AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Guns

**Rogers v. Grewal, \_\_\_ U.S. \_\_\_** (2020)

*Thomas Rogers applied for a permit to carry a handgun because his job required him to service ATMs in high crime areas. He did not obtain that permit because New Jersey law required him to demonstration “specific threats or previous attacks” and not simply “generalized fears for personal safety.” Rogers filed a lawsuit in federal court against Gurbir Grewal, the Attorney General of New Jersey, claiming that the New Jersey gun control law violated his right to bear arms under the Second Amendment as incorporated by the due process clause of the Fourteenth Amendment. The local federal court dismissed the complaint and that decision was affirmed by the Court of Appeals for the Third Circuit. Rogers appealed to the Supreme Court of the United States.*

 *The Supreme Court denied certiorari. Justice Thomas dissented. He claimed the justices should have decided the case both to settle debates over the proper standard for adjudicating Second Amendment rights and to ensure that the right to bear arms is treated with the same respect as other constitutional rights. Thomas is clearly correct when he notes the substantial number of decisions on the right to bear arms in the lower federal courts and the diversity of standards. What best explains the reluctance of the Supreme Court to step in. Will the new 6-3 conservative majority be more aggressive? Thomas insists both that the right to bear arms includes a right to bear arms in public and that decisions to the contrary treat the Second Amendment as a second class right. Is his historical analysis convincing? Should that historical analysis be dispositive? Are second amendment rights being limited more drastically than other constitutional rights? Should they be?*

The petition for a writ of certiorari is denied.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibc7d6c1e831111ea80afece799150095), with whom Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibc7d6c1e831111ea80afece799150095) joins as to all but Part II, dissenting from the denial of certiorari.

The text of the Second Amendment protects “the right of the people to keep and bear Arms.” We have stated that this “fundamental righ[t]” is “necessary to our system of ordered liberty.”  Yet, in several jurisdictions throughout the country, law-abiding citizens have been barred from exercising the fundamental right to bear arms because they cannot show that they have a “justifiable need” or “good reason” for doing so. One would think that such an onerous burden on a fundamental right would warrant this Court’s review. This Court would almost certainly review the constitutionality of a law requiring citizens to establish a justifiable need before exercising their free speech rights. And it seems highly unlikely that the Court would allow a State to enforce a law requiring a woman to provide a justifiable need before seeking an abortion. But today, faced with a petition challenging just such a restriction on citizens’ Second Amendment rights, the Court simply looks the other way.

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Although our decision in *District of Columbia v. Heller* (2008) did not provide a precise standard for evaluating all Second Amendment claims, it did provide a general framework to guide lower courts. In [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we recognized that “the Second Amendment ... codified a *pre-existing* right.”  This right was “enshrined with the scope [it was] understood to have when the people adopted” it.. . . Consistent with this guidance, many jurists have concluded that text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms. But . . . many courts have resisted our decision[] in *Heller. . .*  Instead of following the guidance provided in *Heller*, these courts minimized that decision’s framework. They then “filled” the self-created “analytical vacuum” with a “two-step inquiry” that incorporates tiers of scrutiny on a sliding scale. Under this test, courts first ask “whether the challenged law burdens conduct protected by the Second Amendment.”  If so, courts proceed to the second step—determining the appropriate level of scrutiny.  To do so, courts generally consider “how close the law comes to the core of the Second Amendment right” and “the severity of the law’s burden on the right.”  Depending on their analysis of those two factors, courts then apply what purports to be either intermediate or strict scrutiny—at least recognizing that [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000506&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))barred the application of rational basis review.

This approach raises numerous concerns. For one, the courts of appeals’ test appears to be entirely made up. The Second Amendment provides no hierarchy of “core” and peripheral rights. And “[t]he Constitution does not prescribe tiers of scrutiny.” Moreover, there is nothing in our Second Amendment precedents that supports the application of what has been described as “a tripartite binary test with a sliding scale and a reasonable fit.” . . . [W]e explicitly rejected the invitation to evaluate Second Amendment challenges under an “interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other.”  But the application of the test adopted by the courts of appeals has devolved into just that. . . .

This case also presents the Court with an opportunity to clarify that the Second Amendment protects a right to public carry. . . . The text of the Second Amendment guarantees that “the right of the people to keep and bear Arms, shall not be infringed.” As this Court explained in [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), “[a]t the time of the founding, as now, to ‘bear’ meant to ‘carry.’ ”  “When used with ‘arms,’ ... the term has a meaning that refers to carrying for a particular purpose—confrontation.”  Thus, the right to “bear arms” refers to the right to “ ‘wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.’ “The most natural reading of this definition encompasses public carry.

The meaning of the term “bear Arms” is even more evident when read in the context of the phrase “right ... to keep and bear Arms.” “To speak of ‘bearing’ arms solely within one’s home ... would conflate ‘bearing’ with ‘keeping,’ in derogation of [[*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s] holding that the verbs codified distinct rights.” . . .

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[A]lthough England may have limited the right to carry in the 14th century, by the time of the founding, the English right was “an individual right protecting against both *public* and private violence.”  And for purposes of discerning the original meaning of the Second Amendment, it is this founding era understanding that is most pertinent.

Founding era legal commentators in America also understood the Second Amendment right to “bear Arms” to encompass the right to carry in public.

St. George Tucker, in his 1803 American edition of Blackstone’s Commentaries, explained that the right to armed self-defense is the “first law of nature.” . . . Tucker makes clear that bearing arms in public was common practice at the founding: “In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.”

Similarly, William Rawle, a member of the Pennsylvania Assembly that ratified the Bill of Rights, acknowledged the right to carry arms in public. Rawle noted that the right should not “be abused to the disturbance of the public peace” and explained that if a man carried arms “attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them,” he may be required “to give surety of the peace.” But his general understanding appeared to mirror . . . the English right—public carry was permitted so long as it was not done to terrify.

. . . .This view persisted in the early years of the Republic. The majority of the relevant cases during the antebellum period—many of which [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))relied on—support the understanding that the phrase “bear Arms” includes the right to carry in public.

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Finally, in the wake of the Civil War, “there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves.”  These discussions confirm that the Second Amendment right to bear arms was understood to protect public carry at the time the Fourteenth Amendment was ratified.

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The importance of the right to carry arms in public during Reconstruction and thereafter cannot be overstated. “The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence.”  And, unfortunately, “[w]ithout federal enforcement of the inalienable right to keep and bear arms, ... militias and mobs were tragically successful in waging a campaign of terror” against Southern blacksOn this record, it is clear that “the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms” encompassed the right to carry arms in public for self-defense.

In short, the text of the Second Amendment and the history from England, the founding era, the antebellum period, and Reconstruction leave no doubt that the right to “bear Arms” includes the individual right to carry in public in some manner.

Recognizing that the Constitution protects the right to carry arms in public does not mean that there is a “right to ... carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”  “The protections enumerated in the Second Amendment ... are not absolute prohibitions against government regulation.”  States can impose restrictions on an individual’s right to bear arms that are consistent with historical limitations. “Some laws, however, broadly divest an individual of his Second Amendment rights” altogether. [*Ibid.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039250554&pubNum=0000708&originatingDoc=Ibc7d6c1e831111ea80afece799150095&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))This case gives us the ideal opportunity to at least begin analyzing which restrictions are consistent with the historical scope of the right to bear arms.

It appears that a handful of States throughout the country prohibit citizens from carrying arms in public unless they can establish “good cause” or a “justifiable need” for doing so. The majority of States, while regulating the carrying of arms to varying degrees, have not imposed such a restriction, which amounts to a “[b]a[n] on the ability of most citizens to exercise an enumerated right.”  The Courts of Appeals are squarely divided on the constitutionality of these onerous “justifiable need” or “good cause” restrictions. The D. C. Circuit has held that a law limiting public carry to those with a “good reason to fear injury to [their] person or property” violates the Second Amendment.  By contrast, the First, Second, Third, and Fourth Circuits have upheld the constitutionality of licensing schemes with “justifiable need” or “good reason” requirements, applying what purported to be an intermediate scrutiny standard. .

“One of this Court’s primary functions is to resolve ‘important matter[s]’ on which the courts of appeals are ‘in conflict.’ ”  The question whether a State can effectively ban most citizens from exercising their fundamental right to bear arms surely qualifies as such a matter. We should settle the conflict among the lower courts so that the fundamental protections set forth in our Constitution are applied equally to all citizens.

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