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## Second-Class Rights and Second-Class Americans: Applying Carolene Products Footnote Four and the Court's Enforcement of Nationally Accepted Norms Against Local Outlier Jurisdictions in Second Amendment Enforcement Litigations

Mark W. Smith

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## **Second-Class Rights and Second-Class Americans: Applying Carolene Products Footnote Four and the Court's Enforcement of Nationally Accepted Norms Against Local Outlier Jurisdictions in Second Amendment Enforcement Litigations**

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SECOND-CLASS RIGHTS  
AND SECOND-CLASS AMERICANS:  
APPLYING *CAROLINE PRODUCTS*  
FOOTNOTE FOUR  
AND THE COURT’S ENFORCEMENT OF  
NATIONALLY ACCEPTED NORMS AGAINST  
LOCAL OUTLIER JURISDICTIONS IN SECOND  
AMENDMENT ENFORCEMENT LITIGATION

*Mark W. Smith*<sup>+</sup>

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In the years since deciding *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010), the Supreme Court has largely abandoned the role of protecting American gun owners despite the text, history, and tradition of the Second Amendment's right to keep and bear arms. The Supreme Court has failed to use the jurisprudential tools at its disposal to ensure that the fundamental right to arms is protected as robustly as other enumerated constitutional rights. This failure is an acute one. And it is unjustifiable across a wide variety of jurisprudential methodologies, from originalism to the non-originalist approaches that were dominant during the era of the Warren and Burger Courts. The Supreme Court must do more to protect this right. With the elevation of Judge Amy Coney Barrett to Justice Amy Coney Barrett, the prospect of more robust judicial protection of Second Amendment rights has increased.

There are two important lines of American jurisprudence that, while historically influential, are not receiving their due in contemporary debates about the scope and enforcement of the Second Amendment. The first line of precedent stems from Footnote Four of the Supreme Court's 1938 decision in *United States v. Carolene Products Co.*<sup>1</sup> The second line of authority, also outlined in Footnote Four, arises from the Supreme Court's traditional role of enforcing nationally accepted norms against outlier local majorities that are oppressing distinct and insular minorities.<sup>2</sup> Today, certain outlier jurisdictions dominated by large urban majorities are depriving gun owners, who are a distinct and disfavored minority in many of those jurisdictions, of Second Amendment rights that are fully recognized in the vast majority of states and localities. This article discusses both lines of precedential authority. Today's Supreme Court can and should deploy these two principles to vindicate Second Amendment rights from continued attacks, and to roll back outlier laws enacted by only a few jurisdictions that choose intentionally to ignore the U.S. Constitution as written and refuse to be bound by Supreme Court precedent.

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1. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

2. *E.g.*, Michael J. Klarman, *Rethinking the Civil Rights & Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16 (1996); Frank H. Easterbrook, *Abstraction & Authority*, 59 U. CHI. L. REV. 349, 370 (1992).

I. THE ROBERTS COURT SHOULD USE THE JURISPRUDENTIAL TOOLS AT ITS DISPOSAL TO ENFORCE SECOND AMENDMENT RIGHTS

A. *Carolene Products Footnote Four*

One of the most mainstream and enduring theories of legal interpretation of the U.S. Constitution<sup>3</sup> is the one articulated in Footnote Four of the Supreme Court's 1938 opinion in *United States v. Carolene Products Company*.<sup>4</sup>

In *Carolene Products*, the U.S. Supreme Court addressed whether the Carolene Products Company could be criminally indicted for shipping in interstate commerce a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream.<sup>5</sup> The company raised various constitutional challenges to the indictment, arguing that it was beyond the power of Congress to regulate interstate commerce and that the indictment violated the Fourteenth Amendment's Equal Protection Clause, as well as the Due Process Clause of the Fifth Amendment, by depriving the defendant of its property without due process of law.<sup>6</sup>

The U.S. Supreme Court held that the indictment could stand because the underlying statute was constitutional.<sup>7</sup> In so ruling, the Supreme Court applied a broad reading of the Commerce Clause, and effectively held that statutes restricting property rights or economic liberties would be upheld if the law in question had a "rational basis" in fact or experience.

But the Supreme Court left itself a loophole to its newfound judicial restraint for what it considered to be more important rights. The groundwork for this judicial enforcement loophole was seeded by the opinion's Footnote Four, which is generally viewed as the most famous footnote in U.S. legal history.<sup>8</sup>

Footnote Four states:

There may be [a] narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten [A]mendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types

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3. See Daniel Farber and Philip Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 690 (1991).

4. *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

5. *Id.* at 146.

6. *Id.* at 146-47.

7. *Id.* at 154.

8. Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165 (2004).

of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities. . . . or whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>9</sup>

Footnote Four empowers the Supreme Court to withhold its customary deference to enactments by elected legislatures when a piece of contested legislation “affect[s] rights specifically mentioned in the [C]onstitution;” when it “interferes with the democratic process;” or when it “affects those ‘discrete and insular minorities’ for whom the democratic process does not work fairly.”<sup>10</sup>

*1. Footnote Four and Its Progeny Identify Three Situations Where Robust Judicial Review of Legislation Is Justified*

Legal scholars and commentators view the articulation of Footnote Four as a “pivotal moment in the history of the Court.”<sup>11</sup> The ideas the footnote expressed “laid out the path the Court would follow in the twentieth century” to “protect[] minorities and civil rights,” and “the political process.”<sup>12</sup> Indeed, many constitutional scholars are of the opinion that Footnote Four explains and “encompasses much of the ensuing half-century of constitutional law.”<sup>13</sup>

Without belaboring the footnote’s history and the case law it helped inspire<sup>14</sup>, it suffices to state that courts should give only limited deference to a legislature when a statute or regulation concerns (a) the fundamental, enumerated individual rights set forth in the Bill of Rights, incorporated against the states via the Fourteenth Amendment (the “preferred freedoms doctrine”), (b) the protection of various minority groups such as racial, national, or religious groups, including groups that constitute “discrete and insular minorities”, and (c) the protection of the voting processes necessary to ensure fair and free elections and appropriate political representation.<sup>15</sup>

Two of the foregoing jurisprudential tools are potentially relevant to protect Americans who seek to exercise their Second Amendment right to keep and bear arms: (a) the preferred freedoms doctrine, which permits the Court to exercise greater judicial scrutiny of laws, which restrict rights or liberties guaranteed by

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9. *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (citations omitted) (emphasis added).

10. Gilman, *supra* note 8, at 165–66.

11. *Id.* at 166.

12. *Id.*

13. See Farber and Frickey, *supra* note 3. See also JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

14. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 793 n.16 (1983); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

15. See generally *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

the first ten amendments,<sup>16</sup> and (b) the doctrine protecting discrete and insular minorities from hostile and oppressive laws enacted by local majorities.

2. *Understanding Footnote Four's First Jurisprudential Tool: The Preferred Freedoms Doctrine*

During the 1930s, the Supreme Court increased its vigilance when freedoms of speech, press, or religion were at issue. In *Palko v. Connecticut*, the Court distinguished fundamental rights, those that represented “*the very essence of a scheme of ordered liberty*,” as being entitled to greater protection against state abridgment, in accordance with the Due Process Clause of the Fourteenth Amendment.<sup>17</sup> In *Carolene Products* Footnote Four, which was decided one year later, the Court specifically allowed for enhanced judicial scrutiny of laws that appear “to be within a specific prohibition of the Constitution, such as *those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth*.”<sup>18</sup>

Originally, scholars understood the language in Footnote Four to evoke what was known as the preferred freedoms position.<sup>19</sup> As one commentator has explained, “While modern scholars, critics and admirers alike, agree on the political process, minority-representation interpretation [of Footnote Four], it is very different from the early understanding of the footnote.”<sup>20</sup> In its first incarnation, Footnote Four stood for the opposite of value-free adjudication. It stood instead for the “*preferred position*” of certain freedoms—a firmly value-based position. As one commentator asserts:

The doctrine of the ‘preferred position’ was that personal rights (meaning primarily freedom of speech and religion) were to be preferred to (given more protection than) economic rights, not because of their role in the political process, but because of their ‘sanctity,’ their ‘elevated rank in the hierarchy of values,’ or simply their ‘explicit statement in the Bill of Rights.’<sup>21</sup>

The idea being that:

The usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority

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16. A separate but related concept arising out of *Carolene Products* and similar Supreme Court precedents is called the “Preferred Position.” This doctrine “expresses a judicial standard based on a hierarchy of constitutional rights so that some constitutional freedoms are entitled to greater protection than others.” Richard L. Pacelle Jr., *Preferred Position Doctrine*, THE FIRST AMENDMENT ENCYCLOPEDIA, <http://www.mtsu.edu/first-amendment/article/1008/preferred-position-doctrine> (last visited Feb. 23, 2020).

17. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

18. *Carolene Prods. Co.*, 304 U.S. at 153 n.4 (emphasis added).

19. Gilman, *supra* note 8, at 191.

20. *Id.* at 179.

21. *Id.*

gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.<sup>22</sup>

The current understanding of Footnote Four is different from the original understanding.<sup>23</sup> Today, Footnote Four is considered significant because it allows federal courts to ensure that the political processes are open and available for “discrete and insular minorities” (category two) who would be disenfranchised without court intervention.<sup>24</sup> As commentators acknowledge, “[t]oday, the footnote is understood as standing for an argument that attempts to legitimate judicial review on the basis of the flaws in the political process.”<sup>25</sup>

The Roberts Court would be well-advised to go back to the earliest understanding of Footnote Four and learn from its teachings. The right to bear arms, guaranteed by the Second Amendment and incorporated by the Fourteenth Amendment, falls within Footnote Four’s doctrine of “preferred freedoms”; thus, any legislation that attempts to restrict Second Amendment freedoms should be subject to heightened judicial scrutiny and greater protection against state abridgment.

### 3. *Understanding Footnote Four’s Second Jurisprudential Tool: The Concept of “Discrete and Insular Minorities”*

Beyond the preferred freedoms doctrine, Footnote Four gives the courts another equally important protective doctrine. For several decades, the Supreme Court has drawn inspiration from Footnote Four’s phrase “discrete and insular minorities.” This is the second jurisprudential tool created by Footnote Four, which permits the Court to give only limited deference to the legislature.

To decide whether a group constitutes a discrete and insular minority, there is a long list of factors a court considers. Some of those factors include whether the person or group has been disadvantaged historically or has historically lacked effective representation in the political process.<sup>26</sup> Race, religion, national origin, and alienage have figured prominently in making this determination, but this list of relevant considerations is not exhaustive.

In Part III of this Article, I make the case that gun owners in certain hostile jurisdictions are discrete and insular minorities lacking political power or influence. When the current Supreme Court considers *Carolene Products*

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22. *Id.* at 189 (quoting *Thomas v. Collins*, 323 U.S. 516 (1945)) (statement of Justice Rutledge) (citations omitted).

23. *See id.* at 183.

24. In short, “the Court polices the twin gates of the political process: voting and speech,” and “the Court protects, through whatever constitutional provision is appropriate, those the government stigmatizes.” L.A. Powe, *Does Footnote Four Describe?*, 11 CONST. COMMENT. 197, 197–98 (1994).

25. Gilman, *supra* note 8, at 167.

26. *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012), *appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013).



Footnote Four in the context of today's ideological debates regarding Second Amendment rights, the Court should take inspiration from the discrete and insular minority doctrine.

*B. The Supreme Court's Historical Role of Enforcing Nationally Accepted Norms Against Local Outliers Who Fail to Keep Up with the Mainstream*

The Supreme Court has a long-standing practice of protecting constitutional rights that are popular nationwide against infringement by outlier local jurisdictions that seek to oppress local minorities. To illustrate: when the Court struck down Connecticut's ban on contraceptives in *Griswold v. Connecticut*<sup>27</sup>, it was merely enforcing a mainstream national norm against an extremely unusual local law. When the Court invalidated Texas's sodomy law in *Lawrence v. Texas*<sup>28</sup>, it was merely putting the final period on the handwriting that was already on the wall for these types of laws.

But here, rather than requiring the Court to vindicate or invent a minority right that has no "populist" or popular support in America (as opposed to vindicating a purported right supported only by America's urban, coastal elites), enforcing the right to bear arms against a very few outlier jurisdictions fits squarely within one of the Court's traditional roles, that is, protecting *local* minorities from hostile legislation that is out of step with, and contrary to, the national baseline.<sup>29</sup> Unlike several other rights the Court has "discovered" in the Constitution—and then enforced against majority will—the Second Amendment has strong populist or popular support throughout most of the Nation.<sup>30</sup> Vigorously enforcing that right against the handful of outlier states and localities that continue to refuse to fully recognize it is strongly supported by the Court's accepted role in protecting local minorities in those out-of-step jurisdictions from being targeted by laws that are far outside the national mainstream.

II. APPLYING FOOTNOTE FOUR'S PREFERRED FREEDOMS DOCTRINE TO SECOND AMENDMENT LITIGATION

It is well established that there is no "hierarchy among . . . constitutional rights."<sup>31</sup> None other than Justice Felix Frankfurter explained this in his famous dissent in *West Virginia State Board of Education v. Barnette*. Justice Frankfurter wrote,

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27. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

28. *Lawrence v. Texas*, 539 U.S. 558 (2003).

29. See Klarman, *supra* note 2, at 16–18; Easterbrook, *supra* note 2, at 370.

30. "According to reports such as: ATF Firearms Commerce in the United States, ATF AFMER and Congressional Research Service data, there are an estimated 434 million firearms in civilian possession in the United States." *NSSF Releases Most Recent Firearm Production Figures*, NSSF (Nov. 16, 2020), <https://www.nssf.org/nssf-releases-most-recent-firearm-production-figures/>.

31. *Caplin & Drysdale v. United States*, 491 U.S. 617, 628 (1989).

[t]his Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are ‘specific’ prohibitions. . . . But each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected, and the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.<sup>32</sup>

As to the Second Amendment, the text and original understanding of the document demand that conclusion. Those who framed and ratified the Constitution did not assign “weights” to the various values, interests, and rights they codified; nor did they attempt to list them in order of importance or provide any basis for prioritizing some provisions over others. Indeed, the Supreme Court has emphasized that the Second Amendment is not a “second-class right”<sup>33</sup> that can be “singled out for special—and specially unfavorable—treatment.”<sup>34</sup> To the contrary, the very text of the Second Amendment is phrased in absolute terms (“the right of the people to keep and bear arms shall not be infringed”<sup>35</sup>) unlike some other amendments that have some measure of judgment built in (*i.e.*, Fourth Amendment right to be secure against “unreasonable searches and seizures”; Eighth Amendment prohibition against “excessive bail” and “excessive fines”<sup>36</sup>).

Today’s gun owners rank the right to own guns as comparable in importance to their individual rights to privacy, freedom of speech, freedom of religion, and the right to vote.<sup>37</sup> Like the founding generation that won the Revolution and wrote the Bill of Rights, contemporary American gun owners regard the right to bear arms as “the true palladium of liberty” in our republic.<sup>38</sup> Gun owners and

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32. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting) (citation omitted).

33. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion).

34. *Id.* at 778–79.

35. U.S. CONST. amend. II.

36. U.S. CONST. amend. VI, VIII.

37. Kim Parker, *et al.*, *America’s Complex Relationship With Guns* 30 PEW RSCH. CTR. (June 22, 2017), <https://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/>.

38. *See McDonald*, 561 U.S. at 769–70 (citations omitted)

(“Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as ‘the true palladium of liberty’ and explained that prohibitions on the right would place liberty ‘on the brink of destruction. . . .’ ‘The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.’

*Id.* (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890, p. 746 (1833)).

non-gun owners agree that “freedom of speech, the right to vote, the right to privacy, and freedom of religion are essential to their own sense of freedom.”<sup>39</sup>

The preferred freedoms doctrine allows for enhanced judicial scrutiny of laws that attempt to restrict the first ten amendments to our Constitution. The Second Amendment falls squarely within this category of freedoms deserving of the Court’s enhanced protection. The Court in *Heller v. District of Columbia* and *McDonald v. City of Chicago* recognized the right to bear arms, which is recognized by the Second Amendment, as a fundamental right.<sup>40</sup> Throughout the twentieth century, and as discussed *supra*<sup>41</sup>, the Supreme Court has widely expanded the realm of protected activities under the First, Fourth and Fifth Amendments. In contrast, when it comes to the Second Amendment, the Supreme Court has largely remained silent, thereby permitting to go unchallenged numerous restrictions—and not expansions—of that fundamental right. The Roberts Court should follow the lead of the Warren and Burger Courts and invoke the preferred freedoms doctrine articulated by *Carolene Products* Footnote Four to enforce and broaden Second Amendment rights.

### III. APPLYING FOOTNOTE FOUR’S DISCRETE AND INSULAR MINORITY PROTECTION AND THE NATIONAL BASELINE DOCTRINE TO THOSE AMERICANS SEEKING TO EXERCISE THEIR RIGHT TO KEEP AND BEAR ARMS IN POLITICALLY HOSTILE METROPOLITAN AREAS

#### A. Gun Owners Are A Discrete and Insular Minority

Gun owners in those deep blue urban jurisdictions have a strong argument that they are discrete and insular minorities under Footnote Four.<sup>42</sup>

Although the Supreme Court has not specifically held that members of the LGBTQ community constitute a discrete and insular minority, it is still helpful to discuss the sort of legal analysis that might ultimately give rise to such a finding, which would have implications in the Second Amendment context.

*Golinski v. U.S. Office of Personnel Management* is an instructive 2012 opinion from the U.S. District Court from the Northern District of California.<sup>43</sup> There, the district court found that homosexuals are entitled to the same heightened legal protections as individuals falling within a recognized class of

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39. Parker, *supra* note 3, at 30.

40. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

41. See *supra* Section I.

42. The concept of discrete and insular minorities arises usually in the context of Equal Protection claims under the Fourteenth Amendment. But that does not mean that a class of gun owners cannot benefit from the inspiration and analysis of *Carolene Products* Footnote Four when they assert various legal claims including, but not limited to, claims under the Second and Fourteenth Amendments.

43. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 974 (N.D. Cal. 2012).

discrete and insular minorities, like African Americans or women. The *Golinski* court reasoned:

[T]he court in *High Tech Gays*, in performing the analysis of the issue of whether the legislature's classification based on homosexuality calls for heightened scrutiny, relied on the mistaken assumption that sexual orientation is merely 'behavioral,' rather than the sort of deeply rooted, immutable characteristic that warrants heightened protection from discrimination. . . . The court found that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes. The behavior of such already recognized classes is irrelevant to their identification'. . . . The Supreme Court has since rejected this artificial distinction, noting that its more recent precedent 'have declined to distinguish between status and conduct in the context' of sexual orientation. . . . In *Lawrence*, the Court noted that 'when homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination. . . .' 'While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, the law is targeted at more than conduct. It is instead directed toward gay persons as a class.' Accordingly, the analysis of the Ninth Circuit in *High Tech Gays* on the appropriateness of applying heightened scrutiny to gay men and lesbians because their defining characteristic is immutable has been severely undermined by more recent and overriding precedent.<sup>44</sup>

The *Golinski* court proceeded to analyze the factors to determine whether a class is entitled to suspect status and thus deserving of heightened scrutiny. First, it found that "lesbians and gay men have experienced a long history of discrimination."<sup>45</sup> So have gun owners in outlier states, which have subjected them to long prison terms for peaceable activity, such as the mere possession of a handgun (Chicago and some of its suburbs), or a firearm that is not registered (District of Columbia), or common rifles that are not registered (New York), or ammunition without a state-issued firearms identification card (Illinois) or simple possession of a magazine holding more than ten rounds, or bringing ammunition into the jurisdiction from out of state.<sup>46</sup>

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44. *Id.* at 984–85 (citations omitted).

45. *Id.* at 985.

46. *See, e.g.*, N.Y. PENAL LAW §§ 70.00, 265.01-b; N.J. STAT. ANN. §§ 2C:39-3(j), 2C:39-5(a), 2C:43-3(b)(2), 2C:43-6(a)(4), 2C:44-1(f); CONN. GEN. STAT. §§ 53-202w(b), (c), 53a-35a; D.C. CODE § 7-2502.01(a); CAL. PENAL CODE § 30314 (2020); 430 ILCS § 65/2(a); N.Y.C. ADMIN. CODE § 10-303.

Second, the court found that “sexual orientation has no relevance to a person’s ability to contribute to society.”<sup>47</sup> At least as much could be said for gun owners, who may make extraordinary contributions to society in times of danger or war.<sup>48</sup>

Third, the court considered whether a characteristic “is immutable or otherwise not within the members’ control,” and then softened that factor when it found that “a person’s sexual orientation is so fundamental to one’s identity that a person should not be required to abandon it.”<sup>49</sup> Based on history, culture, and the innate human drive to survive, gun ownership may be as fundamental to one’s identity as any other characteristic. The massive lines surrounding gun stores across the United States during the 2020 Coronavirus crisis and summer riots illustrates the point. As I wrote elsewhere, “[s]hopping lists across the country, in addition to including toilet paper, hand sanitizer, and canned goods, now suddenly list firearms at the top.”<sup>50</sup> So too does the fact that the overwhelming number of states including New Jersey, Illinois and Delaware (not to mention the United States Department of Homeland Security) declared firearms stores to be “essential businesses” that were permitted to stay open during the crisis.<sup>51</sup>

Fourth and last, the court applied the factor of whether the subject group is “a minority or politically powerless,” finding that “although not completely politically powerless, the gay and lesbian community lacks meaningful political power,” and are “a politically vulnerable minority.”<sup>52</sup>

That is indisputably the plight of gun owners in outlier states, which in many legislative sessions are faced with increased restrictions and the creation of new minefields that gun owners must traverse at the risk of felony convictions and imprisonment.<sup>53</sup> Gun owners in states such as New York, New Jersey, and California have long suffered abuse for seeking to exercise their fundamental

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47. *Id.* at 986.

48. See Stephen P. Halbrook, *Nazism, the Second Amendment, and the NRA: A Reply to Professor Harcourt*, 11 TEX. REV. L. & POL. 113, 128–30 (2006); David B. Kopel, *Lethal Laws*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 355, 374–78 (1995).

49. *Golinski*, 824 F.Supp. 2d at 986–87.

50. Mark W. Smith, *Second Amendment Historian Stephen Halbrook Demonstrates that Americans Have—and Always Had—a Fundamental Right to Carry Firearms Outside of the Home*, FEDSOC BLOG (March 31, 2020), <https://fedsoc.org/commentary/fedsoc-blog/second-amendment-historian-stephen-halbrook-demonstrates-that-americans-have-and-always-had-a-fundamental-right-to-carry-firearms-outside-of-the-home>.

51. Zusha Elinson, *Gun Stores Ruled Essential Businesses During Coronavirus Shutdowns*, WALL ST. J. (March 30, 2020), <https://www.wsj.com/articles/gun-stores-ruled-essential-businesses-during-coronavirus-shutdowns-11585601189>.

52. *Golinski*, 824 F. Supp. 2d at 987–89 (citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

53. See, e.g., N.Y. PENAL LAW §§ 70.00, 265.01-b; N.J. STAT. ANN. §§ 2C:39-3(j), 2C:39-5(a), 2C:43-3(b)(2), 2C:43-6(a)(4), 2C:44-1(f); CONN. GEN. STAT. §§ 53-202w(b), (c), 53a-35a; D.C. CODE § 7-2502.01(a); CAL. PENAL CODE § 30314 (2020); 430 ILCS § 65/2(a); N.Y.C. ADMIN. CODE § 10-303.

right to keep and bear arms: New York Governor Andrew Cuomo suggested that gun owners leave New York;<sup>54</sup> San Francisco declared a gun rights group a “domestic terrorist” organization;<sup>55</sup> “New York routinely flouts federal protections for traveling with firearms by arresting and prosecuting air travel passengers who have checked firearms in their baggage.”<sup>56</sup> New York City requires a “premises license” merely to possess a handgun within the home, and with extremely limited exceptions the licensee cannot carry the handgun outside the four walls of his or her home. The license takes at least six months to obtain, requires an in-person interview, and involves intrusive inquiries into everything from the applicant’s criminal history, mental health, failure to pay debts, driving history, and “moral character.” It can be denied or revoked at the City’s sole discretion. Only a little over 1% of households have such a license. In short, the “right” to keep and bear arms is destroyed for most City residents.<sup>57</sup>

Based on the above four factors, the *Golinski* court held that “gay men and lesbians are a group deserving of heightened protection against the prejudices and power of an often-antagonistic majority.”<sup>58</sup> The district court deemed gay men and lesbians to be a discrete and insular minority, thus legislation adversely affecting homosexuals was subject to heightened scrutiny.

As articulated above, Americans seeking to exercise their right to keep and bear arms are akin to the gay men and lesbians in the *Golinski* case. The act of owning, possessing or using a firearm is, at the most basic level, a behavior or form of conduct, precisely the finding of the district court in *Golinski* concerning gay men and lesbians.<sup>59</sup> Though gun ownership is a voluntary activity, there appears to be little reason why this alone would cause Second Amendment advocates to fall outside the additional protections afforded to “discrete and insular minorities.” There can be no more inherent, essential human trait than the urge to protect oneself, one’s family, and one’s community from harm.<sup>60</sup> By virtue of their conduct alone, gun owners in hostile jurisdictions constitute a discrete and insular minority entitled to additional protections under the law.

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54. Heather Long, Opinion, *Conservatives Aren’t Welcome in New York, According to Governor Cuomo*, GUARDIAN (Jan. 24, 2014, 8:49 AM), <https://www.theguardian.com/commentisfree/2014/jan/24/governor-cuomo-conservatives-not-welcome-new-york>.

55. Janie Harr, *NRA Declares Victory over San Francisco’s ‘Terrorist’ Resolution*, MERCURY NEWS (Oct. 2, 2020, 5:43 AM), <https://www.mercurynews.com/2019/10/02/nra-san-francisco-mayor-retreats-on-terrorist-resolution>.

56. *E.g.*, *Torraco v. Port Authority of New York & New Jersey*, 615 F.3d 129 (2d Cir. 2010). See discussion in STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 4.7 (2020).

57. *New York State Rifle and Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), *rev’d*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (Alito, J., dissenting).

58. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989–90 (N.D. Cal. 2012).

59. See *id.* at 985 (stating that “[t]he Supreme Court has since rejected this artificial distinction, noting that its more recent precedent ‘have declined to distinguish between status and conduct in the context’ of sexual orientation.”) (emphasis added).

60. See David Kopel, *The Religious Roots of the American Revolution and the Right to Keep and Bear Arms*, 17 J. FIREARMS & PUB. POL’Y 167, 172 (2005).

*B. Gun Owners Constitute A Discrete and Insular Minority Group  
in Politically Hostile Metropolitan Areas*

Lawful gun use and ownership are enormously popular and widespread nationwide<sup>61</sup>, which is contrary to what many in the mainstream media would have you believe. Following its 2010 decision in *McDonald*, during the Supreme Court’s nearly decade-long hiatus from Second Amendment jurisprudence, the popularity and significance of the Second Amendment continued to grow. Forty-four out of the fifty states allow law-abiding and responsible citizens to carry firearms in public without any particularly onerous obstacles.<sup>62</sup> Specifically, about twenty-six states now recognize the right to carry a handgun in public for self-defense by issuing gun permits to all qualifying, law-abiding adults on a “shall issue” basis.<sup>63</sup> In eighteen states, no carry permit is required for citizens to carry a concealed firearm.<sup>64</sup> There are somewhere between six and eight outlier states that significantly restrict the Second Amendment rights of their residents (and other Americans who happen to be passing through).<sup>65</sup>

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61. See *infra*, Part III.B.1.a.; Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (Aug. 14, 2019), <https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx> (“Thirty percent of U.S. adults say they personally own a gun, while a larger percentage, 43%, report living in a gun household.”); Larry Keane, *Americans Vote Yes in a Landslide for Gun Sales*, NSSF, (Nov. 3, 2020), <https://www.nssf.org/americans-vote-yes-in-a-landslide-for-gun-sales/> (“NSSF [National Shooting Sports Foundation] released the adjusted National Instant Criminal Background Check System (NICS) figures for October [2020]. They aren’t record-breaking. They’re a *record-shattering* 1.76 million background checks completed for the sale of a firearm across the nation. That brings the annual total to 17.2 million, leaving the previous record in the rear-view mirror. That was 15.7 million background checks in 2016, also an election year, when Hillary Clinton promised to re-enact the failed 1994 Assault Weapons Ban.”).

62. Stephen Halbrook, *To Bear Arms for Self-Defense: A “Right of the People” or a Privilege of the Few? Part 1*, FEDERALIST SOC. REV. (Mar. 2020), <https://fedsoc.org/commentary/publications/to-bear-arms-for-self-defense-a-right-of-the-people-or-a-privilege-of-the-few>.

63. At least forty-two states, in fact, either have a de jure or de facto “shall issue” system, or don’t require a permit for public carry at all. See *Gun Laws*, NAT’L RIFLE ASSOC. INST. LEGIS. ACTION, <https://www.nrila.org/gun-laws> (last visited Oct. 10, 2020). Another two states are formally “may issue” but typically “shall issue” in practice. See Halbrook, *supra* note 62. Of note, so-called “shall-issue” states are states in which the issuing authorities are required to issue a permit to an applicant who meets an objective statutory criteria. In contrast, so-called “may issue” states are states that grant government actors, often law enforcement agents, greater discretion in granting or denying requests for carry permits. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-717, *GUN CONTROL: STATES’ LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION 2* (2012).

64. U.S. Constitutional Carry Association *Constitutional Carry/Unrestricted/Permitless Carry*, USCCA, <https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensurepermitting-policies/unrestricted/>.

65. The following six states ban either the carrying or possession of a handgun without a license, issuance of which is limited at the discretion of a governmental entity based on standard-less criteria like “good cause:” California, Hawaii, Maryland, Massachusetts, New Jersey, New York. See CA. PENAL CODE §§ 25400, 26150(a)(2), 26155(a)(2); HAW. REV. STAT. §§ 134-9, 134-

That the vast majority of states fully respect the right to bear arms does not detract from the assertion that gun owners residing in the few outlier or metropolitan majority jurisdictions constitute discrete and insular minorities. That the right to bear arms is an extremely popular right nationwide only highlights the extreme injustice suffered by Second Amendment enthusiasts residing in the *eight or so* outlier jurisdictions that severely restrict guns. These Americans lack political power or influence in those jurisdictions and, as a consequence, they enjoy far *fewer* Second Amendment freedoms when compared to gun owners in the other *forty-two* states. Because the existence and exercise of a fundamental Constitutional right should not be dependent on an American citizen's state of residency, gun owners in these outlier jurisdictions are discrete and insular minorities in need of the Supreme Court's protection.

### 1. *The Great American Gun Control Debate Is About Culture and Values*

The debate over the Second Amendment and gun control is less about crime rates, risk assessment, or policy choices than values and culture.<sup>66</sup> Those who embrace the right to keep and bear arms “tend to be rural, Southern or Western,”<sup>67</sup> and for them “guns symbolize a cluster of positive values,” including honor, independence, and “individual self-sufficiency.”<sup>68</sup>

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51(a); MD. CODE, CRIM. LAW, §§ 4-203(a), (b)(2), 4-303(a), MD. CODE, PUB. SAFETY § 5-306(a)(6)(ii); MASS. GEN. LAW 140 §§ 131(a), (b), (d); 269 § 10(a); N.J. STAT. 2C:39-5(b), 2C:58-4(d); N.Y. PENAL LAW §§ 265.01, 265.20(a)(3), § 400.00(2), (3), (7). *See also Gun Laws*, NRA-ILA, <https://www.nra.org/gun-laws/> (last visited Dec. 7, 2020). Connecticut is technically a may-issue state for purposes of concealed carry permits, but it operates more like a shall-issue state. While CONN. GEN. STAT. § 29-28(b) says the authority “may issue” a carry permit, that statute specifies detailed objective requirements (like training) and disqualifications (like a felony record). In *Kuck v. Danaher* the court noted that the issuing authority “is afforded circumscribed discretion to determine whether a particular applicant seeking a pistol permit would pose a danger to the public if entrusted with a firearm.” 822 F. Supp.2d 109, 129 (D. Conn. 2011). There is no requirement that the applicant show “need” or “good cause.” Illinois requires a Firearms Owner Identification card to possess either a firearm or ammunition. However, the disqualifying criteria (though considerably broader than under federal law) are largely objective in nature. Illinois is a shall-issue state for concealed carry permits.

66. Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3, 3 (2003); Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L. J. 569, 571 (2006); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1293-94 (2003); Gary Kleck, *Crime, Culture Conflict and the Sources of Support for Gun Control: A Multilevel Application of the General Social Surveys*, 39 AM. BEHAVIORAL SCI. 387, 400-01 (1996); WILLIAM R. TONSO, *GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS* (1982); JAMES D. WRIGHT, ET AL., *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* (1983); RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* (1992).

67. Kahan, *supra* note 66, at 4.

68. *Id.*; *see* Wright, *supra* note 66, at 113 (stating values of gun culture “are best typified as rural rather than urban: they emphasize independence, self-sufficiency, mastery over nature, closeness to the land”).



In contrast, those who disparage or discount the Second Amendment are disproportionately coastal, “urban” and “Eastern.”<sup>69</sup> They deem guns to be “abhorrent and alarming” vestiges of a violent, primeval and alien past, while viewing gun control as “symbolizing a competing set of positive values,” including “civilized nonaggression . . . and social solidarity.”<sup>70</sup> This is a clash of cultures—a fundamental disagreement about “alternative views of what America is and ought to be.”<sup>71</sup> And “[i]n such disputes, citizens care less about how a particular law will [actually] affect behavior [and public safety] than they do about what the adoption of that law will say about *the authority of contested moral values* and about *the relative status of the social groups and cultural styles associated with those values*.”<sup>72</sup>

“During the 1960s and 1970s, a tremendous cultural shift took place among American elites” with respect to firearms: “[i]n 1960, it was unexceptional that a liberal Northeastern Democrat, such as John F. Kennedy, would join the NRA.”<sup>73</sup> “But by the early 1970s, gun ownership itself was reviled by much of the urban intelligentsia,”<sup>74</sup> who complained bitterly that “‘Americans cling with pathetic stubbornness’ to ‘the supposed right to bear arms,’ and refuse to adopt European-style gun control laws.”<sup>75</sup> The notion of guns for self-defense in the hands of common citizens came to be seen as an insult to a modern, sophisticated, and well-ordered society.<sup>76</sup>

The urban liberals of the North and East, who for decades had been content with the U.S. Supreme Court writing *their* values into law, were dismayed because *Heller* and *McDonald* instead vindicated values championed largely in the small towns and rural heartlands of the South, the Midwest, and the Mountain states.<sup>77</sup> Furthermore, a simple review of state maps in even deep blue states like New York demonstrate that the deep progressive, anti-gun views are limited to a distinct minority of counties within the state.<sup>78</sup>

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69. Kahan, *supra* note 66, at 4.

70. *Id.* at 4–5.

71. *Id.* at 6.

72. *Id.* at 5 (emphasis added).

73. David B. Kopel, *The Great Gun Control War of the Twentieth Century—And Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L. J. 1527, 1553 (2012).

74. *Id.*

75. *Id.* at 1553–54 (quoting the celebrated scholar of American history—and two-time winner of the Pulitzer Prize—Professor Richard Hofstadter).

76. *See id.* at 1554.

77. *See* Kahan, *supra* note 66, at 4; Terry L. Schell, et al., *State-Level Estimates of Household Firearm Ownership*, RAND CORPORATION 21 (April 21, 2020), <https://www.rand.org/pubs/tools/TL354.html> (Chart of household gun ownership rates of all fifty states shows the highest in Montana at 66% to the lowest in Massachusetts at 15%).

78. David LaPell, *Why Don't Gun Owners Just Move From Where They Lose Their Rights?*, AMMOLAND (Dec. 6, 2018), <https://www.ammoland.com/2018/12/why-dont-gun-owners-move-lose-their-rights/>.

*a. Enforcing the Right To Bear Arms Fits Squarely Within The Supreme Court's Role of Protecting Minorities*

Rather than requiring the Court to vindicate or invent a minority right that has no *populist* or popular support in America, enforcing the right to bear arms against a very few outlier jurisdictions fits squarely within one of the Court's traditional roles, that is, protecting *local* minorities from hostile legislation that is out of step with, and contrary to, the national baseline.<sup>79</sup>

According to Pew Research Center, which is hardly part of a vast right-wing conspiracy, "at least two-thirds of American adults have lived in a household with one or more guns at some point in their lives."<sup>80</sup> Approximately forty-one percent of U.S. adults say they live in a gun-owning household.<sup>81</sup> About sixty-six percent of American adults either currently own a gun or say that they might own one in the future.<sup>82</sup> About forty-eight percent of U.S. adults say they grew up in a gun-owning household.<sup>83</sup> About sixty-seven percent of all gun owners say that a major reason for owning a gun is self-protection.<sup>84</sup> Fifty-eight percent of male gun owners go to a shooting range, thirty-seven percent go hunting, twenty-seven attend gun shows, forty-three watch gun-oriented television or videos, thirty-nine frequent gun websites, and about one in ten gun owners participate in online forums or listen to podcasts or radio shows about guns.<sup>85</sup> Over 19 million Americans (some seven percent of the adult population) are licensed to carry a concealed firearm.<sup>86</sup> This last figure is actually an underestimate because there are eighteen "constitutional carry" states that do not require any sort of permit to carry. Even in those states that require a permit to carry a concealed handgun, most allow open carry without a permit. So, how many more people than these 19 million are carrying guns outside of the home every day and are doing so legally without a permit?

Assuming that the Pew numbers about U.S. adults are reasonably correct, then that means the following (using 2019 population figures):

- More than 169 million adult Americans have lived in a home with one or more guns at some point during their lives.<sup>87</sup>

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79. See Klarman, *supra* note 2, at 16; Easterbrook, *supra* note 2, at 370.

80. Parker, *supra* note 37, at 4.

81. *Id.*

82. *Id.* at 16.

83. *Id.* at 23.

84. *Id.* at 8, 21.

85. *Id.* at 8.

86. *New Concealed Carry Report for 2020: 19.48 Million Permit Holders, 820,000 More Than Last Year Despite Many States Shutting Down Issuing Permits because of the Coronavirus*, CRIME PREVENTION RSCH. CTR. (Oct. 2, 2020), <https://crimeresearch.org/2020/10/new-concealed-carry-report-for-2020-19-48-million-permitholders-820000-more-than-last-year-despite-many-states-shutting-down-issuing-permits-becauseof-the-coronavirus/>.

87. 328,239,523 total U.S. population times 77.6 percent (percentage of population over 18 years of age) equals 254,713,869 adults. See U.S. CENSUS BUREAU, *Quick Facts*, (July 1, 2019),

- More than 104 million adult Americans currently live in a gun-owning household.<sup>88</sup>
- More than 168 million adult Americans either currently own a firearm or say that they might own a firearm in the future.<sup>89</sup>
- More than 122 million adult Americans grew up in households with firearms.<sup>90</sup>

Almost 20 million American have permits to conceal carry firearms, and this number is likely a gross underestimate of the number of Americans who carry firearms outside of the home.<sup>91</sup> The almost 20 million figure is likely an underestimate because many states stopped or slowed their issuance of concealed handgun permits during the 2020 Coronavirus pandemic, and another issue arises from the fact that in approximately eighteen states, citizens may carry firearms without a permit.

The right to bear arms is thus an extremely popular right nationwide. It is not akin to the Supreme Court's 1973 decision in *Roe v. Wade* in which the Court struck down at a single stroke popularly adopted abortion restrictions in 30 states<sup>92</sup>; a then anti-majoritarian decision whose timing even the late Justice Ruth Bader Ginsburg has previously criticized.<sup>93</sup>

Instead, the right to keep and bear arms should fit a different philosophical model: the Supreme Court's practice of protecting constitutional rights that are popular nationwide against infringement by local outliers in local jurisdictions oppressing local minorities. It is this model that caused the Supreme Court to strike down Connecticut's ban on contraceptives in *Griswold v. Connecticut*, which merely enforced a mainstream national norm against an extremely unusual local law, and to invalidate Texas's anti-sodomy in *Lawrence*.<sup>94</sup>

So too with the right to bear arms. Given their status as extreme outliers, "may issue" permit carry laws and similar firearms regulations and restrictions are arguably the modern analogues of bans on contraceptives in the 1960s. "May issue" gun control laws give government law enforcement agencies (frequently

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<https://www.census.gov/quickfacts/fact/table/US/PST045219>. 254,713,869 multiplied by 2/3 of American adults equals 169,639,439. See also Parker, *supra* note 37, at 4.

88. See U.S. CENSUS BUREAU, *supra* note 87; see also Parker, *supra* note 37, at 4.

89. *Id.*

90. See U.S. CENSUS BUREAU, *supra* note 87; see also Parker, *supra* note 37, at 23.

91. *New Concealed Carry Report For 2020: 19.48 Million Permit Holders, 820,000 More Than Last Year Despite Many States Shutting Down Issuing Permits because of the Coronavirus*, CRIME PREVENTION RESEARCH CENTER (October 2, 2020), <https://crimeresearch.org/2020/10/new-concealed-carry-report-for-2020-19-48-million-permit-holders-820000-more-than-last-year-despite-many-states-shutting-down-issuing-permits-because-of-the-coronavirus/>.

92. See *Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973).

93. See Debra Cassens Weiss, *Justice Ginsburg: Roe v. Wade Decision Came Too Soon*, ABA J. (Feb. 13, 2012, 12:29 PM), [http://www.abajournal.com/news/article/justice\\_ginsburg\\_roe\\_v\\_wade\\_decision\\_came\\_too\\_soon](http://www.abajournal.com/news/article/justice_ginsburg_roe_v_wade_decision_came_too_soon).

94. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

overseen by local politicians who are hostile to gun rights) the *discretion* to decide which citizens have government permission to possess or carry firearms.

Gun owners living today in Manhattan or San Francisco face the same challenges as earlier local minorities living in hostile jurisdictions. These “may issue” jurisdictions are out of step with the national mainstream both constitutionally and in reality, and they should be brought in line with the rest of the country.

It is not a coincidence that all of the Supreme Court decisions that reinvigorated the Second Amendment in the 21<sup>st</sup> century arose as challenges to draconian handgun bans enacted by large urban governments in the North and East<sup>95</sup>: most prominently, Dick Heller sued the District of Columbia and Otis McDonald sued Chicago.<sup>96</sup> When those cases were argued before the Court, more than *three dozen* States—from Texas to Michigan, from Washington to Virginia—filed an amicus brief urging the Court to recognize an individual right to keep and bear arms.<sup>97</sup> Only three States—Illinois, Maryland, and New Jersey—urged the Supreme Court to repudiate any such individual right and to uphold the challenged municipal ban on handguns.<sup>98</sup>

Today, gun owners are a discrete and insular minority in the heavily urbanized North. And just as the segregationists of the States of the former Confederacy had contempt for their citizens’ right to equal protection of the law, those living in large urban centers or “metropolitan majorities”<sup>99</sup>—New York (New York City), New Jersey (Newark and Trenton), Massachusetts (Boston), Maryland (Baltimore), the District of Columbia, plus Illinois (Chicago), California (many jurisdictions, including San Francisco and Los Angeles) and Hawaii (Honolulu)—have contempt for their citizens’ right to bear arms.<sup>100</sup> The

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95. These are the types of urban jurisdictions that former Chicago Mayor and President Obama’s former chief of staff Rahm Emmanuel recently referred to as Metropolitan Majorities. Rahm Emanuel *Democrats May be Blowing Their Chance*, WALL ST. J. (Jan. 31, 2020), <https://www.wsj.com/articles/democrats-may-be-blowing-their-chance-11580514064>.

96. See *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008) (striking down “a District of Columbia prohibition on the possession of usable handguns in the home.”); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (striking down a Chicago ordinance “effectively banning handgun possession by almost all private citizens who reside in the City.”). The case that would have been the Supreme Court’s third Second Amendment decision involved a challenge to an ordinance enacted by New York City, but the case was held to be rendered moot by an amendment to the ordinance. See *New York State Rifle and Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), rev’d, 140 S. Ct. 1525 (2020) (per curiam). Finally, the *per curiam* decision in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), likewise involved a law enacted by a Northern urban state.

97. E.g., Brief of the States of Texas *et al.*, as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

98. See Brief for the States of Ill., Md., and N.J. as Amici Curiae in Support of Respondents, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

99. Emanuel, *supra* note 95.

100. Finding further proof that these urban elites view their fellow countrymen and women in rural America with disdain, one need look no further than the comments by Hillary Rodham Clinton

national divide on the Second Amendment is a canyon, not a ditch—there is a yawning chasm between two groups of Americans who caricature and demonize one another. On one side are the “effete” members of the self-proclaimed metropolitan intelligentsia; on the other are the rural, working-class and small-town voters of middle America whom then-Presidential-candidate Barack Obama once described as “bitter” people who “cling to guns or religion” as a way to vent their frustrations with life.<sup>101</sup> Then-presidential candidate Hillary Rodham Clinton offered a similar comment when she referred to many of Donald Trump’s supporters as a “basket of deplorables.”<sup>102</sup>

*b. Is the Supreme Court Finally Getting It?*

Until the *New York State Rifle & Pistol Association v. City of New York* case before the Court in the 2019 term,<sup>103</sup> the Supreme Court had not heard oral argument in a Second Amendment case since 2010, when the Court struck down Chicago’s total ban on private ownership of handguns.<sup>104</sup> And while the Court granted review in the *City of New York* case, the City amended its ordinance – which had prohibited transporting a handgun outside of the licensed premises – in a manner that, according to the majority, gave the petitioners the relief they sought, rendering the case moot.<sup>105</sup> Concurring, Justice Kavanaugh opined that “some federal and state courts may not be properly applying *Heller* and *McDonald*” and that the Court “should address that issue soon . . . .”<sup>106</sup>

Justice Alito, joined by Justice Gorsuch and Justice Thomas, dissented, arguing that the case was not moot.<sup>107</sup> On the merits, Justice Alito would have held that the amended ordinance violated the Second Amendment. No comparable laws existed when the Second Amendment was adopted,<sup>108</sup> the lower court failed to apply heightened scrutiny in holding that the law promoted

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that Trump-supporters are “deplorables,” from Obama that rural Americans “cling to their guns,” and from New York governor Andrew Cuomo that if you support gun rights, then you should move out of New York. Katie Reilly, *Read Hillary Clinton’s ‘Basket of Deplorable’ Remarks About Donald Trump Supporters*, TIME (Sept. 10, 2016), <https://time.com/4486502/hillary-clinton-basket-of-deplorables-transcript/>. See Long, *supra* note 54.

101. See Janell Ross, *Obama Revives His ‘Cling to Guns or Religion’ Analysis—for Donald Trump Supporters*, WASH. POST (Dec. 21, 2015), [www.washingtonpost.com/news/the-fix/wp/2015/12/21/obama-dusts-off-his-cling-to-guns-or-religion-idea-for-donald-trump/?utm\\_term=.f881de79fa3e](http://www.washingtonpost.com/news/the-fix/wp/2015/12/21/obama-dusts-off-his-cling-to-guns-or-religion-idea-for-donald-trump/?utm_term=.f881de79fa3e) (quoting Obama).

102. Reilly, *supra* note 100.

103. See *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *New York State Rifle and Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 1525 (2020) (per curiam); *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

104. Oral argument was heard in *McDonald v. Chicago* on March 2, 2010.

105. *New York State Rifle & Pistol Association, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam).

106. *Id.* (Kavanaugh, J., dissenting).

107. *Id.* at 1533 (Alito, J., dissenting).

108. *Id.* at 1541.

public safety,<sup>109</sup> and the ordinance violated the very right recognized in *Heller*.<sup>110</sup>

In contrast, in that same period, the Justices heard arguments in approximately three dozen cases involving the First Amendment and two dozen cases involving the Fourth Amendment, even though those constitutional provisions—unlike the Second Amendment—have for many decades been the subject of enormous bodies of Supreme Court precedent. In the words of Justice Thomas, “[t]his discrepancy is inexcusable.”<sup>111</sup> For judges “who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense.”<sup>112</sup> The federal courts should not “stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.”<sup>113</sup>

The Roberts Court should take inspiration from *Carolene Products* Footnote Four and its discrete and insular minorities jurisprudence and protect those Americans seeking to exercise their fundamental constitutional rights to keep and bear arms in politically hostile metropolitan areas. Or, perhaps, the Roberts Court should deploy the Supreme Court’s longstanding national baseline test to protect these same Americans who desire to do nothing more than enjoy the freedom to bear arms like the Americans in the vast majority of jurisdictions across the United States.

#### IV. NOW IS THE TIME FOR THE SUPREME COURT TO USE THE JURISPRUDENTIAL TOOLS AT ITS DISPOSAL UNDER FOOTNOTE FOUR AND THE COURT’S NATIONAL BASELINE PROTECTION DOCTRINE TO PROTECT THE SECOND AMENDMENT RIGHTS OF AMERICANS LIVING UNDER METROPOLITAN MAJORITIES

In the years since deciding *Heller* (2008) and *McDonald* (2010), the Supreme Court has failed to use the jurisprudential tools at its disposal to ensure that the fundamental right to keep and bear arms is accorded protection on a par with other enumerated constitutional rights. Regardless of the jurisprudential methodology you apply (originalism, Warren/Burger era jurisprudence or otherwise), the Supreme Court must do more to protect gun owners.

The Supreme Court was well ahead of American public sentiment when it ventured into the areas of abortion and gay rights. Even those who support abortion rights recognize that the Court “may have moved too quickly when it

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109. *Id.* at 1541-42.

110. *Id.* at 1544.

111. *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari).

112. *Id.* at 1999.

113. *Id.* at 2000.

found a constitutional right to abortion in *Roe v. Wade*,<sup>114</sup> according to the late Justice Ruth Bader Ginsburg.<sup>115</sup> During a speech at a Columbia Law School symposium in 2012, Justice Ginsburg surveyed four decades of electoral and judicial controversy on abortion and noted that, rather than granting review in *Roe*, the Supreme Court could have delayed hearing the case while state law evolved on the issue: “It’s not that the judgment was wrong, but it moved too far too fast,” she said.<sup>116</sup> Alternatively, she noted, the Court could have invalidated the particular Texas statute “without finding a right to privacy that overturned abortion bans nationwide,” contending that “[t]hings might have turned out differently if the Court had been more restrained.”<sup>117</sup> When *Roe v. Wade* was decided in 1973, women could legally seek an abortion in only four states although abortions were available on a limited basis in about sixteen other states.<sup>118</sup>

The Supreme Court was also ahead of public sentiment when it legalized gay marriage, although the gap between the Court and the American electorate was perhaps not as wide. In 2012, same-sex marriage was legal in only six states.<sup>119</sup> By 2013, when the Court struck down the federal Defense of Marriage Act<sup>120</sup>—which had barred federal recognition of same-sex unions—twelve states had made gay marriage legal.<sup>121</sup> However, “the vast majority of states [still] ban[ned] such unions, and 31 of them ha[d] amended their constitutions to enshrine the traditional definition of heterosexual marriage.”<sup>122</sup>

The treatment of the right to keep and bear arms in the federal courts stands in stark contrast. Rather than being *ahead* of popular opinion or at least keeping pace with it, the federal judiciary has lagged well *behind* it. For decades the federal courts routinely and almost summarily rejected Second Amendment claims. For example, in 1982 the Seventh Circuit in Chicago upheld a municipal

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114. *Roe v. Wade*, 410 U.S. 113 (1973).

115. *See* Weiss, *supra* note 93.

116. *Id.*

117. *Id.* *See also* Robert Barnes, *The Forgotten History of Justice Ginsburg’s criticism of Roe v. Wade*, WASH. POST (Mar. 2, 2016), [https://www.washingtonpost.com/politics/courts\\_law/the-forgotten-history-of-justice-ginsburgs-criticism-of-roe-v-wade/2016/03/01/9ba0ea2e-dfe8-11e5-9c36-e1902f6b6571\\_story.html?utm\\_term=.a8da74208a01](https://www.washingtonpost.com/politics/courts_law/the-forgotten-history-of-justice-ginsburgs-criticism-of-roe-v-wade/2016/03/01/9ba0ea2e-dfe8-11e5-9c36-e1902f6b6571_story.html?utm_term=.a8da74208a01).

118. *See* Weiss, *supra* note 93.

119. *See id.*

120. *See* *United States v. Windsor*, 570 U.S. 744 (2013).

121. James Richardson, *Why Supreme Court’s Gay Marriage Ruling Won’t be Like Roe v. Wade*, CHRISTIAN SCI. MONITOR (June 10, 2013), <https://www.csmonitor.com/Commentary/Opinion/2013/0610/Why-Supreme-Court-s-gay-marriage-ruling-won-t-be-like-Roe-v.-Wade>.

122. Robert Barnes, *Supreme Court to Hear Same-Sex Marriage Cases*, WASH. POST (Dec. 7, 2012), [https://www.washingtonpost.com/politics/2012/12/07/4bf6c366-40ab-11e2-ae43-cf491b837f7b\\_story.html?utm\\_term=.c9320e4433a8](https://www.washingtonpost.com/politics/2012/12/07/4bf6c366-40ab-11e2-ae43-cf491b837f7b_story.html?utm_term=.c9320e4433a8) (The Court legalized gay marriage nationwide in *Obergefell v. Hodges*, 576 U.S. 644 (2015)); *see also* Lyle Denniston, *Opinion Analysis: Marriage Now Open to Same-Sex Couples*, SCOTUSBLOG (June 26, 2015, 3:01 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-marriage-now-open-to-same-sex-couples/>.

ordinance outlawing the possession of handguns even in one's home.<sup>123</sup> The Supreme Court refused to hear the appeal and that decision remained the law for a quarter-century until a similar ban on handguns in Washington, D.C. was overturned in 2008 in the Court's landmark *Heller* decision. Until 2001, in the Fifth Circuit's decision in *United States v. Emerson*,<sup>124</sup> no federal appellate court had held that the Second Amendment protects an individual's right to keep and bear arms for purely private, civilian purposes.<sup>125</sup> Many lower federal courts continued—right up to the *Heller* decision—to rule that the Second Amendment protects only the states' prerogatives with respect to their militias and does not recognize an individual right.<sup>126</sup>

In the decade since the Supreme Court reinvigorated the Second Amendment with its originalist decisions in *Heller* and *McDonald*, the individual right to keep and bear arms has been ill-used by, and when used, abused by, the lower federal courts.<sup>127</sup> Those lower federal courts have upheld: (1) statutes from New York, New Jersey, Maryland and California denying law-abiding citizens the right to carry a concealed weapon for self-defense;<sup>128</sup> (2) laws from Illinois, Maryland, New York, Connecticut and the District of Columbia banning widely popular and commonly owned semiautomatic rifles and ammunition magazines;<sup>129</sup> (3) a California ban on the sale of types of ammunition commonly

123. See *Quilici v. Village of Morton Grove*, 695 F.2d 261, 263–64 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

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

125. See, e.g., *United States v. Haney*, 264 F.3d 1161, 1164–66 (10th Cir. 2001); *United States v. Napier*, 233 F.3d 394, 402–04 (6th Cir. 2000); *Gillespie v. Indianapolis*, 185 F.3d 693, 710–11 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1271–74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 285–86 (3d Cir. 1996); *Hickman v. Block*, 81 F.3d 98, 100–03 (9th Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1018–20 (8th Cir. 1992); *Thomas v. Members of City Council*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971).

126. See, e.g., *United States v. Lippman*, 369 F.3d 1039, 1043–1044 (8th Cir. 2004); *United States v. Parker*, 362 F.3d 1279, 1282–1284 (10th Cir. 2004); *United States v. Jackubowski*, 63 F. App'x 959, 960 (7th Cir. 2003); *Silveira v. Lockyer*, 312 F.3d 1052, 1060–1066 (9th Cir. 2002); *United States v. Milheron*, 231 F. Supp. 2d 376, 378 (D. Me. 2002); *Bach v. Pataki*, 289 F. Supp. 2d 217, 224–226 (N.D.N.Y. 2003).

127. See Stephen P. Halbrook, *To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few?*, 21 *FEDERALIST SOC'Y REV.* 56 (2020).

128. See, e.g., *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1995 (2017); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 572 U.S. 1100 (2014); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir.), *cert. denied*, 571 U.S. 952 (2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 569 U.S. 918 (2013). See also David G. Savage, *Supreme Court Won't Hear a California Gun Case, Leaving in Place the State's Strict Limits on Concealed Weapons*, *L.A. TIMES* (June 26, 2017, 12:55 PM), <https://www.latimes.com/politics/la-na-pol-court-handguns-california-20170626-story.html>.

129. See, e.g., *Friedman v. Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).



used for self-defense by both civilians and law-enforcement officers;<sup>130</sup> and (4) a California law mandating waiting periods for the purchase of firearms.<sup>131</sup> In sum, as Justice Clarence Thomas, Justice Neil Gorsuch, and the late Justice Antonin Scalia have protested, “the lower courts are resisting th[e] [Supreme] Court’s decisions in *Heller* and *McDonald*.”<sup>132</sup> This unacceptable state of affairs is undisputed; the mainstream news media have noted that the “[f]ederal courts are quietly allowing gun control—and [the Supreme Court] is letting them.”<sup>133</sup>

Consider what has been happening in the largest federal appellate court, the United States Court of Appeals for the Ninth Circuit, which includes the states of California, Oregon, Washington, Hawaii, Idaho, Montana, Nevada, Arizona, and Alaska. The Ninth Circuit applies a double standard: one rule for constitutional rights that it likes (such as abortion) and a different rule for rights it disfavors (most prominently the Second Amendment).<sup>134</sup> The Ninth Circuit struck down an Arizona statute that “‘delayed’ women seeking an abortion.”<sup>135</sup> “The court found it important there,” with respect to a statutory waiting period for an abortion, “that the State ‘presented no evidence whatsoever that the law furthers its interest’ and ‘no evidence that its alleged danger exists or has ever occurred.’”<sup>136</sup> Yet when it came to a statutory waiting period to purchase a firearm, the Ninth Circuit did not care that the state of California presented no evidence that such a period would make any difference in firearms violence; the Ninth Circuit approved the waiting period “based solely on its own ‘common sense.’”<sup>137</sup> The Ninth Circuit also “struck down a county’s 5-day waiting period for nude-dancing licenses because it ‘unreasonably prevented a dancer from

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130. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*, 576 U.S. 1013 (2015).

131. *Silvester v. Becerra*, 843 F.3d 816, 828–29 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945 (2018).

132. *Id.* at 950 (Thomas, J., dissenting from the denial of certiorari). *See also* *Friedman v. Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari); *Peruta v. Cty. of San Diego*, 137 S. Ct. 1995, 1996 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

133. Alison Frankel, *Federal Courts are Quietly Allowing Gun Control – and SCOTUS is Letting Them*, REUTERS (June 13, 2016), <http://blogs.reuters.com/alison-frankel/2016/06/13/federal-courts-are-quietly-allowing-gun-control-and-scotus-is-letting-them/>; *see also* Savage, *supra* note 98; Andrew C. McCarthy, *Supreme Court Denies Review of ‘Assault Weapon’ Ban*, NAT’L REV. (Dec. 7, 2015, 6:52 PM), <https://www.nationalreview.com/corner/supreme-court-denies-review-assault-weapon-ban-andrew-c-mccarthy/>.

134. *Silvester*, 138 S. Ct. at 951 (Thomas, J., dissenting from the denial of certiorari) (“This double standard is apparent from other cases where the Ninth Circuit applies heightened scrutiny.”).

135. *Id.* (Thomas, J., dissenting from the denial of certiorari) (quoting *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 917 (9th Cir. 2014)).

136. *Id.* (Thomas, J., dissenting from the denial of certiorari) (alterations in original) (quoting *Planned Parenthood Arizona, Inc.*, 753 F.3d at 914–15).

137. *Id.* at 945 (Thomas, J., dissenting from the denial of certiorari) (quoting *Silvester v. Harris*, 843 F.3d 816, 828 (9th Cir. 2016)).

exercising first amendment rights while an application was pending.”<sup>138</sup> “The Ninth Circuit found it dispositive there,” where the (apparently) very important constitutional right to dance naked on a bar for tips was at issue, that “the county ‘failed to demonstrate a need for the five-day delay period,’”<sup>139</sup> yet no such dearth of evidence troubled the Ninth Circuit when it upheld a gun-purchase waiting period. As Justice Thomas explained in his dissent, “[i]n the Ninth Circuit, it seems, rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text.”<sup>140</sup>

The problem is not only the misapplication of Supreme Court precedent by the lower federal courts; rather, the bigger problem is that the Supreme Court for *ten years* refused to consider *any* Second Amendment challenge<sup>141</sup> and thereby allowed the individual’s right to keep and bear arms to be disregarded by state and federal judges who disdain the Second Amendment.<sup>142</sup> As Justice Thomas explained when the Supreme Court refused to hear an appeal from a Ninth Circuit decision upholding California’s ten-day waiting period on the purchase of firearms in *Silvester v. Becerra* in 2016:

[The Supreme Court’s] continued refusal to hear Second Amendment cases only enables this kind of defiance. . . . If this case involved one of the Court’s more favored rights, I sincerely doubt we would have denied certiorari. I suspect that four Members of this Court would vote to review a 10-day waiting period for abortions, notwithstanding a State’s purported interest in creating a ‘cooling off’ period. . . . I also suspect that four Members of this Court would vote to review a 10-day waiting period on the publication of racist speech, notwithstanding a State’s purported interest in giving the speaker time to calm down. . . . Similarly, four Members of this Court would vote to review even a 10-minute delay of a traffic stop . . . . The Court would take these cases because abortion, speech, and the Fourth Amendment are three of its favored rights. *The right to keep and bear*

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138. *Id.* at 951 (Thomas, J., dissenting from the denial of certiorari) (alterations in original) (quoting *Kev, Inc. v. Kitsap Cnty.*, 793 F.2d 1053, 1060 (9th Cir. 1986)).

139. *Id.*

140. *Id.* (Thomas, J., dissenting from the denial of certiorari).

141. The Supreme Court granted certiorari and summarily reversed a Massachusetts state court decision which had denied Second Amendment protection to stun guns. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

142. See e.g. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015); *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945 (2018); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 572 U.S. 1100 (2014); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 571 U.S. 952 (2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 569 U.S. 918 (2013).

*arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message.*<sup>143</sup>

Justices Thomas and Gorsuch filed a similar protest when the Supreme Court refused to hear an appeal from a Ninth Circuit decision upholding California's statutory scheme allowing localities to deny virtually every application for a concealed-carry permit:

The Court's decision to deny certiorari in *this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right. . . .* The Constitution does not rank certain rights above others, and [we] do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights.<sup>144</sup>

Speaking to the Federalist Society in 2020, Justice Alito stated that “the ultimate second tier constitutional right in the minds of some is the Second Amendment right to keep and bear arms. From 2010 when we decided *McDonald vs. Chicago* until last term, the Supreme Court denied every single petition asking us to review a lower court decision that rejected the Second Amendment claim.”<sup>145</sup> He went on to describe how, when the Court decided the New York City case in 2020, it “said nothing about the Second Amendment.”<sup>146</sup>

Defenders of the Court's reluctance to enforce the Second Amendment more aggressively might suggest that the Court has appropriately held back to allow lower courts a chance to develop the doctrine in this fraught area. But the lower courts have by now had ample opportunity to weigh the various considerations relevant to the scope of the Second Amendment, and the Supreme Court has had ample time to determine the policy implications of the principal disputed issues.

## V. CONCLUSION

The Supreme Court should act now to protect all Americans that desire to exercise their fundamental constitutional right to keep and bear arms from hostile, local jurisdictions. Actual or potential gun owners who are seeking to exercise their fundamental constitutional right to keep and bear arms in these jurisdictions are entitled to the protections allotted under the preferred freedoms doctrine set forth in *Carolene Products* Footnote Four.

The Supreme Court also should enforce gun rights against those few outlier jurisdictions that seek to restrict the fundamental constitutional right to keep and bear arms under the Second Amendment. In those few jurisdictions, gun owners

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143. *Silvester v. Harris*, 138 S. Ct. 945, 951–52 (2018) (Thomas, J., dissenting from the denial of certiorari) (emphasis added) (citations omitted).

144. *Peruta v. Cty. of San Diego*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari) (emphasis added) (citations omitted).

145. *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON, (Nov. 12, 2020), <https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/>.

146. *Id.*

or those who wish to own guns who are deterred by onerous, likely unconstitutional regulations are the sort of discrete and insular minority that the Supreme Court indicated that it would protect in *Carolene Products* Footnote Four.

By doing so, the Supreme Court would advance two jurisprudential concepts it has long viewed as constitutionally appropriate. These include protecting discrete and insular minorities from cultural oppression by an active local majority—in this case a metropolitan majority—and striking down outlier laws embraced by only a few jurisdictions that chose intentionally to ignore the U.S. Constitution as written or be bound by Supreme Court precedent.