

# *Heller: Past, Present, and Future\**

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**Blocher:** Hello everyone, and welcome. My name is Joseph Blocher. I teach at Duke Law School, and I've been working on Second Amendment issues for almost exactly ten years—the lifespan of *Heller*, something we'll talk about for the next two hours. But just to set the stage for our discussion today, and maybe some of the conversation tomorrow, I want to briefly recap some basic aspects of *Heller* so that we've got some shared vocabulary.

In *Heller*, the Supreme Court held that the Second Amendment right to keep and bear arms extends beyond the organized militia, and it encompasses persons and acts of arms that include certain private purposes, like the use of arms for at least self-defense in the home with a handgun, and potentially a great deal more than that. And in the ten years since

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\* Panelists made edits to this transcript. Visit [www.campbelllawreview.com](http://www.campbelllawreview.com) to view the full video of *Campbell Law Review's* 2018 symposium: *Heller After Ten Years*.

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*Heller*, what we've seen are lower courts, with one major intervention from the Supreme Court, trying to determine the contours of that right.

And that's not easy, because at the same time the Supreme Court recognized this right, and then two years later declared it to be fundamental and enforceable against state and local authorities, the court also recognized that the Second Amendment right, like other constitutional rights, is subject to regulation. The Court in *Heller* listed various forms of regulation it said were presumptively lawful. It didn't say a whole lot about why, or about what other forms of regulation might be lawful. So in the cases in the last ten years, courts have really been dealing with what one Fourth Circuit judge called a "*vast terra incognita*," and trying to map and fill that space.

We've had more than a thousand Second Amendment cases in the last ten years—state and federal, trial and appellate—and the doctrine is starting to take shape. So this is really a wonderful time, I think, to be having this conversation. It's also wonderful that we're having it here because as the dean said, we've got a fantastic panel with which to have that conversation. I'm going to briefly introduce them and then sit back down while they speak.

We're going to start on the end with Professor Glenn Harlan Reynolds, who is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee. Professor Reynolds is known to many of you, presumably, through his writings online, through Instapundit, and his scholarship, which addresses issues of constitutional law and the relationship between law and technology. He's been writing about the Second Amendment for at least twenty years—long before *Heller* was decided. In the mid-nineties, he used the phrase, "Standard Model" to describe the view of the Second Amendment which the court would come to endorse, I think, twelve or thirteen years after Professor Reynolds called that shot. So he can tell us a little bit about the run-up to *Heller* and sort of the scholarly foundation that he helped lay for the Supreme Court's decision.

After that, we have Dennis Henigan. Denny is currently the director of legal and regulatory affairs for the Campaign for Tobacco-Free Kids. But before that, for twenty years he was at the Brady Center to Prevent Gun Violence, where he was, among other things, the vice president for legal and policy affairs and helped coordinate legal defense for municipalities and states defending their gun laws against constitutional challenges. He also helped organize pro bono legal support for people challenging irresponsible gun manufacturers and sellers.

And then finally, we have just to my immediate right, Alan Gura. Alan began his legal career here in North Carolina, with a clerkship for

Judge Terrence Boyle, in the Eastern District of North Carolina. He then moved to Washington, practiced in private practice and in government, and eventually opened his own private firm, which focuses mostly on civil and appellate matters.

Alan, most notably, argued and prevailed in the Supreme Court's two landmark Second Amendment decisions. One of those of course was *Heller*; the other, practically perhaps even more important, is *McDonald v. City of Chicago*,<sup>1</sup> which is the case that made the Second Amendment applicable against state and local governments. Alan is regularly listed among top lawyers, appellate and otherwise, in Washington. Spencer was kind enough to leave this out of my bio, but I was on the litigation team for the district in *District of Columbia [v. Heller]*, so it's good to see you again, Alan, almost ten years to the day of when we finished briefing the case in which you prevailed. [LAUGHTER]

So, the way we're going to do this is, I'm going to sit back down, and the panelists in the order I introduced them are going to speak roughly twenty minutes each, then I'll stand back up; we might have a few questions and some panel discussion, and then we'll open it up for questions from the audience. So, please do give some thought to what you might ask these true experts in the field.

With that, I'll pass it over to Professor Reynolds:

**Reynolds:** So, let me go back to sort of ancient history. Prior to the nineties, there was some, but not a lot, of scholarship about the Second Amendment, a few articles here and there—Dennis Henigan was writing about it in the '80s, and I think even in the '70s. Don Kates had really kind of a seminal article in the *Michigan Law Review* called "Handgun Prohibition and the Original Meaning of the Second Amendment,"<sup>2</sup> which was in like I think 1986 or something like that.

But there wasn't much interest, really, in the subject. Then, Sandy Levinson, who's a law professor in Texas, wrote a piece at the *Yale Law Journal* called "The Embarrassing Second Amendment,"<sup>3</sup> in which he said, "You know, there may be something to this whole idea of an individual right under the Second Amendment, and I think one reason we academics tend to ignore it is we're afraid that if we took it seriously, it might lead to an outcome that we wouldn't politically like."

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1. *McDonald v. City of Chicago (McDonald III)*, 561 U.S. 742 (2010).

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

3. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

And that was very influential for a couple reasons. First, it was in the *Yale Law Journal*. Second, Sandy Levinson is an unreconstructed lefty of the first order, so he couldn't be called a shill for the NRA or the New Right or anything. And third, because he's a super smart guy and it was a persuasive piece. And after that, there was more interest.

So, my own introduction came sort of in a different way. The *Tennessee Law Review* did a symposium on the Tennessee Constitution, and the editor said, "You want to write something about the right to bear arms clause of the Tennessee Constitution?" And I was like, "Yeah, sure, nobody ever has." The thing I love about writing about a state constitutional provision is it doesn't matter what you write, you automatically get in, like the little footnotes and all the annotations and everything, and they kind of have to cite you because, you know, there's nothing else. [LAUGHTER]

So, I was like, "Sure, why not?" And writing about that got me into a lot of the sort of civic-republican thinking of the time of the framing of the Tennessee Constitution—it was just after the framing, it's 1796. So, I got kind of into that, and then from that got sort of slid sideways into the Second Amendment—not jurisprudence, scholarship. And then the next year, the *Tennessee Law Review* said, "We want to do a symposium on the Second Amendment. Would you write something for that?" And I was like, "Sure." And so I did.

And the piece I wrote—which was called "The Critical Guide to the Second Amendment"<sup>4</sup>—was basically a synthesis of the individual rights scholarship up to that point. My own original contributions were modest enough. Mostly, I just took what a lot of people had written already and tied it together into what was a fairly tidy package, which I gave the catchy name of "the Standard Model"—stolen from physics, but you know, we're lawyers; we have to steal from somebody. And it was catchy, which was good, so people started using it, which is always nice, as an academic.

What I did was look at the framing era thought about an armed citizenry as a restraint on a tyrannical government, on the militia being made up of—in the famous words of George Mason—the whole body of the people, and the idea of armed martial virtue in the citizenry, and that sort of thing. And how that translated into the Second Amendment. And, as I said, it made a fairly consistent, tidy package, which had a number of conclusions of varying interest. I mean, among other things, I concluded that on that basis, under the Standard Model, it was hard to really make a Second Amendment argument against licensing and registration, since the

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4. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995).

militia rules required you to actually prove that you owned a gun. So that gave the government some interest in the subject at least.

And it also had the interesting side effect of probably protecting assault rifles, or whatever you want to call them, and other military-style weapons, more than handguns and things like that, which was sort of counterintuitive. It's always fun to be counterintuitive when you're an academic, too. Anyway, it made a pretty nice, tidy package, and people picked up that ball and ran with it, both for and against, for a number of years. And then eventually, the Supreme Court decided *Heller* and, contrary to the kind words spoken, they did not adopt my analysis at all. [LAUGHTER]

As a matter of fact, they did something—I wouldn't say it's exactly inconsistent, but it's not at all my analysis. The *Heller* opinion of the Supreme Court did give some reference to the role of militia as a bulwark against tyranny and the like. But it primarily constitutionalized the right of self-defense. Under *Heller*, the primary driver for a right for civilians to own weapons was to protect themselves and their household in the event of a confrontation with a wrongdoer—typically a criminal of some sort—and that's a somewhat different take than the Standard Model.

Now, to be fair—and this is a point that Don Kates made in a piece in *Constitutional Commentary*, also, I think, back in the '80s—the distinction between the two seems bigger to moderns than it did to people in the framing era.<sup>5</sup> In the framing era, a government official who acted outside his legal authority's limits was essentially indistinguishable from an ordinary crook. And we tend to defer to authority more, for better or for worse—I personally think it's for worse. If I could just change one thing in the law, it would probably be abolition of governmental immunity, absolute or qualified. But that's beyond the scope of this talk—or maybe it's not.

Anyway, so, the distinction between protecting against a tyrannical government and protecting against criminals seems more sharply drawn to moderns, I think, than it probably did to the framers, who saw a tyrannical government as just another species of criminal, really. Nonetheless, in the Supreme Court's take in *Heller*, you wind up basically with somebody like, well, the *Heller* plaintiffs, who were ordinary citizens living in crime-ridden D.C. who wanted to own handguns for protection, and weren't allowed to do so because of the very draconian D.C. handgun laws, which made it very difficult to own a gun. And if by some miracle you managed to do so, you had to keep it disassembled and separated from its

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5. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992).

ammunition, which rendered it largely useless in terms of defense against crime.

And that, I should note, is a different result than you might get with the Standard Model. With the Standard Model, where the purpose of letting people have guns is primarily to defend against the tyrannical government, keeping the guns separate from their ammunition is probably not a big deal. A burglar breaks into your house, you'd probably have ten to thirty seconds to do something about it, but usually, a revolution takes a little longer than that—enough time to put bullets in the gun and things like that. So under the Standard Model, you might actually have gotten a different result there. Probably not, but possibly.

Since *Heller*, of course, we have *McDonald*, which has made clear that the right to arms also applies to the states. And we've had just a huge amount of—I didn't realize it was a thousand cases, but I'm not really surprised to hear that—of percolation in the lower courts, because the Supreme Court, having sort of ruled on the big picture stuff, that there is an individual right to arms, and it does apply to the states, has basically now kept its hands off and not been very interested in getting further involved in everything else.

So we have lot of questions like: Does the Second Amendment right to arms include a right to carry weapons out and about in public? *Heller* seems to say so. It says there's a right to have and carry weapons in case of confrontation. But it didn't go any farther than that, and that was more or less dictum. It's also the case that *Heller* included what a lot of us call "the *Heller* safe harbor," which is a paragraph saying that none of this, of course, overrides traditional limits on carrying guns in places like schools or post offices or whatever, which is an exception that some courts particularly run with.

And we've also seen courts working through things like whether the statutory definitions of being adjudicated mentally defective completely cut off Second Amendment rights, or cut them off only until you were no longer insane, and how to figure that out—the extent to which felons can be debarred from use of arms forever, even if the felony was minor and long ago, and a variety of things like that. And of course, a bunch of cases on the right to carry, where you have—well, I don't want to give away tomorrow's panel on the right to carry; that would be a spoiler. It would be like telling you that Darth Vader is Luke's father—oops, I'm sorry. [LAUGHTER]

But I will say that the courts have not been overwhelmed with the desire to protect the right to carry in public. And that brings me to sort of a couple of interesting things about the Second Amendment, to me. My next project is something called *The Judiciary's Class War*, and I had this

realization a while back that we've got three branches of government, you can elect almost anybody to two of them, but the judiciary is reserved for people who are pretty well off and have postgraduate degrees. And the people who are pretty well off and have postgraduate degrees—and particularly, not just any postgraduate degree, but a degree in law—have tendencies to think and act in particular ways, and those ways are surprisingly similar, even across the political divides.

The culture there is big. And one example: they tend to really care a lot about protecting words. Judges—they're lawyers, they're members of the chattering class—so the First Amendment gets a lot of protection; guns, not so much. The Second Amendment is the part of the Bill of Rights that belongs to what Chris Arnade calls “the backrow kids,” the people who don't excel at education and aren't members of the chattering classes. And the courts have been considerably less solicitous there. They have grudgingly gone along eventually, but it is interesting to see the extent to which the court is willing to protect rights that are not explicitly mentioned in the Constitution, which are highly valued by sort of the educated classes, as opposed to those that are mentioned in the Constitution, but don't enjoy the same degree of upper-middle-class-and-above legitimacy.

Finally—and sort of as a counteraction to that—what we really have seen, despite *Heller* and *McDonald* and all the symposia and law review articles that go with that—which I'm happy to benefit from—is that almost all the real action in protecting rights related to guns is still legislative. We have right-to-carry in just about every state, depending on how you define it. And we have shall-issue with the vast majority, and that's purely a legislative, politically driven determination; the judiciary has had very little to do with that. The judiciary has suggested in a few places that an absolute ban on carrying isn't going to fly, but they certainly have not pushed a requirement for shall-issue carry; that has bubbled up from below politically.

Many of the other protections—again, the assault weapons ban and such have happened for political reasons—really most of the protection of what we call Second Amendment rights has been driven by the two branches of the government that are not reserved for wealthy people with postgraduate degrees. There may be a lesson in that with regard to other constitutional rights and other aspects of our society, as well. That's sort of beyond the scope of this talk, but as the old mathematics textbooks say, I'll leave that one as an exercise for the reader—or in this case, the listener.

There we are. I'll turn it over to Dennis.

[APPLAUSE]

**Henigan:** Thank you, Glenn. Well, first of all, I want to thank *Campbell Law Review* for including me in this symposium, and I have to confess that I was somewhat surprised to have been invited to join you, because I think I can fairly be regarded as a historical relic of a bygone era.

I have not been active on the Second Amendment front for about five years. I think more about e-cigarettes than about AR-15s these days. And that bygone era, of course, is the pre-*Heller/McDonald* era, when the debate was: What is the Second Amendment about? What is the subject matter of the Second Amendment? Is it about an individual right to have a gun for personal reasons? Or is it an entirely militia-centric right?

I was, I confess, on the losing side of that debate, and I expect to be reminded of that several times during this symposium, probably by Alan if no one else. [LAUGHTER] So, even though I'm not an active participant in this debate, I'm very much an interested observer. So, I'll try to bring somewhat of a unique perspective to this symposium, that of someone who remains a strong believer in gun control but is somewhat on the outside looking into the current Second Amendment debate.

So, as we contemplate the tenth anniversary of the *Heller* decision, I want to address three questions which gun control advocates and others were asking at the time the decision came down, and address whether the last ten years might have helped us begin to answer some of those questions. The first question is: Will *Heller* itself survive the test of time? The second question is: Will gun control laws survive *Heller*? And the third question is: What impact will *Heller* have on the continuing national debate about the role of guns in our society?

So, let's turn to the first question. Will *Heller* itself survive? I think this is a legitimate question. The Supreme Court sometimes overrules its own decisions. Sometimes it takes decades, as it did when *Brown v. Board of Education* overruled *Plessy v. Ferguson*, but it has happened in other instances in less than a decade.

I think it's a legitimate question to ask about the *Heller* decision. It was, after all, a five-to-four decision that itself was a sharp departure from Supreme Court precedent in *U.S. v. Miller*,<sup>6</sup> and, in my view, *Heller* was a potentially fragile ruling. And I say that because it was an originalist analysis built on a historical house of cards.

The majority in *Heller* got the history wrong. How do we know this? Well, ask the historians. Professor Paul Finkelman is part of this symposium; I'm so pleased to see. He wrote this about the *Heller* decision: "While the justices in the majority profess to believe in a jurisprudence of original intent, the court's historical analysis could not get a passing grade

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6. *United States v. Miller*, 307 U.S. 174 (1939).



in any serious college history course.” Of the sixteen historians who joined amicus briefs in *Heller*, only one supported the analysis adopted by the majority. And I believe that historian, Joyce Lee Malcolm, is also part of this symposium, which I’m pleased to see.

In *McDonald*, twenty-four historians joined an amicus brief arguing that the *Heller* majority got the history wrong. And in fact, Justice Breyer’s opinion in the *McDonald* case suggested the potential vulnerability of an originalist decision that is based on faulty history. Justice Breyer wrote, “If history and history alone is what matters, why would the court not now reconsider *Heller* in light of these more recently published historical views?” But of course, he knew that wasn’t going to happen.

But *Heller*’s vulnerability, of course, depends entirely on changes in the membership of the Supreme Court. If Merrick Garland had been confirmed as a Supreme Court Justice, there’s a distinct possibility, in my view, that *Heller* would have been overruled. As a judge on the D.C. Circuit, he voted for an en banc rehearing of the panel ruling in the *Parker*<sup>7</sup> case, which, of course, led to *Heller*.

If Hillary Clinton had been elected president, it is quite possible that she would have changed the court’s membership in a way that would constitute a real threat to *Heller*. But, as we all know, elections matter. With the election of Donald Trump, *Heller* is here to stay, at least for a while. But it won’t be because of the decision’s jurisprudential strength. It is, in fact, an originalist decision that defies history.

Well, let’s turn to the second question. Will gun control laws survive *Heller*? The stakes for our society here are very high. I know this symposium topic is not gun violence or gun policy, but it would be a mistake to assess the first ten years of *Heller* without considering it in the context of the continuing tragedy of American gun violence and the continuing debate over how to respond to that tragedy.

The trauma of American gun violence likely is having a profound impact on judicial decision-making on the constitutional validity of gun laws. It is impossible for judges to assess the meaning of *Heller* for gun laws under challenge without some consciousness of the dimensions of gun violence and its impact on American society. And from any perspective you want to look at it, our country has a gun problem.

Americans make up about 4.5 percent of the world’s population; we have 42% of the world’s guns. And we have rates of gun violence unheard of in the rest of the industrialized world. The U.S. homicide rate is seven times that of other high-income countries, and it’s driven by a gun

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7. *Parker v. District of Columbia*, 478 F.3d 370 (2007).

homicide rate twenty-five times higher. American children ages five to fourteen are eighteen times more likely to die of a gun homicide and eleven times more likely to die in a gun suicide than children in other high-income nations. Among those high-income nations, the U.S. accounts for 90% of gun deaths of children under the age of fourteen.

And though public mass shootings represent a tiny percentage of American gun deaths, the profound trauma of these events affects every American. There are places across this country that are now recognizable by millions as sites of unspeakable bloodshed: Columbine, Virginia Tech, Tucson, Newtown, Charleston, Orlando, Las Vegas, Sutherland Springs. And Americans wonder—and I hear them ask this all the time—Is there any end to this? Are these mass shootings a permanent horrifying feature of the American landscape? And I'm quite sure that judges are asking the same question.

So, what has been the impact of *Heller* on laws enacted in response to the tragedy of American gun violence? Well, at the time the decision came down, many feared that *Heller* would be the beginning of the end of gun control. Jeffrey Toobin has written that after the *Heller* decision, “it appeared that all attempts at gun control might be doomed, as a matter of constitutional law,”<sup>8</sup> and I'm sure there are some—maybe many—in this room, who hoped *Heller* would have precisely that impact.

It's certainly fair to say that for the gun rights movement, the point of the *Heller* lawsuit was not simply to strike down local handgun bans—of which there were only two in major American cities—but to establish a precedent that could be used to unravel the fabric of American gun laws, and that clearly hasn't happened. As a threat to current gun laws, *Heller* has largely been a paper tiger. One analysis, which said there are over 1,200 cases in which gun laws have been challenged since *Heller*, found that courts have rejected those challenges 93% of the time.

And it's worth reciting some of the significant categories of gun laws that have been repeatedly upheld. Bans on gun possession by felons, even nonviolent felons, and other categories of high-risk individuals, including domestic violence miscreants. Waiting periods and background checks. Gun registration, including fingerprinting and photographing of registrants. Safety training requirements. Bans of machine guns, assault weapons, and high-capacity magazines. Safe storage requirements. Bans on carrying concealed weapons and other restrictions on the public carrying of guns. And the Supreme Court has shown little interest in reviewing these

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8. Jeffrey Toobin, *What's Really Standing in the Way of Gun Control*, THE NEW YORKER (June 13, 2016), <https://perma.cc/A35S-G95M>.

decisions. It has declined to review at least eighty-two Second Amendment cases since *Heller*.

The reluctance of lower courts to overturn gun laws, and the reluctance of the Supreme Court to review those decisions, has produced some sharp reactions from some of the Supreme Court justices. Dissenting from the court's denial of certiorari in the Seventh Circuit decision upholding the Illinois ban on semiautomatic assault weapons and high-capacity magazines, Justice Thomas, joined by Justice Scalia two months before his death, complained that the Seventh Circuit had relegated the Second Amendment to a "second-class right."<sup>9</sup>

And last year, Justice Thomas wrote a dissent, joined by newly-minted Justice Gorsuch, from the denial of cert to review the Ninth Circuit en banc decision upholding California's restricted concealed carry law. Justice Thomas noted "a distressing trend: the treatment of the Second Amendment as a disfavored right."<sup>10</sup> Justice Thomas noted the Supreme Court has not heard oral argument in a Second Amendment case since the *McDonald* argument in 2010.

So, with certain exceptions—most notably, the D.C. Circuit's ruling in *Wrenn v. District of Columbia*<sup>11</sup> last year, striking down D.C.'s restrictive concealed weapons law—*Heller* generally, I believe, has been a sharp disappointment for gun control opponents who thought it would turn out to be a lethal weapon to be used against gun laws at every level. And it's interesting that no major gun control organization that I know of has attached any priority at all to overruling *Heller*. Contrast that with the decades-long campaign to overturn *Roe v. Wade*. Why? Likely, it's because *Heller* has not yet had a significantly adverse effect on the nation's gun laws.

Well, let's turn to the third question. What has *Heller*'s impact been on the gun control debate? Well, I described *Heller* as a fragile decision—at one time, at least, quite vulnerable to being overruled. But it may be that the demise of *Heller* would be the worst possible result for the gun control movement. I've called this "the *Heller* paradox."

The overruling of *Heller* today would unleash an explosion of pro-gun activism that would be a far greater threat to American gun laws than *Heller* itself. Professor Adam Winkler of UCLA Law School has put it this way: Overturning *Heller*, he wrote, "would spark a backlash that would

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9. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting).

10. *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting).

11. *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

make the political movement to reverse *Roe* seem like a schoolyard kerfuffle.”<sup>12</sup>

In his *Heller* opinion, Justice Scalia declared that the majority ruling had taken certain policy options—namely handgun bans—off the table. Well, *Heller* took broad gun bans off the table not just as a constitutional matter, but also as a feature of the gun control debate. Whether private possession of handguns should be prohibited is simply no longer a live issue, and in my view, that is a positive development for gun control forces in this country because the NRA has always wanted the debate to be about banning guns. It makes it easier for the gun lobby to convince gun owners that far more is at stake in the debate than whether background checks should be applied to all gun sales—the kind of policy recommendation that has the support of even the majority of gun owners.

The NRA—and I know this from experience because I’ve been involved in many of these debates—the NRA strives to cast gun control as an attack on a valued personal possession that is itself a powerful symbol of individual freedom and, indeed, a symbol of a way of life. And that’s why slippery-slope argumentation is so important to the pro-gun forces. Every gun control proposal, no matter how modest, that is proposed, is framed as one more step down the slippery slope to a gun ban or gun confiscation. That’s the argument that the gun lobby uses to try to turn this issue into a cultural issue.

*Heller* may, over time—and it may take some time—function to actually flatten the slippery slope and allow the debate to focus much more on specific policies that are simply sensible responses to gun violence and that have the support of even a majority of gun owners. And I can tell you; the NRA does not want to fight on that terrain.

So, yes, it looks like *Heller* is here to stay. But if *Heller* continues to be a paper tiger in the legal attack on gun laws, and actually functions to recast the gun debate in this way, the gun control movement may be able to live comfortably with *Heller* for some time to come. Thank you.

[APPLAUSE]

**Gura:** Well, thank you so much. I’m always happy to be back here in Raleigh, where I clerked for a little bit to start my legal career, as the dean noted, and also, I’ve spoken before at this wonderful school, and I’m so glad to have such an opportunity to share the stage once again with Dennis, and with Professor Reynolds, as well.

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12. Adam Winkler, *Why the Supreme Court Won't Impact Gun Rights*, ATLANTIC (June 7, 2016), <https://perma.cc/GW4M-BCX6>.

I'd like to address some of the commentary that's been made here by Dennis, and I think he may be surprised to learn that I actually agree with him a fair amount, more than he might suspect, at least about some of what we've seen and what we might expect to see as a political matter, arising to and related to the *Heller* decision.

I do agree with Dennis, and I think it's fairly obvious that many judges have simply not accommodated themselves to the decision in *Heller*. They don't think it's legitimate; they don't believe that it's real. And, absent being compelled by the Supreme Court to do so, they will not enforce it. It is quite obviously a dead letter in much of the United States; I don't think there's any serious question of that for anybody who reads the opinions, and it's not 1,100 or 1,200 or 10,000 opinions that we can cite; it's actually just a select few that we can look at.

I think it's misleading to look at the raw number of total opinions that reject the Second Amendment arguments because, quite frankly, every day in America you have thousands of judges across the land hearing and rejecting arguments by people raised under the Fourth Amendment—people want to suppress evidence that's been seized from them to be used against them in trial—most suppression motions are not successful. There are First Amendment arguments that are raised quite a lot, and it's not surprising that someone facing a very lengthy jail sentence for being a felon in possession of a firearm might throw in one of these kitchen sink arguments about how *Heller* abolished the felon in possession ban as a threshold matter. Those types of arguments don't get anywhere, but they do ring up a tally back in the Brady Center's office—ding, ding—another Second Amendment case got rejected.

So, the raw numbers are not really what I would look at. I would look at certain—a select few, but quite telling landmarks, I would say, that really show you how much the decision is eroding.

So, is *Heller* something that's going to survive? Given the intensity of the resistance to it, I am not so sure that it will. It's interesting that a couple of summers ago, in 2016, I was invited to be sort of the symbolic pro-gun-rights speaker at a panel at the American Constitution Society's national conference, and the debate that we had there—remember, this is the summer of 2016, and everyone's sure that Hillary Clinton's about to be inaugurated and Merrick Garland is going to be confirmed, or maybe even somebody better from the left's perspective—the question was not whether *Heller* would survive, but how would it die? And I was the one voice on the panel that said, "Well, as soon as they get to five they'll overrule it because they just can't stand it."

And most of my friends on the other side said, "No, no, you don't have to worry about that; they'll keep it around"—because it's too

politically devastating to overturn for all the reasons that Dennis regaled you with. It just won't mean a whole lot; it will just be narrowed into nothingness. And that didn't seem right to me. I, too, saw the votes come in, including Judge Garland's vote in *Parker*, and I didn't think that the left would accommodate *Heller* for five seconds. Nonetheless, whether it's overruled as a formal matter or overruled by neglect, or by willful disobedience, the end result is the same. This is a decision that, like any other decision published in *U.S. Reports*, only means something if judges are there to enforce it. In that way, *Heller* is no different than any part of the Constitution itself. We have this parchment, and it says all kinds of interesting things about the limits we place on government and the power that we grant the government.

But, when push comes to shove, if the judges sneer at it and are simply unwilling to give it any effect, then our Constitution is no more effective than the glorious freedom-granting/securing constitution that was enacted by Joseph Stalin in 1938, and we could probably find other examples, right? It's not hard to draft a constitution which generously secures rights. Sometimes it's a little bit harder to find judges who are willing to enforce it, and we've had some meaningful judicial resistance to *Heller*.

If the judges or justices continue to resist or overrule *Heller* formally or informally, one way or another, I do suspect it will be for the class-based reasons that Professor Reynolds noted, and not so much because the history of *Heller* is all wrong. I recommend the opinions, both historical opinions in *Heller*—Justice Scalia's opinion for the majority, as well as Justice Stevens's more erroneous opinion—to anyone who can read them and compare them side by side. There's no shortage of literature out there about the history of the Second Amendment, but I think it speaks largely for itself, and it's beyond the scope of this discussion tonight for me to sit here and reargue the history of *Heller* for you. But the idea, the notion that only capital "H," official, certified historians are allowed to participate in this debate is something that's always bothered me.

Earlier on in the debate, the pre-*Heller* debate about the Second Amendment, we would see this line from the other side once in a while that would say, "Well, this is law office history"—that's sort of a way to deride it, "We are real historians who, of course, are totally neutral; have no political values whatsoever." You grab a hundred historians from any campus in America; you have no idea how they voted in the last election, right? Or, how they might feel about the general social issues of the day. They're all neutral arbiters, they're cold scientists looking at history, and of course, who can argue with them?

And there have been some very official, capital “H,” card-carrying historian members out there writing about the Second Amendment, like Michael Bellesiles, right? We all remember the scandal when a former professor—he’s a former professor now, right?

So, this book came out a number of years ago, which purported to show through historical records that Americans didn’t really have many guns, didn’t much care about guns; that this was essentially an issue manufactured by latter-day lobbyists of the NRA and other nefarious organizations. And this book was lauded; everybody blurbed it; it was a fantastic book; it was awarded, I believe, the Bancroft Prize. Except that the records that were cited to support some of the assertions in the book would have been destroyed in the earthquake in San Francisco in 1906 and, as people started to do more and more digging in the footnotes, they found that this was essentially a fabulism. This was not a true account. The history didn’t hold up. The Bancroft Prize, I believe, was withdrawn; Professor Bellesiles, I believe, is no longer teaching history at Emory. I think they pulped the book, right? Official historian.

Use your judgment when you read things. Check the footnotes and see if the things are there. By the same token, I myself, when I have these debates, do not demand that people certify themselves or qualify themselves in any way to speak about history.

For example, one of the most prolific historians on the other side of this debate is a gentleman named Patrick Charles. I met him once. He’s a nice guy. I don’t agree with him. I disagree with his views, and I would always meet him on those views. If I were to debate him, if I were to disagree with something that he’s written, I would address his arguments. I would not address his qualifications. Interestingly enough, he wound up as one of the historians on this historian’s brief in *McDonald*, and he is a historian. It’s how he holds himself out; it’s what he studies—he studies history. He has a B.A. in history. Okay, that’s fine. I’m not going to say that he’s not a real historian.

Ultimately, I side with what Judge McConnell told Judge Posner in a debate that I was privileged to see a number of years ago at the Federal Society’s annual convention. Judge Posner, a critic of *Heller*, went on and on and on about how the Supreme Court justices are not historians, their clerks aren’t historians— “What do we judges know? Let the historians figure out the history.” And after he’d gotten himself going on this tangent for a while, the response from Judge McConnell was perfect. He said, “We’re not economists either.” And, for those of you who are familiar with Judge Posner’s groundbreaking work on law and economics, you see the problem.

In fact, anyone here in Raleigh should understand the problem of trying to prevent lawyers from arguing about matters that are allegedly outside their expertise, because law is the profession that translates other people's expertise into practical reality. Here in Raleigh, when I clerked here on the local federal court, the district encompassed Research Triangle Park, and so, yes, there were pharmaceutical patent cases that were heard here. And we had a big one when I was a clerk, in *Glaxo v. Novopharm*. I don't have any expertise in organic—synthetic organic chemistry. And neither did my boss. But we had a trial, and the federal circuit affirmed, so I guess he got it right. That's the wonderful thing about law, is that you can learn about other disciplines; you can engage yourself in other areas, and you can present it, translate it, into practical reality.

History is most suitable for lawyers, because after all, you're dealing with the written word, and anybody can read original documents, if you understand the language and understand the language of the day, and come to your own conclusions. Obviously, historians are people who do this more so than other people, and they specialize in some degree. Perhaps if they study a particular period in time or an area, they'd know more about that, really off the top of their head. But this is not something that's outside the province or ability of lawyers to understand, and judges to rule upon.

And so, it's quite appropriate for the Supreme Court, when it is called upon to interpret the Constitution, to apply the Constitution to present-day reality; to ask, "What did the framers of this text understand this text to mean? How was this language used during the day?" And those concepts that it enshrined are the concepts that we are to apply today. If the Constitution does not mean what the framers thought it meant, then it doesn't really mean anything, right? They're just words on a paper, and you can fill in the blanks; they're an empty vessel, and you can pour whatever content you want into those provisions.

So, I don't think *Heller* is vulnerable on the history; I think it makes quite a bit of sense on the matter of history. But the problem is, that we entrust this process, as we have to—somebody has to make these decisions—we entrust it to a class of people who, by and large, are unwilling to accommodate themselves to this and don't believe it and don't care, and aren't going to enforce the decision; it might as well not have been issued in some courts.

I proceed here with caution because there is an old aphorism that provides that you should never tell people your problems because 90% of them don't care and the other 10% are happy to hear it. [LAUGHTER] So I don't like to go around sounding like sour grapes—"Oh, I litigate the Second Amendment. Let me tell you how terrible it's been."



I have not filed all eighty-two cert petitions that Dennis talked about that were denied, but I've filed enough of them to get a flavor of where this is going, and the reality is that I and other lawyers have clients who come to us; they have real, serious questions that arise under the Second Amendment, questions that, regardless of how you think they should turn out, any fair-minded attorney or judge could say, "Well, that's an interesting Second Amendment question. A court should decide this." And I ask the potential client, "Where are you?" And if they are within certain circuits, I said, "Forget it; it doesn't really matter." Because you can't get a panel that's going to buy it. It doesn't matter what the facts are; it doesn't matter what the law is.

You see the type of decision-making which can only be called results-oriented, and before you think this is just me saying it—that this is just, some right-wing gun advocate who's unhappy that he can't get all the victories he wants—let me cite you two folks who are not usually thought of as militia leaders. I start with a former colleague of Dennis Henigan's, I think, Allen Rostron, right? He was a—

**Henigan:** Sitting right there.

**Gura:** Sitting right there, fantastic, that's right—duh. [LAUGHTER] I love your article. I cite it all the time. If there's some place that counts all the citations to an article in briefs and petitions, I am really running up your score, because Dean Rostron wrote a really, I think, good article, which I agree with in many ways, entitled "Justice Breyer's Triumph in the Third Battle Over the Second Amendment."<sup>13</sup> For those of you here at home, that's 80 *George Washington Law Review* 703—right? Yes. Okay.

And, just the title of the article, which came out six years ago, tells you the story. Courts are treating Justice Breyer's dissent essentially as the controlling opinion in *Heller*. Justice Stevens, you will recall, wrote the historical bit; Justice Breyer said, "Well, even if it's a right, let me explain to you why it doesn't mean a whole lot." And he applied a very deferential interest-balancing approach to suggest that even D.C.'s very extreme law would be upheld. And even back then, people could see that this is really what the courts are following, you can call it what you want, but Justice Breyer's interest-balancing approach is what is carrying the day in so many federal courts.

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13. Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

More recently, joining the party we've had Richard Re from UCLA Law. Also publishing an article in the *Georgetown Law Journal*, when he talks about the concept of narrowing Supreme Court precedents from below—this is the title of the article—and the idea is that there are some decisions of the Supreme Court that are either so wrong or so impractical or so offensive—for whatever reason, they are narrowed from below by the lower courts that don't give them the most reasonable construction, but give them the most palatable one, or at least palatable to the judicial class.<sup>14</sup> Now, as far as I can tell from reading the article, which I think is very persuasive—he cites different areas of law where he thinks this is happening, and then, of course, *Heller* is one of these areas, and Re writes, that “the passage of time has seen *Heller*'s legacy shrink to the point that it may soon be regarded as mostly symbolic.”

I can't argue with that. I think that's true. He thinks this is a good thing. What I suggest to you is, put aside whether you think this is good or bad from a normative standpoint about gun laws, how you feel about firearms, and gun rights, whether this is good or bad for America. Ask yourselves what this does to us as a nation that's supposed to be a nation of laws and not men or women—we have female judges, too. Are we the kind of country—the President has used words recently to describe certain places where the rule of law does not usually carry the day—where you go to the lawyer's office, and the lawyer says, “Well, you're going to win or lose based on who the judge is, sitting today.” Is that really what we want for anything, but most especially for the Constitution?

We have an understanding that we teach at this law school and others that we have a system of vertical precedent. The Supreme Court is up here; then you have the intermediate courts of appeal; then you have the trial courts; every state has its own hierarchy. And when one court says something, the lower courts are supposed to follow it. And that gives the law its essential value of predictability, right? One of those values that law does is it informs us what our rights and duties are, how are we to behave, how will the next case turn out, based upon the reasoning of the previous case. And that requires judges to make decisions that they don't personally like.

So, even if you think *Heller* is wrong and horrible and terrible—the history was bad, the consequences for America are terrible, it will cause all these problems—that's all well and good, but this is the Supreme Court's doctrine, and now we have very intelligent scholars who are not gun rights advocates by any measure, who can come in and tell you as an objective

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14. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

matter, this is a symbolic opinion, this is not given its best construction; people are following the dissent.

I would make a prediction that if this phenomenon were to continue, that a lot of the people who are okay with the practice might someday have some very long faces when the tables are turned and something that they care about, as a matter of precedent, is limited into oblivion. But what I'm mostly concerned about is not the feelings of people on either side—we can laugh about turnabout and fair play. I'm mostly concerned about what this is doing to Americans, to my clients and to people in the public, who are becoming cynical about the mission of the federal courts, in particular.

And it's hard to look at some of these decisions and not say, "Come on, this is just a disagreement with *Heller*." I could bore you all night with examples of this; I feel obligated to give you maybe one or two writings from judges that I'm not sure reflect the highest allegiance to *Heller*.

Let's start with a case that I litigated in Illinois; a case called *Moore v. Madigan*.<sup>15</sup> This is the case that struck down Illinois's total ban on the carrying of guns for self-defense outside the home. And there was a petition to have it be heard en banc, which was denied, and we won, and that was great. The dissenters from the decision, from the refusal to rehear the case en banc, not unreasonably and not wrongly noted that Illinois could still regulate the carrying of handguns outside the home; this is not the end of all gun control. Yes, people have to be able to carry a gun somehow, but there's going to be some room for regulation.

But, in their predictions of what regulations would be acceptable, one piece of advice really has stuck with me ever since, and I'll read it to you. The court seized upon the concept that even if you can carry a gun for self-defense, there are going to be some so-called sensitive areas, where you can be excluded from having a gun, and that makes perfect sense. I flew here tonight from Washington—I cannot take this water bottle through TSA, right? For sure, I can't bring a gun if I wanted to. So, there are some places from which guns can be excluded—and we can dispute about how we identify these sensitive places or what they might be, what are the standards the court should apply.

But here's a list of sensitive places that the dissenters came up with: "It should not be difficult to make reasonable arguments to support extending that reasoning"—the sensitive place prohibition—"to areas around"—okay, areas around—what's an area around? Fifty feet? A hundred feet? A thousand feet? "Areas around"—here it comes—"schools, courthouses, other government buildings, public universities, public libraries, hospitals, medical offices, public parks, and forests,

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

churches and other places of worship, banks, shopping centers, public transportation facilities and vehicles, and venues for sporting events, concerts, and other entertainment, among many possible examples.”<sup>16</sup> What’s left? [LAUGHTER] You have the right to carry a gun, but not around a forest, or a building, or a person, or a molecule.

This is not a reasoned attempt to find the limits of a constitutional right. This is an exception that would swallow the rule, and I don’t think it would fly—at least not by a majority of judges who are willing to follow the Second Amendment. But here you have—obviously, you could form a majority of two out of three judges out of these dissenters who would say, “Oh, banning guns from all these places and areas around them, that’s just fine.”

The other case that I always think is a wonderful example of refusal to abide by *Heller* is *Kwong v. Bloomberg*.<sup>17</sup> This is the case in New York that upheld New York City’s \$340 handgun permit fee. New York City, \$340 every three years. So it’s over a hundred bucks a year just to possess a handgun in your home. That’s not including all the fingerprinting and fees. And New York’s position in the case was, “Hey, we’re doing you a favor because the real cost of administering our gun control regime is closer to a thousand-dollars, so it’s a bargain.”

And the court held that charging people 340 bucks to exercise the right to have a handgun in their home for three years is not even an appreciable restraint on the right, and it didn’t even apply heightened scrutiny to it. They decided the case under an essentially rational basis test, but they said, “Oh, but we would uphold it even under intermediate scrutiny—it would get no more than that because the money goes to a good cause—namely, the City of New York.”

How would that panel have addressed a case brought by people who said, “I need to show an ID to vote, and it costs ten bucks to get a state-issued ID for ten years” or whatever. You couldn’t charge them a nickel; you couldn’t even make them get a free ID, in many courthouses. But hundreds of dollars for a handgun? It won’t bankrupt you—you didn’t say it would bankrupt you—so we’re going to approve it as a matter of rational basis.

I could go on; there are other examples. But we do have a problem, with essentially judicial lawlessness. One more example: the case that was mentioned here about the assault weapons ban in Highland Park, Illinois. The reasoning of that case was a little bit different than we’ve seen in other types of assault weapons ban cases—I suppose that there’ll be a panel

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16. *Moore v. Madigan*, 708 F.3d 901 (7th Cir. 2013) (Hamilton, J., dissenting).

17. *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013).

tomorrow discussing this. The reasoning that the Seventh Circuit used to uphold the ban was that, regardless of whether these weapons are harmful to society, incidents where the weapons are used have high salience in the public consciousness. And so, this law makes people feel better, and that's a sufficient value that allows prohibiting the possession of something that would otherwise obtain protection under an enumerated constitutional right. It makes people feel good. That's the new standard for infringing upon an enumerated right. That's hard to accept, and yes, people don't like guns, and I get that. But see if you would like that reasoning applied to your favorite right, whatever it might be.

Where are we going? We're not going anywhere unless we have different judges making these decisions. And that's essentially, at the end of the day, a function of politics and democracy. And it's sad to say that. On the one hand, I'm happy with many, if not all, of the recent nominations that have been made throughout the country; I think these are by and large—except for one or two people that didn't get confirmed—these are, certainly at the appellate level, all highly qualified folks. I'm not going to agree with all of them in every case, but I think that these will be men and women who generally respect and understand and will seek to apply the Second Amendment, whether they have lots and lots of guns or not. It's sad that it requires political controversy to be able to hope that you get enough people who would do that. Thanks.

**Blocher:** The first question, in some respects—and this is for everybody—is what you think about, why, in 2007-2008, did *Heller* finally get results? Because, in some respects, the materials of decision were there all along. There was no new discovery of notes that Madison had written about the Second Amendment. Gun regulation was not a brand-new thing. The D.C. law had been on the books for decades. I'd be happy to be corrected on this, but I don't think there had been a single Second Amendment federal case striking down a law on Second Amendment grounds for 200 years. I emphasize that not to say that *Heller* was wrong, but just to emphasize again the barrenness of the field that Glenn and others had to sow when they were writing their scholarship and the magnitude of the mountain that Alan was climbing when he won this case. I don't know of any federal cases, at least, though, overturning laws on Second Amendment grounds.

So, what was it in 2007-2008 that gave us *Heller*, so that we are here today on the tenth anniversary?

**Gura:** Okay. I'll start. Well, let me start with this. For much of our history, we didn't have any federal gun laws. And so, in a regime

where the Bill of Rights was understood since the 1830s to only restrict the power of the federal government and not the states, state gun laws were not challenged under the Second Amendment. There were state gun laws challenged and struck down from time to time, under state right to bear arms provisions. State constitutions also secure the right to bear arms, and that is not an empty field by any measure. We were able to argue based on a lot of nineteenth-century state constitutional analogues. But we didn't have any federal gun laws to speak of, and the Bill of Rights didn't apply to the states.

When the Fourteenth Amendment was ratified, we saw almost immediately a Second Amendment case come before the Supreme Court. There was a Second Amendment allegation in the criminal complaint in *Cruikshank*, in *U.S. v. Cruikshank*,<sup>18</sup> which arose out of the Colfax massacre in Louisiana where, essentially, the Klan overran a courthouse when they didn't like the outcome of an election that installed anti-Klan forces, and the Justice Department indicted the perpetrators of this massacre for violating the First and Second Amendment rights of the people defending the courthouse. And, of course, the Supreme Court then following the execrable decision earlier in the *Slaughter-House Cases*<sup>19</sup> said, "Well, the First and Second Amendments, these are rights that don't come out of the existence of the federal government, and therefore, you can't charge people under the Fourteenth Amendment for violating the Second Amendment."

It wasn't until the very end of the nineteenth century that we got one right—the Takings Clause—incorporated as against the states. It wasn't until the '20s that the First Amendment started coming in. Why did it happen in 2007 with the Second Amendment? The *Emerson*<sup>20</sup> case was a big factor. Also, all the scholarship that was done on the Second Amendment throughout the 1990s.

We saw the scholarship well up. We saw the issue percolate in the legal academy, and then that broke through in *Emerson*, which created a circuit split, and that's what caused my colleagues to see the issue as one that could be a live one for the Supreme Court. Clark Neily and Steve Simpson at the Institute for Justice said, "This split will be resolved eventually. Let's try to resolve it now, with a decent case." And they were able to put the case together. I came in towards the tail end of that formative process. But that's why you saw it then and there. We just

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18. *United States v. Cruikshank*, 92 U.S. 542 (1875).

19. *Slaughter-House Cases*, 83 U.S. 36 (1872).

20. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

didn't have a base for a decision for many years, and once we got a circuit split, it actually came up pretty quickly.

**Blocher:** Glenn, did you want to—it looked like you were going to say something?

**Reynolds:** Well, I mean, a couple of things that I find interesting—you know, since I teach constitutional law and all, I always talk about how, leading up to the *Brown* case, Thurgood Marshall—and really before him, Charles Hamilton Houston—spent a good twenty years litigating peripherally related cases to close off the Supreme Court's lines of retreat before they ever actually got to the core question in *Brown*. And even then, I mean, now, of course, defeat has a thousand—victory has a thousand fathers.

And so, after they won in *Brown*, everybody thought it was a great idea, but in fact, before *Brown* was decided, it was super controversial, even within the civil rights and the black communities. A lot of people said, "You're ahead of the game"; "You're too early"; "If we lose, we're screwed." And we had a very similar dynamic with *Heller*.

There were a lot of people, including, actually, the NRA, who did not want this case brought in. They thought that it was too early and that it was going to lose. And I have to confess, I looked at it, and said, "Well, I can count four votes, but I can't—I don't feel comfortable saying I can count five." And that's why Alan Gura is Alan Gura, and I am me, I guess. [LAUGHTER]

But—and you never know—I mean, another example I use with students is when they brought *Bowers v. Hardwick*<sup>21</sup> in the '80s, the gay rights lawyers were like, "Well, we can count four votes, and we think we can pick up a fifth. And honestly, we think Reagan is going to appoint more justices, and the court is going to get more conservative. This is our best shot for twenty years." They brought it, and they came really close. And then later, Powell said, "You know, I think I got that wrong. I should have gone the other way." And if he had done that, they would have been geniuses. So sometimes you do just sort of roll the dice on these. If the—if it's an easy case for the court, you may not need to bring it at all.

But I also think that the scholarship did provide some pressure, and there was also popular pressure. And I forget which law professor it was—was it Michael O'Shea who had the thing that said, "The question the court has to face is, how can you say there is a right to abortion, and a right to birth control, when those aren't in the Constitution, and say there is not a

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21. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

right to bear arms when there is something in the Constitution?” How can you say that as a court and have any legitimacy with the public at all? And I think that question was being asked sharply enough that people could no longer be distracted or fobbed off by saying, “Well, Warren Burger wrote in *Parade* magazine that the Second Amendment only protects state armies.” That just wasn’t going to fly anymore.

**Henigan:** I have a little bit different perspective as to how this happened.

**Reynolds:** Shocking. [LAUGHTER]

**Henigan:** I mean, clearly, there was a concerted effort to pack the law journals with articles that were critical of the consensus judicial view that had prevailed for many years. Not all of those articles were funded by the NRA, but a lot of them were written by NRA lawyers. Very few historians were entering the fray, and I’ve got to tell you, you know, being on the other side of this issue, we were concerned about this, just because the sheer number of these law review articles. Many of them, they quoted each other. They all repeated the same thing over and over again, and they were all a grievous distortion of the history.

The problem was that we had a heck of a time getting historians interested in this, to enter this fray, and to—as professionals—and to draw into question some of the historical analysis that was populating the law journals. Paul Finkelman did enter the fray; a few others did. But it’s very difficult to get academics interested in writing articles that basically conclude the courts have had it right all along, particularly historians on law faculties.

And then you had an article that appeared that gets not as much attention as it should. People talk about Larry Tribe writing on this and Akhil Amar. But shortly after I joined the Brady organization, 1989, Michael Kinsley wrote a piece for *The New Republic*, in which he said, “We ought to start thinking seriously about the Second Amendment,” and that was—you know that it’s a liberal journal.<sup>22</sup> He is a very respected columnist. One of my favorites of all time. And for him to give this view credibility exacerbated the problem, and yet we still had trouble getting historians to enter the fray.

The other factor here is that the lower courts, when they were deciding Second Amendment cases, framed the issue in a way that wasn’t very

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22. Michael Kinsley, *Second Thoughts*, NEW REPUBLIC: TRB FROM WASH. (Feb. 26, 1990), <https://perma.cc/ST5X-39GD>.



helpful, because they would say things like, “Oh, the Second Amendment guarantees the states’ right to a militia,” which appeared to be contradicted by the plain language of the amendment, which guarantees a right to the people. And so you had lawyers like Don Kates and others, pointing this out when, in fact, the militia view of the Second Amendment never depended on the assertion that it was a state’s right. The question was not whether it’s a state’s right. It is the people’s right. It says so.

But what right is it? Is it a right to have a gun in connection with participation in an organized militia or a right to have a gun for other purposes? But the lower courts were framing the issue in a way that made it very easy to refute that militia claim. That argument was central to a lot of these law review articles, and it wasn’t until the historians got involved and explained the legislative history of the Second Amendment that it was very clear that these articles had completely distorted it.

But nevertheless, that’s where we are, and it’s an interesting study in how an interest group and an ideology can, basically, use the law journals to make what was considered to be a marginal argument into a credible argument.

**Blocher:** So, let me—I can see that there are going to be responses to that. All the panelists would like to say something about this. But I don’t want to take too much wind from the sails of tomorrow’s history panel with Professor Finkelman and Professor Malcolm, and I don’t want to necessarily relitigate issues involving articles that probably not everybody here has read. Although, I will echo what Alan said earlier, that if you haven’t, I’d highly recommend just rereading Justice Scalia’s opinion and Justice Stevens’s opinion, so you can get a sense of what’s out there.

But I would like to ask a scholarship follow-up question because I think one thing that Professor Reynolds said that is so important here is the influence really does seem to be there in the opinions. And one way to measure this is just look at what the justices cite. In *Heller*, the justices cite more secondary sources and scholarship, and they cite it more often than they do all traditional legal materials combined—statutes, constitutional provisions, and cases. Just empirically speaking, the influence seems to be there.

So I wonder when you are looking at the field today, do you still have the same sense that it is as barren, or as partisan, or as riven? You know, for every—there are innumerable stories of discredited scholars, whether historians, whether it is Michael Bellesiles, whether it’s empiricists whose work can’t be reproduced by others. This is something often said about

John Lott's book, *More Guns, Less Crime*, about which other empiricists have said, "We tried to replicate the results. We can't do it."

And Alan, in particular, you have said earlier in your remarks that you believe pretty strongly in the law's translation function and its ability to translate history, for example, into doctrine. So, I wonder if you think the same for the law's ability to translate other expertise, whether it's policy or otherwise. If John Donohue is right, and loosening concealed carry laws or public carry laws raises the murder rate, is that something that law can take up, because it's as sort of clear and straightforward? You can read the numbers as well as you can read history. So, a general set of questions about the role of scholarship today, in addition to the lead-up.

**Gura:** Well, I think that's a different question. The question of whether guns are good or bad for society and whether John Lott is correct, or any of his critics are correct, or Donohue at Stanford, that's a question for legislators to determine. That's a question for policymakers. That's a question for the people because, at the constitution level, this debate has been constitutionalized in a certain direction.

So, if you believe that guns are, essentially, a social evil and they create a lot more harm than good, and this has been proven empirically as far as you can take it, then your mission is to convince the political process to change the Constitution. Because the Constitution, if nothing else, is a set of political values. Everything in the Constitution is controversial; there is nothing unique about the Second Amendment.

We have debates all the time. We can have debates about whether we should have the police limited by the Fourth Amendment, for example. We'll catch a lot more criminals if we do away with all the limitations on police and prosecutors. Maybe we can do away with the Eighth Amendment, and people will think twice about committing crime. All right. We can have all these empirical arguments, and arguments about social cost are made all the time.

But the Constitution, for good or bad, has set out certain policies, and if you think those are bad policies, then the First Amendment guarantees you the ability to debate that and to participate in the political process. But I don't think that it's for the courts to say, "Well, the framers said, you know, this is—the law should be a certain way, but a bunch of people at the faculty lounge have decided that's a bad idea, so we should let the faculty lounge have its way." That's not the way that law works, especially not in a democracy. So, I think it's the wrong question.

**Reynolds:** Actually, as an empirical matter, that does seem to be the way law works. [LAUGHTER] So I am going to have to argue with that.

But sure, I mean, there are all kinds of policies that you can argue, and people do argue. That making abortion and contraceptives more available has had negative social consequences. Generally speaking, we don't see that as a reason to overturn *Roe*. It's not a constitutional argument. You are supposed to overturn constitutional opinions with constitutional arguments, not with consequential ones. Though, you know, as I say, that requires a certain degree of self-discipline on the part of judges that is, perhaps, more assumed than real.

I'd like to make a sort of spinoff on something we talked about earlier, which is lower court resistance, because Brandon Denning is here, and he and I did a very extensive—I guess for law, it counts as an empirical project.

We looked at how lower courts processed the *Lopez*<sup>23</sup> and *Morrison*<sup>24</sup> opinions over an extended period of years. We did several articles on the subject, and I guess one of them kind of gives away the answer. It was—I think it's in the *Wisconsin Law Review*, we said—our subtitle was, “What if We had a Constitutional Revolution and Nobody Showed Up?”<sup>25</sup> Because the lower courts, basically, read *Lopez* and *Morrison* and said, “You know, these opinions, if we took them seriously, would require us to strike down a lot of federal laws, and so we are not going to take them seriously.” And some of them were really quite upfront about that.

And the Supreme Court told them twice: “We meant it.” Then they said, “We mean it.” But then the Supreme Court didn't do it again, so they ignored it. Are we there with *Heller* and *McDonald*? Told them twice and now we are waiting for the third time, and maybe it's Justice Breyer's third revolution instead? I don't know.

Although some of you have probably seen it if you are on social media, there's a meme. It has a picture from the TV show, *Archer*, and it says, “Do you want more Trump? Because this is how you get more Trump.” And in fact, I think the election of Donald Trump is, in part, a response, not specifically to courts ignoring the Second Amendment decision, but rather to as—here I am talking my book again—imagine that, in an academic—sort of the class war we have going on in America between kind of the mandarin class that runs government, and academia, and a lot of other stuff, and the working and other parts of flyover America, I guess you'd call it. And I think that that resistance is ultimately—if the judiciary fails to pull it off, it's going to be very destructive because—and

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23. *United States v. Lopez*, 514 U.S. 549 (1995).

24. *United States v. Morrison*, 529 U.S. 598 (2000).

25. Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (2000).

even if it does pull it off—it's going to be fairly destructive for the judiciary because, ultimately, its main resource is its credibility, and I think if people don't trust it anymore, it's much weaker.

**Henigan:** I'd like to comment on this notion that both Alan and Glenn have articulated that the problem here is that the lower federal courts are simply not enforcing *Heller*. They're just ignoring it. They are being renegades. And I think that notion is premised on a particular reading of the *Heller* decision that I don't think is a valid reading. The *Heller* decision that the other two speakers are envisioning is a decision that could not have attracted five votes.

The opinion that did attract five votes contained some very, very powerful dicta. I would acknowledge it's dicta, but among the most influential dicta, I think, in the history of our constitutional jurisprudence. And that is the dicta that actually narrows the scope of the *Heller* decision itself. And we'll talk more about this tomorrow. And it recognizes that, just as the court found that there was a historical tradition guaranteeing an individual right to bear arms, there was also a rich historical tradition of restrictions on that right, in the interest of public safety.

In other words, the five votes were assembled to support an opinion that recognizes that not only is there this right, but it is a right that it, in and of itself, creates a sufficient threat to the public safety, that there is an equally long tradition of regulating the right to try to protect the public from gun violence. And so, the lower courts have been applying that *Heller* opinion, that is, the *Heller* opinion that actually attracted five votes. And that signaled to the lower courts that you cannot enforce this opinion the way we wrote it without recognizing the inherent threat to public safety from the exercise of this right, and the inherent power of our elected representatives to regulate the rights so as to minimize the risk to public safety. So, it's a different *Heller* opinion than is envisioned by the other two speakers.

**Gura:** Okay. If I can just briefly respond to that. I am going to disagree with that, unfortunately, Dennis. I don't think that the courts are applying that paragraph of which you speak.

When *Heller* came out, there was this paragraph about certain presumptively lawful longstanding restrictions that tell us about the scope of the right and the Supreme Court gave some examples, and Dennis Henigan's organization said, "Ah-ha. See, it's not so bad. We've got this exception—this list of exceptions that's going to make everything okay." And it was controversial. People thought maybe this was designed to get Justice Kennedy's vote, but we don't really know. None of us were in the

room. We don't know whether this was required to get so-and-so's vote or not.

But what I can tell you after ten years of litigating in this area, is that paragraph has not actually been all that consequential. The only thing it's really done—it's disposed of a lot of the facial challenges to felon disarmament laws—and I'll talk about that more on the panel tomorrow—but it has not solved the question of felon disarmament, because of that word “presumptively” there. I don't want to discuss the paragraph. What I would like to tell you, though, if I were going to make a list of the five or ten worst Second Amendment decisions in the wake of *Heller* that totally ignore the opinion and are essentially fabricating law, that paragraph doesn't feature in them. It's not really been where the courts have gone off the rails. And, in my view, if you look to see how the courts evaded *Heller*, they reduced everything to interest balancing. They have applied, essentially, rational basis review, whether they call it intermediate scrutiny, or, as we saw in one of my cases a couple weeks ago, strict scrutiny. It's a rational basis case. Don't be fooled.

This is what we've been reduced to. There is this magnetic, unyielding attraction of courts to shove every single thing into interest balancing, and apply some standard of review, and that, of course, is extraordinarily empowering to judges, because regardless of what standard you claim to be using, you can always cook the result to come out the way you want, and that's what they're doing. One of the striking things about the *Wrenn* decision, in which the D.C. Circuit got rid of the may-issue carry law there—is that it approached the question in a categorical sense: If this is a destruction of the right, we're not going to get to interest balancing. This is simply—the law is incompatible with the regulation that you have here, which was, of course, the way that *Heller* itself came out.

And, I say it until I'm blue in the face, but judges don't care: *Heller* didn't use interest balancing. *Heller* simply said the amendment means a certain thing. These rules are incompatible with it. We don't need to get into construction. But judges want construction. They don't care about that paragraph too much. Sometimes they do, but usually they don't. They just balance everything into oblivion. That's really been the problem.

**Blocher:** So, let me ask one more question, and then I want to open it up, because what Alan's describing here is the debate about whether *Heller* is essentially being overturned in the lower courts, and we can have a debate about that. But you all also talked about—and Dennis this was in your comments and Alan, yours as well—the idea that *Heller* itself would be outright overturned by a future Supreme Court, and I just want to revisit that, because I think I have a different take on this maybe than both of you.

One thing that was remarkable about *Heller* when it came out was, this was in the middle of a presidential campaign—both Obama and McCain immediately came out and said they supported the results; 75% of Americans support the results. The political parties both said they endorse it, endorse the Second Amendment, support Second Amendment rights. It's not like *Roe* that way. It's not like *Citizens United* that way. I mean, if you look at the platform speeches that are given by the Democrats or Republicans, they have Supreme Court decisions in their sights. And I haven't heard that about *Heller*.

And even on Garland, you know, there were allegations made about his vote in *Parker* and a few other cases that he was going to be an anti-Second Amendment justice if confirmed. The people who supported him if you thought that's what they wanted, you might have thought they'd embrace that. And they didn't. They said, "No, that's wrong. He's not an anti-Second Amendment justice." They pointed out, you know, Judge Randolph voted with him in the *Parker* vote, which was just to go en banc. It wasn't to necessarily overturn the decision.

So, I guess I wonder, it does sound like you kind of come around to this at the end, but there's no major—that I've heard—push from the Democratic Party or from one of the gun control groups, so where would that come from, and do you see it as likely?

**Henigan:** Well, I think the situation would have been different if, in the wake of *Heller*, lower courts began to strike down gun laws, and they did not. And so—and it was, in fact, I think, the dicta about the long tradition of presumptively valid gun laws that was immediately latched onto by the lower courts in upholding gun laws that were under attack.

And I think that—I think the situation would be radically changed, and I think the gun control groups would, in fact, rally against *Heller*, if there were any reason to believe that the *Heller* was becoming a potent weapon that was going to begin to unravel our gun laws. And so the last chapter of this story has not yet been written, and I certainly was appalled by the *Wrenn* decision. I was shocked that there was no en banc review of the *Wrenn* decision. If you had *Wrenn* decisions popping up all over the country striking down not only carry-in-public laws and restrictions, but other kinds of gun laws, I think you'd see a different dynamic toward *Heller*. But the way things are going, I think *Heller* is here to stay.

**Gura:** Well, we're working on it, Dennis. [LAUGHTER] You know, I'm doing the best I can. Okay? It's not easy.

We've seen a very smart strategy from the other side in not sending things to the Supreme Court when they lose, and they have lost a bunch of

cases. They just don't petition for cert on those. And that's why you can now carry a handgun if you want in Chicago and Washington D.C. Go through some hoops, but everything in Chicago and Washington, D.C. has hoops in it. I always tell people, "Look, if I can make guns as regulated in Chicago as everything else is regulated in Chicago, that's fantastic." It's not a place that has a lot of freedom, generally speaking, in other facets of life.

But where would this come from? I think it would come from the culture of the judges and their belief system, and it doesn't matter what the Democratic or Republican parties say about *Heller* and their platforms or what they don't say about it. The hatred, and derision, and hostility of these judges to these decisions is palpable. I've been before them, and I've felt it, and I've seen it.

And a word about—you mentioned Judge Randolph, a George H.W. Bush appointee. Karen Henderson also on that court, a Republican appointee; the most strident skeptics of *Heller* that you might find. These are not judges that any gun rights advocate would necessarily love to see in a case in the D.C. Circuit.

And that brings me to something else. There's a misconception out there that, "Oh, this is all, you know, if we get Republican judges, they'll vote one way, and if you get Democrat judges, we'll get a different decision." I am not sure that's true. I haven't done the math, so this could be wildly wrong. But anecdotally speaking, my back-of-the-envelope guesstimate is that we get a few; occasionally, we'll get the vote of somebody who was nominated by a Democratic president. We might get 50 or 60% of the Republicans. So you can do the math. It's not great. I can think of any number of Republican appointees who are as hostile to this right as anyone that you can name. And they are not going to turn up in the vote for enforcing *Heller* in any way, ever.

**Reynolds:** They're country club Republicans, not gun club Republicans. Is that what you're saying?

**Gura:** I don't know what country club they belong to, or if they belong to a country club. I don't belong to a country club or a gun club, so, I am at the Y. I don't see any judges there. [LAUGHTER] I'm in Alexandria. But no, it's definitely a cultural problem. And they hate this decision. They'll get rid of it, and they don't care what the politicians say. When they are there in that conference room, and they are taking a vote, when they get to five votes, this thing is gone. And I would bet all the money in the world, especially if it's in your pocket, on that.

**Blocher:** All right. With that, I'd like to open it up for questions. Any from the audience, in order to pick up the audio for the videos here, we have a roving mic. I am happy to keep asking. I've got a lot. But if you'd like to ask, please raise your hand, and we have a mic circulating.

**Valone:** My name's Paul Valone. I direct Grass Roots North Carolina, the state's primary gun rights organization. In twenty-five years, it has dawned on me that it has become popular in this debate to say that a school of thought or a person's work is somehow wrong or discredited without actually saying what's wrong or discredited about it. I have read Joyce Lee Malcolm's *To Keep and Bear Arms: Origins of an Anglo-American Right*, and by all accounts and by all appearances, it's extraordinarily well documented, in terms of documenting the intent of the framers in drafting the Second Amendment. So, my question to you is, you have said that the history behind *Heller* is wrong or that it defies reality—I realize we are kind of limited on time here, but what's wrong, and what defies reality, specifically?

**Henigan:** Well, I'm just going to barge in and answer it. The fact of the matter is, if you analyze the legislative history of the Second Amendment, which I think is the most directly relevant historical material, you see that the debate the framers were having was entirely about the militia. It was not about the need to ensure the right to self-defense at all. I've written quite a bit about this myself. I've done my own law office history; I have to confess. As Glenn said, I was one of the few writing about it during this early period, although not as early as you think, Glenn.

And you know, I've got to tell you, when I first started working on these issues, and I thought, "Well, I've got to look at some of this original historical material myself." And I expected to find that well, geez, all these colonial leaders, I mean, they liked guns. They carried guns around. I'm going to find that guns were highly valued by framers of the Constitution, and we're going to have to figure out how to make some kind of argument based on contemporary circumstances. We're going to have to diminish the significance of the history.

And then I started reading the actual debates in the First Congress, and in the ratifying conventions of the states. And I realized, "My goodness. Actually, this is about the militia." And most of the historians, by far, who have looked at it have concluded the same thing. For example—I'll just give you one example from the legislative history—Madison's original draft of the Second Amendment had a conscientious objector clause. Now, if his intent was to create a personal right to be armed, divorced from militia service, why would it ever occur to him to put a conscientious



objector clause in the Second Amendment? Now, it didn't survive. It was actually taken out because those who were supporting the Second Amendment thought that it would serve to weaken the militia, but it was all about the militia. So that's just an example of the kind of historical fact that is largely ignored by much of this pro-gun writing.

As far as Joyce Malcolm's work, I would recommend that you read the work of Lois Schwoerer of George Washington University, who is probably the leading authority on the English Bill of Rights of 1689, which pro-gun people say is the progenitor of the Second Amendment. I would suggest you read some of her work because she does a pretty nice job providing the other side to the interpretation of the English Bill of Rights.

**Reynolds:** I'd just like to jump in with a question, because, I mean, militia discussion seems so old hat now, but since we have it, when the Second Amendment talks about the militia, it says, "A well-regulated militia, being necessary to the security of a free state." Now, I think it's beyond dispute that we don't have what the framer's regarded as a well-regulated militia in any sense or form. And does that mean that what we have right now is insecure and unfree? And if you believe that, and if you believe that the militia clause of the Second Amendment has force, isn't the federal government in default on its Second Amendment responsibilities?

And if the federal government is in default on its Second Amendment responsibilities, what's the remedy for that? One part remedy might be self-help by people arming themselves since they can no longer count on the government to maintain the militia that the Second Amendment says is necessary to a free society. Just a thought.

**Blocher:** Question from the audience, from an historian, no less.

**Finkelman:** From a historian, yeah. I want to suggest to Glenn, and I want to respond to that in this way, which is that the Second Amendment says that a well-regulated militia is necessary for the security of the free state, and that the states have the obligation to maintain a well-regulated militia, if they choose to do so. The federal government in Article 1, not in the Second Amendment, has an obligation to arm those militias and to have set up uniform rules for the militias, et cetera.

Now, the history of the militias is pretty clear. Militias existed in most states until the Civil War, although, for example, Delaware did not have a militia in 1860. And since the Civil War, most states have voluntarily abolished their militias and instead have accepted the National Guard, which functions as the state militia and is the functional equivalent

to the state militia; although some states, such as Texas, still maintain its own state militia.

So, it's not the federal government that would be in default. The federal government made an offer to the states: "We'll take over the whole thing. We'll have National Guard, and if you like that, then you can opt in, or you can have, as Texas does, both the National Guard and the Second Amend—and the state militia." So, I don't think there is a—

**Reynolds:** Well, of course, we got the National Guard primarily because the state militias of some of the southwestern states refused to invade Mexico, and Attorney General Wickersham opined in 1912 that they were within their right to do so, because a militia can only be called out to resist invasion or suppress an insurrection, not to invade other countries. And lo and behold, we instantly get a force that we can use for foreign adventures. So, I would suggest that—

**Finkelman:** Well, wait a minute.

**Reynolds:**—the National Guard is absolute—no, I'm sorry—the National Guard is absolutely not a substitute for the militia at all, but is rather an effort by the federal government to create a new body which is, from its standpoint, more subject to control than the militia contemplated by the Second Amendment was.

**Finkelman:** Can governors call up the National Guard?

**Reynolds:** Yes. But when they do, they are calling up a body of troops. They are not calling up a militia. It is, at best, as Akhil Amar said, "A select militia of the sort the framers thought was dangerous because it was too easily turned to political control of the populace."

**Finkelman:** Well, this is a debate that we could have for a very long time, and we could burn many trees in the process, or at least pulp them into paper. My only point is, is that, functionally, in the twenty-first century, the National Guard functions as the state militia does. It is the first armed body called up in case there is a crisis. It is the armed body called up if you have a nonmilitary crisis, such as a flood or a fire, and it is regulated by the national government under Article 1, as Article 1 says it should be, and I think it's—if you would like to see the state militias recreated, then you need to go to the North Carolina legislature.

**Blocher:** So, if everybody is not at the historical panel tomorrow, I'll be disappointed. [LAUGHTER] There's clearly a lot to discuss here, but there's also only a few minutes remaining, and I want to make sure we get in any other questions.

More questions about the militias or otherwise. In the back there.

**Denning:** There's been a lot of discussion about lower courts not wanting to go along with this and enforce what the Supreme Court ruled. The Supreme Court presumably could say, "Come on, this is the way we ruled. We're going to take another case and say it again." Have you gotten a sense of why the Supreme Court has, basically, washed its hands and said, "We've done what we are going to do; we're not going to say any more"?

**Gura:** No. They don't tell us why they don't take cases. They usually don't give us that level of insight into their reasoning. All we know is what we see, which is that they're not taking cases which are evermore ridiculous in their outcome and reasoning, and there are a few justices who are calling out the unreason of this process. But what you see is what you get, right? The court is obviously okay with it because it's unwilling to do anything about it. And I think we are beyond the point of being concerned solely about Second Amendment doctrine or the state of gun rights. This is very concerning as a matter of having operational vertical precedent and maintaining the court's credibility with the public. They're not fooling anyone. I can tell you the people I interact with out there in America are losing faith in the competence and willingness of the federal judiciary to preserve their rights and to hear serious cases.

**Reynolds:** And just on the larger question—and this is much beyond the Second Amendment—it is absolutely the case that the Supreme Court provides virtually no supervision to the courts of appeals in general. And I actually did some research a few years ago on the number of cases that came out of the courts of appeals—and I am going by memory—I have—this is roughly correct. I think in 1973, I think it was 770 published opinions from the courts of appeal, and in 2008 or whenever it was I did the research, it was like 30,000. Meanwhile, the Supreme Court actually takes half as many cases. So even in terms of providing broad policy guidance, and particularly providing broad policy guidance and then making it stick if the lower courts resist, on any of a number of subjects, the Supreme Court's just not maintaining any kind of significant supervision over the courts of appeals at all anymore, and that is a much larger problem than anything they do about gun rights.

**Henigan:** One brief comment. I think that the question really goes right to the point, which is that if the lower courts were acting as renegades, defying a Supreme Court decision, why hasn't the Supreme Court granted cert in one of these cases? The fact of the matter is that the *Heller* opinion that attracted five votes is the opinion that this current Supreme Court is enforcing, and they could clearly correct what the lower courts have been doing. They could put them on a different path. They could create a whole new precedent. They have done none of those things. Again, the pro-gun folks are imagining a *Heller* opinion that was never written. The lower courts are actually being loyal to the Supreme Court and recognizing the validity of the *Heller* opinion that was written.

**Blocher:** I wanted to make sure that we get in—because everybody had one chance on that question, and I see we have got at least one more coming.

**Denning:** Dennis, the one decision that has come out of the lower courts that I think disproves your thesis is *Moore v. Madigan*. Richard Posner didn't have to write the opinion that way, striking down Illinois's ban on public carry, and yet he did. Because he said, "Oh, I'm pressing *Heller*'s logic to the limit." And I submit that that was an effort—that was bait that he was throwing out, trying to get the Supreme Court to take up the case and either narrow it or overrule it.

**Henigan:** Well, I agree. I think that's a fascinating opinion, and it's one that deserves some thought. Judge Posner is the judge who said that *Heller* was a massive snow job. So, he thought *Heller* got the history completely wrong. And, you know, he is even more extreme, I think, in denouncing *Heller* than my old con law professor, Jay Harvie Wilkinson. But I almost think that part of what he was doing was saying, "You got it so grievously wrong, and now look at what you're making me do." I think that in his mind, what he did was a principled application of *Heller*. I think that he is very much in the minority in that view, although he attracted a majority of the panel, obviously. But other circuit courts have not found in *Heller* a requirement that this right be extended beyond the home. He read *Heller* differently. But I think part of this is him saying, you know, "You're making me do this, what I regard as an opinion that was not required by the Constitution at all, because the court originally got it all wrong."

**Blocher:** Let me ask one last question that hopefully we'll pick up on Brannon's and bring together a lot of the themes that we've engaged today. And we can start with *Moore*, because it's a case that's come up a few times—a Seventh Circuit case involving a statewide ban on public carry. And my recollection of this, and you who are familiar with it may correct me, but that was the only state that had such a law, correct? That Illinois was the only—it was an outlier case; it was an outlier law. And I wonder how that maps onto what we've been saying about judges and their relationship to the Second Amendment or to gun rights and gun regulation, generally, because if it's true that they're so far out of step, then they're not in a position to do much harm, unless the people are also out of step and vote in favor of laws, because the judges can't pass them; they can only strike them down. So, unless the American people—and maybe the answer to this is just they are in certain areas—biased against the Second Amendment in the way that you think judges are, then there shouldn't be problems that the judges would ever be in a position to fail to correct. I wonder if you think that's true?

**Gura:** Well, democratic majorities are always out of step with the rights of people who dissent and want their rights enforced. The whole point of having a Constitution with rights that you can get enforced is that you lost the election, the legislature is against you, they're trampling on your rights, and some neutral judge applying an old but still applicable principle of law is going to override the political judgment. If you take the view that, "Well, people are voting for this stuff, so there's no problem," I mean, I suppose there are people who have that view. I'm not sure it's the system of government that we have.

So, in fact, we do have large areas of the country where there are a great many gun laws that you could never imagine any of them being struck down. Let's look at the Ninth Circuit, for example. This is a court that's gone en banc over and over and over again to undo the work of any panel that remotely imagines there to be some kind of a Second Amendment issue. This is a court that covers what, a very large fraction of both the land mass and, I believe, a fifth of America's population. It has some jurisdictions that are intensely hostile to gun rights. Never has the Ninth Circuit seen a single Second Amendment violation, either facially or as applied at the federal, state, or local level anywhere, as it's applied to that whole region and population. We can ask ourselves, you know, "How many gun laws have been struck down?" There have been a few, but, is it really the case that, magically, all these years, the federal government and the state governments have been operating without the benefit of a true understanding of the Second Amendment and they somehow got it right the

whole time, because they never managed to violate the Second Amendment, or is it that the courts are simply unwilling to enforce the right? I think it's the latter view.

**Blocher:** Please join me in thanking the panelists.