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Repository Citation

Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?*, 23 Wm. & Mary Bill Rts. J. 1143 (2015), <http://scholarship.law.wm.edu/wmborj/vol23/iss4/6>

THE SECOND AMENDMENT IN THE TWENTY-FIRST CENTURY: WHAT HATH *HELLER* WROUGHT?

Patrick J. Charles*

On May 4, 2013, before the National Rifle Association's (NRA) annual convention, Texas Senator Ted Cruz defined the Second Amendment in absolutist terms, stating, "[W]hen the Constitution says the right of the people to keep and bear arms shall not be infringed, it means that right shall not be infringed."¹ Cruz then promised that he, along with fellow Tea Party Conservatives Kentucky Senator Rand Paul and Utah Senator Mike Lee, would make sure to "filibuster any legislation that undermines the Bill of Rights or the Second Amendment right to keep and bear arms."² In the wake of the landmark Supreme Court decision *District of Columbia v. Heller*,³ Second Amendment rhetoric like this has become commonplace. Indeed, well before *Heller* was decided there were some that expressed the Second Amendment in such absolutist terms,⁴ but it was merely a political subset of the larger debate that was taking place—whether the right to keep and bear arms was individual or collective in nature.⁵

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¹ Nat'l Rifle Ass'n, *Ted Cruz at National Rifle Association Convention*, YOUTUBE (May 4, 2013), at 1:15-1:28, <https://www.youtube.com/watch?v=dFLUzObt2a0> (excerpt from Ted Cruz's speech before the 2013 National Rifle Association Convention).

² *Id.* at 9:07-9:13.

³ 554 U.S. 570 (2008).

⁴ See, e.g., Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151, 160-62 (1986); see also Larry Pratt, *Interview With Larry Pratt, Executive Director, Gun Owners of America*, 6 GEO. PUB. POL'Y REV. 37, 39 (2000) ("Any restriction that has to be applied to people that have broken no law is an unconstitutional infringement. It is unreasonable to violate the Constitution. If you can find a way to keep criminals from having guns that has no impact on the rest of us, then that's fine. But so far, there has been no gun control proposal that anybody's ever thought of that would apply to anybody except us, while the criminal thumbs his nose at those laws.").

⁵ For the historiography of the individual versus collective rights debate, see Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000); Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*,

With *Heller* having answered the question jurisprudentially by placing the right to keep and bear arms alongside other individual rights, the discourse has now shifted towards the Second Amendment's proper place in American society, and there is no shortage of viewpoints.⁶ The consequential influence Supreme Court opinions can have on the public discourse is nothing new.⁷ Whenever the Court issues an opinion a sequence of events begins. It generally starts with journalists and the public at large offering a wide array of reactions to the opinion. At the same time, politicians and the heads of political organizations either herald or denounce the opinion dependent upon their respective ideological views, which can be heightened whenever the justices are perceived to have let their alleged liberal or conservative bias dictate the outcome.⁸ Then enter the legal experts and scholars. They examine the Court's rationale and speak out on both the legitimacy of the Court's reasoning as well as what, if any, effects the opinion will have on other legal matters.⁹ While all of this is taking place, legal modifications are being made at the federal, state, and municipal levels of government. Laws, ordinances, and regulations seen as being in direct violation of the Court's opinion are suspended, repealed, or amended.¹⁰ In those instances where

39 FORDHAM URB. L.J. 1727, 1765–66 (2012). For accounts by Standard Model Second Amendment scholars as to why the collective rights approach was wrong, see David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315 (2011); Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211 (2009).

⁶ For a historical summary of Second Amendment politics from the mid-twentieth century until *Heller*, see ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 230–58 (2011); Jill Lepore, *Battleground America: One Nation, Under the Gun*, NEW YORKER (Apr. 23, 2012), <http://www.newyorker.com/magazine/2012/04/23/battleground-America>.

⁷ See, e.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); see also LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 9–33, 299–312 (1992); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299 (1998).

⁸ Compare Robert A. Levy, *Looking Ahead to Heller's New Paradigm*, CATO UNBOUND (July 22, 2008), <http://www.cato-unbound.org/2008/07/22/robert-levy/looking-ahead-hellers-new-paradigm>, with Dennis A. Henigan, *The Heller Paradox: A Response to Robert Levy*, CATO UNBOUND (July 16, 2008), <http://www.cato-unbound.org/2008/07/16/dennis-henigan/heller-paradox-response-robert-levy>. See also Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

⁹ Compare J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009), with Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127 (2009). See also Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)?: Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009).

¹⁰ For an example, see VERONICA ROSE, CONN. GEN. ASSEMB., OFFICE OF LEGAL REVIEW, OLR Backgrounder: State Gun Laws After *Heller* and *McDonald*, Conn. Gen. Assemb. 2010-R-0455 (Dec. 6, 2010), available at <http://www.cga.ct.gov/2010/rpt/2010-R-0455.htm>. In the case of *Heller*, the impact has been marginal. See Anna Stolley Persky, *An Unsteady*

federal, state, or municipal governments do not act accordingly, the law, ordinance, or regulation is subsequently challenged as noncompliant with Court precedent.¹¹ It is at this juncture that the full impact of a Supreme Court opinion takes hold.¹²

Of course, this is a very generalized rationalization as to what transpires after the Supreme Court issues an opinion. It does not take into account other variables that can either amplify or diminish its impact, such as the nature of the case before the Court, whether the case involves the scope of governmental power or individual rights, and whether there is a large body of precedent addressing the subject. In the case of *Heller*, as this Article sets forth to show, it is fair to say that the impact on American culture and society has been substantial. Although *Heller* merely acknowledged the right to possess a handgun for armed self-defense in the home, the opinion, and its companion case incorporating the right to the states, *McDonald v. City of Chicago*,¹³ have succeeded in shifting the discourse away from the Second Amendment meaning to its scope and place within the spectrum of other constitutional rights.¹⁴

It is a discourse that this Article will break down into two categories: (1) the right's impact on politics and lawmaking or what may otherwise be described as the political discourse and (2) the right's impact on the opinions of society at large or what may otherwise be described as the public discourse. In many respects the two categories are intertwined. For instance, political rhetoric and debate often influence society's view of what is and is not lawful.¹⁵ As Yale University law professor Reva B. Siegal

Finger on Gun Control Laws: Despite 2nd Amendment Cases, Firearms Codes Are Moving Targets, 96-DEC A.B.A. J. 14, 14 (2010). For an alternate view, see Gary Kleck, *Gun Control After Heller and McDonald: What Cannot Be Done and What Ought to Be Done*, 39 FORDHAM URB. L.J. 1383 (2012).

¹¹ Right after the *Heller* opinion was handed down there were a number of challenges to gun control regulations. See Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1565–68 (2009).

¹² Arguably, part of this cycle is the public discourse the Supreme Court itself facilitates. See Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013); Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996). For the argument that Supreme Court opinions bring about relatively little social change, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

¹³ 561 U.S. 742 (2010).

¹⁴ For some examples, see Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: "Historical Guideposts" and the Missing Arguments in McDonald v. Chicago*, 2 AKRON J. CONST. L. & POL'Y 7 (2010) [hereinafter Charles, *The Second Amendment Standard of Review After McDonald*]; Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 FORDHAM URB. L.J. 1617 (2012) [hereinafter Lund, *Second Amendment Standards*]; Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437 (2011).

¹⁵ This was what arguably influenced the Supreme Court's decision in *Heller*. See Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F.

has persuasively outlined, the societal politics of gun control and the larger public debate over gun rights was a strong contributing factor to *Heller*'s outcome. "The shape of the right *Heller* protects demonstrates how a judicial decision claiming original authority may nonetheless employ practices of responsive interpretation associated with democratic constitutionalism," writes Siegal, and "it illustrates how constitutional politics can guide and discipline judicial review."¹⁶ At the same time, whatever the judiciary identifies as constitutionally protected impacts society's perception of historic custom and tradition, regardless of whether it is built on historical fact or historical myth.¹⁷ To borrow from historian David Thomas Konig:

[O]nce a court uses the past as a foundation for an opinion, the court redefines the meaning of the past and gives a new, expanded use for that past to a court with a much broader jurisdiction—the court of public opinion, whose black letter law is the dreaded conventional wisdom.¹⁸

Still, despite the substantial overlap between Supreme Court opinions and the political and public discourse, it is worth exploring the two categories separately. It is only then one can truly assess the impact *Heller* has had on American society as a whole.

I. *HELLER*'S IMPACT ON THE POLITICAL DISCOURSE

Since the mid-twentieth century, the impact the Supreme Court can have on political discourse has been a subject of great interest among social scientists, political theorists, historians, and legal theorists alike. Among the different professions there is general agreement that the Court operates as a quasi-policy-making institution whenever it delivers an opinion.¹⁹ This is because Court opinions confer legitimacy upon the basic patterns of behavior required for the operation of a democracy.²⁰ But the impact of each and every opinion is not always the same.²¹ Just because the Court

108 (2011); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

¹⁶ Siegel, *supra* note 15, at 243.

¹⁷ William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227–28 (1988) ("The [] Supreme Court is the only institution in human experience that has the power to *declare* history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding.").

¹⁸ David Thomas Konig, *Heller, Guns, and History: The Judicial Invention of Tradition*, 3 NORTHEASTERN U. L.J. 175, 177–78 (2011).

¹⁹ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 295 (1957).

²⁰ *Id.*

²¹ See, e.g., STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT:

recognizes a constitutional right does not necessarily mean that politicians will openly embrace it or advocate for the right's expansion.

A fitting example is the Court's 1973 opinion in *Roe v. Wade*,²² where a 7–2 majority ruled the right to privacy under the Fourteenth Amendment's Due Process Clause protects a woman's decision to have an abortion.²³ Instead of shifting the debate from whether a woman's decision to have an abortion is constitutionally protected to the scope of the right, *Roe* has escalated and polarized the political discourse over abortions.²⁴ For over forty years conservatives and pro-life organizations have contested the legitimacy of *Roe* by exerting their efforts to undercut a woman's ability to have an abortion.²⁵ In fact, for the most recent 2014 midterm elections the Republican National Committee (RNC) issued a resolution that directly affronts *Roe*.²⁶ According to the RNC, all Republicans should be "proud to stand up for the rights of the unborn and believe all Americans have an unalienable right to life as stated in The Declaration of Independence."²⁷ To those Republicans that "stay silent" in the face of the "War on Women" rhetoric, the RNC declared it will not support their candidacy.²⁸

This type of anti-*Roe* rhetoric was also center stage the year *Heller* was decided. The 2008 Republican Platform declared, "We support a human life amendment to the Constitution, and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."²⁹ Yet at the same time the Republican Platform heralded the *Heller* decision, declaring, "We applaud the Supreme Court's

SOME PERSPECTIVES (1970); STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 283–86 (2d ed. 1984).

²² 410 U.S. 113 (1973).

²³ *Id.*

²⁴ EPSTEIN & KOBYLKA, *supra* note 7, at 303–10.

²⁵ This included a 2013 bill passed by House Republicans that would have banned any abortions at twenty weeks, despite *Roe*'s stipulation that abortions may be performed up to twenty-four weeks. See Aaron Blake, *House Committee Approves Ban on Abortions After 20 Weeks*, WASH. POST (June 12, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/12/house-committee-approves-ban-on-abortions-after-20-weeks/>; Juliet Eilperin, *The House Abortion Bill Likely Won't Make it Into Law. But it Still Matters*, WASH. POST (June 18, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/18/the-house-abortion-bill-likely-wont-make-it-into-law-but-it-still-matters/>. For a recent scholarly exploration of *Roe* and its political backlash, see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

²⁶ REPUBLICAN NAT'L COMM., RESOLUTION ON REPUBLICAN PRO-LIFE STRATEGY (Jan. 24, 2014), <https://cdn.gop.com/docs/RESOLUTION-ON-REPUBLICAN-PRO-LIFE-STRATEGY.pdf>.

²⁷ *Id.*

²⁸ Peter Hamby, *First on CNN: GOP Urges Candidates to Stand Ground on Abortion*, CNN POLITICS (Jan. 21, 2014), <http://politicalticker.blogs.cnn.com/2014/01/21/first-on-cnn-gop-urges-candidates-to-stand-ground-on-abortion/>.

²⁹ REPUBLICAN NAT'L CONVENTION, 2008 REPUBLICAN PLATFORM 52, <http://www.gop.com/wp-content/uploads/2012/06/2008platform.pdf>.

decision in *Heller* affirming [the right of Americans to own firearms], and we . . . call on the next president to appoint judges who will similarly respect the Constitution.”³⁰

The RNC’s differing approach to *Roe* and *Heller* continued into the 2012 elections. While the RNC’s language pertaining to *Roe* was unaltered, their support for *Heller* reached new heights:

We uphold the right of individuals to keep and bear arms, a right which antedated the Constitution and was solemnly confirmed by the Second Amendment. We acknowledge, support, and defend the law-abiding citizen’s God-given right of self-defense. We call for the protection of such fundamental individual rights recognized in the Supreme Court’s decisions in *District of Columbia v. Heller* and *McDonald v. Chicago* affirming that right, and we recognize the individual responsibility to safely use and store firearms. This also includes the right to obtain and store ammunition without registration. We support the fundamental right to self-defense wherever a law-abiding citizen has a legal right to be, and we support federal legislation that would expand the exercise of that right by allowing those with state-issued carry permits to carry firearms in any state that issues such permits to its own residents. Gun ownership is responsible citizenship, enabling Americans to defend their homes and communities. We condemn frivolous lawsuits against gun manufacturers and oppose federal licensing or registration of law-abiding gun owners. We oppose legislation that is intended to restrict our Second Amendment rights by limiting the capacity of clips or magazines or otherwise restoring the ill-considered Clinton gun ban.³¹

The RNC’s open and avowed support for Second Amendment rights is interesting given the constitutional double standard it represents. Republicans see it as their constitutional duty to limit or prevent abortions, yet as it pertains to the Second Amendment, Republicans perceive *Heller* as enshrining a constitutional absolute in which firearms should be subject to little, if any, regulation. *Heller* indeed only conceptualized the right to armed self-defense in the home with a handgun,³² but through

³⁰ *Id.* at 51. It is worth noting that the 2004 Republican Party Platform also endorsed an “individual right to own guns . . . in their homes for self-defense.” REPUBLICAN NAT’L CONVENTION, 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 72, http://www.presidency.ucsb.edu/papers_pdf/25850.pdf.

³¹ REPUBLICAN NAT’L CONVENTION, 2012 REPUBLICAN PLATFORM 13, http://www.presidency.ucsb.edu/papers_pdf/101961.pdf.

³² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

the RNC's 2012 Platform, Republicans have chosen to place the Second Amendment on a pedestal above other constitutional rights.³³

Certainly for a political party to pick and choose which constitutional doctrines deserve national recognition or extra protection is nothing new in the pantheon of American history. What is interesting in the case of the Second Amendment is that both major political parties—Republicans and Democrats alike—embraced the right to keep and bear arms openly. For throughout the same election cycles, Democrats acknowledged that the Second Amendment enshrined a right to own firearms but with the condition that it be subject to reasonable firearm regulations, such as keeping firearms out of the hands of criminals and making background checks universal.³⁴ If one actually compares the 2004 Democratic Platform to its Republican counterpart, it becomes clear that the two political parties were not all that different. Even the 2004 Republican Platform supported legislation that kept firearms out of the hands of criminals and dangerous persons.³⁵ As Andrew J. McClurg has detailed, from 1976 to 2004 both Democrats and Republicans supported a number of gun control measures, to include purchasing waiting periods, background checks, assault weapon bans, and enhanced punishments for crimes committed with firearms.³⁶

It was not until after *Heller* that the two political parties diverged on firearm regulation. While the Democratic Party continued to support reasonable firearm regulations,³⁷ the Republican Party shifted political gears and abandoned its support for enhanced background checks. In its place, Republicans started opposing enhanced background checks on the grounds that it would serve as a gun registry.³⁸ Furthermore, Republicans started touting the NRA's bottom line to obtain political endorsements, which included supporting the belief that all forms of gun control either penalize "law-abiding citizens" or are "ineffective" at reducing crime.³⁹ Even Arizona Senator John McCain, who had supported expanding background checks in previous election

³³ See REPUBLICAN NAT'L CONVENTION, 2012 REPUBLICAN PLATFORM, *supra* note 31, at 13. For a more in depth constitutional discussion on abortions, gun control, and the Second Amendment, see James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights With Responsibilities and Regulation*, 94 B.U. L. REV. 849, 865–68 (2014).

³⁴ Democratic Nat'l Convention, 2004 DEMOCRATIC NATIONAL PLATFORM: STRONG AT HOME, RESPECTED IN THE WORLD 18, http://www.presidency.ucsb.edu/papers_pdf/29613.pdf.

³⁵ REPUBLICAN NAT'L CONVENTION, 2004 REPUBLICAN PLATFORM, *supra* note 30, at 72–73.

³⁶ See Andrew J. McClurg, *Sound-Bite Gun Fights: Three Decades of Presidential Debating About Firearms*, 73 UMKC L. REV. 1015, 1042–45 (2005).

³⁷ DEMOCRATIC NAT'L CONVENTION, 2008 DEMOCRATIC PARTY PLATFORM 48, http://www.presidency.ucsb.edu/papers_pdf/78283.pdf.

³⁸ Compare McClurg, *supra* note 36, at 1030–41 (showing President George W. Bush's support for some forms of gun control), with REPUBLICAN NAT'L CONVENTION, 2008 REPUBLICAN PLATFORM, *supra* note 29, at 51.

³⁹ REPUBLICAN NAT'L CONVENTION, 2008 REPUBLICAN PLATFORM, *supra* note 29, at 51; WINKLER, *supra* note 6, at 68.

cycles, made sure to curtail his political stance upon winning the 2008 Republican presidential primary.⁴⁰

The political gap between Republicans and Democrats concerning gun control carried over into the 2012 elections. While the Republican Platform continued to denounce all forms of gun control, the Democratic Platform stayed true to its pledge of improving the nation's firearm laws in the interests of public safety, declaring:

We believe that the right to own firearms is subject to reasonable regulation. We understand the terrible consequences of gun violence; it serves as a reminder that life is fragile, and our time here is limited and precious. We believe in an honest, open national conversation about firearms. We can focus on effective enforcement of existing laws, especially strengthening our background check system, and we can work together to enact commonsense improvements—like reinstating the assault weapons ban and closing the gun show loophole—so that guns do not fall into the hands of those irresponsible, law-breaking few.⁴¹

Given the Republican and Democratic parties divergent views on gun control, it should come as no surprise that gun advocacy groups have contributed substantially more to the campaigns of Republicans in recent years. In the 2012 elections alone, it is estimated that the NRA contributed more than 18 million dollars, with the overwhelming majority going to the campaigns of individual Republican candidates, and aimed at defeating President Barack H. Obama's campaign for a second term.⁴² But monetary contributions cut both ways. Michael Bloomberg's Super PAC, well known to support gun control, also contributed a significant monetary sum to the 2012 elections.⁴³ Still, it is worth noting that gun advocacy groups outspent gun control groups by a ratio of 7 to 1 during the 2012 elections, and gun advocacy groups

⁴⁰ See Elisabeth Bumiller, *Courting N.R.A., McCain Criticizes Obama and Clinton on Gun Control*, N.Y. TIMES (May 17, 2008), http://www.nytimes.com/2008/05/17/us/politics/17mccain.html?_r=0; John McCain & Chris W. Cox, *An Exclusive Interview with John McCain*, NRA-ILA NEWS & ISSUES (May 16, 2008), <http://www.nraila.org/news-issues/articles/2008/an-exclusive-interview-with-john-mccain.aspx>.

⁴¹ DEMOCRATIC NAT'L CONVENTION, 2012 DEMOCRATIC NATIONAL PLATFORM 53, available at http://www.presidency.ucsb.edu/papers_pdf/101962.pdf.

⁴² Wilson Andrews et al., *How the NRA Exerts Influence Over Congress*, WASH. POST (Jan. 15, 2013), [http://sunlightfoundation.com/blog/2012/12/17/gun-spending/](http://www.washingtonpost.com/wp-srv/special/politics/nra-congress/(mapping NRA donations to congressional candidates); Lee Drutman, Explaining the Power of the National Rifle Association, in One Graph, SUNLIGHT FOUNDATION (Dec. 17, 2012), <a href=).

⁴³ Fredreka Schouten, *Bloomberg Put \$10 Million into Super PAC for 2012 Election*, USA TODAY (Jan. 31, 2013, 8:09 PM), <http://www.usatoday.com/story/news/politics/2013/01/31/bloomberg-nra-political-spending/1881721/>.

have a long history of accomplishing similar feats in prior election cycles, meaning that gun advocacy groups have long maintained the upper hand when it comes to influencing firearm policy.⁴⁴

However, in a post-*Heller* world, monetary contributions alone cannot account for the growing ideological gap between Democrats and Republicans. There are larger political, local, and cultural forces at play, such as the fact that Democrats generally represent the historic North and jurisdictions with the most densely populated urban centers, while Republicans generally represent the historic South and rural areas.⁴⁵ As Duke University law professor Joseph Blocher informs us, this firearm localism is somewhat helpful in explaining the growing political divide over gun rights and gun control:

Americans in cities are, and apparently always have been, less likely to own, use, or approve of guns than those in rural areas. City-dwellers are victimized by gun crime at much higher rates, and are far more likely to support stringent gun control. Rural residents, by contrast, are more likely to grow up with guns, to have positive role models with regard to their responsible use, and to oppose gun control.⁴⁶

Considering that 83.7% of the 2010 United States population resided in the nation's 366 metro areas, as compared to the 16.3% that resided elsewhere, one might assume the former's position on gun control would always trump the latter's position on gun rights.⁴⁷ This assumption is not true, especially if one takes into account the fact that the historic South has nearly the same population as the historic North and Midwest combined.⁴⁸ Then there is the matter of population growth within the South's major cities as compared to the North's. While the southern cities of Dallas, Houston, and Atlanta all grew at a rate of 23% or more from 2000 to 2010, none of the northern cities known for strict firearm regulations such as New York, Chicago, and Boston surpassed 4% growth.⁴⁹ Needless to say, delineating those geographic portions that support gun rights, as opposed to gun control, is much more difficult than it seems.

⁴⁴ See HARRY L. WILSON, GUNS, GUN CONTROL, AND ELECTIONS: THE POLITICS AND POLICY OF FIREARMS 141–78 (2007); Suevon Lee, *By the Numbers: Comparing Spending by Gun Rights and Gun Control Interest Groups*, DENV. POST (Dec. 31, 2012, 1:42 PM), http://www.denverpost.com/commented/ci_22288036.

⁴⁵ Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, THE ATLANTIC (Nov. 30, 2012), <http://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/>.

⁴⁶ Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 91 (2013).

⁴⁷ Paul Mackun & Steve Wilson, *Population Distribution and Change: 2000 to 2010*, at 4, in U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 6.

A useful illustration is the 2013 recall elections of Colorado Senators John Morse and Angela Giron, both of whom voted for tougher firearm restrictions in the wake of the Aurora, Colorado and Newtown, Connecticut shootings.⁵⁰ Despite the public opinion polls showing statewide opposition to the recall efforts, overwhelming support for firearm background checks, and the majority support for bans on high capacity magazines,⁵¹ gun advocacy organizations were successful in rousing their political base to recall Morse and Giron.⁵²

In terms of the purpose behind the recall, the petition of Morse is telling as to how divisive the subject of gun rights has become in a post-*Heller* world:

Senator John Morse . . . has failed to represent the interests of his constituents and has taken direction from national organizations that do not represent the values and liberties of Colorado citizens. . . .

He proposed legislation that shifted liability to firearms manufacturers and gun owners from violent criminals where it rightfully belonged. His legislation was drafted with significant input from the Brady Campaign, which attempts to subvert the Second Amendment rights of citizens. He has limited public debate in the Senate and thereby minimized the opinions of Colorado citizens but permitted celebrities from other states to express their opinions on Colorado bills.⁵³

From a political standpoint, the hypocritical nature of the petition is worth noting, for the petition accused gun control organizations of intervening in state and local politics as well as violating the Second Amendment rights of Coloradans, yet failed to mention—nor did it have any problem with—the intervention in state and local politics

⁵⁰ John Mariani, *Colorado Voters Recall Two Senators Who Helped Pass Tougher Gun Control Law*, SYRACUSE.COM (Sept. 11, 2013), http://www.syracuse.com/news/index.ssf/2013/09/colorado_voters_recall_two_senators_who_helped_pass_tougher_gun_control_law.html.

⁵¹ Tim Malloy, *Colorado Voters Oppose Recall Effort by Wide Margin, Quinnipiac University Poll Finds*, QUINNIPIAC U. POLLING INST. (Aug. 22, 2013), <http://www.quinnipiac.edu/images/polling/co/co08222013.pdf>.

⁵² See Don Gonyea, *6 Lessons From the Colorado Gun Wars*, NPR (Sept. 12, 2013), <http://www.npr.org/2013/09/12/221821893/lessons-from-bloomberg-nra-gun-law-proxy-war-in-colorado>; *Second Amendment Rights Prevail in Colorado*, NRA-ILA (Sept. 10, 2013), <http://www.nra-ila.org/news-issues/news-from-nra-ila/2013/9/second-amendment-rights-prevail-in-colorado-1>. It should be noted that it has been hypothesized that election turnout is a factor that makes gun advocacy organizations so formidable. The same cannot be said of those who support gun control. See, e.g., KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* (2006).

⁵³ OFFICIAL BALLOT FOR EL PASO COUNTY, COLORADO STATE DISTRICT 11 RECALL ELECTION (Sept. 10, 2013), available at <http://i.i.cbsi.com/cnwk.1d/i/tim2/2013/09/10/image003.jpg>.

by gun advocacy groups.⁵⁴ One such group was the NRA. In a pro-recall advertisement, the NRA asserted that firearm restrictions like Colorado's endanger the lives of law-abiding citizens.⁵⁵ The rationale being that more firearms in the hands of citizens serves as a "last line of defense" in both private and public, and also ensures that "legal carriers" can back law enforcement "if need be."⁵⁶ The NRA advertisement then blamed outside interests for putting forth a disarmament "agenda" and attempting to change Colorado's "society of hunters [in] the West."⁵⁷

During the 2014 midterm election cycle, Second Amendment politics only became more divisive or, some might argue, polarizing. In a fundraising letter for the National Association for Gun Rights (NAGR), endorsed by Kentucky Senator Rand Paul, the association claimed that President Obama was part of a conspiracy to confiscate guns.⁵⁸ To emphasize the point, the outside envelope misquoted President Obama as stating, "In the coming weeks, I will use whatever power this office holds [to ban guns]."⁵⁹ However, President Obama's actual quote neither stipulated or inferred an agenda to ban firearms, nor has the president ever stated anything of the like.⁶⁰ Still, gun advocacy groups continued to espouse this false dichotomy as a means to rouse their political base and obtain campaign funding.

Take for instance an editorial published in *American Rifleman* by NRA President Wayne LaPierre, which contended that the 2014 midterm elections will decide whether the right to keep and bear arms is preserved for future generations.⁶¹ "Right now, President Obama is on the verge of putting together a royal flush," wrote LaPierre, "an unbeatable, winner-takes-all hand in poker—in his drive to 'transform' American society

⁵⁴ *Id.*

⁵⁵ Ginny Simone, *Colorado Gun Law Recall: Your Voice, Your Vote, Our Freedoms*, NRA NEWS, <http://nranews.com/ginny/video/colorado-gun-law-recall-your-voice-your-vote-our-freedoms> (last visited May 1, 2015).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ David Weigel, *Read One of the Fundraising Letters Rand Paul is Sending on Behalf of a U.N.-Skeptical Gun Rights Group*, SLATE (Apr. 3, 2013, 4:31 PM), http://www.slate.com/blogs/weigel/2013/04/03/read_one_of_the_fundraising_letters_rand_paul_is_sending_on_behalf_of_a.html.

⁵⁹ Tiffany Willis, *Gun Rights Letter from Rand Paul Has Shocking Lie and Obama Misquote*, LIBERAL AMERICA (May 9, 2014), <http://www.liberalamerica.org/2014/05/09/gun-rights-letter-from-rand-paul-has-shocking-lie-and-obama-misquote/>; see also Mike Weisser, *The Real Story Behind Rand Paul's Gun Lobbying Letter*, HUFFINGTON POST (May 12, 2014, 7:45 AM), http://www.huffingtonpost.com/mike-weisser/rand-paul-nagr-guns_b_5307515.html.

⁶⁰ See generally OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, REMARKS BY THE PRESIDENT AT SANDY HOOK INTERFAITH PRAYER VIGIL (Dec. 16, 2012, 8:37 PM), available at <http://www.whitehouse.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil> ("In the coming weeks, I will use whatever power this office holds to engage my fellow citizens . . . in an effort aimed at preventing more tragedies like this."); Willis, *supra* note 59.

⁶¹ Wayne LaPierre, *The Only Truth Obama Fears*, 162 AM. RIFLEMAN 48, 50 (Feb. 2014), available at <http://www.qmrc.org/hello-to-you/2014---01---february---rm.pdf>.

by disarming the American people.”⁶² On par with the tactics employed by the NAGR, LaPierre claimed the Obama administration was seeking to implement a political conspiracy to take away the people’s firearms. In LaPierre’s mind, it was a conspiracy that’s been “unfolding for five years,” all with the purpose of fundamentally transforming “American values and virtues we were taught—individual rights, personal responsibility, the right to own a firearm for the protection of self, family and freedom—by making those ideas seem outdated, abnormal or wrong.”⁶³

LaPierre’s connection of firearm ownership to American values was not momentary rhetoric; it was a highly calculated statement with the intent of rousing the conservative base—a base that views the Obama Administration as implementing a liberal agenda to the detriment of conservative values. In a speech before the 2014 Conservative Political Action Committee (CPAC), LaPierre asked the audience: “Do you trust this government to protect you?”⁶⁴ After some audience members shouted in the negative, LaPierre responded, stating: “We are on our own—that is a certainty. No less certain than the absolute truth . . . that when you’re on your own, the surest way to stop a bad guy with a gun is a good guy with a gun.”⁶⁵ In other words, LaPierre does not believe that a well-regulated government protects liberty; armed citizens do because they are the last line of defense.

It is a view of American society that LaPierre somehow perceives as being on par with the founding generation. In the words of LaPierre, twenty-first century gunowners are “exactly what our Founding Fathers were and envisioned us to always be.”⁶⁶ Although it is quite common for politicians and advocacy groups to proclaim that the Americans of today are one and the same with their late-eighteenth-century ancestors, this is an impossibility. This type of false historical parallel takes place because people are often seeking to validate the actions of the present through the tradition of the past, and people perceive themselves to be walking in the footsteps of the Founding Fathers. But the United States of today is nothing like that which our forebearers envisioned or witnessed develop during the late eighteenth through the early nineteenth century. At that time, social mobility and economic opportunities were limited.⁶⁷ The nation was agriculturally driven and most people were uneducated.⁶⁸ Furthermore,

⁶² *Id.*

⁶³ *Id.* at 50, 51.

⁶⁴ Am. Conservative Union, *CPAC 2014—Wayne LaPierre, National Rifle Association*, YOUTUBE (Mar. 6, 2014), at 11:45–11:48, <http://www.youtube.com/watch?v=AsBMuZrcdD> (excerpt from LaPierre’s speech).

⁶⁵ *Id.* at 11:48–12:19.

⁶⁶ *Id.* at 14:02–14:12.

⁶⁷ For the social development of the American colonies in the eighteenth century, see generally JACK P. GREENE, *PURSUIITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE* 66–68, 90–91, 125–27, 144–45, 187–88 (1988).

⁶⁸ For a classic study, see generally BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* (1960).

the majority of the population lived great distances from cities, urban centers, or coastal towns.⁶⁹ This situation no longer presents itself today given that agriculture is now technologically driven, with only a small portion of the population working in agriculture and the overwhelming majority residing in cities and urban areas.⁷⁰

For LaPierre or anyone to believe there is some unbroken chain of custom or tradition from the late eighteenth-century to the present is what historians refer to as a “Whiggish” understanding of the past. The fact of the matter is that all societies change and evolve dependent upon a variety of factors. This includes American attitudes and beliefs pertaining to armed individual self-defense. To be sure, the Second Amendment being advanced by LaPierre and the NRA does not at all resemble that of our forebearers.⁷¹ Whether the Second Amendment is being conceptualized in militia-oriented or armed individual self-defense terms, the narrative being advanced by LaPierre and gun advocacy groups does not pass historical muster.⁷² To the founding generation, matters pertaining to arms and ammunition were a regulated enterprise in the interest of the public good.⁷³ This included regulations covering everything from the storage of gunpowder, to the mustering and training of the militia, to the carrying of dangerous arms in public.⁷⁴ Needless to say, modern conceptions of “bearing

⁶⁹ See GREENE, *supra* note 67, at 66, 90.

⁷⁰ CAROLYN DIMITRI ET AL., U.S. DEPT. AGRIC., *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2–3* (June 2005).

⁷¹ See generally Charles, *The Second Amendment in Historiographical Crisis*, *supra* note 5, at 1733–91 (discussing the historical problems associated with the Standard Model view of the Second Amendment).

⁷² See, e.g., Patrick J. Charles, *The Second Amendment and Militia Rights: Distinguishing Standard Model Legal Theory from the Historical Record*, 40 *FORDHAM URB. L.J. CITY SQUARE* 1 (2013); Patrick J. Charles, *The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy*, 41 *FORDHAM URB. L.J. CITY SQUARE* 10 (2013) [hereinafter Charles, *Statute of Northampton*].

⁷³ See, e.g., Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 *NW. U. L. REV.* 1821 (2011) [hereinafter Charles, *Scribble Scrabble*]; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487 (2004). For a counterargument asserting firearms were not highly regulated in the late eighteenth-century, see generally Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 *L. & HIST. REV.* 139 (2007). But see Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 *L. & HIST. REV.* 197 (2007) (rebutting Churchill’s thesis); David Thomas Konig, *Arms and the Man: What Did the Right to “Keep” Arms Mean in the Early Republic?*, 25 *L. & HIST. REV.* 177 (2007) (same).

⁷⁴ See, e.g., Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: “Historical Guideposts” and the Missing Arguments in McDonald v. City of Chicago*, 2 *AKRON J. CONST. L. & POL’Y* 7, 23–26 (2010) [hereinafter Charles, *Historical Guideposts*]. For a detailed history of the right to keep and bear arms in a well-regulated militia discussed in this paragraph, see generally Patrick J. Charles, *The Constitutional Significance of a “Well-Regulated Militia” Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*,

arms” are rather far removed from the late eighteenth-century, and this is not even considering the increased social costs associated with modern weaponry as compared to their historical ancestors.⁷⁵

The reality is the “American values and virtues”⁷⁶ that LaPierre holds dear, particularly the bundle of rights LaPierre associates with firearm ownership, are nothing more than twenty-first century conservative values. In a pre-*Heller* world, when gun advocacy groups or individuals espoused this line of rhetoric, it was common for the public at large to be dismissive or categorize it as merely the views of an extreme insular minority.⁷⁷ But in a post-*Heller* world, given that the Supreme Court primarily relied on historical sources to hold that the Second Amendment protects an individual right, this rhetoric now retains political teeth. No longer can politicians discuss, propose, enact, or implement regulations on firearms without the Second Amendment entering the fold. This was no more visible than the political response to the congressional attempt to strengthen background checks in the wake of the mass shootings in Aurora, Colorado and Newtown, Connecticut.⁷⁸ Despite broad national support for a bill that would have expanded background checks to gun shows, private dealers, and online sales, the legislation could not overcome a Senate filibuster because a number of politicians were concerned over reelection in “pro-gun” districts.⁷⁹ Democrats, by and large, supported expanding firearm background checks, with 50 of 53 Democrat Senators voting in favor of the bill, while Republicans rejected the bill, with 41 of 45 voting against it.⁸⁰

As outlined earlier in this Article, this political divide is not all that surprising given the ideological alignment of conservative values with gun advocacy groups. This is not to say that Democrats do not support and defend the Second Amendment or the interests of gun advocacy groups. Like their Republican counterparts, a number of Democrats see societal value in armed self-defense and hunting.⁸¹ Still, the evidence

3 NORTHEASTERN U. L.J. 1 (2011) [hereinafter Charles, *Constitutional Significance of a “Well-Regulated Militia”*].

⁷⁵ Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 45–48 (2012) [hereinafter Charles, *Faces of the Second Amendment*].

⁷⁶ LaPierre, *supra* note 61, at 50.

⁷⁷ See Charles, *Faces of the Second Amendment*, *supra* note 75, at 52.

⁷⁸ For a summary of the legislation proposed in 2013, see WILLIAM J. KROUSE, CONGR. RESEARCH SERV., R42987, GUN CONTROL PROPOSALS IN THE 113TH CONGRESS: UNIVERSAL BACKGROUND CHECKS, GUN TRAFFICKING, AND MILITARY STYLE FIREARMS (June 7, 2013).

⁷⁹ Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN (Apr. 18, 2013), <http://www.cnn.com/2013/04/17/politics/senate-guns-vote/>; Grace Wyler, *Why Congress Was Too Wimpy to Pass a Gun Control Bill that Almost Everyone in America Wants*, BUS. INSIDER (Apr. 18, 2013, 3:44 PM), <http://www.businessinsider.com/why-back-ground-check-bill-failed-2013-4>.

⁸⁰ See Barrett & Cohen, *supra* note 79.

⁸¹ See, e.g., Adam Beam, *Alison Lundergan Grimes Opposes ‘Gun Show Loophole’*, HUFFINGTON POST (Sept. 25, 2014, 4:51 PM), <http://www.huffingtonpost.com/2014/09/25>

that the Republican party has become intertwined with gun advocacy groups is overwhelming. The 2012 Senate scorecards of the NRA and the Gun Owners of America (GOA) underscore this point. In the case of the NRA's scorecard, out of fifty-three Democrat senators, eleven received variants of A or B grades, seven received variants of C or D grades, and thirty-five received an F.⁸² In contrast, the Senate's 45 Republicans were graded on the opposite end of the spectrum, with 42 receiving variants of A or B grades, two receiving a C+, and only 1 receiving an F.⁸³

The scorecards of the more politically extreme GOA are just as polarizing. Not one Senate Democrat received higher than a C- grade, and forty-seven received an F grade.⁸⁴ In contrast, Republican senators received thirty-seven variants of A or B grades, five variants of C or D grades, and one F.⁸⁵ Certainly, as compared to the NRA, the grades issued by the GOA were more critical of both political parties. Yet the outcome remains the same—the political interests of gun advocacy groups are more closely aligned with Republicans and conservatives than Democrats and liberals.⁸⁶

In a post-*Heller* world, another method that illustrates the political divide over the Second Amendment is to examine the list of the speakers at NRA conventions before and after *Heller* was decided. From 2004 to 2007, before *Heller* was decided, at most one or two high profile politicians spoke at the annual convention, with virtually every speaker identifying with the Republican party or the conservative base.⁸⁷ These speakers included former United States Ambassador to the United Nations John R. Bolton, Texas House Representative Tom DeLay, Texas Governor Rick Perry, and even a prerecorded address by President George W. Bush.⁸⁸ Following the *Heller* decision in 2008, however, speaking before the NRA's convention became more politically lucrative for Republicans and conservatives. Instead of the NRA hosting one or two high profiled Republicans or conservatives, they hosted three to five. This included Republican activist Karl Rove, conservative media pundit Glenn Beck, former Massachusetts Governor Mitt Romney, United State Ambassador to the United Nations

/alison-lundergan-grimes-gun-show-loophole_n_5884368.html.

⁸² Aaron Blake, *Where the Senate Stands on Guns—In One Chart*, WASH. POST (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/17/where-the-senate-stands-on-guns-in-one-chart/>.

⁸³ *Id.* At the state level the grading is even more polarized in favor of Republicans. Take for example Florida's 2014 House grades by the NRA. Out of the 120 Florida House districts, the NRA endorsed the Republican candidate in every contested seat. Moreover, only one Democrat was received an A grade and was endorsed by the NRA, Michelle Rehwinkel Vasilinda (District 9). However, the Democrat candidate was running unopposed. See *Candidate Endorsements 2014*, in AMERICAN HUNTER (Nov. 2014) (on file with author).

⁸⁴ Blake, *supra* note 82.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See, e.g., Nat'l Rifle Ass'n, *2004 Pittsburgh Annual Meetings*, NRAAM.ORG (2004), <http://www.nraam.org/past-meetings/2004-Pittsburgh-annual-meetings> (noting that Dick Cheney was the keynote speaker for the 2004 annual NRA meeting).

⁸⁸ *Id.*

John R. Bolton, Kentucky Senator Mitch McConnell, Arizona Senator John McCain, former Alaska Governor Sarah Palin, former Speaker of the House of Representatives Newt Gingrich, Mike Huckabee, Pennsylvania Senator Pat Toomey, Minnesota Representative Michele Bachmann, former Pennsylvania Senator Rick Santorum, Texas Senator Ted Cruz, Louisiana Governor Bobby Jindal, Texas Governor Rick Perry, Indiana Senator Daniel Coats, Florida Senator Marco Rubio, and Indiana Governor Mike Pence.⁸⁹ During the same seven-year period, only two Democrats delivered speeches at the NRA convention—Oklahoma House Representative Dan Boren and Pennsylvania House Representative Jason Altmire—neither of whom can be classified as a high profile member of the Democratic party or liberal base.⁹⁰

Here, too, the evidence suggests that Republican and conservative politics have become uniquely aligned with gun rights advocacy, but this does not mean that Democrats and liberals do not support armed self-defense, hunting or adherence to Second Amendment jurisprudence in a post-*Heller* world.⁹¹ It just means that, since the *Heller* decision, Republicans and conservatives have far more political equity invested into gun rights advocacy. Yet *Heller* alone cannot explain the conservative gun-rights alliance. There are larger political forces at play, particularly the fear among many conservatives of liberal government overreach, which has been politically packaged and sold as part of a conspiracy to disarm gun owners.⁹² It is no secret that for years LaPierre has advocated as much in a number of speeches, editorials, and debates.⁹³ What is different today is that many Republicans and conservatives are echoing LaPierre's sentiments, as was illustrated by the speeches at the 2014 NRA annual conference.

Former Pennsylvania Senator Rick Santorum, for one, not only categorized all Democrats as historically seeking the erosion of Second Amendment rights, but other conservative principles as well:⁹⁴

⁸⁹ See, e.g., Nat'l Rifle Ass'n, *2013 NRA Annual Meeting & Exhibits*, NRA.ORG (2013), <http://www.home.nra.org/home/2013-nra-annual-meetings-exhibits>; Nat'l Rifle Ass'n, *2008 Louisville Annual Meetings*, NRAAM.ORG (2008), <http://www.nraam.org/past-meetings/2008-Louisville-annual-meetings>.

⁹⁰ For a summary of every National Rifle Association Convention from 2004 to 2014, see Nat'l Rifle Ass'n, *Past Meetings*, NRA ANNUAL MEETINGS AND EXHIBITS, <http://www.nraam.org/past-meetings/past-meetings.aspx> (last visited May 1, 2015).

⁹¹ See *supra* notes 34–44 and accompanying text (discussing the Democratic National Committee's stance on the Second Amendment).

⁹² Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 415–16 (2009) (discussing the politically packed conspiracy of disarmament).

⁹³ See, e.g., Nat'l Rifle Ass'n, *Wayne LaPierre—2014 NRA-ILA Leadership Forum*, YOUTUBE (Apr. 25, 2014), http://www.youtube.com/watch?v=_jm2IBU7x70.

⁹⁴ Nat'l Rifle Ass'n, *Rick Santorum: 2014 NRA-ILA Leadership Forum*, YOUTUBE (Apr. 25, 2014), at 1:45–6:00, <http://www.youtube.com/watch?v=EBTXaG3YHM4> (excerpt from Rick Santorum's speech).

Whether it's through Obamacare, whether it's through redefining marriage, you name it, [Democrats] are coming at it. You have the President of the United States now who talks about—not “freedom of religion”—listen to his words—“freedom of worship.” Ladies and gentlemen, to maybe the untrained ear that sounds like the same thing, but it's not. “Freedom of worship” is what you do inside the four walls of that church. “Freedom of religion” is what you do outside the four walls of that church. And they want to tell you it's okay to do whatever you want inside the church, but once you come outside that church you're mine. I get to tell you what to do. I get to tell you what insurance you have to buy or whether you hold certain beliefs on the institution of marriage.⁹⁵

Mitch McConnell was even more forthright in connecting Democrat and liberal policies as infringing upon the Second Amendment:

If you believe in the Constitution you defend all of it, all of it, not just the parts that happen to be popular at Washington cocktail parties. That, after all, is the oath we take—that's the charge we're entrusted to keep, and yet the [Obama] Administration seems to see things quite differently. They try to curb the rights of those they disagree with, whether it's your right to bear arms or whether it's your right to speak up without fear of government intimidation. When it comes to your Second Amendment rights, it's no secret that the President isn't terribly interested in them . . . He made it clear when his administration signed an international arms treaty that fails to meaningfully recognize your right to private, lawful gun ownership. And he makes it clear every single time he tries to appoint another federal official who is hostile to your Second Amendment freedoms.⁹⁶

Then there was former Alaska Governor Sarah Palin, who was so bold as to ahistorically proclaim that conservatives are walking in the footsteps of the founding generation. “And it's not just the Second Amendment that [liberals] are attacking, it's foundational values and tradition,” she stated.⁹⁷ Palin added that Democrats and liberals operate like “tectonic plates” that shift and grind away at conservative

⁹⁵ *Id.* at 8:18–9:05.

⁹⁶ Nat'l Rifle Ass'n, *Mitch McConnell: 2014 NRA-ILA Leadership Forum*, YOUTUBE (Apr. 25, 2014), at 1:29–2:48, <http://www.youtube.com/watch?v=7px7Uo-876A>.

⁹⁷ Nat'l Rifle Ass'n, *Sarah Palin: 2014 NRA Stand and Fight Rally*, YOUTUBE (Apr. 26, 2014), at 5:55–6:03, <http://www.youtube.com/watch?v=IVIQTYDFTTo>.

values.⁹⁸ According to Palin, it is an affront to the principles of the American Revolution, but assured the audience it is individual gun owners that are providing a check to this type of attack: “This awakening, it harkens back to our beginning. Our founding patriots, they were targeted by an out-of-control government, and they were spied upon, and they were taxed excessively, and punished for producing. So they did something about it, and you all know how that turned out.”⁹⁹

Collectively these speeches reflect a new political era where many conservatives foresee their moral values and gun rights as being inseparable, with the latter serving as the pathway to guaranteeing the former. Indeed, the intertwining of conservative values with gun rights can be traced back to the presidency of Bill Clinton, the Brady Bill outlawing assault weapons, and the NRA’s calculated response.¹⁰⁰ However, during this period, historians will be hard pressed to find any high profile conservatives publicly avowing as much or espousing an affirmative link between gun ownership and preventing government tyranny.

But the politics of today’s conservative movement is much different than years past as was seen during the Cliven Bundy standoff in Nevada. For over twenty years Bundy grazed his cattle on federal lands, yet refused to compensate the Bureau of Land Management (BLM) for doing so.¹⁰¹ In response, the BLM sued for the cost of federal grazing fees and was awarded damages by the Ninth Circuit Court of Appeals in 1998.¹⁰² Even in the face of a court judgment, Bundy, along with other Nevada ranchers, not only refused to compensate the federal government accordingly, but even continued to graze his cattle on federal land under the auspices of states’ rights.¹⁰³

As a result, in the fall of 2013, the BLM took the next possible recourse and went through the courts to obtain an injunction, as well as an order to confiscate all of Bundy’s cattle.¹⁰⁴ However, it was not until April 2014 that the federal government attempted to enforce the courts’ judgments.¹⁰⁵ Therein an armed confrontation ensued with Bundy’s supporters threatening armed force if need be to protect Bundy’s cattle.¹⁰⁶ Montana resident and Bundy supporter Jim Lordy defended the action, stating: “Why [am I carrying a] gun? Well, they have guns. We need guns to protect ourselves

⁹⁸ *Id.* at 8:06–8:25.

⁹⁹ *Id.* at 10:10–10:31.

¹⁰⁰ Siegel, *supra* note 15, at 227–36.

¹⁰¹ Jaime Fuller, *Everything You Need to Know About the Long Fight Between Cliven Bundy and the Federal Government*, WASH. POST (Apr. 15, 2014, 2:15 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government/>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ For a full background of the situation surrounding Cliven Bundy, see *id.*; J.J. MacNab, *Context Matters: The Cliven Bundy Standoff—Part 1*, FORBES (Apr. 30, 2014), <http://www.forbes.com/sites/jjmacnab/2014/04/30/context-matters-the-cliven-bundy-standoff-part-1/>.

¹⁰⁵ See Fuller, *supra* note 101.

¹⁰⁶ See *id.*

from a tyrannical government.”¹⁰⁷ Then there was Richard Mack, another Bundy supporter, head of the Constitutional Sheriffs and Peace Officers Association, and former NRA Law Enforcement Officer of the Year, who was hopeful that an armed confrontation would ensue.¹⁰⁸ Mack went so far as to advocate for placing women on the front-line to show the world just how “ruthless” the BLM and federal government is.¹⁰⁹ To prevent any unnecessary bloodshed and ensure the public safety, the BLM withdrew.

The armed standoff made the national news, and a number of conservative media affiliates came to the defense of Bundy and his supporters. Conservative media coverage and support only heightened when Democratic Nevada Senator Harry Reid referred to Bundy and his supporters as nothing more than “domestic terrorists.”¹¹⁰ Reid’s Republican Nevada Senator counterpart Dean Heller, for one, responded, “What Sen[ator] Reid call[s] ‘domestic terrorists,’ I call[] ‘patriots.’”¹¹¹ Then there was conservative Fox News host Sean Hannity, who, during an interview with Bundy, not only denounced the claim that Bundy’s supporters were “domestic terrorists,” but seemingly defended the armed standoff as an expected response to government overreach and tyranny:

We have an NSA that spies on Americans . . . We’ve had all these controversies going on where the IRS is now being used . . . to intimidate, harass, and even silence Americans. Then you’ve got the government lying to us on Benghazi, [and] making promises about healthcare that they know [are] not true. . . . To me, it’s almost like a tipping point that [Americans] are fed up [] with the government pushing people around, and I think [this] case just became a rallying point.¹¹²

In the end, it was not the impropriety of an armed confrontation that altered conservative support for the standoff but Bundy’s racially charged comments.¹¹³ And

¹⁰⁷ *Rancher’s Fight with Feds Reaches Boiling Point*, CBSNEWS (Apr. 11, 2014, 9:17 AM), <http://www.cbsnews.com/news/cliven-bundy-nevada-rancher-fights-federal-government-over-grazing/> (quoting Jim Lordy of Operation Mutual Aid).

¹⁰⁸ Josh Horwitz, *Is Cliven Bundy the New NRA Poster Child?*, HUFFINGTON POST (Apr. 23, 2014, 6:53 AM), http://www.huffingtonpost.com/josh-horwitz/is-cliven-bundy-the-new-n_b_5197066.html.

¹⁰⁹ Jessica Chasmar, *Former Sheriff Willing to Let Wife, Daughters Die on Front Lines of Bundy Ranch*, WASH. TIMES (Apr. 15, 2014), <http://www.washingtontimes.com/news/2014/apr/15/former-sheriff-willing-let-wife-daughter-die-front/>; Horwitz, *supra* note 108.

¹¹⁰ Stephanie Condon, *Republicans Denounce Rancher Cliven Bundy’s Racist Comments*, CBSNEWS (Apr. 24, 2014, 1:44 PM), <http://www.cbsnews.com/news/republicans-denounce-rancher-cliven-bundys-racist-comments/>.

¹¹¹ *Id.*

¹¹² TeaPartyTyme, *Hannity Segment on Cliven Bundy’s Ranch 4/14/2014 Part 2*, YOUTUBE (Apr. 14, 2014), at 5:00–5:35, <http://www.youtube.com/watch?v=9VgHaey6N0w>.

¹¹³ Wesley Lowery & Aaron Blake, *Republicans Distance Selves from Nevada Rancher Cliven Bundy Over Racial Remarks*, WASH. POST (Apr. 24, 2014), <http://www.washington>

it has not been the only instance where conservatives have stated or implied that armed resistance is an acceptable political response. In 2010, when Sharron Angle ran as the Republican senatorial candidate for Nevada, she warned that “if this . . . Congress keeps going the way it is, people are really looking toward those Second Amendment remedies and saying my goodness what can we do to turn this country around?”¹¹⁴ Then there was Texas House Representative Louie Gohmert, who openly stated that the Second Amendment not only exists to subdue a “government that would run amuck,” but also ensures “all the rest of the amendments [to the Constitution] are followed.”¹¹⁵

Needless to say, there is a growing perception among today’s conservatives that the Second Amendment and gun ownership are society’s last line of defense. Of course, it should be noted that not every conservative has espoused this view, and some are on record as denouncing these opinions as extremist.¹¹⁶ Still, it is fair to say that conservatives in general have joined the NRA’s movement against gun regulation. While the increase in mass shootings¹¹⁷ have prompted Democratic and liberal controlled states such as New York, New Jersey, Connecticut, Colorado, and Maryland to impose new gun restrictions, Republican and conservative controlled states are moving in the opposite direction.¹¹⁸ Since *Heller*, the states of Louisiana, Missouri,

post.com/politics/republicans-distance-selves-from-nevada-rancher-cliven-bundy-over-racial-remarks/2014/04/24/76a72780-cbe3-11e3-95f7-7eccde72d2ea_story.html.

¹¹⁴ Elizabeth Crum, *New Harry Reid Ad Says Angle ‘Over the Line’ on Second Amendment Rhetoric*, NAT’L REV. (Aug. 11, 2010, 5:25 PM), <http://www.nationalreview.com/battle10/243092/new-harry-reid-ad-says-angle-over-line-second-amendment-rhetoric-Elizabeth-Crum>; Sam Stein, *Sharron Angle Floated ‘2nd Amendment Remedies’ as ‘Cure’ for ‘The Harry Reid Problems’*, HUFFINGTON POST (June 16, 2010, 9:41 AM), http://www.huffingtonpost.com/2010/06/16/sharron-angle-floated-2nd_n_614003.html.

¹¹⁵ Nick Wing, *Louie Gohmert: Second Amendment Is Necessary Because . . . Sharia Law?*, HUFFINGTON POST (Feb. 21, 2013), http://www.huffingtonpost.com/2013/02/21/louie-gohmert-second-amendment_n_2735971.html.

¹¹⁶ See, e.g., Chris Good, *Chris Christie’s Gun Gamble*, ABC NEWS (Apr. 23, 2013), <http://abcnews.go.com/Politics/OTUS/chris-christies-gun-gamble/story?id=19018480>. But see Michael Barbaro, *Outside Connecticut Fund-Raiser, a Protest Over Christie’s Veto of Gun Control Bill*, N.Y. TIMES (July 21, 2014), http://www.nytimes.com/2014/07/22/nyregion/outside-connecticut-fund-raiser-a-protest-over-christies-veto-of-gun-control-bill.html?_r=1 (discussing New Jersey Governor Chris Christie’s change of stance on tough gun control).

¹¹⁷ According to the Federal Bureau of Investigation, mass shootings have increased substantially. See J. Pete Blair et al., *Active Shooter Events from 2000 to 2012*, FBI L. ENFORCEMENT BULL. (Jan. 7, 2014), <http://leb.fbi.gov/2014/january/active-shooter-events-from-2000-to-2012>; Michael S. Schmidt, *F.B.I. Confirms a Sharp Rise in Mass Shootings Since 2000*, N.Y. TIMES (Sept. 24, 2014), <http://www.nytimes.com/2014/09/25/us/25shooters.html>.

¹¹⁸ See Miranda Green, *The Gun Rights Revolution You Might Have Missed*, DAILY BEAST (Apr. 24, 2013), <http://www.thedailybeast.com/articles/2013/04/24/the-gun-rights-revolution-you-might-have-missed.html>; Law Ctr. to Prevent Gun Violence, *Tracking State Gun Laws: 2014 Developments*, SMARTGUNLAWS.ORG (May 2, 2014), <http://smartgunlaws.org/tracking-state-gun-laws-2014-developments/>; see also Logan A. Forsey, *State Legislatures Stand Up*

and Alabama have significantly strengthened their respective constitutional right to arms provisions.¹¹⁹ Then there are states like Iowa, which removed its restrictions on the blind being able to carry loaded firearms in public.¹²⁰ Arizona required its towns and municipalities to sell all surrendered weapons, therefore politically nullifying gun buy back programs that destroy surrendered weapons.¹²¹ North Carolina followed in the footsteps of other Republican and conservative-controlled states by eliminating the restriction on the carrying of loaded firearms in public parks and playgrounds, as well as restaurants and bars.¹²² Meanwhile, Georgia enacted a sweeping “guns everywhere” law that allows for the carrying of loaded firearms almost anywhere except college campuses, certain government buildings, and past airport security checkpoints.¹²³

After signing the bill, Georgia Governor Nathan Deal encapsulated just how important Second Amendment politics have become in recent years when he stated, “The Second Amendment should never be an afterthought. It should be at the forefront of our minds.”¹²⁴ This type of Second Amendment politicization is becoming more frequent in a post-*Heller* world. Take for example Alabama House Representative Steve Hurst, who showed his support for the Second Amendment during the 2014 congressional midterm elections by entering a giant revolver float—which also functions as a fully

For Second Amendment Gun Rights While the U.S. Supreme Court Refuses to Order a Cease Fire on the Issue, 37 SETON HALL LEGIS. J. 411, 427 (2013) (“While the Supreme Court has declined to reach the issue of individual gun rights outside of the home, the state legislatures have tackled the issue head on and have given individuals the right to carry an otherwise lawful weapon for self-defense outside of the home.”).

¹¹⁹ See, e.g., Eugene Volokh, *Alabama Constitutional Right to Bear Arms Strengthened, by 72%–28% Vote*, VOLOKH CONSPIRACY (Nov. 5, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/05/alabama-constitutional-right-to-bear-arms-strengthened-by-72-28-vote/>. In the case of Alabama, despite the constitutional amendment requiring all gun laws to be subject to “strict scrutiny,” some hard line gun rights advocates thought the amendment was inadequate in protecting the right to arms. See Dave Workman, *Alabama Rights Flap Indicative of Problem in Gun Community*, EXAMINER (Oct. 29, 2014), <http://www.examiner.com/article/alabama-rights-flap-indicative-of-problem-gun-community>.

¹²⁰ Jason Clayworth, *Iowa Grants Permits for Blind Residents to Carry Guns in Public*, DES MOINES REG. (Sept. 8, 2013), <http://www.archive.desmoinesregister.com/article/2013/09/08/NEWS/309080061/1001/news/Iowa-grants-permits-blind-residents-carry-guns-public>.

¹²¹ See Bob Christie, *Phoenix, Arizona Gun Buyback Held Before Sales Law Goes Into Effect*, HUFFINGTON POST (May 5, 2013, 11:06 AM), http://www.huffingtonpost.com/2013/05/05/phoenix-arizona-gun-buyback_n_3219056.html.

¹²² See An Act to Amend State Firearms Laws, H.R. 937, 2013 Gen. Assemb. Reg. Sess. (N.C. 2013).

¹²³ See Safe Carry Protection Act of 2014, H.R. 60, 152d Gen. Assemb. Reg. Sess. (Ga. 2014); Niraj Chokshi, *What Georgia’s Expansive New Pro-Gun Law Does*, WASH. POST GOVBEAT BLOG (Apr. 23, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/23/what-georgias-expansive-new-pro-gun-law-does/>.

¹²⁴ Devon M. Sayers & Elliott C. McLaughlin, *Georgia Law Allows Guns in Some Schools, Bars, Churches*, CNN (Apr. 23, 2014), <http://edition.cnn.com/2014/04/23/us/georgia-governor-signs-gun-bill/>.

functional barbeque—into the annual Talladega, Alabama parade.¹²⁵ Then there was the less subtle approach taken by Alabama Republican congressional-hopeful Will Brooke, who showed his disdain for the Affordable Care Act by firing multiple caliber firearms at a print copy of the Act itself.¹²⁶ ““We’re down here to have a little fun today and talk about two serious subjects: the Second Amendment and [to] see how much damage we can do to this copy of Obamacare,”” stated Brooke.¹²⁷

Although Brooke’s campaign did not exceed the primary, the advertisement illustrates once more how Republicans have used the Second Amendment to garner the support of the larger conservative base. This includes state Republicans proposing and voting on gun advocacy legislation that is *ipso facto* unconstitutional, such as laws that would prevent federal officials from enforcing federal gun laws.¹²⁸ Of course, laws like these are merely intended to be symbolic. They are a form of political speech that seeks to convey conservative dissatisfaction with the Affordable Care Act and perceived liberal government overreach.¹²⁹ It is a type of symbolism that occurs at all levels of government, from Congress all the way down to city councils.¹³⁰ Take for instance the city council of Nelson, Georgia that adopted an ordinance requiring gun ownership.¹³¹ Although the ordinance was not intended to be enforced, it served the

¹²⁵ Chris Gentilviso, *GOP Lawmaker Steals the Show with Gun-Shaped Parade Float*, HUFFINGTON POST (Apr. 22, 2014, 11:19 AM), http://www.huffingtonpost.com/2014/04/22/steve-hurst-gun-parade-float_n_5191528.html.

¹²⁶ Lucy McCalmont, *Alabama Hill Hopeful Shoots ACA*, POLITICO (Mar. 16, 2014, 5:41 PM), <http://www.politico.com/story/2014/03/will-brooke-alabama-obamacare-105072.html>.

¹²⁷ *Id.* (quoting Will Brooke, *Let’s Do Some Damage*, YOUTUBE (Mar. 26, 2014), <http://www.youtube.com/watch?v=012Z9cCC925>).

¹²⁸ See Robert A. Levy, Op-Ed., *The Limits of Nullification*, N.Y. TIMES, Sept. 4, 2013, at A23, available at <http://www.nytimes.com/2013/09/04/opinion/the-limits-of-nullification.html>; Emma Roller, *Idaho Has Declared It Won’t Obey New Federal Gun Laws*, NAT’L J. (Mar. 25, 2014), <http://www.nationaljournal.com/politics/idaho-has-declared-it-won-t-obey-new-federal-gun-laws-20140325>; see, e.g., *Mont. Shooting Sports Ass’n v. Holder*, 727 F.3d 975 (9th Cir. 2013).

¹²⁹ Andrew Cohen, *Symbolic Legislation to Nowhere: Why Statehouses Fail in Governance*, THE ATLANTIC (Feb. 23, 2012, 5:00 PM), <http://www.theatlantic.com/politics/archive/2012/02/symbolic-legislation-to-nowhere-why-statehouses-fail-in-governance/253488/>.

¹³⁰ This form of symbolic speech is not limited to the Second Amendment. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 233 (1990); Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 415 (1999); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 2–3 (1997); see also William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 303 (2011).

¹³¹ Katharine Lackey, *Ga. City Passes Measure Requiring Gun Ownership*, USA TODAY (Apr. 2, 2013, 2:07 PM), <http://www.usatoday.com/story/news/nation/2013/04/01/georgia-gun-ownership-requirement/2044639/>.

political purpose of placing Congress on notice that Nelson unanimously opposed “any future attempt by the federal government to confiscate personal firearms.”¹³²

Overall, the point to be made is that since *Heller* the impact of the Second Amendment on American politics has reached new heights. Just four decades ago the Second Amendment was hardly a talking point in the political landscape. But in the mid- to late-1970s, through the leadership of the NRA and other gun advocacy groups, the Second Amendment was reintroduced and gradually reintegrated into the American discourse.¹³³ This in turn altered the American discourse and even assisted in culminating the *Heller* decision itself.¹³⁴

II. *HELLER*'S IMPACT ON THE PUBLIC DISCOURSE

In the wake of *Heller*, even those that took part in the reeducation or revival of the Second Amendment in history, law, and politics acknowledge that although the opinion is the finest example of public-meaning originalism ever espoused by the Supreme Court, it embodies facets of living or popular constitutionalism.¹³⁵ Of course, the combination of fixed and living constitutionalism is nothing new within the pantheon of American constitutional jurisprudence. For over a century, Supreme Court jurisprudence has reflected a steady combination of the two, or what professional historians generally refer to as “law office history.”¹³⁶ But no matter one’s views on history in law, it is a rather uncontroversial observation that whenever the Supreme Court declares a historically antecedent right, it impacts society’s perception of the past, as well as the manner in which society discusses the right’s parameters in the present.¹³⁷

As this pertains to the Second Amendment, the public has engaged in a fierce debate—a debate that alternates between notions of individual and collective liberty. While there are some people that perceive the Second Amendment in modern libertarian terms—enshrining an individual right to carry firearms in public, to

¹³² *Id.* (quoting Nelson City Council Agenda).

¹³³ See generally MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 88–137 (2014); WINKLER, *supra* note 6, at 64–68, 94–99, 210–12, 257; Siegel, *supra* note 15, at 212–36; Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *CHL-KENT L. REV.* 349 (2000).

¹³⁴ See generally Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 *UCLA L. REV.* 1095 (2009); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 *OHIO ST. L.J.* 625 (2008); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 *SYRACUSE L. REV.* 267 (2008); William G. Merkel, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It*, 50 *SANTA CLARA L. REV.* 1221 (2010); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 *LEWIS & CLARK L. REV.* 349, 349, 352–54 (2009).

¹³⁵ See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. REV.* 1343, 1354–56 (2009) [hereinafter *The Second Amendment*].

¹³⁶ See generally PATRICK J. CHARLES, *HISTORICISM, ORIGINALISM AND THE CONSTITUTION: THE USE AND ABUSE OF THE PAST IN AMERICAN JURISPRUDENCE* (2014).

¹³⁷ Konig, *supra* note 18, at 177–78; Wiecek, *supra* note 17, at 227–28.

unconditionally acquire arms and ammunition, and to associate with independent militias as a means to check government tyranny¹³⁸—there are others that see the Second Amendment as being subject to reasonable regulation.¹³⁹ Certainly there are variants to these two extremes, but regardless of one’s position or political temperament, one must ultimately reconcile his or her views within the contours of *Heller*, for it currently stands as the jurisprudential beacon through which all public discourse must flow. Just as one cannot discuss the subjects of women’s rights or abortion without bringing *Roe v. Wade* into the conversation, one cannot discuss gun control or gun rights without bringing in *Heller*.

Here, it is important to note that the *Heller* opinion itself is a double-edged sword that offers both sides of the debate—whether it be the absolutist or reasonable regulation position—the necessary dictum to support their arguments. In other words, *Heller*’s dictum is rather conflicting and therefore facilitates a wide array of conversation as to the Second Amendment’s scope and limits. Take for instance *Heller*’s proclamation that the Second Amendment protects against both “public and private violence.”¹⁴⁰ Those that support robust Second Amendment rights perceive this portion of the opinion as extending an armed individual right to self-defense outside the home. David B. Kopel, for one, takes solace in this line of argument by asserting *Heller*’s “presumptively constitutional exception . . . in favor of ‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings’” proves that “Americans have a general right to carry firearms.”¹⁴¹ If the rationale is that “the Second Amendment only applied to the keeping of arms at home, and not to the bearing of arms in public places, then there would be no need [for *Heller*] to specify the exception for carrying arms in ‘sensitive places.’”¹⁴²

Indeed, if comparing and contrasting *Heller*’s dictum is the key to determining whether a right to armed self-defense with a handgun extends beyond the home, it must be admitted that Kopel offers a viable legal conclusion.¹⁴³ There is a problem, however, with solely relying on the dictum chosen by Kopel—the *Heller* majority also pronounced the opinion’s historical analysis as not being “exhaustive” and that

¹³⁸ See, e.g., STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).

¹³⁹ See, e.g., Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 683–88, 715–19 (2007); Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597 (2006).

¹⁴⁰ *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008); accord Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008).

¹⁴¹ David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?: Defending the Right to Sell and Trade Arms*, 127 HARV. L. REV. F. 230, 235 (2014) (footnote omitted) (quoting *Heller*, 554 U.S. at 626).

¹⁴² *Id.* at 235–36.

¹⁴³ See Charles, *supra* note 5, at 1846–47.

the Court would “expound upon the historical justifications” in future cases or controversies.¹⁴⁴ If history matters in determining the Second Amendment’s scope—if it truly matters—then Kopel’s conclusion contradicts what a thorough investigation provides. Not only did the late eighteenth-century common law prescribe a duty to retreat in public before a person could legally exercise their right to self-defense, but from the 1328 Statute of Northampton through the ratification of the Constitution, the prevailing rule of law was that the public carriage of dangerous weapons in the public concourse was at the discretion of government.¹⁴⁵ This is confirmed by a variety of evidentiary sources, all of which signify that the act of carrying dangerous weapons without the license of government terrified the people.¹⁴⁶ This is not even considering the rich history of arms regulations, including numerous open and concealed carry restrictions, from the late eighteenth through the nineteenth century.¹⁴⁷

Yet in the twenty-first century, the history of arms regulation has either been forgotten or outright dismissed by those that perceive armed public carriage as a constitutional right. To these individuals, because *Heller* proclaimed armed individual self-defense was the Second Amendment’s “central component,”¹⁴⁸ it is only logical that the right to “keep and bear arms” extends to the public carriage of handguns, rifles, and assault weapons as a means to protect their person, family, and property and to deter criminals. But *Heller* alone cannot account for fostering this view. For many, *Heller* serves as an affirmation for a predisposed viewpoint—a viewpoint that has been sociologically fostered through changes in the law and their sociological upbringing.

The fact of the matter is that the legality of armed public carriage has undergone a dramatic transformation in recent times. Today, the majority of states maintain ‘shall issue’ laws, which grant to persons qualified a license to carry firearms so long as they meet a set of statutory requirements.¹⁴⁹ But just a few decades ago an overwhelming majority of states subscribed to ‘may issue’ laws, which only granted licenses to carry firearms if the person showed a necessity or good cause to do so.¹⁵⁰ One must

¹⁴⁴ *Heller*, 554 U.S. at 626, 635.

¹⁴⁵ See, e.g., Charles, *Statute of Northampton*, *supra* note 72, at 11–12, 15, 17–18, 20; Charles, *Faces of the Second Amendment*, *supra* note 75, at 6; Parts I–II; see also Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1340–44 (2009) (discussing the complexities surrounding self-defense and the duty to retreat).

¹⁴⁶ See articles cited *supra* note 145.

¹⁴⁷ See generally Cornell & DeDino, *supra* note 73; Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1723 (2012).

¹⁴⁸ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

¹⁴⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-717, GUN CONTROL: STATES’ LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION 8 (July 2012).

¹⁵⁰ See Clayton E. Cramer & David B. Kopel, “Shall Issue”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 701 (1995); Steven W. Kranz, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 HAMLINE L. REV. 637, 646–50 (2006); Megan Ruebsamen, Note, *The Gun-Shy Commonwealth:*

also consider that in the late eighteenth century the law required one to retreat to the wall before employing deadly force,¹⁵¹ yet today this duty is all but extinct in the majority of state jurisdictions. Popularly known as “stand your ground,” an individual “is justified in using . . . deadly force if he or she reasonably believes that using . . . such force is necessary to prevent imminent death or great bodily harm”¹⁵² without retreating if the person is not engaged in unlawful activity and is in a place where he or she has the right to be.¹⁵³

What has also contributed to the societal and legal shift of armed public carriage is reeducating the public as to the alleged benefits afforded by a well-armed society.¹⁵⁴ In most, but not all, cases, this reeducation is funded or influenced by gun advocacy groups.¹⁵⁵ Whether the subject is history, philosophy, criminology, sociology, or health, the conclusion is always the same—maintaining, having, and using firearms is a natural right and the benefits, in public or private, outweigh any societal costs.¹⁵⁶ To be clear, there has been a calculated effort by gun advocates to convince the public that gun

Self-Defense and Concealed Carry in Post-Heller Massachusetts, 18 SUFFOLK J. TRIAL & APP. ADVOC. 55, 71 n.90 (2013).

¹⁵¹ See Cornell & DeDino, *supra* note 73.

¹⁵² FLA. STAT. § 776.012(2) (2014).

¹⁵³ *Id.* For more on “stand your ground” laws, see Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827 (2013). For a legal rebuttal to some common misnomers about what “stand your ground” laws protect, see Eugene Volokh, *What ‘Stand Your Ground’ Laws Actually Mean*, VOLOKH CONSPIRACY (June 27, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/27/what-stand-your-ground-laws-actually-mean/>.

¹⁵⁴ See, e.g., Maxim Lott, *Pennsylvania Town Packs Heat, and Wants Visitors to Know It*, FOX NEWS (Feb. 10, 2015), <http://www.foxnews.com/us/2015/02/10/pa-town-packs-heat-and-wants-visitors-to-know-it/>.

¹⁵⁵ See Firmin DeBrabander, *The Freedom of an Armed Society*, N.Y. TIMES OPINIONATOR (Dec. 16, 2012, 1:00 PM), <http://opinionator.blogs.nytimes.com/2012/12/16/the-freedom-of-an-armed-society>.

¹⁵⁶ Although there are a number of examples such as the writings of Stephen P. Halbrook, David B. Kopel, and Joyce Lee Malcolm, the most prominent is attorney Don B. Kates, Jr. In 1983, Kates wrote one of the most influential pro-gun history articles on the Second Amendment. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). Almost a decade later, Kates wrote a philosophy-centered article endorsing a right to bear arms against both public and private balance. See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT 87 (1992). Then there are criminology and sociology-centered articles endorsing the same bottom line. See Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339 (2009); Don B. Kates, Jr., *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991); Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL’Y 649 (2007). Lastly, there is even a public health article. See Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513 (1995).

control and safety laws are both ineffective at reducing crime¹⁵⁷ and the first step towards the establishment of a tyrannical government through disarmament.¹⁵⁸ One academic study has even gone so far as to advocate for the spiritual revival of the Second Amendment's "well-regulated militia."¹⁵⁹ According to its authors, such a "classical republican" revival has the "potential to restore courage and self-respect, create a new, more positive relationship between the police and the citizens, and . . . to reduce the rates of certain kinds of violent street crime."¹⁶⁰

To date, this public reeducation on the perceived benefits of an armed citizenry has proved to be both highly influential and politically successful, for whenever a new gun control or gun safety bill is put forth—whether it be at the federal, state, or local level—the same rhetoric is employed to stall, modify, or defeat the bill.¹⁶¹ Certainly, this back and forth on the effectiveness or usefulness of gun-related legislation is an essential part of the democratic process. But for those academics that have waded through the empirical data and dissected the scientific methodologies employed, it is a debate based on findings or conclusions that have proven to be highly controversial and tedious at best.¹⁶²

As it pertains to the public discourse and the Second Amendment—that is how the general public perceives the right to function within society, as well as the benefits and burdens of gun laws—contradictory academic findings and evidence are arguably irrelevant. The truth of the matter is that it is more common for individuals to attach

¹⁵⁷ See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (3d ed. 2010); see also Don B. Kates & Carlisle Moody, Heller, McDonald, and Murder: *Testing the More Guns=More Murder Thesis*, 39 *FORDHAM URB. L.J.* 1421 (2012); Don B. Kates & Alice Marie Beard, *Murder, Self-Defense, and the Right to Arms*, 45 *CONN. L. REV.* 1685 (2013).

¹⁵⁸ See, e.g., Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 *ARIZ. J. INT'L. & COMP. L.* 483 (2000).

¹⁵⁹ Robert J. Cottrol & Raymond T. Diamond, *In the Civic Republic: Crime, the Inner City, and the Democracy of Arms—Being a Disquisition on the Revival of the Militia at Large*, 45 *CONN. L. REV.* 1605, 1632–36 (2013).

¹⁶⁰ *Id.* at 1632; see also Glenn Harlan Reynolds, *No Militia Means More Intrusive Law Enforcement*, USA TODAY (Mar. 9, 2014, 5:24 PM), <http://www.usatoday.com/story/opinion/2014/03/09/second-amendment-militia-guns-military-swat-constitution-column/6230769/> (posing the question of whether a modern "well-regulated militia" will check an intrusive government).

¹⁶¹ See, e.g., Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, in 42 *CRIME AND JUSTICE IN AMERICA 1975-2025* 19, 37 (Michael Tonry ed., 2013). For a gun rights advocacy perspective of the same time period, see David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 *FORDHAM URB. L.J.* 1527, 1550–1607 (2012). For a recent example of opposition to a gun control or gun safety bill, see Anna Staver, *Gun Bill Brings Emotional Testimony to Oregon Capitol*, USA TODAY (Feb. 6, 2014, 7:07 PM), <http://www.usatoday.com/story/news/politics/2014/02/06/oregon-gun-background-checks/5260821/>.

¹⁶² Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 *STAN. L. REV.* 1193 (2003).

their moral or personal values to the Second Amendment rather than attempt to seek the truth as to its history, meaning, or scope. In this respect, the Second Amendment does not stand alone. Subjective beliefs, attitudes, and perceptions about the past happen quite often, whether it is about a national landmark such as the Statue of Liberty, or on an important historical event such as the Civil War.¹⁶³ But what these personal values to historic places and events reveal are the respective individual's consciousness or a calculated effort to alter society's perception of the past, not contextual insight into the past itself.¹⁶⁴

This equally holds true whenever one enters into the public discourse over the right to "keep and bear arms." An individual's regurgitation of the Second Amendment generally begins with something to the effect, "I *believe* or *feel* the Second Amendment" For many, but not all individuals, their perception is intimately linked to the values they hold dear. These values can be formed in a variety ways, such as the individual's understanding of the Amendment's text, their familial upbringing with or without guns, a personal experience with crime or suicide, their political ideology, an article or book they read, a newscast, video, or documentary they watched, and so forth. They are values that can be affirmed, modified, or amplified dependent upon the outside influx of information to the individual.

While all of this may seem irrelevant to the lawyer, judge, or constitutional scholar, it is anything but. *Heller* has altered the manner in which society, guns, and the Second Amendment coexist. The opinion now serves as a moral affirmation or multiplier to gun rights advocates. At this point in time, whenever someone affected by gun violence pleads for gun reform, even modest reforms such as enhanced background checks, they receive two rebuttals. The first blames gun control, the second claims a violation of the Second Amendment. For example, after the Los Angeles, California murders by Elliot Rodger, who legally obtained three semi-automatic handguns to shoot and kill three persons, pleas were made for new gun control measures.¹⁶⁵ In what has become routine in the ongoing gun control-gun advocacy debate, the pleas were met with the

¹⁶³ See Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 505 (1997) (book review) ("We experience history in one way—as a set of individualized sensations and emotions which we tie into our own mini-narrative, limited in context, and with no knowledge of the ultimate outcome of the events we are experiencing. We get history as 'history' in the usual sense of the word when, with knowledge of the outcome of the events we describe, we tie these disparate individual experiences into a coherent, streamlined, narrativized effort to explain what happened." (footnote omitted)).

¹⁶⁴ See EDWARD G. LENGEL, *INVENTING GEORGE WASHINGTON: AMERICA'S FOUNDER*, IN MYTH AND MEMORY xviii (2011).

¹⁶⁵ See, e.g., *Gun Law Proposed in California in Wake of Elliot Rodger's Killing Spree*, CBS NEWS (May 28, 2014, 5:10 AM), <http://www.cbsnews.com/news/gun-law-proposed-in-california-in-wake-of-elliott-rodgers-killing-spree/>; see also Harold Pollack, *Why Law Enforcement was Powerless to Stop Elliot Rodger from Buying Guns*, WASH. POST WONKBLOG (May 29, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/29/why-law-enforcement-was-powerless-to-stop-elliott-rodger-from-buying-guns/>.

standard gun advocacy response—“anti-gun” politicians and gun control are at fault for the deaths of the victims, not firearms or the ability to acquire them.¹⁶⁶ This sets off the proverbial political “blame game” or what Josh Blackman and Shelby Baird have aptly described as the “shooting cycle.”¹⁶⁷ It takes place whenever a mass shooting or national tragedy involving firearms occurs.¹⁶⁸ The responsive gun control measure initially receives the support of the public at large.¹⁶⁹ However, so long as enough time elapses, public support for the measure becomes less fervent and the cycle of outrage, action, and reaction eventually fades away.¹⁷⁰

Then there is the Second Amendment rebuttal, where absolutists foresee any impediment on one’s ability to purchase, own, or use guns as unconstitutional.¹⁷¹ In the case of the Elliot Rodger murders, an open letter was penned by Republican supporter Joe “The Plumber” Wurzelbacher, who first gained attention as a public figure during the 2008 presidential campaign.¹⁷² “As harsh as this sounds,” wrote Wurzelbacher, “your dead kids don’t trump my Constitutional rights.”¹⁷³ On par with the political rhetoric espoused by the NRA, Wurzelbacher claimed that the victims’ pleas for gun reform were just another attempt by “gun-grab extremists,” the “anti-Second Amendment Left,” and the “Obama Voter” to proliferate guns.¹⁷⁴

As outlined in Part I, this type of politically charged response has become expected in a post-*Heller* world, as are the pronouncements that the Second Amendment protects high capacity magazine clips,¹⁷⁵ association in independent militias,¹⁷⁶ and even armed

¹⁶⁶ Cam & Co, *Chris W. Cox: NRA “Unequivocally” Supports Open Carry*, NRA NEWS (June 3, 2014), at 7:05–7:14, <http://www.nranews.com/cam/video/chris-w-cox-nra-unequivocally-supports-open-carry> (“This is another awful tragedy that would not have been prevented by gun control. It’s clearly an indictment on the failure of gun control.”).

¹⁶⁷ Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513 (2014).

¹⁶⁸ *See id.* at 1513.

¹⁶⁹ *Id.*

¹⁷⁰ *See* Mark Tushnet, *The Future of the Second Amendment*, 1 ALB. GOV’T L. REV. 354, 361 (2008) (“True, some prominent elections are said to have turned on the perception that Democratic candidates were unduly supportive of gun control. Survey evidence indicates, though, that taking the population as a whole, Americans have a reasonably moderate position on gun policy and the Second Amendment. People believe that the Second Amendment protects an individual right, and that fairly extensive regulations of that right are desirable. Overall, people seem to favor the enforcement of existing gun control laws, and the adoption of somewhat more stringent regulations.” (footnotes omitted)).

¹⁷¹ *See, e.g.*, Lyle Denniston, *Constitution Check: Are There No Limits on Second Amendment Rights?*, CONST. DAILY (Jan. 9, 2014), <http://blog.constitutioncenter.org/2014/01/constitution-check-are-there-no-limits-on-second-amendment-rights/>.

¹⁷² Joe Wurzelbacher, *An Open Letter: To the Parents of the Victims Murdered by Elliot Rodger*, BARBWIRE (May 27, 2014, 6:05 AM), <http://barbwire.com/2014/05/27/open-letter-parents-victims-murdered-elliott-rodger/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See, e.g.*, Brief for Gun Owners of America, Inc. et al. as Amici Curae Supporting Appellants at 25–26, *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036).

public carriage anywhere and everywhere one has a legal right to be.¹⁷⁷ In addition to these responses, there are those that profess that the Second Amendment protects firearms much in the same way that the First Amendment protects books and other forms of speech.¹⁷⁸ Before *Heller*, these types of statements were considered as being on the fringe of constitutional law yet today are becoming widespread.

Let us return to the Second Amendment outside the home as an illustration. Today, it has become commonplace for gun activists to march or to assemble with firearms to advocate for the restoration of their Second Amendment rights.¹⁷⁹ What gun activists fail to understand, however, is that they are not restoring the framers' Second Amendment by any means. If anything, gun activists are rewriting the past to conform with their own ideological predilections. As a historical matter, prior to, during, and after the drafting of the 1787 Constitution, it was not only unlawful for individuals to carry dangerous weapons in the public concourse,¹⁸⁰ but also a crime for individuals to collectively assemble with weapons and arms without the consent of government.¹⁸¹ This included "the people" training or marching with arms under the pretense they were loosely associated with the Second Amendment's "well-regulated militia."¹⁸²

In the 1886 case *Presser v. Illinois*,¹⁸³ a unanimous Supreme Court stated as much when it upheld an Illinois law that prohibited persons from associating "themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this State, without the license of the Governor thereof."¹⁸⁴ The Court stated, "It cannot be successfully questioned that the State governments, unless restrained by their own Constitutions, have the power to . . . control and regulate the

(arguing that "assault rifles" and "high-capacity magazines" are protected because they are "reasonably related" to weapons employed in the militia).

¹⁷⁶ See, e.g., HALBROOK, *supra* note 138, at 181–83.

¹⁷⁷ See, e.g., Volokh, *supra* note 138, at 1516–20.

¹⁷⁸ See, e.g., Kopel, *supra* note 141, at 230, 237; David Kopel, *The First Amendment Guide to the Second Amendment*, VOLOKH CONSPIRACY (Apr. 21, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/21/the-first-amendment-guide-to-the-second-amendment/>; David B. Rivkin Jr. & Andrew M. Grossman, *Gun Control and the Constitution*, WALL ST. J. (Feb. 10, 2013), <http://online.wsj.com/news/articles/SB10001424127887323951904578290460073953432>.

¹⁷⁹ See, e.g., *Man: Bringing Gun to Airport a Political Statement*, ASSOCIATED PRESS (Aug. 5, 2014, 8:12 AM), <http://bigstory.ap.org/article/man-bringin-gun-airport-political-statement-1>; Byron Pitts & Jackie Jesko, *Open Carry Texas Goes for 'In Your Face' Approach to Gun Debate*, ABC NEWS (June 25, 2014, 4:50 PM), <http://abcnews.go.com/US/open-carry-texas-face-approach-gun-debate/story?id=24303400>.

¹⁸⁰ See Charles, *Faces of the Second Amendment*, *supra* note 75, at 1–36; Charles, *Statute of Northampton*, *supra* note 72, at 10–28.

¹⁸¹ See Charles, *Scribble Scrabble*, *supra* note 73, at 1833–34.

¹⁸² See Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J.L. & PUB. POL'Y 323, 367–79 (2011).

¹⁸³ 116 U.S. 252 (1886).

¹⁸⁴ *Id.* at 253.

organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States.”¹⁸⁵

Today, however, under the color of the law, individuals are massing with firearms to bring attention to Second Amendment rights. In doing so, they are advancing that the First Amendment’s right to associate and assemble is somehow interrelated with the right to “keep and bear arms.” Certainly, as a matter of constitutional doctrine, it is normal for observers to compare and contrast the various amendments within the Bill of Rights, to include the First and Second Amendments.¹⁸⁶ But from a contextual perspective, this is a useless endeavor because every amendment maintains a distinct pedigree in both history and law.¹⁸⁷ The fact of the matter is, no two amendments are the same. Yet in an attempt to make the Second Amendment an ordinary fixture in constitutional law,¹⁸⁸ some observers are of the opinion that a “modernized” right to keep and bear arms should “coexist quite comfortably with a robust First Amendment.”¹⁸⁹

As a practical matter, this has yet to be seen. How is the general public to know whether a group of armed individuals are law-abiding and not intent on perpetuating the next mass shooting? From the gun rights perspective, groups of armed individuals are the far better option than unarmed groups.¹⁹⁰ In the words of NRA President La Pierre, “The only thing that stops a *bad* guy with a gun is a *good* guy with a gun.”¹⁹¹ While this mantra has proved effective in convincing many state and local

¹⁸⁵ *Id.* at 267–68.

¹⁸⁶ See Joseph Blocher, *Categoricalism and Balancing the First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009); see also Joseph Blocher, *Second Things First: What Free Speech Can and Can’t Say About Guns*, 91 TEX. L. REV. SEE ALSO 37 (2012); Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. SEE ALSO 137 (2013).

¹⁸⁷ Charles, *Faces of the Second Amendment*, *supra* note 75, at 50–54; see also Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012).

¹⁸⁸ Glenn Harlan Reynolds, *Foreword: The Second Amendment as Ordinary Constitutional Law*, 81 TENN. L. REV. 407 (2014).

¹⁸⁹ Glenn H. Reynolds & Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. SEE ALSO 89, 99 (2013).

¹⁹⁰ NRA INST. FOR LEGIS. ACTION, 10 MYTHS ABOUT GUN CONTROL (1994), available at <http://people.duke.edu/~gnsmith/articles/myths.htm>; Emily Miller, *Law Enforcement Realizes Good People with Guns Deter Crime*, WASH. TIMES (Mar. 12, 2014), <http://www.washingtontimes.com/news/2014/mar/12/miller-the-thin-blue-line-asks-for-help-from-gun-o>; see also Lisa Miller, *Nate Bell, Arkansas State Lawmaker, Sends Insensitive Tweet About ‘Boston Liberals,’* HUFFINGTON POST (Apr. 19, 2013, 11:48 AM), http://www.huffingtonpost.com/2013/04/19/Nate-bell-tweet-boston-_n_3116480.html?

¹⁹¹ Wayne LaPierre, *NRA Press Conference*, NRA (Dec. 21, 2012), available at <http://home.NRA.org/home/document/nra-press-conference>; David Nakamura & Tom Hamburger, *Put Armed Police in Every School, NRA Urges*, WASH. POST (Dec. 21, 2012), <http://www.washing>

jurisdictions to enact gun-friendly legislation, as well as expanding the legal definition of self-defense, it is nothing more than ideological hearsay. For one, it is impossible to prove the claim that ‘more guns’ equals ‘less crime.’¹⁹² But more importantly, there are a number of examples where unarmed individuals have stopped armed criminals¹⁹³ or armed individuals did not stop armed criminals,¹⁹⁴ thus further calling into question the ‘more guns’ equals ‘less crime’ theory. And this is not even taking into account statistics that are impossible to accumulate, such as instances where armed individuals chose not to act, therefore allowing an ongoing crime to continue,¹⁹⁵ or where the armed individual employed the weapon out of anger or frustration.¹⁹⁶ Indeed, pro-gun advocates are quick to provide examples where an armed citizen stopped an ongoing crime,¹⁹⁷ but these examples are not the totality of how ‘more guns’ or expanding the definition of ‘self-defense’ affect society at large.¹⁹⁸

tonpost.com/politics/put-armed-police-officers-in-every-school-nra-head-says/2012/12/21/9ac7d4ae-4b8b-11e2-9a42-d1ce6d0ed278_story.html.

¹⁹² See LOTT, *supra* note 157, at 36.

¹⁹³ Yael T. Abouhalkah, *Ignore NRA Fantasy World: Good Guy with Pepper Spray Stops Bad Guy with Gun*, KAN. CITY STAR (June 6, 2014, 11:04 AM), <http://www.kansascity.com/opinion/opn-columns-blogs/yael-t-abouhalkah/article495106/Ignore-NRA-fantasy-world-Good-guy-with-pepper-spray-stops-bad-guy-with-gun.html>; Ben Brumfield, *Who is the Student who Pounced on the Seattle Gunman? A Hero, Many Say*, CNN (June 6, 2014, 6:14 PM), <http://www.cnn.com/2014/06/06/us/seattle-shooting-hero/>.

¹⁹⁴ See, e.g., Matthew Cooper, *Navy Yard Shows Fallacy of NRA’s ‘More Guns’ Solution*, NAT’L J. (Sept. 17, 2013), <http://www.nationaljournal.com/domesticpolicy/navy-yard-shows-fallacy-of-nra-s-more-guns-solution-20130917>.

¹⁹⁵ One notable example was the 2011 mass shooting at in Tucson, Arizona. See Molly Hennessy-Fiske & Neela Banerjee, *Armed Bystander’s Reaction in Ariz. Shootings Illustrates Complexity of Gun Debate*, DENV. POST (Jan. 16, 2011, 1:00 AM), http://www.denverpost.com/ci_17109372.

¹⁹⁶ See, e.g., Marcia Anne Sanders, *Man Arrested in Road Rage Incident*, BAY BEACON, Sept. 24, 2014, at A-5 (discussing situation where man employed lawful firearm after being cut off by other driver).

¹⁹⁷ See, e.g., CHRIS BIRD, THANK GOD I HAD A GUN: TRUE ACCOUNTS OF SELF-DEFENSE (2d ed. 2014); David Hardy, *Mercy Hospital Shooting: Bad Guy with a Gun Stopped by Good Guy with Same*, ARMS & L. (July 24, 2014, 4:48 PM), http://armsandthelaw.com/archives/2014/07/mercy_hospital_.php; David Hardy, *Shootout in Ottawa*, ARMS & L. (Oct. 23, 2014, 11:40 AM), http://armsandthelaw.com/archives/2014/10/shootout_in_ott.php.

¹⁹⁸ Take for example two recent cases where the home owners entrapped individuals to employ what they perceive to be lawful self-defense. See *Montana Man Charged with Shooting Teen in His Garage*, CBS NEWS (Apr. 28, 2014, 8:58 PM), <http://www.cbsnews.com/news/montana-man-charged-with-shooting-teen-in-his-garage/>; ‘Stand Your Ground’ Law Tested in Recent Shootings, KHOU.COM (May 1, 2014, 9:06 AM), <http://www.khou.com/story/news/2014/07/25/12477008/>; see also Evan Defilippis & Devin Hughes, *The Myth Behind Defensive Gun Ownership*, POLITICO (Jan. 14, 2015), <http://www.politico.com/magazine/story/2015/01/defensive-gun-ownership-myth-114262.html#.VOJKYF4tHIV>; Suevon Lee, *Five ‘Stand Your Ground’ Cases You Should Know About*, PBS-NEED TO KNOW (June 13, 2012), <http://www.pbs.org/wnet/need-to-know/the-daily-need/five-%E2%80%98stand-your-ground-%E2%80%99-cases-you-should-know-about/14039/>.

Despite the uncertainty as to how exactly ‘more guns’ affects crime rates and society at large, what is known is that the debate over gun control and gun rights has become even more entrenched in a post-*Heller* world. Consider the example of Dick Metcalf, a contributing editor of *Guns & Ammo*, who published an op-ed with the intent of opening a healthy dialogue with Second Amendment absolutists on constitutional limits. “The fact is, all constitutional rights are regulated,” wrote Metcalf, “always have been, and need to be.”¹⁹⁹ Metcalf added:

[Readers of *Guns & Ammo* typically argue that] “The Second Amendment is all the authority we need to carry [arms] anywhere we want to” or “The government doesn’t have the right to tell me whether I’m qualified to carry a gun.” I wondered whether those same people believed that just anybody should be able to buy a vehicle and take it out on public roadways without any kind of driver’s training, test or license.

I understand that driving a car is not a right protected by the Constitution, but to me the basic principle is the same. I firmly believe that all U.S. citizens have a right to keep and bear arms, but I do *not* believe that they have a right to use them irresponsibly.²⁰⁰

The reaction Metcalf’s op-ed generated by *Guns & Ammo* readers and gun rights activists was overwhelmingly negative and even resulted in Metcalf’s firing, as well as the resignation of the magazine’s editor-in-chief, Jim Bequette.²⁰¹ In fact, the outcry by Second Amendment absolutists was so strong that Bequette made sure to apologize to *Guns & Ammo* readers for being “untrue” to magazine’s “tradition in supporting the Second Amendment.”²⁰²

Another recent example that shows just how entrenched Second Amendment absolutism has become in a post-*Heller* world is the pro-gun response to smart guns. What makes smart guns unique is each gun retains an electronic chip that prevents

¹⁹⁹ Dick Metcalf, Op-Ed., *Let’s Talk Limits*, GUNS & AMMO, Dec. 2013, at 120 (paraphrasing internal quotations), <http://www.thetruthaboutguns.com/wp-content/uploads/2013/11/Lets-Talk-Limits-by-Dick-Metcalf-of-Guns-Ammo-December-2013.pdf>.

²⁰⁰ *Id.*

²⁰¹ Michael Martinez, *Guns & Ammo Editor Jim Bequette Resigns Amid Gun Control Column Uproar*, CNN (Nov. 8, 2013, 3:42 PM), <http://www.cnn.com/2013/11/07/us/guns--ammo-editor-resigns-after-gun-control-column/>; Ravi Somaiya, *Banished for Questioning the Gospel of Guns*, N.Y. TIMES, Jan. 5, 2014, at A1, available at <http://www.nytimes.com/2014/01/05/business/media/banished-for-questioning-the-gospel-of-guns.html>.

²⁰² Jim Bequette, *Our Response to the December 2013 Backpage Column*, GUNS&AMMO.COM (Nov. 6, 2013), <http://www.gunsandammo.com/featured/response-december-2013-backpage-column/>.

it from firing unless in close proximity to a watch worn by respective shooter.²⁰³ Although smart guns will ultimately curtail many firearm related accidents as well as generally prevent an assailant from using the gun on the respective gun owner, gun rights activists have denounced the technology.²⁰⁴ The reason being that it is feared that smart guns will lead to bans on non-smart guns.²⁰⁵

Thus, when Rockville, Maryland gun store owner Andy Raymond sought to become the nation's first smart gun dealer, gun rights activists responded fervently. Not only did gun rights activists call for the boycott of Raymond's gun store, but Raymond also received a number of death threats causing him to quit selling smart guns.²⁰⁶ Raymond, a gun rights activist himself, responded in a video. In doing so, he discussed the hypocrisy of those gun rights activists that proclaim to support the Second Amendment:

How can the NRA or people want to prohibit a [smart] gun when we are supposed to be pro-gun? We are supposed to say that any gun is good in the right person's hands. How can they say that a gun should be prohibited? How hypocritical is that? . . . If you're pro-gun does it matter what kind of gun the person has?²⁰⁷

This is not to say that gun rights activists in general are hypocritical or that they believe intimidation is an acceptable civil rights tactic. In fact, there are a number of positive examples in which gun rights activists and supporters work within the confines of the law or use the power of symbolism to bring attention to Second Amendment rights. Take for instance the owners of Shooters Grill, a restaurant in Rifle, Colorado. In accordance with their view that the Second Amendment protects the right of law abiding citizens to carry firearms openly, the owners have encouraged all patrons, as well as the restaurant's employees, to come to the establishment with loaded firearms.²⁰⁸ The owners came up with the idea after the decision of some major retail

²⁰³ Michael S. Rosenwald, *Maryland Dealer, Under Pressure from Gun-Rights Activists, Drops Plan to Sell Smart Gun*, WASH. POST (May 2, 2014), http://www.washingtonpost.com/local/maryland-dealer-will-defy-gun-rights-advocates-by-selling-nations-first-smart-gun/2014/05/01/564efa48-d14d-11e3-937f-d3026234b51c_story.html.

²⁰⁴ Joseph Steinberg, *Why You Should Be Concerned About the New 'Smart Guns' (Whether You Love or Hate Guns)*, FORBES (May 4, 2014, 2:40 PM), <http://www.forbes.com/sites/josephsteinberg/2014/05/04/smartguns/>.

²⁰⁵ See, e.g., N.J. STATS. § 2C:58-2.2 (2003); David Kopel, *Smart Guns*, NRA-ILA (Jan. 29, 2003), <http://www.nraila.org/articles/20030129/smart-guns-by-dave-kopel>.

²⁰⁶ Tom Ramstack, *Maryland Gun Store Drops Plans to Sell 'Smart Guns' After Threats*, REUTERS (May 2, 2014, 2:37 PM), <http://www.reuters.com/article/2014/05/02/us-usa-maryland-smartgun-idUSBREA410SD20140502>.

²⁰⁷ *All In with Chris Hayes: Under Pressure, Gun Seller Changes His Mind*, (MSNBC television broadcast May 5, 2014), at 3:07–3:31, <http://www.msnbc.com/all-in/watch/after-vowing-to-sell-a-smart-gun-a-mea-culpa-247522371551> (excerpt from Facebook video uploaded by Andy Raymond).

²⁰⁸ Clayton Sandell et al., *Colorado Restaurant Serves up Big Helping of Second Amendment*,

stores and restaurants to prohibit gun owners from openly carrying firearms in their establishments.²⁰⁹

Shooters Grill is not the only entrepreneur to take a symbolic stance against what is perceived as being a liberal affront to Second Amendment rights. In 2013, Jay Laze, the owner of All Around Pizzas in Virginia Beach, Virginia, decided to show his support for the Second Amendment by offering a fifteen percent discount to any customer that showed a concealed handgun permit or walked in his establishment carrying a firearm.²¹⁰ Yet the most impactful response has been that of the firearm industry. For example, in response to Maryland enacting the Firearm Safety Act of 2013, a law that bans many semi-automatic rifles and magazines holding more than ten rounds, gun manufacturer Beretta made the decision to move its production to Tennessee; and Beretta is not alone.²¹¹ Other gun manufacturers such as PTR Industries, Colt Manufacturing Company, and Sturm Ruger & Company have decided to move manufacturing away from jurisdictions that have enacted strict gun control regulations to more gun friendly ones.²¹²

In summary, as it pertains to the Second Amendment in the public discourse in a post-*Heller* world, it is fair to conclude that *Heller*'s impact has been substantial. Much like *Heller*'s impact on the political landscape, there has been a noticeable shift. As many Supreme Court decisions do, *Heller* now serves as the framework in which the public discusses the Second Amendment. It is essentially the legal guidepost as to how arms and society coexist. At the same time, *Heller* is somewhat of an outlier because the opinion has done little to temper the gun rights-gun control debate, with both sides declaring victories following the 2014 midterm elections.²¹³ Before *Heller*,

ABC NEWS (July 21, 2014, 6:56 PM), <http://abcnews.go.com/US/colorado-restaurant-serves-big-helping-amendment/story?id=24652271&singlePage=true>.

²⁰⁹ See, e.g., Howard Schultz, *An Open Letter from Howard Schultz, CEO of Starbucks Coffee Company*, STARBUCKS BLOG (Sept. 17, 2013), <http://www.starbucks.com/blog/an-open-letter-from-howard-schultz-ceo-of-starbucks-coffee-company/1268>; *Chipotle Asks Customers Not to Bring Guns Into Restaurants*, BBC NEWS (May 20, 2014, 11:43 AM), <http://www.bbc.com/news/world-us-canada-27492193>.

²¹⁰ *Gun Owners Get a Discount at Va. Pizza Shop*, CBS NEWS (Feb. 22, 2013, 8:48 AM), <http://www.cbsnews.com/news/gun-owners-get-a-discount-at-va-pizza-shop/>.

²¹¹ Frank Minitzer, *Gun-Control Drives Beretta Out of Maryland*, FORBES (July 23, 2014, 12:49 PM), <http://www.forbes.com/sites/frankminitzer/2014/07/23/gun-control-drives-beretta-out-of-maryland/>.

²¹² Harriet McLeod, *Firearms Makers Moving to More Gun-Friendly U.S. Southern States*, REUTERS (June 30, 2014, 6:51 PM), <http://www.reuters.com/article/2014/06/30/usa-south-carolina-guns-idUSL2N0PB0X820140630>.

²¹³ Compare David Scherfinski, *Bloomberg Wins . . . I; Gun Control Group Hails Wash. Background Check Initiative*, WASH. TIMES (Nov. 5, 2014), <http://www.washingtontimes.com/news/2014/nov/5/gun-control-advocates-hail-passage-of-background-c/>, and Jack Healy, *Colorado Ousts Pro-Gun Republicans, Showing Effect of Turnout*, N.Y. TIMES (Nov. 12, 2014), at A14, available at <http://www.nytimes.com/2014/11/12/us/colorado-ousts-pro-gun-republicans-showing-effect-of-turnout.html>, with AWR Hawkins, *Second Amendment Crushes Gun Control Candidates in Midterm Elections*, BREITBART.COM (Nov. 4, 2014), <http://www.breitbart.com>.

gun rights activists denounced most gun control regulations as an unconstitutional infringement of the Second Amendment.²¹⁴ This stance has become more widespread in a post-*Heller* world.²¹⁵ Arguably the same can be said for those that support gun control. Before *Heller*, gun control activists were of the opinion that even if the Supreme Court held the Second Amendment protects an individual right, it must be subject to reasonable regulation.²¹⁶ This view has gained many new adherents as well.²¹⁷

CONCLUSION. *HELLER'S* IMPACT ON THE AMERICAN DISCOURSE

This Article has explored *District of Columbia v. Heller's* impact on American discourse as a whole. It is a discourse that was divided into two categories—the political discourse and public discourse. In many respects, both categories are inseparably linked. This is because in any democratic society the political discourse often reflects what is taking place in the public discourse, and vice versa. However, the two categories diverge when it comes to variance of opinion. As is common with any contentious issue, the variance of opinion within the public discourse is greater than it is within the political discourse. This is because the latter is geared to the needs of partisan politics or with the intent of building a political consensus, while the former reflects the beliefs, attitudes, and opinions of American society at large, which varies dependent upon a number of sociological factors.²¹⁸ Still, despite what separates the political discourse from the public discourse, generally speaking, *Heller* has noticeably altered the manner in which both discuss the Second Amendment.

As it pertains to the political discourse, the right to keep and bear arms has reached new heights. No longer is the Second Amendment seen as just another political issue, nor can politicians flat out ignore the gun control-gun rights debate. It is center stage and a politician's stance on the Second Amendment can affect everything from campaign contributions, to political endorsements, to winning a primary election.²¹⁹ Essentially politicians must choose sides between being for gun control and against gun rights, or for gun rights and against gun control. Thus, instead of *Heller* guiding

bart.com/Big-Government/2014/11/04/Second-Amendment-Crushes-Gun-Control-Candidates-In-Midterm-Elections.

²¹⁴ Pratt, *supra* note 4, at 39 (“Any restriction that has to be applied to people that have broken no law is an unconstitutional infringement. It is unreasonable to violate the Constitution.”).

²¹⁵ See *supra* Parts I–II.

²¹⁶ See Jon Lowy, McDonald v. City of Chicago: *Much Ado About Not Much?*, SCOTUS BLOG (June 29, 2010, 11:00 AM), <http://www.scotusblog.com/2010/06/mcdonald-v-city-of-chicago-much-ado-about-not-much/>.

²¹⁷ See *id.*

²¹⁸ For some more detailed discussions as to how the political discourse and public discourse overlap, see generally POLITICS, DISCOURSE, AND AMERICAN SOCIETY: NEW AGENDAS (Roderick P. Hart & Bartholomew H. Sparrow eds., 2001); Paul DiMaggio et al., *Have Americans' Social Attitudes Become More Polarized?*, 102 AM. J. SOC. 690 (1996).

²¹⁹ See, e.g., Daniela Altimari, *Dogged by Gun Issue, McKinney Faces an Uphill Climb*, HARTFORD COURANT (July 27, 2014, 7:23 AM), <http://www.courant.com/news/politics/elections/hc-john-mckinney-0727-20140725-story.html>.

the discussion as to which firearm policies will best serve the safety of the people, the opinion has polarized American politics on firearms.²²⁰

Of course, this polarization can be attributed to the public discourse on the Second Amendment, given that the political discourse often reflects the cultural values of society. Indeed, well before *Heller* was decided, the gun control-gun rights debate was imbued with talk of Second Amendment absolutism. However, it was not until after *Heller* that the absolutist view of the Second Amendment became a fixture within the political discourse. Gun advocacy groups, like the NRA, have undoubtedly assisted in this transformation, and it has served them well.²²¹ No longer can legislative bodies draft, debate, or enact new firearm legislation without the Second Amendment entering the fold.²²²

But once one enters into the foray of constitutional jurisprudence, even hard-line Second Amendment advocates will admit that *Heller*'s societal impact largely subsides.²²³ Despite hundreds of challenges to firearms laws on Second Amendment grounds, there have been only a handful of notable legal victories.²²⁴ *Heller* certainly recognized that the Second Amendment protects an individual right to “keep and bear arms” for self-defense.²²⁵ It is a holding that has led some within the legal community to hypothesize that armed individual self-defense will eventually become normalized within constitutional jurisprudence.²²⁶ This has yet to occur. One reason is that neither *Heller*, nor its companion case *McDonald*, sets forth an affirmative standard of review.²²⁷ This has left the lower courts to fashion a variety of tests to determine the constitutionality of gun control legislation.²²⁸

²²⁰ See Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 14–18 (2010); Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 832–33 (2014).

²²¹ See, e.g., Tom Watkins, *How the NRA Wields its Influence*, CNN (Jan. 10, 2013, 7:35AM), <http://www.cnn.com/2013/01/09/us/nra-gun-research/>; see also Christopher B. Kenny et al., *Does the National Rifle Association Affect Federal Elections?*, INDEPENDENCE INST. (Dec. 2006), <http://www.davekopel.com/2a/othwr/does-the-nra-influence-federal-elections.pdf>.

²²² See Blocher, *supra* note 220, at 814.

²²³ See Persky, *supra* note 10, at 14.

²²⁴ See, e.g., *Moore v. Madigan*, 702 F.3d 933, 940–42 (7th Cir. 2012) (invalidating a statute that prohibited carrying readily operable firearms in public); *Ezell v. City of Chicago*, 651 F.3d 684, 710–11 (7th Cir. 2011) (invalidating a municipal statute that banned “[s]hooting galleries, firearm ranges, or any other place where firearms are discharged” (quoting Chi. Mun. Code § 9-20-280 (repealed))).

²²⁵ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

²²⁶ Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2008 CATO SUP. CT. REV. 127 (2008); Reynolds, *supra* note 188, at 413–14.

²²⁷ See Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1133 (2011); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. City of Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85, 85 (2010); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 492–93 (2012).

²²⁸ Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC’Y

This is not to say that *Heller* did not leave the lower courts with any guidance. One point of agreement among jurists and academics is that some form of categorical approach was preferred and any interest-balancing approach was rejected.²²⁹ Still, there remain too many jurisprudential unknowns.²³⁰ For instance, what type of categorical approach should be applied?²³¹ Also, what is the court to do if a regulation does not fall squarely within a category? In such a case, are the courts prohibited from fashioning any type of interest-balancing inquiry? These are not easy questions to answer, especially considering that *Heller* failed to fully articulate the full range of Second Amendment core values.²³²

Another reason *Heller* has yet to normalize armed individual self-defense within constitutional jurisprudence, at least not to the degree Second Amendment advocates would prefer, is what George Mason law professor Nelson Lund refers to as *Heller*'s "activist dicta,"²³³ or where the Supreme Court used modern firearm regulatory regimes to caution that the Second Amendment was not an absolute right.²³⁴ What Lund, and perhaps others, find troubling with this "activist dicta" is its inconsistency with *Heller*'s methodology of interpreting the Second Amendment according to its historical or original meaning.²³⁵ But a closer look at the evidentiary record suggests that there are a number of historical antecedents which support *Heller*'s list of presumptively constitutional regulations.²³⁶ Certainly, these historical antecedents do not precisely mirror

(Oct. 12, 2010), available at https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf.

²²⁹ *Heller*, 554 U.S. at 626–29; Blocher, *supra* note 186, at 405–11.

²³⁰ See, e.g., Michael B. De Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L.J. 1449, 1467–69 (2012); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 268–69 (2008).

²³¹ See, e.g., Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 852 (2013) (proposing that the Seventh Amendment provides the answer).

²³² Joseph Blocher, *Heller's Problematic Second Amendment Categoricalism*, LEGAL WORKSHOP (Oct. 2, 2009), available at http://scholarship.law.duke.edu/faculty_scholarship/2462/. For a discussion on some penumbra rights in light of *Heller*, see generally Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247 (2012).

²³³ Lund, *The Second Amendment*, *supra* note 135, at 1356.

²³⁴ *Heller*, 554 U.S. at 626–27 (citations omitted).

²³⁵ See, e.g., Lund, *The Second Amendment*, *supra* note 135, at 1356–57; Lund, *Second Amendment Standards*, *supra* note 14, at 1619–21; see also Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 127–32 (2013); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 712–15 (2012); John L. Schwab & Thomas G. Sprankling, Houston, *We Have a Problem: Does the Second Amendment Create a Property Right to a Specific Firearm?*, 112 COLUM. L. REV. SIDEBAR 158, 166–67 (2012); Winkler, *supra* note 11, at 1562–64.

²³⁶ Charles, *The Second Amendment Standard of Review After McDonald*, *supra* note 14, at 23–26.

modern arms regulations.²³⁷ They do, however, fall squarely into a number of regulatory categories, which is in line with *Heller*'s call for some form of categorical approach.²³⁸

One might also consider the philosophical or intellectual origins of arms regulations as a categorical guidepost, particularly through the lens of the public good doctrine in the late eighteenth century.²³⁹ This doctrine can be found in a number of historical sources, each of which indicates that only the core(s) of constitutional rights were to be judicially protected from legislative interference. Meanwhile, any regulatory interests or categories that fell outside the core(s) could be regulated for the advancement of the common good.²⁴⁰

There is at least one doctrinal concern, however, with utilizing the founding generation's public good doctrine to determine the constitutionality of modern gun control regulation. This being that it seemingly resembles the very interest-balancing approach that *Heller* rejected,²⁴¹ albeit in a historical form.²⁴² But as it stands today, the majority of federal circuits have incorporated facets of interest-balancing into the jurisprudential equation.²⁴³ This is reflected in what has become a standard two-part test for weighing the constitutionality of gun control in the wake of post-*Heller* Second Amendment challenges. The test first asks whether the challenged law burdens conduct within the scope of the Second Amendment, and then asks whether the burden can be justified.²⁴⁴ Under this test, courts have upheld everything from statutes that require a showing of a special need to carry a firearm,²⁴⁵ to prohibiting the possession of firearms by individuals convicted of misdemeanor domestic violence,²⁴⁶ to forbidding the sale of handguns to persons under the age of twenty-one.²⁴⁷

²³⁷ See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

²³⁸ Miller, *supra* note 231, at 907–17.

²³⁹ Charles, *Scribble Scrabble*, *supra* note 73, at 1822–25.

²⁴⁰ See Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 502–17 (2011).

²⁴¹ See *District of Columbia v. Heller*, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).

²⁴² See Charles, *Scribble Scrabble*, *supra* note 73, at 1821–22.

²⁴³ Rostron, *supra* note 235, at 706–07 (“The lower courts, frustrated by the indeterminacy of historical inquiry and puzzled by the categorizations suggested by Justice Scalia, have steered in other directions. They have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.”).

²⁴⁴ See, e.g., *Nat'l Rifle Ass'n of Am. v. BATFE*, 700 F.3d 185, 194 (5th Cir. 2012); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

²⁴⁵ *Kachalsky v. County of Westchester*, 701 F.3d 81, 97–101 (2d Cir. 2012).

²⁴⁶ *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc).

²⁴⁷ *Nat'l Rifle Ass'n*, 700 F.3d at 203.

For the most part, the two-part test has proven to be highly deferential to legislative determinations.²⁴⁸ Still, there have been cases where the courts have struck down gun control laws as unconstitutional.²⁴⁹ A recent example is the Ninth Circuit's decision in *Peruta v. County of San Diego*,²⁵⁰ where the court held that the Second Amendment's text and history dictates that the right to "keep and bear arms" must extend beyond one's home.²⁵¹ It is an opinion that Second Amendment Foundation attorney Alan Gura has described as "punctuating [the] historical exegesis of the right to bear arms."²⁵² Gura particularly lauds the Ninth Circuit's methodology because, contrary to the "prevailing approach" assumed by other federal circuits, "the Ninth Circuit took seriously the question of what conduct the Framers understood the Second Amendment to protect."²⁵³

But Gura's recollection of the past is at odds with what a thorough historical inquiry provides. As discussed in Part II, the history of the Statute of Northampton, accompanied by the late-eighteenth-century duty to retreat, calls into question historically recognizing a Second Amendment right to armed self-defense in the public concourse.²⁵⁴ In other words, what Gura recognizes as 'history' is not really history at all, but instead is a combination of gun rights mythology supported by a selective use of historical evidence. Most historians would categorize *Peruta* as another prime example of "law office history" or the selection and manipulation of historical data favorable to a predisposed legal position.²⁵⁵ Others might categorize *Peruta* under the subheading of "faux originalism" or the practice of originalism without applying the interpretive theory that the framers of the Constitution expected the judiciary to use when construing a constitutional provision.²⁵⁶

Whatever term one wants to use to describe *Peruta*'s application of history in law, it is easy to see how such an approach could be employed to nullify other gun control regulations.²⁵⁷ Those that support or advocate on behalf of the reasonable regulation of firearms may assert that *Peruta* is merely an exception to the hundreds of Second Amendment cases that have upheld the constitutionality of gun control legislation. However, to do so would be to dismiss a growing number of lower federal

²⁴⁸ See, e.g., *id.* at 211 n.21.

²⁴⁹ De Leeuw, *supra* note 230, at 1464–67.

²⁵⁰ *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

²⁵¹ *Id.* at 1150–66.

²⁵² Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 223 (2014).

²⁵³ *Id.* at 224.

²⁵⁴ See *supra* note 145 and accompanying text.

²⁵⁵ Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77 (1963).

²⁵⁶ Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32–33, available at http://www.newrepublic.com/article/books/defense_looseness.

²⁵⁷ Darrell A.H. Miller, *Peruta, The Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238, 241–42 (2014).

courts' decisions overturning gun control regulations, particularly as they apply to the Second Amendment outside the home.²⁵⁸ Still, despite the increase in the number of court decisions striking down gun control regulations, it seems that the majority of courts will continue to uphold the constitutionality of gun control regulations, at least until there is further direction from the Supreme Court. For without clear guidance as to what standard review is proper for Second Amendment claims, the lower courts will continue to rely on *Heller*'s list of regulatory presumptions, as well as work within the framework of the current two-part test. In either instance, those that challenge the constitutionality of gun control legislation on Second Amendment claims face an uphill battle.²⁵⁹

In conclusion, the Second Amendment right to armed self-defense has indeed made noticeable gains in the political and public discourse. But the same cannot be said for *Heller*'s jurisprudential impact. In fact, it would be fair to say that what might seem acceptable to those absolutists participating in the political and public discourse over the Second Amendment is completely nonsensical from a jurisprudential perspective. According to absolutists, the Second Amendment must mean what it says—the right “shall not be infringed,” period. Then there are those who profess that the Second Amendment requires all firearm regulations be subject to strict scrutiny.²⁶⁰ Yet claims like these contradict how the judiciary weighs the constitutionality of most laws.²⁶¹ It would mean that all constitutional rights are subject to some higher form of scrutiny, which is blatantly false.²⁶² This does not mean that *Heller* will not have a substantial impact on the constitutionality of gun control in the years to come, but in order for this to happen it will require the Supreme Court to jurisprudentially direct this course of action.

²⁵⁸ See *Palmer v. District of Columbia*, 2014 U.S. Dist. LEXIS 101945 (D.D.C. July 24, 2014); *Morris v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 1082 (D. Idaho 2013).

²⁵⁹ See, e.g., Rostron, *supra* note 235, at 736–56.

²⁶⁰ See, e.g., Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227 (2006).

²⁶¹ *Id.* at 227–29.

²⁶² See, e.g., James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights With Responsibilities and Regulation*, 94 B.U. L. REV. 849, 865–68 (2014).

