer decided according to principles applied to all applicants or if the issuer acted arbitrarily. With only a record of one applicant’s case before a court, an issuer can justify almost any action as a part of some rational licensing policy; however, without
any record explaining how that issuer has dealt with other applicants, there is no way to
determine whether the purported licensing policy is applied to all applicants or simply a
post hoc justification for an arbitrary decision. One New York City attorney, experienced
with the city’s CCW licensing system, stated that “there are so few cases … where the
courts are forced to face the inconsistencies in the system, because it is so difficult to
view applications from which licenses were granted to make those comparative
arguments.” Therefore, judicial review in these states can only correct abuses so
obvious that courts need not compare the treatment of the applicant before it to other
applicants’ treatment. For all but the most extreme cases, those states using an
arbitrary and capricious standard of judicial review are failing to provide any meaningful
judicial review.

Of the two remaining states, Hawaii’s standard of judicial review is uncertain
because there is no record of any license ever having been issued and no relevant
Hawaiian case has ever gone to the courts. New Jersey courts have been willing to
freely review licensing decisions. Those applying the CCW statute must answer the
policy questions left unresolved in that statute. Usually license issuers settle
unresolved policy questions when creating the licensing standards by which they will
exercise their discretion; however, New Jersey’s Supreme Court has set the state’s
licensing standards. New Jersey’s licensing system does have the advantage of
providing concrete licensing rules published in court opinions; but, New Jersey’s
supreme court has simply claimed the discretion that otherwise would reside with license
issuers, and is thus still a discretionary issuance system. Also, because New Jersey’s
Supreme Court, the reviewer of issuer decisions, determined the licensure standards,
there is no impartial review available for challenging the standards themselves. If those court created standards violate the rule of law or other basic principles, there is no impartial forum for airing those grievances. New Jersey’s licensing standards do violate the rule of law because they have effectively nullified New Jersey’s CCW statute. New Jersey’s system does avoid arbitrary issuer determinations because the courts have set a uniform licensing standard, but New Jersey has failed to prevent the creation of an issuing standard that arbitrary nullifies state law.

Ten states use a discretionary CCW licensing system. These states’ CCW statutes contain vague eligibility criteria that effectively empower the license issuers to substantially create and enforce their own policy towards gun control and the carrying firearms. Through not requiring license issuers to publish rules and determinations, the policy effectuated by license issuers is concealed from the public; additionally, the issuers face no meaning judicial review. Discretionary licensing systems delegate the license issuers’ substantial policy making power that is unaccountable to the public and the courts.

III. DISCRETIONARY CCW LICENSING SYSTEMS VIOLATE THE FUNDAMENTAL TENETS OF THE RULE OF LAW.

“The rule of law, not men”, is a fundamental ideal for western democracies, including the American political system. That laws, rather than arbitrary power, ought to govern society holds enormous normative force in America. As Thomas Paine stated, “[i]n America the law is king.” The rule of law describes an ideal legal order where rules, rather than arbitrary decisions, control the coercive powers of the state. The rule of law serves to limit the power of government through restricting its ability to
act arbitrarily, and in so doing furthers rational and just governance. Discretionary CCW licensing systems embody the antithesis of the ideals encompassed in the rule of law.

The rule of law ideal is a very broad concept, not easily given a precise definition. However, the rule of law ideal is divisible into two general parts. First, the rule of law regulates government action through restricting its power to act arbitrarily. Second, the rule of law demands equality before the law: that the law applies to all equally. Laws must control the coercive powers of government within a legal system from which none are exempt or superior, but from which all are guaranteed the fair and honest application of the law.

1. That Laws Exist

For rules or laws to regulate a state’s exercise of power, then obviously some rules must exist. A government ruling on a purely ad hoc basis, making arbitrary determinations as situations arise, is an example of pure rule by man. The originator of modern rule of law theory, A.V. Dicey, stated that the rule of law requires, “in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.” Governments that obey no rules, but instead rely only upon the preferences of government officials, are frequently the most oppressive. Caligula’s appointing his horse as consul, or the unchecked power, and subsequent atrocities, of fascist and communist governments of the twentieth century, all showcase the dangers of a government controlled by the whims of rulers. The first demand of the rule of law ideal is that a government rule within and through the law.
Discretionary CCW licensing systems often empower issuers to act in a wholly arbitrary manner: Discretionary statutes require license issuers to provide a concrete interpretation to a vague statute, whether an issuer actually creates and follows an actual interpretation or simply acts arbitrarily on an ad hoc basis is left to the issuer. It is clear that many issuers operating under a discretionary system do act arbitrarily. A Cato Institute policy report described the situation as:

A review of how discretionary licensing systems have in fact been administered confounds any attempt to find a coherent or consistent application of the law. In fact, one of the most respected American legal encyclopedias, *American Law Reports*, states simply that the results of cases that have specifically addressed the issue of who is entitled to carry firearms ‘are not necessarily reconcilable, differing results having been reached as to applications offering similar evidence or allegations concerning the kinds of dangers to which the applicants claimed they have been subjected, and from which they allegedly required means of personal protection.’ In other words, the laws, embodying similar concepts, are applied as those in charge of administering and interpreting them see fit on a case-by-case basis.

The report concluded that “discretionary standards are not standards, for they do not produce standard results.” Many discretionary licensing jurisdictions do not publish how they are interpreting the vague statutory eligibility criteria and act as if no standards exist at all.

When Minnesota considered a nondiscretionary licensing system, which it subsequently enacted, legislative reports of arbitrariness and abuse of discretion in license issuance demonstrated the problems with the old discretionary licensing system:

At town meetings and committee hearings all over the state, legislators heard about permits freely given to campaign supporters, grade school buddies, relatives, neighbors, and other favored persons. The testifiers mentioned permits granted and renewed for 5 years and denied the next merely because ‘I’ve decided not to give them out anymore.’ Folks testified that the phrase I’m not going to give permits out anymore often meant ‘not to you’ but did not mean ‘not to everyone’ … Believing that state law allowed unfettered subjective decisions, members of the Suburban Law Enforcement Association began eliminating permits to carry for persons with personal safety concerns. Existing permits were not renewed and new permits were denied irrespective of the characteristics of the applicant … Testimony at various House hearing established a widespread pattern of arbitrary decisions, administrative abuse, and occasional flat-out refusal to follow the permit law by police chiefs, especially in the metro area, and by some sheriffs. Letters from chiefs stating that it is my policy not to issue permits under the ‘personal safety
Likewise, Los Angeles has issued CCW licenses on an apparently arbitrary basis:

From 1984 to 1992, in the City of Los Angeles police administration refused to issue any permits. In a city of over three million people, not one person was found needful of a handgun permit. The Los Angeles policy changed, however, on June 28, 1992. The new police chief, Willie Williams, twice failed practice versions of the POST (Police Officer Standards and Training) test. As a result, although he could retain the appointive position of police chief, Mr. Williams could not legally qualify to be a police officer in Los Angeles. Nonetheless, Mr. Williams was issued a concealed carry permit, the first civilian since 1984 to be so honored. The City of Los Angeles was subsequently sued for its discriminatory handling of permits; the City settled before trial, promising to issue licenses on the basis of need. Despite the City's agreement to the settlement, only five permits were issued in the ensuing nine months. Three permits went to government employees, and two went to private attorneys. On the basis of the absence of a 'compelling' need, a permit was denied to a jeweler who 1) routinely carried large amounts of jewelry and valuables, 2) had been burgled, 3) had received police-documented death threats from a criminal he had helped to apprehend, and 4) had passed a defensive handgun class.

San Francisco has not done any better; Senator Diane Feinstein is the only permit holder in the city.

New York City also appears to issue CCW licenses either arbitrarily or only to the rich and connected. New York licenses were in the public record, but New York City refused to release the information until a reporter obtained a court order. The list of license holders in the city was revealing: they were mostly “entertainers, publishers, media stars, and politicians of all stripes.” License holders include such famous persons, and gun control supporters, as Laurence Rockefeller, Arthur ‘Punch’ Sulzberger, William F. Buckley, and the husband of Dr. Joyce Brothers. License holders also “include an aide to a city councilman widely regarded as corrupt, several major slumlords, a Teamsters Union boss who was a defendant in a major racketeering suit, and a restaurateur identified with organized crime and alleged to control important segments of the hauling industry.” Also of note are Bill Cosby, Howard Stern, Donald Trump,
and Joan Rivers. Those not politically connected stand no chance for obtaining a license, and even the connected are not necessarily guaranteed a CCW license:

[W]hile being a publisher of a respectable publication such as the New York Times or National Review is apparently sufficient in itself for a carry permit, being the recipient of death threats such as ‘kill the white creep,’ ‘you will be shot,’ and ‘This is no joke. We are going to kill Al Goldstein,’ is not a sufficient basis. Mr. Goldstein, while the recipient of death threats considered serious by the police, is also the publisher of the highly unrespectable Screw magazine.

Eventually, the obvious elitism in New York City CCW licenses lead to a scandal: “The recent [1997] scandal involving favoritism for obtaining gun permits in New York City Police Department’s licensing division shows a lack of restraint on discrimination and other arbitrary action facilitated by a ‘proper cause’ standard for making license determinations.” New York has dealt with the situation by removing license records from public examination.

While not all issuers operating under a discretionary licensing system will act wholly arbitrarily, certainly some do. Vague discretionary statutes require license issuers to interpret the statute in order to give it concrete meaning and application; if issuers do not provide or use any meaningful interpretation, then those issuers’ actions can only be ad hoc and arbitrary. Issuance without any meaningful rules violates the most basic requirement of the rule of law ideal: that rules exist.

2. That Laws Incorporate Fundamental Regulatory Forms

For the laws to regulate government action and lead to rational governance, they must satisfy certain basic requirements. The rule of law ideal requires that laws have the attributes necessary to fulfill the goals of the rule of law, or, as Nobel laureate Friedrich Hayek wrote, the rule of law “means that a government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair
certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.” Influential rule of law theorist Lon Fuller wrote that any theory of law is “without intelligible content … unless it starts with the obvious truth that the citizen cannot orient his conduct by law if what is called law confronts him merely with a series of sporadic and patternless exercises of state power.” For law to truly constrain the arbitrariness of government, the laws must be prospective, knowable, and stable.

_a. That Laws Must Be Prospective_

Laws must be prospective, of a general nature applying to all similar situations similarly and giving citizens notice of what the law demands, rather than simply being a judgment or decree on present or past situations concerning only specific, known cases. As Justice Brennan stated, “[o]ur scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on _ad hoc_ notions of what is right or wrong in a particular case … [l]aw is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but … ‘the general law.’”

Discretionary licensing systems do not uphold this principle and allow the use of post hoc decisions or rulemaking. No discretionary state requires its license issuers to publish the rules by which they will grant licenses, and most provide no public record of how the issuer has decided in the past. Vague statutory eligibility criteria and the absence of any clarification by relevant agencies make knowledge of the rules for issuance unclear at best. Additionally, courts in discretionary systems review issuer decisions very narrowly, usually only overruling an issuer’s actions if they are
demonstrably arbitrary and capricious.\textsuperscript{161} New York is typical in that the “agency’s determination must be upheld if the record shows a rational basis for it.”\textsuperscript{162}

Without a clear record of what rules, if any, an issuer has created to regulate its application of vague statutory eligibility criteria, and in the absence of any significant level of judicial oversight, there is no practical way to determine whether the “rational basis” for an issuer’s decision was either actually based upon a pre-existing agency rule, or based upon a rule created at the time the issuer took action, or is a post hoc rationalization of arbitrary behavior. To determine whether an agency has followed its rules, the rules must be known and the agency must be held accountable to them; however, discretionary CCW licensing systems allow issuers to conceal the content and existence of any agency rules, making a judicial finding of arbitrariness or capriciousness impossible because an issuer can always present some post hoc justification, based upon previously unrevealed rules, to conceal arbitrariness or a lack of general and proscriptive rules. When an issuer admits, as a Maryland issuer did, that he just “made up” the rules,\textsuperscript{163} it is certain that many discretionary issuance jurisdictions do not have rules governing their actions that are general and prospective. If discretionary issuers actually create a concrete interpretation of the vague statutory eligibility criteria, there is no guarantee that those rules are prospective rather than simply post hoc justifications. Thus, the Supreme Court has stated that “[s]tandards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating … [w]ithout these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy”.\textsuperscript{164}
b. That Laws Must Be Knowable

Laws restraining the arbitrariness of government must be knowable. If one cannot know by what rules a state is acting, the result is the same as a state acting without rules: the only apparent rationale behind state action is personal whim. Although discretionary licensing statutes contain licensing criteria, some states authorize issuers to consider other, unspecified criteria, and all discretionary statutes contain criteria too vague to offer any substantial knowledge of the law.\(^{165}\) Without further clarification one cannot determine in any concrete manner who is a proper person with sufficient need for a CCW license; in other words, the statutes do not illuminate who is eligible for a license or what policy the state has taken on this contentious gun control issue. The discretionary CCW statutes are as informative “as Caligula’s practice of printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning.”\(^{166}\)

The license issuers enforcing these vague laws face a similar problem in having to apply an insufficiently clear law. The issuers must interpret the vague eligibility criteria and provide them with concrete meaning, involving the making of primary policy determinations in order to complete the CCW statute.\(^{167}\) However, no issuing agency is required to, or actually does, use any formal rule-making process.\(^{168}\) CCW license issuers provide no notice of impending rule creation, no opportunity for interested parties to be heard, no specification of how rules are actually decided upon, and no publication of any rules created, if any.\(^{169}\)

In the rare instances when issuers do publish guidelines on how they will exercise their discretion, they almost never provide any meaningful clarification.\(^{170}\) For example, during litigation Rhode Island’s CCW license issuer, the Rhode Island attorney general,
published a pamphlet explaining the licensing process, but prefaced the statutory explanation with: “there cannot be any set formula or criteria to limit or restrict the Attorney General’s discretion to issue…” Before even clarifying the statute, Rhode Island’s issuer stated that it would not be bound to its own interpretation of the statute.

The Rhode Island attorney general’s interpretation then failed to offer any real clarifications, simply using more vague language to explain the statute’s vague criteria; the Rhode Island Attorney General’s “clarifications” simply amplify any ambiguity. Some of the criteria even seem to force an applicant to prove basic policy issues that a CCW statute should have already settled, such as “has the applicant demonstrated how a pistol permit will decrease the risk” and “[h]ow greatly will the possession of a loaded firearm by the applicant increase the risk of harm to the applicant or to the public?” Whether firearms are useful tools for self-defense and whether ordinary citizens carrying concealed firearms is good policy or one fraught with danger are basic questions that should inform a legislature in crafting its CCW statute. Forcing a CCW license applicant to establish a position on these basic policy questions in order to receive a license puts the cart before the horse, and fails to provide the public with any meaningful knowledge concerning what policy the state has adopted towards CCW and who is eligible for a license.

Even if a discretionary license issuer publishes a clear and precise explanation of his interpretation of the CCW statute and how he will exercise his discretion, the lack of meaningful judicial review and the nonbinding nature of any guidelines renders the informational value of those guidelines suspect. Published rules that do not have any
practical or binding effect provide society no knowledge of what, if any, rules control an agency’s behavior.

One possible source for discerning issuer licensing standards is court opinions considering license denials. The courts reviewing discretionary issuers’ applications of CCW statutes may have placed limits upon their exercise of discretion and thus have imposed knowable rules regulating license issuance. However, almost all courts in discretionary systems have refused to provide any meaningful oversight of issuer decisions, applying only the very narrow arbitrary and capricious standard of review.\textsuperscript{176} Courts generally accept any plausible justification an issuer presents, and thus fail to provide any limitations upon issuers that could form a basic framework of knowable issuance regulations.\textsuperscript{177} Any licensing rules relied upon by a court are almost always the rules issuers claim, upon judicial review, to operate under, and are almost always standards violating other rule of law tenets.\textsuperscript{178} Even if a court does order an issuer to follow a standard the issuer opposes, issuers, such as New York City’s licensing division, will sometimes just ignore the court order, and sometimes even ignore a legislative change in statutory standards.\textsuperscript{179} Therefore, the nominal review offered by courts, although published, is insufficient to provide meaningful knowledge of the rules by which a discretionary issuer actually operates.

The failure of discretionary license issuers to publish meaningful rules explaining how they will wield their considerable discretion leaves the public without any direct knowledge of a discretionary licensing state’s actual issuance policy. However, if the public had access to records concerning an agency’s past licensing decisions, then the rules, if any, by which that agency acted would be inferable. Unfortunately, most
discretionary states do not release that information, and, therefore, the public cannot even indirectly discover the rules and policies by which their state issues CCW licenses. ¹⁸⁰

Concealing the substance of any rules regulating an issuer’s actions both obscures the policy preferences affecting that issuer’s actions and any improprieties within the concealed rules. Without knowledge of an issuer’s policy preferences or how they inform his enforcement of the CCW statute, an applicant has no guidance in determining what will satisfy the licensing eligibility criteria. This leads to a fundamental failure for the law to inform and guide the public. The practical result is to force applicants to guess which specific facts will satisfy the generally unknown eligibility criteria. If an applicant merely produces general information to satisfy the statute’s vague criteria, he runs the risk of an issuer rejecting the application because it fails to meet some unspecified criterion for demonstrating proper need. Such was the case when a New York court accepted an issuer’s argument that an applicant’s statement that he needed a CCW license because, as a bank president, he was required to regularly carry large sums of cash was “too vague to constitute ‘proper cause’ within the meaning of” New York’s CCW statute.¹⁸¹ Concealing the rules by which a licensing agency makes licensing decisions prevents the public from knowing who is eligible for a license and acting pursuant to that law.

Additionally, the lack of any public record demonstrating how license issuers have acted and will act obscures the public’s knowledge of whether issuers are acting within law: “if the press and the public are precluded from learning the names of concealed weapons’ licensees and the reasons claimed in support of the licenses, there will be no method by which the public can ascertain whether the law is being properly
applied or carried out in an evenhanded manner.” As one New York Court commented, records of the issuer’s past decisions are “necessary if” the denied applicant “is to be afforded the opportunity to prove discrimination in the enforcement of the licensing provision.” However, discretionary licensing states have generally refused to document the actions of CCW license issuers. The result is a lack of public accountability for issuer’s actions. For example, a Rhode Island court ruled that a journal “attempting to uncover abuses of discretion … in the granting of gun permits” had no right to see records of the issuer’s prior decisions because “the public interest is insubstantial unless the requester puts forth compelling evidence that the agency denying the … request is engaged in illegal activity and shows that the information is necessary in order to confirm or refute that evidence.” Although a crucial function of the media is to inform the public of government misconduct, Rhode Island will conceal all records, and thus evidence of, how its CCW license issuer has decided applications unless there is already evidence demonstrating illegal activity; essentially, one cannot know what the government is doing until it is already known. That the “public interest is insubstantial” in knowing the propriety of the rules and policies by which issuers distribute CCW licenses is simply untrue, as demonstrated by the intense public debate over gun control. A basic element of the rule of law is that the laws regulating government action are knowable. If laws are unknowable by the public, they are also unaccountable to the public.

Furthermore, for a law to be knowable, it must be non-contradictory. All states using a discretionary licensing system permit the carrying of concealed firearms under the circumstances specified in the states’ CCW statutes; therefore, all states offering
CCW licensing have made the policy conclusion that some citizens are eligible for a CCW license. However, some discretionary license issuers have decided that no one is eligible for a CCW license, in direct contradiction with the plain intention of a statute authorizing CCW licenses for certain citizens. When a statute clearly states one general policy, that issuers are to issue CCW licenses to qualified applicants, but the agency enforcing the statute operates under a contradictory policy, that the issuer will never issue a CCW license, then a state’s CCW policy and the rules upholding that policy are unknowable because they are contradictory. Essentially, the law on the books does not match reality; those enforcing the licensing statute have made the law a theoretical construct of no practical value.

Hawaii has a CCW statute authorizing law enforcement to issue CCW licenses; however, there is no indication that any Hawaiian issuer has ever granted a permit. Although Hawaii’s positive law establishes a policy permitting the carrying of concealed firearms as regulated through the issuance of CCW licenses, license issuers have effectively established a policy of prohibition through refusing to ever issue a license. Hawaii’s rules regarding the carrying of concealed firearms are thus unknowable; by statute Hawaii is a discretionary licensing state, by practice Hawaii is a prohibition state. Iowa’s attorney general realized the contradiction that would arise within its discretionary licensing system if the state’s issuers, sheriffs, could categorically refuse to issue:

[I]f a county sheriff … ‘would categorically refuse or deny the issuance of any permits whatsoever, the discretionary or decision making power vested in him by the legislature would be rendered a nullity and the responsibility conferred under the language of the statute to render a judgment would be abrogated. This a sheriff cannot do. The legislature has not said that no person may carry a concealed weapon, but rather citizens may be so armed if the sheriff in his judgment finds it to be warranted.’

Every court that has considered whether a license issuer can categorically refuse to issue permits has ruled that issuers cannot.

44
However, issuers in some discretionary licensing jurisdictions have still enacted de facto licensing prohibitions. New Jersey issuers have determined that firearm possession is inherently dangerous and serves no useful purpose, and, therefore, New Jersey issuers have enforced a de facto prohibition on the issuance of CCW licenses, despite the New Jersey CCW statute’s creation of a licensing program. Because New Jersey’s statutory rules allow for citizens to obtain licenses to carry concealed firearms, the statutory policy clearly does not hold that firearm possession is categorically detrimental, or else New Jersey’s statute would have simply banned the carrying of concealed firearms instead of regulating it through a licensing system. For New Jersey license issuers to apply the CCW statute, through the creation of clarifying rules, as a de facto CCW ban creates a contradiction in New Jersey’s CCW rules.

Other states have also attempted to interpret their CCW licensing statute as a CCW ban. An Indiana court rejected a dissenting opinion that would have defined “proper need” as a logically unattainable standard:

Any ordinary citizen applying for license could be ‘factually’ denied a permit because no one had actually threatened him. Thus, he would have no ‘need’ to defend himself. Similarly, if threatened, the permit could be denied on the basis that the official police agencies were capable of handling the matter so that he had no ‘need’ to defend himself.

The same Indiana dissenter also believes that a person stating self-defense as the “proper need” for a license without demonstrating specific threats is an unsuitable person because any desire to carry a firearm for defense against nonspecific or unknown dangers makes the applicant a potential danger to society: “[the applicant’s] assault anxieties had little basis in fact and that these assault anxieties could present a danger to the general public.” If Indiana had used that interpretation of its statutory “proper need” criterion, then anyone without a specific and demonstrable threat would be unsuitable and without...
need, while anyone with knowledge of specific threats would have no proper need
because law enforcement could deal with the threat; therefore, resulting in a classic catch
22, effectively excluding all applicants.

States regulating the carrying of concealed firearms through discretionary
licensing systems have established rules centered on the obvious policy that sometimes
the carrying of concealed firearms is permissible; discretionary issuers that use their
discretion to interpret the CCW licensing statute as a prohibition have in effect negated
the statutory law. Contradictory rules make the law unknowable: should one consider the
law as on the books or as applied?

Discretionary CCW licensing regimes all employ vague statutes offering no
concrete knowledge concerning the state’s CCW policy. Those interpreting the vague
statutes never use any formal rule-making procedures, and only rarely provide informal
and insufficient guidelines on how they will apply any vague statutory language.
Discretionary issuers almost never make public their past decisions and thus obscure any
inference of the rules by which they operate. Some discretionary issuers even act under
rules clearly contradictory to the statute they are charged with enforcing. All
discretionary licensing systems violate the rule of law’s basic demand that the rules
controlling state action be knowable to the public. Unknown rules cannot guide the
public’s actions and those rules’ rationality is uncertain since actions controlled by
unknowable rules appear arbitrary. Without any knowledge of the rules controlling CCW
licensing agencies, issuers are unaccountable to the public.
c. That Laws Must Be Reasonably Stable

The rule of law ideal requires that laws be reasonably stable. Otherwise, even if the laws are concretely known, a rapid change in laws, and the substantive policies reflected in each law, would approximate rule by arbitrary whim. Political decisions, and the laws that embody them, must only change within some framework of reasonability, or else a series of otherwise sensible laws would, as a whole, be nothing more than an arbitrary series of pronouncements. The rule of law ideal is a bulwark against state arbitrariness and irrational governance; without reasonable stability in the laws, none of those goals are attainable.

Discretionary licensing systems’ almost absolute grant of discretion to license issuers eliminates any restraint upon issuers’ powers to change the rules by which they issue licenses. No state requires issuers to promulgate licensing rules according to any formal rule-making procedures; nor does any discretionary CCW statute mention how an issuer is to go about changing how it will interpret and apply the statute. Any current limitations upon an issuer’s ability to alter its licensing rules can only come from the courts.

However, because license issuers almost never publish any licensing rules, any change in those rules is often unnoticed. The only court cases directly dealing with limitations upon an issuer’s ability to change issuance rules are cases where an issuer changed a previous determination concerning a license holder, absent any correlating change in the license holder’s circumstances, and, therefore, done only because of a change in issuance rules. A Massachusetts court ruled that:

[Given the latitude that is enjoyed by licensing authorities in determining suitability, Lt. Pellecchia [the issuer] was not strictly required to base his decision on one of the specific]
disqualifications to Section 131. Nor was the fact that Masiello [the applicant] previously held a firearms license dispositive of his suitability now, even if there has been no change in his record.\textsuperscript{197}

The Massachusetts issuer thus has broad discretion to determine license eligibility, not being bound to the eligibility criteria specified in the statute, or even by any previous eligibility determinations. That the issuer must have changed his issuance rules, even as applied to the same license holder, and used that change to reverse its previous determination, without any notice of a change, and absent any factual changes, represents a near absolute power to change the law at whim. In another case, a Massachusetts court even held that such an unrestrained power is obligatory:

\textit{This Court finds that the knowledge of Chief Dufort’s predecessors is of no consequence in this case. Even assuming that previous police chiefs had knowledge of Roy’s criminal past and chose to ignore it, Chief Dufort still had a statutory obligation to revoke any and all licenses held by people who he determined were no longer suitable to hold that license.\textsuperscript{198}}

Of course an issuer should not grant licenses to the unsuitable; however, the Massachusetts court’s view is deceptive because the issuer has almost absolute discretion to define and determine suitability. To hold that an issuer can change his definition of suitability at will, but then must revoke licenses from those no longer suitable, even if only because of the rules change, conflates discretionary arbitrariness with an honest duty to ensure reasonable enforcement of the licensing system. That the issuer can change issuance rules without notice or limitation and overturn earlier decisions based upon that unrestricted power saps the issuance rules of any stability.

Massachusetts is not alone in empowering its licensing officials to alter their issuance rules at whim. New York City’s licensing rules are subject to constant change and unpredictability: “The turnover of city officials also results in inconsistent interpretation and application of the meaning of ‘proper cause’ … the standards to obtain
a carry permit have become stricter and tougher over the last two decades, making police
department determinations of such applications unpredictable."¹⁹⁹ New Jersey’s Supreme
Court has offered a justification for such changes:

[T]he word ‘need’ has appeared without alteration through all the pertinent legislation
since 1924. But he [the appellant] evidently entertains the mistaken notion that its
contextual concept remains frozen as of that date and that types of permits originally
issued must necessarily be issued today. ‘Need’ is a flexible term which must be
read and applied in the light of the particular circumstances and the times … [the
issuer’s] determination must be made in the light of the circumstances presented to him
and of sound current approaches on the issue of ’need’; it would appear to be of no legal
significance that, under earlier circumstances or earlier approaches, a predecessor County
Judge [the issuer] had exercised his judgment in favor of a permit grant.²⁰⁰

New Jersey license issuers publish no rules explaining their interpretation of the CCW
statute or what they consider to be the current meaning of the “flexible term” “need.”
Determining the substantive definition of “proper need” supplies New Jersey’s vague
CCW statute with the core policy conclusions left unanswered in the statute.²⁰¹

Authorizing license issuers to determine what “need” means “in the light of the … times”
empowers them to both decide the fundamental policy issues of the CCW debate, the
subsequent rules embodying those policy choices, and decide when to change those rules.

No significant restrictions govern the issuers’ authority to change their unpublished rules;
and to know of any change in them requires knowledge of when a particular issuer has
determined that the “light of the times” concerning CCW has changed. That such a
guideline for changing the issuance rules is wholly subjective, and conducted without
notice or limitations, renders New Jersey’s licensure rules unstable and, from all outside
appearances, arbitrarily determined by the personal opinions of issuers. Permitting the
subjective opinions of a “light of the times” understanding of what rules ought to guide
CCW licensing only invites issuers to use their broad discretion to arbitrarily alter the
issuance rules to suit their own prejudices and biases:
The history of the laws regulating the carrying of firearms also should alert us to the manner in which gun control laws embody the political and social fears of their time and the often unconscious class and social presumptions underlying those laws, easily justified and made antiseptic when discussed only in terms of the abstract concern for "public safety."202

Discretionary CCW license issuer’s ability to change licensing rules at any time and without any significant restrictions not only demonstrates the breadth of their discretionary authority, but also makes any licensing rules or decisions of uncertain authority and of little value in guiding future conduct or revealing license eligibility. Authorizing license issuers to alter issuance rules at will, even in an attempt to align those rules with the spirit of the times, undermines the stability of the licensing system and the rule of law. Unregulated power to alter issuance policies at whim gives what might be otherwise rational licensing rules an arbitrary effect.

d. That the Rules Controlling Discretionary CCW Licensing Systems Fail to Incorporate the Forms Basic to the Rule of Law

The rule of law ideal seeks to limit government power and further rational and just governance. Laws must be of a certain type or form in order to truly restrict the state’s power to act arbitrarily. Laws must be prospective and general, or else they are simply expressions of a government’s arbitrary exercise of power rather than rules controlling a government’s use of coercive force.203 Discretionary issuers’ ability to use post hoc justifications for prior decisions means that the rules used by issuers to enforce vague CCW statutes are often not prospective or general. When issuers can use post hoc rationalizations to justify past actions, arbitrariness will often simply be whitewashed by subsequently created rules. Enabling issuers to act under any plausible rules, even potential future rules, does not limit an issuer’s power to act arbitrarily and does not ensure even a basic sense of rationality in the rules controlling CCW license issuance.
Laws must also be knowable to the public or else state power will be arbitrary. Those held from knowing the rules controlling government actions cannot discern the reasons for those government actions and thus can only view those actions as arbitrary. Discretionary CCW license issuers must create issuance rules in order to apply vague statutory criteria. Even if an issuer does create and obey some meaningful, but unknowable to the public, issuance rules, the issuer’s actions are still arbitrary because those rules, a creation of the issuer, can only reflect the subjective opinions of the issuer, which are not revealed to the public, and thus operate no differently than an issuer acting arbitrarily upon his own beliefs. Whether an issuer creates unpublished rules reflecting his views, or simply issues licenses based upon ad hoc subjective judgments, the result is still that the issuer acts arbitrarily upon his personal whim rather than by any legitimate rules. For the law to be rational it must be known; otherwise, the law would be functionally irrelevant since any effects it may have on government behavior will be lost in that behavior’s outward appearance of, and functional equivalence to, pure arbitrariness. That no discretionary licensing issuer is controlled by knowable licensing rules means that all discretionary licensing systems are controlled by the whim of men, not by the rule of law.

Finally, laws must be reasonably stable in order to limit government arbitrariness. Permitting the states to alter the laws controlling their exercise of power at will empowers them to simply change the law at any moment and thus act arbitrarily. Because no discretionary licensing system limits its issuers’ power to unilaterally change the licensing rules, all discretionary licensing systems fail to restrict issuers’ ability to act arbitrarily.
The rule of law ideal can ensure that governments rule through laws that limit the
government’s ability to act arbitrarily and can promote rational governance. Regulating
the form laws must take, that laws must be prospective, knowable, and reasonably stable,
requires governments to operate through binding rules limiting government officials’
discretion to arbitrarily act when enforcing the law, and provides the public with notice of
how the state will act and how they can plan their actions in accordance with the law. A
CCW statute in accordance with the rule of law ideal’s proper forms would contain a
clear statement of the government’s CCW policy and the rules by which that policy will
be enforced. Idaho’s attorney general realized the problems with vague CCW licensing
statutes when he wrote: “Legislation that contains language so loose as to leave overly
wide discretion encourages erratic administration, turns individual impressions into the
yardstick of action, and bases regulation upon the beliefs of the individual administrator
rather than law. Further, judicial review is rendered inoperative.”206 States not regulating
CCW, states prohibiting CCW, and states regulating CCW through a nondiscretionary
licensing system all have CCW laws clearly establishing a definite CCW policy and clear
rules concerning the enforcement of those policies.207 Discretionary licensing systems
delegate license issuers the task of providing policy conclusions and substantive meaning
to vague statutes, that, when coupled with no significant restraints on the issuers’ power
to create and enforce those rules, leads to a system that violates the basic tenet of the rule
of law: that the laws are such that they prevent rule by the unbridled whim of man.

3. That Laws Apply Equally to All

The rule of law ideal requires not only that governments exercise power through
laws, ruling by law, but also that the law is sovereign and supreme, constraining all alike,
so that society is not ruled just by laws, but controlled by the rule of law.\textsuperscript{208} Or, as John Locke wrote: “Wherever law ends, tyranny begins.”\textsuperscript{209} The rule of law requires more than shaping the conformation of laws to specific forms, but also that the law itself is the actual arbiter of state power, rather than being merely symbolic, or of subordinate status to, some other authority, such as the will of the politically powerful. The law must apply on its own terms and be subject only to other laws or rules within the legal framework establishing the rule of law. If the law is not supreme, if the law is subject to other powers outside the legal framework, then the aims of the rule of law, limited government through restricting a state’s ability to act arbitrarily, in furtherance of rational and just governance, would be nearly unobtainable.

The benefits of the law must be available for all, regardless of the claimant’s political influence, or lack thereof; and the obligations of the law must be borne by all, regardless of the bearer’s political power. Otherwise, the law would only serve the arbitrary whims of those supreme to it, and likely not the interests of those ruled beneath it. A.V. Dicey wrote: “not only that … no man is above the law, but (what is a different thing) that … every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals … though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.”\textsuperscript{210} Rationality, not raw power, ought to control state action; the law should specify its application and treat similar cases similarly, not just treat those of similar power similarly.
Discretionary CCW licensing systems rarely operate under any sense of equality and flagrantly violate the rule of law. Although all discretionary CCW states use ostensibly neutral eligibility criteria based upon proper need and suitability,\textsuperscript{211} frequently applicants are denied licenses based upon race and gender. A licensing system attempting to rationally distribute CCW licenses to those trustworthy and in need of a license would not rely on irrational disqualifications based upon race and gender. A Florida judge even admitted that Florida’s now repealed discretionary licensing statute violated the rule of law’s demand for equality before the law because “[t]he statute was never intended to be applied to the white population.”\textsuperscript{212}

Many of the discretionary licensing statutes were passed with vague eligibility criteria\textsuperscript{213} in order that those issuing the licenses could reject groups not favored by those in power, rather than only denying those applicants who are truly unsuitable or without some need:

\[\text{T}he \ twin \ criteria, \ ‘good \ moral \ character’ \ and \ ‘need’ \ or \ ‘good \ cause,’ \ were \ favored \ precisely \ because \ they \ were \ vague \ enough \ to \ ensure \ that \ only \ the \ ‘right’ \ sort \ of \ people \ could \ carry \ arms, \ however \ conceived \ from \ age \ to \ age, \ or \ region \ to \ region. \ While \ self-justifying \ and \ apparently \ even-handed \ on \ the \ surface, \ the \ criteria \ are \ so \ broad, \ undefined, \ and \ devoid \ of \ any \ objective \ standards \ that \ they \ pose \ no \ obstacle \ to \ granting \ or \ withholding \ licenses \ in \ a \ highly \ discriminatory, \ prejudicial, \ arbitrary, \ or \ political \ manner … [T]he discretionary licensing systems invite and produce discrimination on grounds of class, race, religion, country of origin, fame, wealth, or political influence in a manner that has no rational correlation with the risk of criminal victimization … or trustworthiness or competence with a firearm. Such systems invite, and in fact produce, wholly inconsistent, arbitrary, and irrational results.\textsuperscript{214}\]

For example, Missouri’s old discretionary licensing system produced unjustifiably discriminatory results:

Permits are automatically denied in St. Louis to wives who don’t have their husband’s permission, homosexuals, and nonvoters. … As one of my students recently learned, a ‘personal interview’ is now required for every St. Louis application. After many delays,
he finally got to see the sheriff – who looked at him only long enough to see that he wasn’t black, yelled ‘He’s all right’ to the permit secretary, and left.\textsuperscript{215}

California’s licensing system also impermissibly discriminates:

While the motivations behind California’s concealed handgun statute are not as clearly understood, the effect has been similar to frankly racist statutes. California’s legislative research body studied the issue in 1986 and concluded: ‘The overwhelming majority of permit holders are white males.’ Because so many victims of violent crime are female or non-white, discriminatory granting of carry permits is especially hard to justify.\textsuperscript{216}

Additionally, New York City’s discretionary CCW license issuance also appears sexist:

An ordinary woman who seeks a gun permit because she has been threatened or beaten … faces an administrative obstacle course including every technique of discouragement, persuasion, and delay the New York City police can thrust in her path. If an unusually resolute applicant nevertheless perseveres, the permit is automatically denied unless the police are convinced that she will be able and willing to bring a lawsuit. … Police bureaucrats … work on the principle that if they give a threatened woman a gun permit and she misuses it there will be an immense clamor in the newspapers. Whereas, if they deny the permit and something happens to her, no one will pay attention to her complaints (even if she is still alive to make them). By the same token, such ordinary women – and especially minority and underprivileged women – are considered far too unimportant to receive the limited special protection resources that the police allocate to an elite few city officials and prominent individuals.\textsuperscript{217}

Discretionary licensing systems’ reluctance to publish how they have exercised their discretion\textsuperscript{218} prevents any wholly conclusive determination that they issue licenses upon racist and sexist criteria, but there is substantial anecdotal evidence to that effect and nothing to prevent issuers for acting so.\textsuperscript{219} The Orange County, California, license issuer even claimed that discriminatory issuance practices are licit:

In addition, we note that at oral argument before this court, the county took the position that it was not bound by the fourteenth amendment equal protection clause, apparently on the theory that the second amendment somehow supersedes it whenever the state’s regulation of firearms is at issue. This wholly unsubstantiated position in itself seems to be evidence of the county’s official policy of indifference to fourteenth amendment protections.\textsuperscript{220}

Discretionary issuers can, and do, deny applicants based upon race and gender, rather than upon any reasonable interpretation of the statutory need and suitability criteria. Not honestly applying the law to the least politically influential or connected, in this case women and minorities, is not only irrational governance, but also a violation of the rule of law’s requirement that the law be applied equally to all.
On the opposite end of the spectrum, issuers often ignore statutory eligibility criteria and grant licenses to the rich and politically connected. It is common for discretionary issuers to only issue to the rich and connected.\textsuperscript{221} New York City’s issuance is notoriously unfair, as was revealed in one commentator’s interview of a New York City issuing official:

Lieutenant McCormack conceded that because the state legislature has not issued any guidelines for assessing proper cause, the [licensing] system can never be entirely fair. While he stated that the police ‘try to be fair,’ a recent [1997] New York City Police Department scandal involving accusations of favoritism in issuing gun licenses suggests otherwise. Henry Krantz, the commanding officer of the NYPD’s licensing division, agreed to pay a $10,000 fine and receive a reduction in rank to settle administrative charges that he had shown favoritism in granting gun licenses, and that he had ordered his subordinates to do so. Other officials in the division were transferred, demoted, or forced to retire.\textsuperscript{222}

At least as early as 1937, one could not get a New York City CCW permit “unless you know a local judge or a ward politician.”\textsuperscript{223} Even after a series of court injunctions, “The police ‘actively attempt to keep the number of pistol-packing New Yorkers at a minimum … so low that even the police are embarrassed at having to pretend that they believe the rationality of their own statistics.’”\textsuperscript{224} New York City, under its statutory proper cause requirement, has granted numerous licenses to the rich and powerful,\textsuperscript{225} but, “[c]onversely, permits are generally not awarded to persons in genuine need of carrying firearms. For example, crime victims are denied permits even though they are cooperating with the police, will testify against a criminal, and are receiving death threats from the criminal.”\textsuperscript{226} Although New York’s CCW statute has issuers grant CCW licenses to those with a proper need and of good moral character,\textsuperscript{227} unless only the rich and connected have proper cause and good morals, then the actual practice is to issue only to those with proper connections and of good financial means:
Class discrimination pervades the permit application and approval process. New York City taxi drivers, although greatly at risk of robbery, are denied gun permits because they carry less than $2,000 in cash. Many taxi drivers carry weapons anyway. As the courts have ruled, ordinary citizens and storeowners in the city may not receive carry permits because they have no greater need for protection than anyone else in the city.228

Typical of New York City’s CCW licensing system is its rejection of a bank president who sometimes carries up $125,000, while Robert De Niro went to the licensing department and received a carry license the next day.229

New York City is not unique. In order to correct an issuer’s refusal to consider applications not from “selected public officials”, a California court stated the obvious: “To determine, in advance, as a uniform rule, that only selected public officials can show good cause is to refuse to consider the existence of good cause on the part of citizens generally and is an abuse of, and not an exercise of, discretion.”230 Some California issuer’s do not even take these problems seriously; the Fresno County sheriff, when accused of only giving CCW permits to his friends, quipped “I'm sure not going to give them to my enemies.”231

Additionally, a “federal district court in California recently upheld Los Angeles County’s policy of issuing handgun carry permits almost entirely to retired police officers and celebrities. The court found the county’s policy rational ‘because famous persons and public figures are often subjected to threats of bodily harm’ … [and retired police officers] are ‘particularly well-trained in the use of weapons.’”232 The famous are often the subject of threats, but that clearly does not mean that no one else is; and, similarly, that retired police officers may generally be well trained does not mean that no one else is. That court’s flimsy arguments simply rationalize the inequality in California’s CCW licensing system; namely, “if you are famous enough to attract death threats, you may
carry an effective means with which to defend your life … Special treatment for special people.”

Providing CCW licenses for the wealthy and connected, while using the same statutory standards to deny licenses to the ordinary population, is a gross violation of the rule of law. Issuers should apply licensing standards evenly and fairly for all. Granting licenses to allies and the politically influential is to ignore the rule of law in favor of rule by man, or, in this case, simple corruption.

c. That Rules Not Be Applied to Arbitrarily Deny the Benefits Otherwise Conferred by Law

Government officials charged with applying a law must fulfill their obligations according to the law; if a government official applies the law according to rules not rationally rooted in the authorizing statute, then he has replaced the law with personal preference. CCW license issuers that create issuance rules not rationally based upon their CCW statute have acted arbitrarily; therefore, any subsequent decisions based upon those arbitrary standards are contrary to the rule of law because they rely not upon the CCW statute, but instead upon the mere personal preferences of issuers. Arbitrary standards arbitrarily distinguish between applicants and thus fail to treat all as equal before the law, treating similar cases dissimilarly.

Discretionary licensing systems foster arbitrary and unequal treatment in numerous ways. The four states using a non-mandatory interpretation of “may issue” almost guarantee rule of law violations because they grant license issuers almost absolute discretion. A Florida court held when striking down Florida’s old discretionary licensing system’s non-mandatory “may issue” language: “This paragraph is
unconstitutional because it allows the county commissioners [the issuers] to consider any criteria they desire and does not require the commissioners to consider the same criteria for each applicant. Such unbridled discretion allows for capricious and arbitrary discrimination…”235 Licensing systems not requiring issuers to use standardized eligibility criteria, based upon the CCW statute, will result in, or at least not prevent, issuers holding similar applicants to dissimilar standards. Non-mandatory “may issue” states authorize issuers, unburdened by statutory constraints, to act upon any personal preference, not law. Therefore, any licensing standards or decisions from these systems are arbitrarily contrived.

Discretionary licensing systems that do not authorize issuers to wholly create licensing standards still permit issuers to substantially create standards because the vague statutory standards require interpretation in order to be enforced.236 Most inequality within discretionary licensing systems is due to a lack of issuer accountability, caused by a lack of any duty to publish rules, or records of licensing decisions, and not being subject to meaningful judicial review; thus, allowing issuers to ignore standards or operate without them.237 Any agency acting without rules or accountability is likely to abuse its power, and issue licenses based upon personal preference rather than rational standards.

Even when discretionary issuers do create and follow concrete interpretations of vague statutory criteria, the created rules often simply further unequal application of the law. Issuer interpretations of statutory eligibility criteria that rely on arbitrary distinctions, those not rationally related to the statutory criteria, will promote an irrational licensing policy that treats similar cases dissimilarly. The most significant source of
issuer rule creation, and, thus, the most frequent source of arbitrary eligibility distinctions, is discretionary CCW statutes’ use of proper need criteria.\(^{238}\) Although discretionary issuers must also define suitable person criteria, these do not afford issuers with significant discretion, but do serve to exclude criminals and the unstable, or those with inadequate firearms training.\(^{239}\)

One who legally carries a concealed firearm does so for self protection; thus, proper need or cause should be linked to an applicant’s need for any protection offered by carrying a firearm. To use a firearm is to use lethal force, and is generally only legally justifiable when defending one’s life against immanent mortal danger; therefore, proper need logically ought to be dependant upon the chance an applicant might have to use a firearm for its only proper use, the deployment of lethal force to defend against immanent mortal danger.\(^{240}\) An interpretation and application of proper need should be based upon what amount of risk from mortal danger is sufficient to constitute a proper need and what amount of mortal danger an applicant faces.\(^{241}\)

Need requirements could include a calculation of the effectiveness of firearms for self-defense; however, that is a policy issue that should precede any eligibility rules. If firearms are not useful for self-defense, the state ought to prohibit all carrying of firearms for defense. If, as all CCW licensing systems presume,\(^{242}\) firearms are at least marginally useful for self-defense, then all those otherwise eligible and at sufficient risk of mortal danger, i.e.: with proper need, ought to have the benefit of carrying a firearm. If firearms are generally useful for self-defense, then generally those at risk should be permitted to carry them.\(^{243}\) Because suitability requirements will ensure that license holders are sane, law-abiding, and sufficiently trained, and because a licensing system already recognizes
some usefulness in carrying a firearm, proper need requirements should only concern actual need: an applicant’s likely need to employ lethal force in self-defense.

Many of the rules used by issuers do not have any rational relation to proper need determinations and serve only to arbitrarily exclude groups from eligibility. Issuers concluding that living or working in a high crime area is not a sufficient need for a CCW license have excluded those that are forced to live and work in such dangerous areas their primary reason for needing a license: that they are at increased risk of victimization due to location. Many people who live and work in high crime areas do so out of financial necessity; therefore, a rule that those in high crime areas do not have a proper need for a license will primarily affect the poor, minorities, and the politically disenfranchised.

Living and working in a high crime area certainly does have a bearing on one’s risk of being violently assaulted; to exclude that risk as a proper need is to discount the primary reason for carrying a firearm. Although an issuer may determine that living and working in a high crime area does not pose a sufficient risk to constitute a proper need, such a determination would exclude a large population of those at risk from violent assault. Even though a licensing system recognizes the utility of firearms for self-defense, a rejection of the high crime justification denies that utility to the large population living and working in dangerous neighborhoods. Such an exclusive policy choice may be defensible, but that decision ought to be made by the elected legislature, not by CCW license issuers.

Interpretations of proper need that do not include the dangers faced by ordinary citizens, even by those living in the most violence plagued neighborhoods, require applicants to prove some special risk factor. Requiring applicants to demonstrate explicit
threats against them, or some very specific or unique risks, also precludes ordinary citizens from obtaining licenses. Issuers that define proper need to include only applicants that can demonstrate specific threats ignore the unannounced risks of violence faced by many. 245 Public figures may often receive threats that provide grounds for obtaining a license, but it is unlikely that the vast majority of violent crime victims receive advance warning. The practical effect of this standard of proper need is the disqualification of a substantial portion of those at risk from violent crime, and specifically those that are not public figures or well known enough to be the subject of threats. Or, as one commentator put it, “[i]f you are not famous enough and the criminals do not extend the courtesy of first warning you that you may be victimized but simply surprise you one day with robbery, rape, or attempted murder, then you do not deserve the right to protect yourself with a handgun.”246

Additionally, requirements that applicants regularly carry large sums of cash will exclude substantially the same groups.247 Those not possessing highly valuable objects obviously do not need to protect them, but that does not mean that the poor are not at risk from violent crime. Carrying valuables risks robbery, but those living in high crime areas are also at risk. To say that the risks faced by the rich are more important than those faced by the poor is contrary not only to any sense of equality, but also to common decency. Additionally, there is no clear reason why those carrying valuables are categorically more at risk than those living in high crime areas. Issuing CCW licenses simply because the applicant carries valuables, while denying licenses to those living in high crime areas, has no rational relation to the ostensible goal of proper need criteria, to issue licenses to those at risk from violence assault.
Rules requiring applicants to have “a special need for the license distinguishable from that of other persons similarly situated” virtually assures unequal issuance. Any ordinary applicant will presumably have someone “similarly situated,” so technically this rule will grant licenses only to those in unique circumstances. That many may face similar risks of violent assault demonstrates that society is dangerous, not that those risks are irrelevant. Holding that only unique risks are sufficient to create a proper need both obscures what risks are actually significant enough to be of greater magnitude than those faced by ordinary citizens and provides no useful framework for judging risk. This relative measure of need is a strange test; it does not measure an applicant’s objective or rational need for a license, but only his need relative to someone similarly situated. Technically, then one whose peers face a low level of risk should be eligible, while another applicant facing more serious risks than the first applicant, but only those risks faced by all his peers, would be ineligible. New York City’s use of that rule demonstrates that the relative needs test is never taken to its logical end, but instead that unique circumstances often means only those experienced by the rich and powerful.

Finally, issuers that create expensive, time consuming, and generally burdensome application procedures will exclude those unable to pay the expenses needed to complete the process. New York City is a prime example of that practice: “The paper work and delaying tactics employed by the New York City Police Department are usually enough to discourage even the most avid…” Only those unburdened by high licensing fees and able to avoid, whether through influence or attorneys, procedural mazes will obtain CCW licenses.
Proper need criteria are not connected to the issue of whether firearms are useful for self-defense because a CCW licensing system presupposes some utility; and issuers not accepting as proper need the risks faced by ordinary citizens do not rationally apply a need standard, but instead distort any coherent meaning of need with mere personal preference. The primary effect of many issuer interpretations of proper need is the disenfranchisement of the ordinary, the poor, and minorities. These proper need standards fail to measure actual need for a CCW license, and instead confine need to situations faced primarily by the rich and well connected. Those who are subject to explicit threats, or those carrying large sums of cash, or those facing uniquely dangerous circumstances clearly would have need for a CCW license; however, there is no reason why those threatened, or those carrying valuables, or those in some undefined unique situation are all categorically more at risk and in need of a CCW license than the general population or those simply living and working in a high crime neighborhood. Issuers using these standards are not engaging in any rational determination of an applicant’s need, but are effectively denying permits to those with the least political power: minorities, the poor, and even just the ordinary population. Thus, the standards often used by discretionary license issuers arbitrarily deny benefits otherwise conferred by law and violate the rule of law.

Another standard greatly affecting CCW license eligibility in discretionary issuance systems is one’s place of residence. Of the ten discretionary licensing states, nine issue licenses on a county or municipal level, usually through a local law enforcement officer. The nine states authorizing local officials the broad discretionary authority to grant permits will inevitably create variances in issuance standards within
each state. Because issuers in a discretionary system must make the concrete licensing standards, those standards will be made by local officials and, thus, prevent any state uniformity in licensing rules. For example, New York’s issuers vary widely between either placing severe restrictions upon carry licenses or not, with “about half of the issuing officers in the State adher[ing] to a policy of restrictions on pistol permits which are not specifically mentioned in the statute.” The result is that some localities will employ substantially more liberal issuance rules than others; therefore, an applicant’s license eligibility, even when under the same state CCW statute, is greatly dependant upon his place of residence.

Because every issuer and resident in a state is subject to the same CCW statute, the fact that an applicant’s county of residence is crucial to his actual license eligibility may violate the rule of law. If this distinction between applicant eligibility based upon area of residence is arbitrary, then the divergent issuer created rules derived from a common statute would violate the rule of law’s requirement to treat similar cases similarly, i.e.: that issuers should not arbitrarily deny to some the benefits otherwise conferred by the law. This geographical distinction is arbitrary.

First, some argue that the geographical distinction is irrelevant because the local licensing rules are, ideally, applied equally to all within that locality. If each locality fairly applies its rules, then all are treated equally within each jurisdiction. However, even if each locality does fairly administer its rules, the state law is still not uniformly applied across the state and eligibility within the state is still partially a factor of geography. The significance of the geographical distinction is apparent in its anomalous licensing effects. For instance, if a locality refuses to issue any licenses, then that policy
equally affects all in the locality; however, such a policy denies those subject to it access to benefits available to others in the state, based solely upon their places of residence.\textsuperscript{257} Additionally, residents of a liberal issuance jurisdiction that possess a CCW license can carry in localities that either do not issue licenses or only very infrequently issue licenses.\textsuperscript{258} For example, Maine’s Supreme Court considered the “anomalous result” from allowing a local CCW license issuer to use eligibility criteria stricter than other issuers:

> It is undisputed that a license granted by the municipality of residence entitles the licensee to carry a concealed weapon anywhere in the State. Thus, an individual obtaining a license from another town in the State could carry a concealed weapon anywhere in Maine, including Freeport, even though he could not qualify under Freeport’s ordinance requirements. A resident of Freeport, on the other hand, who did meet the statutory condition but lacked the additional eligibility standard of the ordinance could not carry a concealed weapon anywhere in the State. Obviously, the need for uniform application of the concealed weapons law precludes local regulation resulting in such inconsistencies.\textsuperscript{259}

The geographical distinction does affect the eligibility of applicants and treats people subject to the same state law differently, and thus requires justification.

The rule of law requires that issuers treat people in similar situations similarly. State CCW statutes authorize the issuance of CCW licenses, a legal benefit, and also prescribe statewide eligibility standards, which for discretionary licensing systems are proper need and suitability criteria.\textsuperscript{260} Any factors substantially affecting eligibility should come from those statutory standards;\textsuperscript{261} therefore, if the geographical distinction has a rational basis in the CCW statute’s eligibility criteria, then the distinction is a legitimate interpretation or consequence from the statute, rather than an arbitrary rule or result that unfairly denies legal benefits to certain populations.

Some courts dealing with this issue have ruled that the geographical distinction is rational because different jurisdictions pose different circumstances that justify different
issuance criteria. One court ruled that New York issuers’ lack of a uniform policy concerning restrictions placed on licenses, the use of which can dramatically alter issuance policies and effects, are justified:

The further contentions that restrictions do not further any legitimate county interest, are arbitrary and capricious, and improperly distinguish or discriminate between residents of this county and residents of counties that do not utilize restrictions, are also without merit. The variations in population density, composition, and geographical location provide ample grounds upon which to exercise the discretion provided by statute. The circumstances which exist in New York City are significantly different than those which exist in Oswego or Putnam Counties. Such circumstances must be considered in the exercise of the licensing officer’s discretion. The licensing officers in each county are in the best position to determine whether any interest of the population of their county is furthered by the use of restrictions on pistol licenses. The mere fact that some licensing officers choose to utilize restrictions while others do not does not make their use arbitrary or capricious. Such a determination can only be made on a case-by-case basis. California’s Supreme Court found geographical distinctions beyond dispute: “That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority.” However, the issue is not whether different areas should have different gun laws, but whether applying the same gun law, in this case a state CCW statute, differently within the same state is legitimate.

Discretionary CCW licensing statutes all use proper need and suitable person criteria to determine license eligibility. With proper need and suitability as the statutory basis for issuing CCW licenses, all issuer created eligibility standards should be rationally related to providing concrete interpretations of the statutory criteria, and thus facilitating enforcement of the statute, which is the reason why issuers must create licensing rules in the first place. If the geographical distinction is rational, rather than arbitrary, it must be because the distinction is rationally related to determining proper need or suitability.
Proper need is logically connected to the risk one faces from mortal danger, or the likely necessity of having to legally employ lethal force.\textsuperscript{267} One’s place of residence can affect one’s risk from violent crime; certainly those living in a high crime urban area are more at risk than those living in an affluent suburb. Justifying the geographical distinction upon differences in the risks one faces from living in different localities is dependant upon accepting the generic risks faced in the ordinary course of life as relevant to determining proper need. If only specified threats, versus statistical threats based upon geographical crime rates, are relevant, then one’s place of residence is not particularly important in determining whether the specified threats are sufficient to constitute proper need. The geographical distinction must rely on the risks faced simply by living or working in a particular location for that distinction to be more than insignificantly relevant to proper need criteria.\textsuperscript{268}

If the geographical distinction is rationally related to proper need, then geography must play a role in establishing an applicant’s risk and subsequent need; however, no discretionary issuer has ruled that the generic risks faced by living in a certain area are dispositive in determining proper need.\textsuperscript{269} In fact, the only state to consider whether living in a high crime area should be relevant to proper need answered in the negative.\textsuperscript{270} Additionally, states that require applicants to demonstrate a specific threat, or demonstrate that they regularly carry large sums of cash, or that they face dangers beyond those faced by ordinary people, all implicitly deny the relevance of geography in determining proper need; otherwise, they would not ignore, in favor of the previous standards, the risks faced simply by living in a high crime area.\textsuperscript{271} If geography is not related to risk, then the geographical distinction is not rationally related to statutory
proper need criteria; however, despite no state having claimed the relevance of geography to risk, and many having an implied denial of its relevance through their issuance policies, almost all discretionary licensing states have a geographical distinction.\textsuperscript{272}

If states are secretly using geographical risk as a factor in determining proper cause, the licensing rates show a great miscalculation of risk. Crime rates tend to be higher in urban areas than in rural or suburban neighborhoods, but for most discretionary licensing states, issuers in rural areas grant licenses more freely than urban issuers.\textsuperscript{273} The geographical distinction in practice generally severely restricts or prohibits citizens in urban areas from obtaining a CCW license while often allowing otherwise identical residents of suburban and rural areas to obtain licenses.\textsuperscript{274} If geographical risks are calculated into proper need criteria, presumably those at the highest statistical risk from crime, those in high crime areas, would receive more licenses than those in low crime areas; however, the actual situation is the just the opposite, with those in low crime areas more freely obtaining licenses, while those in high crime areas receive almost no licenses.\textsuperscript{275} Therefore, it is unlikely that local discretionary license issuers are using geographical crime risks as a factor in determining proper need. Because discretionary issuers do not claim, or even imply, any considered geographical relevance in determining an applicant’s risk or proper need, the geographical distinction is not rationally related to any statutory proper need criterion.

Discretionary licensing statutes also contain suitability criteria that could form a rational basis for the geographical distinction.\textsuperscript{276} For suitability criteria to justify geographical distinctions, geography must rationally relate to an applicant’s suitability. There is no compelling reason why one’s place of residence should, in itself, be relevant
to one’s suitability for a CCW license. The geographical distinction usually divides those in urban areas from those in suburban or rural areas. Those living in urban neighborhoods are not clearly or categorically less suitable or trustworthy than those living in suburban or rural areas, especially because all licensing laws already exclude criminals and the mentally ill. There is no rational reason why issuers should deny licenses to those living in urban areas, based upon their suitability, while issuing to those in suburban and rural areas. The geographical distinction’s exclusion of many urban citizens from eligibility may rest upon an illegitimate suitability policy; specifically, that urban areas tend to be home to more minorities than suburban or rural areas. For example, in California an applicant’s chance of receiving a CCW license are five times greater if he resides in a county that has a below average black population. To justify the geographical distinction upon an interpretation of a statutory suitability criterion risks the implication that issuers are using either an arbitrary, or an outright racist, licensing policy.

Finally, the geographical distinction might be rationally based upon a CCW statute through implication; because discretionary licensing statutes delegate discretionary powers to local license issuers, then the statute must intend or authorize local issuers to act independently in creating issuance standards, regardless of any inevitable geographical inconsistencies in the application of the statute. Because the geographical distinction is not rationally based in the statute’s explicit eligibility criteria, the proper need and suitability criteria, it is unclear what rational basis justifies divergent application of the same statute. The inevitability of arbitrary applications of a law does
not justify itself, it simply establishes a procedural flaw in the underlying licensing system.

For the geographical distinction to be legitimate, it must be rationally derived from some element of the CCW statute. The vague eligibility criteria in discretionary CCW statutes are the primary source for issuer rule making power, but those criteria do not justify the geographical distinction. Some other unresolved policy issue within the CCW statute must provide a rational basis for the distinction; otherwise, it is arbitrary. One possibility is that the issuer must determine the usefulness of a firearm for self-defense. Although a licensing statute presumes that firearms possess some utility for self-protection, or else the statute would have simply banned all carrying of firearms, a delegation of broad discretion to local issuers may imply a mandate to local issuers to determine whether their particular jurisdiction poses an exception to the general statutory policy of recognizing some utility in firearms. For this mandate to justify the geographical distinction a local determination of the effectiveness of firearms for self-defense must concern local geographical considerations; otherwise, there is no reason for the statute to leave that consideration to local officials.

Although a firearm is either useful for self-defense or not, there may exist mitigating circumstances; however, those circumstances are not related to the jurisdiction in which a person resides. For example, someone with extensive firearms training would almost certainly derive more utility out of a defensive firearm than someone who has never before fired a gun, but that has nothing to do with geography. There is no apparent reason why two people, one of which lives in a city and the other in the suburbs, but who are otherwise identical, would find a firearm of different utility.
If the difference is that for some reason firearms are less effective when used in a
city rather than in a suburb or farm, then the clear solution is to not allow license holders
to carry in cities, rather than to grant licenses to non-city dwellers, thus allowing them to
carry in cities, and not to urbanites, thus not allowing them to carry outside the city.
Additionally, if a firearm is less useful in an urban environment, then the statute should
explicitly prohibit carrying in cities, rather than allowing local issuers to categorically
deny city dwellers. Local issuance creates anomalous licensing effects that a uniform
state-wide policy would avoid. For example, if city issuers should deny licenses in their
jurisdiction, rural and suburban residents that have CCW licenses can still legally carry in
those cities.²⁸⁰ Also, one city might not issue licenses because it has determined that
firearms are not useful in a city, while another city in the same state might freely issue
licenses. Delegating local issuers the power to make the policy determination of whether
firearms are useful for self-defense leads to anomalous and contradictory results. A state-
wide policy would avoid these problems. Therefore, the geographical distinction has no
rational basis in a CCW statute’s unlikely and irrational implied delegation to local
issuers of the authority to override a licensing statute’s presumed policy conclusion that
firearms are useful for self-defense.

While licensing statutes presume that any dangers from allowing eligible citizens
to carry firearms are less than the benefits, or else the statute would have simply
prohibited all carrying of firearms, a delegation of local discretion may imply that local
issuers have the authority to conclude that even if firearms do generally possess some
utility self-defense, local conditions increase the dangers from carrying firearms and thus
the general state policy should be locally contradicted. To justify the geographical
distinction, any increased dangers from carrying firearms must be due to local conditions, or else there is no reason to delegate such decisions to local authorities.

There is no clear reason why someone that resides in a city is more dangerous when carrying a firearm than someone who resides in the suburbs or rural regions. The obvious dangers from allowing people to carry concealed handguns are that the person will misuse the firearm, such as committing a crime with it, or will negligently cause a firearm accident, such as experiencing an accidental discharge from improper firearm handling. Licensing statutes already disqualify criminals and the mentally ill, so there is no reason to believe that just because someone lives in a city that he is less trustworthy than his suburban or rural counterparts. If the issue is not that those living in a city are categorically less trustworthy, but that carrying a firearm in a city increases anyone’s chance of misusing a firearm, then, as in the previous case, the rational solution is to ban all from carrying in cities, rather than banning only those who live in cities. Therefore, no rational basis for the geographical distinction exists in an irrational and unlikely implied statutory delegation to local issuers of authority to override a licensing statute’s presumed policy conclusion that firearms are not so dangerous as to nullify any countervailing utility.

Colorado’s Legislature replaced its discretionary licensing system with a non-discretionary system to end the arbitrary variations in licensing policies across the state:

The general assembly finds that … [t]here exists a widespread inconsistency among jurisdictions within the state with regard to the issuance of permits to carry concealed handguns … Inconsistency results in the arbitrary and capricious denial of permits to carry concealed handguns based on the jurisdiction of residence rather than the qualifications for obtaining a permit.281

Oklahoma’s Legislature came to the same conclusion: “The Legislature finds as a matter of public policy and fact that it is necessary to provide statewide uniform standards for
issuing licenses to carry concealed handguns for lawful self-defense and self-protection..."282

The legal benefit of a CCW license is granted pursuant to state statute in all licensing states. For issuers to apply the CCW statute inconsistently across a state requires some justification for that inconsistency. The criteria for issuing CCW licenses are contained within the licensing statute; therefore, any distinction between applicants that substantially affects their eligibility must come from a rational interpretation of the statute, or else the distinction serves only to arbitrarily deny benefits. The inconsistencies in the application of the same statutory eligibility criteria among local license issuers, the geographical distinction, are not rationally based upon any CCW statute. The geographical distinction arbitrarily denies legal benefits to those residing in the wrong jurisdiction, treating similar cases dissimilarly. Therefore, the geographical distinction is contrary to the rule of law. That arbitrary geographical distinctions are inevitable in any licensing system delegating broad discretion to local officials only demonstrates that all CCW statutes delegating broad discretion to local issuers will inevitably violate the rule of law.

d. That Discretionary CCW Licensing Laws Do Not Apply Equally to All

The rule of law demands that laws control government actions and that the laws apply equally to all. When government officials fail to apply the law, in deference to other forces, such as the political power of those to whom the officials must apply the law, then the law has failed to regulate government behavior and society is subject to the rule of man, not law. If government officials apply the law arbitrarily, then the law will reflect the whims of officials. Discretionary CCW licensing systems violate the rule of
law through allowing license issuers to arbitrarily issue licenses based not upon the law, but upon personal opinion and political bias.

States using a non-mandatory interpretation of “may issue” immediately violate the rule of law through authorizing issuers to arbitrarily create issuance standards without any regard to the statutory standards or any consistent application of those arbitrary standards; in essence, non-mandatory “may issue” states empower issues to act wholly arbitrarily. Authorizing issuers to ignore the statutory standards places the issuer above the law and makes any equal application of the law dependant upon the personal preferences of the issuer.

Discretionary statutes that limit an issuer’s discretion to interpreting undefined statutory standards still often violate the rule of law. If issuers create eligibility standards that are not rationally related to the statutory standards, then those issuers have arbitrarily denied the benefits of the law. Whether issuers do so through arbitrary definitions of proper need or arbitrary geographical distinctions, the equality of the law is violated because those standards will deny some applicants of a legal benefit for reasons not rooted in the law, thus treating similar cases dissimilarly. Even if issuers do operate under eligibility standards based upon statute, many still ignore the law and grant licenses to those with political influence while using the same rules to deny licenses to those of little political influence or official favor.

Contrariwise, nondiscretionary licensing systems do not run afoul of the rule of law. Nondiscretionary license issuers do not have the authority to create issuance standards outright and the statutory standards are definite enough that issuers do not gain meaningful rule making power through applying them; therefore, nondiscretionary
issuers must operate within the standards provided by statute because they cannot create contrary standards. Additionally, because nondiscretionary issuers operate under a clear statute, they have little ability to misapply the statutory standards in deference to non-legal considerations, such as an applicant’s political connections or wealth. While discretionary issuers have wide latitude in issuing licenses, which can obscure corrupt practices under the guise of discretion, nondiscretionary issuers have no such cover. Therefore, the frequent rule of law abuses, through unequal application of the law, found in discretionary licensing systems are very infrequent in nondiscretionary systems. Because discretionary CCW license issuers act with little accountability or oversight, whether they follow and fairly apply the law is dependant upon an issuer’s desire to do so. As a result, discretionary issuers frequently violate the rule of law.

4. Separation of Powers Doctrine

The political theory of the separation of powers is closely linked with the rule of law ideal. Each aims for a limited government providing rational governance; and each views any state exercise of unrestrained and arbitrary power as a threat to the fundamental values of civilized society. While the rule of law ideal shows how government ought to rule, the separation of powers doctrine shows how that ideal is often compromised; Montesquieu, the father of separation of powers doctrine, warned against ignoring it:

"Political liberty … is there only when there is no abuse of power: but constant experience shews us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit. … To prevent the abuse of power, 'tis necessary that by the very disposition of things power should be a check to power." The United States has embraced Montesquieu’s position since its founding; James Madison wrote that “If men were angels, no government would be necessary. If angels
were to govern men, neither external nor internal controls on government would be necessary." The three traditional branches of government, the legislature, the executive, and the judiciary, are combined only at the risk of creating a government of tyranny and arbitrariness. Unfortunately, administrative agencies frequently disregard Madison’s wisdom and combine government functions within one body; a combination that threatens to become, as A.V. Dicey judged, “the insurmountable flaw of the administrative state.”

Although no perfect definitions of each branch of government are possible, reasonably effective definitions are possible. The legislative branch promulgates general rules regulating citizen and government behavior in order to achieve a particular social policy. The executive branch executes the laws. Executing laws presupposes the existence of laws, and subsequently should confine executive powers to enforcing existing laws. Therefore, the executive exercise of power is legitimate only when it reasonably enforces existing legislation. The scope of that power is wider than it initially appears:

It should be emphasized that this requirement in no way implies that the executive branch’s power should somehow be confined to the performance of ‘ministerial’ functions, bereft of any room for the exercise of creativity, judgment, or discretion. All it means is that, unless some other specifically delegated executive branch power applies, the executive branch must be exercising that creativity, judgment, or discretion in an ‘implementational’ context. In other words, the executive branch must be interpreting or enforcing a legislative choice or judgment; its actions cannot amount to the exercise of free-standing legislative power.

The legislative and executive branches begin to merge when an executive creates policy decisions that it then enforces, rather than simply enforcing the policy choices made by the legislature. If CCW license issuers are creating policy not reflected in the CCW statute, then they are acting with both legislative and executive powers.
License issuers operating under a non-mandatory interpretation of “may issue” are exercising both legislative and executive powers. When an issuer can either accept or deny a license applicant that otherwise meets the statutory eligibility criteria, then that issuer is authorized to create new eligibility criteria at will and is thus able to act beyond the policy and language of the statute. Without being bound to the statute, the statute is not really law, but simply an optional guideline for the issuer to consider. Whatever CCW policy that issuer wishes to enforce when issuing licenses is the law; therefore, issuers operating under a non-mandatory interpretation of “may issue” are both the legislator and executor of the CCW law, in violation of the separation of powers doctrine.

Discretionary licensing statutes contain two main eligibility standards: suitability and proper need. Discretionary issuers acting with executive, rather than legislative, powers will issue licenses solely according to eligibility criteria rationally based upon the statutory criteria. Issuers enforcing vague suitability criteria do not typically engage in policy making. Discretionary statutes usually explicitly disqualify certain applicants: criminals, those otherwise prohibited from owning firearms, the mentally ill, etc. Although discretionary statutes also often use a vague suitability criterion, most issuer interpretations of that criterion are rationally related to the statute. Suitability is linked to whether an applicant is trustworthy enough to carry a concealed firearm; therefore, suitability standards should concern those traits or histories that make an applicant untrustworthy. Issuers can make the interpreted suitability standards objective, as nondiscretionary licensing statutes do. Objective suitability standards will, barring extreme examples, bear a rational relation to a CCW statute’s vague suitability criterion
and its policy of disqualifying untrustworthy applicants and, therefore, not be an exercise of legislative power.

Suitability standards will involve legislative power if they involve policy creation. Standards in no way related to any honest interpretation of suitability, such as granting licenses only to celebrities or political allies, or never issuing licenses to minorities or women, would constitute a creation of policy and an exercise of legislative power. Additionally, a licensing state presupposes that some citizens are eligible for a license, and that others are not. A suitability standard that categorically holds all as suitable or unsuitable not only creates policy, but would also directly contradict the statutory policy. Any reasonable interpretation of suitability, however, would be a legitimate exercise of an issuer’s executive power.

The other vague statutory criteria that discretionary issuers must interpret are proper need criteria. For issuers to not exercise legislative powers, their interpreted need standards must further the statutory policies; the issuer interpreted need standards must be rationally based upon the statutory policy expressed within its need criterion. However, CCW statutes containing an undefined proper need eligibility criterion express no coherent CCW policy choices. Because vague statutory need criteria do not express any coherent policy choice, issuers must make policy decisions in order to create meaningful proper need standards.

Discretionary statutes’ proper need criteria presuppose that some applicants will have a proper need while others will not, otherwise the need criterion is meaningless. Therefore, proper need criteria cannot reasonably mean either that everyone has a proper need or that no one has a proper need. There is a lot of range between almost everyone
qualifying for a license and effectively no one qualifying, but issuers must make concrete
proper need standards falling somewhere between those two extremes. Issuers must
conform their interpretations to furthering the policy choices made within the CCW
statute in order to avoid usurping legislative powers.

However, there is no rational way for an issuer to create a proper need standard
without reference to a policy not expressed in the statute. Whether an individual has a
justifiable reason, or a proper need, to carry a concealed firearm is a highly contentious
political issue. CCW statutes that do not provide a definition of proper need have
failed to express any policy choice concerning the various political stances on CCW.
Issuers must decide whether almost everyone has proper need, and thus use their
discretion to approximate a nondiscretionary licensing system, or whether almost no one
has proper need, and thus use their discretion to approximate a state prohibiting CCW.
There is no expressed policy within a discretionary CCW statute for an issuer to use in
determining which interpretation of proper need to take, and thus an issuer must first
settle the statute’s unresolved policy issues in order to apply the statute. The issuers’
ability to interpret proper need gives them the power to determine the practical substance
of their states’ CCW policy. Statutes containing undefined proper need eligibility criteria
delegate CCW license issuers the power to create the policies effectuated by the CCW
statute and, therefore, violate the separation of powers doctrine through granting license
issuers both legislative and executive powers.

Statutes containing a vague proper need criterion delegate to those applying the
law the power to create the policy left unresolved by the statute; this delegation is not
necessarily taken up by the license issuer. New Jersey’s supreme court, in interpreting
the state’s CCW statute, has resolved the policy issues not answered in the statute.\textsuperscript{304} New Jersey’s CCW statute uses “has a justifiable need to carry a handgun” as an eligibility criterion.\textsuperscript{305} The statute does not define what constitutes a “justifiable need,” but the only legitimate use of a concealed handgun is for self-defense, so logically “justifiable need” should correlate to the risks an applicant faces that might require him to resort to the use of lethal force in self-defense.\textsuperscript{306} That New Jersey’s statute licenses, rather than prohibits, the carrying of concealed firearms demonstrates the CCW statute’s policy choice recognizing some self-defense utility form carrying a concealed firearm. New Jersey’s Supreme Court settled the statutorily unanswered issue of what amount of risk should justify the issuance of a license by holding that firearms never have any self-defense utility and, therefore, that no one has a justifiable need.\textsuperscript{307} The court’s reasoning and conclusion effectively nullified New Jersey’s CCW statute, overturning the statute’s policy choice and replacing the licensing statute with a judicial prohibition.\textsuperscript{308} New Jersey’s judicial prohibition depends upon the policy conclusion that firearms never are useful for self-defense, only posing a danger to society; if New Jersey’s supreme court had come to the opposite policy conclusion, that firearms offer great utility and little danger, then it would have presumably mandated New Jersey issuers to grant licenses liberally.\textsuperscript{309} New Jersey has not commingled legislative and executive powers, but instead has allowed its Supreme Court to judicially legislate a repeal of the licensing statute, and in so doing has effectively nullified any executive power to apply the licensing statute.\textsuperscript{310} New Jersey illustrates not only why vague proper need criteria require a policy choice to interpret, and thus delegate legislative power, but also the theoretical limits of that otherwise broad delegation.
Discretionary license issuers not only exercise legislative and executive powers, but often exercise judicial powers as well. Licensing is a procedure that often blurs the distinction between executive and judicial powers.\(^3\) However, no clear distinction is presently necessary because almost all discretionary CCW license issuers are subject to no meaningful judicial review.\(^4\) Without any meaningful judicial review, the only judge of an issuer’s actions is himself. Issuers, therefore, exercise all three forms of state power: legislating CCW policy, executing that policy, and adjudicating controversies arising from that policy.

Delaware is a clear example of discretionary licensing systems’ gross violation of the separation of powers doctrine. Delaware’s CCW statute includes vague suitability and proper need criteria that provide license issuers with “absolute discretion to grant or deny licenses.”\(^5\) Delaware’s “General Assembly has given the court [the license issuer] the ultimate power of enforcement.”\(^6\) Issuers are not even required to grant licenses to applicants’ that satisfy the statutory eligibility criteria, rendering the Delaware’s statute a nonbinding guideline rather than a substantive law.\(^7\) That “absolute discretion” is not subject to any review or appeal.\(^8\) Delaware issuers have the authority to create their state’s licensing policy and enforce their policy, all without any judicial review. Delaware CCW license issuers, therefore, act with the combined powers of all three branches of government, in obvious violation of the separation of powers doctrine.

Modern administrative agencies often violate the separation of powers doctrine, prompting some to argue that certain exceptions ought to apply to the separation of powers doctrine.\(^9\) The exception often cited in support of broad issuer discretion is that law enforcement, the usual issuer of CCW licenses,\(^1\) has some special expertise that
justifies their discretion. Administrative agencies are usually granted the power to create rules when the subject matter is so technical or complex that legislators have neither the time nor knowledge to properly craft the rules. However, there is nothing technical about CCW licensing. Thirty-seven states use a nondiscretionary licensing system, all utilizing no substantial issuer discretion. Even if legislatures wanted to use law enforcement expertise during license issuance, the CCW statutes should still indicate some legislative policy to guide that expertise, rather than simply leaving the policy issues unresolved. There is no justification for authorizing CCW license issuers to create a state’s CCW policy; licensing rules are a highly contentious political issue, not a highly technical issue.

Agencies possessing legislative, executive, and judicial powers, as discretionary CCW issuers possess, have no institutional limitations upon their power and act without accountability. Whether such agencies follow the rule of law is simply a matter of agency preference; no discretionary CCW license issuers follow the rule of law. Within the realm of CCW licensing, discretionary issuers have the powers of a tyrant.

IV. RULE OF LAW BASED LEGAL CHALLENGES TO CCW DISCRETIONARY LICENSING SYSTEMS

Rule of law violations inherent in discretionary licensing systems have spawned legal challenges; however, courts have not been receptive to addressing CCW licensing abuses. Almost all rule of law based challenges to discretionary licensing systems have centered on various due process claims. These claims are routinely rejected by courts.
### 1. Void for Vagueness and Standardless Delegation Challenges

The claim most closely aligned with the rule of law ideal is that discretionary licensing systems are unconstitutionally vague. The Supreme Court has explained the vagueness doctrine as:

The void-for-vagueness doctrine reflects the principle that ‘a statute which either forbids or requires the doing of an act in terms so vague that (persons) of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.’ The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.\(^324\)

The Supreme Court’s discussions on the problems posed by vague statutes mirrors rule of law concerns: “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an \textit{ad hoc} and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.”\(^325\)

When courts have applied the void for vagueness doctrine to discretionary CCW licensing statues, they have ruled it inapplicable: “The vagueness doctrine only applies when the challenged statute affects interests protected by the due process clause of the Fourteenth Amendment.”\(^326\) However, the Supreme Court has not held that position, instead holding that: “The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.”\(^327\)

Discretionary CCW statutes fail to resolve basic policy questions basic to the regulation of CCW licensing,\(^328\) thus failing to “reflect[] an authoritative choice among
competing social values”, failing to “provide explicit standards for those who apply them”, and resulting in “the danger of caprice and discrimination in the administration of the laws.” Undefined statutory proper need criteria lack policy choices, and thus lack any substantive meaning. Any application of these criteria requires a policy choice not settled within the CCW statute; therefore, those criteria are not substantively knowable without reference to the issuer’s unpublished and nonbinding policy preferences. All applications of statutorily undefined proper need criteria are vague. Although no void for vagueness challenge has succeeded, discretionary licensing systems are a textbook illustration of how vague statutes lead to arbitrary and discriminatory application.

Analogous to the void for vagueness doctrine are the common state constitutional prohibitions against standardless delegations of legislative powers to administrative agencies. As with the void for vagueness theory, prohibitions on standardless delegations are rooted in the rule of law ideal:

To a remarkable extent the delegation doctrine restates in a particular context the chief aspirations of the rule of law ideal. … The legitimacy of executive action traces ultimately to legislative grants … the delegation doctrine is designed to force adherence to the rule of law vision. Congress should fulfill its paramount duty, the executive should have the law’s guidance, and the courts should have reasonably clear legal benchmarks against which to assess executive behavior.

As with the previous challenges, standardless delegation challenges almost never succeed. A common judicial response to this challenge is:

Reasonable standards must be imposed where the Legislature delegates discretionary powers to an administrative officer. However, the policy of the Legislature and the standards to guide the administrative agency may be laid down in very broad and general terms. Such terms get precision from the knowledge and experience of men whose duty it is to administer the statutes, and then such statutes become reasonably certain guides in carrying out the will and intent of the Legislature.

The court is arguing that the broad grant of discretion to the issuer will allow him to use his expertise to provide concrete meaning to the statute, thus furthering the “will and intent of the Legislature.” The problem is that the undefined proper need criteria,
contained in all discretionary statutes, represent a legislative failure to make basic policy choices crucial to a CCW licensing system. The license issuer cannot give definite meaning to a statute in furtherance of the legislative will when the legislative will was not exercised. Discretionary issuers are not simply giving meaning to the legislature’s policy choices, they are creating CCW policy. New Jersey’s Supreme Court was unusually forthright when it rejected a standardless delegation challenge to its CCW statute because it observed that New Jersey courts only “pay lip service to the doctrine.”

2. Equal Protection Challenges

Another cause of action against discretionary CCW licensing systems is equal protection claims. These claims touch upon the rule of law’s demand that the law be the supreme arbiter of state power and apply to all equally. Equal protection usually applies in two ways:

The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws.’ Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. … Unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

Courts have almost unanimously held that CCW licensing does not impinge upon any fundamental right. Thus, only the use of a suspect characteristic in licensing standards, or the use of irrational licensing standards, will violate equal protection; one federal court held:

[An applicant] has no property right in the denial of a pistol permit. Alabama gives county sheriffs the discretion to issue or deny a pistol license … No § 1983 cause of action exists for the exercise of this discretion in favor of denial of the permit absent some constitutionally impermissible consideration.
No current discretionary statutes expressly discriminate against a suspect class.341 However, because discretionary issuers create the substantive policy behind the issuance standards they enforce,342 a court may find that issuers who create and enforce licensing rules based upon impermissible considerations have violated equal protection rights.343 The difficulty of this approach lies in discretionary issuers’ refusal to publish any meaningful licensing standards documenting their exercise their discretion, and their frequent refusal to reveal past licensing decisions that could allow an inference of an issuer’s operational licensing standards.344 Without that information, the content of any discretionary issuer’s interpreted licensing standards are often unknown and subsequently unassailable.345 It is difficult to argue that a law uses impermissible distinctions when its distinctions are unknown. Anecdotal evidence strongly suggests that many discretionary issuers grant licenses in corrupt or intolerably discriminatory manners,346 but the frequent absence of meaningful issuance information hampers the any efforts to construct comprehensive equal protection cases against discretionary issuers.347

The second level of due process analysis, that the “classification rationally further a legitimate state interest,” is very difficult to establish. The Supreme Court employs the permissive rational basis test for classifications not based upon suspect classes and not affecting fundamental rights:

The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.348 On a few occasions courts have ruled that a discretionary statute’s eligibility criteria to not bear a rational relation to a legitimate end, but those cases dealt with criteria peripheral to those granting license issuers broad discretionary powers.349
Although it is unlikely that courts would hold a discretionary CCW statute’s eligibility standards as not being rationally based upon a legitimate end, there are two possible equal protection challenges against a CCW statute’s licensing standards. First, states using a non-mandatory interpretation of “may issue” authorize CCW license issuers to create the standards by which they will issue licenses while failing to stipulate that the same standards apply to all applicants. There is no obvious rational basis for a CCW statute to authorize issuers to apply different licensing standards to different applicants without notice or justification. The four states expressly using a non-mandatory interpretation of “may issue” all do so not because of any explicit statutory language indicating that “may issue” ought to be read broadly, but because their respective state courts have interpreted each state’s CCW statute to mean “may issue” in the widest possible sense. A court is unlikely to hold that its state’s judicial interpretation of a statute has no rational basis to furthering the legitimate ends of that statute.

Second, because all discretionary statutes contain undefined proper need criteria, if proper need has no possible rational meaning, there cannot be a rational basis for those criteria. Need is unquantifiable and no plausible standard of need can do more than arbitrarily distinguish applicants. A statutory standard that is only capable of arbitrarily distinguishing between applicants is not rationally based upon anything; a statute containing a standard that could mean almost anything simply says that applicants are eligible as long as they are not arbitrarily ineligible. There can be no rational basis for a standard devoid of rational meaning. However, it is highly unlikely that courts will agree. The word “need” is not devoid of linguistic meaning; its inadequacy is in being
incapable of providing substantive meaning in the context of CCW licensing. The rational basis test is a permissive standard and courts often afford legislatures deference in these cases. It is therefore improbable that a court will rule that undefined proper need statutory criteria violate equal protection standards because their arbitrariness classifies applicants in a manner lacking any rational basis in the legitimate ends of the statute.

Discretionary issuance systems may be vulnerable to one other type of equal protection challenge. Courts recently have been using a purpose scrutiny test that examines the rational basis of a law’s intended aims, rather than the government’s stated aims. This test is sometimes called “rational basis with bite.” Under this standard, a court will examine why a law was enacted, rather than whether the law currently serves a valid state aim; the Supreme Court stated:

Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection…

Although courts do not consistently use purpose scrutiny, it may present a serious equal protection challenge to discretionary licensing systems. Numerous states enacted discretionary licensing statutes for less than admirable motives; there is significant evidence that the New York and California CCW statutes were products of racial and social animus. No court has considered these issues, but such an approach may offer the best chances of successfully challenging discretionary licensing statutes on equal protection grounds.

Courts have not remedied, and are unlikely to remedy, the rule of law and separation of powers abuses by discretionary licensing systems. Discretionary CCW
The statutes are almost a century old; it is highly improbable that discretionary license issuers will start to voluntarily comply with the basic tenets of the rule of law anytime soon. The only realistic solution for these rule of law abuses is for state legislatures to enact nondiscretionary CCW statutes, either banning CCW or issuing licenses through a nondiscretionary system. However, state legislatures are the cause of the problem; because state legislatures failed to resolve the policy questions central to the regulation of CCW, instead enacting statutes lacking sufficient policy content, they delegated their legislative powers to make policy choices to the license issuers, who subsequently act outside the bounds of the rule of law. State legislatures must remedy their past failures and enact laws expressing meaningful policy choices:

Administrative agencies thwart the Constitution’s attempt to provide limited government and effective representation[;] … congressional members should not be permitted to avoid controversial issues by delegating them to agencies. Agencies, beholden to no one, have little incentive to abide by the people’s mandate which is to provide reasonable decisions that are in the nation’s best interests.

V. CONCLUSIONS

A state must consider two questions before passing a CCW statute. First, the legislature must decide what should be the government’s policy towards the carrying of concealed weapons. This question first requires a constitutional answer to whether there is a binding legal force that restrains the legislature from enacting certain CCW policies. Usually there are no constitutional restraints upon a state legislature’s powers to regulate the carrying of concealed firearms. A state legislature must then decide what CCW policy is best for society. This question is usually empirical, concerning the practical questions of CCW: its relation to crime and violence, a firearm’s utility for protecting its possessor, the relation of CCW to the state’s overall firearm policies, etc. A legislature
should decide whether citizens ever ought to be legally permitted to carry concealed firearms, and, if so, specifically which qualities or circumstances should trigger that permission. Determining who, if anyone, ought to have state approval to carry should follow naturally from the legislature’s basic policy choices concerning CCW and gun control. If a legislature decides that carrying concealed firearms almost never provides any utility commensurate with any social costs imposed by firearms, that legislature should either prohibit CCW or severely restrict it. Contrariwise, if a legislature concludes that firearms empower many to successfully defend their lives with correspondingly minor costs, then that legislature should craft a CCW statute liberally granting its citizens permission to carry.

Regardless of a legislature’s policy conclusions concerning CCW, they must draft a statute expressing those conclusions. A state could decide to simply not regulate the carrying of concealed firearms, such as Vermont and Alaska have essentially done. Or a state could prohibit the concealed carrying of firearms, as two states do. If a state decides that it should regulate CCW, then the obvious approach is to enact a licensing system. Here there are two approaches: a discretionary or a nondiscretionary licensing system. However, discretionary licensing systems delegate the license issuers the power to make the policy choices that a legislature should have made before enacting a CCW statute. The consequence of that delegation of discretionary power is the creation of a licensing system outside the principles of the rule of law, where issuers exercise unfettered powers to create policy and arbitrarily grant or deny licenses. The second licensing regime, the “shall issue”, or nondiscretionary, system, clearly expresses the legislative policy conclusions within the CCW statute and restricts licenses issuers to
enforcing those policies, rather than creating them. The result is that “shall issue” licensing systems adhere to the rule of law ideal, while discretionary systems demonstrate the arbitrariness when the rule of man, not law, reigns.

The debate over states’ widespread adoption of “shall issue” laws frequently becomes muddled when those opposing “shall issue” statutes support discretionary systems. It is more likely that those opposed to “shall issue” licensing systems are opposed to the more liberal rate of license issuance under “shall issue” laws than discretionary issuance laws. Although supporters of discretionary licensing systems often argue that license issuers should have the discretion to reject applicants likely to misuse a firearm, the real concern often appears to be that “shall issue” laws will increase the population eligible for a license. For example, one prominent gun control organization states that: “These lenient laws, called ‘non-discretionary’ or ‘shall issue’ CCW laws, force law enforcement to issue concealed handgun permits to virtually anyone who does not have a felony conviction.” Whether a licensing system is discretionary does not necessarily determine whether it will issue licenses liberally; Alabama employs a discretionary system, but issues CCW licenses freely enough that many consider it a de facto “shall issue” state. Additionally, although no “shall issue” statute requires applicants to establish a specific need for a license, there is no reason why a “shall issue” law could not include an objective form of such a requirement. Therefore, whether a licensing system is discretionary or “shall issue” is not dispositive of how liberally it will issue licenses, although in practice it is very indicative.

Supporters of discretionary licensing systems must show not that it is a better policy to severely restrict CCW, but that granting CCW license issuers broad discretion is
good policy. Some argue that issuers should have the discretion to reject those applicants likely to pose a danger.\textsuperscript{372} However, a broad grant of discretion to license issuers is unnecessary to achieve that end. First, it is not obvious that using wholly objective suitability criteria does not exclude unsuitable applicants, especially when issuer discretion is used not to determine whether an applicant poses a danger, but instead, whether an applicant has a proper need. Also, many “shall issue” statutes include an escape clause, granting license issuers limited discretion to reject applicants when there is evidence that the applicant might pose some unspecified danger if licensed.\textsuperscript{373} Nearly a century of experience with discretionary CCW licensing systems has shown that issuers use their broad discretion not to expertly judge applicants based upon safety standards, but to arbitrarily deny whoever they disfavor.\textsuperscript{374} The abuses of discretion and blatant disregard for the rule of law common in discretionary licensing systems make them very difficult to defend.\textsuperscript{375} Those supporting issuer discretion are often really arguing for the frequent consequence of discretionary systems, the restriction of CCW licenses.

The indefensible abuses discretionary licensing systems foster reinforce the importance of the rule of law ideal. Those opposed to “shall issue” laws should stop defending discretionary licensing systems and instead support only what they want out of discretionary systems: they should either argue that states ought to ban CCW or that CCW ought to be licensed under a fair, but very restrictive, licensing system. Legislatures in states employing discretionary licensing systems should listen to those arguing for and against permissive CCW policies and decide what policy their state should take; laws embodying and fairly enforcing legislative policy conclusions should replace current discretionary statutes.
This appendix provides information on each state’s CCW legislation. The legislation and caselaw here considered are only those affecting the legality of carrying a concealed firearm for self-defense, not the open carrying of a firearm for hunting, transportation to a range, or other general allowances for carrying a firearm. The concern is not to examine all aspects of CCW legislation, but simply to investigate how a state determines who is qualified to carry a concealed firearm. Most states issue a CCW license, so the amount of discretion afforded the issuing authority in each state is of key importance. Not all discretion is here discussed, but only that discretion permitting the issuing authority to promulgate policy determining who is eligible for a CCW license. The issue discussed under each licensing state’s entry is whether the legislation allowing people carry concealed firearms, or the judicial interpretation of that statute, decides precisely which people are permitted to potentially carry a concealed firearm, or whether that determination is substantially left to the issuing authority. The state entries are divided between the four major legislative approaches to CCW, and then alphabetically within each part.
PART A: LIST OF EACH STATE'S CCW SYSTEM.

1. States Not Regulating CCW:
   - Alaska
   - Vermont

2. States Prohibiting CCW:
   - Illinois
   - Wisconsin

3. States Using a Discretionary Licensing System:
   - Alabama
   - California
   - Delaware
   - Hawaii
   - Iowa
   - Massachusetts
   - Maryland
   - New Jersey
   - New York
   - Rhode Island

4. States Using a Nondiscretionary Licensing System, by year when adopted
   - Washington (1961)
   - Maine (1981)
   - Indiana (1983)
   - North Dakota (1985)
   - Connecticut (before 1987)
   - New Hampshire (before 1987)
   - South Dakota (before 1987)
   - Florida (1987)
   - Georgia (1989)
   - Pennsylvania (1989)
   - West Virginia (1989)
   - Idaho (1990)
   - Oregon (1990)
   - Mississippi (1991)
   - Montana (1991)
   - Alaska (1994)
   - Arizona (1994)
   - Wyoming (1994)
   - Arkansas (1995)
Alaska employs two approaches to CCW: issuing a CCW permit\textsuperscript{376} and allowing citizens to carry a firearm concealed without a permit.\textsuperscript{377} Alaska passed a nondiscretionary licensing system in 1994, and then permitted citizens to carry without a permit in 2003. The licensing system still exists, but a permit is not required to carry within Alaska. The value of possessing a permit is that it allows its holder to carry in states that recognize an Alaskan CCW permit as valid for carrying in those states.\textsuperscript{378}

Vermont allows citizens to carry a firearm unless they carry “with the intent or avowed purpose of injuring a fellow man”.\textsuperscript{379} Vermont has not regulated the
carrying of concealed firearms since the Supreme Court of Vermont struck down a local licensing ordinance for being unconstitutional:

By the ordinance in question, no person can carry such weapon concealed on his person within the city of Rutland in any circumstances, nor for any purpose, without the permission of the mayor or chief of police in writing … The result is that Ordinance No. 10, so far as it relates to the carrying of a pistol, is inconsistent with, and repugnant to, the Constitution and the laws of the State, and it is therefore, to that extent, void.\textsuperscript{380}

PART C: STATES GENERALLY PROHIBITING THE CARRYING OF CONCEALED WEAPONS. (2 States)

\textit{Illinois}

Illinois outlaws the carrying of firearms except when on one’s property or place of business:

\begin{itemize}
\item[(a)] A person commits the offense of unlawful use of weapons when he knowingly:
\end{itemize}

\begin{itemize}
\item[(4)] Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol…\textsuperscript{381}
\end{itemize}

Beyond allowances for carrying on one’s property\textsuperscript{382} or place of business,\textsuperscript{383} Illinois allows an affirmative defense of necessity to the charge of unlawfully carrying a firearm.\textsuperscript{384} The necessity defense is only available when the defendant did not create the situation leading to his arrest and he believed his actions, the carrying of a firearm, to be necessary to avoid danger greater than that which may reasonably result from his actions.\textsuperscript{385} Such a situation is rare. When not on one’s property, Illinois has an almost total prohibition on the concealed carry of firearms by the general population.
Wisconsin

Wisconsin’s statute prohibiting the concealed carry of firearms has, on its face, almost no exceptions: “Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.” Wisconsin offers no statutory exception for those on their property or place of business. Until recently the only exception was for self defense; however, the Supreme Court of Wisconsin found that exception to be very narrow:

Any privilege that would justify carrying a concealed weapon must be extremely narrow and must not undermine the purpose of the statute. Like the crime of felon in possession of a firearm, the nature of carrying a concealed weapon only makes a privilege available on the ‘rarest of occasions.’ It will be difficult for a defendant to show that there was not a reasonable alternative to violating the law, and that the firearm was not possessed for longer than reasonably necessary.

However, recently the extent of Wisconsin’s ban on carrying concealed firearms is quite murky. In 1998 Wisconsin voters amended their constitution to include: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” The Supreme Court of Wisconsin subsequently ruled in State v. Hamdan that Wisconsin’s blanket prohibition of the carrying on concealed firearms violates its state’s constitution when applied in certain circumstances:

If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.

That ruling does not provide much guidance for determining when one can carry a concealed firearm when not on his property or place of business. The Hamdan court ruled that:
In circumstances where the State’s interest in restricting the right to keep and bear arms is minimal and the private interest in exercising the right is substantial, an individual needs a way to exercise the right without violating the law. We hold, in these circumstances, that regulations limiting a constitutional right to keep and bear arms must leave some realistic alternative means to exercise the right.390

A person carrying a concealed firearm must also do so for lawful purposes.391 Although in Hamdan the court found a shopkeeper carrying a concealed firearm constitutionally protected, and implied that such protection would usually apply to those on their property or place of business, it did not find that protection absolute in nature.392 The Hamdan court has created an affirmative defense for violations of Wisconsin’s CCW statute that rests on ambiguous factual determinations and obscure standards, offering those wishing to know when carrying a concealed weapon is legal little guidance.393 The Hamdan court admitted that it has inadequately addressed the issue and that the Wisconsin Legislature ought to rewrite the state’s CCW law:

The approval of a state constitutional right to keep and bear arms for security, defense, hunting, recreation, and any other lawful purpose will present a continuing dilemma for law enforcement until the legislature acts to clarify the law. We urge the legislature to thoughtfully examine Wis. Stat. § 941.23 in the wake of the amendment and to consider the possibility of a licensing or permit system for persons who have a good reason to carry a concealed weapon. We happily concede that the legislature is better able than this court to determine public policy on firearms and other weapons.394

PART D: STATES REGULATING THE CARRYING OF CONCEALED FIREARMS THROUGH A DISCRETIONARY LICENSING SYSTEM. (10 states)

Alabama

Alabama’s CCW licensing legislation authorizes county sheriffs to issue CCW licenses to those whom the sheriff finds “suitable” and having a “proper reason”:

The sheriff of a county may … issue a … license to such person to carry a pistol in a vehicle or concealed on or about his person … if it appears that the applicant has good
reason to fear injury to his person or property or has any other proper reason for carrying a pistol, and that he is a suitable person to be so licensed.\footnote{395}

The Alabama CCW statute does not define “proper reason” or “suitable person.” Without any definition or guidance concerning who is suitable and has a proper reason for a license, and with the statutory use of “may issue,” an Alabama sheriff “has been granted the authority to grant or deny a pistol permit at the Sheriff’s discretion.”\footnote{396} CCW licenses are public record and therefore some account of a sheriff’s licensing determinations is available.\footnote{397}

The courts will only reverse a sheriff’s licensing decision when “the licensing officer’s judgment or discretion is abused and exercised in an arbitrary or capricious manner.”\footnote{398} The courts have not ruled on how extensive a sheriff’s discretion is when determining what constitutes a “proper reason” for a license. Also, Alabama courts have not significantly limited how extensively a sheriff may define “suitable person,” but they have placed some limits: “a sheriff is prohibited from issuing a license to carry a pistol to a person, who, by operation of law, would be ineligible for such a license.”\footnote{399}

Alabama has granted its sheriffs great discretion in deciding CCW policy. The criteria for issuing a license are defined by the sheriff, whose creation and application of those definitions, controlling his determination of who exactly is eligible for a CCW permit, are only bounded by a very limited review of whether the sheriff’s actions were arbitrary and capricious.\footnote{400}

\textit{California}

California authorizes either a county sheriff or a municipal police chief to issue a CCW license: a sheriff or police chief, “upon proof that the person applying is of good
moral character, [and] that good cause exists for the issuance, … may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person.” California’s CCW law defines neither “good moral character” nor “good cause.” California courts have described issuers’ discretion as “unfettered,” and have held that the California CCW law “gives extremely broad discretion to the sheriff concerning the issuance of such [CCW] licenses.” That discretion is so great that “Section 12050 explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements.” Therefore, California issuers may even deny applicants meeting the statutory requirements, making the statute a nonbinding guideline rather than a definitive law.

The decisions of the issuing authority, in the form of CCW license applications, are public record because “if the press and the public are precluded from learning the names of concealed weapons’ licensees and the reasons claimed in support of the licenses, there will be no method by which the public can ascertain whether the law is being properly applied or carried out in an evenhanded manner.”

The California courts have offered only very limited review of the license issuers’ decisions: “courts may exercise a very limited review of a public agency’s action, and may merely determine whether the agency’s action was arbitrary, capricious, or entirely lacking in evidentiary support.” However, the courts have ruled that an issuer must exercise discretion for each applicant, rather than simply rejecting all applications: “To determine, in advance, as a uniform rule, that only selected public officials can show good cause is to refuse to consider the existence of good cause on the part of citizens generally and is an abuse of, and not an exercise of, discretion.” Nevertheless, beyond
being required to exercise its discretion, the issuing authority has no real limitations upon that exercise of its discretion.

Delaware

In Delaware the state courts issue CCW licenses:

(a) A person of full age and good moral character desiring to be licensed to carry a concealed deadly weapon for personal protection or the protection of the person’s property may be licensed to do so when the following conditions have been strictly complied with:

...

(d) The Court may or may not, in its discretion, approve any application…

The statute does not define “good moral character” or what precisely “desiring to be licensed to carry a concealed deadly weapon for personal protection…” means. The statute does expressly give the Superior Court great discretion in issuing licenses. Delaware Superior Courts have found their discretion to be almost total: “the Court may deny the application, in accordance with its absolute discretion to grant or deny licenses to applicants who claim to meet the minimum eligibility requirements.” Therefore, Delaware issuers may even deny applicants meeting the statutory requirements, making the statute a nonbinding guideline rather than a definitive law. Delaware courts have also decided that they have the authority to restrict licenses as they see fit, such as issuing a license to carry a concealed firearm only for employment. The only limit the courts have found on their discretion is that good cause must exist to refuse to renew a license.

The Supreme Court of Delaware has decided that:

In considering applications for permits to carry concealed deadly weapons, the Superior Court is engaging in an administrative function delegated by the General Assembly … The gun permit proceeding under 11 Del. C. § 1441 is essentially ex parte and discretionary, although the Superior Court ‘may’ receive evidence in opposition to the
application. The statute fixes no standard for the granting or denial of an application, and while a rejected applicant may feel aggrieved there is no underlying civil right which has been adjudicated. In the absence of the exercise of a judicial function by the Superior Court this Court [the Supreme Court of Delaware] lacks the power of review.415

The Supreme Court of Delaware also has concluded that it cannot review licensing decisions by the Superior Court: “We find that no right of appeal lies to this Court from a discretionary ruling by Superior Court under section 1441 not to renew a license to carry a concealed deadly weapon.”416 Therefore, Delaware Superior Courts exercise nearly absolute licensing discretion that is not subject to any review.

Hawaii

Hawaii authorizes local law enforcement chiefs to issue CCW licenses in exceptional circumstances:

In an exceptional case, when an applicant shows reason to fear injury to the applicant’s person or property, the chief of police of the appropriate county may grant a license to an applicant … to carry a pistol or revolver and ammunition therefor [sic] concealed on the person within the county where the license is granted.417 None of the terms in the statute are defined, and, thus, the sheriff may interpret “exceptional case” however he wishes. There is no caselaw concerning the issuance of Hawaii CCW licenses, nor any indication that Hawaii has ever issued a license.

Iowa

Iowa legislation offers a CCW permit for the general population: “Any person who can reasonably justify going armed may be issued a nonprofessional permit to carry weapons.”418 The CCW statute includes certain mandatory qualifications for a CCW permit, including that “[t]he issuing officer reasonably determines that the applicant does not constitute a danger to any person.”419 A CCW permit application is submitted to the
applicant’s county sheriff and “the issuance of the permit shall be by and at the discretion of the sheriff…”\footnote{420} Although the statute does not define what circumstances “can reasonably justify going armed”, the Iowa Public Safety Department has offered that: “‘Reasonable justification for a nonprofessional permit to carry a weapon’ means a written statement that contains clear and convincing evidence that the applicant needs to go armed.”\footnote{421} Additionally, there is no requirement that sheriffs keep any records, available to the public or not, of CCW permit applications.\footnote{422}

Iowa courts will only review a sheriff’s decision if it is “lacking in substantial evidence, based on application of an incorrect rule of law, or unreasonable, arbitrary, or capricious.”\footnote{423} In exercising his authority, “[t]he sheriff may deny a permit because of certain conduct, but the conduct must have a rational connection to the denial … [and] to deny the permit requires more than the sheriff’s personal opinion.”\footnote{424} A sheriff also cannot refuse to categorically deny all applicants:

\begin{quote}
[I]f a county sheriff … ‘would categorically refuse or deny the issuance of any permits whatsoever, the discretionary or decision making power vested in him by the legislature would be rendered a nullity and the responsibility conferred under the language of the statute to render a judgment would be abrogated. This a sheriff cannot do. The legislature has not said that no person may carry a concealed weapon, but rather citizens may be so armed if the sheriff in his judgment finds it to be warranted.’\footnote{425}
\end{quote}

The only limitations upon Iowa sheriffs in issuing CCW permits is that they cannot categorically refuse to issue any permits and must offer some justification for their decision that is not obviously “illegal, arbitrary, capricious, or an abuse of discretion.”\footnote{426} Sheriffs therefore have great discretion in deciding what is a “reasonable justification” and who “constitute[s] a danger.”
Maryland

Maryland grants the Secretary of State Police great discretion in issuing CCW permits:

(a) … the Secretary shall issue a permit within a reasonable time to a person who the Secretary finds:

(ii) has not exhibited a propensity for violence or instability that may reasonably render the person’s possession of a handgun a danger to the person or to another; and

(ii) 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.427

The statute defines neither what constitutes “danger to the person or others,” nor what constitutes a “good and substantial reason.” Maryland’s CCW law does use the verbiage “shall issue,” but those subjective licensing criteria leave the secretary great discretion to determine who qualifies for a permit. One supervisor of the State Police Handgun Permit Unit admitted in court hat he simply “made up” the standards he used for issuing a permit.428 That “made up” standard required the average citizen to supply evidence of specific threats while not requiring any such evidence from retired law enforcement personnel.429

An applicant may appeal the secretary’s decision to the Handgun Permit Review Board, a part of Maryland’s Department of Public Safety and Correctional Services.430 Upon appeal to the Board, “[t]he applicant for a handgun permit has the burden of establishing a ‘good and substantial reason’ to wear, carry, or transport a handgun. If the evidence presented is not sufficient to meet this burden, the Board must sustain the decision of the State Police.”431 The courts have ruled that “[t]he [CCW] statute … leaves to the Board the question of what is ‘good and substantial reason.’”432 Although

105
the statutory language specifying “apprehended danger” as a “good reason” may appear
to mean danger as perceived by the applicant, the courts have interpreted it to mean
danger as determined by the issuer: “The statute makes clear that it is the Board not the
applicant, that decides whether there is ‘apprehended danger’ to the applicant.” The
Board has found applicants to have a reasonably apprehended danger only when the
applicant can prove specific threats made against him. The Maryland courts offer only
very limited review of the board’s decisions:

The role of the judiciary in reviewing the decisions of an administrative agency is
extremely narrow because of the recognized expertise of the agency in a particular field.
We note[ ] … the court’s 1) deference to agency expertise; 2) the presumption of validity
of agency actions; 3) the inappropriateness of a court’s substituting its fact finding for
that of the agency; and 4) the correction of agency decisions only when they are illegal,
arbitrary, and unreasonable acts.

The Maryland CCW statute grants great authority to the secretary in deciding who
may receive a permit. An applicant may appeal to the Board, but they also have great
authority in determining which initially denied applicants will meet whatever standard
the Board chooses to use for defining “a danger to the person or to another” and “good
and substantial reason.” The courts very limited review of the Board’s decisions means
that the Board and secretary have almost unlimited discretion to determine who will
receive a CCW permit.

Massachusetts

Massachusetts’ CCW statute states that local law enforcement “may issue [a
CCW license] if it appears that the applicant is a suitable person to be issued such license,
and that the applicant has good reason to fear injury to his person or property, or for any
other reason, including the carrying of firearms for use in sport or target practice only.”
Law enforcement has the key role in issuing CCW licenses: “In this Commonwealth the
decision as to who shall carry a firearm and under what conditions, be it a public official 
or a private citizen, is one which our Legislature has seen fit to leave with the heads of 
law enforcement agencies. The Massachusetts CCW law does not define either 
“suitable person” or “good reason,” thus delegating local law enforcement great 
discretion in determining who meets those standards:

Because the statute does not further define the ‘suitable person’ standard, the chief of 
police or the licensing authority has the authority to require an otherwise eligible 
applicant for a license to carry a firearm to comply with any other requirements that are 
reasonably related to the goal of keeping firearms out of the hands of irresponsible 
people.

Local law enforcement both defines each criterion and then applies them to each 
applicant:

The statute directs that a two-step inquiry be made before a license is issued. That 
inquiry requires that the licensing authority first ascertain whether the applicant is a 
‘suitable person’ to possess a firearm. If satisfied on that point, the licensing authority 
then must inquire whether the applicant can demonstrate a ‘proper purpose’ for carrying a 
firearm. Without excluding other valid reasons for being licensed, the statute identifies 
two purposes which will furnish adequate cause to issue a license – ‘good reason to fear 
injury to person or property’ and an intent to carry a firearm for use in target practice. In 
performing its task, the licensing authority is given considerable latitude.

The issuing authority is allowed to place restrictions upon a license based upon which 
“good reason” the applicant demonstrates in his application. An issuer may specify 
that a license only authorizes its holder to carry a concealed firearm when hunting, or for 
sporting purposes, etc. Therefore, an issuer can deny an applicant a license permitting 
him to carry a concealed weapon for self-defense, and instead issue a license useful in 
only very limited circumstances, such as only when hunting. What sort of evidence, if 
any, an issuer requires from an applicant to receive a CCW license allowing its holder to 
carry a concealed weapon at any time for general self-defense, as other states’ CCW 
licenses authorize, is completely within the discretion of the issuer.
Massachusetts CCW legislation also lists automatic disqualifications for certain applicants; these are objective in nature, such as prohibiting issuance to felons, the mentally ill, etc. However, these objective disqualifications are not the sole reasons upon which an issuer may reject an applicant:

\[G\]iven the latitude that is enjoyed by licensing authorities in determining suitability, Lt. Pellecchia [the issuer] was not strictly required to base his decision on one of the specific disqualifications to Section 131. Nor was the fact that Masiello [the applicant] previously held a firearms license dispositive of his suitability now, even if there has been no change in his record. As the above ruling holds, the issuer is not bound by previous issuer decisions, either his own decisions or those of previous law enforcement chiefs. An issuer may change his conclusions and not renew a license without any change in the license holder’s circumstances. Additionally, because an issuer “was not strictly required to base his decision on one of the specific disqualifications” in the statute, Massachusetts issuers may even deny applicants meeting the statutory requirements, making the statute a nonbinding guideline rather than a definitive law. Beyond being granted the discretion to define the statute and then change that definition at will, the issuer may add new requirements that applicants must meet, such as testing an applicant’s ability to use a firearm: “The grant to him, without guidelines, of the general power and responsibility of determining a person’s suitability to carry firearms necessarily includes any incidental power reasonably related to effectuating the purposes of the granting statute.”

An applicant denied a CCW license may appeal to the courts. The courts’ review of an issuer’s decision is very narrow:

In the absence of a finding that no reasonable ground existed for the chief of police to refuse the license on the basis that the defendant was not a ‘suitable person,’ the judge was in error in ordering the issuance of the license to the defendant … To warrant a finding that a chief of police had no reasonable ground for refusing to issue a license it must be shown that the refusal was arbitrary, capricious, or an abuse of discretion.
Additionally, “[t]he burden is upon the applicant to produce substantial evidence that he is a proper person to hold a license to carry a firearm.”451

Massachusetts courts have been unwilling to overrule almost any determination from the license issuers. For instance, a police chief revoked a CCW license because the license holder invoked his constitutional right not to answer police questions in an investigation not related to his permit, despite the license holder not being charged with any crime.452 The court affirmed the chief’s revocation of the license even though the license holder “might have been well within his rights in declining to answer, and … might be entitled to some remedy upon proof of his claim that the revocation was ‘in retaliation’ for his assertion of his rights.”453

The Massachusetts legislature has delegated great discretion to its local law enforcement agencies in determining who is eligible for a CCW license. Those agencies can interpret the CCW statute’s licensing criteria at will and change their interpretations just as easily. They can also impose whatever additional licensing requirements they wish. The courts have not questioned their exercise of discretion in any meaningful manner.

New Jersey

New Jersey requires a CCW permit applicant to first apply to the local police chief, who cannot issue a permit unless the applicant “has a justifiable need to carry a handgun.”454 If the police chief approves an application, the Superior Court must examine the application, and:

The court shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is a person of good character … and that he has a justifiable need to carry a
handgun. The court may at its discretion issue a limited-type permit which would restrict
the applicant as to the types of handguns he may carry and where and for what purposes
such handguns may be carried.455

If the police chief rejects an applicant, the applicant may request a hearing with a
Superior Court.456 The statute does not define “good character” nor “justifiable need.”

The New Jersey courts, as the primary issuers of CCW permits457 and the source
of judicial review, have defined “justifiable need” so that the issuance of a CCW permit
to anyone in the general population is only theoretical. One commentator noted: “the
New Jersey Supreme Court has interpreted the need requirement so that permits are
effectively inaccessible to the general public. As revealed by the cases, concealed carry
permits are not granted to civilians, even if they have genuine, reasonable and routine
fears for their own safety.”458

The seminal case for New Jersey courts’ interpretation of the state’s CCW statute
is Siccardi v. State.459 Although that court found its role as issuer troublesome, “[t]he
legislative designation of the judiciary as the issuing authority was unfortunate for it
burdened the Justices with functions which were clearly nonjudicial in nature,” 460 the
court accepted all the discretion granted it. The Siccardi court made the policy decision
that under almost no circumstances should the courts issue a permit:

The grant of a permit to him to carry a concealed handgun on his person or in his
automobile would, as all of the expert testimony indicates, afford hardly any measure of
self-protection and would involve him in the known and serious dangers of misuse and
accidental use. And ... if the law is applied fairly and impartially as it must be, the grant
of a carrying permit to him would call for permits to other theater managers as well as to
the innumerable men in business who are obliged to carry funds and whose
psychologically felt needs are no less than his. Surely such widespread handgun
possession in the streets, somewhat reminiscent of frontier days, would not be at all in the
public interest.461

Upon deciding that firearms would most likely make a person less safe, the court then
decided to endorse:
[A] strict policy which wisely confines the issuance of carrying permits to persons specifically employed in security work and to such other limited personnel who can establish an urgent necessity for carrying guns for self-protection. One whose life is in real danger, as evidenced by serious threats or earlier attacks, may perhaps qualify within the latter category but one whose concern is with the safety of his property, protectible [sic] by other means, clearly may not so qualify.462

Not only did Saccardi define “justifiable need,” but it also allowed for changes in its definition at any time:

The appellant correctly asserts that the word ‘need’ has appeared without alteration through all the pertinent legislation since 1924. But he evidently entertains the mistaken notion that its contextual concept remains frozen as of that date and that types of permits originally issued must necessarily be issued today. ‘Need’ is a flexible term which must be read and applied in the light of the particular circumstances and the times.463

The Siccardi decision therefore exercised the discretion granted the issuing authority through the subjective and undefined criteria in New Jersey’s CCW statute to create a very narrow interpretation of what constitutes a justifiable need.

Subsequent New Jersey cases defined the requirement of justifiable need so that it constituted an almost insurmountable obstacle to obtaining a CCW permit. The Supreme Court of New Jersey, in two companion cases to Siccardi, held, first, that doctors carrying narcotics in high crime areas did not have a justifiable need for a CCW permit because:

Their situations are not materially distinguishable from those confronting other doctors, particularly those whose practices take them into urban areas. Their possession of handguns in the streets would, as the expert testimony referred to in Siccardi indicates, furnish hardly any measure of self-protection and would involve them in the known and serious dangers of misuse and accidental use.464

And, second, that diamond dealers carrying large amounts of loose diamonds in a high crime neighborhood did not have a justifiable need because:

The applicant’s situation does not differ materially from those confronting many businessmen and others who carry substantial funds on their persons, often in high crime areas … He has never been assaulted or threatened and, as the expert testimony referred to in Siccardi indicates, his possession of a handgun in the streets would furnish hardly any measure of self-protection and would involve him in the known and serious dangers of misuse and accidental use.465
These cases create New Jersey courts’ “justifiable needs” test; a test that is not premised upon any objective measure of danger an applicant faces, but instead looks at an applicant’s danger relative to those facing identical material circumstances. The court will compare an applicant’s danger not to an objective standard, or even to a generally comparable person, such as another businessman, but to an identical person, such as another businessman “carry[ing] substantial funds on their persons … in high crime areas.” That comparison has no real meaning as a court can always say that a person faces a similar threat as another person in an identical situation. Additionally, implying that having “never been assaulted or threatened” demonstrates a lack of a justifiable need has the perverse effect of rendering the feared consequences from not having the means to defend oneself a prerequisite for a permit to carry those very means for defense.

New Jersey’s impossible judicial requirements for establishing “justifiable need” are the logical consequence of the New Jersey courts premising their tests on their conclusion that the “possession of a handgun in the streets would furnish hardly any measure of self-protection and would involve him in the known and serious dangers of misuse and accidental use.” If that assertion is true, then no justifiable need exists because no situation, however dangerous, is improved through introducing an object that will only increase any danger. Although the court must ostensibly accept the laws providing for the issuance of a CCW permit, they can use their discretion to make the criterion requiring “justifying need” impossible to satisfy.

The New Jersey courts continue to employ the Siccardi line of cases to deny CCW permits to all applicants from the general population: “While there is no guarantee that any particular applicant will not be attacked, the minimal protection afforded by a
handgun to one not subject to the special dangers noted in *Siccardi* is still greatly outweighed by the dangers to society inherent in the proliferation of handguns.\footnote{470} It is hard to imagine what “the special dangers noted in *Siccardi*,”\footnote{471} establishing an “urgent necessity for carrying guns for self-protection,”\footnote{472} could be when a gun can “afford hardly any measure of self-protection”\footnote{473} and poses “the dangers to society inherent in the proliferation of handguns.”\footnote{474}

The Supreme Court of New Jersey has restated its interpretation of the CCW statute as:

*Under the *Siccardi* rule there must be ‘an urgent necessity … for self-protection.’ The requirement is of specific threats or previous attacks demonstrating a special danger to the applicant’s life that cannot be avoided by other means. Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice.*\footnote{475}

That decision ruled that even private security guards must satisfy the strict criteria for CCW permit eligibility.\footnote{476} Even mayors acting as head of a police department do not necessarily have a justifiable need for a permit.\footnote{477} One New Jersey judge refused to ever issue a CCW permit for any reason, stating in his refusal to issue a security guard a CCW permit that the denial is because “I am going to have applications for every service and detective in the State of New Jersey to carry a gun and I won’t grant it and I won’t grant any of them until the Appellate Division tells me to grant them.”\footnote{478} Recently one court has held that the issuer cannot categorically deny every application: “We hold that each application must be dealt with on its own merits, on a case-by-case basis”;\footnote{479} however, New Jersey courts’ nearly insurmountable requirements for a CCW permit make such a restriction irrelevant. Issuers can simply every applicant individually rather than categorically.
New Jersey statutes ostensibly allow citizens of good character and possessing a justifiable need to obtain a CCW permit. New Jersey courts, as the issuer of those permits, has used its discretion to define justifiable need as “urgent necessity” and has determined that firearms provide no real value for the defense of oneself, and, therefore, that no real reason exists for anyone to ever justifiably need a CCW permit. Obtaining a New Jersey permit is almost impossible for the general public; the New Jersey CCW statute’s allowance for the issuance of permits has been effectively nullified by the New Jersey courts.

**New York**

New York issues CCW licenses through a discretionary system. County judges issue CCW licenses that are valid throughout the state, except for New York City, where only a license issued by New York City’s Police Commissioner is valid. Any firearm license, including a license for mere possession, requires the issuer to apply subjective criteria: “No license shall be issued or renewed except for an applicant … of good moral character … [and] concerning whom no good cause exists for the denial of the license.” The statute then lists types of licenses, including various CCW licenses. The only CCW license available to the general public, as opposed to licenses specifically for judges and other specified persons, is a “license for a pistol or revolver, [which] … shall be issued to … have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof.” The terms “of good moral character,” “good cause for denial,” and “proper cause” are not defined by statute and, thus, their definitions and application are left to the issuer.
The discretion New York vests in its issuing authorities is quite extensive; New York’s Attorney General published an opinion stating that “[t]he determination whether to issue a firearms license is completely within the discretion of the licensing officer.”

One New York court ruled that the issuer’s “authority isuncircumscribed;” the Court of Appeals of New York noted the “extraordinary power reposed in a licensing officer.” Under its broad discretion, the CCW license issuer defines the subjective criteria of “proper cause” and “good moral character”; and then an applicant has the burden of establishing that he meets the issuer’s interpretation of the statutory criteria.

Despite the “extraordinary” discretion New York issuing authorities wield, there are some restrictions upon its use. An issuer must clearly state the reasons for a denial or revocation:

It is not possible to determine with any assurance from the licensing officer’s cryptic observations whether the disapprovals were based on general criteria applicable in an even-handed way to those similarly situated. Respondents of course are vested with broad discretion in responding to such applications and are required to exercise their judgment on the basis of a total evaluation of the relevant factors. Inevitably the decision to grant or deny an application will from time to time turn on rather narrow distinctions. Nor do we suggest that respondents should be rigidly confined to the mechanical application of very detailed criteria. But under the circumstances presented, a more informative statement of the controlling considerations is necessary…

There must exist some evidence supporting the issuer’s reasons for denial. An issuer also must also permit an applicant to respond to any objections the issuer may have; an applicant “must be given the specific reasons for the denial of the pistol license, and be given an opportunity to respond to the objections to her application.”

When judges are the issuer, they cannot simply accept the recommendation of law enforcement officials and the conclusions of those officials’ investigation of the applicant; the issuer must examine the evidence in that investigation and provide the applicant an opportunity to respond:
Although an applicant must have the opportunity to respond to any objections to the issuance of a license, he is not entitled to a formal hearing: “It is well settled that a formal hearing is not required prior to the revocation of a pistol permit as long as the licensee is given notice of the charges and has an adequate opportunity to submit proof in response.”

Issuers also cannot alter the statutory procedures for licensing, such as not renewing licenses and instead requiring the license holder to re-apply for a new license. Additionally, issuers cannot refuse to consider certain classes of applicants, except for those disqualifications listed in the statute, but instead must exercise their discretion in each case. For example, one court ruled that “the action of respondent in denying issuance of a target pistol permit to petitioner on the basis of a blanket rule that he was under the age of 21 without any further inquiry was erroneous as a matter of law and was arbitrary and capricious and an abuse of discretion.”

An issuer also cannot categorically refuse to issue CCW licenses as a policy; however, they may place restrictions upon the licenses they issue: “the power to determine the existence of ‘proper cause’ for the issuance of a pistol license necessarily and inherently includes the power to restrict the use to the purposes which justified its issuance.” New York’s CCW law is like Massachusetts’ because it authorizes the issuer to limit the use of a CCW license, rather than permitting only the issuance of a general CCW license, as is the case in New Hampshire. The restrictions used by New
York issuers are not standardized and differ significantly across the state. Authorizing the issuer to place restrictions upon licenses greatly increases the discretion of an issuer because it enables the issuer, in its discretion, to severely limit the issuance of general CCW licenses. Issuers may then issue licenses only to those demonstrating whatever proper cause, even if not specified in the statute, that the issuer deems desirable for a general license; thus, permitting the issuer to create criteria beyond the statutory language. Conversely, if forced to issue only general CCW licenses, then any showing of proper purpose will result in a general license. For example, New York courts have ruled that target shooting and hunting are proper causes for a license; if New York issuers could only issue general CCW licenses, then anyone wanting a license for target shooting could also use that license to carry generally, as is the case in New Hampshire. Not permitting restrictions based upon discretionary distinctions of proper cause essentially nullifies the need to show a specific cause because any proper cause allows for a general, unrestricted license.

Although the discretion afforded issuing authorities under New York law is great, they have no real obligation to make available to the public any notice on how they will exercise that discretion. New York issuing authorities are under no duty “to adopt written standards applicable to all such applications, as no such written standards are required under the statute.” An indirect determination of how issuing authorities have defined and enforced New York’s CCW statute is no longer available because in 1994 the New York Legislature altered the CCW law to exclude CCW license applications from disclosure, and thus concealed any record of what proper causes an issuer has accepted for the issuance of a license:
The Legislature limited the scope of disclosure of the approved pistol license application to name and address where previously the entire application was discoverable. In light of the stated legislative purpose of protecting the licensee from publication of the reason or reasons ‘proper cause’ was found, it is clear that the Legislature intended only the name and address of the licensee to be a public record.\textsuperscript{502}

Judicial review of CCW license issuers’ decisions is very limited:

The issuance of a pistol license is not a right, but a privilege subject to reasonable regulation. The Police Commissioner has broad discretion to decide whether to issue a license. Judicial review of a discretionary administrative determination is limited to deciding whether the agency’s actions were arbitrary and capricious. The agency’s determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result.\textsuperscript{503}

In light of the “extraordinary power” delegated to New York’s issuers, courts’ powers to “review in handgun license cases only extends to whether substantial evidence supports the challenged determination, and our obligation is limited to insuring that respondent [the issuer] met ‘the very minimal evidentiary requirement necessary to uphold its determination.’”\textsuperscript{504}

Although some issuing authorities may liberally issue CCW licenses, the New York courts’ very narrow review of CCW license denials permits licensing authorities to create and enforce strict interpretations of “good character” and “proper cause.” What precisely is good cause for disqualifying a CCW license applicant or who exactly is not of good moral character can vary widely across New York jurisdictions as issuers exercise their discretion differently. Interpreting these subjective criteria requires issuers to make contentious policy decisions; for example, one court, in determining whether an applicant’s delinquent son, who lived with the applicant, should constitute good cause for denying the applicant a license, engaged in fundamental policy decisions:

It is desirable to uphold the hands of the Police Commissioner whenever possible; he is valiantly striving against desperate odds to protect an already lawless community from the incursion of further violence against the peace of our city -- by enemies from within as well as from without … It is the corruption of the elders which has spawned the delinquency of the young. The teenage gang on the street is but the pale image of the mob in the rackets. The toy pistol too often becomes the zip-gun which in turn is transformed into the revolver and the shotgun. Parents arm their young with miniature arsenals almost from infancy. Thus they are conditioned that when they become
teenagers they aspire (?) [sic] to lethal arms … petitioner should be willing to be deprived of his pistol in order to protect his son and the community. Stress of rights must often be balanced by public interest -- even if there results an individual loss. There are important things which must replace personal consideration or there could be no human society worth living in. The progress of humanity has resulted more from the concept of duty than of right: ‘acceptance or restraints in tune with the order of the world’ … One of the obvious methods of combating violence is to remove the weapons of violence. In the struggle against evil we need help -- not to be tempted as we are prone to be in our daily lives. The means of avoidance of temptation is itself a weapon against evil … It is altogether fitting and proper that the Police Commissioner who is vested with authority in this matter should deny petitioner’s application. His action in the circumstances may not be termed arbitrary or capricious. On the contrary, it demonstrates commendable concern for the individual family and the public at large.505

Determining what constitutes the moral fiber necessary for entrusting one with a CCW license involves decisions touching upon basic political issues, which are often controversial in the gun control arena.

Another policy determination by a New York court held that granting CCW licenses because the applicant works or lives in a high crime area would be a poor policy: “Nor was it error for the licensing official to reject the petitioner’s ‘high crime area’ argument, the logical extension of which is to ‘make the community an armed camp.’”506

Despite the factual question of whether the thirty-nine states507 employing a more permissive stance towards civilians carrying concealed firearms all constitute “armed camps,” another New York court decided that sections of New York City are already armed camps in ruling that an applicant was improperly denied a license: “While the police department does the best job possible to combat crime in the street, it has been hamstrung in this job by reductions in force due to budgetary cutbacks. At the same time it appears that lawless elements have transformed this area into an armed camp.”508 The broad discretion given to New York issuers, the resulting policy decisions the exercise of that discretion requires, and the decentralized nature of New York’s CCW licensing system, all make the creation of any uniform policy decision almost impossible.509
Some New York CCW license issuers have enacted the policy of enforcing a strict interpretation of “good character” and “good cause” for denial. For example, although an applicant cannot be denied simply because she has a small child, if the applicant’s child has “strayed from the accepted behavior pattern of the law-abiding citizen”, a license denial “demonstrates commendable concern for the individual family and the public at large.” Not having steady employment cannot alone constitute a “proper basis” for denial, but membership in a suspect organization is, in and of itself, sufficient grounds for a denial. Convictions for minor crimes, such as loitering and public lewdness from skinny-dipping, are “not of such stature as to constitute good cause to deny the permit.” However, “the apparent lack of candor and the irritability of the petitioner [the applicant] at the [licensing] hearing, as noted by the licensing officer, in and of themselves would warrant the revocation of the license.” Those having displayed poor judgment, or having had a firearm accident, or even having improperly handled a firearm, are all potentially lacking the qualities necessary for a CCW license. Those going through a divorce may have their license revoked as well. One court has even ruled that anyone who has ever suffered from depression is disqualified from obtaining a license.

New York also has allowed issuers to implement very restrictive interpretations of “proper cause.” New York City employs the strictest policy in the State for issuing CCW licenses. The city’s Rules only allow a CCW license for those in “extraordinary personal danger.” Issuers and courts in New York City have interpreted both the state and local CCW laws narrowly:

Penal Law § 400.00 … requires the petitioner to show ‘proper cause’ for issuance of the permit, which this Court has interpreted to mean ‘a special need for self-protection distinguishable from that of the general community or of persons engaged in the same
profession’. The Police Department’s regulations regarding Carry Pistol Licenses … also
require a showing of ‘extraordinary personal danger, documented by proof of recurrent
threats to life or safety,’ and add that ‘the mere fact that an applicant … resides or is
employed in a ‘high crime area,’ does not establish ‘proper cause’.

The standard requiring an applicant to demonstrate “need for self-protection
distinguishable from that of the general community or of persons engaged in the same
profession” is quite vague. This requirement is similar to a New Jersey CCW license
requirement. Like New Jersey’s enforcement of the ‘danger greater than similar
people’ requirement, this provision can eliminate all applicants depending on how
specifically similar the hypothetical similar person is; if that hypothetical person is
assumed to face dangers similar to its real-life counterpart, then the applicant by
definition will never face a greater danger than his hypothetical equivalent. For instance,
New York City’s issuer and courts have determined that hypothetical lawyers practicing
criminal and divorce law frequently experience “threats from dissatisfied clients involved
with the criminal law or threats related to the matrimonial practice” and also receive cash
payment of their services; therefore, lawyers threatened by criminals and who regularly
carry cash cannot receive a CCW license as those experiences “are not uncommon
occurrences sufficient to distinguish [them] … from other attorneys engaged in similar
practice.” An elevator repairman carrying payments of four thousands dollars in cash
and working late into the night in high crime areas also “did not demonstrate ‘a special
need for the license distinguishable from that of other persons similarly situated.’” On
one occasion a court found that a New York City applicant possessed sufficient need for
a CCW license because he kept large amounts of cash in his office, which was located in
a high crime area; however, the courts have not found anyone who carries cash in a high
crime neighborhood to have sufficient cause for a license in the nearly three decades
since that ruling.
Simply living or working in a high crime area is not sufficient cause for license, and carrying valuables through a high crime area is almost never sufficient. Those wanting a CCW license because they carry large sums or cash or other valuables cannot be certain what amount of cash carried is sufficient, because after they prove the amount regularly carried, the issuer has complete discretion in determining, in each case, what amount is sufficient. Despite the vague “proper cause” requirements, an applicant must submit specific evidence of need, such as “documentation substantiating the cash carried or a showing of particular threats, attacks or other extraordinary danger to personal safety”, or else the application will be “too vague to constitute ‘proper cause’ within the meaning of Penal Law § 400.00”. It is difficult to know what circumstances, experienced by which people, would be uncommon enough, when compared to some vague, hypothetical doppelganger, and sufficiently dangerous, to satisfy New York City’s issuer and courts that proper cause exists for the issuance of a CCW license.

Some jurisdictions outside New York City have also interpreted New York’s CCW statute very narrowly. Although each issuer has the discretion to grant CCW licenses liberally, they also can restrict issuance severely. New York has great variation in how each county interprets the CCW law and the discretion issuers wield to create their respective policies are subject to almost no significant review. Issuers are under no obligation to publish any standards that they use to issue CCW licenses, and the removal of CCW applications from the public domain renders unobtainable any indirect information concerning how issuers grant licenses. In upholding a license denial, one court ruled:
On this record it cannot be said that the determination of insufficient need was either arbitrary or capricious. And since there is no claim that the standards, against which all applicants are measured, are infirm there is no basis for finding the denial of a license to be without a rational basis.533

Without access to license applications, and with the issuer under no obligation to publish clear standards on how it will exercise its discretion, “the standards, against which all applicants are measured” are unknowable by either applicants or the courts reviewing licensing determinations. Under these circumstances, the discretion given New York CCW license issuers is almost absolute.

**Rhode Island**

Rhode Island’s CCW statute employs two discretionary systems for issuing a CCW license.534 The first is a local licensing scheme:

> The licensing authorities of any city or town shall, upon application … issue a license or permit to the person to carry concealed upon his or her person a pistol or revolver … if it appears that the applicant has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver, and that he or she is a suitable person to be so licensed.535

The licensing authorities are local law enforcement officials.536 The statute does not define “good reason” or “suitable person” and thus leaves their interpretation to the issuer. The second system for obtaining a Rhode Island CCW license is administered by the Rhode Island attorney general: “The attorney general may issue a license or permit to any person … upon his or her person upon a proper showing of need…”537 The statute does not define “proper showing of need.” The undefined and subjective criteria in Rhode Island’s CCW statute grants issuers great discretion: “the issuance of a gun permit in Rhode Island requires a discretionary decision to be made by the issuing authority.”538

Rhode Island issuers do not have any duty to publish rules explaining how they will exercise their discretion, or to keep in records documenting to whom and for what
reasons CCW licenses were either issued or denied. A Rhode Island court ruled that the attorney general must release “a list of all valid permits to carry firearms, including the name, sex, date of birth, and city and state of residence of the permit holder, as well as the permit number and expiration date of permit.”\textsuperscript{539} However, after that ruling Rhode Island altered its CCW statute to prohibit the release of information concerning the issuance of CCW licenses, except for “statistical data of a general nature relative to age, gender and racial or ethnic background.”\textsuperscript{540} The attorney general has issued nonbinding guidelines on for reviewing license applications.\textsuperscript{541}

In 2004 the Supreme Court of Rhode Island decided \textit{Mosby v. Devine}, providing a comprehensive analysis of Rhode Island’s CCW statute.\textsuperscript{542} The court held that the local CCW licensing system did not delegate too much discretion:

\begin{quote}
Although we are mindful that the ‘suitable person’ provision in § 11-47-11 vests the local licensing authority with discretion to reject an application filed by an unsuitable person, this leeway does not affect the requirement that the licensing authority shall issue a permit to a suitable person who meets the requirements set forth in the statute. The finding that an applicant is a suitable person involves an exercise of discretion, but certain individuals are unsuitable as a matter of law, including convicted felons, habitual drunkards, mental incompetents, illegal aliens, and anyone who has failed to meet the minimum firing qualification score. Moreover, if a license is refused on the ground that a person is not suitable, this determination is subject to review by this Court on certiorari.\textsuperscript{543}
\end{quote}

The local licensing system the \textit{Mosby} court called “mandatory,” while the licensing system administered by the attorney general was called “discretionary,” since “the inclusion of the word ‘may’ in § 11-47-18(a) expressly confers broad discretion upon the department to issue or decline to issue gun permits.”\textsuperscript{544} The second CCW licensing system, with the attorney general as issuer, “vests the Attorney General with discretion to refuse a license even if a person makes ‘a proper showing of need’.”\textsuperscript{545} That broad discretion also permits the attorney general to deny applicants a hearing: “§ 11-47-18
does not impose an express limitation on the department’s decision-making authority. Thus, § 11-47-18 does not implicitly require a hearing.”

Although the Mosby opinion labels the local licensing scheme “mandatory,” the broad discretion afforded issuers in interpreting the undefined and vague criteria in the statute renders that licensing scheme discretionary; as the Mosby dissent noted: “the majority’s suggestion that the issuance of permits under § 11-47-11 is mandatory minimizes the enormous discretionary mischief implicit in § 11-47-11’s requirement that the local licensing authority must deem the applicant to be a ‘suitable person,’ a term that the statute does not define.” Local issuers in Rhode Island have, at the urging of the attorney general, used their discretion to define “suitable person” as requiring an applicant to have obtained a license from the attorney general before even applying for a license from a local issuer. Such an interpretation by local issuers essentially eliminates that whole system for issuing licenses, or, as the Mosby dissent observed:

[F]ar from allowing § 11-47-11(a) to constitute an alternative method of obtaining a gun permit, the department, [of the attorney general.] with the assistance of local law enforcement and licensing authorities, effectively can shut down the gun-permit pipeline completely by excluding all applicants that the department arbitrarily deems to be ‘unsuitable.’ Surely, such an administrative scheme allows government regulation to sink to its most Kafkaesque and insidious depths of arbitrariness.

Despite possessing the discretion to deny a CCW license applicant, even when proper need is established, the court held that the CCW statute offers “adequate guidance to the licensing bodies” and they must follow that guidance. The Mosby court recognized some judicial review of the attorney general’s discretion:

As a matter of policy, this Court will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency. Although the court’s authority to review the decision is limited, it is not nonexistent. One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon. The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the
basis of an unreviewable unrestricted licensing scheme. Such review is available through a common-law writ of certiorari.551

_Mosby_ ruled that since judicial review is permitted, “[a] rejected applicant is entitled to know the evidence upon which the department based its decision and the rationale for the denial.”552 The review afforded a denied applicant is slight:

Armed with this information, an aggrieved applicant can petition this Court for a writ of certiorari so that we may review the department’s decision for error of law. In conducting such a review, this Court will not weigh the evidence nor substitute its judgment for that of the fact finder. Rather, we will inspect the record to determine whether the department’s findings are supported by any legally competent evidence.553

If the attorney general can deny an applicant that has demonstrated a proper need for a license, then a court upon review must accept almost any possible reason for denial. The dissent in _Mosby_ argued:

According to the majority, the department [of the attorney general] has virtually unfettered discretion to deny an application for a gun permit pursuant to § 11-47-18(a). Indeed, according to the majority, ‘§ 11-47-18 vests the department with extremely broad discretion to grant or deny a license even when there has been ‘a proper showing of need.’ Therefore, if the department possesses this type of unfettered discretion in determining who may receive a license under § 11-47-18, then any articulation of an alleged lack of a proper need that the department chooses to use must be upheld on review as sufficient. Presumably, therefore, the Court will have little or nothing to review on certiorari because if the department is not required to issue a permit even on a proper showing of need, how could any applicant obtain reversal of a license denial on review by certiorari? For this reason, review on certiorari of the department’s denial of a gun license will prove to be a meaningless exercise because, by according the department the right to deny a license even after the applicant has made a proper showing of need, any articulated reason -- no matter how flimsy, insubstantial, or restrictive of the applicant’s right to bear arms for any lawful purpose -- must be deemed sufficient to affirm the department’s denial of a gun license.554

Rhode Island’s licensing systems are both discretionary. The attorney general has almost absolute discretion to interpret and enforce the statute, and is subject to no meaningful judicial review. Local issuers, unless the Rhode Island legislature or courts force them to consider applicants that have not first obtained a CCW license form the attorney general, have made the local licensing system essentially nonexistent. Even if forced to change policy, local issuers will still retain discretion in interpreting and
defining the subjective criteria in the CCW statute, despite the use of “shall issue” as the operative verb in the statute. Therefore, Rhode Island is a discretionary licensing state.

PART E: STATES REGULATING THE CARRYING OF CONCEALED FIREARMS THROUGH A NONDISCRETIONARY SYSTEM. (37 states)

Alaska

Alaska employs two approaches to CCW: issuing a CCW permit and allowing citizens to carry a firearm concealed without a permit. Alaska passed a nondiscretionary licensing system in 1994, and then permitted citizens to carry without a permit in 2003. The licensing system still exists, but a permit is not required to carry within Alaska. The value of possessing a permit is that it allows its holder to carry in states that recognize an Alaskan permit.

Alaska’s CCW permit statute is a nondiscretionary statute: “The department shall issue a permit to carry a concealed handgun to a person who…” The issuer is Alaska’s Department of Public Safety. The permit eligibility criteria are wholly objective and do not confer the issuer any discretion. Generally, the eligibility criteria specify mandatory training requirements, a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. Alaska’s CCW permit system is nondiscretionary; the issuer has wholly ministerial duties in issuing permits.
Arizona

Arizona passed a nondiscretionary CCW licensing system in 1994. Before 1994, Arizona prohibited the concealed carry of firearms, but permitted the carrying of non-concealed firearms: “Although Arizona has long allowed open carry of handguns, it did not have even a discretionary permit system for concealed carry. In April of 1994, a statute originally intended to prohibit the carrying of guns by minors was amended to create a nondiscretionary, concealed weapon permit system for adults.”

Arizona’s CCW law states that “[t]he department of public safety shall issue a permit to carry a concealed weapon to a person who is qualified under this section.” The criteria determining “who is qualified under this section” are wholly objective. Generally, the eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. The objective eligibility criteria for an Arizona CCW permit do not grant the permit issuer any discretion and its role is purely ministerial.

Arkansas

Arkansas enacted a nondiscretionary CCW licensing statute in 1995. The statute states that “[t]he Director of the Department of Arkansas State Police shall issue a license to carry a concealed handgun if the applicant…” The eligibility criteria specified in Arkansas’s CCW statute is, except for one exception, objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age,
residency requirements, specific criminal offenses that disqualify an applicant, and that
an applicant is mentally sound and not an abuser of drugs or alcohol.570

The issuer does have some discretion to deny an applicant:

The director may deny a license if the sheriff or chief of police, if applicable, of the
applicant’s place of residence submits an affidavit that the applicant has been or is
reasonably likely to be a danger to himself or herself or others or to the community at
large as the result of the applicant’s mental or psychological state, as demonstrated by
past patterns of behavior or participation in an incident involving unlawful violence or
threats of unlawful violence, or if the applicant is under a criminal investigation at the
time of applying for a license.571

The discretion afforded the issuer under the Arkansas CCW statute is not broad enough to
permit the issuer to create policy affecting the issuance of licenses. The issuer must
obtain evidence proving, through actual behavior, that an applicant is unfit for a license.
The statute does not impose upon the applicant a duty to establish a proper need for a
license or that he is a suitable person for a license; instead, the statute allows the issuer to
deny an applicant based upon evidence that a the applicant possesses a “mental or
psychological state” that poses “a danger to himself or herself or others or to the
community at large.” Although the issuer must determine which mental states are
dangerous under the statute, and what behavior an applicant must have exhibited to prove
such a state, those determinations cannot reasonably impose a duty upon the applicant to
prove eligibility nor empower the issuer to make policy determinations significantly
affecting the range of people eligible for a CCW license.

If an applicant meets the requirements set forth in the CCW statute, then the
issuer must grant the applicant a CCW license; the Arkansas attorney general determined:
“The State Police, on the other hand, is bound to issue concealed-carry licenses to
persons who are not ineligible, assuming all other requirements have been met.”572
The issuer’s lack of any discretion empowering it to create and enforce policy determinations
significantly affecting the range of people eligible for a CCW license, and its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Arkansas’s CCW licensing system nondiscretionary.

**Colorado**

In 2003 Colorado enacted a nondiscretionary CCW licensing system, replacing its former discretionary system. The statute includes a legislative declaration explaining its adoption of a nondiscretionary licensing system:

> The general assembly finds that … [t]here exists a widespread inconsistency among jurisdictions within the state with regard to the issuance of permits to carry concealed handguns … Inconsistency results in the arbitrary and capricious denial of permits to carry concealed handguns based on the jurisdiction of residence rather than the qualifications for obtaining a permit.

Colorado’s CCW statute specifically states that it does not give license issuers, the county sheriffs, the discretion to restrict the issuance of CCW licenses:

> The general assembly does not delegate to the sheriffs the authority to regulate or restrict the issuance of permits … beyond the provisions of this [statute] … An action or rule that encumbers the permit process by placing burdens on the applicant beyond those sworn statements and specified documents detailed in this [statute] … or that creates restrictions beyond those specified in this [statute] … is in conflict with the intent of this [statute] … and is prohibited.

Upon receipt of an application, a Colorado issuer has two options:

1. Within ninety days after the date of receipt of the items specified in section 18-12-205, a sheriff shall:
   - Approve the permit application and issue the permit; or
   - Deny the permit application based solely on the ground that the applicant fails to qualify under the criteria listed in section 18-12-203 (1) or that the applicant would be a danger as described in section 18-12-203 (2).

The criteria a sheriff must use for issuing a CCW license is mostly objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an
applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.\textsuperscript{578}

The Colorado CCW statute does grant the issuer some discretion in issuing licenses: “if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others if the applicant receives a permit to carry a concealed handgun, the sheriff may deny the permit.”\textsuperscript{579} The discretion afforded the issuer under the Colorado CCW statute is not broad enough to permit the issuer to create policy significantly affecting the issuance of licenses. The issuer must obtain evidence, documenting actual behavior by the applicant, that supports a reasonable belief that the applicant will present a danger if licensed. The statute does not impose upon the applicant a duty to establish a proper need for a license or that he is a suitable person for a license; instead, the statute allows the issuer to deny an applicant based upon evidence that a specific applicant will “present a danger to self or others if the applicant receives a permit to carry a concealed handgun.” Although the issuer must determine what documented behavior reasonably “makes it likely the applicant will present a danger”, that determination cannot impose a duty upon the applicant to prove eligibility nor empower the issuer to make policy determinations significantly affecting the range of people eligible for a CCW license. The statute specifically forbids such an interpretation,\textsuperscript{580} and any denial made on the basis that the applicant poses a danger places the burden upon the issuer to justify that denial: “if the denial, suspension, or revocation was based on the sheriff’s determination that the person would be a danger as provided in section 18-12-203 (2), the sheriff shall have the burden of proving the determination by clear and convincing evidence.”\textsuperscript{581} The issuers’ lack of
any discretion empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Colorado’s CCW licensing system nondiscretionary.

Connecticut

Connecticut employs a nondiscretionary licensing system. It requires an CCW license applicant to first apply to a local official for a temporary permit:

Upon the application of any person having a bona fide residence or place of business within the jurisdiction of any such authority, such chief of police, warden or selectman may issue a temporary state permit to such person to carry a pistol or revolver within the state, provided such authority shall find that such applicant intends to make no use of any pistol or revolver which such applicant may be permitted to carry under such permit other than a lawful use and that such person is a suitable person to receive such permit.582

The local official “may issue” issue a permit to an applicant he finds “suitable” and whose intentions are lawful. Additionally, the statute specifies the criteria under which the issuer must deny an application.583 These criteria are objective; they disqualify those convicted of certain crimes, those suffering from mental illness, etc.584 If a temporary CCW permit is issued, then the local issuer must forward the permit holder’s application to the Commissioner of Public Safety who then “may issue” a state CCW permit:

Upon issuance of a temporary state permit to the applicant, the local authority shall forward the original application to the commissioner … Said commissioner may then issue, to any holder of any temporary state permit, a state permit to carry a pistol or revolver within the state.585

Connecticut does not require an applicant to demonstrate some need for a permit, except that the applicant’s intentions for carrying a concealed weapon are lawful.586

132
Connecticut does not define who is “suitable” and the “may issue” language in its CCW statute clearly grants the issuer some discretion; as Connecticut’s courts have found:

[The issuer] is given the power to determine whether a person is suitable. Suitability ‘is not defined by the law so that its application can be determined as mere matter of eye-sight, but it is left necessarily to be determined solely by the judgment of the commissioners based upon inquiry and information.’587

Despite the lack of a clear definition for “suitability,” the Connecticut CCW law has withstood challenges of being unconstitutionally vague because “the statutory standard in this case is based on factors and considerations that are or should be within the grasp of anyone who is licensed to carry a handgun outside the home or business.”588

If denied a permit, an applicant may appeal to Connecticut’s Board of Firearms Permit Examiners for a de novo review of the application:

Any person aggrieved by any refusal to issue or renew a permit or certificate … may … appeal to the board … On such appeal the board shall inquire into and determine the facts, de novo, and unless it finds that such a refusal, limitation or revocation, or such refusal or failure to supply an application, as the case may be, would be for just and proper cause, it shall order such permit or certificate to be issued, renewed or restored, or the limitation removed or modified, as the case may be.589

An applicant may then appeal the board’s decision to the Connecticut Superior Courts, but “the scope of that review is very restricted.”590 The court will only overrule the board’s decision if it is “clearly erroneous” or “arbitary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”591

Despite the narrow scope of review by Connecticut courts, they have placed some restrictions on the issuer’s discretion. First, the board must “be reasonably precise in stating the basis for its conclusion that an individual is ‘unsuitable’ to hold a permit to carry a handgun. Otherwise, the decision on its face will be susceptible to the interpretation that it is unduly subjective, arbitrary, or unreasonable.”592
whether an applicant is suitable, “the facts found by the board should show or provide a logical inference that the person poses some danger to the public if allowed to carry a weapon outside the home or business.”\(^{593}\) In other words, “[i]n order to determine that a person is ‘unsuitable’ to continue to hold a gun permit, the law requires that there be facts sufficient to show generally that he or she lacks ‘the essential character or temperament necessary to be entrusted with a weapon.’”\(^{594}\) The evidence necessary for the issuer find an applicant unsuitable must be more than mere speculation.\(^{595}\)

Connecticut’s statute does not grant the issuer the breadth of discretion that discretionary licensing systems grant because it does not have a requirement that an applicant demonstrate a proper need for a permit. Connecticut’s issuers only decide who is suitable, and the courts have required that for the issuer to find an applicant unsuitable, some reliable evidence that the applicant “poses some danger to the public if allowed to carry a weapon” is necessary.\(^{596}\) Issuer discretion to determine suitability is limited and the Connecticut courts keep their exercise of that discretion within reason.\(^{597}\) Therefore, the issuers’ lack of authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Connecticut’s CCW licensing system nondiscretionary.

**Florida**

Florida’s 1987 passage of a nondiscretionary CCW licensing statute is often cited as the beginning of the movement of the majority of states to nondiscretionary licensing systems.\(^{598}\) Florida’s new CCW statute replaced its previous discretionary licensing
system: “The Florida reform law essentially ended the power of local law enforcement to deny carry permits for arbitrary reasons.”\(^599\) The nondiscretionary statute states that “[t]he Department of Agriculture and Consumer Services shall issue a license if the applicant…”\(^600\) The eligibility criteria in the statute are wholly objective and do not grant the issuer any discretion to make policy determinations significantly affecting the range of people eligible for a CCW license; instead the issuer has primarily ministerial duties.\(^601\) Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.\(^602\) Florida’s CCW licensing statute is a nondiscretionary system.

**Georgia**

Georgia’s CCW statute, on its face, is not obviously nondiscretionary.\(^603\) It first states that “[t]he judge of the probate court of each county may … issue a [CCW] license…”\(^604\) The statute then states that:

> Not later than 60 days after the date of the application the judge of the probate court shall issue the applicant a license to carry any pistol or revolver if no facts establishing ineligibility have been reported and if the judge determines the applicant has met all the qualifications, is of good moral character, and has complied with all the requirements contained in this Code section.\(^605\)

The statute’s use of “may issue” indicates that the issuer has some discretion in issuing licenses; however, the statute later uses “shall issue,” indicating a nondiscretionary system. Whether the issuer had discretion in issuing CCW licenses was ambiguous.\(^606\) The Supreme Court of Georgia ruled that the statute “grants to probate courts the discretion to grant or deny applications for licenses to carry handguns.”\(^607\) However, Georgia’s attorney general settled the issue in 1989 when he ruled that “the current
statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit.”608 The discretion found by the Supreme Court of Georgia exists only when the issuer is determining whether to issue a CCW license to an applicant that recently underwent hospitalization for mental illness or drug addiction.609

Although Georgia’s CCW statute specifies mostly objective eligibility criteria, the statute does contain the subjective criterion that an applicant is of “good moral character”.610 What discretion that subjective and undefined term grants Georgia CCW issuers is unclear. The attorney general’s opinion appears unequivocal in its holding that “[t]he judge of the probate court, in considering an application for a firearms permit under O.C.G.A. § 16-11-129, has no discretion to exercise, but must issue the permit unless provided with information indicating the disqualification of the applicant.”611 The opinion cites only one exception to its general holding, and that exception does not concern the good moral character clause.612 However, the opinion also states that “a determination of an individual's ‘good moral character’ is a determination that must be made on a case-by-case basis and is inappropriate for consideration in this unofficial opinion.”613 That the issuer must make its good moral character determination “on a case-by-case basis” implies that the issuer cannot create policies interpreting and applying the good moral character criterion such that significant segments of the otherwise eligible population are excluded from CCW license eligibility. It is unlikely that an issuer could reasonably interpret “good moral character” in a manner that would disqualify a significant portion of the general population otherwise eligible for a CCW license, especially because those otherwise eligible would not have a serious criminal
record. Therefore, the issuers’ lack of any discretion empowering them to create and
enforce policy determinations significantly affecting the range of people eligible for a
CCW license, and their obligation to issue licenses to those applicants satisfying the
generally objective eligibility criteria, make Georgia’s CCW licensing system
nondiscretionary.

\textit{Idaho}

Idaho enacted a nondiscretionary CCW licensing system in 1990.\textsuperscript{614} The
operative portion of the statute reads:

\begin{quote}
The sheriff of a county shall, within ninety (90) days after the filing of an application by
any person who is not disqualified from possessing or receiving a firearm under state or
federal law, issue a license to the person to carry a weapon concealed on his person …
The citizen’s constitutional right to bear arms shall not be denied to him, unless he…\textsuperscript{615}
\end{quote}

The eligibility criteria specified in the law are primarily objective.\textsuperscript{616} Generally, the
objective eligibility criteria specify mandatory training requirements, a minimum age,
residency requirements, specific criminal offenses that disqualify an applicant, and that
an applicant is mentally sound and not an abuser of drugs or alcohol.\textsuperscript{617} The statute does
delegate the issuer some discretion, but only in limited circumstances; specifically, when
applicants are under twenty-one years of age\textsuperscript{618} and when an applicant requests a
temporary, emergency license.\textsuperscript{619} The narrow applicability of the issuers’ discretion
prevents the issuers from using that discretion to make and enforce policy determinations
significantly affecting the range of people eligible for a CCW license.

Shortly after the 1990 passage of Idaho’s CCW law, the Idaho attorney general
ruled that statute unconstitutionally vague; however, the Idaho legislature has since
amended the statute to address those concerns. Since those amendments, Idaho has employed a nondiscretionary CCW licensing system.

**Indiana**

Indiana issues CCW licenses pursuant to a nondiscretionary system. The statute has “shall issue” verbiage: “If it appears to the superintendent that the applicant … [meets the eligibility criteria, then] the superintendent shall issue to the applicant a qualified or an unlimited license to carry any handgun lawfully possessed by the applicant.” However, the statute contains subjective criteria usual to a discretionary licensing system: specifically, “that the applicant: (1) has a proper reason for carrying a handgun; (2) is of good character and reputation; [and] (3) is a proper person to be licensed.” In 1983 Indiana included in its CCW statute objective definitions for the subjective terms “proper reason” and “proper person;” therefore, despite retaining the language that formerly made Indiana’s CCW licensing system discretionary, the addition of specific and objective definitions to the statute’s subjective criteria eliminated the issuer’s authority to interpret those previously subjective criteria.

Before Indiana’s 1983 adoption of a nondiscretionary licensing system, achieved through objectively defining the former subjective eligibility criteria, Indiana’s courts were increasingly interpreting the CCW statute as a nondiscretionary statute. First, Indiana’s CCW license issuer, the Superintendent of State Police, was required to issue a license if an applicant met the statutory criteria:

> When the statute here in question provides that the Superintendent of State Police shall issue to the applicant a license, if it appears that he is of good character and reputation and a suitable person, it requires that such Superintendent must determine whether or not the applicant meets these qualifications and if, in the opinion of the Superintendent the
conditions of the statute are met, he has no discretion in the matter but must issue the license.  

Second, an Indiana court ruled that self-defense constitutionally satisfies the CCW statute’s criterion of proper reason:

[It] is clear from the record that the superintendent decided the application on the basis that the statutory reference to ‘a proper reason’ vested in him the power and duty to subjectively evaluate an assignment of ‘self-defense’ as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant ‘needed’ to defend himself. Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved. We therefore hold that Schubert's assigned reason which stood unrefuted was constitutionally a ‘proper reason’. 

Additionally, the issuer must accept an applicant’s assertion of self-defense as a reason for needing the license, unless evidence exists contradicting that assertion: “absent some evidence to refute self-defense as a reason, the superintendent could not deny an applicant a license on the basis of the superintendent’s subjective evaluation of the asserted reason.”

Indiana amended its CCW statute in 1983 making its licensing system nondiscretionary. The nondiscretionary system offers two CCW licenses, a qualified license for “hunting and target practice” and an unlimited license that “shall be issued for the purpose of the protection of life and property.” The amended CCW statute added an objective definition of proper reason: “‘Proper reason’ means for the defense of oneself or the state of Indiana.” The statute also defines proper person in a generally objective manner. The objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. The definition of proper person does include one discretionary criterion: “‘Proper person’ means a person who … does not have documented evidence
which would give rise to a reasonable belief that the person has a propensity for violent or emotionally unstable conduct.\textsuperscript{632} Although the issuer must determine what precisely constitutes a “propensity for violent or emotionally unstable conduct”, and what evidence would reasonably establish such a condition, that discretion does not empower the issuer to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Indiana’s CCW statute does not define “good character and reputation;” however, it is unlikely that Indiana’s issuer could reasonably interpret that criterion sufficiently more expansively than the statutory proper person definition for that interpretation to exclude a significant portion of the otherwise eligible population. Therefore, the issuer’s lack of any discretion empowering it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Indiana’s CCW licensing system nondiscretionary.

\textit{Kansas}

Kansas enacted a nondiscretionary licensing statute in March of 2006.\textsuperscript{633} The statute states that: “the attorney general shall issue licenses to carry concealed weapons to persons qualified as provided by this act.”\textsuperscript{634} The eligibility criteria specified in the CCW law are primarily objective.\textsuperscript{635} Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.\textsuperscript{636}

The statute does delegate the issuer some discretion:
The sheriff of the applicant’s county of residence, at the sheriff’s discretion, may participate in the process by submitting a voluntary report to the attorney general containing readily discoverable information, corroborated through public records, which, when combined with another enumerated factor, establishes that the applicant poses a significantly greater threat to law enforcement or the public at large than the average citizen.637

Although the statute does grant the issuer some discretion to interpret what constitutes a “significantly greater” danger, that discretion is narrow because the issuer has the burden of establishing, through “corroborated” evidence, that a specific applicant poses that level of danger.638 It is improbable that any reasonable interpretation of this escape clause can render ineligible a significant portion of the otherwise eligible population. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Kansas’s CCW licensing system nondiscretionary.

Kentucky

Kentucky enacted a nondiscretionary CCW licensing statute in 1996.639 Kentucky’s General Assembly stated the purpose of the new CCW statute:

The General Assembly finds as a matter of public policy that it is necessary to provide statewide uniform standards for issuing licenses to carry concealed firearms and to occupy the field of regulation of the bearing of concealed firearms to ensure that no person who qualifies under the provisions of this section is denied his rights. The General Assembly does not delegate to the Department of State Police the authority to regulate or restrict the issuing of licenses provided for in this section beyond those provisions contained in this section. This section shall be liberally construed to carry out the constitutional right to bear arms for self-defense.640

The statute requires the issuer to approve a CCW license to eligible applicants: “The Department of State Police … shall issue a license if the applicant…”641 The statute then specifies objective eligibility criteria.642 Generally, the objective eligibility criteria
specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. The issuer’s lack of any discretion empowering it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Kentucky’s CCW licensing system nondiscretionary.

**Louisiana**

Louisiana has two systems for issuing CCW permits: an older discretionary system and a nondiscretionary system passed in 1996. The discretionary system requires an applicant to seek a license from the chief law enforcement official in a parish, who may grant a CCW permit that is valid only within that parish. If the applicant receives a parish CCW permit, he may then apply to Department of Public Safety for a statewide CCW permit. The statute offers no clear directives concerning to whom local and state officials ought to issue CCW permits, only stating indirectly that an applicant ought to be suitable. The lack of any guidance offered by the CCW statute has prompted Louisiana courts to rule that the CCW statute grants both local and state issuers discretion in issuing CCW permits.

In 1996 Louisiana enacted a nondiscretionary CCW licensing system that operates parallel to the discretionary system. The new licensing system uses mandatory language in its operative clause: “the deputy secretary of public safety services of the Department of Public Safety and Corrections shall issue a concealed handgun permit to
any citizen who qualifies for a permit under the provisions of this Section”. The eligibility criteria specified in the nondiscretionary CCW statute are almost entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. The statute does give the issuer some discretion through prohibiting applicants that “have a history of engaging in violent behavior.” The statute then states that for applicants charged or arrested for specified crimes, there exists a “rebuttable presumption” that the applicant has a history of violent behavior. The grounds for creating a rebuttable presumption implies that there must exist evidence to establish a history of violent behavior and that suspicions of having committed violent crimes constitutes the most appropriate evidence of such a history. Considering that most people have not been charged or arrested for violent crimes, the discretion afforded the issuer in this circumstance is not sufficient to empower the issuer to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license.

Therefore, the issuer’s lack of any authority empowering it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Louisiana’s new CCW licensing system nondiscretionary.

Maine

Maine enacted a nondiscretionary CCW licensing system in 1981. Before 1981 Maine’s CCW statute used the verb “may issue”; however, the Supreme Judicial Court of
Maine ruled that an issuer could deny an applicant based only upon criteria within the CCW statute and that if an applicant met that criteria then the issuer must grant a permit. The 1981 statute explicitly uses mandatory operative language: “The issuing authority shall … issue a permit to carry concealed firearms to an applicant over whom it has issuing authority and who has demonstrated good moral character and who meets the following requirements…” Except for the good moral character criterion, the eligibility requirements are objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.

The good moral character criterion does grant issuers some discretion, although that discretion is narrow. The CCW statute provides a framework for the issuer to use in determining whether an applicant is of good moral character: “The issuing authority in judging good moral character shall make its determination in writing based solely upon information recorded by governmental entities within 5 years of receipt of the application, including, but not limited to, the following matters…” The “following matters” are well defined and do not afford the issuer much discretion, however, issuers are not confined to the listed criteria when determining who is of good moral character. In determining good character, the issuer can only consider government documents less than five years old:

The Legislature has established, wisely or not, a procedure by which concealed firearm permit applications are reviewed based upon recorded information from governmental entities such that the decision is largely ministerial and free from the exercise of any personalized judgment by the issuing authority of the stability of the applicant or the wisdom of granting the permit. The Legislature has apparently developed this procedure to avoid personalized and often divisive decisions which would have to be made if a wider ranging, more personalized inquiry were permitted. The Legislature has also set a
procedure where good moral character is to be presumed in the absence of fresh recorded information evidencing a lack of good moral character.663

Outside of evidence obtained from recent government documents, the issuer has no discretion to deny an applicant for a lack of good moral character:

The decision to deny the permit cannot be sustained regardless of any good faith belief by the selectmen [the issuer] that the conduct of … [the applicant] was such that it was unwise to issue him a concealed firearm permit. The Legislature has set the standards for the issuance and denial of permits to carry concealed firearms and the only remedy for disagreement with those standards is to seek legislative change.664

Although issuers have discretion in determining what constitutes good moral character, they can only consider a very narrow range of evidence when applying that determination. Because the size of the population that is otherwise eligible for a CCW permit, but still possibly affected by issuers’ policy decisions on what government documented acts within the past five years will determine who is of good moral character, is in all probability quite small. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue permits to those applicants satisfying the generally objective eligibility criteria, make Maine’s CCW licensing system nondiscretionary.

**Michigan**

Michigan replaced its discretionary CCW licensing system with a nondiscretionary system in 2001.665 The new CCW law states: “The concealed weapon licensing board shall issue a license to an applicant to carry a concealed pistol … after the applicant properly submits an application under subsection (1) and the concealed weapon licensing board determines that all of the following circumstances exist…”666 A Michigan court explained the CCW statute:
A licensing board ‘shall issue’ a concealed pistol license to an applicant who has properly submitted the application materials, provided that all the enumerated statutory grounds for granting the license are satisfied. The first 13 grounds are based on objective criteria, such as the age of the applicant, whether the applicant has ever been subject to an order of involuntary commitment, whether the applicant has completed a pistol safety course, and whether the applicant has been convicted of an enumerated offense. The final ground … § 425b(7)(n), is subjective and subject to discretionary decision making by a licensing board.667

The only subjective eligibility criterion in the statute requires the issuer to grant a license if:

Issuing a license to the applicant to carry a concealed pistol in this state is not detrimental to the safety of the applicant or to any other individual. A determination under this subdivision shall be based on clear and convincing evidence of repeated violations of this act, crimes, personal protection orders or injunctions, or police reports or other clear and convincing evidence of the actions of, or statements of, the applicant that bear directly on the applicant’s ability to carry a concealed pistol.668

Although the subjective element in Michigan’s CCW statute does delegate issuers discretion in interpreting and applying the statute, the statutory language and the Michigan courts have given that discretion narrow effect:

[I]n light of the legislative policy to liberalize the issuance of concealed pistol licenses, … an application must be presumed to satisfy § 425b(7)(n), absent a showing to the contrary … MCL 28.425b(7)(n) plainly requires ‘clear and convincing evidence’ before a license can be denied on that ground. The clear and convincing evidence standard presents a heavy burden that far exceeds the preponderance of the evidence standard that is sufficient for most civil litigation.669

The sole subjective eligibility criterion in Michigan’s CCW legislation is insufficient to authorize Michigan issuers to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Therefore, the issuer’s lack of authority empowering it to create and enforce policy determinations affecting the eligibility of significant portions of the general public, and its obligation to issue permits to those applicants satisfying the generally objective eligibility criteria, make Michigan’s CCW licensing system nondiscretionary.
Minnesota

In 2003 Minnesota replaced its discretionary CCW licensing system with a nondiscretionary system. Although the Minnesota courts struck down the 2003 nondiscretionary CCW licensing statute as unconstitutional for technical reasons, the legislature retroactively reenacted the statute in 2005. The 2005 statute requires the issuer to grant a CCW permit to eligible applicants: “Unless a sheriff denies a permit under the exception set forth in subdivision 6 … a sheriff must issue a permit to an applicant if the person…” The eligibility criteria, barring one exception, are entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.

The one subjective criterion, “the exception set forth in subdivision 6”, authorizes the issuer to “deny the application on the grounds that there exists a substantial likelihood that the applicant is a danger to self or the public if authorized to carry a pistol under a permit.” The CCW statute requires that “the sheriff establish[] by clear and convincing evidence … that there exists a substantial likelihood that the applicant is a danger to self or the public if authorized to carry a pistol under a permit. Incidents of alleged criminal misconduct that are not investigated and documented may not be considered.” Although the statute does grant issuers some discretion to interpret what constitutes a danger, that discretion is narrow because the issuer has the burden of establishing, through clear and convincing evidence, that a specific applicant poses a danger. It is improbable that any reasonable interpretation of “substantial likelihood that the applicant
is a danger to self or the public” can render ineligible a significant portion of the otherwise eligible population. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue permits to those applicants satisfying the generally objective eligibility criteria, make Maine’s CCW licensing system nondiscretionary.

**Mississippi**

Mississippi enacted a nondiscretionary CCW licensing system in 1991. The statute mandates that “[t]he Department of Public Safety shall issue a license if the applicant…” The eligibility criteria are, with one exception, entirely objective. Generally, the objective eligibility criteria specify a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. The only discretion afforded the issuer is that “[t]he Department of Public Safety may deny a license if the applicant has been found guilty of one or more crimes of violence constituting a misdemeanor unless three (3) years have elapsed”. The issuer must determine specifically which crimes are misdemeanor “crimes of violence”, and which of those crimes of violence will warrant the denial or revocation of CCW licenses. Considering that most otherwise eligible people have not been convicted of a violent crime, the discretion afforded the issuer is not sufficient to empower the issuer to create and enforce policy determinations affecting the eligibility of significant portions of the general public. Therefore, the issuer’s lack of any authority empowering it to create and enforce policy determinations
significantly affecting the range of people eligible for a CCW license, and its obligation
to issue licenses to those applicants satisfying the generally objective eligibility criteria,
make Mississippi’s CCW licensing system nondiscretionary.

\textit{Missouri}

Missouri passed a nondiscretionary CCW licensing statute in 2003.\textsuperscript{685} Although
the Supreme Court of Missouri ruled that, for technical reasons, the CCW statute was
unconstitutional in its application in some counties,\textsuperscript{686} an amendment to the statute has
since corrected any constitutional problems.\textsuperscript{687} The statute mandates CCW permit issuers
to grant a permit to eligible applicants: "A certificate of qualification for a concealed
carry endorsement issued … shall be issued by the sheriff or his or her designee of the
county or city in which the applicant resides, if the applicant…"\textsuperscript{688} The eligibility criteria
are, with one exception, entirely objective.\textsuperscript{689} Generally, the objective eligibility criteria
specify mandatory training requirements, a minimum age, residency requirements,
specific criminal offenses that disqualify an applicant, and that an applicant is mentally
sound.\textsuperscript{690}

The criterion permitting the issuer discretion requires an applicant to "not [have]
engaged in a pattern of behavior, documented in public records, that causes the sheriff to
have a reasonable belief that the applicant presents a danger to himself or others".\textsuperscript{691} This
requirement necessitates an issuer to define what behavior or attitudes specifically
constitute "a danger to himself or others" and what kind and amount of public documents
are needed to justify a "reasonable belief” that an applicant meets an issuer’s definition of
dangerous. However, considering that most otherwise eligible people likely do not have
a record of dangerous behaviors, the discretion afforded the issuer is not sufficient to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations affecting the eligibility of significant portions of the general public, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Missouri’s CCW licensing system nondiscretionary.

Montana

Montana replaced its discretionary CCW licensing system with a nondiscretionary system in 1991. The state mandates the issuer to grant CCW permits to eligible applicants: “A county sheriff shall … issue a permit to carry a concealed weapon to the applicant … this privilege may not be denied an applicant unless the applicant…” The eligibility criteria are, with one exception, entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound.

The criterion permitting the issuer discretion states:

The sheriff may deny an applicant a permit to carry a concealed weapon if the sheriff has reasonable cause to believe that the applicant is mentally ill, mentally defective, or mentally disabled or otherwise may be a threat to the peace and good order of the community to the extent that the applicant should not be allowed to carry a concealed weapon. The issuer must interpret what precisely determines whether an applicant is “mentally ill, mentally defective, or mentally disabled or otherwise may be a threat to the peace and good order of the community” and what amount of evidence is necessary to create a
reasonable belief that an applicant meets those standards. Therefore, this criterion “vests the sheriff with discretion to deny an application for a concealed weapon permit based on good cause.” However, it would stretch the limits of good cause and reasonable belief for issuers to define and apply the subjective criterion in such a manner to significantly affect the range of people eligible for a CCW license.

One Montana district court has ruled that issuers possess the discretion to issue CCW permits to applicants that do not satisfy the objective eligibility criteria:

The language of the pertinent portions of this statute is clear and unambiguous. Unless any of the exceptions in subsection (1) exist, a permit ‘may not be denied.’ Conversely, if any of the exceptions do exist, the permit may be denied. Thus, upon finding that any of the enumerated exceptions exist, the sheriff has discretion to grant or deny the permit … There is nothing in the language of this statute that automatically precludes eligibility for a permit upon the existence of an enumerated exception in subsection (1). If the legislature had intended such an effect, it would have done so.

Although the previous court’s ruling uses expansive language, it is unlikely that Montana’s CCW statute, and higher courts’ possible interpretations of it, grant issuers the discretion to issue permits to violent felons, the severely mentally ill, or other applicants clearly unfit for a CCW permit. If the statute does authorize issuers some discretion to issue a permit to those otherwise ineligible under the statute’s objective criteria, that discretion almost certainly cannot be so great as to confer upon Montana issuers the power to issue permits to significant portions of the otherwise ineligible population. Therefore, the issuers’ lack of authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Montana’s CCW licensing system nondiscretionary.
Nebraska

Nebraska repealed its CCW prohibition and enacted a nondiscretionary licensing system in March of 2006. The new law states: “The permit to carry a concealed handgun shall be issued by the county sheriff … if the applicant has complied with this section and has met all the requirements of section 7 of this act.” The eligibility criteria are entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, a residency requirement, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. The statute uses mandatory “shall issue” language and contains no vague eligibility criteria that would grant issuers discretion. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW permit, and their obligation to issue permits to those applicants satisfying the wholly objective eligibility criteria, make Nebraska’s CCW licensing system nondiscretionary.

The applicability of Nebraska’s new statute is uncertain because the CCW statute does not preempt localities from prohibiting the carrying of concealed firearms. Whether local Nebraska jurisdictions may enact ordinances directly contrary to state law is an issue that Nebraska courts must decide. Nebraska statutes still permit many municipalities to regulate the carrying of concealed weapons; whether Nebraska’s new CCW statute will alter those municipal powers is unclear.
Nevada

Nevada replaced its discretionary CCW licensing system with a nondiscretionary system in 1995. The statute mandates that the issuer grant CCW permits to eligible applicants: “the sheriff shall issue a permit for … any person who is qualified to possess each firearm under state and federal law, who submits an application in accordance with the provisions of this section and who…” The eligibility criteria are entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Nevada’s CCW licensing system nondiscretionary.

New Hampshire

New Hampshire gives local officials little discretion in issuing CCW licenses:

The selectmen of a town or the mayor or chief of police of a city or some full-time police officer designated by them respectively, upon application … shall issue a license to such applicant authorizing the applicant to carry a loaded pistol or revolver in this state … if it appears that the applicant has good reason to fear injury to the applicant’s person or property or has any proper purpose, and that the applicant is a suitable person to be licensed. Hunting, target shooting, or self-defense shall be considered a proper purpose. The statute does not define “good reason” or “suitable person,” thus leaving the issuer some discretion when defining those criteria. The statute’s use of “shall issue” suggests that the issuer must grant a license if the applicant meets the qualifications within the
statute. Whether New Hampshire’s CCW law is discretionary depends on whether the undefined terms “proper purpose” or “suitable person” grant the issuer enough discretion to create policy significantly affecting the range of people eligible for a CCW license.

New Hampshire’s CCW law is similar to Massachusetts’ law in that it states that “any other purpose” is sufficient to show need. However, while Massachusetts authorizes the issuer to restrict a CCW license to uses listed and approved in the license application, and thus gives the issuer discretion to decide who is eligible for a general CCW license, New Hampshire does not empower the issuer to restrict licenses based upon the purposes listed in an application. Regardless of one’s stated purpose for a license, all New Hampshire CCW licenses are identical. That “any proper purpose” suffices for a CCW license, and that “[h]unting, target shooting, or self-defense shall be considered a proper purpose,” a New Hampshire issuer has no room to deny an application based upon an applicant lacking a proper purpose. Unless an applicant states an illegal purpose, there is little that a New Hampshire issuer can do to unilaterally restrict licenses based upon a narrow definition of “proper purpose.”

New Hampshire issuers do have some discretion in defining “suitable person”; however, that discretion is limited. The Supreme Court of New Hampshire has ruled that an issuer cannot create criteria that automatically disqualify an applicant as unsuitable unless those criteria are already within New Hampshire law. Issuers therefore must examine each application on its own merits.

Additionally, the review process in New Hampshire reduces an issuer’s ability to unilaterally define “suitable person.” The CCW statute allows a denied applicant an appeal to the courts. During an appeal, the court holds a hearing and “[d]uring this
hearing the burden shall be upon the issuing authority to demonstrate by clear and convincing proof why any denial, suspension, or revocation was justified, failing which the court shall enter an order directing the issuing authority to grant or reinstate the petitioner's license.\textsuperscript{717} Under the CCW law, the courts have reviewed the decisions of license issuers broadly:

Although the district court did believe that the statute allows the court to substitute its judgment for that of the selectmen [the issuer], we think that it does. Unlike many other appeal statutes ... there is no requirement ... that any presumption of reasonableness be accorded the decision of the selectmen. It appears to us that the statute contemplates that the district court would hear evidence and make its own determination ‘whether the petitioner is entitled to a license.’\textsuperscript{718} The issuer has the burden of justifying any denial upon appeal, although the applicant has an initial burden of providing the issuer with the information required to establish suitability.\textsuperscript{719} A New Hampshire issuing authority cannot create absolute bars to issuance, but must instead consider individually each applicant, and also must produce “clear and convincing proof”\textsuperscript{720} justifying its determination before a court empowered to “substitute its judgment for that of”\textsuperscript{721} the issuer. These limitations upon the issuers’ potential interpretations of “suitable person” do not afford them the ability to unilaterally create policy, through their discretion, that will substantially affect the range of people eligible for a CCW license.

The “shall issue” verbiage within the CCW statute, the lack of meaningful discretion when applying the “proper purpose” criterion, and the very limited discretion when interpreting the term “suitable person,” offer the issuing insufficient licensing discretion to effectively create policy significantly affecting the range of people eligible for a CCW license.

However, federal courts have held otherwise. In order to deny the existence of any due process interests in the issuance of a New Hampshire CCW license, a U.S.
District Court, in *Conway v. King*, ruled that “[u]nder 159:6, the licensing authority has broad discretion to issue licenses. In light of this broad discretion, the Court finds that the statute does not confer on Conway a claim of entitlement to a license to carry a concealed weapon.”\(^\text{722}\) The *Conway* ruling argued that to have due process rights in the issuance of a license, that license must contain some property interest, which could not exist if the issuance of the license was at the discretion of the issuer. The *Conway* opinion offers no direct justification for finding broad issuer discretion under the New Hampshire CCW legislation. Instead, *Conway* cites *Medina v. Rudman*,\(^\text{723}\) which held that a New Hampshire greyhound-racetrack licensing law, employing “may issue” language, granted the issuer broad discretion and thus did not create any property interest in the license. That comparison is unfounded. Not only did the *Medina* law use “may issue” verbiage, as opposed to the “shall issue” language in New Hampshire’s CCW statute, but also the Supreme Court of New Hampshire specifically ruled the *Medina* law is discretionary, whereas no such ruling exists for New Hampshire’s CCW statute.\(^\text{724}\) New Hampshire courts’ CCW licensing caselaw serve to circumscribe, rather than expand, any issuer discretion.

The *Conway* court further added that:

> The court [*Medina*] further explained that ‘while vesting discretionary powers in a state commission may open the way to abuse, a state may reasonably believe that discretionary control makes it easier to see that licenses do not fall into the wrong hands and that only persons who will act affirmatively in the public interest obtain licenses.’ The Court finds this statement particularly apt in the context of gun-licensing laws.\(^\text{725}\)

A state may reasonably believe discretion in the issuance of CCW licenses is necessary, but there is little evidence that New Hampshire does. The state may want to only give licenses to those “who will act affirmatively in the public interest,” but New Hampshire’s CCW statute effectively erases any discretion on the part of the issuer to reject applicants.
based upon them not having a “proper purpose;” New Hampshire does not permit the issuer to substantially determine what constitutes a “proper purpose” or which purposes are “affirmatively in the public interest.” New Hampshire does want to “see that licenses do not fall into the wrong hands,” but the New Hampshire courts and legislation have placed limits on issuers’ ability to substantially define whose hands are the wrong ones.

The Conway court may think it wise or good policy to grant New Hampshire CCW licensing authorities broad discretion, but it is neither its place, nor in its power to do so. Conway offers no direct support for its interpretation of New Hampshire’s CCW law, offers no compelling reason to treat the CCW law similarly to a clearly dissimilar law, offers irrelevant policy arguments, and has not been followed, or even cited, by a single New Hampshire court, despite being over fifteen years old. These deficiencies should render Conway’s naked assertion that the New Hampshire CCW law grants license issuers “broad discretion” highly dubious.

The same District Court as Conway stated in Penney v. Town of Middleton that “[t]he chief plainly acts as a municipal policymaker when he decides on the criteria to be considered in granting or denying a request for a gun permit.”726 The Penney opinion offers no citation or argument explaining or identifying the issuer’s authority to create “the criteria to be considered.”727 The discretion granted the issuing authority under New Hampshire’s CCW statute does not afford that authority “policymaker” powers.728 The Penney court’s assertion is unsupported by statute or caselaw, and, like Conway, no New Hampshire court has bothered following or citing the Penney opinion despite it being over a decade old.
The New Hampshire CCW statute does use subjective eligibility criteria. However, limitations upon the issuers’ discretion from both the statute and the courts have restricted issuers from unilaterally creating policy that will substantially affect the range of people eligible for a CCW license. Therefore, issuers’ lack authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make New Hampshire’s CCW licensing system nondiscretionary.

**New Mexico**

New Mexico first enacted a nondiscretionary CCW licensing system in 2001; however, that statute contained an opt-out provision for municipalities that the Supreme Court of New Mexico held was a constitutional defect voiding the whole CCW statute. The New Mexico Legislature reenacted the CCW statute in 2003 without the municipal opt-out provision. The new statute survived constitutional challenge. The new CCW statute mandates the issuer to grant CCW licenses to eligible applicants: “The department [of Public Safety] shall issue a concealed handgun license to an applicant who…” The eligibility criteria are entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, residency requirements, a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. Therefore, the issuers’ lack of any authority empowering it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and
its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make New Mexico’s CCW licensing system nondiscretionary.

**North Carolina**

North Carolina enacted a nondiscretionary CCW licensing system in 1995. The CCW statute mandates the issuer to grant CCW permits to eligible applicants: “The sheriff shall issue a permit to an applicant if the applicant qualifies under the following criteria…” The eligibility criteria are entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make North Carolina’s CCW licensing system nondiscretionary.

**North Dakota**

North Dakota enacted a nondiscretionary CCW licensing system in 1985. The operative clause of its CCW statute states:

1. The chief of the bureau of criminal investigation shall issue a license to carry a firearm or dangerous weapon concealed upon review of an application submitted to the chief if the following criteria are met:
   a. The applicant has a valid reason for carrying the firearm or dangerous weapon concealed, including self-protection, protection of others, or work-related needs.
   b. The applicant is not a person specified in section 62.1-02-01.
c. The applicant has the written approval for the issuance of a license from the sheriff of the applicant’s county of residence, and, if the city has one, the chief of police or a designee of the city in which the applicant resides.739

The statute’s three criteria for CCW licensing are somewhat ambiguous. The statute uses the mandatory verb “shall issue,” but the following criteria may require the state issuer, the Chief of the Bureau of Investigation, to exercise discretion. The first criterion, that an applicant must establish a valid reason for a license, identifies protection as valid; however, the statute does not specify whether an applicant’s stated desire for a CCW license for protection is sufficient, or whether the state issuer must independently assess the reasonableness of an applicant’s need for protection. The statute does not clearly identify whether the valid reason of self-protection is a subjective requirement pertaining to an applicant’s actual beliefs or an objective standard requiring that an applicant’s belief be reasonable, as determined by the issuer. At issue is whether an applicant must establish a need for a license that the issuer believes is acceptable, or whether the state issuer must accept an applicant’s stated need of protection. North Dakota’s Administrative Code does state that:

The chief agent of the bureau of criminal investigation may deny a concealed weapons permit for any of the following reasons:

...  
2. The applicant has failed to state a valid reason to possess a concealed weapon.

...  
5. For any other good and valid reasons that has a direct bearing on the individual’s fitness to carry and possess a concealed weapon.740

However, this code does little to clarify the issue; it does not state whether “failure to state a valid reason” means simply leaving that portion of the application blank, or whether it means a failure to sufficiently demonstrate a valid need for protection. Denials “[f]or any other good and valid reasons” is also quite vague and dependant upon an interpretation of the CCW statute that grants the issuer discretion.
The second eligibility criterion is objective. Generally, the second criterion specifies a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound. The statute also specifies training requirements for applicants. The third criterion is ambiguous because it is unclear whether sheriffs have the authority to refuse to approve an applicant for any reason or whether they must approve all applicants that properly fill out an application and pass the testing requirements. The statute requires sheriffs to administer the training requirements, conduct a background check, and then forward applications to the state issuer; whether sheriffs can refuse to approve an application for reasons not related to their specified tasks and whether the state issuer may deny an applicant solely because a sheriff recommends denial is unaddressed in the CCW statute.

The Supreme Court of North Dakota has clarified some of these issues. They ruled that a sheriff does not have the discretion to deny an applicant:

From our review of the language in N.D.C.C. § 62.1-04-03 and the legislature’s stated intent, we conclude the legislature did not intend to give sheriffs discretionary authority to deny licenses … We conclude the legislature vested sheriffs with ministerial and investigative responsibilities under the statute. A sheriff must approve an application within a reasonable time, unless the applicant has objectively failed the ‘testing procedure’ specified in N.D.C.C. § 62.1-04-03 (1) (c). A sheriff forwards the results of the background investigation to BCI. In every case, a sheriff must forward the application to BCI.

In dicta, the Supreme Court of North Dakota also pondered what discretion the issuer possessed:

The legislature has not specified in detail how the BCI chief is to exercise his licensing authority or the extent of any discretion the BCI chief may exercise in deciding whether to issue or deny a license … Giving no discretion to deny an application of a person not prohibited from possessing a firearm would undercut the legislature’s intent to regulate the possession and use of firearms. On the other hand, ‘unbridled discretion allows for capricious and arbitrary discrimination in violation of the due process clauses.’

Although that court did not state what discretion the CCW statute grants issuers, the ruling’s dicta implies that it will permit some discretion on the part of the issuer;
immediately after the above quoted discussion, the court stated: “We have held leaving the manner and means of exercising an administrative agency’s powers to the discretion of the agency implies a range of reasonableness within which the agency’s exercise of discretion will not be interfered with by the judiciary.” It is unclear whether the court intended this statement to mean that it will leave the issuer discretion to determine whether the issuer has the power to exercise discretion, or that if the issuer possesses discretion, or because the issuer already possesses discretion, the court will not interfere with the reasonable exercise of that discretion.

Whether the issuer has the discretion to create eligibility criteria significantly affecting the range of people eligible for a CCW license determines whether North Dakota’s CCW statute is discretionary or not. Although the Supreme Court of North Dakota has implied in dicta that the issuer may have some discretion, it is unlikely that the issuer may employ significant discretion. The intent of the statute indicates otherwise:

> It is the intent of the legislative assembly that the chief of the bureau of criminal investigation issue a license to carry a firearm concealed if the necessary criteria are met. It is further the intent of the legislative assembly that the chief may not use the criterion requiring a valid reason for carrying the firearm concealed to arbitrarily deny an application for a license.

The intention of the statute and its plain meaning, specifically stating protection as a valid reason for a license, clearly serve to limit the issuer’s power to define the eligibility criteria so that the issuer cannot enforce the statute to exclude large portions of the general public from eligibility. If the legislature wanted the issuer to have the discretion to adopt a restrictive licensing policy, they could have used “may issue” instead of the “shall issue” language in the CCW statute, and not have included protection as a valid reason.
Additionally, the valid reasons criterion only confers broad discretion upon the issuer if the applicant must establish a reasonable need for protection. If an applicant has the burden of proving some objectively valid reason for protection then the issuer must determine which applicants have a valid need for protection and what evidence is sufficient to prove that need. In other words, the issuer would have the discretion to define what standards an applicant must meet for his stated reason to be reasonable and valid. If the applicant does not have the burden of proving an objectively valid reason for protection, then the issuer must accept an applicant’s statement of need, unless evidence shows the applicant’s reasons for applying are otherwise. If an applicant must demonstrate a reasonable and valid need for protection, then the issuer has the power to determine North Dakota’s policy conclusions for the issuance of CCW licenses. Although North Dakota’s CCW statute is somewhat vague, and some court dicta may imply that the issuer possesses some amount of discretionary power, there is no clear authority granting the issuer discretionary power or placing a high burden for establishing valid reason of protection upon applicants.

Therefore, North Dakota’s CCW license issuer does not possess discretion sufficient to empower it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Until either North Dakota’s legislature or judiciary clarifies the extent of the issuer’s authority, there is no reason to ascribe to the issuer significant discretionary power. Additionally, the statute uses the mandatory verbiage of “shall issue,” thus requiring the issuer to grant licenses to those applicants satisfying the eligibility criteria. Thus, North Dakota’s CCW licensing system is nondiscretionary.
Ohio

Ohio enacted a nondiscretionary CCW licensing statute in 2004. The CCW statute mandates that the issuer grant CCW licenses to eligible applicants: “a sheriff … shall issue to the applicant a license to carry a concealed handgun … if all of the following apply…” The eligibility criteria are entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Ohio’s CCW licensing system nondiscretionary.

Oklahoma

Oklahoma enacted a nondiscretionary CCW licensing system in 1995. The Oklahoma Legislature stated in its CCW statute:

The Legislature finds as a matter of public policy and fact that it is necessary to provide statewide uniform standards for issuing licenses to carry concealed handguns for lawful self-defense and self-protection, and further finds it necessary to occupy the field of regulation of the bearing of concealed handguns to ensure that no honest, law-abiding citizen who qualifies pursuant to the provisions of the Oklahoma Self-Defense Act … is subjectively or arbitrarily denied his or her rights.

The CCW statute mandates the issuer, the Oklahoma State Bureau of Investigation, to issue a CCW license to all eligible applicants: “The Bureau shall deny a license when the applicant fails to properly complete the application form or application process or is determined not to be eligible as specified by the provisions of … this title. The Bureau
shall approve an application in all other cases.” The eligibility criteria are mostly
goobjective. Generally, the objective eligibility criteria specify mandatory training
requirements, a minimum age, residency requirements, specific criminal offenses that
disqualify an applicant, and that an applicant is mentally sound.

Two eligibility criteria afford the issuer some discretion. The first states that the
issuer shall not grant a license to an applicant with “[s]ignificant character defects … as
evidenced by a misdemeanor criminal record indicating habitual criminal activity.”
The second prohibits from obtaining a license those “[c]urrently undergoing treatment for
a mental illness, condition, or disorder.” The statute defines “currently undergoing
treatment for a mental illness, condition, or disorder” as when the applicant “has been
diagnosed by a licensed physician as being afflicted with a substantial disorder of
thought, mood, perception, psychological orientation, or memory that significantly
impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary
demands of life.” The issuer must determine precisely how to apply these two
provisions, and thus have some discretion through interpretation. However, because the
large majority of the otherwise eligible population does not have “a misdemeanor
criminal record indicating habitual criminal activity” or a serious mental illness, the
permissible range of the issuer’s discretion does not empower it to make and enforce
policy determination significantly affecting the range of people eligible for a CCW
license. Also relevant is the Oklahoma Legislature’s statement of intent:

The Legislature does not delegate to the Oklahoma State Bureau of Investigation any
authority to regulate or restrict the issuing of licenses except as provided by the
provisions of this act. Subjective or arbitrary actions or rules which encumber the issuing
process by placing burdens on the applicant beyond those requirements detailed in the
provisions of the Oklahoma Self-Defense Act or which create restrictions beyond those
specified in this act are deemed to be in conflict with the intent of this act and are hereby
prohibited. The Oklahoma Self-Defense Act shall be liberally construed to carry out the
constitutional right to bear arms for self-defense and self-protection … The restricting conditions specified in the Oklahoma Self-Defense Act generally involve the criminal history, mental state, alcohol or substance abuse of the applicant or licensee, a hazard of domestic violence, a danger to police officers, or the ability of the Oklahoma State Bureau of Investigation to properly administer the Oklahoma Self-Defense Act. Therefore, the issuer’s lack of any authority empowering it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make Oklahoma’s CCW licensing system nondiscretionary.

Oregon

In 1990 Oregon replaced its discretionary CCW licensing system with a nondiscretionary system. The CCW statute mandates that the issuer grant CCW licenses to eligible applicants: “The sheriff of a county … shall issue the person a concealed handgun license if the person…” The eligibility criteria are, with one exception, entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound. The only subjective criterion states that:

[A] sheriff may deny a concealed handgun license if the sheriff has reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to self or others, or to the community at large, as a result of the applicant’s mental or psychological state, as demonstrated by past pattern of behavior or participation in incidents involving unlawful violence or threats of unlawful violence.

The Oregon courts have ruled that one incident does not constitute a “pattern” as used in the subjective criterion, and that an issuer can only use this criterion to deny new applicants, not to revoke a license from an existing license holder. Because the vast majority of the otherwise eligible population does not have a history of multiple acts or threats of illegal violence that demonstrate a dangerous mental state, the discretion
afforded Oregon’s license issuers is not sufficient to empower them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Additionally, their obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria makes Oregon’s CCW licensing system nondiscretionary.

**Pennsylvania**

Pennsylvania replaced its discretionary licensing system with a nondiscretionary system in 1989, except for within Philadelphia, where the discretionary system was replaced with a nondiscretionary system in 1995. The statute mandates issuers to grant a license to eligible applicants:

> A license to carry a firearm shall be for the purpose of carrying a firearm concealed on or about one’s person or in a vehicle and shall be issued if, after an investigation … it appears that the applicant is an individual concerning whom no good cause exists to deny the license.

The eligibility criteria is primarily objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. Pennsylvania has two possibly subjective criteria. They are, first, that “[a]n individual whose character and reputation is such that the individual would be likely to act in a manner dangerous to public safety” shall not receive a CCW license, and, second, that good cause exists for a license denial or revocation.

The significant change between Pennsylvania’s old and new CCW systems is that the new system does not have the subjective eligibility criteria of the older discretionary system. The repealed discretionary system required that an applicant be a “suitable
person to be so licensed” and to show a “proper need” for a license. The current nondiscretionary statute does prohibit an applicant “whose character and reputation is such that the individual would be likely to act in a manner dangerous to public safety”, however, this new criterion, although still somewhat vague, is certainly less discretionary than the previous suitable person standard.

The nondiscretionary statute has also replaced the “may issue” verbiage with the mandatory “shall issue” language. The new statute requires a showing of good cause for an issuer to deny or revoke a license, which indicates that an issuer has the burden of establishing an applicant’s ineligibility for license. Therefore, the mandatory issuance language, the requirement of good cause for a denial or revocation, and the repeal of the proper need and suitable person requirements show a legislative intent to reduce issuers’ licensing.

Despite Pennsylvania’s significant changes in its CCW legislation, the Pennsylvania courts have generally refused to acknowledge any change. For instance, in *Pa. State Police v. McPherson*, a 2003 decision, a Pennsylvania court noted the significant changes in the CCW statute and then treated the issuers’ discretion as if the statute had not changed. The *McPherson* court first describes the previous law, “[p]rior to the 1995 amendments to Sections 6109 … the issuance of a gun license was … left entirely to the sheriff’s discretion” while also explaining the new statute as if no change in the issuers’ discretion was present, “the sheriff exercising his sound discretion *may* issue a license, except in the specific circumstances listed in subsection (e) where a license is prohibited.” Because the *McPherson* case concerns parties outside Philadelphia, the opinion is incorrect in stating that prior to 1995 the statute left CCW
licensing decisions “entirely to the sheriff’s discretion”; the Pennsylvania Legislature
repealed the “proper need” and “suitable person” criteria, the source of sheriffs’
discretion for areas outside Philadelphia, in 1989. Also, the McPherson opinion’s use of
the verb “may issue” in describing the current statute ignores the CCW statute’s explicit
change from “may issue” to “shall issue” in 1989. Although the new CCW statute does
afford issuers some discretion, the McPherson court’s explicit denial of statutory changes
that are clearly aimed at reducing that discretion is without explanation.

The key case concerning Pennsylvania license issuers’ discretion under the new
CCW statute is Harris v. Sheriff of Del. County. The Harris opinion stated that “this
Court has held that the legislature intended in Section 6109 of the Act to confer discretion
on sheriffs, empowering them to exercise judgment in applying the Act’s standards to
determine if applicants should be licensed.” That court also ruled that issuers had
discretion in defining “good cause” for revocation of a license and that “[a]lthough the
Act does not define the ‘good cause’ … findings relating to specified criteria for the
original issuance of the license … certainly would be among those factors that may
constitute good cause for revocation.” Therefore, the character and reputation criterion
and the good cause requirement both grant the issuer discretion; and the good cause
requirement can include, besides the objective criteria for issuance, the subjective finding
of an individual’s character and reputation as being dangerous to public safety. The
Harris opinion does not consider whether an issuer can interpret good cause for denial or
revocation to include factors wholly absent from the statute, or whether only the
eligibility criteria within the statute, both the subjective dangerous character and
reputation criterion and the objective criteria, are relevant in determining good cause.
Although the *Harris* court states that previous decisions have held that an issuer has discretion in applying the CCW statute, *Harris* only cites *Gardner v. Jenkins*, a case concerning Pennsylvania’s old discretionary CCW statute. The *Gardner* decision’s ruling that issuers possessed discretion was based upon the “may issue” language within the old statute: “The language of this section, providing that the sheriff *may* issue a license, shows that the intent of the legislature was to make such issuance not mandatory, but discretionary in that sheriffs are empowered to exercise judgment in applying the statute’s standards to decide if applicants should be licensed.”

The *Harris* court, however, interpreted the new Pennsylvania CCW statute, which had replaced “may issue” with “shall issue.” Therefore, the *Harris* opinion’s citation of *Gardner* does not support its holding because the Pennsylvania legislature specifically changed the “may issue” verbiage that *Gardner* had relied upon to argue that the old statute granted issuers discretion. Although the new CCW statute does afford issuers some discretion, the *Harris* ruling’s simple statement the courts have previously held issuers to have discretion, supported only by a citation to a case concerning the old statute, ignores the changes to the CCW statute and offers no guidance as to whether one should simply imply that any discretion remains unaltered through the legislative overhaul of the statute or whether the discretion granted under the new statute is more limited, as the new statutory language indicates.

After *Harris*, the Pennsylvania courts have still failed to clarify whether the statute’s change from stating that an issuer “may … issue a license … if it appears that the applicant … is a suitable person to be so licensed” with “[a] license shall not be issued to … [a]n individual whose character and reputation is such that the individual
would be likely to act in a manner dangerous to public safety”\textsuperscript{791} has any practical affect on licensing. Although the new statutory language is clearly aimed at limiting the discretion of issuers, most courts simply cite \textit{Harris} and hold that an issuer has wide discretion;\textsuperscript{792} for example, a federal court stated: “In addition to the plain language of § 6109, Pennsylvania courts have expressly ruled that § 6109, and in particular § 6109(e)(1), grants far-reaching discretion to licensing bodies in issuing and revoking gun permits.”\textsuperscript{793} That court then quotes \textit{Harris} in support of finding a grant of “far-reaching discretion.”\textsuperscript{794} Another court, after citing \textit{Harris}, specifically states that \textit{Gardner} relied upon the old CCW statute, but then applies its ruling anyway.\textsuperscript{795} It appears that the courts may simply believe that the old suitability and the new dangerous character and reputation standards are functionally equivalent, and the change from “may issue” to “shall issue” has no bearing upon a license issuer’s authorized discretion.

Another Pennsylvania court gives the impression that the suitability requirement is still in the CCW statute: “A review of Gardner and Tsokas discloses that it is for the sheriff to determine the fitness of an individual to carry weapons. Each case is decided on its own facts and there is no fixed rule to determine fitness.”\textsuperscript{796} Not only is “fitness to carry weapons” not a term in either the old or new CCW statute, but this court has only cited a case dealing with the old law, \textit{Gardner},\textsuperscript{797} and a case that simply cites \textit{Harris},\textsuperscript{798} which in turn simply relies upon \textit{Gardner} for its ruling. All the Pennsylvania cases dealing with an issuer’s discretion essentially rely, without justification, upon \textit{Gardner}, a case decided before Pennsylvania significantly changed the relevant portions of its CCW statute.
Although Pennsylvania courts have not adequately dealt with the dramatic changes in the CCW law, the discretion afforded issuers under the dangerous character and reputation criterion is not sufficient to empower issuers to create and enforce, through statutory interpretation, policy decisions significantly affecting the range of people eligible for a CCW license. To deny an applicant a CCW license under the dangerous character and reputation criterion, the issuer must present evidence specific to the applicant establishing that applicant’s dangerous character and reputation.\(^7\) It is unlikely that Pennsylvania issuers could interpret “dangerous character and reputation” in such a way that issuers could demonstrate a significant portion of the otherwise eligible population as being dangerous.

An issue not dealt with by the Pennsylvania courts is whether an issuer can interpret “good cause for denial” to include factors outside the criteria within the CCW statute. If issuers can do so, then they could make policy decisions that include any number of criteria excluding large portions of the otherwise eligible population. However, although the Pennsylvania courts have been reticent to adequately recognize the new statutory language, an issuer’s decision to enforce a strict interpretation of “good cause for denial” that excludes a significant portion of the population would force the courts to examine the statute’s clear intent to limit issuers’ discretion. It is unlikely that “good cause for denial,” a term apparently limiting an issuer’s discretion and requiring issuers to bear the burden of demonstrating an applicant’s ineligibility, could also authorize issuers the discretion to create whole new eligibility criteria excluding significant portions of the population from obtaining CCW licenses. The only interpretation of the “good cause for denial” clause that is in accord with the legislative
intent to limit issuers’ discretion is that issuers can only establish a “good cause for denial” that relies upon the criteria explicitly listed in the statute.

Finally, although the new CCW statute has repealed any requirement for an applicant to demonstrate a proper need for a license, some Pennsylvania courts have implied that some need requirement may still exist. The statute’s only mention of need is that: “Issuing authorities shall use only the application form prescribed by the Pennsylvania State Police. One of the following reasons for obtaining a firearm license shall be set forth in the application: self-defense, employment, hunting and fishing, target shooting, gun collecting or another proper reason.”800 Nowhere does the statute mention any requirement that an applicant demonstrate any need for a CCW license, just that the reason for a license be in the application. The section of the statute concerning the issuance of licenses makes no mention of proper need.801 If the legislature wished for an applicant to demonstrate some need for a license, they would not have repealed the older statute’s explicit requirement for applicants to establish a proper need for a license.

However, some courts have implied that an applicant might require a proper need for a license, despite the new CCW statute. One court stated that “[t]he issuance or denial of a license under Section 6109 is a decision made by the local sheriff based not only on an investigation of the applicant’s criminal record history, but also takes into consideration the applicant’s character, reputation and the stated reasons for obtaining the license.”802 The opinion does not specify whether “the stated reasons for obtaining the license” are relevant only to the extent that they may reveal an applicant’s possibly dangerous character and reputation, or whether the reasons are an independent consideration upon which an issuer may deny a license. In considering a statute that
reduced the criminal penalties to carrying a firearm without a license for defendants otherwise eligible for a CCW license, the Supreme Court of Pennsylvania left open the possibility that eligibility for a CCW license includes “a preliminary burden of producing some evidence that he has a proper reason for carrying a firearm.” Although no court has directly ruled that some proper need criterion still exists, some courts have left possible such an interpretation. Until the courts rule that a need requirement still persists, the clear language and legislative intent of the statute determine that an applicant does not need to demonstrate a proper reason for a possessing license.

Barring more judicial misrepresentations of Pennsylvania’s CCW statute, issuers in Pennsylvania do no have sufficient discretion to create and enforce policy determinations denying CCW licenses to significant portions of the otherwise eligible population. Even though the Pennsylvania courts have not adequately addressed the statutory changes, the state’s issuers have changed behavior. For example, after the 1995 amendment including Philadelphia in the nondiscretionary licensing statute, the number of issued licenses went from 4,500 to over 38,000. The repeal of the CCW statute’s subjective eligibility criteria, which granted issuers discretion, obviously affected the Philadelphia issuer, who had previously enforced very narrow restrictive policies when issuing licenses. Therefore, the issuers’ lack of sufficient authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants satisfying the generally eligibility criteria, make Pennsylvania’s CCW licensing system nondiscretionary.
South Carolina

South Carolina enacted a nondiscretionary CCW licensing system in 1996.806 The CCW statute mandates that the issuer grant CCW permits to eligible applicants: “SLED [South Carolina Law Enforcement Division] must issue a permit … to carry a concealable weapon to a resident who is at least twenty-one years of age and who is not prohibited by state law from possessing the weapon upon submission of: …”807 South Carolina’s attorney general explained the CCW statute:

The ‘Law-Abiding Citizens Self-Defense Act of 1996’, codified at S. C. Code Ann. Section 23-31-205 et seq., requires that if an individual meets certain criteria, a ‘concealable weapons permit’ must be issued. The statute is thus representative of the so-called ‘right to carry’ acts which have been enacted throughout the United States.808 The eligibility criteria are entirely objective.809 Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, a residency requirement, and that the applicant otherwise is able to legally possess a firearm.810 Therefore, the issuer’s lack of any authority empowering it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make South Carolina’s CCW licensing system nondiscretionary.

South Dakota

South Dakota employs a nondiscretionary CCW licensing system.811 The CCW statute mandates that the issuer grant CCW permits to eligible applicants: “A permit to carry a concealed pistol shall be issued to any person by the sheriff of the county in which the applicant resides.”812 The eligibility criteria are, with two exceptions, entirely objective.813 Generally, the objective eligibility criteria specify a minimum age,
residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant not is addicted to chemical substances.814

The two subjective criteria require an issuer to grant a permit to an applicant that “[h]as no history of violence” and “[h]as not been found in the previous ten years to be a ‘danger to others’ or a ‘danger to self’ as defined in § 27A-1-1”. 815 The statute does not define “history of violence” and, therefore, requires South Dakota issuers to interpret “history of violence.” Interpreting eligibility criteria empowers issuers with discretion. South Dakota does define danger to self or others.816 To be a danger to self or others under South Dakota law, an applicant must display behavior indicating “severe mental illness.”817 Because under any reasonable definition of “history of violence” the vast majority of the otherwise eligible population does not have a history of violence, nor displays behavior indicating severe mental illness, the discretion afforded South Dakota’s CCW permit issuers is not sufficient to empower them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Additionally, their obligation to issue permits to those applicants satisfying the generally objective eligibility criteria makes South Dakota’s CCW licensing system nondiscretionary.

**Tennessee**

Tennessee enacted a nondiscretionary CCW licensing system in 1996.818 The CCW statute mandates that the issuer grant CCW permits to eligible applicants: “If the applicant is not prohibited from purchasing or possessing a firearm [under state or federal law] … and the applicant otherwise meets all of the requirements of this section, the
department [of safety] shall issue a permit to the applicant.”^819 The eligibility criteria are, with one possible exception, entirely objective.820 Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.821

Tennessee’s CCW statute does contain one subjective eligibility criterion; the issuer cannot grant a permit to an applicant that “[p]oses a material likelihood of risk of harm to the public”.822 The statute does not define what exactly constitutes “harm to the public” or what “material likelihood of risk” means when evaluating an applicant. The statute does require the issuer to possess “sufficient evidence” before denying or revoking a license because of a likelihood of harm.823 No reasonable interpretation of “material likelihood of risk of harm to the public” could create a situation permitting the issuer to potentially present sufficient evidence showing that a significant portion of the otherwise eligible population is, on an individual basis, likely to pose material risk to the public if licensed; therefore, the discretion afforded Tennessee’s CCW permit issuer is not sufficient to empower it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license. Additionally, the issuer’s obligation to issue permits to those applicants satisfying the generally objective eligibility criteria makes Tennessee’s CCW licensing system nondiscretionary.

**Texas**

Texas enacted a nondiscretionary CCW licensing system in 1995.824 The CCW statute mandates that the issuer grant CCW licenses to eligible applicants:
The department [of public safety] shall issue a license to carry a concealed handgun to an applicant if the applicant meets all the eligibility requirements and submits all the application materials. The department may issue a license to carry handguns only of the categories indicated on the applicant’s certificate of proficiency issued under Section 411.189. The department shall administer the licensing procedures in good faith so that any applicant who meets all the eligibility requirements and submits all the application materials shall receive a license. The department may not deny an application on the basis of a capricious or arbitrary decision by the department. 825

The eligibility criteria are entirely objective.826 Generally, the eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.827 To deny an applicant, the issuer must present a preponderance of evidence supporting the denial.828 Therefore, the issuer’s lack of any authority empowering it to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and its obligation to issue licenses to those applicants satisfying the generally objective eligibility criteria, make the Texas CCW licensing system nondiscretionary.

**Utah**

Utah replaced its discretionary CCW licensing system with a nondiscretionary system in 1995.829 The CCW statute mandates that the issuer grant CCW permits to eligible applicants: “The [Criminal Investigations and Technical Services] division … shall issue a permit to carry a concealed firearm for lawful self defense to an applicant … unless … the division finds proof that the applicant is not of good character.”830 The statute defines “good character” with wholly objective criteria.831 The remaining eligibility criteria are, with some exceptions, entirely objective as well.832 Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age,
residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound.  

Utah’s CCW statute does contain some subjective eligibility criteria. First, to be of good character an applicant must “not [have] been convicted of an offense involving moral turpitude”. The statute does not specify what constitutes an “offense involving moral turpitude”, therefore, leaving the issuer the discretion to determine precisely which crimes are offenses of moral turpitude. Second, the statute states that:

The division may deny, suspend, or revoke a concealed firearm permit if the licensing authority has reasonable cause to believe that the applicant has been or is a danger to self or others as demonstrated by evidence including, but not limited to:

(i) past pattern of behavior involving unlawful violence or threats of unlawful violence;

(ii) past participation in incidents involving unlawful violence or threats of unlawful violence; or

(iii) conviction of an offense in violation of Title 76, Chapter 10, Part 5, Weapons.

The use of “may deny” implies that the issuer has some discretion to determine what patterns of violence or threats will result in a denial or revocation. Finally, the statute also instructs that “[i]n assessing good character under Subsection (2), the licensing authority shall consider mitigating circumstances.” Except for the requirement that to be of good moral character an applicant must not have committed a crime involving moral turpitude, Subsection (2) lists only objective eligibility criteria. For consideration of mitigating circumstances to have any effect, the issuer must be authorized to grant permits to applicants ineligible under Subsection (2) if the issuer finds sufficient mitigating circumstances. Determining the value of mitigating evidence gives the issuer discretion.

Although the Utah CCW statute grants the permit issuer discretion, that discretion is not sufficient to empower it to create and enforce policy determinations significantly
affecting the range of people eligible for a CCW license. To have “been convicted of an
offense involving moral turpitude” one must have been convicted of some crime; the
population eligible for a Utah CCW permit, except for having been convicted of a crime
involving turpitude, as defined under any reasonable interpretation, is almost certainly
insignificant. Second, for any denial or revocation the issuer must show a preponderance
of proof supporting its decision;\textsuperscript{838} therefore, no reasonable interpretation of “pattern of
behavior” or “past participation in incidents” “involving unlawful violence or threats of
unlawful violence” could create a situation permitting the issuer to potentially present a
preponderance of proof establishing that a significant portion of the otherwise eligible
population is, on an individual basis, ineligible under that interpretation. Finally,
however the issuer chooses to deal with mitigating evidence, the otherwise eligible
population guilty of a crime listed in Subsection (2), but for whom some mitigating
circumstances exist, is almost certainly insignificant. Therefore, the issuer’s lack of any
authority empowering it to create and enforce policy determinations significantly
affecting the range of people eligible for a CCW license, and its obligation to issue
permits to those applicants satisfying the generally objective eligibility criteria, make
Utah’s CCW licensing system nondiscretionary.

\textit{Virginia}

Virginia enacted a nondiscretionary CCW licensing system in 1995.\textsuperscript{839} Virginia
originally had a discretionary licensing system, but slowly amended it until finally wholly
adopting a nondiscretionary system in 1995.\textsuperscript{840} In 1988 Virginia amended its statute to
include “shall issue,” but left discretionary eligibility criteria.\textsuperscript{841} Some judges, as
Virginia CCW permit issuers, categorically refused to renew permits, so the Virginia Legislature amended the CCW statute to require issuers to renew permits “unless there is good cause shown for refusing to reissue a permit.” Although from 1992 to 1994 the Virginia CCW statute appeared to limit issuers’ discretion, many issuers ignored the statute:

The Virginia Legislature has revised its statutes several times to make it clear that judges really are supposed to issue permits. The need for repeated revision suggests that while the law required issuance of permits, many judges effectively nullified it by using unauthorized discretion. While the law is currently [1994] applied as written in most of Virginia, in the two counties of Virginia closest to Washington, D.C., carry permit applicants must often spend thousands of dollars in legal fees to force courts to issue permits according to legislative command.

Therefore, in 1995 the Virginia Legislature substantially rewrote the CCW licensing statute to make it unambiguously nondiscretionary.

The 1995 nondiscretionary statute mandates that issuers grant licenses to qualified applicants: “The court shall issue the permit within 45 days of receipt of the completed application unless it is determined that the applicant is disqualified.” The eligibility criteria, barring one exception, are entirely objective. Generally, the eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol. Issuers must base their licensure decisions solely upon the eligibility criteria specified in the statute; one court ruled that the statute “sets forth the sole and exclusive list of disqualifications from obtaining a concealed weapon permit.”

Virginia’s one subjective eligibility criterion disqualifies “[a]n individual who the court finds, by a preponderance of the evidence, based on specific acts by the applicant, is likely to use a weapon unlawfully or negligently to endanger others.” The statute does
not define exactly what “specific acts” make an individual “likely to endanger others,” but the statute does require issuers possess “a preponderance of” evidence before denying a permit on that ground. No reasonable interpretation of the “likely to endanger others” criterion could create a situation permitting issuers to potentially establish a preponderance of evidence showing that a significant portion of the otherwise eligible population is, on an individual basis, likely to endanger others if granted a CCW permit.

On possible source of discretion is that the statute does not define “good cause … for refusing to reissue a permit”. However, the CCW statute specifically enumerates the exclusive grounds for denying or revoking a permit; therefore, the only reasonable interpretation of “good cause” for not reissuing a permit is that its “good cause” exists when there would otherwise be grounds for revoking a permit. Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations affecting the eligibility of significant portions of the general public, and their obligation to issue permits to those applicants satisfying the generally objective eligibility criteria, make Virginia’s CCW licensing system nondiscretionary.

**Washington**

Washington enacted a nondiscretionary CCW licensing system in 1961. The CCW statute mandates that issuers grant CCW licenses to eligible applicants: “The chief of police of a municipality or the sheriff of a county shall … issue a license … to carry a pistol concealed”. The statute’s eligibility criteria are exclusive and objective: “The applicant’s constitutional right to bear arms shall not be denied, unless…” Generally, the objective eligibility criteria specify a minimum age, specific criminal offenses that
disqualify an applicant, and that an applicant is mentally sound. One Washington judge discussing the CCW statute held that:

Clearly, the 1935 enactment [,the repealed discretionary licensing system,] accorded great discretion to the licensing official. By shifting the regulatory focus [under the present nondiscretionary CCW statute] from a determination of whether the applicant ‘is a suitable person to be so licensed’, to a denial of the applicant’s ‘constitutional right to bear arms’ in specific circumstances, the legislature obviously intended to curtail the discretion of the licensing authority … In light of the volume of serious gun-related crime which has occurred since 1961 and the inherent dangers of carrying concealed weapons, especially in urban areas, RCW 9.41.070 [the present CCW statute] may as a matter of public policy be overly restrictive of the licensing authority’s power to deny permits to unsuitable persons. Nevertheless, RCW 9.41.070’s language and legislative history demonstrate convincingly that the legislature intended to limit official discretion in this area. The wisdom of such restrictions on the licensing authority is a matter for legislative rather than judicial determination.

Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue permits to those applicants satisfying the generally objective eligibility criteria, make Washington’s CCW licensing system nondiscretionary.

West Virginia

West Virginia replaced its discretionary CCW licensing system with a nondiscretionary system in 1989. The CCW statute mandates that issuers grant CCW licenses to eligible applicants: “If the information in the application is found to be true and correct, the sheriff shall issue a license.” The eligibility criteria are entirely objective. Generally, the objective eligibility criteria specify mandatory training requirements, a minimum age, a residency requirement, and that an applicant is mentally sound and not an abuser of drugs or alcohol. Any possible issuer discretion is “symbolic at best.” Therefore, the issuers’ lack of any authority empowering them to create and enforce policy determinations significantly affecting the range of people eligible for a CCW license, and their obligation to issue licenses to those applicants
satisfying the generally objective eligibility criteria, make West Virginia’s CCW licensing system nondiscretionary.

Wyoming

Wyoming replaced its discretionary CCW licensing system with a nondiscretionary system in 1994. One Wyoming Supreme Court justice remarked: “The legislature abolished the ‘discretionary issue’ system and replaced it with the ‘shall issue’ system we have today which vests in the state attorney general the authority to issue concealed weapon permits. Thus, Wyoming joined the growing number of states that have facilitated more liberal issuance of permits.” The CCW statute mandates that the issuer grant licenses to eligible applicants: “The attorney general … shall issue a permit to any person who…” The eligibility criteria are mostly objective. Generally, the eligibility criteria specify mandatory training requirements, a minimum age, residency requirements, specific criminal offenses that disqualify an applicant, and that an applicant is mentally sound and not an abuser of drugs or alcohol.

The first eligibility criterion that grants discretion to the issuer states:

The division may deny a permit if the applicant has been found guilty of or has pled nolo contendere to one (1) or more crimes of violence constituting a misdemeanor offense within the three (3) year period prior to the date on which the application is submitted or may revoke a permit if the permittee has been found guilty of or has pled nolo contendere to one (1) or more crimes of violence constituting a misdemeanor offense within the preceding three (3) years.

This criterion does not define “crimes of violence” and uses the verb “may deny,” implying that the issuer has discretion when determining whether to use this criterion to deny an applicant. However, because almost certainly only a small portion of the population otherwise eligible for a CCW license would have a criminal record of violent crimes, the discretion afforded the issuer under this eligibility criterion is insufficient to
empower the issuer to create and enforce policy decisions significantly affecting the range of people eligible for a CCW license.

The statute also grants the issuer discretion through authorizing it to deny an application “upon reasonable grounds for denial specified under subsection (g) of this section.” Subsection (g) reads:

(g) The sheriff of the applicant’s county of residence shall submit a written report to the division containing any information that he feels may be pertinent to the issuance of a permit to any applicant. The written report shall state facts known to the sheriff which establish reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to himself or others, or to the community at large as a result of the applicant’s mental or psychological state, as demonstrated by a past pattern or practice of behavior, or participation in incidents involving a controlled substance, alcohol abuse, violence or threats of violence as these incidents relate to criteria listed in this section.

The issuer thus must determine what constitutes “reasonable grounds that the applicant has been or is reasonably likely to be a danger to himself or others.” In *Griess v. Office of the AG, Div. of Crim. Investigation*, the Supreme Court of Wyoming ruled that the reasonable grounds criterion does grant the issuer discretion: “The legislative intent to vest in the Division discretion to issue a permit to carry a concealed firearm is manifest in the statute.” The *Griess* court also held that, despite the statute’s apparent requirement that an issuer demonstrate reasonable grounds through an applicant’s pattern, practice, or participation in incidents of specified behaviors, “[a] reasonable ground for denial of the permit can consist of a single instance in which the applicant manifested danger to himself or others.”

After the *Griess* decision determined that the reasonable grounds to believe an applicant is dangerous criterion granted the issuer discretion, the Supreme Court of Wyoming, in *Mecikalski v. Office of the AG*, ruled that the CCW permit issuer possessed very broad discretion:
Subsection 6-8-104(m)(ii) requires DCI to deny such a [CCW] permit if there are reasonable grounds for denial based on the specifications of § 6-8-104(g). The statute invests broad discretion in the DCI, county sheriffs, and chiefs of police in this regard … The statute, when read in pari materia, clearly demonstrates a legislative intent to rely heavily upon the expertise of local law enforcement officials in making judgments about individuals who seek concealed firearm permits. Not only is that legislative intent clear in the statute, it is extraordinarily sensible. We agree that the statute is quite generous in directing DCI to issue concealed firearm permits to qualified individuals without proof of a specific need. However, it is also very restrictive in commanding DCI to deny permits if there are reasonable grounds, based in fact, that issuance of the permit is likely to endanger the community. One of the most significant changes to the concealed firearms statute is that it is valid throughout the state of Wyoming and likely good in many of our sister states. Thus, the ‘community’ to be protected from ill-advised issuance of such permits is a large one and, commensurate with that, the discretion placed in law enforcement officials is broad.872

The Mecikalski court held both that the reasonable grounds criterion commands the issuer “to deny permits if there are reasonable grounds” and “invests broad discretion” in the issuer. The Mecikalski opinion cites Griess to support its claim, even though Griess’s finding that the issuer had discretion suddenly transforms under Mecikalski into “broad discretion.” However, regardless of the issuer’s discretion under the reasonable grounds criterion, it must still present evidence, based on fact, that an applicant does pose a danger. No reasonable interpretation of the reasonable grounds to believe that an applicant poses a danger could create a situation permitting the issuer to use its discretion to potentially present evidence and then determine that a significant portion of the otherwise eligible population is, on an individual basis, ineligible under that criterion. Even though the courts will only overturn the issuer’s determinations if arbitrary, capricious, or an abuse of discretion,873 it is difficult to imagine any possible interpretation of reasonable grounds to believe an applicant is dangerous that would encompass a significant portion of the law-abiding population and be generally provable on an individual basis. Any such interpretation would surely be contrary to the legislative intent of liberalizing the issuance of CCW permits and an abuse of the issuer’s discretion. Therefore, the issuer’s lack of sufficient authority empowering it to create and
enforce policy determinations significantly affecting the range of people eligible for a CCW license, and its obligation to issue permits to those applicants satisfying the generally objective eligibility criteria, make Wyoming’s CCW licensing system nondiscretionary.

1 See Jill Lawrence, Federal Ban on Assault Weapons Expires, USA TODAY, Sept. 12, 2004.


3 See Mike Rupert, Gun Ban Repeal Looks Like Sure Shot, WASHINGTON EXAMINER, June 30, 2005.


6 Cramer & Kopel, id. at 680-86.

7 Id. at 681.

8 See infra Appendix, Part A.

9 Discretionary licensing systems tend to grant significantly less licenses than nondiscretionary systems. Issuer discretion is almost always used to restrict the issuance of licenses, usually based upon proper need standards not present in nondiscretionary systems. See infra Section II.3.c. Every discretionary system that interprets proper need such that a significant portion of the population does not meet that standard will subsequently issue less licenses than nondiscretionary systems. Because many discretionary systems issue licenses on the local level, issuance rates vary county by county within the same state; however, if such a state enacts a nondiscretionary licensing system, those jurisdictions that formerly used strict issuance policies will, by law, issue more licenses. See JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 28-35 (2nd ed. 1998) (“[I]t has become very clear that there was a large variation across counties within a state in terms of how freely gun permits were granted to residents prior to the adoption of nondiscretionary right-to-carry laws…the most populous counties had previously adopted by far the most restrictive practices in issuing permits.” at 28); GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 191-211, 367-72 91997) (providing, first, an excellent analysis of the research concerning the carrying of firearms, and, second, an analysis of Florida’s experience when they adopted a nondiscretionary issuance law); Cramer & Kopel, supra note 5, at 682-708, 712-16 (providing, first, an analysis of fourteen states after they adopted shall issue laws, and, second, an analysis of California, a discretionary licensing state, and how its rates of issuing licenses varies greatly from county to county); infra Section III.3.c.

10 Only two states allow citizens to carry a concealed firearm without a license, Vermont and Alaska. See infra Appendix, Part B.

11 See Cramer & Kopel, supra note 5, at 681-82.
12 See id. (“[May issue] statutes were broadly discretionary; while the law might specify certain minimum standards for obtaining a permit, the decision whether a permit should be issued was not regulated by express statutory standards.” at 681); see also Snyder, supra note 5 (“The most serious problem with discretionary licensing systems is the broad discretionary power that is wielded by government officials.”).

13 See Snyder, supra note 5.

14 Id.

15 N.Y. PENAL LAW § 400(1)(b).

16 N.Y. PENAL LAW § 400(2)(f).

17 N.Y. PENAL LAW § 400(1)(g).

18 See Suzanne Novak, Why the New York State System for Obtaining a License to Carry a Concealed Weapon Is Unconstitutional, 26 FORDHAM URBAN LAW JOURNAL 121 (1998) (“The sole ‘proper cause’ standard for the issuance of a [New York] carry license is the equivalent of a standardless delegation, which, in effect, grants unelected and unaccountable administrative officials the discretion to apply their own public policy on gun control.”).

19 See Snyder, supra note 5.

20 See infra Appendix, Idaho entry.

21 See Snyder, supra note 5.

22 See supra note 9.

23 The debate over the empirical effects from “shall issue” laws is intense. John Lott’s study finding that shall issue laws reduce crime is at the center of the disagreement. See LOTT, supra note 9 (presenting Lott’s research and his responses to various criticisms of it); Ian Ayres, John J. Donohue III, Shooting Down the “More Guns, Less Crime” Hypothesis, 55 STAN. L. REV. 1193 (2003) (presenting the most compelling criticism of Lott’s research and conclusions); Florenz Plassmann, John Whitley, Confirming “More Guns, Less Crime”, 55 STAN. L. REV. 1313 (2003) (responding to Ayres’ and Donohue’s article and defending Lott’s work); Ian Ayres, John J. Donohue III, The Latest Misfires in Support of the “More Guns, Less Crime” Hypothesis, 55 STAN. L. REV. 1371 (2003).

24 See id.

25 See id.


27 See supra note 5.

28 See id.

29 See infra note 45.
30 See supra note 9.

31 See FOR THE DEFENSE OF THEMSELVES AND THE STATE, supra note 26, at 19-96 (discussing early firearm regulations in America).


33 See infra Appendix, Alaska entries.


36 See CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC, supra note 34.

37 See infra Appendix.


39 See Toward a History of Handgun Prohibition, id.; Don B. Kates, Jr., The Battle over Gun Control, 3 J. FIREARMS & PUB. POL’Y (1991); Snyder, supra note 5.

40 Watson v. Stone, 148 Fla. 516, 524, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

41 See infra Appendix.

42 See Cramer & Kopel, supra note 5; infra Appendix, Part A.

43 See id. Oklahoma’s CCW statute’s statement of intent presents a typical reason why states adopt a nondiscretionary CCW statute:

The Legislature finds as a matter of public policy and fact that it is necessary to provide statewide uniform standards for issuing licenses to carry concealed handguns for lawful self-defense and self-protection, and further finds it necessary to occupy the field of regulation of the bearing of concealed handguns to ensure that no honest, law-abiding citizen who qualifies pursuant to the provisions of the Oklahoma Self-Defense Act … is subjectively or arbitrarily denied his or her rights.


44 See infra Appendix, Part E.

45 See infra Appendix. Even those states banning the general carrying of concealed weapons have exceptions. Illinois and Wisconsin permit the carrying of concealed firearms upon one’s property or place of business. See infra Appendix, Illinois and Wisconsin entries; 720 ILL. COMP. STAT. ANN. 5/24-1 (West 2005); State v. Hamdan, 264 Wis. 2d 433, 665 N.W.2d 785 (2003).

46 See supra note 5.
47 For example, some consider New Hampshire and Connecticut discretionary licensing states, while others contend that they are “shall issue” states. See Cramer & Kopel, supra note 5, at 747 n.41; infra note 88. Cramer & Kopel notes that:

Mr. Cramer has been repeatedly told by New Hampshire gun owners that concealed handgun permit issuance is non-discretionary in the Granite State. However, while New Hampshire authorities may issue permits readily, there is nothing in the statutes that requires them to do so. A number of Connecticut residents are also under the same impression. While Connecticut’s concealed weapon permit law does provide an appeal process that appears to be weighted in favor of law-abiding citizens who wish a permit, there is nothing explicit in the statute that requires a permit to be issued. Id. (citations omitted). New Hampshire and Connecticut, despite granting license issuers some discretion, are both nondiscretionary states. See infra Appendix, New Hampshire and Connecticut entries (providing extended discussions of each state’s licensing statute).

48 The core policy issues of a CCW law concern who, if anyone, the state ought to permit to carry a concealed firearm; if an official’s discretion does not significantly affect the range of citizens eligible for a license, then that discretion does not touch upon core policy issues.

49 See supra notes 5, 23.

50 See supra note 5.

51 See supra notes 5, 23.

52 See supra note 48.

53 ALASKA STAT. § 18.65.700 (2005); VT. STAT. ANN. tit. 13, § 4003 (2005); see infra Appendix, Alaska and Vermont entries.

54 720 ILL. COMP. STAT. ANN. 5/24-1 (West 2005); see also infra Appendix, Illinois and Wisconsin entries.

55 Id.

56 See 720 ILL. COMP. STAT. ANN. 5/24-1 (West 2005); State v. Hamdan, 264 Wis. 2d 433, 479, 665 N.W.2d 785, 808 (2003); see also infra Appendix, Illinois and Wisconsin entries (discussing cases dealing with how each state’s courts have dealt with any vagueness in interpreting one’s property or place of business).

57 See People v. Wright, 180 Ill. App. 3d 1032; 536 N.E.2d 812 (Ill. App. 1989) (recognizing the affirmative defense of necessity in Illinois); Cody A. Long, Right to Bear Arms – The Supreme Court of Wisconsin Declares Concealed Weapon Statute May Not Be Constitutionally Applied When Carrying a Concealed Weapon Is the Only Means of Exercising the Right to Bear Arms, 35 RUTGERS L. J. 1531 (2004) (explaining that Wisconsin’s affirmative defense “is necessarily fact-specific and fails to sufficiently alert citizens to what the law requires,” at 1547); see also infra Appendix, Illinois and Wisconsin entries (including cases dealing with how each state’s courts have dealt with their respective affirmative defenses).

58 Id.

59 See infra Appendix, Part A. That the total between the forty-seven licensing states and the four non-licensing states is more than the existing 50 states is because Alaska uses two systems of regulation and is thus counted twice. See infra Appendix, Alaska entries.

60 Clayton E. Cramer and David B. Kopel coined the term “shall issue” statute. See Cramer & Kopel, supra note 5.
See BLACK’S LAW DICTIONARY 993, 1379-80 (7th ed. 1999) (defining shall as “has a duty to, is required to” and may as “is permitted to”, usu. termed the ‘permissive’ or ‘discretionary’ sense”).

See infra Appendix. Maryland is the only discretionary state to use “shall issue” language. MD. CODE ANN., PUBLIC SAFETY § 5-306 (2005). Minnesota and South Carolina do not use the verb “shall issue”, but instead use the synonymous “must issue.” MINN. STAT. ANN. § 624.714, subd. 2(b) (2005); S.C. CODE ANN. § 23-31-215(A) (2004). Georgia uses both “may” and “shall” in its statute; Georgia’s attorney general settled any ambiguity by finding that the language is mandatory. GA. CODE ANN. § 16-11-129(a), (d) (2005); 1989 Op. Atty Gen. Ga. 188 (“the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit.”).

The four states are California, Delaware, Massachusetts, and Rhode Island. See Erdelyi v. O’Brien, 680 F.2d 61, 63 (9th Cir. 1982) (“[the California CCW statute] explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements.”); Application of Wolstenholme, 1992 Del. Super. LEXIS 341, ¶ 11-12 (Super. Ct. 1992) (“the Court may deny the application, in accordance with its absolute discretion to grant or deny licenses to applicants who claim to meet the minimum eligibility requirements.”); Roddy v. Leominster Dist. Court, 15 Mass. L. Rep. 658,7 (Mass. Supp. 2003) (“given the latitude that is enjoyed by licensing authorities in determining suitability, Lt. Pellecchia [the issuer] was not strictly required to base his decision on one of the specific disqualifications [in the statute.]”); Mosby v. Devine, 851 A.2d 1031, 1048 (2004) (“[the CCW statute] vests the Attorney General [the issuer] with discretion to refuse a license even if a person makes ‘a proper showing of need’.”).

See Ambrogio v. Connecticut State Board of Firearms Permit Examiners, 36 Conn. Supp. 166 (Super. Ct. 1980) (holding that an applicant’s failure to demonstrate some need for a CCW permit does not raise a “strong presumption of an unlawful use” and that “need itself is not a criteria for a permit.”). If Connecticut’s issuer had non-mandatory discretion under the statute’s “may issue” verbiage, then it would have the authority to impose a need based eligibility criterion; that the courts have disallowed such a criterion demonstrates that the issuer must base denials upon the criteria within the statute, which is a mandatory interpretation of “may issue”.


For example, one Maryland issuer admitted that he simply “made up” the standards he used for evaluating CCW permit applications. Scherr v. Handgun Permit Review Bd., 163 Md. App. 417, 435, 880 A.2d 1137, 1147 (Spec. App. Ct.2005) (“Detective Sergeant Galloway … testified that he would issue a permit only if he thought the applicant faced a level of danger that was higher than the level ‘the average person would encounter’ … Detective Sergeant Galloway admitted he had made up this ‘danger encountered by an average person’ standard.”) (“Detective Sergeant Galloway had, on approximately fifteen to twenty occasions, approved applications when there had been no prior police report of a threat against the applicant, but, except for former police officers, he had never approved an application where the applicant had failed to produce evidence of a threat.” at 430, 1144).

These states are Alabama, Hawaii, Iowa, New Jersey, and New York. See infra Appendix, entries for Alabama, Hawaii, Iowa, New Jersey, and New York.

N.Y. PENAL LAW § 400.00(1) (Consol. 2005).


71 See Cramer & Kopel, supra note 5, at 697-98 (using the term “escape clause”).

72 COLO. REV. STAT. ANN. § 18-12-203(2) (2005).

73 These states are Arkansas, Colorado, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, and Wyoming. ARK. CODE ANN. § 5-73-308(b)(1) (2006); COLO. REV. STAT. ANN. § 18-12-203(2) (2005); Kansas Senate Bill No. 418, New Sec. 5(C)(1); LA. REV. STAT. ANN. § 40:1379.3(C)(16) (2005); MD. CODE ANN., PUBLIC SAFETY § 5-306 (2005); MICH. COMP. LAWS ANN. § 28.425b(7)(m) (2005); MINN. STAT. ANN. § 624.714, subd. 6(a)(3) (2005); MO. REV. STAT. § 571.101(2)(k) (2006); MONT. CODE ANN. § 45-8-321(2) (2005); OKLA. STAT. ANN. tit. 21 § 1290.10(8) (2005); OR. REV. STAT. § 166.293(2) (2003); 18 PA. CONS. STAT. ANN. § 6109(e)(1)(i) (2005); S.D. CODED LAWS §§ 23-7-7.1(4) to (5) (2006); TENN. CODE ANN. § 39-17-1352(a)(3) (2005); VA. CODE ANN. § 18.2-308(E)(13) (Michie 2005); WYO. STAT. ANN. §§ 6-8-104(m)(ii) (2005); see infra Appendix (providing state specific discussions of these clauses). Maine does not use traditional escape clause language, but instead uses the broader “of good moral character” criterion; however, Maine’s statute restricts license issuers to such narrow evidentiary sources for determining an applicant’s moral character that its good moral character criterion operates more like an escape clause, and thus is included with the states using traditional escape clause language. ME. REV. STAT. ANN. tit. 25, § 2003(4) (2005); see infra Appendix, Maine entry. Indiana uses the usually highly discretionary criterion of “proper person”; however, Indiana’s CCW statute includes a definition of “proper person” that contains within it an escape clause. IND. CODE ANN. § 35-47-2-3(e) (Burns 2005) (specifying Indiana’s eligibility criteria, including the “proper person” requirement); IND. CODE ANN. § 35-47-1-7 (Burns 2005) (defining “proper person” and containing the escape clause); see infra Appendix, Indiana entry.

74 Even though some license issuers have used very slight evidence to find an applicant unsuitable, still some evidence must exist for each unsuitable applicant. See, e.g., Godfrey v. Chief of Police, 35 Mass. App. Ct. 42, 616 N.E.2d 485 (App. Ct. 1993) (upholding a police chief’s revocation of a CCW license because the license holder invoked his constitutional right not to answer police questions in an investigation not related to his permit, despite the license holder not being charged with any crime); Harris v. Sheriff of Del. County, 675 A.2d 400 (Pa. Commw. Ct. 2003) (upholding a license revocation based solely because “Chief Deputy Sheriff John McKenna testified that FBI agent Carl Wallace told him that unnamed confidential informants provided information that they had supplied Harris [the license holder] with large quantities of cocaine”).

75 CCW statutes generally already exclude felons, violent criminals, those subject to a restraining order or convicted domestic abusers, the mentally ill, drug abusers, or those unable to own a firearm under other laws. See Appendix (providing state specific information).

76 The Connecticut, Georgia, Indiana, and New Hampshire CCW statutes all use discretionary suitable person criteria, but still all four state licensing systems are nondiscretionary. See infra Appendix, Connecticut, Georgia, Indiana, and New Hampshire entries. Additionally, sixteen states with escape clauses are nondiscretionary. See supra note 73.

77 See GARY KLECK, DON B. KATES, ARMED: NEW PERSPECTIVES ON GUN CONTROL 31-106 (2001) (criticizing the scientific validity of the public health research arguing that firearms are inherently dangerous and akin to medical illnesses); KLECK, supra note 9, at 18-23 (establishing that there is no empirical association between firearms and violence).
See infra Appendix (providing state specific information).


These states are Alaska, Arizona, Florida, Idaho, Kentucky, Nevada, New Mexico, North Carolina, Ohio, South Carolina, Texas, Washington, and West Virginia. See infra Appendix, entries for previous states.

See infra note 84. Although the language varies between states, they ask the same question. Some require “a good reason to fear injury” while others require “a justifiable reason.” Id. The commonality is that each implies that CCW licenses are for a specific purpose and that an applicant must want or need a license for that purpose to be eligible. What purpose should justify one to carry a concealed firearm is a highly contentious issue and without some clarification of need those contentious issues are left unaddressed. See infra notes 84-105 and accompanying text.

N.Y. PENAL LAW § 400.00(2) (Consol. 2005).

These states are Alabama, California, Connecticut, Delaware, Hawaii, Indiana, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Dakota, and Rhode Island. ALA. CODE § 13A-11-75 (2005) (“that the applicant has good reason to fear injury to his person or property or has any other proper reason for carrying a pistol”); CAL. PENAL CODE § 12050 (2005) (“that good cause exists for the issuance”); CONN. GEN STAT. ANN. § 29-28(b) (2005) (“intends to make no use of any pistol or revolver which such applicant may be permitted to carry under such permit other than a lawful use”); DEL. CODE ANN. tit. 11, § 1441 (2005) (“desiring to be licensed to carry a concealed deadly weapon for personal protection or the protection of the person's property”); HAW. REV. STAT. § 134-9 (2005) (“an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property”); IND. CODE ANN. § 35-47-2-3(e) (Burns 2005) (“has a proper reason for carrying a handgun”); IOWA CODE ANN. § 724.7 (2004) (“can reasonably justify going armed”); MD. CODE ANN., PUBLIC SAFETY § 5-306 (2005) (“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”); MASS. ANN. LAWS ch. 140, § 131 (2005) (“has good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only”); N.H. REV STAT. ANN. § 159:6 (2005) (“has good reason to fear injury to the applicant's person or property or has any proper purpose”); N.J. STAT. ANN. § 2C:58-4(c) (2005) (“has a justifiable need to carry a handgun”); N.Y. PENAL LAW § 400.00(2) (Consol. 2005) (“when proper cause exists for the issuance thereof”); N.D. CENT. CODE § 62.1-04-03(1) (2005) (“has a valid reason for carrying the firearm or dangerous weapon concealed, including self-protection, protection of others, or work-related needs”); R.I. GEN LAWS § 11-47-11 (2005) (controlling Rhode Island’s local issuance of CCW licenses) (“has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver”); R.I. GEN LAWS § 11-47-18 (2005) (controlling Rhode Island’s statewide issuance of CCW licenses) (“upon a proper showing of need”); see also infra Appendix (providing discussions concerning each state’s CCW statute).

These states are Alabama, California, Hawaii, Iowa, Maryland, New Jersey, and Rhode Island. See infra Appendix (providing state specific information). Hawaii and Maryland do specify that the need must, respectively, be extreme or substantial, but no further explanation is provided. HAW. REV. STAT. § 134-9 (2005) (“an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property”); MD. CODE ANN., PUBLIC SAFETY § 5-306 (2005) (“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”). Absent any further specification, these modifiers to the proper need requirements do not offer significant limitations upon the range of potential interpretations an issuer could create and enforce: does extreme or substantial mean only ten should meet the standards, or ten thousand?

86 In addition to difference between states, discretionary issuance often leads to great variations between issuing jurisdictions within the same state. See infra Section III.3.c. (arguing that intrastate licensing variations violate the rule of law); see also <www.packing.org> (providing state maps illustrating intrastate licensing variations).


92 For a fuller discussion of New Jersey’s caselaw concerning its proper need criterion, see Appendix, New Jersey entry.


94 See supra note 85.

95 These states are Indiana, Massachusetts, New Hampshire, New York, and North Dakota. See infra Appendix, entries for previous states. Although New York’s CCW statute does not list specific purposes that are proper needs, New York courts have held that some purposes are proper as a matter of law, and not within the discretion of license issuers to hold otherwise. See Appendix, New York entry (providing a discussion on the relevant New York caselaw).

96 Mass. Ann. Laws ch. 140, § 131 (2005) (“may issue [a CCW license] if … the applicant has good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only”). New York’s statute does not specify certain needs as proper, but New York courts have ruled that issuers must accept certain needs as proper. See Davis v. Clyne, 58 A.D.2d 947, 397 N.Y.S.2d 186 (App. Div. 1977) (“[P]etitioner has indicated that if she is granted a pistol license she will engage in practice and competitive pistol shooting … This is a legitimate purpose … it was an impermissible exercise of the issuing officer's discretion to disapprove the application.”); Klapper v. Codd, 78 Misc. 2d 377, 356 N.Y.S.2d 431 (Sup. Ct. 1974) (“[M]arksmanship purposes have been recognized as a proper basis upon which to seek a pistol license.”).

97 Id.; see Ruggiero v. Police Comm’r of Boston, 18 Mass. App. Ct. 256,259, 464 N.E.2d 104, 107 (App. Ct. 1984) (holding that Massachusetts license issuers have the authority to issue restricted CCW licenses); In re O’Connor, 154 Misc. 2d 694, 697, 585 N.Y.S.2d 1000, 1003 (Westchester County Ct. 1992) (“the power to determine the existence of ‘proper cause’ for the issuance of a pistol license necessarily and inherently includes the power to restrict the use to the purposes which justified its issuance”); Eddy v. Kirk, 195 A.D.2d 1009, 1011, 600 N.Y.S.2d 574, 575 (App. Div. 1993) (“We conclude that the authority of the licensing officer to determine whether ‘proper cause’ exists necessarily and inherently includes the authority to impose and retain certain restrictions on the license so that the pistol is used for the purposes that justified its issuance in the first place.”).
Delaware and California also allow issuers to place restrictions upon CCW licenses; however, their use of a non-mandatory interpretation of “may issue” already renders those states’ licensing systems discretionary, regardless of an issuer’s ability to restrict licenses. See Application of Wolstenholme, 1992 Del. Super. LEXIS 341 (Super Ct. 1992); CAL. PENAL CODE § 12050(b) (2005), supra note 63.


99 Id.

100 Id.

101 IND. CODE ANN. § 35-47-1-8 (Burns 2005) (“‘Proper reason’ means for the defense of oneself or the state of Indiana.”); N.D. CENT. CODE § 62.1-04-03(1) (2005) (“The applicant has a valid reason for carrying the firearm or dangerous weapon concealed, including self-protection, protection of others, or work-related needs.”).

102 See Shettle v. Shearer, 425 N.E.2d 739, 741 (Ind. Ct. App. 1981) (“absent some evidence to refute self-defense as a reason, the superintendent could not deny an applicant a license on the basis of the superintendent's subjective evaluation of the asserted reason.”).

103 For an extended discussion of the discretion afforded North Dakota’s license issuer see Appendix, North Dakota entry.

104 CONN. GEN STAT. ANN. § 29-28(b) (2005) (“intends to make no use of any pistol or revolver which such applicant may be permitted to carry under such permit other than a lawful use”).

105 See supra Section II.3.a.

106 Penney v. Town of Middleton, 888 F. Supp. 332, 341 (D.N.H. 1994). Although the Penney opinion’s argument is logically valid, it is also untrue because it falsely asserts that New Hampshire license issuers have the authority to “decide upon the criteria to be considered.” See infra Appendix, New Hampshire entry.

107 See, e.g., Seltzer v. Kane, 242 A.D.2d 302, 660 N.Y.S.2d 740 (App. Div. 1997) (holding that New York issuing authorities are under no duty “to adopt written standards applicable to all such applications, as no such written standards are required under the statute.”); infra Sections III.2.b., c. (discussing the nonbinding and often vague guidelines offered by some license issuers); infra Appendix (providing state specific information).

108 Some issuers do not even keep meaningful records. Iowa does not require issuers to keep applications that would show what “proper needs” have been sufficient for the issuance of a license. See Clark v. Banks, 151 N.W.2d 5 (Iowa 1994).

109 New York and Rhode Island courts first ruled that CCW license applications were public records. See Providence Journal Co. v. Pine, 1998 R.I. Super. LEXIS 86, ¶ 20 (Super. Ct. 1998); Kwitny v. McGuire, 53 N.Y.2d 968, 424 N.E.2d 546 (1981) (“applications should be open to inspection”); Goldstein v. McGuire, 84 A.D.2d 697, 443 N.Y.S.2d 730 (App. Div. 1981) (permitting discovery of historic applications because “[t]his information is necessary if Goldstein is to be afforded the opportunity to prove discrimination in the enforcement of the licensing provision.”). However, after those rulings, each state amended its statute to remove license applications from the public record. See R.I. GEN LAWS § 11-47-18(c), 11(b) (2005); N.Y. PENAL LAW § 400.00 (Consol. 2005); Sportsmen’s Ass’n for Firearms Educ., Inc. v. Kane, 178 Misc. 2d
185, 189, 680 N.Y.S.2d 411, 413 (Sup. Ct. 1998) (“[T]he Legislature limited the scope of disclosure of the approved pistol license application to name and address where previously the entire application was discoverable. In light of the stated legislative purpose of protecting the licensee from publication of the reason or reasons ‘proper cause’ was found, it is clear that the Legislature intended only the name and address of the licensee to be a public record.”).

110 See 223 Op. Att’y Gen. Ala. 16 (1991); CBS, Inc. v. Block, 42 Cal. 3d 646, 725 P.2d 470 (1986) (“if the press and the public are precluded from learning the names of concealed weapons’ licensees and the reasons claimed in support of the licenses, there will be no method by which the public can ascertain whether the law is being properly applied or carried out in an evenhanded manner.”).

111 See infra Section III.2.b.

112 These seven states are Alabama, California, Iowa, Maryland, Massachusetts, New York, and Rhode Island. See Hess v. Butler, 379 So. 2d 1259, 1260 (Ala. 1980) (“the licensing officer’s judgment or discretion is abused and exercised in an arbitrary or capricious manner”); Gifford v. City of L.A., 88 Cal. App. 4th 801, 805 (Ct. App. 2001) (“courts may exercise a very limited review of a public agency’s action, and may merely determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support”); Kasper v. Cedar County Sheriff’s Office, 2005 Iowa App. LEXIS 420, ¶ 4 (App. Ct. 2005) (affirming a sheriff’s determination when “the Sheriff exercised the discretion afforded him under the statute to deny the permit application, did so after specifically considering the justification proffered by Kasper, and furnished reasons for the denial that were not illegal, arbitrary, capricious, or an abuse of discretion”); Snowden v. Handgun Permit Review Board, 45 Md. App. 464, 468, 413 A.2d 295, 297 (Spec. App. Ct. 1980) (permitting “the correction of agency decisions only when they are illegal, arbitrary, and unreasonable acts”); Chief of Police v. Moyer, 16 Mass. App. Ct. 543, 545-46, 453 N.E.2d 461, 464 (App. Ct. 1983) (“To warrant a finding that a chief of police had no reasonable ground for refusing to issue a license it must be shown that the refusal was arbitrary, capricious, or an abuse of discretion”); Kaplan v. Bratton, 249 A.D.2d 199, 201, 673 N.Y.S.2d 66, 68 (App. Div. 1998) (“Judicial review of a discretionary administrative determination is limited to deciding whether the agency’s actions were arbitrary and capricious”); Mosby v. Devine, 851 A.2d 1031, 1051 (2004) (“we will inspect the record to determine whether the department’s findings are supported by any legally competent evidence”); see also infra Appendix, Part D (providing state specific information).


The arbitrary and capricious standard appears to derive from both statutory and constitutional roots, although it does not appear in the United States Constitution or most state constitutional texts. It is generally understood to constitute a democratic backstop to potential excesses of state power. In other words, governmental actions should ultimately be reviewable in court under the deferential but substantive constraint that, if proved to be arbitrary, capricious, or in bad faith, they will be declared void. This principle holds great structural and philosophical significance, obviously linked to the concept of due process. Remarkably, for a test so putatively basic, there are relatively few cases, especially federal cases, in which the concept is used straightforwardly to strike down governmental actions as arbitrary and capricious on substantive (as opposed to procedural) grounds. The phrase flourishes as dicta but seems to wilt as a support for judicial holdings, except in the negative sense where courts uphold challenged official acts upon the finding that they are not arbitrary. … When courts do use the ‘arbitrary and capricious’ phrasing actively, moreover, they almost never define it analytically. Instead, they apply it to such a disparate range of analytical inquiries that the phrase emerges as an amorphous and scarcely useful evaluative concept. Scholars have not done much better.
Id. at 667-69 (citations omitted). Federal courts are also very reluctant to review state agency actions challenged for arbitrariness. See Ann Woolhandler, Michael G. Collins, Judicial Federalism and the Administrative States, 87 CALIF. L. REV. 613, 682-86 (1999) (discussing federal courts’ policy of only remedying arbitrary agency actions when they “shock the conscience”).

114 These states are California, Massachusetts, and Rhode Island. See id.; supra note 63 (listing the states using a non-mandatory “may issue” interpretation).

115 See supra Section II.3.a.

116 See id.; infra Section III.3.c.

117 Some courts have held as much. See Brevard County v. Bagwell, 388 So. 2d 645, 647 (Fla. App. Ct. 1980) (quoted infra note 235).


119 See Application of Buresch, 672 A.2d 64, 65-66 (Del. 1996) (“In the absence of the exercise of a judicial function by the Superior Court [the issuer] this Court [the Supreme Court of Delaware] lacks the power of review”).

120 These four states are Alabama, Iowa, Maryland, and New York. See supra notes 112-114.

121 BLACK’S LAW DICTIONARY 100 (7th ed. 1999) (defining arbitrary as “determined by a judge rather than by fixed rules, procedures, or law”).

122 Id. at 203 (defining capricious as “characterized by or guided by unpredictable or impulsive behavior”).

123 See supra Section II.3.d.

124 Novak, supra note 18, at 166 n.33 (recounting a telephone interview with Susan Courtney Chambers, attorney (Nov. 3, 1995)).

125 For example, all courts to consider whether issuers can categorically refuse to issue licenses have held that to do so is an abuse of discretion, or a failure to even exercise discretion. See infra note 189.

126 See infra Appendix, Hawaii entry.

127 See infra Appendix, New Jersey entry.

128 See supra Section II.1.

129 See infra Appendix, New Jersey entry.

130 See infra Section III.2.b.

131 See infra Appendix.

133 Some modern legal and philosophical theories dispute the usefulness or validity of the rule of law ideal because it often relies on the contentious legal theories of formalism and objectivism. However, the general desire for society to be ruled in a rational and fair manner rather than by arbitrary individual preferences is nearly universal; therefore, even though the present task is to critique discretionary licensing systems with a rule of law analysis, the underlying problems exposed are just as troublesome when framed within other generally acceptable theoretical frameworks. For a discussion of modern challenges to the rule of law ideal and traditional legal theories see Ademi, supra note 132 (providing a discussion of the major arguments disputing the rule of law ideal’s validity); Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U.L. REV. 781 (1989); see also Steven D. Smith, Believing Like a Lawyer, 40 B.C. L. REV. 1041, 1137 (1999) (stating that theories criticizing the rule of law are “marginalized”); John Hasnas, The Myth of the Rule of Law, 1995 WIS. L. REV. 199 (1995) (arguing that the rule of law is a myth and society would benefit from abolishing that myth); Laurence H. Tribe, Revisiting the Rule of Law, 64 N.Y.U.L. REV. 726 (1989) (defending the rule of law); Paul D. Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222, 227 (1984) (arguing that criticism of the rule of law ideal is nihilistic and those espousing such criticism ought not to teach law students); Morton Horowitz, The Rule of Law: An Unqualified Human Good?, 86 YALE L. J. 561 (1977) (criticizing the rule of law ideal with Marxist arguments).

134 PAPKE, supra note 132, at 1 (quoting Thomas Paine).

135 The traditional account of the rule of law ideal was presented by Albert V. Dicey. See A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1985) (1885).

136 See Fred Dallmayr, Hermeneutics and the Rule of Law, 11 CARDozo L. REV. 1449, 1451 (1990) (observing “the unstable meaning of the phrase” given that “rule and law are themselves the targets of continuous interpretation and reinterpretation”); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997) (stating that “the precise meaning of the Rule of Law is perhaps less clear than ever before”).

137 Most theoretical accounts of the rule of law ideal are muddled and no universally accepted description of the rule of law exists. The elements to the rule of law used here are taken generally from Dicey’s thoughts on the rule of law, supra note 135.

138 DICEY, supra note 135.


142 See supra Section II.1.

143 Snyder, supra note 5 (citations omitted) (quoting Who is Entitled to Carry Concealed Weapons, AMERICAN LAW REPORTS 51, 506 (3rd ed. 1973)).

144 Id.

146 Cramer & Kopel, *supra* note 5, at 683 (citations omitted).

147 *See* Kates, *supra* note 39 (“That Feinstein received the only carry permit in the city should (and in any other context would) have outraged those most concerned with equality before the law.”).

148 *Id.*

149 *Id.*

150 *See* Cramer & Kopel, *supra* note 5, at 684.

151 *Id.*

152 *See* Snyder, *supra* note 5.


154 Novak, *supra* note 18, at 137 (citation omitted).

155 *See* N.Y. Penal Law § 400.00 (Consol. 2005); Sportsmen’s Ass’n for Firearms Educ., Inc. v. Kane, 178 Misc. 2d 185, 189, 680 N.Y.S.2d 411, 413 (Sup. Ct. 1998) (“[T]he Legislature limited the scope of disclosure of the approved pistol license application to name and address where previously the entire application was discoverable. In light of the stated legislative purpose of protecting the licensee from publication of the reason or reasons ‘proper cause’ was found, it is clear that the Legislature intended only the name and address of the licensee to be a public record.”).

156 FRIEDRICH HAYEK, THE ROAD TO SERFDOM 80 (50th ann. ed. 1994).


158 The broad and vague nature of the rule of law ideal leads different theorists to use different elements for what structure proper laws must take; however, the various elements used by theorists are generally similar, if worded or organized somewhat differently. The three criteria used here are adapted from Fuller’s and Fallon’s theories. *See id.* at 39; Fallon, *supra* note 136, at 7-11.


160 *See supra* Section II.3.d.

161 *See supra* Section II.3.e.


163 *See* Scherr v. Handgun Permit Review Bd., 163 Md. App. 417, 435, 880 A.2d 1137, 1147 (Spec. App. Ct. 2005) (“Detective Sergeant Galloway … testified that he would issue a permit only if he thought the applicant faced a level of danger that was higher than the level ‘the average person would encounter’ … Detective Sergeant Galloway admitted he had made up this ‘danger encountered by an average person’ standard.”).

See supra Section II.3.


See supra Section II.3.

See supra note 107; infra Appendix (providing state specific information).

See supra note 107.

Rhode Island Weapons Carry Permit Package, p. 4, available at <http://www.riag.ri.gov>. Additionally, Iowa’s license issuer, the Iowa Public Safety Department, has clarified its statutory requirement that applicants “can reasonably justify going armed” with “‘[r]easonable justification for a nonprofessional permit to carry a weapon’ means a written statement that contains clear and convincing evidence that the applicant needs to go armed.” IOWA CODE ANN. § 724.11 (2004); IOWA ADMIN. CODE r. 661-4.1 (724) (2005). Although Iowa’s issuer defined the statue’s need requirement with twice as many words as the statute, they failed to clarify the statute. The issuer has simply stated that reasonable justification means evidence of a need to go armed. To provide meaning, issuers must define vague statutory standards with substance, rather than equating vague statutory standards with vague synonyms of the statutory language.

See supra Section II.3.e.

See infra Section III.2.c.

See supra Section II.3.e.

See id.; supra Section III.2.a. (discussing some issuers’ use upon litigation of post hoc justifications for prior licensing decisions); see infra Appendix (providing state specific information).

See id.; see infra III.3.c. (discussing issuer created licensing standards, often relied upon by courts, and how they almost universally violate the rule of law).

See Kates, supra note 39. Kates writes:
When New York appellate courts held that applicants could only be rejected if found unfit, New York City simply ignored the rulings. When the gun lobby obtained injunctions forcing the city to comply, it did, but only after establishing a two-year wait to obtain the gun-permit form. Finally, when the New York legislature reaffirmed the court decision and ordered that the permit approvals or denials be made within six months, the city imposed an enormous processing fee, making application renewal economically feasible for only the well-to-do.

See supra notes 108-110 and accompanying text.

CBS, Inc. v. Block, 42 Cal. 3d 646, 656, 725 P.2d 470, 477 (1986) (“Without the applications which accompany the licenses and which set forth the reasons why a license is necessary, the public cannot judge whether the sheriff has properly exercised his discretion in issuing the licenses.” at 657, 477); see also Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984) (holding that the lower court erred by not allowing into evidence testimony concerning the issuer’s treatment of other applicants).


See supra Section II.3.d.


See supra Section II.3.d.

Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984) (holding that the lower court erred by not allowing into evidence testimony concerning the issuer’s treatment of other applicants).

See supra Section II.3.d.

Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984) (holding that the lower court erred by not allowing into evidence testimony concerning the issuer’s treatment of other applicants).

See supra Section II.3.d.

See infra Appendix, Hawaii entry.


See Salute v. Pitchess, 61 Cal. App. 3d 557, 560 (App. Ct. 1976) (“To determine, in advance, as a uniform rule, that only selected public officials can show good cause is to refuse to consider the existence of good cause on the part of citizens generally and is an abuse of, and not an exercise of, discretion.”); Kellogg v. Gary, 562 N.E.2d 685, 700 (Ind. 1990) (“we find the actions of the city and its officials in cutting off the supply of handgun license application forms to the citizens of Gary were arbitrary and capricious and lacked a reasonable basis.”); Kasprowicz v. Finck, 1998 ND 4, 574 N.W.2d 564 (1998) (ruling that the CCW license issuer must exercise its discretion); In re Borinsky, 363 N.J. Super. 10, 26, 830 A.2d 507, 517 (Super. Ct. App. Div. 2003) (“We hold that each application must be dealt with on its own merits, on a case-by-case basis”); Seltzer v. Kane, 242 A.D.2d 302, 660 N.Y.S.2d 740 (App. Div. 1997) (“[issuer] denied the petitioner’s application for a ‘full carry’ permit because ‘such a permit cannot be granted under our current licensing policies’. These are not reasons ‘specifically and concisely stated in writing’ required under Penal Law § 400.00 (4-a).”); 2001 Iowa AG LEXIS 25 (2001) (“if a county sheriff … ‘would categorically refuse or deny the issuance of any permits whatsoever, the discretionary or decision making power vested in him by the legislature would be rendered a nullity and the responsibility conferred under the language of the statute to render a judgment would be abrogated. (quoting 1976 Iowa Op. Att’y Gen. 767, 768)).

See infra Appendix, New Jersey entry.


See Fuller, supra note 157, at 79-81 (discussing the rule of law’s requirement of “Constancy of the Law through Time”).

See supra Section II.3. (discussing the enormous discretion authorized issuers in discretionary states).

See infra Appendix (providing state specific information).

See supra Section II.3.d. (discussing the lack of any published licensing rules in discretionary issuance systems).


Novak, supra note 18, at 126 (“An administrative system in which the notion of ‘proper cause’ changes every four years, without notice, cannot be considered fair or democratic.” at 141).


See supra Section II.3.

See Snyder, supra note 5.

See supra Section III.2.a.

See supra Section II.3.

See supra Section III.2.b.


See supra Section II.3.; infra Appendix (providing state specific information).

This rule of law element is similar to the prior requirement that rules exist. The difference between the two is a matter of degree, that rules exist versus that existing rules are the whole and actual rules not subject to some other set of unspoken rules or authority. A failure to fulfill either element risks tyranny or irrational and arbitrary governance; just the obviousness of that circumstance is more apparent in the total absence of law, in favor of rule by personal whim, versus the latter’s appearance of a meaningful legal system that in reality is subordinate to personal whim.


Dicey, supra note 135, at 114-15.

See infra Appendix (providing state specific information).

Watson v. Stone, 148 Fla. 516, 524, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

The courts have even found some discretionary licensing statutes to be overtly discriminatory. See, e.g., People v. Rappard, 28 Cal. App. 3d 302, 104 Cal. Rptr. 535 (App. Ct. 1972) (holding that a law prohibiting aliens from carrying firearms was unconstitutional as applied because aliens are a suspect factor for discrimination and the statute did not meet the strict scrutiny standard).

Snyder, supra note 5.


Cramer & Kopel, supra note 5, at 681-82 (citations omitted) (quoting California Assembly Office of Research, Smoking Gun: The Case for Concealed Weapon Permit Reform 6 (1986)).


See supra Section II.3.d.
219 The lack of any significant review of issuer licensing decisions and any requirement that issuers publish rules and past licensing decisions permits issuers to use racist and sexist issuance criteria without accountability. See id.; Section IV.2.

220 Guilleroy v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984).

221 See supra Section III.1.

222 Novak, supra note 18, at 125-26 (citations omitted).

223 Silver & Kates, supra note 217, at 230 n.4 (quoting Morris Ernst, The Ultimate Power 198 (1937)).


225 See supra Section III.1.

226 Cramer & Kopel, supra note 5, at 684.

227 See Appendix, New York entry.

228 Cramer & Kopel, supra note 5, at 685; see infra Appendix, New York entry (explaining and discussing the caselaw and standards referred to in the previous quotation).


232 Cramer & Kopel, supra note 5, at 747 n.24 (quoting Hickman v. County of Los Angeles, No. CV 91-5594-RMT(Bx) (C.D. Cal. Apr. 21, 1994) (Takasugi, J.)); see also supra note 146 (note that the City of Los Angeles and Los Angeles County have separate license issuers).

233 Snyder, supra note 5.

234 See supra Section II.3.a.

235 Brevard County v. Bagwell, 388 So. 2d 645, 647 (Fla. App. Ct. 1980); see Schwanda v. Bonney, 418 A.2d 163 (1980) (holding that license issuers can only use the statutory standards for licensing); but see supra note 63 (cases extending issuers’ discretion to include the use any licensing standards).

236 See supra Section III.3.

237 See supra Section III.3.d.

238 See supra Section III.3.c.

239 See supra Section III.3.b.

240 Of course firearms have other, non-lethal, uses; however, CCW licenses permit the carrying of firearms in places where those the other activities are generally prohibited, such as places other than a firing range or
hunting grounds. A CCW license is not necessary for the sporting uses of firearms, only for self-defense usage while in areas otherwise subject to a prohibition on the carrying of firearms.

241 Thus six discretionary statutes either define or equate protection as need. See ALA. CODE § 13A-11-75 (2005) (“the applicant has good reason to fear injury to his person or property”); DEL. CODE ANN., tit. 11, § 1441 (2005) (“to carry a concealed deadly weapon for personal protection or the protection of the person’s property”); HAW. REV. STAT. § 134-9 (2005) (“an applicant shows reason to fear injury to the applicant’s person or property”); MD. CODE ANN., PUBLIC SAFETY § 5-306 (2005) (“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”); MASS. ANN. LAWS ch. 140, § 131 (2005) (“the applicant has good reason to fear injury to his person or property”); R.I. GEN LAWS § 11-47-11 (2005) (“if it appears that the applicant has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver”).

Additionally, two nondiscretionary states that have objective proper need criteria both equate proper need with self-protection. See IND. CODE ANN. § 35-47-2-4(a) (Burns 2005) (“the purpose of the protection of life and property”); N.H. REV STAT. ANN. § 159:6 (2005) (“if it appears that the applicant has good reason to fear injury to the applicant’s person or property”).

242 It would be nonsensical for states to issue CCW licenses for those demonstrating a need to defend themselves while simultaneously believing that firearms provided no defensive utility. Id.

A possible determination is that firearms are useful for self-defense in only very limited circumstances. If that is the case, then those circumstances should be specifically enumerated. No discretionary licensing issuer claims that firearms have only very narrow self defense benefits, and then provides criteria centered around those limited circumstances, and who is in need of that limited benefit.


246 Snyder, supra note 5.
See, e.g., Hunt v. Rubin, 52 A.D.2d 955, 383 N.Y.S.2d 632 (App. Div. 1976) (“It was properly within the discretion of the respondent County Judge to determine that the amount of money to be carried by petitioner does not warrant the possession of a pistol for protection. The denial of the application for a pistol license was neither arbitrary nor capricious.”).


See supra Sections III.1., 3.a-b.

Supra note 224; see also Kates, supra note 39 (“[New York] city imposed an enormous processing fee, making application and renewal feasible only for the well-to-do.”).

See supra note 9.

Maryland is the only discretionary state to issue licenses through a state agency. Rhode Island offers licenses through both local and state agencies. See infra Appendix (providing state specific information).

See <www.packing.org> (providing information concerning intrastate issuing variations).

See supra Section II.3.

Mulligan v. Williams, 169 A.D.2d 280, 283, 572 N.Y.S.2d 471, 473 (App. Div. 1991) (noting that the state attorney general offered that statistic during oral argument); see also Novak, supra note 18, at 140-41. Novak observes:

The formulation of standards by each licensing officer creates serious practical problems aside from the constitutional ones. Yet, different officials in different parts of the state set up their own standards, leading to anomalous results depending on the applicant’s county of residence. The existence of the state promulgated ‘proper cause’ standard indicates that all New York State applicants must be governed by the same standard. Id. (citation omitted).

See, e.g., Rodgers v. Johnson, 2005 U.S. Dist. LEXIS 5476, ¶ 9-10 (E.D. Penn. 2005). The Rodgers opinion concerned an equal protection challenge to Philadelphia’s requirement that CCW license applicants provide fingerprints, while no other Pennsylvania issuer had a similar requirement. The court held that: “All persons similarly situated within Philadelphia are subject to the same requirement. Because Rodgers does not contend that he is being treated differently from anyone within the jurisdictional reach of the fingerprinting requirement, i.e., within Philadelphia, he does not have an equal protection claim.” Id.
This situation not only has happened, such as when the sheriff of Gary, Indiana refused to issue license applications, but also persists in some states, such as San Francisco’s refusal to issue any licenses. See Kellogg v. Gary, 562 N.E.2d 685, 691 (Ind. 1990) (“As a class, the citizens were denied access to the state procedure for obtaining handgun licenses. To this extent, we agree they were denied the protection of a state procedural law available to other Indiana citizens.”); supra note 147 and accompanying text (noting that San Francisco has only issued one CCW license).

All state CCW licenses are valid throughout each respective state, except that New York licenses are valid in New York City only if granted or certified by the City’s license issuer. See infra Appendix (providing state specific information).

Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1980).

See supra Section II.3.

This restriction does not apply to states using a non-mandatory interpretation of “may issue” because that interpretation permits issuers to create any eligibility standards, regardless of the standards specified in the authorizing statute. See supra note 63 (listing the four states using a non-mandatory interpretation of “may issue”); supra Section II.3.a. (explaining how states using a non-mandatory “may issue” interpretation categorically violate the rule of law’s demand that the law be applied equally).

See supra Section II.3.c.; see also Appendix, New York entry (discussing the effects of the use of restrictions upon licensing policies and effects).

In re O’Connor, 154 Misc. 2d 694, 698, 585 N.Y.S.2d 1000, 1004 (Westchester County Ct. 1992); see also 2001 Iowa AG LEXIS 25 (2001) (“Issuing or denying a permit will involve an assessment of the facts and conditions peculiar to a geographic area. No two counties are alike--their differing crime rates and differing demographics may have an impact on the decision to issue nonprofessional weapons permits.”).


See supra Section II.3.b.-c.; see infra Appendix (providing state specific information).

See supra Section II.3.

See supra notes 240-243 and accompanying text.

Geography may play a factual role in some evaluations of specific threats, such as whether the application is geographically close to any specified danger; however, such an incidental and contingent relevance to proper cause cannot alone justify the rationality of the geographical distinction’s enormous affect on license eligibility for a substantial portion of the otherwise eligible population. See supra Section III.3.c. (discussing the importance of the geographical distinction to issuance).

See infra Appendix (providing state specific information). Some issuers may have taken such a stance, but, if so, they have not made their views known to the public. One New York court did order the issuance of a license because the applicant’s business was in an area of Manhattan so plagued with crime that “it appears that lawless elements have transformed this area into an armed camp”; however, twenty-nine years later, no New York court or issuer has used that argument again. Blumenfeld v. Codd, 89 Misc. 2d 837, 393 N.Y.S.2d 145 (Sup. Ct. 1977); see also infra Appendix, New York entry.

See supra note 244.

See id.
Maryland, which uses one state level issuer, and Hawaii, which never issues licenses, both have geographical issuance policy uniformity. See infra Appendix, (providing state specific information). Additionally, the geographical distinction’s relevance to proper need criteria is a moot issue for states operating under a non-mandatory interpretation of “may issue.” See supra note 261.

See <www.packing.org> (providing information concerning intrastate issuing variations).

Id. The frequent difference between issuance rates between rural and urban areas is not because those in low issuance areas are otherwise ineligible for a license, such as for having criminal records or mental illnesses.

Id.

See supra Section II.3.b.

See infra Appendix (providing state specific information).


New York City is an exception. See infra Appendix, New York entry.


See supra Section III.3.c.

See supra Section II.3.

For example, former Representative Tom DeLay, formerly one of the most powerful members of Congress, and currently under felony indictment, has had his CCW license suspended. See Eric Hanson, DeLay Fights to Get His Gun License Back, HOUSTON CHRONICLE, March 29, 2006.


See Redish & Cisar, supra note 287, at 478-482 (discussing possible definitions for each branch of government in light of the difficulties faced in creating practical definitions).

Some argue that the traditional formulation of the separation of powers theory is of little practical use or relevance. See Verkuil, supra note 289 (arguing for a “conflicts of interest” approach to the
separation of powers); Thomas A. Sargentich, The Contemporary Debate about Legislative-Executive Separation of Powers, 72 CORNELL L. REV. 430 (1987) (arguing for a “checks and balances” approach to the separation of powers). Despite some scholars’ criticisms of the separation of powers doctrine, their competing visions of separation of powers issues all would likely condemn the delegation of broad powers to discretionary CCW license issuers. Those supporting a conflicts of interest vision of the separation of powers doctrine would decry the joining of legislative and executive powers in CCW license issuers’ discretionary authority. See Verkuil, supra note 289, at 315 (“The combination of law creation and law execution is a conflict of interest.”); infra notes 293-309 and accompanying text (demonstrating the fusion of legislative and executive powers in issuers’ discretionary power). The checks and balances position would condemn the lack of judicial review in discretionary licensing systems. See supra Section II.3.d. (demonstrating the lack of judicial review in discretionary issuance systems); infra notes 311-312 and accompanying text (demonstrating how that lack of judicial review violates the tradition separation of powers doctrine). One checks and balances supporter wrote:

Tyranny, of course, results not just from having all governmental powers placed in one set of hands; it may just as easily result from bureaucratic rule. It occurs whenever the sovereign exerts power that is arbitrary, irrational, and capricious and when no recourse is available to correct or compensate for irrational, arbitrary, and capricious abuses of power by the sovereign against individual persons or the public.


291 See Redish & Cisar, supra note 287, at 479-80.
292 See id.
293 Id. The “specifically delegated executive branch power” does not apply here because no state grants license issuers the constitutional power to create CCW policy. For a CCW statute to explicitly delegate issuers that power would violate the separation of powers doctrine because the doctrine applies even if one branch willingly violates it; otherwise, the separation of powers doctrine would have no meaning because those to whom it applies, the branches of government, would be able to violate it as long as they did so expressly. Functionally such a delegation would operate the same as a non-mandatory interpretation of “may issue.” See infra note 294 and accompanying text.

294 See supra note 63 and accompanying text.
295 See supra Section II.
296 See supra Section II.3.b. (discussing in more detail specific statutory suitability criteria); infra Appendix (providing state specific information).
297 See id.
298 See supra Section II.3.c..
299 See Novak, supra note 18, at 137-39. Noavk writes:

‘Proper cause,’ like ‘good cause,’ is not capable of reasonable application, and therefore is not a sufficient standard to guide administrative officials in their licensing determinations. The recent scandal involving favoritism for obtaining gun permits in the New York City Police Department’s licensing division shows the lack of restraint on discrimination and other arbitrary action facilitated by a ‘proper cause’ standard for making carry license determinations. … New York law does not provide legislative guidance regarding how prevalent gun carrying should be, or which reasons are legitimate for carrying a gun. It thus follows that the delegation of authority in Penal Law 400 is solely to determine important policy. However, such delegation blatantly violates
the New York State Constitution and basic democratic principles, and makes it impossible to place responsibility for a city or county’s gun control policy.

Id.

300 In other words, for a undefined statutory need criterion to have any meaning, the eligibility criteria cannot be interpreted as functionally equivalent to a CCW statute without a need criterion, i.e.: that everyone has proper need. Nor can they be functionally equivalent to a prohibition, i.e.: that no one has a proper need. Indiana’s need requirement is defined so that everyone has a proper need, but that proper need standard is in the statute, rather than being an issuer creation, and thus is not a violation of the separation of powers doctrine. See infra Appendix, Indiana entry.

301 See supra note 5.

302 See supra Section II.3.c.

303 Some state courts have attempted to evade this problem by arguing that issuers making proper need determinations are simply acting as a fact finder. See State v. Storms, 112 R.I. 121, 128, 308 A.2d 463, 466 (1971) (“to make those determinations, calls for an exercise of the fact-finding function which the Legislature obviously is in no position to supply”); Matthews v. State, 237 Ind. 677, 684, 148 N.E.2d 334, 337 (1958) (“Whether the applicant ‘has a proper reason for carrying a pistol …’ [is a] question[] of fact; and the Legislature may delegate the function of determining these facts upon which the execution of the legislative policy, as expressed in the Act, is dependent.”) (Indiana statute ruled upon since significantly amended, see infra Appendix, Indiana entry). In order for an issuer to act as a fact finder, the standard by which the issuer is to evaluate the facts must exist. Undefined proper need criteria do not supply any standard or policy choice by which to judge actual factual situations. Issuers must substantially create the standards they will use to subsequently act as fact finder, and, therefore, employ legislative powers in addition to executive powers.

304 See Appendix, New Jersey entry (discussing the caselaw interpreting New Jersey’s CCW statute). All other discretionary licensing states have had the license issuers exercise that discretion, rather than the courts. See supra Section II.3.c.; Appendix (providing state specific information).

Some state courts have chosen to ignore a legislative change to their states’ CCW statutes, instead continuing those courts’ favored policies. See infra Appendix, Pennsylvania and Virginia entries (detailing those states’ problems with courts refusing to acknowledge clear legislative policy amendments to their CCW statutes). Sometimes federal courts choose to read their preferred policy choices into state laws clearly enacting contrary policies. See infra Appendix, New Hampshire entry (providing a clear example of that shameful mischief). Some courts have rejected New Jersey’s model of judicial policymaking. See, e.g., State v. Hamdan, 264 Wis. 2d 433, 489, 665 N.W.2d 785, 812 (2003) (“We happily concede that the legislature is better able than this court to determine public policy on firearms and other weapons.”); Milton v. Waldt, 30 Wn. App. 525, 529-32, 635 P.2d 775, 777-78 (Wash. App. Ct. 1981) (James, C.J., dissenting) (“The wisdom of such restrictions on the licensing authority is a matter for legislative rather than judicial determination.”).


306 See supra Section III.3.c.

307 See Appendix, New Jersey entry (discussing the caselaw interpreting New Jersey’s CCW statute).

308 Id.; see also supra Section II.3.c.

309 Alabama, a discretionary issuance state, has taken the opposite approach to New Jersey, readily issuing licenses. See supra Section II.3.c.
The distinction between judicial and legislative powers is often difficult to define. Judicial power is the adjudication of live cases or controversies, which often includes the authority to create rules and standards necessary to settle cases. The largest difference is that courts may only exercise judicial power when deciding a specific case, versus the legislative power to promulgate rules generally. See Redish & Cisar, supra note 287, at 479-80. However, excepting constitutional issues, courts should not overrule legislative policy choices, especially when the judicial preference directly contradicts the legislative choice, i.e.: when a court is simply replacing the legislative preference for a judicial preference.

See Novak, supra note 18, at 142-51 (discussing this definitional difficulty’s effect on New York’s licensing system).

See supra Section II.3.e.

Application of Wolstenholme, 1992 Del. Super. LEXIS 341, ¶ 11-12 (Super. Ct. 1992); DEL. CODE ANN. tit. 11, § 1441 (2005); see infra Appendix, Delaware entry.

Application of Wolstenholme, id.

Id.

See Application of Buresch, 672 A.2d 64, 65-66 (Del. 1996); infra Appendix, Delaware entry.


See infra Appendix (providing state specific information).

See Mecikalski v. Office of the AG, 2 P.3d 1039, 1046 (Wyo. 2000) (“The statute, when read in pari materia, clearly demonstrates a legislative intent to rely heavily upon the expertise of local law enforcement officials in making judgments about individuals who seek concealed firearm permits. Not only is that legislative intent clear in the statute, it is extraordinarily sensible.”); Brescia v. McGuire, 509 F. Supp. 243, 246 (S.D.N.Y. 1981) (“The New York courts have consistently recognized and sustained the necessity of affording the licensing officer broad discretion.” ); Schubert v. De Bard, 398 N.E.2d 1339, 1346 (Staton, J., dissenting) (1980) (“The Superintendent is trained to recognize patterns of violence, just as he is well-versed in the dangers inherent to handguns. His expertise, gained from his experience and training should be respected and not ‘lightly overridden’ by this Court, which lacks any significant degree of expertise in the subject matter at hand.”); Iley v. Harris, 345 So. 2d 336, 338 (Fla. 1977) (Boyd, J., dissenting) (“County commissioners are closer to the people than other public officials and reflect the thinking of the communities in which they serve. They generally know, or can easily ascertain, the needs, moral character and fitness of applicants….”); Application of Grauling, 17 Misc. 2d 1021, 183 N.Y.S.2d 654, 655 (Sup. Ct. 1959) (“It is desirable to uphold the hands of the Police Commissioner whenever possible; he is valiantly striving against desperate odds to protect an already lawless community from the incursion of further violence against the peace of our city…”).

Some of the previous cases mention that a local issuer may personally know some applicants and thus be in a better position to know whether they possess an actual need or are suitable. It is unlikely that many issuers, even rural county sheriffs, would personally know most applicants, especially in large jurisdictions such as New York City and Los Angeles. Even when an issuer does personally know an applicant, there is the issue of whether that knowledge makes the issuer no longer impartial enough to fairly apply the law.

See Marra, supra note 317.

In fact, police may even be less qualified to determine licensing rules. See KLECK, supra note 9, at 175-77 (explaining the “police chief’s fallacy”).
See infra Appendix.

See Novak, supra note 18, at 137; Snyder, supra note 5 (arguing that the history of discretionary licensing systems demonstrates that police will issue licenses not based upon technical expertise, but upon favoritism and unjust discrimination). Novak writes:

The courts have upheld standardless delegating statutes only when it would be both impractical for the legislature to lay down a comprehensive rule, and when the relevant policy was express or implied. However, the applicable criteria for carrying a concealed weapon is not a complex or technological determination that requires the particular expertise of a delegated administrative official. This notion is confirmed by the fact that the official who administers such licenses varies from county to county. Moreover, that relevant criteria for issuing a gun license are listed in comparable statutes in other states illustrates that it would not be complex or impractical for the legislature to articulate factors for the issuing of carry licenses by administrative officials.

Id. (citations omitted).


In order to possess “interests protected by the due process clause of the Fourteenth Amendment,” there must exist property or liberty interests; courts have uniformly denied the existence of any liberty or property interests in discretionarily issued CCW licenses. See Guillory v. County of Orange, 731 F.2d 1379, 1382-83 (9th Cir. 1984) (“A licensed private investigator, however, does not have a liberty or property interest in receiving a concealed weapon permit under Cal. Penal Code § 12050”); Fullman v. Graddick, 739 F.2d 553, 561 (11th Cir 1984) (1984) (holding that there is “no property right in the denial of a pistol permit” because “Alabama gives county sheriffs the discretion to issue or deny a pistol license”); Erdelyi v. O’Brien, 680 F.2d 61, 63-64 (9th 1982) (“Where state law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, initial applicants do not have a property right in such licenses … [and the applicant] did not have a liberty interest in obtaining a concealed weapons license.”); Potts v. City of Philadelphia, 224 F. Supp. 2d 919, 939-45 (E.D. Penn. 2002) (“Potts did not have a protected property interest in his gun permit”); Costerus v. Neal, 2001 U.S. Dist. LEXIS 3295, ¶ 11-14 (D. Mass. 2001) (“An applicant seeking ‘License to Carry’ has neither a ‘property’ nor ‘liberty’ interest, but is seeking a privilege, which can be extended (or refused) by the Commonwealth without Due Process implications.”); Dupont v. Chief of Police of Pepperell, 57 Mass. App. Ct. 690, 695, 786 N.E.2d 396, 400 (App. Ct. 2003) (holding that there are no property or liberty interests in a CCW license); Chief of Police v. Moyer, 16 Mass. App. Ct. 543, 547, 453 N.E.2d 461, 464 (App. Ct. 1983) (“nor is there any question of a property right or deprivation of liberty involved in the statutory procedures for obtaining a license to carry firearms.”); Conway v. King, 718 F. Supp. 1059, 1061 (D.N.H. 1989) (holding that “While the range of constitutionally protected liberty interests is broad, it does not include the right to carry a concealed weapon”, and that there is no property interest in CCW licenses either); Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1242-45, 273 Cal. Rptr. 84, 87-89 (App. Ct. 1990) (holding that “the limited nature of a license to carry a concealed firearm which has been issued under Penal Code section 12050 prevents characterizing it as a property right”, and that there is no liberty interest either); Application of Wolstenholme, 1992 Del. Super. LEXIS 341, ¶ 7-13 (Super. Ct. 1992) (“a person who has not yet received a license and is applying for one under a statute that gives the issuing authority broad discretion to grant or deny license applications does not have a protected property interest in the license. That person merely has a unilateral expectation of receiving one.”); Mosby v. Devine, 851 A.2d 1031, 1048-49 (R.I. 2004) (“because the statute under consideration vests the Attorney General with discretion to
refuse a license even if a person makes ‘a proper showing of need,’ we are of the opinion that it has no impact on any constitutionally protected liberty interest’); King v. Wyo. Div. of Crim. Investigation, 2004 WY 52, ¶ 28-29; 89 P.3d 341, 350-52 (2004) (“Mr. King wrongly assumes he has a protected property interest in obtaining a concealed weapon permit.”); see generally David H. Armistead, Substantive Due Process Limits on Public Officials’ Power to Terminate State-Created Property Interests, 29 GA. L. REV. 769 (1995).

Some courts have recognized liberty and property interests in licenses issued in states employing a nondiscretionary licensing system. See, e.g., Kellogg v. Gary, 562 N.E.2d 685, 692-702 (Ind. 1990).


328 See supra Section II.3.

329 Id.

330 See supra Section III.2.c.

331 The void for vagueness doctrine is not often used to challenge discretionary CCW statutes, and when it is used, it has failed. See supra note 326. Void for vagueness doctrine was also used to challenge Connecticut’s CCW statute, but that challenge failed as well. See Rizzuto v. Board of Firearms Permit Examiners, 1997 Conn. Super. LEXIS 340, ¶8-9 (Super. Ct. 1997) (quoted at note 588); infra Appendix, Connecticut entry.


334 See supra Section II.3. For example, in the Storms ruling the court held:

Even our brief summary of some of the Act’s essential provisions clearly evidences that the goal of the Legislature was to prevent criminals and certain other persons from acquiring firearms generally and handguns in particular without at the same time making unduly such acquisition for other members of society.

Storms, 112 R.I. 121, 127. The statute’s proper need requirement is unrelated to the Storm court’s statement of statutory intent; proper need is logically a measure of risk. See supra Section III.3.c. Therefore, the statute does not provide policy conclusions that issuers must enforce, but instead empowers issuers to create policy. The Storm decision ignores this point. Id.

335 Id.


337 See supra Section III.3.


Fullman v. Graddick, 739 F.2d 553, 561 (11th Cir. 1984).

See infra Appendix (providing state specific information); see also People v. Rappard, 28 Cal. App. 3d 302 (App. Ct. 1972) (striking down a California statute prohibiting aliens, a suspect distinction, from owning or possessing concealable firearms).

See supra Section II.3.

Courts have allowed equal protection claims against some issuer created licensing policies. See Kellogg v. Gary, 562 N.E.2d 685, 691-92 (Ind. 1990). The Kellogg opinion held that the Gary, Indiana, license issuer violated the equal protection rights of Gary residents when he instituted a policy of not supplying any license applications. The court concluded: “As a class, the citizens were denied access to the state procedure for obtaining handgun licenses. To this extent, we agree they were denied the protection of a state procedural law available to other Indiana citizens.” Id.

See supra Section II.3.d.

See supra note 183 and accompanying text; Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984) (holding that the lower court erred by not allowing into evidence testimony concerning the issuer’s treatment of other applicants).

See Sections III.1., 3.

See supra notes 344-345.


See State ex rel. Oklahoma State Bureau of Investigation v. Warren, 1998 OK 133, 975 P.2d 900 (1998) (ruling that a CCW statute provision violated equal protection rights because there is no rational basis for precluding an applicant from license eligibility for three years after a felony arrest, when the applicant was acquitted of all charges and none of the charges involved firearms); Morris v. Blaker, 118 Wn.2d 133, 821 P.2d 482 (Wash. 1992) (finding no rational basis: “The [CCW] act denies equal protection of the law to those former mental patients by permanently banning them from obtaining concealed weapons permits while affording persons who have been convicted of violent felonies an opportunity to demonstrate rehabilitation or innocence.” at 147-48, 490). Despite those successful challenges, the bar is still quite high for establishing no rational basis for a issuance standard:

Plaintiff's final claim alleges that he has been denied equal protection of the laws by being treated differently by defendant in revocation proceedings than a New York City Police Officer. … The prohibition of the Equal Protection clause goes no further than invidious discrimination. A statutory classification will not be overturned ‘unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that (the court) can only conclude that the legislature's actions were irrational.’ There is clearly a rational basis for difference in the treatment of a Police Officer and private pistol licensee in that the Officer possesses a gun in order to fulfill his duty to protect the public safety, whereas plaintiff, by his own allegation, is a sportsman who uses his pistol for recreational purposes. Further, plaintiff’s loss of his pistol carrying license has not deprived him of his principal employment.

weapon into the City of New York is rationally related to the legislative goals of ensuring order in a densely populated high-crime area.”).  

350 Although such arguments have succeeded in some states no longer using a discretionary licensing system, if current discretionary statutes were prone to equal protection arguments, courts would have likely struck them down sometime in the last century. See Brevard County v. Bagwell, 388 So. 2d 645 (Fla. App. 1980). Brevard struck down Florida’s old licensing statute’s provision allowing issuers to consider any eligibility criteria they wished: “This paragraph is unconstitutional because it allows the county commissioners to consider any criteria they desire and does not require the commissioners to consider the same criteria for each applicant. Such unbridled discretion allows for capricious and arbitrary discrimination in violation of the due process clauses.” Id. at 647. The Brevard court did rule that the statute’s proper need requirement did not violate equal protection rights because “such classification is not arbitrary and is reasonably related to legitimate public purposes.” Id. However, Florida’s old licensing statute did provide a definition of proper need more substantial than any contained in current discretionary statutes. See id. (quoting Florida’s old statutory definition of proper need: the relevant portion being: “Whether or not there exists an imminent and continuing threat of serious bodily harm to the person of the applicant based upon a consideration of the individual circumstances of the applicant that are different in kind and degree from that of the general public.”); infra Appendix, Part D (providing information on current discretionary statutes).

351 See supra note 63 and accompanying text (discussing the states using a non-mandatory interpretation of “may issue”). Some courts have found that non-mandatory “may issue” interpretations violate constitutional protections. See supra note 350.

352 See supra note 350.

353 See supra note 63.

354 See supra Section II.3.

355 See supra Section III.3.c. Clearly proper need is unquantifiable; no issuer can meaningfully conclude that an applicant has a “level four” need and thus does not meet the eligibility standard requiring at least a “level five” need. Standards descriptively setting the required level of need are simply arbitrary selections of circumstances equated to proper need. For example, saying that an applicant must carry large sums of cash to qualify for a license does not evaluate an applicant’s need in comparison to a set standard of proper need, but simply defines need as carrying large sums of cash. Any such definition of need is arbitrary. A proper need criterion could mean that everyone has a need, or that no one does, but that renders the criterion meaningless. Undefined need criteria are irrational because they contain no substantive meaning. They simply ask for an arbitrary definition in order to provide substance. Any substantive meaning given to proper need criteria will be arbitrary because one cannot derive something from nothing.

356 See supra note 350 and accompanying text.

357 See Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 CALIF. L. REV. 297, 305-12 (1997) (discussing the rational basis and other judicial constitutional tests); Daniel J. Solove, The Darkest Domain: Deferece, Judicial Review, and the Bill of Rights, 84 IOWA L. REV. 941 (1999); John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612 (1996). Although the two previous articles deal with agency interpretations of law rather than a laws’ explicit language, agencies must apply the statutory proper need criteria; therefore, courts will most likely defer to license issuers on the question of whether proper need criteria have any rational meaning. See supra note 350 and accompanying text.

358 See Bhagwat, id. at 312-16.

359 Id.
See Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 106 S. Ct. 925, 929 (1986) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive…” (quoting United States v. O’Brien, 391 U.S. 367, 383, 88 S. Ct. 1673, 1682 (1968)). Ashutosh Bhagwat writes of the previous cases:

The Court’s disavowal of a motive inquiry in City of Renton—and in O’Brien, the seminal case on which the Court relies—seems to have been driven by a reluctance to strike down legislation which under the Court’s precedents was quite clearly improperly motivated—in City of Renton, because of hostility to an ‘adult’ theater, and in O’Brien, because of hostility to the anti-Vietnam War message conveyed by draft card burning. It should be noted, though, that the flat constitutional principle stated in City of Renton and O’Brien has not been followed historically.

Bhagwat, supra 357, at 369 n.239.

See supra Section I.

Id.

Marra, supra note 317, at 789.


See infra Appendix, Part B.

See infra Appendix, Part C.

See supra note 9 (explaining why “shall issue” systems often grant licenses more liberally than discretionary systems). Two court opinions illustrate that the intentions behind supporters of non-mandatory issuer discretion are to reduce the rate of license issuance, rather than to support issuer discretion as an end in itself. First, in Iley v. Harris Florida’s supreme court held that under Florida’s old discretionary licensing system issuers must issue licenses to applicants that satisfied the statute’s eligibility criteria. Iley v. Harris, 345 So. 2d 336 (Fla. 1977). The dissent argued that issuers should be authorized to deny applicants that met the statute’s standards because the dissenting judge was “deeply concerned over the result of the majority opinion which, if literally construed, would require boards of county commissioners to grant licenses to bear firearms to approximately three million Floridians.” Id. (Boyd, J., dissenting). The dissent’s concern was not how the court should read the statute, nor what the legislative intent indicated, nor whether it would be wise to entrust such powers to license issuers, but only that majority’s interpretation would increase license issuance.

Second, in Schubert v. De Bard, Indiana’s Supreme Court held that the statutory amendment specifying self defense as a proper need means that license issuers must accept self-defense as a proper need. Schubert v. De Bard, 398 N.E.2d 1339 (Ind. App. 1980). The dissent argued that the statutory amendment should mean that an applicant must prove to the issuer that he has some specific need to defend himself; and, therefore, the statutory amendment should have no practical effect, despite clear legislative intent otherwise. Id. (Staton, J., dissenting). The dissent relies on the argument that, as supported by a list of empirical studies, allowing citizens to carry concealed firearms is a dangerously bad policy. The majority’s interpretation of the statutory amendment eliminates the issuer’s discretion, and would result in an increase in CCW license approvals. Therefore, the dissent argued that the court should hold the legislature’s amendment of the CCW statute as irrelevant because to give the amendment effect would be poor policy.

The previous dissenters supported broad issuer discretion not because it was inherently wise to grant that power, but because the consequence of authorizing issuer discretion is to restrict the issuance of CCW licenses.

370 See supra Section II.3.c.

371 Of course a “shall issue” need requirement would have to state specifically what circumstances constitute proper need. The standards would have to be clear and objective to avoid delegating the issuer significant discretion when interpreting the need standards, or else the statute would be discretionary instead of “shall issue”. Although no state uses such a standard, it is not logically impossible.

372 See supra note 369.

373 See supra notes 71-73 and accompanying text.

374 See supra Sections III.1., .3.

375 Those that attempt to defend discretionary systems, abuses and all, display a disregard for basic democratic ideals. For example:

The National Coalition to Ban Handguns (NCBH) [now named the Coalition to Stop Gun Violence] actually touts New York City as a model for gun control everywhere. (For obvious reasons, the NCBH does not discuss the issue of discriminatory administration.) When such a discussion was forced on the NCBH’s principal spokesman, his response was significant: He blithely replied that there is no problem so long as permits are confined to people like Times publisher Sulzberger (whom he described familiarly as ‘Punch’) who are obviously not criminals. Apparently, the NCBH is not concerned with a discriminatory administration that grants a gun permit to ‘Punch’ Sulzberger but denying one to those who may have legitimate concerns for their safety: grocers in Spanish Harlem; welfare recipients whom robbers target, knowing when their checks come and where they cash them; the elderly trapped in deteriorating neighborhoods (like the Manhattan couple who in 1976 hanged themselves in despair over repeatedly loosing their pension checks and furnishings to robbers). But even if, as the NCBH argues, guns do not provide protection from violent crime, common citizens in a violent society have at least as much right to one as do the prominent and wealthy.

Kates, supra note 39.

376 ALASKA STAT. § 18.65.700 (2005); see infra Part E, Alaska entry.


381 720 ILL. COMP. STAT. ANN. 5/24-1 (West 2005).

382 See Id.; see also People v. Hayes, 308 Ill. App. 3d 194, 719 N.E.2d 372 (App. Ct. 1999) (reversing a conviction for illegally carrying a firearm because the state failed to prove beyond a reasonable doubt that the defendant was not on his property when carrying a firearm).
See supra note 381; see also People v. Free, 112 Ill. App. 3d 449, 445 N.E.2d 529 (App. Ct. 1983) (finding that only a person with a proprietary interest in a business, rather than just an employee, falls under the “place of business” exception to prohibition on carrying firearms).


Id.

WIS. STAT. ANN. § 941.23 (2005).

State v. Nollie, 249 Wis. 2d 538, 548, 638 N.W.2d 280, 285 (2002) (citations omitted); see also State v. Dundon, 226 Wis. 2d 654, 594 N.W.2d 780 (1999) (“Opening up § 941.23 to broad ‘justification’ defenses would create mischief, destroy uniformity, and impose a heavy burden on prosecutors. Hence, to the extent that any privilege in § 939.45 does apply, it must be applied restrictively so as not to undermine the objective of the statute.” at 665, 785).


Id. at 483, 810 (“a defendant is not entitled to assert a constitutional defense to a CCW charge if he or she carried a concealed weapon for an unlawful purpose”).

Id.


2003 Ala. AG LEXIS 184 (2003); see also Hess v. Butler, 379 So. 2d 1259, 1260-61 ( Ala. 1980) (“The statute [AL. CODE § 13A-11-75] obviously accords to the sheriff some measure of discretion when determining whether the applicant for a license to carry a pistol ‘is a suitable person to be so licensed.’); Fullman v. Graddick, 739 F.2d 553, 561 (11th Cir. 1984) (“Alabama gives county sheriffs the discretion to issue or deny a pistol license.”).


E.M. v. State, 675 So. 2d 90, 92 (Ala. Crim. App. 1995); see also Crawford v. State, 356 So. 2d 690, 691 (Ala. Crim. App. 1978) (“it is clear to this court that any person who has been convicted of committing or attempting to commit a crime of violence is not a suitable person to be licensed to own a pistol or have one under his possession or control. The sheriff therefore had no authority to issue a pistol permit to the appellant and the license is void.”).
See supra Section II.3.e. (discussing the arbitrary and capricious standard of review).


CBS, Inc. v. Block, 42 Cal. 3d 646, 655, 725 P.2d 470, 475-76 (1986) (“The final decision [to issue a CCW license] is made by the sheriff, who under the statute, has broad discretion.” at 659, 478); see also Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1241 (App. Ct. 1990) (“In CBS, Inc. v. Block … that discretion was described as ‘unfettered.’”).


Erdelyi v. O’Brien, 680 F.2d 61, 63 (9th Cir. 1982).

CBS, Inc. v. Block, 42 Cal. 3d 646, 656, 725 P.2d 470, 477 (1986) (“Without the applications which accompany the licenses and which set forth the reasons why a license is necessary, the public cannot judge whether the sheriff has properly exercised his discretion in issuing the licenses.” at 657, 477).

Gifford v. City of L.A., 88 Cal. App. 4th 801, 805 (Ct. App. 2001); see supra Section II.3.e. (discussing the arbitrary and capricious standard of review).


Id.; see also In re Application of McIntrye, 552 A.2d 500 (Del. Super. Ct. 1988) (“Indeed the words, ‘any application’ contained in that section [§ 1441] are very broad.” at 501).

Application of Wolstenholme, 1992 Del. Super. LEXIS 341, ¶11-12 (Super. Ct. 1992) (“the General Assembly has given the Court the ultimate power of enforcement, the authority to forbid a person to carry a concealed deadly weapon.” at 18).

See supra Section II.3.a (discussing non-mandatory “may issue” verbiage).


In re Application of McIntrye, 552 A.2d 500 (Del. Super. Ct. 1988) (“The General Assembly has specifically differentiated between a ‘renewal’ and an ‘application’ … Thus, the Court finds that where a renewal is pending before the Court such renewal will be approved unless good cause is presented which will justify further inquiry into the renewal.” at 501).


In re Wolynetz, 545 A.2d 1194, 1196 (Del. 1988).


IOWA CODE ANN. § 724.7 (2004).


See Clark v. Banks, 515 N.W.2d 5 (Iowa 1994) (“we find no basis in the Iowa or Administrative Codes for imposing a duty upon the sheriff to maintain firearm permit application material.” at 6).


Kasper v. Cedar County Sheriff’s Office, 2005 Iowa App. LEXIS 420, ¶4 (App. Ct. 2005) (affirming a sheriff’s determination when “the Sheriff exercised the discretion afforded him under the statute to deny the permit application, did so after specifically considering the justification proffered by Kasper, and furnished reasons for the denial that were not illegal, arbitrary, capricious, or an abuse of discretion.”).


Scherr v. Handgun Permit Review Bd., 163 Md. App. 417, 435, 880 A.2d 1137, 1147 (Spec. App. Ct. 2005) (“Detective Sergeant Galloway … testified that he would issue a permit only if he thought the applicant faced a level of danger that was higher than the level ‘the average person would encounter’ … Detective Sergeant Galloway admitted he had made up this ‘danger encountered by an average person’ standard.”) (“Detective Sergeant Galloway had, on approximately fifteen to twenty occasions, approved applications when there had been no prior police report of a threat against the applicant, but, except for former police officers, he had never approved an application where the applicant had failed to produce evidence of a threat.” at 430, 1144).

Id.


Id. at 470, 298.

Id. at 469, 298; see Scherr v. Handgun Permit Review Bd., 163 Md. App. 417, 438, 880 A.2d 1149, 1147 (Spec. App. Ct. 2005) (“it was for the Board to decide whether Scherr [the applicant], in fact, reasonably apprehended danger to himself.”).


440 See id.

441 See id.

442 See supra Section II.3.c. (discussing license restrictions).

443 Ruggiero v. Police Comm’r of Boston, 18 Mass. App. Ct. 256,259, 464 N.E.2d 104, 107 (App. Ct. 1984). The Ruggiero court affirmed the Boston’s police Commissioner’s requirement that an applicant provide evidence demonstrating that he had a good reason to need a CCW license for self-defense: No issue exists as to whether the commissioner acted unreasonably … in refusing to issue the plaintiff an unrestricted license. The plaintiff was found to be a suitable person to have a license. However, from all that appears from the record, the only justification offered by the plaintiff for an unrestricted license was that he ‘does not spend his entire life behind locked doors and is a potential victim of crimes against his person.’ This reason, without further explanation, would not make arbitrary, capricious or an abuse of discretion the commissioner’s decision to deny the plaintiff a license for self-protection. Id. at 261, 108 (citations omitted).

444 MASS. ANN. LAWS ch. 140, § 131(d) (2005).


446 See id.; Roy v. Dufort, 11 Mass. L. Rep. 73 (Mass. Supp. 1999). The Roy court ruled: [T]his Court finds that the knowledge of Chief Dufort’s predecessors is of no consequence in this case. Even assuming that previous police chiefs had knowledge of Roy’s criminal past and chose to ignore it, Chief Dufort still had a statutory obligation to revoke any and all licenses held by people who [sic] he determined were no longer suitable to hold that license.

447 Id.


451 Id.


453 Id. at 48, 488.


Although law enforcement has the initial task of issuing permits, the final decision is made by the courts. See In re Preis, 118 N.J. 564, 576, 573 A.2d 148, 155 (1990) (“the Legislature has designated the judiciary as the issuing authority for gun permits”).


Id. at 553, 538.

Id. at 558, 540.

Id at 557, 540.

Id. at 555, 539.


Application of “X”, 59 N.J. 533, 525, 284 A.2d 530, 531 (1971).

See supra SectionIII.3.c. (demonstrating why these relative danger tests are irrational).

Application of “X”, 59 N.J. 533, 525, 284 A.2d 530, 531 (1971).

Id.

Id.


Id.


Id. at 558, 540.


Id.


In re Preis, 118 N.J. 564, 567, 573 A.2d 148, 150 (1990) (quoting a Superior Court Judge’s refusal to issue a permit).


See N.Y. PENAL LAW § 400.00 (Consol. 2005).

See N.Y. PENAL LAW § 400.00(6) (Consol. 2005).

N.Y. PENAL LAW § 400.00(1) (Consol. 2005).
483 N.Y. PENAL LAW § 400.00(2) (Consol. 2005).


489 See Falk v. New York, 41 A.D.2d 530, 340 N.Y.S.2d 127 (App. Div. 1973) (“Although the record seems to indicate the real reason for the rejection was a conclusion on the part of the inspector that the petitioner was ‘immature’ and ‘untrustworthy’, we are unable to find evidentiary support for such a subjective determination. Finding that this sparse record lacks substantial evidence for the conclusion reached, we remand for further supportive evidence…”).

490 Savitch v. Lange, 114 A.D.2d 372; 493 N.Y.S.2d 889 (App. Div. 1985); see also Babu v. Lange, 164 A.D.2d 910, 559 N.Y.S.2d 747 (App. Div. 1990) (“Before an application for a pistol permit may be denied, the petitioner [applicant] must be given the specific reasons for the denial of the permit, and also an opportunity to respond to the objections to his application.”); Bobrick v. Leggett, 71 A.D.2d 869; 419 N.Y.S.2d 667 (App. Div. 1979) (“While we are cognizant of the fact that substantial evidence of lack of good moral character is sufficient to justify disapproval of an application for a pistol license, under these circumstances, petitioner should have been given a reasonable opportunity to respond to the objection to his application and to submit proof of his good moral character.” (citations omitted)).

491 Guida v. Dier, 54 A.D.2d 86, 87, 387 N.Y.S.2d 720, 721-22 (App. Div. 1976); see also La Grange v. Bruhn, 276 A.D.2d 974, 714 N.Y.S.2d 392 (App. Div. 2000) (annulling the issuer’s denial because the reasons stated for the denial were based upon evidence not presented at the licensing hearing and, thus, the applicant was denied any ability to respond to that evidence); Buffa v. Police Dep’t of Suffolk County, 47 A.D.2d 841, 366 N.Y.S.2d 162 (App. Div. 1975) (“The only reason given for revocation of the license was the withdrawal of Police Department approval. This record lacks substantial evidence to support the revocation…”).


493 See Bitondo v. State, 151 Misc. 2d 182, 184, 573 N.Y.S.2d 127, 128 (Sup Ct. 1991) (“No authority exists, however, for periodic reviews of licensee status in upstate counties. In this instance the County
Judge is limited to applying the intent of the legislature as set forth in the statute and may not make public policy determinations which go beyond the legislative edict.

494 Kreshesky v. Codd, 89 Misc. 2d 439, 442, 391 N.Y.S.2d 792, 794 (Sup. Ct. 1976); see also De Vito v. McGuire, 124 Misc. 2d 65, 475 N.Y.S.2d 730 (Sup. Ct. 1984) (ruling that the issuer could not refuse to consider an applicant under 21 years of age because the CCW statute does not prohibit those under 21 from possessing a CCW license).

495 See Seltzer v. Kane, 242 A.D.2d 302, 660 N.Y.S.2d 740 (App. Div. 1997) (“[issuer] denied the petitioner’s application for a ‘full carry’ permit because ‘such a permit cannot be granted under our current licensing policies’. These are not reasons ‘specifically and concisely stated in writing’ required under Penal Law § 400.00 (4-a).”).

496 In re O’Connor, 154 Misc. 2d 694, 697, 585 N.Y.S.2d 1000, 1003 (Westchester County Ct. 1992); see also Eddy v. Kirk, 195 A.D.2d 1009, 1011, 600 N.Y.S.2d 574, 575 (App. Div. 1993) (“We conclude that the authority of the licensing officer to determine whether ‘proper cause’ exists necessarily and inherently includes the authority to impose and retain certain restrictions on the license so that the pistol is used for the purposes that justified its issuance in the first place.”).

497 See Id.; supra Massachusetts entry; infra New Hampshire entry.


We note in passing that at oral argument the Attorney-General informed the court that about half of the issuing officers in the State adhered to a policy of restrictions on pistol permits which are not specifically mentioned in the statute. Given this situation, it would appear wise for the Legislature to study the statute and specifically grant issuing officers the right to restrict the use of these handguns for hunting and target practice in order to promote consistency among the jurisdictions.

Id. Another court justified that inconsistency:

The further contentions that restrictions do not further any legitimate county interest, are arbitrary and capricious, and improperly distinguish or discriminate between residents of this county and residents of counties that do not utilize restrictions, are also without merit. The variations in population density, composition, and geographical location provide ample grounds upon which to exercise the discretion provided by statute. The circumstances which exist in New York City are significantly different than those which exist in Oswego or Putnam Counties. Such circumstances must be considered in the exercise of the licensing officer’s discretion. The licensing officers in each county are in the best position to determine whether any interest of the population of their county is furthered by the use of restrictions on pistol licenses. The mere fact that some licensing officers choose to utilize restrictions while others do not does not make their use arbitrary or capricious. Such a determination can only be made on a case-by-case basis.


499 See Davis v. Clyne, 58 A.D.2d 947, 397 N.Y.S.2d 186 (App. Div. 1977) (“[P]etitioner has indicated that if she is granted a pistol license she will engage in practice and competitive pistol shooting … This is a legitimate purpose … it was an impermissible exercise of the issuing officer’s discretion to disapprove the application.”); Klapper v. Codd, 78 Misc. 2d 377, 356 N.Y.S.2d 431 (Sup. Ct. 1974) (“Marksmanship purposes have been recognized as a proper basis upon which to seek a pistol license.”).

500 See infra New Hampshire entry.


Kaplan v. Bratton, 249 A.D.2d 199, 201, 673 N.Y.S.2d 66, 68 (App. Div. 1998) (citations omitted); see also Davis v. Clyne, 58 A.D.2d 947, 397 N.Y.S.2d 186 (App. Div. 1977) (“the licensing officer has a great deal of discretion in deciding whether a pistol license should be granted to a particular. This discretion is not, however, without limits. The determination of the licensing officer may not be arbitrary and capricious.”). Another court described its power to review an issuer’s determination as:

The only issue for consideration by the court is whether the administrative decision to revoke petitioner’s pistol license was arbitrary and capricious or an abuse of discretion. The judicial function is limited to ascertaining whether there is a rational basis for the agency’s determination. A rational basis for revoking a pistol license exists when the evidence adduced is adequate to support the Commissioner’s. In reviewing the administrative ruling, the court must defer to the fact-finder’s assessment of the evidence and the credibility of witnesses. It is axiomatic that the ‘court may not weigh the evidence, choose between conflicting proof, substitute its assessment of the evidence or interfere with the Administrative Law Judge’s province to pass on the credibility of witnesses.’


These are the thirty-seven nondiscretionary licensing states plus Vermont and Alabama.


Whether uniformity is desirable is a separate issue, see supra Section III.3.c.; also compare supra note 498 with Suzanne Novak, Why the New York State System for Obtaining a License to Carry a Concealed Weapon Is Unconstitutional, 26 FORDHAM URB. L.J. 121, 140 (1998) (“The formulation of standards by each licensing officer creates serious practical problems … different officials in different parts of the state set up their own standards, leading to anomalous results depending on the applicant’s county of residence.”).

See Davis v. Clyne, 58 A.D.2d 947, 397 N.Y.S.2d 186 (App. Div. 1977) (“since petitioner’s age and the fact that she has a small child at home are not disqualifying facts or in any way related to the purpose stated in her application, we conclude that petitioner has shown good cause and, further, that it was an impermissible exercise of the issuing officer’s discretion to disapprove the application” at 948, 187).


Klapper v. Codd, 78 Misc. 2d 377, 356 N.Y.S.2d 431 (Sup. Ct. 1974) (“Although the petitioner has had a number of jobs in the last several years, that, in and of itself, may not be proper basis upon which to have denied petitioner’s application.”).
See Biganini v. Gallagher, 293 A.D.2d 603, 742 N.Y.S.2d 73 (App. Div. 2002). Biganini concerned an applicant who was a member of the Hell’s Angels. The applicant had no criminal history, but some of the other members did. Based solely upon the applicant’s membership, the court sustained the initial denial: “Although there was no proof that Biganini had been directly involved in any criminal activities, we conclude that the determination to revoke his license on the ground that he lacked ‘good moral character’ was supported by substantial evidence in the record and was not arbitrary or capricious.” Id.

517 See De Trano v. Looney, 66 Misc. 2d 183, 320 N.Y.S.2d 141 (Sup. Ct. 1970) (ruling that when a license holder accidentally discharged a firearm causing the injury of another, “[t]he mere occurrence of the incident … satisfies this court that this petitioner should not have been entrusted with the right to handle a pistol and the police department acted properly, in the petitioner’s as well as the public’s interest, in revoking his permit.”); see also Silverberg v. Dillon, 73 A.D.2d 838, 423 N.Y.S.2d 760 (App. Div. 1979) (holding that a license revocation was proper because the license holder’s firearm accidentally discharged, although the discharge caused no injuries).

518 See Lipton v. Ward, 116 A.D.2d 474, 476, 496 N.Y.S.2d 744, 746 (App. Div. 1986) (“The evidence discloses that on several occasions he failed to safeguard properly his firearms in his home and that such failure created a grave risk to the safety of others. Indeed, on this ground alone, revocation would have been proper.”).

519 See Fromson v. Nelson, 178 A.D.2d 479, 577 N.Y.S.2d 417 (App. Div. 1991) (holding that a license suspension was proper when the license holder was going through an “acrimonious divorce” and his “wife expressed some concern for her safety”).

520 In re H., 96 Misc. 2d 117, 408 N.Y.S.2d 759 (Ontario County Ct. 1978). The In re H. court held that: This brings us to a construction of section 400.00 of the Penal Law. I find that reactive depression, accompanied by 14 days’ hospitalization of the kind described, is the kind of mental illness contemplated by the statute. It is of a nature likely to bring about a homicide or suicide. I find further that the statute renders ineligible anyone who has ever suffered any such illness and that mental capacity at any subsequent time is irrelevant. Since the condition is so common, and the practice of seeking treatment so commendable and so readily available, it might well be that the Legislature should consider this issue.

Id.

521 See Suzanne Novak, Why the New York State System for Obtaining a License to Carry a Concealed Weapon Is Unconstitutional, 26 FORDHAM URB. L.J. 121, 140, 166 n.133 (1998) (quoting an interview with an officer at the New York City Police Department Licensing Division where the officer stated that “New York City has the most restrictive policy in the state towards issuing carry licenses.”).


524 See supra New Jersey entry.


528 See Sable v. McGuire, 92 A.D.2d 805, 460 N.Y.S.2d 52 (Sup. Ct. 1983) (“Nor was it error for the licensing official to reject the petitioner’s ‘high crime area’ argument, the logical extension of which is to ‘make the community an armed camp.’”). However, if an area is already an armed camp, an applicant may stand a better chance of obtaining a CCW license. See Blumenfeld v. Codd, 89 Misc. 2d 837, 393 N.Y.S.2d 145 (Sup. Ct. 1977).

529 See supra notes 525-526.

530 See Williams v. Bratton, 238 A.D.2d 269, 656 N.Y.S.2d 626 (App. Div. 1997) (holding that the issuer has discretion in determining what proof an applicant must submit to prove that he carries large sums of cash and that the issuer has discretion in determining whether any submitted evidence is sufficient); Hunt v. Rubin, 52 A.D.2d 955, 383 N.Y.S.2d 632 (App. Div. 1976) (“It was properly within the discretion of the respondent County Judge to determine that the amount of money to be carried by petitioner does not warrant the possession of a pistol for protection. The denial of the application for a pistol license was neither arbitrary nor capricious.”).


536 See R.I. GEN LAWS § 11-47-2 (2005) (“(5) ‘Licensing authorities’ means the board of police commissioners of a city or town where the board has been instituted, the chief of police or superintendent of police of other cities and towns having a regular organized police force…””).


539 Id. at ¶45-46.
See Mosby v. Devine, 851 A.2d 1031, 1035 (2004) ("In June 1999, the department first promulgated a document setting forth its guidelines for reviewing applications to obtain a permit under the Firearms Act."); see also Rhode Island Weapons Carry Permit Package, supra note 171.


Id. at 1047.

Id. at 1048; see supra Section II.3.a (discussing non-mandatory “may issue” verbiage).

Id. at 1049-50.

Id. at 1078 (Flanders, J., dissenting).

Id. at 1079 n.61 (Flanders, J., dissenting). The note explains:

In its amicus curiae brief, the Citizens Rights Action League has suggested to this Court that local licensing authorities, to whom one seeking a permit pursuant to § 11-47-11 must apply, effectively have circumvented the requirement of § 11-47-11(a) by interpreting the term ‘suitable’ to require that an applicant for a license under this local licensing law first must seek and obtain a permit from the department pursuant to § 11-47-18(a) before the local authority will even consider a permit applicant to be ‘suitable’ under § 11-47-11. Local licensing authorities adopted this stance, we are told by this amicus, at the urging of the department on the theory that each local licensing authority could take the position with gun-permit applicants that no applicant could or would be considered ‘suitable’ until and unless the department first granted him or her a license under § 11-47-18.

Id.

Id. at 1079 (Flanders, J., dissenting).

Id. at 1050; see also State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973) (holding that Rhode Island’s CCW statute was not an unconstitutional delegation of authority).


Id. at 1051.

Id. (citations omitted).

Id. (citations omitted) (Flanders, J., dissenting).

ALASKA STAT. § 18.65.700 (2005); see supra Alaska entry.


See ALASKA STAT. § 18.65.790(5) (2005) ("department’ means the Department of Public Safety").

See ALASKA STAT. § 18.65.700, .705 (2005).


Clayton E. Cramer, David B. Kopel, “Shall Issue”: The New Wave of Concealed Handgun Permit Laws, 62 TENN. L. REV. 679, 705 (1995); see also State v. Moerman, 182 Ariz. 255, 261, 895 P.2d 1018, 1024 (App. Ct. 1994) (“the legislature intended to prohibit a person from carrying a concealed weapon on his or her person in a manner readily accessible for immediate use unless the conveyance utilized to carry the weapon reasonably would place others on notice that such person is armed”) (decided before the 1994 passage of Arizona’s CCW licensing statute: “While of no moment to the decision today, the court acknowledges that the legislature now allows licensed individuals to carry concealed weapons in any manner they choose.”).


ARIZ. REV. STAT. ANN. § 13-3112 (2005); see also Ryan S. Andrus, The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity, 42 ARIZ. L. REV. 129, 130-32 (2000) (providing an explanation of the process for obtaining an Arizona CCW permit). The Arizona Attorney General, in an opinion arguing that the training requirements in Arizona’s CCW statute are constitutional, stated that:

The Legislature has determined that concealed weapons are a danger to the citizenry of Arizona. The Legislature has also determined, however, that the danger is sufficiently diminished if persons are licensed to carry concealed weapons after meeting certain conditions, including successfully completing a firearms safety class. The courts will acquiesce in legislative determinations of fact unless they are clearly erroneous, arbitrary, or wholly unwarranted.


Id.


Id.


COLO. REV. STAT. ANN. § 18-12-201 (2005).
Id.

COLO. REV. STAT. ANN. § 18-12-201(3) (2005).


COLO. REV. STAT. ANN. § 18-12-203 (2005).


COLO. REV. STAT. ANN. § 18-12-203(2) (2005).

COLO. REV. STAT. ANN. § 18-12-201(3) (2005).

COLO. REV. STAT. ANN. § 18-12-207(3) (2005).

CONN. GEN. STAT. ANN. § 29-28(b) (2005).

Id.

Id.

Id.

Id.; see also Ambrogio v. Connecticut State Board of Firearms Permit Examiners, 36 Conn. Supp. 166 (Super. Ct. 1980) (holding that an applicant’s failure to demonstrate some need for a CCW permit does not raise a “strong presumption of an unlawful use” and that “need itself is not a criteria for a permit.”).


[T]he [CCW] statutes in question … are not unconstitutionally vague. In order to avoid forfeiture of the permit, a permit holder’s conduct in the exercise of rights granted by the permit must demonstrate that he or she, as a permit holder, does not pose an immediate or potential danger to the public. If the board finds on the basis of evidence in the particular case that the permit holder has acted so as to pose an immediate or potential danger, the board may determine that the person is ‘unsuitable’ to hold the permit, which is ‘just and proper cause’ for revoking it. Although this statutory standard requires careful consideration of the facts of the individual case and the exercise of judgment and discretion by the board, those factors do not make the standard less ascertainable nor more difficult to obey.

Id. at ¶8-9.

CONN. GEN. STAT. ANN. § 29-32b(b) (2004).


Id. at ¶4.

Id. at ¶5; see also Storace v. Mariano, 35 Conn. Supp. 28, 391 A.2d 1347 (Super. Ct. 1978) (overruling the issuer and board because their decisions were based on “personal reasons” and “not supported by the evidence.” at 33, 1349).


See, e.g., Hansen v. Board of Firearms Permit Examiners, 1997 Conn. Super. LEXIS 1312 (Super. Ct. 1997) (holding that the board improperly revoked a CCW permit because making prank phone calls does not in itself establish unsuitability). The Hansen court’s analysis illustrates how the courts have kept Connecticut’s permit issuers’ discretion within reasonable limits:

In the present case, there are no facts set forth in the board’s decision or in the record of the administrative proceeding that would lead a reasonable person to infer that the plaintiff poses some danger to the public if allowed to carry a gun. In particular, there is nothing in the record indicating the misuse of a gun or any tendency toward reckless or violent behavior of any kind, armed or unarmed. At worst, there is evidence that the plaintiff exhibited some immaturity either by engaging in prankish behavior himself or allowing others to do so.

Id. at ¶4-5.


Cramer & Kopel, id. at 691.

FLA. STAT. ANN. §790.06(2) (2005).

FLA. STAT. ANN. §790.06 (2005).

Id.


Georgia’s Attorney General decided that there was one exception to the CCW statute’s denial of discretion to the issuer:
The sole exception contained in the statute relates to the authorization for the judge to exercise discretion in determining whether or not to authorize a firearms permit for an individual who has been hospitalized as an in-patient in a mental hospital or alcohol or drug treatment center during the five years immediately proceeding application for a permit.  

Id.; see also Propst v. McCurry, 252 Ga. 56, 310 S.E.2d 914 (1984) (allowing a reasonable interpretation that this ruling, finding that the CCW statute granted the issuer discretion, only applies to the situation that the attorney general held as the “sole exception” to his ruling that the statute did not confer general discretion to the issuer).


612 Id.

613 Id.


618 IDAHO CODE § 18-3302(11) (2005) (“The sheriff of a county may issue a license to carry a concealed weapon to those individuals between the ages of eighteen (18) and twenty-one (21) years who in the judgment of the sheriff warrants the issuance of the license to carry a concealed weapon. Such issuance shall be subject to limitations which the issuing authority deems appropriate.”).

619 IDAHO CODE § 18-3302(5) (2005) (“Notwithstanding the requirements of this section, the sheriff of the county of the applicant’s residence may issue a temporary emergency license for good cause pending review under subsection (1) of this section.”).

620 See 1990 Op. Atty Gen. Idaho 15. The Idaho attorney general Concluded that: Idaho Code § 18-3302 is unconstitutional because it will force a person of common intelligence to guess as to whether or not he or she will be in violation of the law. Further, it is unconstitutional because it does not provide proper standards for the persons charged with applying the statute, in some cases forcing them to guess at its meaning, and in other cases granting them unfettered discretion as to its implementation.  

Id. The Idaho legislature amended the CCW statute to remove the subjective elements and better define its terminology.  See IDAHO CODE § 18-3302 (2005).

621 IND. CODE ANN. § 35-47-1-7., -8 (Burns 2005); IND. CODE ANN. § 35-47-2-3 (Burns 2005).

622 IND. CODE ANN. § 35-47-2-3(e) (Burns 2005).

623 Id.

624 IND. CODE ANN. § 35-47-1-7., -8 (Burns 2005).


IND. CODE ANN. § 35-47-2-4(a) (Burns 2005).

IND. CODE ANN. § 35-47-1-8 (Burns 2005).

IND. CODE ANN. § 35-47-1-7 (Burns 2005).

Id.; IND. CODE ANN. § 35-47-2-3 (Burns 2005).

IND. CODE ANN. § 35-47-1-7 (Burns 2005).

See Kansas Senate Bill No. 418, New Sec. 3(a); see also Brent D. Wistrom, Ron Sylvester, House Overrides Veto; Gun Bill Is Law, WICHITA EAGLE, March 24, 2006.

Kansas Senate Bill No. 418, New Sec. 3(a).

Id. at New Sec. 4.

Id.

Id. at New Sec. 5.(c)(1).

Id.


Id.


LA. REV. STAT. ANN. § 40:1379.1(F) (2005) ("The chief law enforcement officer of a parish shall have the authority to issue a concealed handgun permit to an individual, which permit shall be valid only within the boundaries of the chief law enforcement officer’s parish … Notwithstanding the provisions of this Subsection, the issuance of a permit shall not be unreasonably withheld.").

LA. REV. STAT. ANN. § 40:1379.1(G) (2005). The statute specifies:
The deputy secretary of the Department of Public Safety shall have the authority to grant to an individual a concealed handgun permit from the office of state police. Before the individual applies to the deputy secretary for a permit, he must have been granted a concealed handgun permit by the chief law enforcement officer of the parish in which he is officially domiciled … Further, the deputy secretary shall have the authority to promulgate and adopt regulations providing with respect to the issuance and use of said permit.

Id. 232
LA. REV. STAT. ANN. § 40:1379.1(H) (2005) (“The superintendent of state police or the chief law enforcement officer of a parish shall have the authority to revoke any concealed handgun permit, and is further empowered to require those holding handgun permits to furnish … information as may be deemed necessary for determining suitability for holding a concealed handgun permit.”).

See Hays v. Volentine, 694 So. 2d 633, 635 (La. Ct. App. 1997) (“A plain reading of this statute, with its reference to ‘unreasonable’ withholding of the permit and ‘other information deemed necessary’ to determine an applicant’s suitability, shows that an element of discretion inheres in the chief law enforcement officer’s decision to grant or deny the concealed handgun permit.”).


Id.


Id. The statute reads:

There shall be a rebuttable presumption that an applicant has a history of engaging in violent behavior upon proof that, within a ten-year period immediately preceding the date of the application, the applicant has been arrested or charged on three or more occasions for any crime of violence as defined in R.S. 14:2(13), or has been arrested or charged on two or more occasions for any crime of violence that may be punished by death.

Id.

ME. REV. STAT. ANN. tit. 25, § 2003 (2005). Some argue that the Maine CCW law did not become truly nondiscretionary until 1985:

The laws in 1981 and 1985 differed in one crucial aspect: Under the 1981 law, city councils and mayors had responsibility for issuing permits. However, the police chiefs in Portland (with almost 20% of the state’s population in 1985) and other major cities resisted issuing permits. The 1985 law overcame this problem by taking this power away from the city governments, particularly the Portland police chief, Frank Maoroso.


Schwanda v. Bonney, 418 A.2d 163 (1980). The court ruled:

The [Town of] Freeport[‘s] ordinance imposes licensing criteria beyond the statutory requirements and to that extent is invalid; the denial of the license to [the applicant] Schwanda based solely on his failure to meet such non-statutory prerequisites was error of law and must be reversed. Conversely, the municipal authorities must grant a license to an applicant who does meet the statutory criterion.

Id. at 167.


Id.
See Hider v. Chief of Police, Portland, 628 A.2d 158 (Me. 1993) (“Section 2003(4) lists four issues, including reckless and negligent conduct, that the Chief must consider when making an assessment of good moral character. The statute makes clear, however, that this assessment is not limited to those issues.”), related proceeding sub nom, Hider v. City of Portland, 1995 U.S. App. LEXIS 23941 (1st Cir. 1995). Even though issuers are “not limited to those issues,” their good moral character determinations must be reasonable: “the question before us is whether the Chief’s assessment that Hider’s conduct demonstrated a failure of good moral character, constitutes an abuse of discretion or is otherwise unlawful. ‘We . . . must affirm the decision of the administrative agency, unless that decision was unlawful, arbitrary, capricious or unreasonable . . . ’” Id. at 161 (quoting Driscoll v. Gheewalla, 441 A.2d 1023, 1026 (Me. 1982)).
677 MINN. STAT. ANN. § 624.714, subd. 12(b) (2005).

678 J.M.P. v. Fletcher, 2005 Minn. App. LEXIS 111, ¶21-22 (App. Ct. 2005) (“The clear and convincing standard is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt. Clear and convincing proof exists where the truth of the facts asserted is ‘highly probable.’” (quoting Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978)) (citations omitted)).

679 See id. (holding that a “highly probable … tendency toward impulsive, over-reactionary, and aggressively threatening behavior” can establish that there is “substantial likelihood that appellant is a danger to the public if authorized to carry a firearm.” at ¶24-25).


683 Id.


686 Brooks v. State, 128 S.W.3d 844 (Mo. 2004) (holding that in counties where the CCW statute acted as an unconstitutional unfunded mandate, those “counties are not required to comply with the Act to the extent that it mandates them to expend funds for that purpose” at 850); see also David B. Kopel, The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts, 68 ALB. L. REV. 305, 309-12 (2005) (providing an explanation of Missouri’s CCW statute’s constitutional issues).

687 See Greg Jonsson, St. Louis County, City Will Issue Concealed-Carry Permits, ST. LOUIS POST-DISPATCH, July 13, 2005, at A1 (“In May, the Legislature sent a bill to Gov. Matt Blunt that fixed the flaws. Blunt, a Republican, signed the bill Tuesday.”).


690 Id.


695 Id.

Smith v. County of Missoula, 297 Mont. 368, 377, 992 P.2d 834, 840 (1999); see also Barrett v. O’Reilly, 1996 Mont. Dist. LEXIS 1068 (Dist. Ct. 1996) (“Subsection (2) gives the sheriff additional discretion in granting or denying the permit in other circumstances not enumerated previously.” at ¶5).


Nebraska Legislative Bill 454, § 4(3).

Id. at § 6 to 7.

Id.

Many local Nebraska mayors have stated their intentions to enact local ordinances prohibiting CCW. See, e.g., Deena Winter, Seng Plans to Propose Concealed-Weapons Ban, LINCOLN JOURNAL STAR, April 20, 2006, published online at www.journalstar.com.

No Nebraska court has specifically dealt with this issue. For a discussion of Nebraska’s general preemption caselaw, see State ex rel. City of Alma v. Furnas County Farms, 266 Neb. 558, 567-71, 667 N.W.2d 512, 521-23 (2003).


Id.

Id.


Compare Massachusetts entry, supra, with N.H. Rev Stat. Ann. § 159:6 (2005) (“The license shall be valid for all allowable purposes regardless of the purpose for which it was originally issued.”).


Id.
See Kozerski v. Steere, 121 N.H. 469, 443 A.2d 1244 (1981) (“It appears that the court incorrectly considered the felony conviction to be an automatic bar to the issuance of a license to carry a pistol.” at 473, 1246). The Kozerski court reasoned:

We do agree with the plaintiff, however, that RSA 159:6 does not bar the issuance of a license to a convicted felon who otherwise qualifies under the statute as a ‘suitable person.’ Nowhere does RSA ch. 159 prohibit a convicted felon from carrying a loaded pistol. Moreover, RSA 159:3 and RSA 159:7 together provide a statutory mechanism by which a convicted felon may own or possess a pistol, provided he first obtains a permit from the selectmen. This, it seems to us, is a clear indication that it was not intended that felons be absolutely barred from owning or possessing pistols and that they may, if otherwise ‘suitable,’ obtain a license to carry a loaded one. Although a prior felony conviction may be considered as one factor in determining whether the applicant is a ‘suitable person to be licensed,’ it is not an automatic bar.

Id. at 472, 1245-46.


717 Id.


Although the burden of proof at the hearing is placed upon the licensing authority, the initial burden of establishing suitability before the licensing authority rested with the applicant. The record reflects that, prior to acting upon the license application, the chief sought additional criminal background information relevant to the issue of suitability. Read in context with the court’s other findings, it appears that the court considered evidence of Silverstein’s failure to provide the requested information as further support for the chief’s initial decision to deny the license based upon lack of suitability. The court could make such a finding without shifting the ultimate burden of proof on whether the denial was justified.

Id. at 682-83, 965 (citations omitted).


723 Medina v. Rudman, 545 F.2d 244 (1st Cir. 1976).

724 See id. (“The statute says only that the Commission "may" issue a license” at 251); North Hampton Racing & Breeding Assoc. v. New Hampshire Racing Commission, 94 N.H. 156, 48 A.2d 472 (1946) (“We are of opinion that the word ‘may’ … of the law we are considering is intended to confer discretionary power to the commission in the exercise of its administrative governmental function in regard to the issuance of a license.” at 159, 475).

725 Conway v. King, 718 F. Supp. 1059, 1061 n.2 (D.N.H. 1989) (citations omitted) (quoting Medina v. Rudman, 545 F.2d 244 (1st Cir. 1976)).


727 Id.
See supra note 715 and accompanying text.

See Baca v. N.M. Dep’t of Pub. Safety, 132 N.M. 282, 47 P.3d 441 (2002). The court ruled:

We determine that the Legislature’s delegation of authority to local governments to prohibit the carrying of concealed weapons in Section 29-18-11(D) violates the constitutional proscription against municipal and county regulation of an incident of the right to keep and bear arms in Article II, Section 6 of the New Mexico Constitution. We also conclude that Section 29-18-11(D) is not severable from the remainder of the Concealed Handgun Carry Act and that the Act as a whole is therefore unconstitutional.

Id. at 286-87, 445-46.


Id.

N.C. GEN. STAT. § 14-415.12 (2005); see generally William F. Lane, Public Endangerment or Personal Liberty?: North Carolina Enacts a Liberalized Concealed Handgun Statute, 74 N.C.L. REV. 2214 (1996) (providing an overview of the legislative history behind North Carolina’s CCW legislation and the policy arguments surrounding its passage) (“[T]he real issue surrounding the new law is whether one considers all gun carriers a threat to safety, or only those who are likely to commit an unlawful act. North Carolina’s new law attempts to distinguish between responsible gun owners and those inclined to perpetrate gun-related crimes.” at 2238-39).


Id.


N.D. ADMIN. CODE § 10-12-01-08 (2005).


Id.


Id.

Id. The full criterion reads:

c. The applicant has the written approval for the issuance of a license from the sheriff of the applicant’s county of residence, and, if the city has one, the chief of police or a designee of the city in which the applicant resides. The approval by the sheriff may not
be given until the applicant has successfully completed a background investigation in that county and has attended a testing procedure conducted pursuant to rules adopted by the attorney general. The testing procedure for approval of a concealed weapons license must be an open book test to be given from a manual that sets forth weapon safety rules and the deadly force law of North Dakota, including judicial decisions and attorney general opinions. A weapons instructor certified by the attorney general shall conduct the testing procedure. The attorney general shall develop rules that ensure that this testing will be conducted. The person conducting the testing may assess a charge of up to twenty-five dollars for conducting this testing. The testing procedure is not required for a renewal of a concealed weapons license.

*Id.*


747 Id., at 12-13, 569 (quoting Brevard County v. Bagwell, 388 So. 2d 645, 647 (Fla. App. 1980)) (citations omitted).

748 Id. (citing Cass County Elec. Coop., Inc. v. Northern States Power Co., 518 N.W.2d 216, 220 (N.D. 1994)).

749 Id. at 12, 568 (quoting 1985 N.D. Laws, Ch. 683, § 1).


752 OHIO REV. CODE ANN. § 2923.125 (2006); see also 2004 Ohio Op. Atty Gen. No. 46 (“a county sheriff is not required to issue a license to carry a concealed handgun under R.C. 2923.125 to a person when the sheriff has reason to believe the person is in danger of becoming a drug dependent person or a chronic alcoholic.”). One court lamented the nondiscretionary nature of Ohio’s CCW statute because of its inflexibility:

The non-violent nature of applicant’s twenty-five year old, fourth degree felony and the court’s sealing of that conviction appear to mitigate against the use of that conviction as a bar to the issuance of a permit to appellant pursuant to R.C. 2923.125. That statute, however, does not permit any such mitigation, because the felony prohibition in that statute, on its face, applies to all felonies, regardless of the time since conviction, violent nature, degree, or subsequent expungement. While the absolute nature of R.C. 2923.125(D)(1)(e), as written and applied to appellant in this case, appears inequitable in this case, we must defer to the Legislature to address this issue.


753 Id.

754 OKLA. STAT. ANN. tit. 21 § 1290.1to .26 (2005).


757 OKLA. STAT. ANN. tit. 21 § 1290.9 to .11 (2005); see also State ex rel. Oklahoma State Bureau of Investigation v. Warren, 1998 OK 133, 975 P.2d 900 (1998) (holding that, as applied in this case, one eligibility criterion was unconstitutional because “there is no rational basis for withholding a concealed
weapons license from a person whose felony arrest … occurred within the last three years of applying, where no nexus was shown between the critical arrest and some element of improper use … of a handgun”, at ¶1, 905 (Opala, J., concurring)); Gilio v. State ex rel. Okla. State Bureau of Investigation, 2001 OK CIV APP 122, 33 P.3d 937 (Civ. App. 2001) (holding that a CCW license is not required to carry a concealed firearm within one’s home); Meyer v. State ex rel. Oklahoma State Bureau of Investigation, 1999 OK CIV APP 118, 993 P.2d 799 (Civ. App. 1999) (“a license may be revoked for any reason that would have justified refusal to issue it in the first place, and may be revoked for various acts of misconduct occurring after the license has been issued” at ¶13, 802).

758 Id.

759 OKLA. STAT. ANN. tit. 21 § 1290.10(8) (2005).


761 Id.


766 Id.

767 OR. REV. STAT. § 166.293(2) (2003).


769 See Bates v. Gordon, 201 Ore. App. 619, 120 P.3d 512 (App. Ct. 2005) (“We hold that ORS 166.293 does not permit a sheriff to revoke a concealed handgun license on the basis that the sheriff has reasonable grounds to believe that the licensee ‘has been or is reasonably likely to be a danger …’”). Another Oregon appellate court held that the subjective criterion does permit an issuer to revoke a license; however, that ruling provides no argument supporting its ruling and does not follow the plain language of the statute, as noted in Bates v. Gordon. Compare id., with Rossi v. Jackson, 183 Ore. App. 235, 51 P.3d 674 (App. Ct. 2002).


773 Id.


775 18 PA. CONS. STAT. ANN. § 6109(i), (e)(1) (2005).
Compare 18 PA. CONS. STAT. ANN. § 6109 (1988) with 18 PA. CONS. STAT. ANN. § 6109 (2005); see also Green v. City of Phila., 2004 U.S. Dist. LEXIS 9687 (E.D. Pa. 2004) (“Prior to October 1995, Pennsylvania law provided the City with the discretion to require an applicant for a gun permit to demonstrate a showing of need. In October 1995, the Pennsylvania Legislature changed the law such that the City no longer could require a showing of need.” (citations omitted)).

Id.


Id. at 804.

Id. at 803 (emphasis added).

Harris v. Sheriff of Del. County, 675 A.2d 400 (Pa. Commw. Ct. 2003) (upholding a license revocation based solely because “Chief Deputy Sheriff John McKenna testified that FBI agent Carl Wallace told him that unnamed confidential informants provided information that they had supplied Harris [the license holder] with large quantities of cocaine.” at 402).

Id. at 403.

Id. The whole passage reads:

As the trial court noted in its opinion, Section 6109 of the Act specifically states that the issuance of a firearm license may be made contingent upon the character and reputation of the applicant. This Court agrees that such evidence may also be relevant to the issue of revocation. Although the Act does not define the ‘good cause’ that may support a revocation under Section 6109(i), this Court agrees that new information countering previous findings relating to specified criteria for the original issuance of the license (such as character or reputation that one may act in a manner dangerous to public safety) certainly would be among those factors that may constitute good cause for revocation. In addition, this Court has held that the legislature intended in Section 6109 of the Act to confer discretion on sheriffs, empowering them to exercise judgment in applying the Act’s standards to determine if applicants should be licensed. That principle applies also to the sheriff’s determination of ‘good cause’ for revocation.

Id. (citations omitted).


Id. at 109, 408. The Gardner decision did go on to qualify that an issuer’s discretion is not absolute under the old law:

The term ‘may’ in 18 Pa. C. S. § 6109 might be argued to give the sheriff untrammeled discretion to refuse to issue a firearms license even if an applicant meets the requirements of (1) need and (2) suitability. However, such a construction would be vulnerable to a constitutional challenge based on the right to bear arms. Therefore, we must read the Firearms Act as guiding the sheriff’s discretion to proceed with the issuance of a license if the requirements are met.
\textit{Id.} at 111, 408.


794 \textit{Id.}

795 Morley v. City of Phila. Licenses & Inspections Unit, 844 A.2d 637 (Pa. Commw. Ct. 2004) (“Although the above language is no longer contained in the Uniform Firearms Act, the reasoning of the trial court in Gardner in denying the permit to carry a firearm is instructive to the case before us regarding revocation.” at 641n.8).


799 See Smith v. Nace, 824 A.2d 416, 419 (Pa. Commw. Ct. 2003) (“Each case is decided on its own facts and there is no fixed rule to determine fitness.”); \textit{cf.} Tsokas v. Bd. of Licenses & Inspections Review, 777 A.2d 1197, 1202 (Pa. Commw. Ct. 2001) (“When the evidence supports the conclusion that an individual licensed to carry a firearm does not possess the requisite character and reputation to do so, this Court must uphold the decision of a police chief or other proper official to revoke the license.”).

800 18 PA. CONS. STAT. ANN. § 6109(c) (2005).

801 18 PA. CONS. STAT. ANN. § 6109(e) (2005).


804 Commonwealth v. Bavusa, 574 Pa. 620, 644 n.12, 832 A.2d 1042, 1056 n.12 (2003) (“We also need not and do not decide the merit of the Commonwealth's argument that the defendant should have a preliminary burden of producing some evidence that he has a proper reason for carrying a firearm.”).

805 See Green v. City of Phila., 2004 U.S. Dist. LEXIS 9687 (E.D. Pa. 2004) (“In the years following this change in the law, the number of applicants for gun licenses dramatically increased from 1,200 to 12,000 per year and the number of issued licenses rose from 4,500 to over 38,000.” (citations omitted)).


As with any statute, the issuer does have some need to interpret the statute in order to properly enforce it; South Carolina’s issuer decided that a CCW license holder may only carry the firearm he used during the mandatory firearm training program. 1996 S.C. AG LEXIS 167 (1996). The South Carolina Attorney General ruled that such an interpretation was properly within the issuer’s discretion. Id.


Id.


(4) ‘Danger to others,’ a reasonable expectation that the person will inflict serious physical injury upon another person in the near future, due to a severe mental illness, as evidenced by the person’s treatment history and the person’s recent acts or omissions which constitute a danger of serious physical injury for another individual. Such acts may include a recently expressed threat if the threat is such that, if considered in the light of its context or in light of the person’s recent previous acts or omissions, it is substantially supportive of an expectation that the threat will be carried out; (5) ‘Danger to self,’

(a) A reasonable expectation that the person will inflict serious physical injury upon himself or herself in the near future, due to a severe mental illness, as evidenced by the person’s treatment history and the person’s recent acts or omissions which constitute a danger of suicide or self-inflicted serious physical injury. Such acts may include a recently expressed threat if the threat is such that, if considered in the light of its context or in light of the person’s recent previous acts or omissions, it is substantially supportive of an expectation that the threat will be carried out; or (b) A reasonable expectation of danger of serious personal harm in the near future, due to a severe mental illness, as evidenced by the person’s treatment history and the person’s recent acts or omissions which demonstrate an inability to provide for some basic human needs such as food, clothing, shelter, essential medical care, or personal safety, or by arrests for criminal behavior which occur as a result of the worsening of the person’s severe mental illness;

Id.

Id.

Id.


TENN. CODE ANN. § 39-17-1351(b) (2005).


Id.; see also 2003 Tenn. AG LEXIS 136 (2003 (further explaining the mental health requirements for license eligibility).

TENN. CODE ANN. § 39-17-1352(a) (2005); TENN. CODE ANN. § 39-17-1354(b) (2005) (“If the court finds [upon review] that the department … made a determination which is unsupported by the evidence in the record, the court may reverse the department’s determination.”); see generally 1998 Tenn. AG LEXIS 199 (1998) (explaining the appeal procedure under § 39-17-1354).

TEX. GOV’T CODE ANN. § 411.171 to .208 (2005); see also Nate G. Hummel, Where Do I Put My Gun?: Understanding the Texas Concealed Handgun Law and the Licensed Owner’s Right-to-Carry, 6 TEX. TECH J. TEX. ADMIN. L. 139 (2005) (providing a history of the Texas CCW statute and a explanation of it).

TEX. GOV’T CODE ANN. § 411.177(a) (2005).

TEX. GOV’T CODE ANN. § 411.172, .188 (2005).

Id.


Id.


UTAH CODE ANN. § 53-5-704(1)(a) (2005) ("The division … shall issue a permit … unless … the division finds proof that the applicant is not of good character."); UTAH CODE ANN. § 53-5-704(16)(d) (2005) ("On appeal to the board, the agency shall have the burden of proof by a preponderance of the evidence.").

VA. CODE ANN. § 18.2-308 (Michie 2005).

The court, after consulting the law-enforcement authorities of the county or city and receiving a report from the Central Criminal Records Exchange, shall issue such permit if the applicant is of good character, has demonstrated a need to carry such concealed weapon, which need may include but is not limited to lawful defense and security, is physically and mentally competent to carry such weapon and is not prohibited by law from receiving, possessing, or transporting such weapon.

Id. (citations omitted).

Id. (citations omitted).

Id. (citations omitted).

When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute … Pursuant to the clear language of § 18.2-308(D), the decision of the circuit court must be based only on information required on the application form prescribed by the Supreme Court, on information received from local law-enforcement officials, on any sworn statements submitted by local law-enforcement officials, and on information contained in the report from the Central Criminal Records Exchange. The General Assembly’s 1995 amendments to § 18.2-308 do not authorize the circuit court to require additional information for determining the advisability of granting an applicant a permit for reasons not enumerated in the statute.

Issuers are, however, authorized to require an applicant to establish his residency so that an issuer can determine its jurisdiction. See Merkel v. Manger, 2003 Va. Cir. LEXIS 80 (Cir. Ct. 2003).

Id. (citations omitted).
Washington’s Attorney General issued an opinion holding that an issuer cannot deny an applicant solely because he does not reside in that issuer’s county:

Nowhere within this or any other current statute do we find any basis for the denial of a license to carry a pistol solely on the ground that the applicant, although otherwise eligible to receive such a license, is not a resident of the county to the sheriff of which the application is made. In fact, for the sheriff to deny issuance of such a license for this reason alone would be in direct conflict with the statute as above quoted.

1973 Ltr. Op. Att’t Gen. Wash. No. 59 (1973) (citations omitted). However, an issuer can deny an applicant if that applicant states an intention to commit a future crime, even though grounds for a denial under those circumstances are not explicitly authorized in the CCW statute:

Although courts may not read into a statute that which the Legislature has omitted, they may construe a statute so as to avoid strained or absurd consequences which could result from a literal reading. Given a fact pattern such as you postulate--unlikely though it may be--we believe that a court would read RCW 9.41.070(1) as not requiring issuance of a concealed weapon permit when the applicant has announced an intention to commit a crime in the future. We believe this result would be even more likely if the announced intention included use of the concealed weapon in the criminal activity, or if the intended crime were one the past commission of which would constitute a basis for denial under RCW 9.41.070(1)(a)…


Milton v. Waldt, 30 Wn. App. 525, 529-32, 635 P.2d 775, 777-78 (Wash. App. Ct. 1981) (James, C.J., dissenting) (citations omitted) (holding that “[s]ince the concealed weapon permit in question has expired, the controversy is moot and the appeal should be dismissed.”).


W. VA. CODE § 61-7-4(a) (2005).

Id.


WYO. STAT. ANN. § 6-8-104(b) (2005); see also WYO. STAT. ANN. § 6-8-104(m) (2005).

WYO. STAT. ANN. § 6-8-104 (2005).
867 WYO. STAT. ANN. § 6-8-104(c) (2005).

868 WYO. STAT. ANN. § 6-8-104(m)(ii) (2005).

869 Id. at (g).


871 Id.
