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

*Betty J. Craipo**

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* J.D., cum laude, Gonzaga University School of Law, 2017; B.A., summa cum laude, Eastern Washington University, 2014. I would like to thank EWU for giving me the tools and the freedom to become a thorough researcher, Gonzaga Law and the Thomas More Program for generously investing in my public service advocacy, and my husband, children, and seemingly tireless supporters for their life-altering influence. I dedicate this article to my dear husband Alvin, whose lifelong bond with the Second Amendment encouraged me to do the research and document the necessity for judicial toleration of its negative externalities.

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I. 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 to the regulation of firearms.³ These courts have placed more weight on the negative externalities of bearing arms than on a 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 until the citizen has established a reason ‘why’ he or she needs a concealed firearm for self-defense.⁴ In contrast, other 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 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 have ignored the government’s burden to prove whether it has the authority to infringe upon an individual’s constitutional right to bear arms⁸ and has placed the burden

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 *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

⁵ See *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012).

⁶ See *Heller*, 554 U.S. at 626 (Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings).

⁷ *Id.* at 584 (internal quotations omitted).

⁸ See e.g. *Kachalsky*, 701 F.3d at 87–88; *Drake*, 724 F.3d at 443. (Both courts assumed the general public had no right to self-defense without a “justifiable need” or “proper cause” to carry a handgun. Neither court placed a burden on the government to

on the shoulders of law-abiding citizens to prove they have the right to defend themselves.⁹

These circuit 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 armed self-defense as 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 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 early 2018, have stepped into that dance and asserted their own paths toward new restrictions on bearing arms. Part III challenges

prove the general public had no such constitutional right although the cases both were ruled upon after *Heller* and *McDonald*).

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*, 824 F.3d at 942.

¹³ *U.S. v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1875).

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 626–27.

¹⁸ Blackman *supra* note 14, at 956.

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.

II. 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 protecting the principles of representation via reapportionment and controlling the 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 article.²² What will be addressed in Part I is that Congress and the Supreme Court have consistently held, from 1791 to 2018, 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 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

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 530–31.

²¹ Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204, 220 (1983).

²² See *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (This article does not thoroughly address this issue, but this court declared 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. II.

²⁴ See 60 U.S. 393, 15 L. Ed. 691 (1856) (superseded on other grounds (1868)).

²⁵ *Id.* at 416–17.

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* pronouncement 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 the right of the people to peaceably assemble and a mere assembly of people as a military company that drills and parades with arms, which is not a right.³⁵ With this narrowing came a broad stroke of the Supreme Court's power to deny any other restriction on the individual's right to bear arms.³⁶ "[T]he states

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. at 416–17.

²⁹ Kealy, *supra* note 26, at 251.

³⁰ See *Cruikshank*, 92 U.S. at 553.

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*.")

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.* at 266–67.

³⁶ *Id.* at 265.

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 *Robertson* 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 *Robertson* 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 Other than the reference to English law, no further explanation for this exception can be found in *Robertson*.⁴⁵ This lack of American precedent and weakness inherent in *dicta* pronouncements should 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.

³⁷ *Id.*

³⁸ *Id.* at 264–65.

³⁹ *Robertson v. Baldwin*, 165 U.S. at 281.

⁴⁰ *Id.* at 287–88.

⁴¹ *Id.* at 281–82. (As the Thirteenth Amendment does not prohibit all contracts that could be deemed to include involuntary servitude, neither does the Second Amendment prohibit all gun regulation such as laws prohibiting the carrying of concealed weapons).

⁴² *Id.* at 281.

⁴³ *Id.* at 281–82.

⁴⁴ *Id.* at 281. (“The law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the ‘Bill of Rights,’ were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case.”).

⁴⁵ *Robertson*, 165 U.S. at 275.

⁴⁶ *Id.* at 281.

B. 20th & 21st Centuries

As the roaring twenties were well under way, Congress supported 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 The PRA

⁴⁷ Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1587 (2014).

⁴⁸ *Id.*

⁴⁹ See *U.S. 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 *Miller*, 307 U.S. 174.

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.

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 which would prohibit the possession of firearms by those convicted of crimes of violence was unreasonable if the prohibition was due to the firearms traveling through interstate commerce.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") reads,

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 restricted the right for "minors, convicted felons, and persons who had been adjudicated as mental defectives or

⁵⁸ *Id.*

⁵⁹ *See Tot v. U.S.*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).

⁶⁰ *Id.* at 468.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Zimring, *supra* note, 51.

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).

committed to mental institutions.”⁶⁹ The 1960s ended with the federal government making it clear ‘who’ ‘law-abiding citizens’ were and how citizenship alone earned a citizen’s right to bear arms without government discouragement.

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 waistband of a suspect.⁷⁰ The officer “asked no questions; he made no investigation; he simply searched.”⁷¹ Critics at the time considered whether both the Second and Fourth Amendments were being watered down.⁷² There, the *Williams* Court held that if a police officer “has reason to believe that a suspect is armed and dangerous, he may conduct a weapons search limited in scope to [his] protective purpose.”⁷³ *Williams* allowed a police officer’s probable cause deduction that a suspect is not a ‘law-abiding’ citizen to temporarily restrict the suspect’s Second Amendment rights.⁷⁴ Again, only if one is ‘law-abiding’ are Second Amendment protections safeguarded.

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.”⁷⁵ 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.”⁷⁶

Although the Supreme Court stamped the GCA with its approval with these rulings, Congress implemented the Firearms Owners’ Protection Act of 1986 (“FOPA”).⁷⁷ FOPA was the congressional culminating statement that began in 1866, continued from 1941⁷⁸ to 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 155.

⁷² *Id.* at 151.

⁷³ *Id.* at 146 (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

⁷⁴ *Barrett v. U.S.*, 423 U.S. 212, 96 S. Ct. 498, 46 L. Ed. 2d 450 (1976).

⁷⁵ *Id.* at 218.

⁷⁶ *Lewis v. U.S.*, 445 U.S. 55, 64–65, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).

⁷⁷ Firearms Owners’ Protection Act, P.L. 99-308, 100 Stat. 449 (May 19, 1986).

⁷⁸ *Halbrook, supra* note 56, at 636 (citing *U. S. v. Breier*, 827 F.2d 1366 (9th Cir. 1987) (Noonan, J., dissenting)).

and was best summarized in the 1985 Senate Judiciary Committee.⁷⁹ 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.”⁸⁰ 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 1990.⁸¹ 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.”⁸² The Supreme Court responded to the GFSZA with *United States v. Lopez* in 1995.⁸³ *Lopez* confronted Congress’s Commerce Clause authority again when Congress attempted to qualify this criminal statute as an issue within “commerce.”⁸⁴ 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.”⁸⁵ The right to bear arms was protected by the Founders’ insight into the separation of powers and ‘the people’ had not surrendered that right to Congress by way of the Commerce Clause.⁸⁶

The next scuffle of the 1990s occurred after Congress passed the Brady Handgun Violence Prevention Act (“Brady Law”) of 1993.⁸⁷ 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.⁸⁸ The waiting-period issue never came before the court.⁸⁹ Yet, in *Printz v. United States*, the Supreme Court addressed the background check issue with the same separation of powers concerns addressed in *Tot* and *Lopez*.⁹⁰ The *Printz*

⁷⁹ Kealy, *supra* note 26, at 283.

⁸⁰ *Id.*

⁸¹ 18 U.S.C. 922(q)(2).

⁸² *Id.*

⁸³ *U.S. v. Lopez*, 514 U.S. 549 (1995).

⁸⁴ *Id.* at 561.

⁸⁵ *Id.* at 576.

⁸⁶ *Id.*

⁸⁷ See *Printz v. U.S.*, 521 U.S. 898, 905 (1997).

⁸⁸ *Id.* at 903.

⁸⁹ *Id.* at 935.

⁹⁰ *Id.*

Court found that when the federal government conscripted state actors to enforce the Brady Act,⁹¹ it undermined the independent authority of the state and risked the degradation of the safeguards on individual liberty.⁹² The Acts of the 1990s were the first hints that Congress was starting to weigh the negative externalities of bearing arms whereas the Supreme Court simply refused to participate in such a balancing act.

It was not until 2008 that the Supreme Court forcefully documented its unwillingness to balance negative externalities of bearing arms with the enumerated constitutional right.⁹³ In *Heller*, the District of Columbia banned handgun possession in the home.⁹⁴ 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.⁹⁵

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.⁹⁶

Although the Supreme Court has challenged congressional movement on the Second Amendment, Congress has never challenged the Supreme Court on the issue. As of 2018, Congress has not challenged the *Heller* case. To the contrary, Congress made a statement on bearing arms within the Credit Card Accountability Responsibility and Disclosure Act of 2009 (“CARD”).⁹⁷ As odd as that seems, this Act has a provision protecting the right to bear loaded arms in national parks.⁹⁸ Thus, Congress’s last words on the subject fully embrace the Second Amendment’s core that, “the right of the people to keep and bear Arms, shall not be infringed.”⁹⁹

Not long after *Heller*, the Supreme Court followed up its ruling by hearing an Illinois case that claimed the *Heller* ruling did not apply to the States.¹⁰⁰ As mentioned earlier, in the 1872 *Slaughterhouse Cases*, the Supreme Court placed State civil rights enforcement out of the hands of the federal government using the Privileges and Immunities Clause as its

⁹¹ *Id.*

⁹² *Id.* at 976–77. (Breyer, J., Stevens, J., dissenting).

⁹³ *Heller*, 554 U.S. at 634.

⁹⁴ *Id.* at 628.

⁹⁵ *Id.*

⁹⁶ *Id.* at 628–29.

⁹⁷ 15 U.S.C. § 1601.

⁹⁸ 54 U.S.C. § 104906 (Protection of right of individuals to bear arms).

⁹⁹ *Id.*

¹⁰⁰ *McDonald*, 561 U.S. at 743.

tool.¹⁰¹ In 2010, the *McDonald* Court sidestepped the *Slaughterhouse Cases* and declared that “[C]ruikshank, 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.”¹⁰² *McDonald* further articulated that,

[u]nder 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.¹⁰³

With these words, the Supreme Court reiterated that the Second Amendment “is the very product of an interest balancing by the people” that must not be conducted anew.¹⁰⁴

The most recent case¹⁰⁵ heard by the Supreme Court on the topic of bearing arms was *Caetano v. Massachusetts* in March of 2016.¹⁰⁶ There, a woman defended herself with a stun gun and was arrested, tried, and convicted of possession of that stun gun.¹⁰⁷ 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.¹⁰⁸ After dismissing all the arguments, the *Caetano* court provided the pertinent issue itself, “[w]hether stun guns are commonly possessed by law-abiding citizens for lawful purposes today.”¹⁰⁹ This holding foreshadowed the Supreme Court’s future test for bearing arms going forward; whichever test is chosen, it will include the necessity of law-abiding citizens performing acts for lawful purposes.¹¹⁰ 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.¹¹¹ “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

¹⁰¹ *Slaughter-House Cases*, 83 U.S. at 77–79. [To be completely honest, I’m not sure if “*Slaughter-House Cases* gets italicized here, so I’m going to ask my editor!]

¹⁰² *McDonald*, 561 U.S. at 758.

¹⁰³ *Id.* at 784–85.

¹⁰⁴ *Heller*, 554 U.S. at 635.

¹⁰⁵ See *U.S. v. Castleman*, 134 S. Ct. 1405, 1408 (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)).

¹⁰⁶ See *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

¹⁰⁷ *Id.* at 1029.

¹⁰⁸ *Id.* at 1027–32.

¹⁰⁹ *Id.* at 1032.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1033.

authorities who may be more concerned about disarming the people than about keeping them safe.”¹¹²

C. *Yesterday and Today*

Part I of this article demonstrated 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, which make certain activities outside the protection of the Second Amendment, Supreme Court decisions and congressional legislation focusing on the ‘why’ do not exist.

Part II will explore the sister circuits’ heated argument about the ‘why’ which has forced the issue of concealed carry to rise dramatically to the surface. The argument pits the circuits against each other and sometimes provokes panels to disagree within a circuit itself. Concealed carry is at the heart because citizens are being denied permits to carry weapons outside the home when open carry is not an option. However, open carry is not being adjudicated, only concealed. This is the reason the Supreme Court has denied hearing these cases. Until a case comes to the Court that takes on both manners of carrying weapons, certiorari will continue to be denied.

In the meantime, certain circuit courts are holding on to *Robertson* from 1897 with both hands. As you may recall, the *Robertson* court discussed in *dicta* that Second Amendment protections were not available for concealed carry.¹¹³ However, *Robertson* is without precedent since its ruling is based on English law.¹¹⁴ To demonstrate this lack of precedence issue, the Supreme Court held that constitutional issues,

[m]ust 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.¹¹⁵

Therefore, not only has the history of Supreme Court decisions and Congressional acts not supported adding a ‘why’ to the regulation of bearing arms, the one supposedly precedential case that supports prohibiting concealed carry has no 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.

¹¹² *Caetano*, 136 S. Ct. at 1033.

¹¹³ *Robertson*, 165 U.S. at 281–82.

¹¹⁴ *Id.*

¹¹⁵ *U. S. v. Brewster*, 408 U.S. 501, 508 (1972).

III. 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*.¹¹⁶ These landmark Supreme Court cases created new arguments for the judicially dissimilar sister circuit courts to distinguish themselves and further dilute the arguments made.¹¹⁷ Today, the hot topic among the circuit courts is whether the law-abiding have a constitutionally protected right to bear arms in public.¹¹⁸ Even with this contentious topic, all circuit courts that have ruled on this issue agree, “[t]he Second Amendment right to bear arms extends outside the home or have assumed that the right exists.”¹¹⁹ This article will focus on circuit decisions from each side of the debate: the Second, Third, Fourth, and Ninth circuits versus the Fourth, Seventh and District of Columbia circuits.

Initially, the Second Circuit declared, “[t]he Amendment must have some application in the very different context of the public possession of firearms.”¹²⁰ The Third Circuit recognized “that the Second Amendment’s individual right to bear arms may have some application beyond the home.”¹²¹ The Fourth Circuit assumed, “[t]he *Heller* right exists outside the home”¹²² 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*.”¹²³ The Ninth Circuit determined that, “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.”¹²⁴ Finally, the D.C. Circuit concluded “(longstanding exceptions aside) carrying beyond the home, even in populated areas, even without special need, falls within the Amendment’s coverage, indeed within its core.”¹²⁵ As shown, the sister circuits agree that

¹¹⁶ See Joseph B. Adams, *Dispensing with the Second Amendment*, 12 TRINITY L. REV. 75, 113 (2004).

¹¹⁷ David O’Boyle, *The Right to Bear Arms*, 30 WASH. LAW. 25, 31 (October 2015).

¹¹⁸ *Id.* at 28.

¹¹⁹ *Peruta*, 824 F.3d at 947.

¹²⁰ *Kachalsky*, 701 F.3d at 88.

¹²¹ *Drake*, 724 F.3d at 431.

¹²² *Woollard*, 712 F.3d at 876.

¹²³ *Moore*, 702 F.3d at 937.

¹²⁴ *Peruta*, 824 F.3d at 948.

¹²⁵ *Wrenn v. D.C.*, 864 F.3d 650, 664 (D.C. Cir. 2017).

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 circuit splitting argument against concealed-carry permits begins with ‘why’ law-abiding citizens need 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 first established in New York in 1913.¹²⁶ In 1913, the “proper cause” requirement for obtaining a concealed weapons license for bearing arms in public was,

... it shall be lawful for any magistrate, upon proof before him that the person applying therefor is of good moral character, and that proper cause exists for the issuance thereof, to issue to such person a license to have and carry concealed a pistol or revolver without regard to employment or place of possessing such weapon.¹²⁷

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.”¹²⁸ This limiting standard allowed government authority to provide concealed weapon licenses only to those with a “special need for self-protection.”¹²⁹ The 1913 New York law was supported by the 1897 Supreme Court *Robertson dicta*, “the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons.”¹³⁰

In *Kachalsky*, the court acknowledged that *Heller* did not use a means-end scrutiny test when it held 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.”¹³¹ 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.”¹³² In order to withstand strict scrutiny, “[t]he law must advance a compelling state interest by the least restrictive means available.”¹³³ To withstand intermediate scrutiny, a law “must be

¹²⁶ *Kachalsky*, 701 F.3d at 92.

¹²⁷ 1913 N.Y. Laws 608, at 1629.

¹²⁸ *Kachalsky*, 701 F.3d at 92. (citing *Klenosky v. N.Y. City Police Dep’t*, 75 A.D.2d 793, 793, 428 N.Y.S.2d 256 (1st Dep’t 1980).

¹²⁹ *Id.*

¹³⁰ *Robertson*, 165 U.S. at 281–82.

¹³¹ *Kachalsky*, 701 F.3d at 92 (citing *Heller*, 554 U.S. at 634–635).

¹³² *Id.* at 97.

¹³³ *Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

substantially related to an important governmental objective.”¹³⁴ To withstand minimum scrutiny, “a statutory classification must be rationally related to a legitimate governmental purpose.”¹³⁵

The Second Circuit choosing a standard of scrutiny was the first sidestep away from the specific *Heller* ruling. For *Heller* declined to determine what level of scrutiny should be used for bearing arms outside the home.¹³⁶ In fact, the *Heller* test consisted of a two-part approach purposely omitting a level of scrutiny distinction.¹³⁷ The first part of the *Heller* test determined whether the individual right to bear arms for self-defense was a protected Second Amendment activity.¹³⁸ In the second part, the Court weighed the effect of the challenged gun laws on that activity to determine the extent of the burden.¹³⁹ Nevertheless, *Kachalsky* circumvented the *Heller* analysis.

Next, the Third Circuit entered this side of the ‘bearing arms in public’ debate in 2013.¹⁴⁰ Like the Second Circuit, it chose not to use the *Heller* test, but instead, used its own 2010 two-part test.¹⁴¹ 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.¹⁴²

The challenged law here came 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.’”¹⁴³ In 2013, the *Drake* court embraced this law as its “longstanding,” “presumptively lawful” exception to the Second Amendment guarantee.¹⁴⁴ Thus, allowing it to move onto its second test, that of evaluating the law under some form of means-end scrutiny.¹⁴⁵

Drake began this inquiry by sidestepping the Supreme Court and declaring that strict scrutiny should *only* be used when the challenged law

¹³⁴ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

¹³⁵ *Id.*

¹³⁶ *Heller*, 554 U.S. at 592, 628.

¹³⁷ Joseph Gonnella, *Concealed Carry: Can Heller’s Handgun Leave the Home?*, 51 CAL. W. L. REV. 111, 137 (2014).

¹³⁸ *Id.*; *Heller*, 554 U.S. at 576–626.

¹³⁹ Gonnella, *supra* note 135, at 137; *Heller*, 554 U.S. at 626–35.

¹⁴⁰ *Drake*, 724 F.3d 426.

¹⁴¹ *Id.* at 429 (citing *U.S. v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

¹⁴² *Drake*, 724 F.3d at 429.

¹⁴³ *Id.* at 432.

¹⁴⁴ *Id.* at 433–34.

¹⁴⁵ *Id.* at 435.

burdens “the ‘core’ protection of self-defense in the home.”¹⁴⁶ 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.”¹⁴⁷ Unlike the intermediate standard embraced by the Supreme Court, where a law must be “substantially related” to an important governmental objective the *Drake* court skirted around the Supreme Court and embraced an arguably lower standard of “a reasonable fit” with legislative intent.¹⁴⁸ Thus, not only did the Third Circuit sidestep the Supreme Court by ignoring the *Heller* test, but it also adjusted the test for intermediate scrutiny.¹⁴⁹

Also in 2013, the Fourth Circuit repeated a two-part inquiry, similar to that relied upon by the Third Circuit, in order to evaluate the good-and-substantial-reason requirement of the Maryland law being challenged.¹⁵⁰ There, the *Woollard* court held that “public safety interests often outweigh individual interests in self-defense.”¹⁵¹ *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.¹⁵² This is but another consistent sidestep of the Supreme Court by the circuit courts.

Finally in 2016, the Ninth Circuit disregarded the *Heller* two-part inquiry to fully embrace the Supreme Court’s 1897 holding in *Robertson*.¹⁵³ The *Peruta* court established that *Robertson* 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.¹⁵⁴ *Peruta* also brought to the surface the issue of open-carry.¹⁵⁵ 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-

¹⁴⁶ *Id.* at 436 (citing *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012)).

¹⁴⁷ *Id.* at 437.

¹⁴⁸ *Drake*, 724 F.3d at 437.

¹⁴⁹ *Id.*

¹⁵⁰ *Woollard*, 712 F.3d at 875–77.

¹⁵¹ *Id.* at 882.

¹⁵² *Id.*

¹⁵³ *Peruta*, 824 F.3d at 939.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 941–42.

defense.”¹⁵⁶ Nevertheless, since an open-carry argument was not before the *Peruta* court, the notion of a probable complete ban was not addressed.¹⁵⁷

Again, *Heller* is ignored by a circuit court and, as with all the petitioning cases above, the Court denied certiorari for *Peruta*.¹⁵⁸ In his dissent of the denial, Justice Thomas stated that there is a “distressing trend” in the court that treats the Second Amendment as a “disfavored right” compared to the First and Fourth.¹⁵⁹ This author suggests, as stated previously, the right case has not yet come before the Supreme Court that would allow it to take on open- and concealed-carry as a whole.

When evaluating these circuit court decisions, the argument 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 nineteenth-century Supreme Court *dicta* or passing a test that balances individual rights with public safety. In contrast, sister circuits refuse to enter this “vast *terra incognita*” which the Supreme Court has chosen not to explore.¹⁶⁰

C. Circuit Courts Refusing to Enter Terra Incognita

The Fourth Circuit reappears on the opposite side of the ‘bearing arms in public’ debate. Before the Fourth Circuit chose to require a reason ‘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.”¹⁶¹ The *Masciandaro* and *Woollard* courts did not share a single member of their judicial panels.¹⁶² 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.¹⁶³ Even in following the Supreme Court, the *Masciandaro* court struggled with the obscure nature of this “*terra incognita*.”¹⁶⁴ *Terra incognita* has not been defined by the Supreme Court, but lower courts have described *terra incognita* as a place “where gossip

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Peruta v. California*, 137 S. Ct. 1995 (2017).

¹⁵⁹ *Id.* at 1999.

¹⁶⁰ *Moore*, 702 F.3d at 942; *U.S. v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

¹⁶¹ *Masciandaro*, 638 F.3d at 474 (citing *Heller*, 554 U.S. at 591).

¹⁶² *Woollard*, 712 F.3d at 868; *Masciandaro*, 638 F.3d at 458.

¹⁶³ *Woollard*, 712 F.3d at 882; *Masciandaro*, 638 F.3d at 471–73.

¹⁶⁴ *Masciandaro*, 638 F.3d at 475.

and guesswork abound”¹⁶⁵ and as “blank areas which have no discernable details.”¹⁶⁶ While *Masciandaro* wrestled with this lack of clarity, it held that “self-defense has to take place wherever [a] person happens to be.”¹⁶⁷ The Seventh Circuit followed this course just months later with a similar but expanded argument.¹⁶⁸

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.”¹⁶⁹ The *Moore* court reiterated that both *Heller* and *McDonald* were just about self-defense, and that a person is much more likely to need to be armed in a rough neighborhood rather than to have a loaded weapon under his or her mattress.¹⁷⁰ The court evaluated multiple studies and their inconsistent conclusions led the 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.¹⁷¹ 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.”¹⁷² Undoubtedly, the *Moore* decision is the inverse of the *Kachalsky* decision.¹⁷³ In *Moore*, laws prevent dangerous people from having handguns whereas in *Kachalsky* laws prevent law-abiding citizens from having handguns without a justified need.¹⁷⁴ *Moore* declares that if there is to be a balancing test, even if *Heller* says it is improper to make one,¹⁷⁵ then the test should consist of measuring how public safety is balanced by responsible persons bearing arms in public.¹⁷⁶

In 2017, the District of Columbia Circuit Court became the last circuit court to touch on the ‘bearing arms in public’ debate and zealously followed *Heller*.¹⁷⁷ The *Wrenn* court held that *Heller* revealed “the Second Amendment erects some absolute barriers that no gun law may breach.”¹⁷⁸

¹⁶⁵ *Lynch v. Merrell-Nat’l Labs., Div. of Richardson-Merrell, Inc.*, 830 F.2d 1190, 1194 (1st Cir. 1987).

¹⁶⁶ *Cont’l Steel Corp. v. U.S.*, 614 F. Supp. 548, 554 (Ct. Int’l Trade 1985), vacated in part sub nom. *Georgetown Steel Corp. v. U.S.*, 801 F.2d 1308 (Fed. Cir. 1986).

¹⁶⁷ *Masciandaro*, 638 F.3d at 475.

¹⁶⁸ *Moore*, 702 F.3d 933.

¹⁶⁹ *Id.* at 936.

¹⁷⁰ *Id.* at 937.

¹⁷¹ *Id.* at 939.

¹⁷² *Id.* at 940.

¹⁷³ *Id.* at 941; *Kachalsky*, 701 F.3d at 97.

¹⁷⁴ *Moore*, 702 F.3d at 941; *Kachalsky*, 701 F.3d at 97.

¹⁷⁵ *Heller*, 554 U.S. at 635.

¹⁷⁶ *See Moore*, 638 F.3d at 940.

¹⁷⁷ *Wrenn*, 864 F.3d at 650.

¹⁷⁸ *Id.* at 664.

The gun law in question was a D.C. Code provision, which limited “licenses for the concealed carry of handguns to those showing a good reason to fear injury to [their] person or property or any other proper reason for carrying a pistol.”¹⁷⁹ *Wrenn* discussed sister circuit rulings where “the circuits settling on a level of scrutiny to apply to good-reason laws explicitly declined to use *Heller*’s historical method to determine how rigorously the Amendment applies beyond the home.”¹⁸⁰ In line with that discussion, the *Wrenn* court did not settle on a level of scrutiny because D.C.’s ‘good reason’ law was “analogous to the ‘total ban’ that the Supreme Court struck down in *Heller* without pausing to weigh its benefits.”¹⁸¹

The *Wrenn* court viewed the good-reason law as leaving “each D.C. resident some remote chance of one day carrying in self-defense.”¹⁸² The court emphasized the notion that D.C. residents’ Second Amendment rights were being infringed by stressing, “[t]he Second Amendment doesn’t secure a right to have some chance at self-defense.”¹⁸³ This amounted to a ban on carrying weapons in public, forcing the court to conclude “that (longstanding exceptions aside) carrying beyond the home, even in populated areas, even without special need, falls within the Amendment’s coverage, indeed within its core.”¹⁸⁴ Thus, allowing the D.C. circuit to have the last word in the ongoing debate.

IV. 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.¹⁸⁵ Once an individual proves he or she is a responsible (mature in age with acceptable mental health), law-abiding (non-felonious) citizen,¹⁸⁶ further questions must be answered about what firearm was to be borne, where the firearm was to be borne, and how the firearm was to be borne.¹⁸⁷ The courts

¹⁷⁹ *Id.* at 655 (internal quotation marks omitted).

¹⁸⁰ *Id.* at 663.

¹⁸¹ *Id.* at 656.

¹⁸² *Id.* at 665.

¹⁸³ *Wrenn*, 864 F.3d at 665.

¹⁸⁴ *Id.* at 664.

¹⁸⁵ See *Heller*, 554 U.S. at 626; Zimring, *supra* note 51, at 140.

¹⁸⁶ See *U.S. v. Castleman*, 134 S. Ct. 1405, 1408 (2014).

¹⁸⁷ See discussion *supra* Part IB.

created these questions over time, and these questions make up the “longstanding prohibitions” to bearing arms formed by the courts that take away Second Amendment protection.¹⁸⁸

The individual’s burden to be ‘law-abiding’ is interlinked with the “foundation of the administration of our criminal law” that one has the “presumption of innocence” without obvious proof that one is not law-abiding.¹⁸⁹ The Supreme Court consistently holds the fundamental concept of the presumption of innocence and the equally fundamental principle that the government bears the burden of proof beyond a reasonable doubt.¹⁹⁰ This solid foundation supports the implication that once innocent, no further burden remains on the law-abiding citizen. 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.¹⁹¹

Second, the government retains the burden to prove whether it has the authority to infringe upon an individual’s constitutional right to bear arms.¹⁹² 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.¹⁹³ Also in its basic form, the Fourteenth Amendment declares that no state¹⁹⁴ shall deprive any person of liberty without due process of law.¹⁹⁵ Both of these amendments place strict limits on the government, not the individual.¹⁹⁶ In Section 5 of the Fourteenth Amendment, there exists an additional limitation.¹⁹⁷ There, as emphasized by the Supreme Court in *Katzenbach*, “Congress’[s] 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.”¹⁹⁸ These amendments imply that the burden remains solely on the government to prove it has the authority to infringe upon a law-abiding citizen’s right to

¹⁸⁸ See *Heller*, 554 U.S. at 626.

¹⁸⁹ *Coffin v. U.S.*, 156 U.S. 432, 453 (1895).

¹⁹⁰ See *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

¹⁹¹ See discussion *supra* Part IB.

¹⁹² *Heller*, 554 U.S. at 634.

¹⁹³ U.S. CONST. amend. II.

¹⁹⁴ *McDonald*, 561 U.S. at 791 (holding “that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*,” meaning that the Second Amendment became enforceable against the states in the same manner as the federal government).

¹⁹⁵ U.S. CONST. amend. XIV.

¹⁹⁶ Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 220 (1983).

¹⁹⁷ *Kates*, *supra* note 195, at 220; U.S. CONST. amend. XIV, § 5 (stating that Congress shall have power to enforce, by appropriate legislation, the provisions of this article).

¹⁹⁸ *Katzenbach*, 384 U.S. at 651 n. 10.

bear arms.¹⁹⁹ In general, this burden can be lessened by way of a means-end scrutiny test.²⁰⁰

A means-end scrutiny test does not apply when the challenged law fits within Second Amendment guarantees due to the Supreme Court “declining to establish a level of scrutiny for evaluating Second Amendment restrictions.”²⁰¹ 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.²⁰² A burden cannot fall on the individual for conduct protected by the Second Amendment; therefore, the burden lies squarely with the government.²⁰³ However, conduct deemed to be 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.²⁰⁴ 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.”²⁰⁵

Whether it is *Kachalsky*’s “proper cause,”²⁰⁶ *Drake*’s “showing of need,”²⁰⁷ or *Woollard*’s “good and substantial reason” for why an individual should be permitted to exercise his or her rights,²⁰⁸ 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.²⁰⁹ There, instead of the government carrying the burden of proving that an individual constitutes a threat before taking away a fundamental right, the individual maintains the burden to prove that he or she is being threatened in order to exercise a fundamental right.²¹⁰ The fundamental right here, mirrors *Heller*’s “inherent right of self-defense.”²¹¹ This burden shift created by the lower courts gives greater weight to public safety than self-defense.²¹² Since the Supreme Court “elevates above all other interests the right of law-abiding, responsible

¹⁹⁹ *Id.*

²⁰⁰ *See* U.S. v. *Carolene Products Co.*, 304 U.S. 144, 148 (1938).

²⁰¹ *See Heller*, 554 U.S. at 634.

²⁰² *Drake*, 724 F.3d at 430.

²⁰³ *Id.*

²⁰⁴ *See* discussion, *supra* Part IIB.

²⁰⁵ *Id.*

²⁰⁶ *Kachalsky*, 701 F.3d at 97.

²⁰⁷ *Drake*, 724 F.3d at 449.

²⁰⁸ *Woollard*, 712 F.3d at 882.

²⁰⁹ *Kachalsky*, 701 F.3d at 83–84.

²¹⁰ *See Caetano*, 136 S. Ct. at 1033 (Alito, J., concurring).

²¹¹ *Heller*, 554 U.S. at 628.

²¹² *Kachalsky*, 701 F.3d at 83–84; *Drake*, 724 F.3d at 449; *Woollard*, 712 F.3d at 882.

citizens to use arms in defense of hearth and home,”²¹³ 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 made it known that the inherent right of self-defense does not end at one’s front door.²¹⁴

B. Interest Balancing not to be Redone Anew

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 for [the people] anew.”²¹⁵ This phrase relates back to the consideration that “the people” of this country gave at the time of the ratification of the Constitution.²¹⁶ *Heller* provided a clear illustration of lawful self-defense.

[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.²¹⁷

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.²¹⁸

As a current example, the Supreme Court declared that it “would not apply an ‘interest-balancing’ approach to the prohibition of a peaceful neo-Nazi march through Skokie.”²¹⁹ The reference draws a picture of an extremely dangerous activity performed by law-abiding, responsible people in which the government would not interfere.²²⁰ In this example, First Amendment rights are being exercised.²²¹ Using the *Moore* ruling

²¹³ *Heller*, 554 U.S. at 635.

²¹⁴ *Id.* at 594.

²¹⁵ *Id.* at 635.

²¹⁶ *Id.* at 633–34.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Heller*, 554 U.S. at 635 (citing *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (per curiam)).

²²⁰ *Id.*

²²¹ *Id.*

in the Seventh Circuit, the court considered a similar example that dealt with the Second Amendment.²²²

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*.²²³

With Judge Posner's example above, it is apparent that he predicted the direction of the sister circuits.²²⁴ After Judge Posner authored the *Moore* opinion in 2012, the sister circuits followed by creating the very protective-order type restrictions that he presented in *Moore*.²²⁵ Nevertheless, his point is clear, it would be an arbitrary decision to restrict one type of self-defense and not another.²²⁶ 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."²²⁷

V. JUDICIAL TOLERATION OF THE NEGATIVE EXTERNALITIES

This article has established that public safety cannot undermine the inherent right of self-defense, which responsible and law-abiding individuals can exercise. However, plenty of negative externalities affect the right to bear arms that beg the question of whether all law-abiding citizens *should* bear arms. An incident involving police officers in New York who shot and killed a gunman on the street presents an instructive example of this question.²²⁸ During this confrontation, the police officers mistakenly shot nine bystanders.²²⁹ Although the officers were trained how to shoot, when to shoot, and when not to shoot, this horrible event

²²² See *Moore*, 702 F.3d at 933.

²²³ *Id.* at 937.

²²⁴ *Woollard*, 712 F.3d at 882; *Drake*, 724 F.3d at 449; *Kachalsky*, 701 F.3d at 97; *Moore*, 702 F.3d at 937.

²²⁵ *Moore*, 702 F.3d at 937.

²²⁶ *Id.*

²²⁷ *Heller*, 554 U.S. at 635.

²²⁸ Danielle Weatherby, *Opening the "Snake Pit": Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine*, 48 CONN. L. REV. 119, 142 (2015).

²²⁹ *Id.*

still occurred.²³⁰ 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.”²³¹

Looking at the bigger picture, there are positive as well as negative externalities for bearing arms.²³² The former focuses on “arms as a mechanism of self-defense that can ensure the safety of the gun-carrying individual”; the latter focuses on the “benefits to society as a whole.”²³³ The positive externalities of public and private deterrence of wrong doing are arguably not outweighed by the negative ones.²³⁴ The negative externalities of bearing arms in public include individuals fearing “being mistaken for criminals and shot, or caught in a cross-fire between people asserting a right to bear arms for self-defense.”²³⁵ Even within such a harsh reality, the Supreme Court has choreographed its legal moves away from these named negative-externalities.²³⁶ The Court 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.”²³⁷ This is a constitutional view; a broader view that demands the judicial toleration of the negative externalities of bearing arms in public.

VI. 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 questionable exceptions focused on in this article are found in *Robertson’s dicta* and the circuit courts. *Robertson* states that a prohibition on carrying concealed weapons does not infringe Second Amendment rights. This *dicta* places concealed-carry outside the guarantees of the Second Amendment. As the *Robertson* 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.

²³⁰ *Id.*

²³¹ *Moore*, 702 F.3d at 939.

²³² Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. 279, 295–97 (2016).

²³³ *Id.* at 295–96.

²³⁴ *Id.*

²³⁵ *Id.* at 296.

²³⁶ *See McDonald*, 561 U.S. at 856.

²³⁷ *Id.* at 776.

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.²³⁸ For both *Heller* and *McDonald*, responsible, law-abiding citizens have an inherent right to self-defense that is protected by the Second Amendment.²³⁹ Nevertheless, a handful of circuit courts are bringing forth the notion that the law-abiding must justify exactly ‘why’ they need to conceal carry.²⁴⁰ If looked upon with a First Amendment lens, 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 absurd as that sounds, 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 *Heller* nor *McDonald* 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. The Court concluded that the right to bear arms by responsible citizens balances out the dangers created by carrying guns in public.²⁴¹ In 2016, the Court followed up that conclusion with a warning, “[t]he lower court’s ill treatment of *Heller* cannot stand.”²⁴² As of 2018, the Supreme Court has not acted on that warning or ruled specifically for reconstituting Second Amendment protections for the concealed bearing of arms in public. Nevertheless, the Court’s holdings throughout its history and its *dicta* in the past one-hundred plus years lead this author to believe that open-carry and concealed-carry will be held together as constitutionally protected under Second Amendment guarantees for responsible, law-abiding citizens in the near future.

Regardless of that prediction, today’s 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

²³⁸ *Heller*, 554 U.S. at 634.

²³⁹ *Id.* at 628; *McDonald*, 561 U.S. at 888.

²⁴⁰ See *Peruta*, 824 F.3d 919; *Woollard*, 712 F.3d 865; *Drake*, 724 F.3d 426; *Kachalsky*, 701 F.3d 81.

²⁴¹ See *Moore*, 638 F.3d at 940.

²⁴² *Caetano*, 136 S.Ct. at 1033.

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 shifts from the government to the individual or a balancing test is being performed, Second Amendment rights continue to be infringed. Therefore, the obvious next move for the Supreme Court is to return concealed-carry back under the protection of the Second Amendment. This move will conclude the circuit courts' venture into the *terra incognita* in which the law-abiding were forced to give a reason for 'why' they needed to defend themselves. This future Supreme Court ruling would conclusively declare that no balancing test will be used when deciding whether law-abiding citizens can endeavor into lawful activity. Then, judicial toleration of the negative externalities of bearing arms in public will bear constitutional fruit.

