NOTE

JUDICIAL TOLERATION FOR NEGATIVE EXTERNALITIES OF BEARING ARMS IN PUBLIC - ADDRESSING THE SECOND AMENDMENT CIRCUIT SPLIT

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INTRODUCTION

Historically, Second Amendment objections to firearm regulation did not present itself.[1] Even upon objection, longstanding prohibitions on who may possess firearms, what type of firearms, and how and where possession occurs have been consistently upheld.[2] Recently, a few circuit courts have introduced a "why" question of the necessity of arming for the bearer.[3] These courts have placed more weight on the negative externalities of bearing arms than on law-abiding citizen's right to self-defense in public.

Several circuit courts have held that the government can refuse to permit a law-abiding citizen to bear arms in public unless the citizen has a particularized reason why he or she needs a concealed firearm for self-defense.[4] In contrast, sister circuit courts have held that the restrictions on bearing arms in public have gone too far when the burden is placed on law-abiding citizens to demonstrate why they need a firearm to ward off a specific dangerous person.[5] Requiring this "why" veers far off from the longstanding prohibitions on possession in sensitive places and possession by those who have proven themselves dangerous to society.[6] Law-abiding citizens have proven their right to bear arms by their conduct and these "why" restrictions conflict with their right to be "armed and ready for offensive or defensive action in a case of conflict with another person."[7] Nevertheless, several circuit courts continue to shift the burden away from the government and support not requiring the State to prove it has the power to restrict a law-abiding citizen's rights.[8] This shift has placed the burden on the shoulders of law-abiding citizens to prove they have the right to defend themselves.[9]

These courts ignore the implication of the Supreme Court's analysis that the constitutional right of armed self-defense is broader than the right to simply have a gun in one's home.[10] In addition, these courts ignore that the Supreme Court has declared that armed self-

defense is the central component to Second Amendment rights.[11] In spite of this, these courts have banned a large swath of law-abiding citizens from bearing arms in public, while not considering whether they could bear arms openly in their respective states.[12] For although it was established in 1897 that a prohibition on carrying concealed weapons does not infringe upon Second Amendment rights, carrying arms was never considered a right that could be prohibited for the law-abiding.[13]

Nonetheless, the judiciary in general has justified restricting access to firearms in order to "promote public safety and eliminate negative externalities."[14] The objective of the judiciary is to perform a balancing of individual liberties and negative externalities.[15] However, when it comes to the bearing of arms by the law-abiding, the Second Amendment "is the very product of an interest balancing by the people" that the court should not "conduct anew."[16] Therefore, outside of the "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places,"[17] law-abiding citizens do not need a "why" to bear arms because the Constitution gives them the right to "judicial toleration of the negative externalities"[18] of bearing arms in public.

Below, this proposition and the thought process involved are further discussed. Part I describes the responsive dance the Supreme Court and Congress have performed since the 18th century, cautiously shuffling through the issue of bearing arms. Part II further describes how the circuit courts, as of 2016, have stepped into that dance and asserted their own steps toward new restrictions on bearing arms. Part III challenges those restrictions through an analysis of burden shifting and interest balancing. Part IV considers this author's proposition for the Supreme Court's next choreographed move toward judicial toleration. Finally, Part V concludes with practical implications with or without this movement in the law.

I. BACKGROUND OF BEARING ARMS

A. 18th & 19th Centuries

On December 15, 1791, Virginia was the last necessary state to ratify ten of the first twelve proposed amendments, consequently adding the Bill of Rights to the Constitution.[19] The states did not ratify the first two proposals that aimed at controlling representation reapportionment and compensation of representatives.[20] This inaction framed the bill of rights to be solely focused on individual rights for the first nine amendments and states' rights for the tenth.[21] Therefore, the "collective rights" argument for the second amendment will not be addressed in this note.[22] What will be addressed in Part I is that Congress and the Supreme Court have consistently held, from 1791 to 2016, that the right to bear arms can only be marginally regulated and not outright prohibited for law-abiding citizens.

Congress ratified the following text of the second amendment in 1791 and the text has never been altered. "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[23] It was not until 1856 when the Supreme Court embraced this right in the infamous case, *Dredd Scott v. Sanford*.[24] There, the court declared that the "privileges and immunities of citizens . . . give them the full liberty . . . to keep and carry arms wherever they went."[25] Soon after the Civil War, Congress spoke out on the right to bear arms for the first time since 1789 with the Freedman's Bureau Act of 1866.[26] The law mirrored the Supreme Court's findings from ten years before, "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security . . . including the constitutional right to bear arms, shall be secured to, and enjoyed by all citizens."[27] Although Congress reached the same conclusion as the Supreme Court, the reasoning for the law could not have been farther apart. In 1856, the Supreme Court embraced the right to bear arms

to keep non-citizens from obtaining it.[28] In 1866, Congress embraced the right to bear arms because "the threat of this period was not a federal standing army, but state encroachment on basic civil rights, and the issue focused on private violence and local lapses in protection rather than federal tyranny."[29] Law-abiding citizens needed their right to bear arms unobstructed through governmental regulations and Congress delivered protection of their right.

Within a decade, the Supreme Court further embraced the right to bear arms by holding it above the Constitution itself.[30] In *Cruikshank* it declared, "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[31] As a side note, the Slaughterhouse Cases of 1872 boldly placed State civil rights enforcement out of the hands of the federal government, silently removing Fourteenth Amendment federal protections for the right to bear arms.[32] This dicta decision was overturned by *McDonald* in 2010.[33] In 1886, the Court narrowed the right to exclude military drill-and-parade-under-arms outside of the control of the government.[34] There, the *Presser* court emphasized the difference between groups bearing arms and individuals.[35] With this narrowing came a broad stroke of the Supreme Court's power to deny any other restriction on the individual right.[36] "The states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."[37] With the stroke of a pen, the Court informed law-abiding citizens that the right to parade with arms could only be granted by the government and its ruling was prohibiting no other use of arms.[38]This was the beginning of "how" one could bear arms.

In 1897, the Supreme Court plunged deep into our country's English ancestry and expressed concern that the Bill of Rights could be interpreted as being a novel expression of new

rights without exception.[39] Seemingly off topic, the *Baldwin* Court held that the Thirteenth Amendment was never intended to apply to the deserting seamen's contracts within the conflict.[40] In *dicta*, the Court announced that the Second Amendment also consisted of certain well-recognized exceptions as the Thirteenth.[41] This unenumerated Second Amendment exception created by the Court was said to have been passed down from our English ancestors, who prohibited the carrying of concealed weapons.[42] It read, "the right of the people to keep and bear arms (under article 2) is not infringed by laws prohibiting the carrying of concealed weapons."[43] There, the *Baldwin* Court halted the notion that the Bill of Rights was a blank check with which individual citizens could cash with full protection of his or her right.[44] As is obvious, other than the reference to English law, no further explanation for this exception can be found in *Baldwin*.[45] This lack of American precedent can make way for a 21st century Supreme Court to produce a different outcome. Since 1897, the "how" of bearing arms lost its Second Amendment protections unless born openly,[46]but that can change.

B. 20th & 21st Centuries

As the roaring twenties were well under way, Congress seconded the Court's restrictions on concealed weapons with the enactment of the Mailing Firearms Act (MFA) of 1927.[47] The MFA "prohibited the mailing of concealable firearms through the United States Postal Service."[48] In the 1930s the question evolved from "how" weapons could be born to "what" weapons could be born.[49] Congress introduced the National Firearms Act (NFA) in 1934, which "taxed the manufacture, sale, and transfer of short-barreled rifles and shotguns, machine guns, and silencers."[50] Then in 1938, The Federal Firearms Act (FFA) "spread a thin coat of regulation over all firearms and many classes of ammunition suitable for handguns."[51] The FFA went even further to hint at "who" could possibly be restricted from bearing arms.[52] "Licensees

were prohibited from knowingly shipping a firearm in interstate commerce to some felons, a fugitive from justice, a person under indictment, or anyone required to have a license under the law of the seller's state who did not have a license."[53] The Supreme Court ended the decade refocusing the law on "what" arms could be born.[54] There, the *Miller* Court held,

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[55]

For the next generation, the Supreme Court and Congress would only be heard once, respectively, on this topic. Congress began this short conversation in 1941 with the Property Requisition Act (PRA).[56] Although the PRA dealt with the federal government requisitioning private property, Congress used it to clarify that an individual right to bear arms would not be infringed due to this Act's enforcement.[57] PRA read, "Nothing contained in this Act shall be construed--(1) to authorize the requisitioning or require the registration of any firearms possessed by any individual . . . [or](2) to impair or infringe in any manner the right of any individual to keep and bear arms."[58] The Supreme Court only glimpsed at this topic when it dealt with cases challenging the FFA in 1943.[59] There, the *Tot* Court held that a provision of the FFA to make the possession of firearms by those convicted of crimes of violence prohibited due to the firearms traveling through interstate commerce was unreasonable.[60] *Tot* rejected the presumption that, "mere possession tends strongly to indicate that acquisition must have been in an interstate transaction."[61] With *Tot*, Congress was informed that it had stretched its Commerce Clause powers too far.[62] With that, the responsive dance between the Supreme Court and Congress ended and did not resume for the next twenty-five years.[63]

The counter-culture movement of the 1960s reignited the Supreme Court and Congress' interest in protecting individual rights.[64] The Court acted first in 1966.[65] There, the *Katzenbach* Court declared that Congress' power granted by the enforcement provision of the Fourteenth Amendment "is limited to adopting measures to enforce the guarantees of the [Fourteenth] Amendment; [section five] grants Congress no power to restrict, abrogate, or dilute these guarantees."[66] Although the Court's move was not specifically targeted at the right to bear arms, when Congress considered passing gun control laws just two years later,[67] it became the main issue. The Gun Control Act of 1968 (GCA) read,

> it is not the purpose of this title to place any undue or unnecessary Federal Restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens.[68]

Additionally, the GCA also restricted the right for "minors, convicted felons, and persons who had been adjudicated as mental defectives or committed to mental institutions."[69] The 1960s ended with the federal government making it quite clear who "law-abiding citizens" were and how they had earned the right to bear arms without being discouraged by their government.

The 1970s and 1980s kept with this mantra and emphasized that the right to bear arms was protected for the "law-abiding." In 1972, an officer seized a gun from the waist band of a suspect.[70] With that seizure, it was questioned if both the Second and Fourth Amendments were being water downed.[71] There, the *Williams* Court held that if a police officer "has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to [his] protective purpose."[72] This case planted the seed and paved the way for the belief that if a police officer has probable cause to believe that you are not a "law-abiding" citizen and that you pose a threat, your rights are limited.[73]

Soon thereafter, the Court embraced the GCA in two consecutive cases. First in 1976, the *Barrett* Court declared, "[the] very structure of the Gun Control Act demonstrates that Congress … sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means."[74] Then in 1980, the *Lewis* Court declared, "Congress clearly intended that the defendant clear his status [of felon] before obtaining a firearm, thereby fulfilling Congress' purpose, "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous."[75]

Although the Supreme Court stamped the GCA with its approval with these rulings, Congress implemented the Firearms Owners' Protection Act of 1986 (FOPA).[76] FOPA was the congressional culminating statement that began in 1866, continued from 1941[77] to 1968, and was best summarized in the 1985 Senate Judiciary Committee.[78] There, the history, concept, and wording of the Second Amendment indicated that it was "an individual right of a private citizen to own and carry firearms in a peaceful manner."[79] The 1980s ended with a familiar mantra, the right to bear arms was protected for the "law-abiding" or peaceful private citizen.

The 1990s found the Supreme Court and Congress in less of a dance with one another and more of a friendly sparring match on the right to bear arms issue. The first scuffle began after Congress created the Gun Free School Zones Act (GFSZA) of 1990.[80] GFSZA read in part, "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."[81] The Supreme Court responded to the GFSZA with *Lopez* in 1995.[82] *Lopez* confronted Congress' Commerce Clause authority again when Congress attempted to qualify this criminal statute as an issue within "commerce."[83] This move

was explained foundationally, "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."[84] Here, the right to bear arms was protected by the founder's insight into the separation of powers, the People had not surrendered that right to Congress by way of the Commerce Clause.[85]

The next scuffle of the 1990s occurred after Congress passed the Brady Handgun Violence Prevention Act (Brady Law) of 1993.[86] The Brady Law had two components, background checks for gun purchasers that were to be provided by state law enforcement and a waiting-period gun dealers had to honor before consummating the sales.[87] The waiting-period issue never came before the court.[88] Yet, the *Printz* Court addressed the background check issue with the same separation of powers concerns addressed in *Tot* and *Lopez*.[89] The *Printz* Court found when the federal government conscripted State actors to enforce the Brady Act,[90] it undermined the independent authority of the State and risked the degradation of the safeguards on individual liberty.[91] The Acts of the 1990s were the first hints that Congress was starting to weigh the negative externalities of bearing arms, while the Supreme Court simply refused to participate in such a balancing act.

Not until 2008 did the Supreme Court forcefully document its unwillingness to balance negative externalities of bearing arms with the enumerated constitutional right.[92] In *Heller*, the District of Columbia banned handgun possession in the home.[93] The Supreme Court declared,

> the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.[94]

The court concluded by declaring that prohibiting a law-abiding citizen from protecting his or her home and family by bearing arms failed constitutional muster.[95]

As this note hopefully has so far made apparent, Congress has never responded to a Supreme Court case on bearing arms and it did not respond to the *Heller* case. However, Congress did make its last statement (as of November 2016) on bearing arms within the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD).[96] As odd as that seems, this act has a provision that protects the right to bear loaded arms in national parks.[97] Therefore, in Congress' last words on the subject, it quoted the Second Amendment, "the right of the people to keep and bear Arms, shall not be infringed."[98]

After *Heller*, the Supreme Court immediately followed up its ruling with an Illinois case that claimed the *Heller* ruling did not apply to the States.[99] As mentioned earlier, in the *Slaughterhouse Cases* of 1872, the Supreme Court had placed State civil rights enforcement out of the hands of the federal government using the Privileges and Immunities Clause as its tool.[100] In 2010, the *McDonald* Court sidestepped the *Slaughterhouse Cases* and declared that "*Cruikshank, Presser,* and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States."[101] *McDonald* further articulated, "Under our precedents, if a Bill of Rights guarantee is fundamental . . . then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the states and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values."[102] With these words, the Supreme Court reiterated that the Second Amendment "is the very product of an interest balancing by the people" that the court and the States should not "conduct anew."[103]

The last case[104] brought before the Supreme Court on the topic of bearing arms was *Caetano v. Massachusetts* in March of 2016.[105] There, a woman defended herself with a stun gun and was arrested, tried, and convicted of possession of that stun gun.[106] What makes this case more interesting than most is that the lower court used the losing *Heller* arguments and then completely ignored the *Heller* ruling.[107] After dismissing all the arguments, the *Caetano* court provided the pertinent issue itself, "whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today."[108] This holding foreshadows the Supreme Court's future test for bearing arms going forward; the test will include the necessity of law-abiding citizens performing acts for lawful purposes.[109] As the last words of the opinion attest, negative externalities balancing with enumerated constitutional rights is a fundamentally flawed method of protecting law-abiding citizens.[110] "If the fundamental right of self-defense does not protect [Ms.] Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe."[111]

C. Yesterday and Today

Part I of this note demonstrates the dance between the Supreme Court and Congress and in what manner those movements framed the who, what, where, and how of bearing arms. The "why", the necessity of arming for the bearer, is obviously missing. Even with longstanding prohibitions that make certain activities of law-abiding and non-law-abiding persons outside the protection of the Second Amendment, regulation focusing on the "why" does not exist. As it pertains to bearing arms in public, only one Supreme Court case, *Baldwin*, articulated that Second Amendment protections were not available for concealed carry.[112] *Baldwin* is without actual precedent however, due to the fact that its ruling is based on English law.[113]

In 1972, the United States Supreme Court made it very clear when it clarified that a clause of the Constitution,

> must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.[114]

Therefore, not only has the history of Supreme Court decisions and Congressional acts not supported adding a "why", the necessity of arming for the bearer, to the regulation of bearing arms, the one "precedential" case that supports prohibiting concealed carry has no actual legal foundation within the United States. Without even looking at the circuit courts, one would wonder how concealed carry for law-abiding citizens could be constructively banned.

II. CIRCUIT COURT DETOUR INTO THE "WHY" OF BEARING ARMS

A. All Conflicting Circuits Agree: There is a Right to Bear Arms Outside the Home

In the last decade, right-to-bear-arms arguments in the circuit courts have lost focus on militia dependence and collective rights largely due to *Heller* and *McDonald*.[115] These landmark Supreme Court cases created new arguments for the judicially dissimilar sister circuit courts to distinguish themselves and further dilute the arguments made.[116] Today, the hot topic among the circuit courts is whether the law-abiding have a constitutionally protected right to bear arms in public.[117] Even with this contentious topic, the sister circuit courts agree, "the Second Amendment right to bear arms extends outside the home or have assumed that the right exists."[118] This note will focus on circuit decisions from each side of the debate, the Second, Third, Fourth, and Ninth circuits versus the Fourth, and Seventh.

How the courts agree will be addressed first in Part II of this note. Initially, the Second Circuit declared, "the Amendment must have some application in the very different context of the public possession of firearms."[119] The Third Circuit recognized "that the Second Amendment's individual right to bear arms may have some application beyond the home."[120] The Fourth Circuit merely assumed, "the *Heller* right exists outside the home."[121] The Seventh Circuit explained, "To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in Heller and McDonald."[122] Finally, the Ninth Circuit acknowledged its sister circuits agreement and concluded, "pursuant to *Heller* and *McDonald*, an individual's right to self-defense extends outside the home and includes a right to bear arms in public in some manner."[123] As shown, the sister circuits agree that the right to bear arms in public cannot be prohibited but they disagree on what extent it can be regulated.

B. Circuit Courts Sidestepping the Supreme Court

The argument against concealed full-carry permits to bear arms for the law-abiding begins for these sister circuits with why a law-abiding citizen needs to possess a firearm in public. The Second Circuit was the first to enter this side of the 'bearing arms in public' debate in 2012 when it embraced a longstanding principle that was first established in New York in 1913.[124] In 1913, the "proper cause" requirement for obtaining a concealed weapons license for bearing arms in public was, "[t]o obtain a license to carry a concealed pistol or revolver the applicant was required to demonstrate 'good moral character, and that proper cause exists for the issuance [of the license].' "[125] The modern version of this law pinpoints 'proper cause' as, "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[126] This limiting standard allowed government authority to provide concealed weapon licenses only to those with a "special need for self-protection."[127]

The 1913 New York law was supported by the 1897 Supreme Court *Baldwin* ruling, "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons."[128]

This Second Circuit case is *Kachalsky* and it acknowledged that *Heller* did not use a means-end scrutiny test when it established that "the 'core' protection of the Second Amendment is the "right of law-abiding, responsible citizens to use arms in defense of hearth and home."[129] Yet, the *Kachalsky* court ruled that defense outside the home needs to meet an intermediate scrutiny test where "the fit between the challenged regulation need only be substantial, not perfect."[130] For review, in order to withstand strict scrutiny, "the law must advance a compelling state interest by the least restrictive means available."[131] To withstand intermediate scrutiny, a law "must be substantially related to an important governmental objective."[132] To withstand minimum scrutiny, "a statutory classification must be rationally related to a legitimate governmental purpose."[133]

The Second Circuit choosing a standard of scrutiny was the first step away from the specific *Heller* ruling. For *Heller* declined to determine what level of scrutiny should be used for bearing arms outside the home.[134] In fact, the *Heller* test consisted of two steps purposely omitting a level of scrutiny distinction.[135] The first *Heller* step determined whether the individual right to bear arms for self-defense was a protected Second Amendment activity.[136] In the second *Heller* step, the Court weighed the effect of the challenged gun laws on that activity to determine the extent of the burden.[137] Nevertheless, K*achalsky* was a significant sidestep away from *Heller*.

Next, the Third Circuit entered this side of the 'bearing arms in public' debate in 2013.[138] Using not the *Heller* test, but its own 2010 two-step test.[139] The Third Circuit asked,

> whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.[140]

The challenged law here came to be from a 1924 New Jersey law which "directed that no persons (other than those specifically exempted such as police officers and the like) shall carry [concealed] handguns except pursuant to permits issuable only on a showing of 'need.'"[141] In 2013 the *Drake* court embraced this law as its "longstanding," "presumptively lawful" exception to the Second Amendment guarantee.[142] Thus, allowing it to move onto its second test, that of evaluating the law under some form of means-end scrutiny.[143]

Drake begins this inquiry by stepping ahead of the Supreme Court and declaring that strict scrutiny should only be used when the challenged law burdens "the 'core' protection of self-defense in the home."[144] For self-defense outside of the home, the Third Circuit went directly to an intermediate scrutiny test and asked "whether there is a 'reasonable fit' between this interest in safety and the means chosen by New Jersey to achieve it: the Handgun Permit Law and its 'justifiable need' standard."[145] Unlike the intermediate standard embraced by the Supreme Court, where a law must be "substantially related" to an important governmental objective, instead, the *Drake* court stepped ahead of the Supreme Court and embraced an arguably lower standard of "a reasonable fit" with legislative intent.[146] Thus, not only did the Third Circuit sidestep the Supreme Court by ignoring the *Heller* test, it also adjusted the test for intermediate scrutiny.[147]

In 2013 as well, the Fourth Circuit repeated a two-step inquiry similar to the Third Circuit's test in order to evaluate the good-and-substantial-reason requirement of the Maryland law being challenged.[148] There, the *Woollard* court held that "public safety interests often outweigh individual interests in self-defense."[149] *Woollard*, in full agreement with *Drake* and

Kachalsky held that the Second Amendment right of the party applying for a concealed-carry permit was burdened by the good-and-substantial-reason requirement, but that burden was constitutionally permissible.[150] Without saying more, this is a consistent sidestep of the Supreme Court by the circuit courts.

Finally in 2016, the Ninth Circuit disregarded the two-step inquiry to fully embrace the Supreme Court's 1897 holding in *Baldwin*.[151] The *Peruta* court established that the *Baldwin* decision and the history surrounding it were all that were necessary to declare that the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public.[152] *Peruta* also brought to the surface the issue of open-carry.[153] While addressing the dissent, *Peruta* acknowledged the dissent's argument that combining California's ban on open-carry and its "good cause" restrictions on concealed carry may violate the Second Amendment, "tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense."[154] Nevertheless, since an open-carry argument was not before the *Peruta* court, the notion of a probable complete ban was not addressed.[155]

When evaluating these circuit court decisions, the argument for requiring law-abiding citizens to provide why they need to possess a firearm in public to earn the right to bear concealed firearms, condenses down to following one Supreme Court decision or passing a two-prong test that balances individual rights with public safety. In contrast, other circuit courts refuse to enter this "vast terra incognita" in which the Supreme Court chose not explore.[156]

C. Circuit Courts Refusing to Enter Terra Incognita

For the opposite side of the 'bearing arms in public' debate, the Fourth Circuit reappears. Before the Fourth Circuit chose to require why law-abiding citizens needed to carry a concealed weapon in *Woollard*, it ruled in *Masciandaro* that it would follow *Heller* and leave largely intact

the right to "possess and carry weapons in case of confrontation."[157] The *Masciandaro* and *Woollard* courts did not share a single member of their judicial panels.[158] Not surprisingly, while the *Woollard* court focused on the "why," the *Masciandaro* court remained with the Supreme Court's focus of "where" law-abiding citizens are permitted to bear arms.[159] Even in following the Supreme Court, this lower court struggled with the obscure nature of this "terra incognita."[160] Terra incognita has not been defined by the Supreme Court, but lower courts have described terra incognita as a place "where gossip and guesswork abound"[161] and as a "blank area which has no discernable details."[162] Still, as *Masciandaro* focused on holding "self-defense has to take place wherever [a] person happens to be,"[163] the Seventh Circuit followed just months later with a similar but expanded argument.[164]

In 2012, *Moore* began its analysis by boldly stating, "[a] right to bear arms thus implies a right to carry a loaded gun outside the home."[165] The court immediately reminded the reader that both *Heller* and *McDonald* were just about self-defense and a person is much more likely to need to be armed in a rough neighborhood than to have a loaded weapon under his or her mattress.[166] Multiple studies were then evaluated and their inconsistent conclusions led the *Moore* court to find that "[i]f the mere possibility that allowing guns to be carried in public would increase the crime or death rates," *Heller* would have been decided differently.[167] To build on *Heller's* longstanding prohibitions of "gun ownership by children, felons, illegal aliens, lunatics, and in sensitive places," the *Moore* court pointed to "a proper balance between the interest in self-defense and the dangers created by carrying guns in public is to limit the right to carry a gun to responsible persons."[168] This is where it is starkly clear that the *Moore* decision is the polar opposite of the *Kachalsky* decision.[169] In *Moore*, laws prevent dangerous people from having hand guns versus *Kachalsky* where laws require law-abiding citizens to justify a need for

handguns.[170] Conclusively, *Moore* declares that if there is to be a balancing test, even if *Heller* says it is improper to make one,[171] then it should be that public safety is balanced by responsible persons bearing arms in public.[172]

III. SIGNIFICANCE OF EXPANDING TO THE "WHY"

A. Shifting the Burden to the Law-Abiding

There are two necessary burdens of proof involved with the right to bear arms, that of the individual and that of the government. The first is an individual's burden to prove whether he or she falls in the category of one of the types of people who have been historically prohibited from bearing arms, such as youth, felons, and the mentally ill.[173] Once an individual proved he or she was a responsible (mature in age with acceptable mental health), law-abiding (non-felonious) citizen,[174] further questions had to be answered about what firearm was to be born, where the firearm was to be born, and how the firearm was to be born.[175] These questions were created over time and make up the "longstanding prohibitions" to bearing arms formed by the courts that may take away Second Amendment protection.[176] The only legal burden on the individual was fixed on the presumption of innocence without obvious proof that one was not law-abiding, which is the "foundation of the administration of our criminal law."[177] The Supreme Court consistently holds that the presumption of innocence and the equally fundamental principle that the government bears the burden of proof beyond a reasonable doubt;[178] this supports the implication that once innocent, no further burden remains on the law-abiding. Once an individual is removed from the list of people who have been historically prohibited from bearing arms, he or she is free to bear arms within the aforementioned limitations of what, where, and how.[179]

The second necessary burden is the government's burden to prove whether it has the authority to infringe upon an individual's constitutional right to bear arms.[180] At a very basic

level, the Second Amendment declares that the right of the people to keep and bear arms shall not be infringed by Congress.[181] Also in its basic form, the Fourteenth Amendment declares that no state[182] shall deprive any person of liberty without due process of law.[183] Both of these amendments place strict limits on the government, not the individual.[184] The Fourteenth Amendment has an additional limitation in its section five (§5).[185] There, as emphasized by the Supreme Court in *Katzenbach*, "Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[186] These amendments imply that the burden is solely on the government to prove it has the authority to infringe upon a law-abiding citizen's right to bear arms.[187] In general, this burden can be lessened by way of a means-end scrutiny test.[188]

A means-end scrutiny test is inappropriate when the challenged law fits within Second Amendment guarantees.[189] For example, the circuit courts dutifully follow *Heller*'s ruling that challenged laws which impose a burden on conduct falling within the scope of Second Amendment guarantees are unconstitutional.[190] A burden cannot fall on the individual for conduct protected by the Second Amendment and thus the burden lies squarely with the government.[191] However, conduct deemed not protected by Second Amendment guarantees, as described in Part II, have left room for lower courts to introduce means-end scrutiny tests on challenged laws.[192] As of now, burdens are being shifted in the lower courts by using the intermediate scrutiny test where a law "must be substantially related to an important governmental objective."[193]

Whether it is *Kachalsky's* "proper cause",[194] *Drake's* "showing of need",[195] or *Woollard's* "good and substantial reason" for why an individual should be permitted to exercise his or her rights,[196] they all shift the burden. For example, in *Kachalsky* the plaintiffs were

denied a full-carry concealed-handgun license by one of the defendant licensing officers for failing to establish "proper cause"—a special need for self-protection.[197] There, instead of the government carrying the burden of proving that an individual is a threat before taking away a fundamental right, the individual has the burden to prove that he or she is being threatened in order to exercise a fundamental right.[198] The fundamental right here, of course, is *Heller's* "inherent right of self-defense."[199] This burden shift created by the lower courts gives greater weight to public safety than self-defense.[200] Since the Supreme Court "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home,"[201] this burden cannot be shifted in the home. Shifting the burden from the government to the individual outside the home has not been ruled upon by the Supreme Court but the Court has made it known that the inherent right of self-defense does not end at one's front door.[202]

B. Interest Balancing not to be Redone Anew

In order to settle this 'bearing arms outside the home' issue, an evaluation of interest balancing for bearing arms in public must be done. Remember, the Second Amendment "is the very product of an interest balancing by the people" that the court should not "conduct anew."[203] This phrase relates back to the consideration 'the people' of this country gave at the time of the ratification of the Constitution.[204] *Heller* provides a clear illustration, which is provided below.

> [T]he laws… punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties. They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5–shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him.[205]

At the time of ratification, whether an individual needed to defend him or herself inside the home or out on the street, a law would not be enforced against him or her for lawful self-defense.[206]

As a current example, the Supreme Court has declared that it "would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie."[207] The reference lends the reader to drawing a picture of an extremely dangerous activity performed by law-abiding, responsible people in which the government would not interfere.[208] In this example, First Amendment rights are being exercised.[209] Using the *Moore* ruling in the Seventh Circuit, the court considered a similar example that dealt with the Second Amendment.[210]

> Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by McDonald to honor the latter. That creates an arbitrary difference. To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in Heller and McDonald.[211]

With Judge Posner's example above, it is now apparent that he predicted the direction of the sister circuits.[212] As he wrote this in 2012, the sister circuits followed by creating the very protective-order type restrictions that he presented in *Moore*.[213] Nevertheless, his point is clear, it would be an arbitrary decision to restrict one type of self-defense and not another.[214] Therefore, an interest-balancing approach that weighs public safety against self-defense of a responsible, law-abiding individual has already been done and should not be done "anew."[215]

IV. JUDICIAL TOLERATION OF THE NEGATIVE EXTERNALITIES

This note has established that public safety cannot undermine the inherent right of self-defense, which responsible and law-abiding individuals can exercise. However, there are plenty of negative externalities to the bearing-of-arms that beg the question of whether all law-abiding citizens *should* bear arms. An interesting example is that of police officers in New York who shot and killed a gunman on the street.[216] During this confrontation, the police officer mistakenly shot nine bystanders.[217] Although the officers were trained in how to shoot, when to shoot, and when to not shoot, this horrible event still occurred.[218] Mistakes will be made by law-abiding citizens and that actuality does not diminish the fact that the Second Amendment right to bear arms does not depend on "casualty counts."[219]

Looking at the bigger picture, there are positive as well as negative externalities for bearing arms.[220] The former focuses on "arms as a mechanism of self-defense that can ensure the safety of the gun-carrying individual; [as well as focusing] on the benefits to society as a whole. These positive externalities of public and private deterrence of wrong doing are arguably not outweighed by the negative."[221] The negative externalities of bearing arms in public include "fear of being mistaken for criminals and shot, or caught in a cross-fire between people asserting a right to bear arms for self-defense."[222] Even within such a harsh reality, the Supreme Court has choreographed its legal moves away from these named negative-externalities.[223] For the Court has declared that when you "[d]isarm a community, you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty."[224] This is a constitutional view, a broader view that permits the judicial toleration of the negative externalities of bearing arms in public.

CONCLUSION AND PRACTICAL IMPLICATIONS

The journey between ratification and incorporation took over two-hundred years, but the Second Amendment's right to bear arms for responsible, law-abiding individuals is now fully enforceable against state and federal governments. During those two-hundred-plus years, the Supreme Court and Congress consistently found that the right to bear arms was an individual right with few exceptions. The exception focused on in this note, is *dictum* in *Baldwin*, which states a prohibition on carrying concealed weapons does not infringe Second Amendment rights. This *dictum* purposefully places concealed-carry outside the guarantees of the Second Amendment. As the *Baldwin* case has shown to be without precedent and its *dicta* being a remnant from English law, the longstanding placement of concealed-carry as outside constitutional protections should be eliminated.

The *Heller* and *McDonald* Courts lend plenty of support to this proposition. Both courts find that constitutional protections are for law-abiding citizens performing lawful acts. The *Heller* Court declared that the very enumeration of the right to bear arms removes from the branches of government the power to decide on a case-by-case basis whether the right is really worth insisting upon for the law-abiding. For the *Heller* and *McDonald* Courts, responsible, law abiding citizens have an inherent right to self-defense that is protected by Second Amendment guarantees. Nevertheless, a handful of circuit courts are bringing forth the notion that the law-abiding must justify exactly why they need to conceal carry. In a similar effect, these courts would be acknowledging that a citizen has freedom of speech but require that citizen to petition the government with a documented need to speak or it would be forbidden. As ridiculous as that sounds, the circuit courts have made a similar argument for the Second Amendment since 2012.

These courts lean on the negative externalities of bearing arms to further their position. However, neither the *Heller* or *McDonald* Courts put much, if any weight to the inconsistent studies that have neither confirmed nor denied if the negative externalities outweigh the positive externalities. With this, the Supreme Court has made it clear that a means-end scrutiny test is not appropriate for self-defense issues. It concludes that the right to bear arms by responsible citizens balances out the dangers created by carrying guns in public. Although the Court has not ruled specifically for reconstituting Second Amendment protections for the bearing of arms in public, its holdings in the past one-hundred years lead this author to believe that open-carry and conceal-carry will continue to be held to be under Second Amendment guarantees for responsible, law-abiding citizens.

The implications of requiring the law abiding to have a special need for self-protection are many. First, in requiring the intent of the law-abiding before they are permitted to exercise constitutional rights is a slippery slope that slides into having no rights at all. Second, the government being permitted to evaluate rights requests based on a balancing of that right with need for public safety, is exactly what it sounds like, a request to a government to exercise rights instead of a right in which a government is limited in its ability to infringe rights. Whether the burden of proof is being shifted from the government to the individual or a balancing test is being performed, where the *Heller* Court said one could not be done anew, Second Amendment rights are being infringed upon by the government. Therefore, the obvious next move for the Supreme Court is to place bearing arms in public back under the protection of the Second Amendment.

[1] D.C. v. Heller, 554 U.S. 570, 626, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008).
[2] *Id*. at 626-27.
[3] *See e.g.* Peruta v. Cty. of San Diego, 824 F.3d 919, 924 (9th Cir. 2016).
[4] *Id*.; *see also* Peterson v. Martinez, 707 F.3d 1197 (10th Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Drake v. Filko, 724 F.3d 426, 429–30 (3d Cir. 2013); Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012).
[5] *See* Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012).
[6] *See* U.S. v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).
[7] D.C. v. Heller, 554 U.S. 570, 584 (2008).
[8] *See e.g. Kachalsky*, 701 F.3d at 87; *Drake*, 724 F.3d at 443.
[9] *Kachalsky* 701 F.3d at 88; Drake, 724 F.3d at 431.
[10] *See Moore*, 702 F.3d at 935.
[11] *See Heller*, 554 U.S. at 599.
[12] Peruta v. Cty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016).
[13] *See* Robertson v. Baldwin, 165 U.S. 275, 282, 17 S. Ct. 326, 41 L. Ed. 715 (1897).
[14] Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J. L. & PUB. POL'Y 951, 953 n.3 (2011)
[15] *Id*. at 963.
[16] *Heller*, 554 U.S. at 635.
[17] *Id*. at 626-627.
[18] *Blackman supra* note 14, at 956.
[19] Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 532 (1992).
[20] *Id*. at 530-531.
[21] Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 220 (1983).
[22] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (This note does not thoroughly address this issue but this case did declare that 'the people' protected by the Second Amendment are individuals, not states, which reinforced the 'individual rights' argument on Second Amendment issues.).
[23] U.S. Const. Amend. 2.
[24] *See Dred Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691 (1856), superseded on other grounds (1868)
[25] *Id*. at 416–17.
[26] Sean J. Kealy, *The Second Amendment as Interpreted by Congress and the Court*, 3 NE. U.L.J. 225, 250 (2011).
[27] *Id*.
[28] *See Scott*, 60 U.S. 416-417.
[29] Kealy, *supra* note 26, at 251.
[30] *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1875).
[31] *Id*.
[32] Slaughter-House Cases, 83 U.S. 36, 77-79, 21 L. Ed. 394 (1872).
[33] McDonald v. City of Chicago, Ill., 561 U.S. 742, 791, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.") *Id*.
[34] *See* Presser v. People of State of Ill., 116 U.S. 252, 267, 6 S. Ct. 580, 29 L. Ed. 615 (1886).
[35] *Id*.
[36] *Id*. at 265.
[37] *Id*.
[38] *Id*.
[39] Robertson v. Baldwin, 165 U.S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715 (1897).
[40] *Id*. at 287-288.
[41] *Id*. at 281-82.
[42] *Id*. at 281.
[43] *Id*. at 281-82.
[44] *Id*.
[45] *Id*.
[46] *Id*.

[47] Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1587 (2014).
[48] *Id*.
[49] *See* United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939)
[50] Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 NYU J.L. & LIBERTY 48, 60 (2008).
[51] Franklin Zimring, *Firearms and Federal Law: The Gun Control Act of 1968,* 4 J. LEGAL STUD. 133, 140 (1975).
[52] *Id*.
[53] *Id*.
[54] *See* United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939)
[55] *Id*. at 178.
[56] Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by A Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).
[57] *Id*. at 599.
[58] *Id*.
[59] *See* Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).
[60] *Id*. at 468.
[61] *Id*.
[62] *Id*.
[63] Franklin Zimring, *Firearms and Federal Law: The Gun Control Act of 1968,* 4 J. LEGAL STUD. 133, 144 (1975).
[64] *Id*. at 148.
[65] *See* Katzenbach v. Morgan, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966).
[66] *Id*. at 651.
[67] Kealy, *supra* note 26, at 282.
[68] 18 U.S.C. 101, Pub. L. No. 90-618, 82 Stat. 1213 (1968).
[69] Zimring, *supra* note 51, at 149 (citing Gun Control Act of 1968, 18 U.S.C. 925(d)(3) (1970)).
[70] Adams v. Williams, 407 U.S. 143, 148, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).
[71] *Id*. at 151.
[72] *Id*. at 146 (citing Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).
[73] Barrett v. United States, 423 U.S. 212, 96 S. Ct. 498, 46 L. Ed. 2d 450 (1976).
[74] Id. at 218.
[75] Lewis v. United States, 445 U.S. 55, 64–65, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).
[76] Firearm Owners' Protection Act, P.L. 99-308. 100 Stat. 449 (May 19, 1986).
[77] Halbrook, *supra* note 56, at 636 (citing U. S. v. Breier, 827 F.2d 1366 (9th Cir. 1987) (Noonan, J., dissenting)).
[78] Kealy, *supra* note 26, at 283.
[79] *Id*.
[80] 18 U.S.C. 922(q)(2).
[81] *Id*.
[82] *See* United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)'
[83] *Id*. at 561.
[84] *Id*. at 576.
[85] *Id*.
[86] *See* Printz v. United States, 521 U.S. 898, 905, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).
[87] *Id*. at 903.
[88] *Id*. at 935.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 976-77. (Breyer, J., Stevens, J., dissenting).
[92] D.C. v. Heller, 554 U.S. 570, 634, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).
[93] *Id*. at 628.
[94] *Id*.
[95] *Id*. at 628-629.
[96] 15 U.S.C. § 1601, Pub.L. 111–24, May 22, 2009, 123 Stat. 1734.
[97] 54 U.S.C.A. § 104906 (Subtitle I. National Park System - Protection of right of individuals to bear arms).
[98] *Id*.
[99] McDonald v. City of Chicago, Ill., 561 U.S. 742, 743, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).
[100] Slaughter-House Cases, 83 U.S. 36, 77-79, 21 L. Ed. 394 (1872).

[101] *McDonald*, 561 U.S. at 758.
[102] *Id*. at 784-85.
[103] *Heller*, 554 U.S. at 635.
[104] *See* United States v. Castleman, 134 S. Ct. 1405, 1408, 188 L. Ed. 2d 426 (2014) (Although not a Second Amendment case, Castleman's conviction of a misdemeanor crime of domestic violence was found by the Supreme Court to be enough to show that he was not a law-abiding citizen and thus forbid him from possessing firearms pursuant to 18 U.S.C. § 922(g)(9).).
[105] *See* Caetano v. Massachusetts, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016).
[106] *Id*. at 1029.
[107] *Id*. at 1027-32.
[108] *Id*. at 1032.
[109] *Id*.
[110] *Id*. at 1033.
[111] *Id*.
[112] Robertson v. Baldwin, 165 U.S. 275, 281-282, 17 S. Ct. 326, 41 L. Ed. 715 (1897).
[113] *Id*.
[114] U. S. v. Brewster, 408 U.S. 501, 508, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972).
[115] Joseph B. Adams, *Dispensing with the Second Amendment*, 12 TRINITY L. REV. 75, 113 (2004).
[116] David O'Boyle, *The Right to Bear Arms*, 30 WASH. LAW. 25, 31 (October 2015).
[117] *Id*. at 28.
[118] Peruta v. Cty. of San Diego, 824 F.3d 919, 947 (9th Cir. 2016).
[119] Kachalsky v. Cty. of Westchester, 701 F.3d 81, 88 (2d Cir. 2012).
[120] Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013).
[121] Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013).
[122] Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).
[123] *Peruta*, 824 F.3d at 948.
[124] *Kachalsky*, 701 F.3d at 92.
[125] 1913 Laws of N.Y., ch. 608, at 1629.
[126] *Id*.
[127] *Id*.
[128] Robertson v. Baldwin, 165 U.S. 275, 281-282, 17 S. Ct. 326, 41 L. Ed. 715 (1897).
[129] *Kachalsky*, 701 F.3d at 92 (citing D.C. v. Heller, 554 U.S. 570, 634-635 (2008).
[130] *Id*. at 97.
[131] Bernal v. Fainter, 467 U.S. 216, 104 S. Ct. 2312, 81 L. Ed. 2d 175 (1984).
[132] Clark v. Jeter, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988).
[133] *Id*.
[134] *Heller*, 554 U.S. at 592, 628.
[135] Joseph Gonnella, *Concealed Carry: Can Heller's Handgun Leave the Home?*, 51 CAL. W. L. REV. 111, 137 (2014).
[136] *Id*.; *Heller*, 554 U.S. at 576-626.
[137] *Gonnella*, *supra* note 135, at 137; *Heller*, 554 U.S. at 626-635.
[138] Drake v. Filko, 724 F.3d 426 (3d Cir. 2013).
[139] *Id*. at 429 (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).
[140] Drake, 724 F.3d at 429.
[141] *Id*. at 432.
[142] *Id*. at 433-34.
[143] *Id*. at 435.
[144] *Id*. at 436.
[145] *Id*. at 437.
[146] *Id*.
[147] *Id*.
[148] Woollard v. Gallagher, 712 F.3d 865, 875-877 (4th Cir. 2013).
[149] *Id*. at 882.
[150] *Id*.
[151] Peruta v. Cty. of San Diego, 824 F.3d 919, 939 (9th Cir. 2016).
[152] *Id*.

[153] *Id*. at 941-42.
[154] *Id*.
[155] *Id*.
[156]Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); U.S. v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).
[157]*Masciandaro*, 638 F.3d at 474 (quoting D.C. v. Heller, 554 U.S. 570, 591 (2008).
[158] Woollard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013); Masciandaro, 638 F.3d at 458.
[159] *Woollard*, 712 F.3d at 882; *Masciandaro*, 638 F.3d at 471-73.
[160] *Masciandaro*, 638 F.3d at 475.
[161] Lynch v. Merrell-Nat'l Labs., Div. of Richardson-Merrell, Inc., 830 F.2d 1190, 1194 (1st Cir. 1987.
[162] Cont'l Steel Corp. v. United States, 614 F. Supp. 548, 554 (Ct. Int'l Trade 1985), vacated in part sub nom. Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).
[163] *Masciandaro*, 638 F.3d at 475.
[164] Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).
[165] *Id*. at 936.
[166] *Id*. at 937.
[167] *Id*. at 939.
[168] *Id*. at 940.
[169] *Id*. at 941; Kachalsky v. Cty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).
[170] *Moore, 702 F.3d at 941; Kachalsky, 701 F.3d at 97.*
[171] D.C. v. Heller, 554 U.S. 570, 635 (2008).
[172] *See* Moore, 638 F.3d at 940.
[173] *See* Heller, 554 U.S. at 626; *Zimring*, *supra* note 51, at 140.
[174] *See* U.S. v. Castleman, 134 S. Ct. 1405, 1408, 188 L. Ed. 2d 426 (2014).
[175] *See* discussion *supra* Part IB.
[176] *See* Heller, 554 U.S. at 626.
[177] Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895).
[178] *See* Taylor v. Kentucky, 436 U.S. 478, 483, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).
[179] *See* discussion *supra* Part IB.
[180] *Heller*, 554 U.S. at 634.
[181] U.S. Const. Amend. 2.
[182] McDonald v. City of Chicago, Ill., 561 U.S. 742, 791 (2010) (It was not until 2010 when the Court held, "We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller.". Meaning, the Second Amendment became enforceable against the states in the same manner as the federal government.)
[183] U.S. Const. Amend. 14.
[184] Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 220 (1983).
[185] *Id*.; U.S. Const. Amend. 14, § 5 (The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.).
[186] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).
[187] *Id*.
[188] *See* United States v. Carolene Products Co., 304 U.S. 144, 148, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).
[189] *See* D.C. v. Heller, 554 U.S. 570, 634 (2008).
[190] Drake v. Filko, 724 F.3d 426, 430 (3d Cir. 2013).
[191] *Id*.
[192] *See* discussion *supra* Part IIB.
[193] *Id*.
[194] Kachalsky v. Cty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).
[195] *Drake*, 724 F.3d at 449.
[196] Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013).
[197] *Kachalsky*, 701 F.3d at 83–84.
[198] *See* Caetano v. Massachusetts, 136 S. Ct. 1027, 1033 (2016).
[199] D.C. v. Heller, 554 U.S. 570, 628 (2008).
[200] *Kachalsky*, 701 F.3d at 83–84; *Drake*, 724 F.3d at 449; *Woollard*, 712 F.3d at 882.
[201] *Heller*, 554 U.S. at 635.

[202] *Id*. at 594.
[203] *Id*. at 635.
[204] *Id*. at 633-34.
[205] *Id*.
[206] *Id*.
[207] *Id*. at 635 (citing National Socialist Party of America v. Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam)).
[208] *Id*.
[209] *Id*.
[210] *See* Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).
[211] *Id*. at 937.
[212] *Id*.; Kachalsky v. Cty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426, 449 (3d Cir. 2013).; Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013).
[213] *Moore*, 702 F.3d at 937.
[214] *Id*.
[215] *Heller*, 554 U.S. at 635.
[216] *See Moore*, 702 F.3d at 902-903.
[217] *Id*. at 903.
[218] *Id*.
[219] *Id*.
[220] Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279, 295-97 (2016).
[221] *Id*. at 295-296.
[222] *Id*. at 296.
[223] *See McDonald*, 561 U.S. at 856.
[224] *Id*. at 776.