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The Strange Story of the Second Amendment in the Federal Courts, and Why It Matters

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The Strange Story of the Second Amendment in the Federal Courts, and Why It Matters*

Lee Epstein and David T. Konig **

INTRODUCTION

The “Second Amendment” is everywhere—on tee shirts, hats, signs, bumper stickers and even tattoos. Funny thing, though, is that few people seem to have actually read it; and when they do, they’re often confused.¹

That’s fair; the wording seems a little awkward. Then again, for most of our country’s history—actually until the 1990s—federal judges had no problem interpreting these 27 words:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.²

Regardless of their partisanship or ideology, judges agreed that the first part of the Amendment told the story.³ Lacking (and distrusting) standing armies, the colonies organized their own militias to respond to emergencies.⁴ These citizen soldiers were expected to provide their own weapons and to muster regularly.⁵ As one New Englander remarked, the “near neighbourhood of the Indians and French quickly taught them the necessity of having a well regulated militia.”⁶ With independence, the ideal (if not the reality) lived on in the Second Amendment as a reassuring guarantee that citizens of the newly federated states would be able to stop the federal government from meddling with their state militias. For this

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1. Or at least that’s our experience when we’ve delivered lectures to students and the public.
2. U.S. CONST., amend II.
3. *See infra* Part II.A.
4. SAUL CORNELL, A WELL-REGULATED MILITIA 13 (2006).
5. *Id.* at 12.
6. *Id.* at 13.

reason, federal judges uniformly saw the Second for what it was: a states' rights amendment.

Undergirding this traditional-consensual interpretation of the Second Amendment were two principles: (1) the Second Amendment does not touch the states; it's designed to protect them; and (2) the Amendment prevents the federal government from enacting laws that impair state militias; the Amendment does not "reach the possession of firearms for purely private activities."⁷

Beginning in the late 1990s this long-standing consensus fell apart because some Republican-conservative judges, egged on by legal commentators, jettisoned the traditional approach in favor of one that emphasized the second half of the Amendment. That is, they read the Amendment to guarantee an individual right to keep and bear arms disconnected from service in state militias—a version anointed by its supporters as "the Standard Model."⁸

Almost needless to say: the Republican-conservative judges have won. No longer is the Second an assurance to the states; it now protects the rights of individual gun owners.

In what follows, we describe this shift, from judicial consensus over the states' rights story to judicial polarization over the individual rights story. We then turn to the implications of the shift, some of which may seem surprising. Finally, considering present day realities, we discuss steps for forward movement—especially the role research can play in helping judges resolve the next generation of gun disputes.

I. A (BRIEF) POLITICAL-EMPIRICAL ACCOUNT OF THE SECOND AMENDMENT

Our goal in this section is not to recount the history of the Second Amendment in the federal courts; that's been done—and done well—by many others.⁹ Rather we simply wish to contrast the once bi-partisan

7. *District of Columbia v. Heller*, 554 U.S. 570, 707 (2008) (Stevens, J., dissenting).

8. Glenn Harland Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (conferring the term "Standard Model").

9. As historian Saul Cornell points out, however, "The growing support for the Standard Model among legal scholars contrasts with the cool reaction among early American historians." Rather, "the dominant trends in recent historiography point in the opposite direction." Saul Cornell, *Commonplace*

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commitment to the traditional states' rights account with current polarization over the individual rights story. Along the way, we make use of data we collected on every U.S. district and appellate court decision issued between 1876 and 2008 that implicated the Second Amendment.¹⁰

A. Consensus Over the States' Rights Story

Through the 1990s, federal judges had few opportunities to interpret the Second Amendment.¹¹ But when they did the judges overwhelmingly coalesced around the two principles we just laid out: (1) the Second Amendment has no effect on the ability of states to regulate guns and (2) the Amendment also allows the federal government to regulate guns unless its regulations touch on state militias. Taken together, these principles favor the states' rights story of the Second Amendment and work against the individual rights account.

Starting with the "no effect" approach of Principle 1, the Court held as much over 140 years ago in *United States v. Cruikshank*.¹²

This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to

or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory, 16 CONST. COMMENT. 221, 222 (1999). Among those most widely accepted by historians are: ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011); MICHAEL WALDMAN, *THE SECOND AMENDMENT* (2014); PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* (2018).

10. That is, between the Court's decision in *United States v. Cruikshank*, 92 U.S. 542 (1876), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). To develop the dataset, we conducted a search in Westlaw using the term "Second Amendment." We focused exclusively on U.S. district court and court of appeals decisions, though we excluded en banc and magistrate reports to district judges. After eliminating cases that did not address a Second Amendment claim on its merits, we were left with 553 judge-votes in 261 cases. The 261 cases include reported/unreported and published/unpublished decisions.

11. See *supra* note 7. See also *infra* text accompanying notes 48-66 (discussing political and cultural reasons behind this change).

12. 92 U.S. 542 (1875).

look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called... the “powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,” “not surrendered or restrained” by the Constitution of the United States.¹³

That’s what the Court said. What the opinion omitted is equally important. It never used the word “militia,” relying instead on *City of New York v. Miln*¹⁴ and the states’ power to regulate in the common good (i.e., state police power). This language is noteworthy because it treats the regulation of firearms as a foundational (and back then, unquestionable) power reserved to the states.

In cases coming on the heels of *Cruikshank*, the Court—by unanimous votes—continued to hew to the “no effect” principle under the police power justification. In *Presser v. Illinois*,¹⁵ concerning a state ban on armed parades, the Court held:

the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.¹⁶

In denying that Second Amendment applied to the states, the Court observed of the ban:

The exercise of this power by the States is necessary to the public peace, safety, and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.¹⁷

13. *Id.* at 553 (quoting *City of New York v. Miln*, 36 U.S. 102, 103 (1837)).

14. 36 U.S. 102 (1837).

15. 116 U.S. 252 (1886).

16. *Id.* at 265.

17. *Id.* at 268.

To reinforce the “no effect” principle, the Court quoted *Cruikshank*'s¹⁸ (and *Miln*'s) language on the “internal police” power of the states. Eight years later, in *Miller v. Texas*,¹⁹ it once again reiterated that the Second Amendment “operate[s] only upon the Federal power, and [has] no reference whatever to proceedings in state courts.”

Some commentators²⁰ explain away *Cruikshank*, *Presser*, and *Miller* as predating the “selective incorporation” doctrine under which the Court applied certain guarantees in the Bill of Rights to the states. To justify their questioning of these early precedents, the commentators point out that *Cruikshank* also rejected the application of First Amendment guarantees to the states—a holding the Court repudiated in the late 1930s.²¹

A problem with this justification is that *Cruikshank*, *Presser*, and *Miller* retained their vitality for decades post the incorporation revolution. More to the point, even after the 1970s, when the Court had applied almost all guarantees in the Bill of Rights to the states,²² federal judges continued to

18. *Id.* at 265 (quoting *United States v. Cruikshank*, 92 U.S. 542 (1875)).

19. 153 U.S. 535 (1894).

20. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008) (Scalia, J.) (“With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”).

21. *Cruikshank* notes:

The first amendment to the Constitution prohibits Congress from abridging “the right of the people to assemble and to petition the government for a redress of grievances.” This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.

United States v. Cruikshank, 92 U.S. 542, 552 (1875).

See also *DeJonge v. Oregon*, 299 U.S. 353 (1937) (applying the guarantee of assembly to the states); *Hague v. CIO*, 307 U.S. 496 (1939) (applying the guarantee of petition to the states). *See* LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 79, tbl.3-2 (2019).

22. By 1978, the Court had incorporated all provisions of the Bill of Rights except the Second,

hold firm to *Cruikshank* et al.'s “no effect” principle.

Quilici v. Village of Morton Grove provides an example.²³ Over a century after *Cruikshank*, the Seventh Circuit was asked whether the Second Amendment barred a village from prohibiting the possession of handguns within its borders. Quoting from *Cruikshank* and *Presser* in upholding the municipal ordinance, the court's answer was a definitive reiteration of Principle 1: the Second Amendment has “no other effect than to restrict the powers of the National government.”²⁴ A year later, in October 1983, the Supreme Court declined to review the panel's decision without any Justice noting a dissent.²⁵

That Supreme Court, we hasten to note, was hardly full of lefties. To the contrary: 1983 was the 5th most conservative term of the 72 between 1946 and 2017.²⁶ Likewise, the author of the *Quilici* decision, William Bauer, was no liberal Democrat.²⁷ The law-and-order minded Richard Nixon appointed him to a U.S. district court and Gerald Ford elevated him to the Seventh Circuit.

Nor was Bauer's opinion in *Quilici* unusual. Using Westlaw,²⁸ we identified 56 judge-votes (in 30 cases) decided before 2000 that involved action taken by the states or localities. Only two of the 56 judges (both Reagan appointees) referenced an individual guarantee to keep and bear arms—and one located the guarantee in the right to privacy, not the

Third, Fifth (grand jury hearings), Seventh, and Eighth (excessive bail and fines) Amendments. *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010).

As we note later in the text, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court incorporated the Second Amendment; in 2019, the Court held that the excessive fines clause should be applied to the states. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

23. 695 F.2d 261 (7th Cir. 1982).

24. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269 (7th Cir. 1982).

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

26. The 1983 Court reached left-of-center decisions in only 41% of orally argued cases resolved with a signed opinion or judgment compared with 75% just twenty years earlier in 1963. WASHINGTON UNIV. LAW, THE SUPREME COURT DATABASE, <http://supremecourtdatabase.org/> (choose decisionType=1 or 7) (last visited Apr. 15, 2019).

27. Chicago Council of Lawyers, *Evaluation of the United States Court of the Appeals for the Seventh Circuit – Report*, 43 DEPAUL L. REV. 673, 729 (1994) (noting that Judge Bauer defers to law enforcement more than colleagues).

28. See *supra* note 10.

Second Amendment.²⁹ Twenty-one of the judges simply noted that the Amendment didn't guarantee an individual right, while 33 wrote or joined opinions stating that it was unenforceable against the states. Of the 33 judge votes, 58% were cast by Republican appointees (19 of 33)—including seven Reagan appointees.

These data focus on States' Rights Principle 1: the enforcement of the Second Amendment against the states. What about the federal government? That goes to Principle 2, which says that the federal government also can regulate guns unless its regulations touch on state militias.

Principle 2 follows from the 1939 case, *United States v. Miller* (1939),³⁰ which presented a challenge to the first major federal law to regulate guns, the National Firearms Act (NFA) of 1934.³¹ The NFA imposed a tax on certain lethal weapons, required their registration, and prohibited the shipment of unregistered guns in interstate commerce.³²

Miller is interesting on several dimensions.³³ But to bottom line it, the Court *unanimously* held that the NFA did not violate the Second Amendment. The majority opinion couldn't have been clearer about the purpose of the Amendment, "With obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."³⁴

29. WASHINGTON UNIV. LAW, THE SUPREME COURT DATABASE, <http://supremecourtdatabase.org/> (choose) (last visited Apr. 15, 2019). *Austin v. Neal*, 933 F. Supp. 444, 452 (1996) (Waldman, J. claiming that "the Second Amendment may ensure the relatively unfettered access of law-abiding citizens"); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 280 (7th Cir. 1982) (Coffey, J., dissenting) (writing that "Morton Grove's prohibition of handgun possession within the confines of a person's own home has not been shown to be necessary to protect the public welfare and thus violates the fundamental right to privacy.")

30. 307 U.S. 174 (1939).

31. 48 Stat. 1236 (1934) (currently codified at I.R.C. §§ 5801-5822).

32. *Id.*

33. For an interesting analysis of this case, see Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U.J.L. & LIBERTY 48 (2008).

34. *Miller*, 307 U.S. at 178.

Because there was no evidence that the weapon at issue—a sawed-off shotgun—had “some reasonable relationship to the preservation or efficiency of a well regulated militia,”³⁵ the Court could not “say that the Second Amendment guarantees the right to keep and bear such an instrument” to a private individual.³⁶

Worth highlighting, yet again, is the opinion author. By all accounts, James McReynolds was an über-conservative — and a justice certainly not timid about invalidating federal laws. But here in *Miller* he wrote for a unanimous court upholding the NFA.

To us *Miller* clearly advances a states’ rights account of the Second Amendment — specifically Principle 2.³⁷ As long as the federal government does not impair the right to keep and bear arms for certain military purposes, it can “regulate the nonmilitary use and ownership of weapons.”³⁸

But you need not take our word for it. Data developed from pre-2000 Second Amendment cases support Justice Stevens’ claim that that hundreds of judges relied on *Miller* for the proposition “that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes.”³⁹ Of the 142 judge-votes cast in the 62 gun cases involving federal action, only 5 (3.5%) made some gesture toward an individual right to bear arms. And that number includes Heartsill Ragon, the FDR appointee whose decision was reversed in *Miller*; it also includes then-Judge Alito’s dissent in *United States v. Rybar*,⁴⁰ which was grounded in the commerce clause, not the Second Amendment.⁴¹ Nine judges did not specify an approach to the Second Amendment, though they uniformly ruled against the party alleging a Second Amendment claim.

35. *Id.*

36. *Id.*

37. *But see* *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008) (claiming that *Miller* actually “positively suggests... that the Second Amendment confers an individual right to keep and bear arms (though only arms that ‘have some reasonable relationship to the preservation or efficiency of a well regulated militia’”) (quoting *United States v. Miller*, 307 U.S. 174 (1939)). But, as we note in the text, among federal judges, Justice Scalia was in the minority to say the least.

38. *Id.* at 637 (Stevens, J., dissenting).

39. *Id.* at 638 n.2 (Stevens, J., dissenting).

40. 103 F. 3d 273 (3d Cir. 1996).

41. *Id.* at 286 (Alito, J., dissenting).

That leaves 128 judge-votes (90%), all of which adopted a *Miller*-type approach. Typical along these lines is the Sixth Circuit's opinion in *Stevens v. United States*:⁴²

Since the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm. *United States v. Miller*, 307 U.S. 174

Judge Harry Phillips, the author of *Stevens*, was a John F. Kennedy appointee. But Republican appointees expressed precisely the same view. Writing for a unanimous Ninth Circuit panel in *Hickman v. Block*,⁴³ Judge Cynthia Holcomb Hall, appointed by Reagan, echoed Phillips:

The Court's understanding [in *Miller*] follows a plain reading of the Amendment's text. The Amendment's second clause declares that the goal is to preserve the security of "a free state;" its first clause establishes the premise that a "well-regulated militia" is necessary to this end. Thus it is only in furtherance of state security that "the right of the people to keep and bear arms" is finally proclaimed.

Following *Miller*, "[i]t is clear that the Second Amendment guarantees a collective rather than an individual right."⁴⁴

We have not cherry-picked these quotes. Our data show judges of all ideological and partisan stripes routinely upheld firearm laws citing *Miller* or related lower court decisions. This was as true of the Supreme Court justices—including the Nixon appointee Harry Blackmun in his more conservative days⁴⁵—as it was of Republican and Democratic judges in the lower courts. Of the 128 judge-votes accepting *Miller* (again, 90% of

42. 440 F.2d 144, 149 (6th Cir. 1971).

43. 81 F.3d 98 (9th Cir. 1996).

44. *Id.* at 101–102.

45. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (noting that the "legislative restrictions on the use of firearms" at issue "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties.") (citing *United States v. Miller*, 307 U.S. 174, 178 (1939) ("the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'")).

all votes), 43% were cast by Republican appointees (including 15 by Nixon and 18 by Reagan appointees). Put another way, of the 67 Republican votes in the 62 pre-2000 gun cases involving federal action, over 80% rejected the individual rights approach (over 90% if we include the 8 votes that didn't specify an approach but nevertheless ruled against the claimant).

Indeed, there was so much consensus in the courts over the states' rights interpretation of the Second Amendment that a former Chief Justice of the United States went on television in 1991 to denounce as fraudulent the individual rights story being told by pro-gun groups.⁴⁶ That Chief Justice was Warren Burger, a Nixon appointee who was, by some rankings, even more conservative than McReynolds.⁴⁷

B. Polarization Over the Individual Rights Story

Of course, Burger's wasn't the last word on the meaning of the Second Amendment. Beginning in the late 1990s, the bipartisan-judicial consensus over the states' rights story began to disappear. What happened?

Lawyers and law scholars happened.⁴⁸ Turning to historical materials and originalist methodologies they began publishing law review articles claiming that the traditional states' rights approach was much weaker than the courts were letting on.⁴⁹

You may be able to predict what happened next. The scholars and various interest groups began airing their views in public outlets and using

46. Frank Staheli, *Warren Burger "2nd Amendment Fraud" – 1991 PBS News Hour*, YOUTUBE (Aug. 28, 2016), https://www.youtube.com/watch?v=Eya_k4P-iEo.

47. E.g., LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 108–09 tbl.3.2 (2013).

48. To this sentence commentators could plausibly add the NRA and other gun rights groups because these organizations were directly or indirectly responsible for some law review articles advocating an individual rights interpretation. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship*, 76 CHI.-KENT L. REV. 3 (2000). We do not take issue with this fact but neither do we think it is especially relevant as long as research meets the standards the academic community uses to assess research, the authors' identity, affiliations, and funding sources should not matter. See Lee Epstein & Charles E. Clarke, *Academic Integrity and Legal Scholarship in the Wake of Exxon Shipping*, *Footnote 17*, 21 STAN. L. & POL'Y REV. 33 (2010). See *infra* Part III.C.

49. Bogus, *supra* note 48, at 5 (writing that the first law review article—a student note—advocating against the traditional states' rights approach appeared in 1960). Pro-individual rights scholarship picked up notably in the 1980s into the 1990s. *Id.* at 8, 14.

anti-states' rights law review articles as the basis for amicus curiae briefs.⁵⁰ And, lo and behold, conservative-Republican judges started citing those articles—both in the lower courts and the Supreme Court—to justify jettisoning the conventional-consensus approach to the Second Amendment in favor of a radical reinterpretation: that the Amendment guaranteed an individual right to keep and bear arms.

Prominent signs came in two opinions in the late 1990s, though special circumstances in each prevented the authors from establishing the unequivocal individual right to bear arms that gun advocates sought. In *United States v. Gomez*, a convicted drug dealer pled guilty to being a felon in possession of a firearm. After the trial court denied his motion to introduce evidence of justification, he appealed to the Ninth Circuit. Writing for the panel, Judge Alex Kozinski, a Reagan appointee, cited a 1987 law review article claiming that “[t]he Second Amendment embodies the right to defend oneself and one's home against physical attack.”⁵¹ Kozinski nonetheless went on to follow precedent, writing that cases such as *Gomez*'s “have almost always been analyzed in terms of justification.”⁵² Here, *Gomez* lived under the threat of death after

50. See, e.g.,

Of 41 law review articles published since 1980 which offer substantial discussion of the Amendment, just four take the states' right-only position. Their quality does not exceed their quantity... In contrast, articles accepting the Amendment as an individual right are published on their own merits and in top rank law reviews.

Brief for the Academics of the Second Amendment et al., as Amicus Curiae at 11–12, *United States v. Lopez*, 514 U.S. 549 (1994) (No. 93-1260).

This numerical accounting is open to serious doubt, both as to quality and quantity claimed. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI-KENT L. REV. 349 (2000). Spitzer provides a full bibliography that includes book-length studies published from 1912 to 1999. *Id.* at 389–95. If only those between 1980 and 1994 (when *Lopez* was decided) are counted, Spitzer identifies 40 accepting the individual right and 28 the collective view. *Id.*

51. *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996) (citing Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 117–120, 130 (1987) (arguing that the Second Amendment guarantees right to means of self-defense)).

52. *Id.* at 774.

his release from prison and was constantly “running for his life.”⁵³

A year later, in *Printz v. United States*, the Supreme Court invalidated a provision of the Brady Act requiring state law enforcement officers to enforce an instant background check on firearms purchases. Writing for the majority, Justice Scalia’s opinion rested not on the Second Amendment but on states’ rights grounds: Such a “commandeering” of state officers’ authority violated the residual authority of the states, contrary to the enumerated powers specified in Article I, §8, as well as the Tenth Amendment’s “assertion that the powers not delegated to the United States Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people.”⁵⁴

But the anchor of the Court’s right-wing, Clarence Thomas, took the opportunity to opine on the Second Amendment, suggesting that Kozinski was not alone in thinking that it established an individual right. In his concurrence in *Printz*, (joined by no other justice),⁵⁵ Thomas suggested that “If... the Second Amendment is read to confer a *personal* right to “keep and bear arms,” a colorable argument exists that the Federal Government’s [effort to regulate] the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections.”⁵⁶

Thomas and Kosinski are the most prominent but certainly not the only examples of a change in thinking about the meaning of the Second Amendment among Republican judges. Our data show that between 2000 and 2008⁵⁷ 62 judge-votes, out of a total of 355 (17%), were against a state rights’ interpretation of the Second Amendment. Republican appointees cast 49 of the 62 (79%). Put another way, of the Democratic appointees’ 140 votes only 9% favored an individual rights interpretation; that figure was 23% for Republican appointees (49/215).

Among those Republicans was Judge William Lockhart Garwood, a Reagan appointee to the Fifth Circuit, who accomplished what Kosinski and Thomas did not: he articulated and applied the individual rights rationale to decide a case, *United States v. Emerson*.⁵⁸ After Emerson had

53. *Id.* at 773.

54. *United States v. Printz*, 521 U.S. 898, 919 (1997).

55. *Id.* at 936 (Thomas, J., concurring).

56. *Id.* at 938 (Thomas, J., concurring).

57. *Before Heller*.

58. 270 F.3d 203, 260 (5th Cir. 2001).

threatened his estranged wife, she obtained a temporary restraining order, which, under federal law barred him from possessing a firearm. Emerson challenged the federal ban on the ground that he needed the weapon for his own self-defense. Such a personal right, he argued, was guaranteed by the Second Amendment independent of militia service.⁵⁹

Writing for the three-judge panel, Garwood agreed, dismissing the preamble and its connection to militia service: “[S]uch an interpretation is contrary to the plain meaning of the of the text of the guarantee, its placement within the Bill of Rights and the wording of other articles thereof and the original meaning of the Constitution as a whole.”⁶⁰ The Amendment, he wrote, had no “military connotation”:

The plain meaning of the right of the people to keep and bear arms is that it is an individual, rather than a collective, right, and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard.⁶¹

In so holding, *Emerson* became the first decision at any level of the federal courts to recognize the individual right interpretation of the Second Amendment.

That interpretation did not go unnoticed. Although one member of the panel, the George H.W. Bush appointee Harold R. DeMoss, Jr., joined Garwood’s opinion, another, Robert M. Parker (a Clinton appointee) did not. In a partial concurrence explaining his decision not to join the Second Amendment part of the opinion, Parker wrote that Garwood’s interpretation of the Second Amendment amounted to “dicta and not and is therefore not binding on us or any other court.”⁶² Nonetheless, the genie was out of the bottle.

59. *Id.* at 211–12.

60. *Id.* at 233.

61. *Id.* at 232.

62. *Id.* at 272.

Considering these developments, perhaps it was inevitable that the question of the Second Amendment's meaning would return to the Supreme Court; and it did in the 2008 case of *District of Columbia v. Heller*.⁶³ At issue in *Heller* was a Washington, D.C. law which, with narrow exceptions, effectively banned gun ownership by private individuals.⁶⁴ In a 5-4 vote—with the conservatives (all Republican appointees) in the majority and the liberals in dissent (the Democratic appointees plus Souter and Stevens)—the Court invalidated the District's law.

Written by Justice Scalia, the *Heller* opinion has been called a quintessential example of originalism. That is, just like the law review articles that brought us the individual rights approach to the Second Amendment, Scalia's *Heller* opinion is based almost exclusively on his reading of historical materials. And those materials led him to deem the Amendment's preamble merely a "prefatory clause" that did not control the next "operative clause." From that reading a definitive conclusion followed: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."⁶⁵

With these words, not only was consensus thrown out the window; recall the 5-4 liberal-conservative split on the Court. In supplanting the states' rights interpretation with the individual rights story, Scalia also erased *Miller's* long-standing Principle #2 because the District of Columbia is ultimately controlled by the federal government.

What about the Principle 1—concerning the ability of states to regulate guns? Two years after *Heller*, the Court blue-penciled that too in *McDonald v. City of Chicago*. Again, by an ideologically polarized vote of 5-4, the Court overruled *Cruikshank*, *Presser*, and *Miller*, holding that the Second Amendment was not only a constraint on the federal government but also on the states.

With *McDonald* the doctrinal disruption was complete: from long-

63. 554 U.S. 570 (2008).

64. See Edward D. Jones, III, *The District of Columbia's "Firearms Control Act of 1975": The Toughest Handgun Control Law in the United States – Or Is It?* 455 ANNALS AM. SOC'Y POL. & SOC. SCI., 138 (1981) (gives a detailed examination of this law).

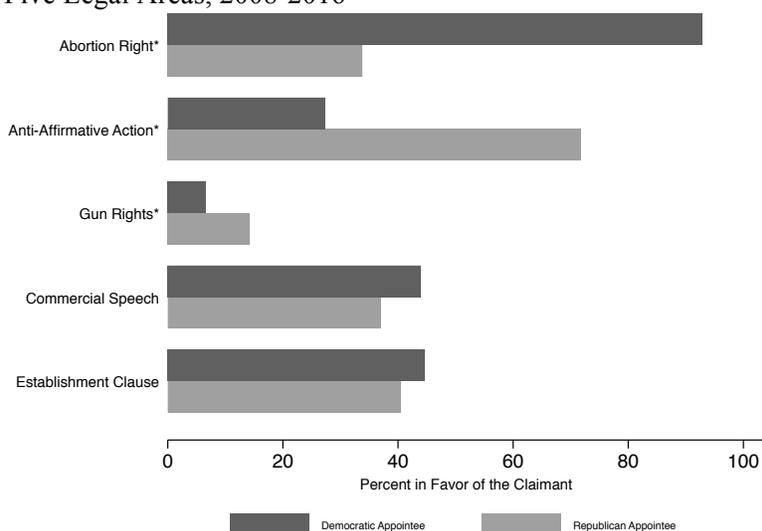
65. *Heller*, 554 U.S. at 595.

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standing consensus over the states' rights account to ideological-partisan polarization over the individual right story. The divisions are obvious in the U.S. Supreme Court but they're also evident in the lower courts. Using Samaha and Germano's dataset,⁶⁶ which records U.S. appellate court votes in five legal areas (including gun rights), we calculated the percentage of support for the claimant by the party of the appointing president. As the results displayed in Figure 1 make clear, litigation over the Second Amendment now joins abortion and affirmative action as among the most polarizing areas in the courts today. In all three the difference between Democratic and Republican appointees is statistically significant at $p < .01$.

66. Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. 57, 66 (2018).

Figure 1. U.S. Court of Appeals Judges' Votes in Favor of the Claimant in Five Legal Areas, 2008-2016



Data Source: Samaha and Germano.⁶⁷
 Notes: * indicates a statistically significant difference at $p < 0.01$. Includes only civil cases; includes en banc votes.

II. IMPLICATIONS OF THE SHIFT

That's the shifting meaning of the Second Amendment in the Supreme Court. But what are the shift's implications for law and public policy? Believe it or not, many knowledgeable people say there are *no* implications: that the move from states' rights to individual rights was interesting but otherwise amounted to a purely academic debate between liberal and conservative justices and lawyers over the meaning of the Second Amendment. As Sanford Levinson, a constitutional law professor, put it, "*Heller* will more likely than not turn out to be of no significance to anyone but constitutional theorists."⁶⁸ The distinguished scholar of the

67. *Id.*

68. Adam Liptak, *Few Ripples from Supreme Court Ruling on Guns*, N.Y. TIMES (Mar. 16, 2009),

Second Amendment, Adam Winkler,⁶⁹ agreed: “The *Heller* case is a landmark decision that has not changed very much at all.”⁷⁰

Why do they say this? For two related reasons. First, although lower court judges have divided along partisan lines, on balance they’ve been reluctant to overturn gun-control laws. Figure 1 suggests as much, as does Samaha and Germano’s study. Comparing the votes of judges in civil gun cases and in the four other areas of constitutional law displayed in Figure 1,⁷¹ Samaha and Germano concluded that “gun rights claims generally underperform.”⁷² That may understate the case. Overall, since 2008 only 14% of the judges’ votes were in favor of the claimant in gun cases; in all others, the percentage was 43.⁷³ Ruben and Blocher’s research makes a similar point. Of the 1,153 Second Amendment challenges to gun restrictions in federal and state courts between *Heller* and February 2016, they found that a measly 9% (108) succeeded (though the figure was higher for federal appellate courts, at 13%, or 29 of 221).⁷⁴

The second reason commentators say “*Heller* is firing blanks”⁷⁵ implicates the U.S. Supreme Court. Although *Heller* and *McDonald* established an individual right to bear arms, the decisions left open many questions about the constitutionality of other regulations, notably bans on concealed weapons and waiting periods for gun sales. Ruben and Blocher’s data suggest that lower courts have answered these questions mostly by upholding whatever restriction is at issue. The Supreme Court,

<https://www.nytimes.com/2009/03/17/us/17bar.html> (quoting Sanford Levinson).

69. See, e.g., ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011); Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253 (2018).

70. Adam Liptak, *Few Ripples from Supreme Court Ruling on Guns*, N.Y. TIMES (Mar. 16, 2009), <https://www.nytimes.com/2009/03/17/us/17bar.html> (quoting Adam Winkler).

71. Commercial speech, abortion rights, establishment clause, and anti-affirmative action.

72. Samaha & Germano, *supra* note 16, at 66.

73. Calculated from Samaha & Germano’s data (includes en banc votes).

74. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1473 tbl.1 (2018).

75. Adam Liptak, *Few Ripples from Supreme Court Ruling on Guns*, N.Y. TIMES (Mar. 16, 2009), <https://www.nytimes.com/2009/03/17/us/17bar.html>.

in contrast, hasn't bothered to answer them at all: Between *McDonald* and 2019, it declined to hear a Second Amendment case.⁷⁶ The silence didn't go unnoticed. Justice Thomas filed several dissents from the Court's refusal to hear gun cases;⁷⁷ and Alan Gura, who successfully argued both *Heller* and *McDonald*, commented that the lack of clarity in the opinions means that "we are the very beginning of the post-*Heller*, post-*McDonald* process."⁷⁸

Why did the Court seemingly remove itself from this area of the law? There are several theories but most likely the inaction traced to Justice Kennedy. He joined the majority in invalidating the restrictions in *McDonald* and *Heller*, but how he would vote in the next generation of Second Amendment cases remained something of a mystery to justices on the left and right. Their uncertainty, in turn, likely traced to this passage in Scalia's otherwise originalist opinion in *Heller*:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁷⁹

No closer observer of the Court thought that Scalia wanted these words in his opinion; he apparently added them to secure Kennedy's vote. As Adam Liptak, Supreme Court correspondent for the *New York Times*, recounted it: Justice Stevens, a supporter of the traditional states' rights account, "helped persuade" Kennedy to ask Scalia for "some important

76. In January 2019, the Court agreed to hear arguments in a challenge to New York City's ban on transporting a handgun outside city limits in its October 2019 term. See *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2nd Cir. 2018), cert. granted, 139 S.Ct. 939 (U.S. Jan 22, 2019) (No. 18-280); *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2nd Cir. 2018), petition for cert. filed, 2018 WL 4275878 (U.S. Sept. 4, 2018) (No. 18-280).

77. E.g., *Silvester v. Becerra*, 843 F.3d 816 (9th Cir. 2016), cert. denied, 86 U.S.L.W. 3411 (U.S. Feb. 20, 2018) (No. 17-342) (Thomas, J., dissenting); *Peruta v. California*, 824 F.3d 919, (9th Cir. 2016), cert. denied, 85 U.S.L.W. 3597 (No. 16-894) (Thomas, J., dissenting) (Gorsuch, J., concurring in dissent).

78. AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 58 (2015).

79. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

changes” to his opinion, specifically that the majority opinion “should not be taken to cast doubt” on many kinds of gun control laws.⁸⁰

Assuming the Court’s silence reflected uncertainty over Kennedy’s vote, the implications of *Heller/McDonald* may be realized soon. With the Kavanaugh-for-Kennedy swap, there is far less uncertainty about votes over gun regulations⁸¹—meaning that the Court in the not-so-distant future could start hearing challenges to concealed weapon bans, waiting periods, and the like⁸²—and begin invalidating them by votes of 5-4 along party lines. No longer may *Heller* be firing blanks.

III. HOW TO CHALLENGE THE NEW LEGAL REGIME

If you’re pleased by the prospect of the Court invalidating many restrictions on guns—not to mention continued polarization in the federal courts—you can stop reading. But if you’re unhappy with the new legal regime and a polarized judiciary, what can be done?

A. Repeal the Second Amendment

Retired Justice John Paul Stevens⁸³—like Chief Justice Burger before him⁸⁴—has advocated repeal of the Second Amendment. Maybe that was

80. Adam Liptak, “*It’s a Long Story*”: Justice John Paul Stevens, 98, *Is Publishing a Memoir*, N.Y. TIMES, (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/us/politics/john-paul-stevens-memoir.html>.

81. In fact then-Judge Kavanaugh was part of a three judge panel that heard a subsequent lawsuit brought by the same plaintiff from *Heller*. There he dissented from the panel opinion authored by Reagan appointee Douglas Ginsburg and argued that the District of Columbia’s ban on semi-automatic rifles and gun registration requirements violated the Second Amendment. *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

82. See *supra* note 76.

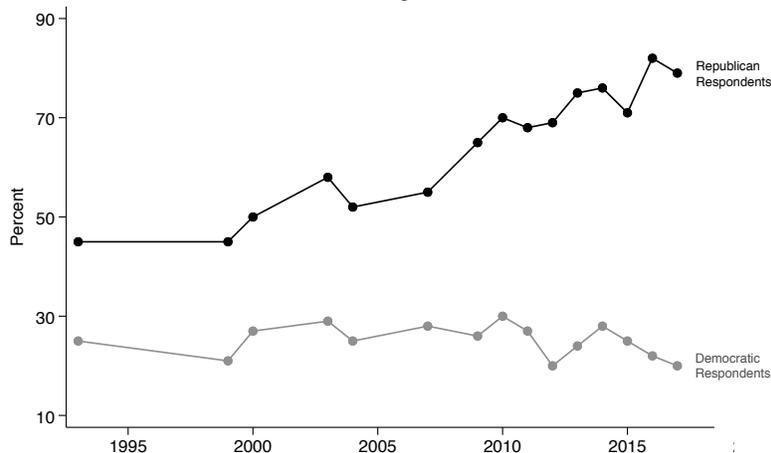
83. John Paul Stevens, Opinion, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.

84. Russell Berman, *Where the Gun-Control Movement Goes Silent*, ATLANTIC, Mar. 1, 2018, <https://www.theatlantic.com/politics/archive/2018/03/guns-second-amendment-repeal/554540/>

plausible in 1991 when Burger appeared on television. But not today.

Whether *Heller* was the cause or not, Americans are just too politically polarized over guns to make realistic repeal of the Second Amendment. Figure 2 below, developed from Pew surveys,⁸⁵ shows the percentage of Republicans and Democrats who think it's more important to protect the right of Americans to own guns than to control gun ownership since 1993.

Figure 2. Percentage Democratic and Republican Respondents Believing It's More Important to Protect the Right of Americans to Own Guns than to Control Gun Ownership, 1993-2017



Data Source: Pew Research Center, at: <http://www.people-press.org/2017/06/22/public-views-about-guns/#party>

Sure, there's always been a divide between Republicans (in black) and Democrats (in grey). But note first, that in 1993 neither a majority of Republicans nor Democrats favored gun ownership over gun control. And, second, the gap between the two was only 20 percentage points in 1993; today it's 59. Indeed, Americans are now more polarized over guns than

(quoting Chief Justice Burger).

85. *Public Views About Guns*, PEW RESEARCH CTR.: U.S. POLITICS & POL'Y (June 22, 2017), <https://www.people-press.org/2017/06/22/public-views-about-guns/#party>.

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any other issue, save President Trump's wall.⁸⁶

Considering these data, securing the necessary two-thirds of Congress and three-fourths of the states to ratify a repeal Amendment seems downright Quixotic.

B. Legal-Historical Pushback on McDonald

Although *Heller* and *McDonald* left many questions unanswered and considerable confusion in their wake, much less uncertainty now exists over the Supreme Court: as we just mentioned, the 5-4 conservative majority on the Supreme Court will be more receptive to gun rights. Any strategy to mitigate the onrush of pro-gun legislation or protect restrictions must accept that.

One avenue can— perhaps must— be grounded in history, jurisprudence, policy, and the prevailing political tilt of the conservative post-Reagan Republican judicial legacy. A successful strategy would combine the Court's acceptance of "long-standing" parameters of firearms regulation and the tradition of federalism that has recognized spheres of authority vested in the states since the Founding. This strategy would invoke the states' power to regulate in the common good ("police power")—a power understood to be reserved to them under the Tenth Amendment—as well as a long legal tradition of allowing states to place limits on individual rights in the interest of public health and safety.

Because we lack the space to develop this argument in detail, suffice it to note here that we agree with commentary suggesting that the *Heller/McDonald* individual right to keep and bear arms should not treat the circumstances of life in rural-urban environments the same when firearms are concerned, nor deny local governments the right to enact laws for their citizens' health and safety. Judge J. Harvie Wilkinson III, a conservative Reagan appointee to the Fourth Circuit, made this point in his

86. See Harry Enten, *The U.S. Has Never Been So Polarized on Guns*, FIVETHIRTYEIGHT (Oct. 4, 2017, 6:00 AM), <https://fivethirtyeight.com/features/the-u-s-has-never-been-so-polarized-on-guns/>.

critique of *Heller*, noting that “establishing a more uniform national gun policy would be particularly improvident because gun regulations are so uniquely tied to the different views and conditions among regions, individual states, and even smaller units of government.”⁸⁷

C. Bring in the Social Scientists

As we’ve suggested, transformation of the Second Amendment—from protecting states’ rights to protecting individual rights—was fueled by research, though research of a very particular kind: “originalism,” or reading old documents. This could be a plausible interpretive methodology but it has become, to quote a prominent law scholar, so “radicalized and weaponized by conservative activists”⁸⁸ that its reliability is open to question to say the least.

Still if “research” brought us the current legal regime over guns—the individual rights story—then the best way to challenge it or at least limit its application may be to fight fire with fire: not solely by reading old documents but by designing and conducting empirical studies to assess present-day conditions. No longer should legal turf be completely ceded to 18th century documents when real-time prudential and policy concerns are also highly relevant to the debate.

Of course there are already many interesting and high-quality studies⁸⁹—and, in fact, there are more and more each year despite substantial cuts in federal funding for gun research.⁹⁰ Also without doubt these studies are crucial for the development of sensible gun policy. But if judges ultimately invalidate the resulting policies because that’s what old documents tell them to do, then the studies are in vain.

87. J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 315 (2009) (citations omitted).

88. Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325, 326 (2009).

89. E.g., Arindrajit Dube, Oeindrila Dube, & Omar Garcia-Ponce, *Cross-Border Spillover: U.S. Gun Laws and Violence in Mexico*, 107 AM. POL. SCI. REV. 397 (2013); Emilio Depetris-Chauvin, *Fear of Obama: An Empirical Study of the Demand for Guns and the U.S. 2008 Presidential Election*, 130 J. PUB. ECON. 66 (2015); Nathan Irvin, et al., *Evaluating the Effect of State Regulation of Federally Licensed Firearm Dealers on Firearm Homicide*, 104 AM. J. PUB. HEALTH 1384 (2014).

90. See Philip J. Cook & John J. Donohue, *Saving Lives by Regulating Guns: Evidence for Policy*, 358 SCI. 1259, 1259 (2017).

To turn the judges' gaze from the 1700s to the 21st century, we must produce studies that will speak to them—studies with at least three characteristics. First, and most obvious, the research should be aimed at the specific regulation at issue in the court case. If the case is about a restriction on carrying concealed weapons, then the research should assess, for example, the effect of the adoption of right-to-carry laws on crime.

Second, the studies must be as bullet proof as is possible for research making causal inferences from observational data. For judges, that means research that is reliable, valid, and transparent.⁹¹

A threshold requirement in empirical research, reliability is the extent to which it is possible to replicate a measurement—reproducing the same value on the same standard for the same subject at the same time.⁹² Obviously, we can't expect judges and lawyers to retrace or even review all the steps in every study. What researchers can do instead is signal their commitment to reliability by adhering to the replication standard.⁹³ This standard commits researchers to supplying enough information about their study—including their data—so that a third party could replicate the results without any additional information from the author.

Validity is the extent to which a reliable measure reflects the underlying concept being measured. Because assessing validity is even harder for judges than assessing reliability, scholars could signal their commitment to validity by subjecting their studies to peer review.

As for transparency the idea here is to lay bare not only the funders of the research but also the relevant organizational affiliations of the researchers. Some pro-gun historical studies have been criticized for not revealing their sponsors;⁹⁴ empirical studies can easily avoid the same fate by being above board.

91. See Epstein & Clarke, *supra* note 48, at 33.

92. For more details on reliability, as well as the other criteria, see LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH (2014).

93. Gary King, *Replication, Replication*, 28 PS: POL. SCI. & POL. 444 (1995) (explaining what the replication standard is and its importance).

94. See Bogus, *supra* note 48, at 8 n.28.

Finally, researchers must be able to communicate their methods and results to lawyers who can in turn explain the studies to judges. This is absolutely critical. It's easy for judges to understand historical arguments but far harder for them to give meaning to words like "*p*-values," "synthetic controls," "regression," and on and on. No matter how great the study, judges require translation—a role well-suited to lawyers.

CONCLUSION

How to develop novel legal arguments and how to conduct and make plain data-driven research are challenges. But only by undertaking them—and transmitting any new knowledge to lawyers and, ultimately, policy makers and judges—can we begin to make progress toward the development of sensible principles to guide gun policy.